

# HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT?

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How many judges does it take to make a supreme court? Three? Five? Seven? Nine? Or more? If state as well as federal courts are considered, all answers have been correct at one time or another, in one court or another. State constitutions sometimes set the number of judges; sometimes, like the U.S. Constitution, they leave it to the legislature to decide.<sup>1</sup> The size of a court is usually determined by more or less objective considerations, such as the cost of the judicial establishment, the size of the caseload, or the existence of other judicial duties such as circuit-riding, but occasionally in notorious cases the number of judges is increased or decreased to serve partisan purposes. "We are under a Constitution," Charles Evans Hughes once remarked off-the-cuff and to his everlasting regret, "but the Constitution is what the judges say it is."<sup>2</sup> As the politicians are well

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1. U.S. Const. art. III, § 1 (not determining number of supreme court justices); N.J. Const. art. VI, § II ("The Supreme Court shall consist of a Chief Justice and six Associate Justices."); N.C. Const. art. IV, § 6 ("The Supreme Court shall consist of a Chief Justice and six Associate Justices, but the General Assembly may increase the number of Associate Justices to not more than eight.").

When first created by statute in 1818, the North Carolina Supreme Court consisted of three judges. After the Civil War, the state's Reconstruction Constitution, the first to give the court constitutional status, increased the total to five, but post-Reconstruction amendments in 1876 reduced it again to three. Since then, the size of the court has grown steadily: to five in 1888 by constitutional amendment; to seven in 1937 by statute authorized by constitutional amendment in 1935. Although the General Assembly is empowered by the 1971 Constitution to increase the size to nine, the court remains today at seven. See John V. Orth, *The North Carolina State Constitution: A Reference Guide* 106 (Greenwood Press, 1993).

2. David J. Danelski and Joseph S. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes* 143 (Harvard U. Press, 1973). Hughes, who was governor of New York at the time, was speaking extemporaneously in defense of his proposal to create an administrative agency to regulate public utilities. In keeping with developing notions of administrative law, he sought to limit judicial review to questions of the constitutionality of the empowering statute and implementing orders; opponents of the proposal sought to make the commission's findings of fact reviewable as well. Hughes always insisted that

aware, sometimes it matters not just *who* the judges are but *how many* there are.

Ever since the Judiciary Act of 1869<sup>3</sup> the authorized strength of the United States Supreme Court has remained at nine. So long accustomed to that number have we become that it seems just about perfect—not too large, not too small. State supreme courts tend not to exceed the federal number. With larger caseloads but smaller jurisdictional areas, they typically function today with nine, seven, or five judges.

Although the size of the U.S. Supreme Court has remained constant since 1869, the status quo was memorably challenged in 1937, when President Franklin Roosevelt proposed his Court Reform Bill, better known as the “court-packing plan,” designed to secure a majority of justices to uphold the government’s economic program.<sup>4</sup> Authorizing the president to appoint one new justice for every sitting justice over the age of seventy, the bill provided for a maximum complement of as many as fifteen judges.<sup>5</sup> Never adopted, the proposal foundered on a public consensus that it would have too obviously politicized the judicial branch. In any event, a majority of the sitting justices rather suddenly coalesced in support of the president’s program, the so-called “switch in time that saved nine.”<sup>6</sup>

his much-quoted comment was misunderstood:

This remark has been used, regardless of its context, as if permitting the inference that I was picturing constitutional interpretation by the courts as a matter of judicial caprice. This was farthest from my thought. I was not talking flipantly or in disrespect of the courts, but on the contrary with the most profound respect. I was speaking of the essential function of the courts under our system in interpreting and applying constitutional safeguards, and I was emphasizing the importance of maintaining the courts in the highest public esteem as our final judicial arbiters and the inadvisability of needlessly exposing them to criticism and disrespect by throwing upon them the burden of dealing with purely administrative questions.

Id. at 143-44.

3. Act of April 10, 1869, ch. 22, 16 Stat. 44.

4. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-packing” Plan* in William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 82 (Oxford U. Press, 1995); id. at 132.

5. At the time, six of the nine sitting justices were over seventy years of age: Louis Brandeis, Pierce Butler, Charles Evans Hughes, James McReynolds, George Sutherland, and Willis Van Devanter.

6. The provenance of this phrase is discussed in Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 Harv. L. Rev. 620, 623 n. 11 (1994). Whether the “switch” was in response to the court-packing plan has been the subject of debate. Compare Ariens, id., with Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forgery*, 142 U. Pa. L. Rev. 1985 (1994). See also Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford U. Press, 1998), reviewed by William Lassiter, *Justice Roberts and the Constitutional Revolution of 1937—Was There a “Switch in Time”?* 78 Tex. L. Rev. 1347 (2000).

For the first century of American history the number of U.S. Supreme Court justices was closely tied to the number of federal judicial circuits. The connection was forged by the original judiciary act in 1789, which created the federal judicial system of district and circuit courts, topped by a supreme court. Although the act provided for the appointment of district judges and supreme court justices, no circuit judgeships were authorized. Instead, the circuit courts were to be staffed by judges from the other two courts. At first, the nation was divided into three judicial circuits, each to be visited twice yearly by two supreme court justices, who in combination with the resident district judge would form the circuit court.<sup>7</sup> The number of circuits inevitably grew with the nation, but political considerations often played a role in determining when to recognize new circuits and which states to include. The assignment of the states in the circuits was important because of the tradition of placing one representative from each circuit on the court.

Circuit-riding quickly became an object of complaint with the justices. Particularly onerous in the early days, it was never easy for the elderly men typically appointed to the court. Justice James Iredell of North Carolina, who drew the Southern circuit in the 1790s, was described as leading “the life of a post boy,” traveling as much as 1,900 miles in a single circuit.<sup>8</sup> Even as transportation improved to make travel less difficult, the nation expanded in size to make the distances to be covered ever greater. In 1793 it was provided that only one supreme court justice was required to visit each circuit.<sup>9</sup> In 1801, as we will see, circuit-riding was briefly eliminated but was quickly restored the next year, under circumstances that made further changes difficult. Although the circuits were periodically reconstituted over the years, the number of justices seemed for long inescapably tied to the number of circuits. At last, the process of breaking the link began when circuit judgeships were finally authorized by the Judiciary Act of 1869, the same act that stabilized the court’s membership at nine.<sup>10</sup> Nominal circuit-riding duties for the justices continued, however, until the creation in 1891 of the circuit

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7. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, § 4. See Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421; Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence* (U. of Oklahoma Press, 1990).

8. Willis Whichard, *Justice James Iredell* 173 (Carolina Academic Press, 2000).

9. *Id.* at 183.

10. Act of April 10, 1869, ch. 22, 16 Stat. 44. One supreme court justice was still expected to visit each circuit once in two years.

courts of appeals (since 1948 called simply the courts of appeals).<sup>11</sup> Today, the remaining circuit duties of the justices are merely vestigial. Applications for stays, for bail, or for extensions of time are addressed to the circuit justice for the circuit in which the case arises.<sup>12</sup> Now that there are fourteen circuits, some justices must necessarily be assigned to more than one circuit.<sup>13</sup>

Nine as the designated number of circuits and justices was first attained in 1837,<sup>14</sup> but the upheaval of the Civil War caused a couple of temporary distortions. In 1863 Congress increased the size of the court from nine to ten, in order to provide a circuit justice for an additional circuit created on the admission of California<sup>15</sup> and to permit President Abraham Lincoln to name the Democratic but Unionist Stephen J. Field to the court. In 1866 an ill-conceived and short-lived judiciary act reduced the number of justices from ten to seven after three vacancies to deny President Andrew Johnson any judicial appointments.<sup>16</sup>

The court's membership had first reached seven in 1807.<sup>17</sup> Before that, throughout the first two decades of the court's existence, the authorized number of justices had generally held at six. The Judiciary Act of 1789 had set the pattern: "[T]he supreme court of the United States shall consist of a chief justice and five associate justices . . ."<sup>18</sup> In a notorious maneuver in 1801 the Federalist Party, having lost the election of 1800, used its lame-

11. The Judiciary Act of 1891, Act of March 3, 1891, ch. 517, 26 Stat. 826 (Evarts Act). The circuit courts as such (as opposed to the circuit courts of appeals) continued in existence until 1911 when their jurisdiction was transferred to the district courts.

12. Supreme Court Rule 22.

13. For the current assignments, see the front matter in the United States Reports.

14. Although proposals to increase the number of circuits and justices had been heard for years, authorizing legislation had always foundered on concern about giving the extra appointments to the incumbent president. Finally, on March 3, 1837, the last day of President Andrew Jackson's last term, a new judiciary act was signed into law. Charles Warren, 2 *The Supreme Court in United States History* 313-14 (Little, Brown, & Co., 1924).

15. Charles Fairman, 6 *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part One* 2 (Macmillan, 1971).

16. Warren, 3 *Supreme Court* at 144 (cited in note 14); id. at 223. The original proposal was to revert to nine justices, "thereby creating an odd number of justices and making the Court more manageable," but the number was reduced for political purposes. In fact, the size of the court did not drop below eight before the 1869 Judiciary Act, adopted after President Andrew Johnson had left office, returned the authorized strength to nine. Kermit L. Hall, ed., *Oxford Companion to the Supreme Court of the United States* 475 (Oxford U. Press, 1992). The extra appointment was helpful to the incoming President Ulysses Grant in securing reversal of the first Legal Tender Case. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), reversed by *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871).

17. Act of Feb. 24, 1806, ch. 16, 2 Stat. 420.

18. 1 Stat. 73 § 1.

duck majority to pass a new judiciary act that combined many admirable features, including the elimination of circuit-riding and the creation of circuit courts of appeals, with a reduction in the size of the court from six to five on the next vacancy, apparently to deny the incoming president, Thomas Jefferson, the opportunity to make an appointment.<sup>19</sup> The victorious Jeffersonians, of course, lost no time in using their newfound legislative power to reverse the Federalist measure. A repeal act, adopted March 8, 1802, the first act of the new congress, restored the status quo ante, jettisoning the good with the bad and returning the authorized strength of the court to six.<sup>20</sup> Yet another judiciary act cancelled the 1802 term of the court,<sup>21</sup> apparently to delay the hearing of *Marbury v. Madison*, a case with implications for the constitutionality of the abolition of the courts of appeals.<sup>22</sup>

Legislative fiddling with the number of judges was perhaps a necessary consequence of the judiciary's new-found security of tenure. *Durante bene placito*, "during good pleasure," were the Latin words that originally described a common law judge's term of office, as it still describes the term of the Lord Chancellor, titular head of the English judiciary.<sup>23</sup> *Quamdiu se bene gesserit*, "so long as he shall behave himself well," was the formula adopted in England after the Act of Settlement in 1701 to indicate that a judge could be removed only for good cause shown.<sup>24</sup> The United States Constitution in 1787, dispensing with Latinity, provided that federal judges hold their offices "during good Behaviour."<sup>25</sup> Although the Jeffersonians early experimented with impeachment as a means of cleansing the federal bench of their enemies, the obvious partisanship of the trial of Justice Samuel Chase in 1804 made that method of judicial discipline costly and

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19. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89. See Katherine Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 Will. & Mary Q. 3 (1965).

20. Act of March 8, 1802, ch. 8, 2 Stat. 132.

21. Act of April 29, 1802, ch. 31, 2 Stat. 156.

22. 5 U.S. (1 Cranch) 137 (1803). See also John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 31-34 (Oxford U. Press, 1987).

23. David M. Walker, *The Oxford Companion to Law* 384 (Oxford U. Press, 1980).

24. *Id.* at 1022. On judicial tenure in England, see generally Robert Stevens, *The Independence of the Judiciary: The View From the Lord Chancellor's Office* (Oxford U. Press, 1993). Good behavior tenure was not granted to colonial judges even after the Act of Settlement, and its denial was one of the grievances of the rebellious colonies. See Declaration of Independence (1776) ("He [King George III] has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.").

25. U.S. Const., Art. III, § 1.

unreliable.<sup>26</sup> Without a ready means of removing a judge, the obvious legislative alternative was heightened scrutiny during the confirmation process—and playing the numbers game by increasing (or decreasing) the size of the court. The political object might be to affect the course of judicial decision, as with the 1937 court-packing plan, or simply to increase (or decrease) the number of appointments available to a certain president, as with the 1863 act shrinking the supreme court during President Andrew Johnson’s term of office. Alternatively, congress could try to fiddle with the court’s jurisdiction under the “exceptions and regulations” clause of Article III.

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How many judges does it take to make a supreme court? Three? Five? Seven? Nine? Fifteen? All the most frequently given answers have one obvious thing in common: they are all odd numbers. The restriction of the range of likely answers to odd numbers, of course, makes perfect sense: if the court is fully staffed and all judges participate, the possibility of a tie vote is eliminated.<sup>27</sup> The drafters of the first judiciary act presumably overlooked the necessity to provide a casting vote in case of a tie when they authorized a supreme court of six, bemused by the need to correlate the number of justices with the number of circuits. The drafters of the 1802 repeal, which restored the court’s authorized strength to six from five, were apparently intent only on undoing the work of their political enemies. The choice of the anomalous ten justices, briefly authorized during the Civil War, was necessitated by pressing political concerns, and was promptly abandoned with the passing of the necessity. The only question then was whether to revert to nine or seven.<sup>28</sup>

If an odd number of judges is so obviously desirable, it is curious (one is tempted to say odd) that the premier common law courts, the Court of King’s Bench, the Court of Common Pleas, and the Court of the Exchequer, operated for so many centuries with four judges each.<sup>29</sup> In a striking simile Francis Bacon likened

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26. See Stephen B. Presser, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* 156-58 (Carolina Academic Press, 1991).

27. In cases within the Supreme Court’s appellate jurisdiction, an evenly divided court leaves the lower court’s decision in effect. What would happen in the event of an evenly divided court in a case within the Supreme Court’s original jurisdiction is unknown. See, e.g., *New Hampshire v. Maine*, 532 U.S. 742 (2001) (Souter, J., recused).

28. See note 16.

29. William Blackstone, 3 *Commentaries on the Laws of England* 40-41 (1768) (Reprinted, U. of Chicago Press, 1979). The judges of the Court of Exchequer were called bar-

the “twelve Judges of the realm” to the “twelve lions under Solomon’s Throne” mentioned in the Bible.<sup>30</sup> Of course, these courts were not “supreme” in the sense of the United States Supreme Court. A writ of error, a proceeding in the nature of an appeal, lay from Common Pleas to King’s Bench, and from King’s Bench, in turn, to the Court of Exchequer Chamber or the House of Lords.<sup>31</sup> But as a practical matter judgements of the common law courts were almost always final, and the two “higher” courts were extraordinary bodies, rarely invoked and of shifting membership. When reviewing judgements of King’s Bench, the Court of Exchequer Chamber consisted of the four judges of Common Pleas and the four barons of the Exchequer.<sup>32</sup> The House of Lords, composed of hereditary peers, when acting as a judicial body was usually guided by the “law lords,” a varying number of peers with judicial experience.<sup>33</sup> It was not until the Judicature Acts of 1873-75 that English appellate courts were regularly composed of an odd number of judges: the English Court of Appeal today sits in several divisions of three judges each.<sup>34</sup>

The point here is not that the founders of the common law thought an even number of judges better, but only that they apparently did not think an odd number necessary. In fact, the history of the common law is littered with legal bodies with an even-numbered membership, from the summary courts composed of two justices of the peace<sup>35</sup> to the solemn circuit courts of two justices of assize, not to mention the venerable jury of twelve “good and lawful men.”<sup>36</sup> This fact should give us pause. Perhaps we need to examine exactly why odd numbers leap to

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ons, out of a presumed necessity from a provision in Magna Carta. Id. at 44.

30. Francis Bacon, *On Judicature* in Francis Bacon, *Essays* (Lee and Shepard, 1884). See 1 Kings 10:20 (KJV).

31. Blackstone, 3 *Commentaries* at 43 (cited in note 29).

32. Id. at 56.

33. Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* at 10-13 (U. of North Carolina Press, 1978).

34. Walker, *Oxford Companion to Law* at 1199-1200 (cited in note 23). Of course, an appeal may still be taken from the Court of Appeal to the House of Lords. Id. at 585.

35. For examples of summary courts composed of two justices of the peace, see John V. Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906* at 7, 12, 17, 18 (Oxford U. Press, 1991). When an early example of labor legislation, the Combination Act of 1799, provided for summary proceedings before one justice of the peace, a storm of protest led to a speedy repeal and reenactment with changes, including a requirement that two justices of the peace hear the case. Id. at 52.

36. The time-hallowed phrase appeared in North Carolina’s 1776 and 1868 constitutions, but was deleted in 1946 in order to open jury service to women. See Orth, *The North Carolina State Constitution: A Reference Guide* at 19, 66 (cited in note 1).

our minds today when we are asked how many judges it takes to make a supreme court. Could it be that we have come to expect (and accept) disagreement on legal issues? Could it be that the common law was not always seen as a subject that necessarily lent itself to differences of opinion? Could it be that the drafters of the 1789 Judiciary Act copied the English example of an even number of judges in part because it was not so obvious to them as it is to us that split decisions were to be expected?

Why have multi-member courts at all? Why not adopt the model used for chief executives in which final authority is vested in one officer, be it constitutional monarch, president, or governor? The constitution of ancient Sparta with two simultaneous kings remains a lonely monstrosity in world history.<sup>37</sup> And Pennsylvania's early experiment in its 1776 Constitution with an executive council of twelve was quickly aborted.<sup>38</sup> Presumably we think executive action may on occasion need to be quick and decisive, the product of one mind.<sup>39</sup> Shifting the focus of comparison, why not have single member appellate courts as we now have single member trial courts?<sup>40</sup> The English Court of Chancery functioned for centuries with a single chancellor (with the assistance of four vice chancellors);<sup>41</sup> the Chancery Court of Delaware, in which so many important issues of corporate law are litigated, still does. Presumably the answer is: because we think a single presiding judge, like a single executive, is better able to make the quick decisions sometimes necessary in the rapid give-and-take of a trial. Appellate judging, on the other

37. See Plutarch, *The Lives of the Noble Grecians and Romans* 53 (John Dryden, trans., Modern Lib., 1979) (life of Lycurgus).

38. Pa. Const. of 1776, ch. II, § 19, superseded by Pa. Const. of 1790. See J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (Da Capo Press, 1971).

39. When quick and decisive action is required of an appellate court, a single judge is authorized to act, as with applications for stays. See Supreme Court Rule 22 (cited in note 12).

40. It is true that federal circuit courts, which performed both trial and appellate work, were from 1793 to 1869 regularly composed of two judges: a supreme court justice and the resident district judge. See note 7.

41. Who can forget the description of the solitary lord chancellor presiding over his court in the opening pages of Charles Dickens' *Bleak House*?

London. Michaelmas Term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall. . . . Fog everywhere. Fog up the river . . . ; fog down the river. . . . The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation: Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog sits the Lord High Chancellor in his High Court of Chancery.

Charles Dickens, *Bleak House* chap. 1 (Bradbury and Evans, 1853).

hand, is viewed as a deliberative process, benefiting from the contributions of many minds.<sup>42</sup> "In the multitude of counsellors, there is safety"<sup>43</sup> has been proverbial wisdom since the days of King Solomon.

Many counsellors, of course, do not necessarily mean unanimous counsel; indeed, it is in the very variety of counsel that safety often lies. What must be explained about our view of appellate judging, in other words, is not only the idea that many judges are better than one, but also that an odd number of judges is more eligible than an even one. At the root of the historic shift from an even-numbered to an odd-numbered court seems to lie a changing assumption about whether deliberation on legal subjects by trained judges is likely to result in disagreement. It is the unexamined assumption that often tells us more about what we really believe, and it is the change of assumptions, out of sight and without conscious reflection, that registers the progressions of which we are unaware. In the history of science it is called a "paradigm shift."<sup>44</sup>

A suggestive episode from English legal history casts a chilling light on our contemporary assumption about the value of an odd number of judges. It was King James I in the early seventeenth century who, according to Blackstone, first saw the need for a "casting voice in case of a difference of opinion" and "appointed five judges in every court."<sup>45</sup> The first Stuart monarch is an uncongenial model for American lawyers. A believer in the divine right of kings, James was frequently at odds with his judges, and was associated with the notion that "the Judges are but the delegates of the King" and that therefore "the King may take what causes he shall please to determine, from the determination of the Judges and may determine them himself."<sup>46</sup> On a memora-

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42. Wythe Holt has pointed out that no trials were ever permitted in federal appellate courts in order to preserve the prerogatives of the jury. Hall, ed., *Oxford Companion to the Supreme Court* at 472 (cited in note 16).

43. Proverbs 11:14 (KJV).

44. See Thomas S. Kuhn, *The Structure of Scientific Revolutions* 175 (U. of Chicago Press, 2d ed. 1970). Kuhn admits to using "paradigm" in two different senses:

On the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science.

See also John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 Const. Comm. 337 (1997).

45. Blackstone, 3 *Commentaries* at 40n (cited in note 29).

46. 12 Co. Rep. 63, 77 Eng. Rep. 1342 (1608) (Archbishop Bancroft). See also Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward*

ble occasion Sir Edward Coke, Chief Justice of Common Pleas, accused the king to his face of proposing to substitute “natural reason” for the “artificial reason and judgment of law,”<sup>47</sup> and thereby violate the nascent concept of separation of powers. Could it be that the king already perceived law as matter for individual interpretation and therefore likely to result in divided counsels? James’ idea of providing the courts with a “casting voice”—the word “vote” was not yet in vogue where judicial action was involved—was quickly abandoned by his successors, and the stigma of Stuart absolutism that attached to the innovation of a court with an odd number of judges only reinforced English attachment to the traditional four-member courts.

Judging between individual litigants on the basis of long-established common law rules was not particularly likely to lead to disagreements in England in the age of Blackstone, a relatively small and homogeneous society. But in America it was a different matter. Already in 1735 a colonial lawyer had argued that common law rules on the periphery of the British Empire might not be identical with those at home in England,<sup>48</sup> and a century later the U.S. Supreme Court itself declared: “The common law of England is not to be taken in all respects to be that of America.”<sup>49</sup> Deciding what was and was not appropriate to the changed circumstances of the New World was a question of a different order than deciding what the common law was, and increased the risk of disagreement.

Not only did American courts have to rediscover (if not reinvent) the common law, they also had to construe the requirements of the new American constitutions. “It is emphatically the province and duty of the judicial department to say what the law is,” Chief Justice John Marshall intoned in *Marbury v. Madison* with specific reference to constitutional law.<sup>50</sup> This, of course,

Coke 303 (Little, Brown, & Co., 1957).

47. 12 Co. Rep. 65, 77 Eng. Rep. 1343. See also John V. Orth, *Did Sir Edward Coke Mean What He Said?* 16 Const. Comm. 33, 36-37 (1999). Coke emphasized that “long study and experience” of the law were required “before that a man can attain to the cognizance of it,” suggesting a process of socialization that would minimize differences of opinions.

48. See James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal* (Stanley Katz, ed., Belknap Press, 1963) (argument of Hamilton for defendant) (“what is good law at one time and in one place is not so at another time and in another place”); id. 67-68. See also Paul Finkelman, *Politics, the Press, and the Law: The Trial of John Peter Zenger* in Michal Belknap, ed., *American Political Trials* (Greenwood Press, 1994).

49. *Van Ness v. Packard*, 27 U.S. (2 Pet.) 137, 144 (1829) (Story, J.).

50. 5 U.S. (1 Cranch) 137 (1803).

was to raise the stakes immensely, since custodianship of the constitution would bring the judiciary into every part of American life and impinge on the cherished prerogatives of the politicians. So exercised was Thomas Jefferson by the possibility of a decision “perhaps by a majority of one” being presented as the opinion of the court that he thought there ought to be a law requiring the judges publicly to announce their individual opinions *seriatim*, one after the other, so they would, in effect, have to stand up and be counted.<sup>51</sup>

Akin to the question of how many judges it takes to make a supreme court is the question of the role of the advocates in the decision of an appellate case. Are opposing counsel, as we seem to think today, like gladiators in the ring, contending for a thumbs-up or thumbs-down from the imperial judges? Could they once have been seen as collaborators with the judges in the discovery of the law, “officers of the court” in more than name only? Recall that in many early volumes of the U.S. Reports the often lengthy arguments of opposing counsel are set out in full with no obvious break marking the transition to the opinion of the court. In the exchanges between the judges and counsel in the old English Reports it is sometimes even difficult to tell exactly which is which. Could both be “sources of the law”? Does the shift to an exclusive, not to say obsessive, emphasis on the words of the judges reflect our conversion to a highly positivistic view of law? The law is what the judges, and no one else, say it is. Could it be that an earlier generation, not anticipating frequent and endemic disagreements among those “learned in the law,” did not understand the law to be solely the will of the judges—or, to be more precise, the will of a majority thereof?

We have, seemingly, moved beyond the simple question we began with. But the number of judges on our ideal court serves as an index of a much larger issue, our conception of the nature of law itself. To the extent that law is the application of known rules to resolve individual disputes, disagreements among the judges should be relatively rare, and benign—something like medical experts occasionally disagreeing about the proper course of treatment, disagreements that we do not, by the way, necessarily resolve by counting noses. When appellate judging becomes the elaboration of policy as well as, if not more than, the resolution of individual disputes, it inevitably begins to

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51. See Jean Edward Smith, *John Marshall: Definer of a Nation* 456 (H. Holt & Co., 1996) (quoting letter of Jefferson to Thomas Ritchie).

mimic political decision-making. Law, in such cases, is the continuation of politics by other means. As the political element comes to predominate, a method is required for the orderly resolution of disagreements, which in our democratic system is ordinarily done by majority vote: each to count for one and only one.<sup>52</sup> Without consciously confronting the question of the nature of law, we nonetheless indicate our likely answer when we supply an answer to the practical question of how many judges it takes to make a supreme court.

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52. The tradition of judicial opinion-writing, explaining the deliberative process, continues to set off judicial decision-making from purely majoritarian head-counting. In its policy-making function the supreme court has become a uniquely powerful administrative agency, making policy decisions on a special technocratic basis. For a knowledgeable discussion of the distinction between politics and technocracy in the practice of American government today and a suggestion for more extensive use of technocratic agencies, see Alan S. Blinder, *Is Government too Political?* 76 (no. 6) *Foreign Affairs* 115 (1997).