

NOTES

“TO BE READ TOGETHER”*: TAXONOMIZING COMPANION CASES OF LANDMARK SUPREME COURT DECISIONS

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Supreme Court “companion cases” are decisions released on the exact same day that address substantially similar legal or factual matters. The list of consequential Supreme Court decisions that the Justices have resolved as part of a set of companion cases is lengthy: It includes NLRB v. Jones & Laughlin Steel Corp., Korematsu v. United States, Brown v. Board of Education, Terry v. Ohio, Roe v. Wade, Miller v. California, and Gregg v. Georgia. Although it is not surprising that important topics like civil rights and abortion generate significant amounts of litigation, the Supreme Court’s practice of conducting plenary review of multiple similar cases and issuing separate decisions resolving each one should give us pause. The Justices have a number of other procedural tools available for disposing of similar matters for which parties seek review. Options include granting certiorari for only one of the cases, vacating and remanding some of the matters, issuing at least one summary disposition, consolidating the cases, or releasing the decisions at very different times. The Court sidesteps these alternative approaches when it issues companion cases. Yet previous scholars have not devoted adequate attention to this practice as a distinct procedural mechanism, with unique characteristics that may motivate its usage. This Note fills that gap by studying some of the Court’s most famous companion cases and taxonomizing them into four categories—coordinate hedges, contested hedges, extensional reinforcements, and applicative reinforcements—based on factors including the voting behavior of the Justices and the constitutive decisions’ relationships to each other. The Note leverages that taxonomy to frame its analysis of why the Court chose to issue companion cases given all the procedural alternatives. This Note concludes by discussing how the practice of deciding certain sorts of companion cases—in which a majority of the Justices agree that they should resolve similar cases in ostensibly contradictory ways—may improve the Court’s legitimacy by accentuating its responsibility and capacity to collaboratively identify subtle distinctions between comparable cases that compel different outcomes.

* Roe v. Wade, 410 U.S. 113, 165 (1973) (referring to *Roe*’s companion case and explaining that “[t]hat opinion and this one, of course, are to be read together”), *overruled* by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Doe v. Bolton*, 410 U.S. 179 (1973) (*Roe*’s companion case).

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INTRODUCTION

Supreme Court observers could be forgiven for feeling confused on January 13, 2022. On that temperate winter day in Washington, D.C., the Court released two per curiam decisions addressing public health measures. Both cases dealt with the federal government's power to encourage vaccination against the COVID-19 virus. One of those cases was *Biden v. Missouri*.¹ It considered the Department of Health and Human Services' indirect requirement that certain medical providers mandate their employees' vaccinations.² The other case was *National Federation of Independent Business v. OSHA*.³ In that case, the Secretary of Labor had issued a rule obligating large employers to require their workers' vaccination or compliance with

¹ 142 S. Ct. 647 (2022).

² *Id.* at 650.

³ 142 S. Ct. 661 (2022).

testing and mask-wearing obligations.⁴ When the Court handed down its opinions for these two cases on January 13, it decided them in ostensibly opposite ways. In *Biden*, the Court upheld the government's vaccine policy vis-à-vis healthcare providers.⁵ But in *OSHA*, the Justices effectively struck down the vaccination requirement for employers of one hundred or more employees.⁶ Hence one's confusion about the decisions' substantive holdings is understandable.⁷

But these two opinions should also puzzle readers because they embodied a strange procedural phenomenon that legal academia has mostly neglected up to this point.⁸ Namely, the Supreme Court decided *Biden* and *OSHA* as “companion cases.”⁹ In other words, the Court handed down two full unconsolidated decisions about similar legal or factual matters on the exact same day,¹⁰ despite possessing a host of alternative procedural tools for handling such cases.¹¹ Of course, this was not the first time that the Court has issued companion

⁴ *Id.* at 662.

⁵ *Biden*, 142 S. Ct. at 652–54.

⁶ *OSHA*, 142 S. Ct. at 662–63.

⁷ Readers commenting on a *New York Times* article about these two rulings questioned and criticized the decisions' contradictory approaches. One commenter mused, “[T]hey decide to allow the rules for health care workers and not for others. To my mind that CLEARLY sounds like a legislative distinction and not a legal one.” ManhattanWilliam, Comment to Adam Liptak, *Supreme Court Blocks Biden's Virus Mandate for Large Employers*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/us/politics/supreme-court-biden-vaccine-mandate.html> [<https://perma.cc/K5Q5-WGLH>]. Another person wrote, “Please explain why a vaccine mandate for healthcare workers is valid but not for all workers?” Deirdre, Comment to Adam Liptak, *Supreme Court Blocks Biden's Virus Mandate for Large Employers*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/us/politics/supreme-court-biden-vaccine-mandate.html> [<https://perma.cc/M8MU-JJX7>]. These sorts of comments were also on the *Wall Street Journal's* website. One poster noted, “Healthcare workers are now the only workers in the country that cannot make their own healthcare decisions. . . . What am I missing?” Dennis O'Neil, Comment to Brent Kendall & Jess Bravin, *Supreme Court Blocks Biden Vaccine Rules for Large Employers*, WALL ST. J. (Jan. 13, 2022), <https://www.wsj.com/articles/supreme-court-blocks-biden-vaccine-rules-for-private-employers-allows-them-for-healthcare-workers-11642103130> [<https://perma.cc/2PKY-Q2KG>].

⁸ *Cf.* Steve Vladeck, *The Rise of Certiorari Before Judgment*, SCOTUSBLOG (Jan. 25, 2022), <https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment> [<https://perma.cc/5EHK-C3GT>] (making a similar point about how recent affirmative action cases' substantive import overshadowed an interesting procedural aspect).

⁹ At least one publication has already articulated these two decisions' status as “companion case[s].” See Brent Kendall & Jess Bravin, *Supreme Court Blocks Biden Vaccine Rules for Large Employers*, WALL ST. J. (Jan. 14, 2022), <https://www.wsj.com/articles/supreme-court-blocks-biden-vaccine-rules-for-private-employers-allows-them-for-healthcare-workers-11642103130> [<https://perma.cc/2PKY-Q2KG>].

¹⁰ People have used the term “companion case” to describe several different phenomena, including cases that came out on different dates. This Note focuses exclusively on cases decided on the same day.

¹¹ See *infra* Section I.B.

cases. Nor is it likely to be the last.¹² Yet the previous literature has not devoted sufficient attention to this distinct procedural practice and its frequent use. Many prior articles have treated the fact that the Court handed down several decisions addressing the same topic on the same day as a historical oddity that deserves little more than passing mention.¹³ Admittedly, not all discussions of companion cases have been so fleeting. Certain authors have devoted entire journal articles to a single set of companion cases.¹⁴ Others have considered the various alternative tools that the Court uses to manage its docket and have briefly discussed companion cases along the way.¹⁵ But it does not appear that any author has placed the Supreme Court's practice of issuing companion cases—as a distinct procedural mechanism transcending any specific substantive legal topic—at the center of her analysis. This Note fills that gap and gives companion cases the attention they deserve.

¹² The Supreme Court granted certiorari for two cases involving affirmative action in January 2022. It remains to be seen whether the Court will decide this pair of controversies as companion cases. See Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [https://perma.cc/MF23-MRET].

¹³ Some scholars take this approach when referring to companion cases in the course of a narrative that is primarily focused on a distinct procedural or substantive legal topic. See, e.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 455 & n.505 (2011) (referring briefly to *Roe*'s companion case, *Doe*, in the course of discussion about Lochner's status as an "anticanonical" decision); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527, 530–31 (2004) (noting that *NLRB v. Jones & Laughlin Steel Corp.* had companion cases in an article chronicling the demise of "the right to strike"). In this context, these articles sometimes analyze the import of both companion cases' holdings, but still ensconce this discussion within a study of something else. See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 921, 935 n.200, 991 (2000) (discussing *Board of Regents v. Roth* and its companion case *Perry v. Sindermann* as part of a broader argument about how to understand property interests' relationship to the Takings Clause and Due Process Clause).

¹⁴ Certain scholars have even chosen to focus primarily on the "less famous" case in a given pair, lavishing attention on a decision whose partner often overshadows it. See, e.g., Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975 (2004) (using *Bolling* as a starting point to consider the dearth of Equal Protection claims brought against the federal government for racial discrimination); Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003) (encouraging increased attention to *Korematsu*'s companion case, *Ex parte Endo*).

¹⁵ See, e.g., Stephen L. Wasby, *Case Consolidation and GVRs in the Supreme Court*, 53 U. PAC. L. REV. 83, 84–85, 127 (2021) (situating the issuance of companion cases (referred to as "grouping") as closely related to the use of consolidation and describing both practices as possibly falling out of favor due to the rise of GVR). See generally *infra* Section I.B.

More specifically, this Note's purpose is to aggregate and taxonomize some of the Court's most influential companion cases,¹⁶ to help identify constitutive decisions' typical functions relative to each other, and to offer some insight into *why* the Court chose to decide those matters as companion cases, given the alternative possibilities for managing its docket. It is worth clarifying what this Note *does not* do. This piece does not seek to explain the doctrinal reasons that the Court ruled the way that it did in any specific set of companion cases or to argue that such decisions are reconcilable or contradictory relative to each other or precedent. The focus is instead on the noteworthy procedural approach that the Court took in deciding companion cases.

This Note proceeds in three Parts. Part I provides a brief history of companion cases and illustrates that the Supreme Court has used them at many junctures throughout its history. This Part also explains why the Court's decision to issue companion cases should interest scholars, by situating the practice among a multitude of other procedural options available to the Justices for handling similar cases. Part II reviews the Court's one hundred "most influential" cases and specifies which of those landmark decisions had at least one companion case.¹⁷ This discussion conceptually draws together several dozen cases that other authors have not often identified as all sharing certain commonalities.¹⁸ Then, this Part taxonomizes these noteworthy companion cases and discusses some of the most notable ones according to this taxonomy. Next, this Part analyzes why the Court may have found issuing companion cases preferable to using other procedural mechanisms and discusses seven possible motivations for engaging in this practice. Part III turns to normative considerations. It offers a qualified endorsement of the Court's issuance of certain types of companion cases as a way to bolster the Court's legitimacy as a non-political branch. Namely, deciding certain cases *as* companion cases accentuates the judiciary's responsibility to discern subtle differences between substantially similar matters. To this end, Part III suggests modifying the Rules of the Supreme Court of the United States to

¹⁶ This Note searched for the "most influential companion cases" by reviewing the one hundred Supreme Court decisions to which articles have cited most frequently (according to HeinOnline) and determining which of those landmark decisions had at least one companion case. *See infra* Section II.A.

¹⁷ *See supra* note 16.

¹⁸ *See* Wasby, *supra* note 15 (discussing a significant number of companion cases, while omitting several of the important sets of companion cases that this Note includes). As of January 27, 2022, a Westlaw search for secondary sources including the names of three noteworthy companion cases, "Bolling v. Sharpe," "Doe v. Bolton," and "Sibron v. New York," returned zero results.

deepen the Court's commitment to deciding the sorts of companion cases that may underscore its distinctly judicial character.

I THE HISTORY AND SIGNIFICANCE OF ISSUING COMPANION CASES

A. *A Brief History of the Companion Case*

The Supreme Court's practice of issuing companion cases is by no means new.¹⁹ In fact, it dates to at least 1809. On March 15 of that year, the Court handed down two cases addressing the issue of subject matter jurisdiction over corporations. One of the cases was *Bank of the United States v. Deveaux*, in which a Pennsylvania-based bank claimed that it could invoke diversity jurisdiction to bring a suit in federal court against several Georgians who had committed a robbery.²⁰ The Court held that a corporation did not possess citizenship for the purpose of establishing diversity jurisdiction.²¹ Parties seeking to bring a claim in federal court would instead need to base diversity jurisdiction on the citizenship of the individuals associated with the corporation.²² The other case, *Hope Insurance Co. v. Boardman*, applied *Deveaux's* reasoning to the claim of several people from Massachusetts against a Rhode Island-based corporation, and found a lack of federal jurisdiction.²³

The Court handed down other sets of companion cases later in the nineteenth century addressing topics including loyalty oaths,²⁴ taxes,²⁵ and price regulation.²⁶ Before 1900, another trend began:

¹⁹ Part I's historical discussion relies on other scholars' identifications of companion cases. However, for the later discussion of the one hundred most influential Supreme Court decisions and their companion cases, I confirmed the existence or absence of companion cases in the U.S. Reports personally.

²⁰ 9 U.S. (5 Cranch) 61, 62–63 (1809).

²¹ *Id.* at 90–92.

²² *But see* *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 555 (1844) (abandoning this understanding of diversity jurisdiction for corporations).

²³ 9 U.S. (5 Cranch) 57, 57–58, 61 (1809). Some may dispute the classification of *Deveaux* and *Boardman* as pure companion cases, and instead frame them as a hybrid usage of consolidation, summary disposition and companion cases.

²⁴ *Cummings v. Missouri*, 71 U.S. 277, 316–17, 332 (1866) (overturning the conviction of a priest who had not taken a state-required oath—encompassing assertions about previous behavior—prior to acting in his religious capacity); *Ex parte Garland*, 71 U.S. 333, 374–76, 381 (1866) (ruling for a party challenging a federal law that prohibited attorneys from practicing in federal court if they had not taken an oath regarding past and future loyalty to the United States).

²⁵ *Home of Friendless v. Rouse*, 75 U.S. 430, 435–36, 438–39 (1869) (holding that Missouri's commitment not to tax a certain charity—specified in charity's founding charter—constituted a contract that the state could not subsequently violate); *Washington*

State²⁷ and federal courts²⁸ started to use the term “companion case” in their decisions. In 1897, the United States Supreme Court used the words “companion case” for the first time.²⁹ The phrase began to appear in legal academic writing within the next two decades in various law journals.³⁰ The words “companion case” also showed up in less specialized publications,³¹ including the *Washington Post*.³²

Univ. v. Rouse, 75 U.S. 439, 439–41 (1869) (finding that Missouri could not tax a university whose charter had provided that it was not taxable).

²⁶ See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877); *Chi., Burlington & Quincy R.R. Co. v. Iowa*, 94 U.S. 155 (1877); *Peik v. Chi. & Nw. Ry. Co.*, 94 U.S. 164 (1877); *Chi., Milwaukee & St. Paul R.R. Co. v. Ackley*, 94 U.S. 179 (1877); *Winona & St. Peter R.R. Co. v. Blake*, 94 U.S. 180 (1877); *S. Minn. R.R. Co. v. Coleman*, 94 U.S. 181 (1877); *Stone v. Wisconsin*, 94 U.S. 181 (1877); see also Charles Fairman, *The So-Called Granger Cases, Lord Hale, and Justice Bradley*, 5 *STAN. L. REV.* 587, 587 & n.41 (1953) (identifying “the Granger Cases” as a set of companion cases); Larry Yackle, *Young Again*, 35 *U. HAW. L. REV.* 51, 61 & n.54 (2013) (identifying *Munn*’s companion cases as those listed above, with the exception of *Coleman*).

²⁷ *Long v. State*, 13 *Tex. App.* 211, 212 (1882) (“This is a companion case to *Marcus Tyler v. The State*, which we have just decided.”). Westlaw suggests that three other cases may have used the phrase before *Long*. However, one of these cases used the term in a “Reporter’s Note” and the other two mentioned the phrase in their synopses, which casts doubt on whether the opinions actually used the term at the time of their initial release. See *Tyler v. State*, 11 *Tex. App.* 388, 388 (1882) (containing a synopsis that refers to a “companion-case”); *Black v. State*, 9 *Tex. App.* 328, 328 (1880) (using the term in its synopsis); *Republic of Texas, Defendant in Error (Tex. 1845)*, 65 *TEX. L. REV.* 406 (Paulsen rep. 1986) (employing the phrase in a “Reporter’s Note”). After *Long*, other state courts used the phrase “companion case” in the bodies of their decisions. See, e.g., *Int’l & G.N.R.R. v. Smith*, 1 *S.W.* 565, 566 (Tex. 1886) (“We are at a loss to know how a remark to the effect that all the questions raised by the demurrer had been settled by the supreme court in a companion case . . . could influence the verdict of the jury.”); *Indianapolis, Decatur & Springfield R.R. Co. v. Davis & Finney*, 32 *Ill. App.* 67, 68 (1889) (“It will thus be seen that it was a companion case to that of *Ervin* against the same company . . .”).

²⁸ See *Metro. R.R. Co. v. Snashall*, 3 *App. D.C.* 435, 436 (D.C. Cir. 1894) (“[This] is a companion case to the joint action of the said husband and wife . . .”).

²⁹ *Thompson v. Maxwell Land-Grant & Ry. Co.*, 168 U.S. 451, 464 (1897) (“In this connection we are referred to this paragraph in the opinion of the Supreme Court of the Territory, filed in the companion case to which we have heretofore referred . . .”).

³⁰ My research on academic journals’ use of the phrase was limited to a search of Westlaw. R.W. Withers, *The Legality of So-Called “Business Insurance,”* 24 *YALE L.J.* 471, 476–78 (1915) (“In the companion case . . . a similar conclusion is reached by the Virginia court.”); see also Note, *Rights of the Trustee in Bankruptcy Under Modern Life Insurance Policies*, 35 *HARV. L. REV.* 80, 82–83 (1921) (noting that “[t]wo companion cases of *Burlingham v. Crouse* followed this reasoning” and musing that a certain idea “is inconsistent with the companion cases of *Burlingham*”); John E. Hallen, *The Texas Libel Laws*, 5 *TEX. L. REV.* 335, 358 (1927) (“In *Express Pub. Co. v. Lancaster*, the plaintiff had no difficulty in getting the jury to find express malice, after the companion case on the same set of facts had been reversed because of the lack of this requirement.”).

³¹ *Druggist Must Pay for Mistake: Supreme Court Sustains Claim Against a New Britain Pharmacist*, *HARTFORD COURANT*, Mar. 8, 1912, at 6 (summarizing Connecticut state court decisions and noting that “Chief Justice Hall also finds error in a companion case . . .”). *The Hartford Courant* may provide an especially accurate indication of when the term

Admittedly, not all of these sources used the phrase “companion case” to refer to the same exact phenomenon that this Note explores.³³ But the fact remains: The term was gaining a foothold by the early twentieth century.

The Supreme Court decided some of its most famous sets of companion cases in the coming decades. In the interwar period, the Justices handed down consequential companion decisions³⁴ that laid the foundation for the later development of substantive due process,³⁵ and issued others that were harbingers of the Court’s increasingly broad interpretation of the Commerce Clause.³⁶ Near the end of World War II, the Justices decided a pair of cases that dealt with the forcible removal³⁷ and internment³⁸ of Japanese Americans on the West Coast. During the post-war era, the Court issued numerous sets of companion decisions as it waded into the defining civil rights debates of that time.³⁹ But the modern Court’s practice of issuing

“companion case” gained currency in American society, because it has been in circulation since 1764. See *The Oldest US Newspaper in Continuous Publication*, CONN. HUMANS. (Oct. 29, 2015), <https://connecticuthistory.org/the-oldest-newspaper-in-continuous-publication> [https://perma.cc/773L-SPZY].

³² *Supreme Court to Meet Today; Many Decisions Handed Down*, WASH. POST, June 10, 1913, at 4 (employing the phrase in a story about recent U.S. Supreme Court decisions). An earlier usage of the term from 1905 referred to a pair of Senators’ legal troubles. See *Burton Case Embarrassing. Resignation Would Take Senate Out of a Predicament*, WASH. POST, Nov. 30, 1905, at 3.

³³ See, e.g., Withers, *supra* note 30, at 476–78 (employing the term to refer to state court decisions from Ohio and Virginia that had been released on the same day). Other authors have used the term to describe cases decided years apart. In contrast, this Note identifies companion cases only where the same court hands down two or more decisions—addressing substantially similar legal or factual matters—on the exact same day.

³⁴ *Meyer v. Nebraska*, 262 U.S. 390, 396–97, 399–400 (1923) (striking down a law that prohibited schools from teaching German to American youths, due in part to the Fourteenth Amendment’s protection of liberty); *Bartels v. Iowa*, 262 U.S. 404, 409 (applying the holding of *Meyer*).

³⁵ Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 72 (“[T]he Supreme Court invokes [*Meyer* and a case that the Court decided two years later] as a starting point in much of its modern substantive due process analysis.”).

³⁶ For example, *Jones & Laughlin Steel* affirmed Congress’s constitutional authority to pass legislation addressing labor relations. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 252–53 (2020) (noting *Jones & Laughlin Steel*’s status as an indication of the Court’s lessened hostility to New Deal legislation).

³⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

³⁸ *Ex parte Endo*, 323 U.S. 283 (1944).

³⁹ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948) (companion case to *Shelley*); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (companion case to *Sweatt*); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (companion case to *Brown*); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (companion case to *Heart of Atlanta Motel*).

companion cases transcended any single substantive legal issue. During the second half of the twentieth century, the Justices decided companion decisions that touched on issues including divestiture of citizenship,⁴⁰ abortion,⁴¹ the death penalty,⁴² adequate assistance of counsel,⁴³ and more.⁴⁴ In the twenty-first century, the Court handed down companion cases addressing affirmative action,⁴⁵ personal jurisdiction,⁴⁶ and public health measures related to COVID-19.⁴⁷ Of course, this abbreviated discussion is not a comprehensive chronicling of every instance in which the Supreme Court has issued companion cases throughout its history. But the preceding paragraphs demonstrate that the Court has handed down such decisions with non-trivial frequency.

⁴⁰ See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958) (disallowing the government's effort to divest an American soldier of his citizenship for having committed desertion); *Perez v. Brownell*, 356 U.S. 44 (1958) (companion case to *Trop*); *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (same).

⁴¹ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the federal constitution protects the right to have an abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Doe v. Bolton*, 410 U.S. 179 (1973) (companion case to *Roe*).

⁴² See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (holding a Georgia law imposing the death penalty unconstitutional); *Moore v. Illinois*, 408 U.S. 786, 800 (1972) (applying the holding of *Furman*); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's revised statute imposing the death penalty as constitutional); *Proffitt v. Florida*, 428 U.S. 242, 247, 254 (1976) (companion case to *Gregg*); *Jurek v. Texas*, 428 U.S. 262, 268, 274 (1976) (same); *Woodson v. North Carolina*, 428 U.S. 280, 285 (1976) (same); *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976) (same).

⁴³ See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the test for when defendant's Sixth Amendment right to counsel is violated by counsel's inadequate performance); *United States v. Cronin*, 466 U.S. 648 (1984) (companion case to *Strickland*).

⁴⁴ See speech cases including *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980).

⁴⁵ *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating certain aspects of the University of Michigan's undergraduate admissions process on constitutional and statutory grounds); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (companion case to *Gratz*).

⁴⁶ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (finding that North Carolina courts lacked general personal jurisdiction over a company based overseas whose product had allegedly caused a deadly accident in France but who did not distribute that particular product in North Carolina); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (holding that New Jersey courts did not have specific personal jurisdiction over an English company whose product had allegedly caused an injury in New Jersey); see also Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 412, 422 (2012) (identifying this pair of holdings as "companion cases" and "companion decision[s]").

⁴⁷ See *supra* Introduction.

B. *Why Companion Cases Are Noteworthy:
Considering the Alternatives*

Although companion cases appear relatively regularly throughout the Supreme Court's history, some readers may be wondering: Who cares? Why is the fact that the Court has often decided several similar cases on the same day a subject of interest? After all, controversial issues ranging from abortion to free speech are likely to generate frequent litigation. Thus, the High Court's decision to address one topic through multiple decisions on the same day should not raise any eyebrows. Or should it? The best way to answer this question requires a summary of the methods by which the Court can avoid deciding companion cases. By examining five decision points⁴⁸ where the Supreme Court can opt *not* to engage in this practice, its noteworthiness becomes apparent.⁴⁹

First, the Court chooses the appellate cases that it will hear by granting writs of certiorari. Although it is true that the Supreme Court is required to review certain lower court decisions,⁵⁰ the Court selects the vast majority of appellate cases that it hears through a discretionary process.⁵¹ According to the famous "Rule of Four," the Court chooses to hear all cases for which four Justices vote affirmatively.⁵² When it comes to granting certiorari, the Justices are by no means short of options. The Court tends to choose less than one hundred cases per year out of a pool of several thousand.⁵³ For example, in the 2019 Term, the Court decided to hear only sixty of 5,718 cases for which "plenary review" was sought.⁵⁴ The upshot of this dynamic is

⁴⁸ These five procedural practices do not capture the full range of options that the Supreme Court has for handling a case. Other practices exist, like "dismissing . . . writ[s] of certiorari as improvidently granted." See Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1421 (2005) (chronicling the Court's practice of choosing to dismiss cases for which it had granted certiorari improvidently and arguing the Court should generally only "DIG" a case if at least six Justices agree to do so).

⁴⁹ Cf. Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 NOTRE DAME L. REV. 171, 244 (2020) (making a somewhat similar point about the Court's choice to use certain types of remands despite having numerous other options).

⁵⁰ *Id.* at 180–81, 181 n.33.

⁵¹ See 16B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4001 (3d ed. 1999).

⁵² Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–69 (1988) ("The Rule of Four is the mechanism that the Supreme Court uses to determine to which . . . cases . . . it will give full consideration on the merits.").

⁵³ See Solimine & Gely, *supra* note 48, at 1423–24 ("The Court now routinely decides only about eighty cases on the merits each Term.").

⁵⁴ *The Supreme Court, 2019 Term—The Statistics*, 134 HARV. L. REV. 610, 618 tbl.II (2020) (providing a numerical overview of the Court's 2019 Term, although this specific

simple: Many parties are vying for the Justices' limited time and attention.⁵⁵ Thus, the decision to hear and decide numerous cases about the same topic in one term represents a head-scratching allocation of resources. Why decide multiple cases about one issue in any single year? Selecting a variety of dissimilar cases would seem to allow the Court to provide the greatest amount of guidance to lower courts and to maximize its influence. So why does it decide companion cases?

Second, even if the Supreme Court decides to address several very similar cases, it can avoid deciding all of them on the merits by granting certiorari, vacating, and remanding (GVR) some of the lower court decisions.⁵⁶ The Court usually employs GVR because of an "intervening event,"⁵⁷ like a recent relevant decision from the Supreme Court itself.⁵⁸ In practice, this may involve the Court granting plenary review and issuing a decision for one case dealing with a certain topic. The Court can then direct a host of similar cases back to federal appellate courts using GVR.⁵⁹ The lower courts will

statistic does not include cases over which the Court had original jurisdiction). The Court conducts "plenary review" of a case if it receives briefings on the merits and holds oral argument before issuing a decision.

⁵⁵ See *id.*

⁵⁶ Many scholars have devoted attention to the Court's GVR practice. See, e.g., Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 715–16 (2009) (aggregating and studying a subset of the Court's GVRs and proposing a revised approach "that shift[s] more responsibility to lower courts"); Sena Ku, Comment, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 N.W. U. L. REV. 383 (2008) (hypothesizing about the Court's motivations for utilizing GVR and advocating for more restrained use of it); Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 552 (2004) ("explor[ing] the systemic impact of GVRs on judicial adjudication and contend[ing] that the availability of such a remedy generates suboptimal results, at least in particular categories of cases"); J. Mitchell Armbruster, Note, *Deciding Not to Decide: The Supreme Court's Expanding Use of the "GVR" Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota*, 76 N.C. L. REV. 1387 (1998) (considering the Court's GVR practice with a specific focus on two examples from October 1996); see also Bruhl, *supra* note 49, at 177 (conducting an analysis of federal appellate courts' remand practices and finding support for an expansive, rather than overly restrictive, understanding of this power).

⁵⁷ See Armbruster, *supra* note 56, at 1387, 1403 (noting the role of an "intervening event" in causing the Court to GVR a case).

⁵⁸ See *id.* at 1387 (listing events that may lead to a GVR). It is possible for the Court to vacate and remand a case at the same time that it grants certiorari, or to vacate and remand after plenary review has commenced. Whether the latter technically constitutes a GVR is debatable. See *id.* at 1406 (describing two Supreme Court cases that reflect these different possibilities and implying the latter's ambiguous status as a GVR).

⁵⁹ See, e.g., *Borden v. United States*, 141 S. Ct. 1817 (2021) (interpreting the Armed Career Criminal Act). The Court has GVR'ed many cases thereafter "for further consideration in light of" its decision in *Borden*. See, e.g., *Williams v. United States*, 142 S. Ct. 891 (2022) (mem.) (GVR'ed after *Borden* decision); *Kamahele v. United States*, 142 S. Ct. 58 (2021) (mem.) (same); *Segovia-Lopez v. United States*, 141 S. Ct. 2781 (2021) (mem.) (same).

reconsider these remanded cases with an awareness of the Supreme Court's recent merits decision addressing the same topic.⁶⁰

Third, summary disposition offers another escape route. If GVR indicates that the Court has chosen not to issue a substantive decision for a case, a summary disposition reflects the Court's desire to resolve a case on the merits without much fanfare.⁶¹ When the Court issues a summary disposition, it affirms or reverses a lower court's decision without oral argument or even briefing on the merits.⁶² The Court can thus use summary dispositions to avoid conducting plenary review for multiple similar cases.⁶³ For instance, the Justices can grant plenary review and pen a detailed decision for one case, then use summary disposition to resolve the remaining disputes based on the same rationale.⁶⁴

Fourth, the Court can decide to consolidate the similar cases, either before or after it has heard oral argument.⁶⁵ It can then issue a

⁶⁰ This Note does identify certain decisions as companion cases despite the fact that they include vacatur and remand. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 37 (1973) (categorized as a companion case with *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973)); *Kaplan v. California*, 413 U.S. 115, 122 (1973); *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 (1973); and *United States v. Orito*, 413 U.S. 139, 145 (1973)). The distinction between these decisions and the sorts of GVRs that note 59 references is the nontrivial extent of the factual and legal discussions in the Court's opinions for the cases in the first category. All five cases mentioned in this footnote are functioning together as one group of companion cases.

⁶¹ Other authors have studied the Court's use of summary dispositions. *See, e.g.*, Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 697 (2020) (arguing that the Court should use summary dispositions to illustrate how lower courts should apply preexisting legal standards in practice).

⁶² WRIGHT & MILLER, *supra* note 51, § 4004.5 (“The Court has adopted a regular habit of deciding cases on the merits by orders or brief opinions that simultaneously grant certiorari and decide the case on the certiorari papers. . . . At times, the Court has explained that . . . further briefs and oral argument would not materially assist in its decision.”).

⁶³ Readers may recognize this alternative as one of the tools that the Court uses when managing its “shadow docket.” *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

⁶⁴ A leading treatise posits that the Court's use of summary dispositions in this context is apt. *See* WRIGHT & MILLER, *supra* note 51, § 4004.5 (“[T]he technique of summary disposition seem[s] particularly fitting on disposition of cases held for resolution in parallel with another case granted plenary consideration . . .”).

⁶⁵ The Court has sometimes used both consolidation and companion cases to handle similar controversies. For instance, although the Court decided *Brown v. Board* along with a companion case, *Brown* itself had several cases consolidated into it. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 & n.1 (1954) (describing prior history and consolidation of lower court cases from Kansas, South Carolina, Virginia, and Delaware); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (companion case to *Brown*); *see* Wasby, *supra* note 15, at 85 (recognizing that the Court consolidated some cases into *Brown* while keeping *Bolling* as a standalone decision).

single decision addressing all the heretofore separate controversies.⁶⁶ Consolidation does not necessarily dissolve the individual rights of the parties whose cases are combined.⁶⁷ But it does save the Court the trouble of writing multiple decisions about the same subject. Famous examples of consolidation include the four cases folded into the *Miranda* decision (including *Miranda* itself) and the trio of cases resolved in *Bostock v. Clayton County*.⁶⁸

Lastly, even when the Court *does* decide to issue individual merits decisions for each similar case, there is no requirement that the Court release those opinions on the same exact day. Opinion release dates are largely discretionary.⁶⁹ As such, the Justices can choose to publish similar decisions days, weeks, or even months apart. Spacing out related decisions can attenuate the conceptual linkage between them. In contrast, releasing similar decisions simultaneously serves to underscore their relationship to each other.

In light of the aforementioned options,⁷⁰ readers should begin to see the puzzling nature of companion cases. The nation's highest court has finite resources and a primarily discretionary docket. It can direct lower courts to decide doppelgänger cases in accordance with its most recent controlling decision and possesses the option of issuing summary affirmances and reversals. The Court can also handle multiple controversies with one written opinion. Further, the Court can choose to publish related decisions at different times during its term. And yet the Court eschews these options when it decides companion cases. To understand why, Part II identifies and examines some specific examples more closely. That exercise helps uncover the motivations that may animate this practice.

⁶⁶ Some scholars have chronicled the Court's practice of case consolidation. See, e.g., Wasby, *supra* note 15, at 84–98.

⁶⁷ *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) (holding “that constituent cases [consolidated under Federal Rule of Civil Procedure 42(a)] retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party”). The relevance of this decision for cases that the Supreme Court consolidates may be limited, because there is no higher court to which the parties may appeal.

⁶⁸ See Wasby, *supra* note 15, at 85, 96 (noting that the Supreme Court consolidated cases when deciding *Miranda* and *Bostock*); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

⁶⁹ *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/VJ9D-JYUC>] (“All opinions of the Court are, typically, handed down by the last day of the Court’s term With the exception of this deadline, there are no rules concerning when decisions must be released.”).

⁷⁰ See generally Bruhl, *supra* note 49, at 185–86 (considering the federal statute—28 U.S.C. § 2106—that codifies the appellate courts’ various options for disposing of a case).

II

AGGREGATING AND TAXONOMIZING COMPANION CASES IN ORDER TO HELP IDENTIFY THE SUPREME COURT'S MOTIVATIONS FOR USING THIS APPROACH

This Part proposes that many of the Supreme Court's landmark companion cases can fit into one of four categories. These categories, defined in Section II.A, are contested hedges, coordinated hedges, extensional reinforcements, and applicative reinforcements.⁷¹ This terminology is original to this Note. Section II.A presents some of the Court's most notable companion cases and classifies each set of decisions in Table 1, according to this four-part taxonomy. Section II.B offers some general reflections on these landmark companion decisions. Sections II.C and II.D consider each of these groups in detail and examine certain companion cases in depth to demonstrate how each category works in practice. That discussion frames Section II.E's analysis of why the Justices resolved companion cases *as companion cases*.⁷² Section II.E identifies seven possible motivations, including a quasi-policymaking desire to maximize the Court's binding impact on lower courts and an organizational interest in keeping decisions using distinct legal reasoning separate from each other.

A. Methodology and Taxonomy

Instead of sifting through every single case that the Supreme Court has decided since 1791 in order to identify companion cases,⁷³ this Note focuses on a subset of the Court's cases. Specifically, this Note used a legal database to identify the one hundred most cited Supreme Court decisions as of January 5, 2022. This list, from the HeinOnline database, is located in the Appendix. This metric—which cases have been cited the most in legal articles—seemed to be a reasonable (even if imperfect) proxy for each case's influence and

⁷¹ The closest thing to prior usage of any of these terms occurred in discussions inapposite to this Note's focus. See, e.g., Michal Barzuza & Eric Talley, *Long-Term Bias*, 2020 COLUM. BUS. L. REV. 104, 182 (2020) ("coordinated hedge funds"); John Valery White, *Civil Rights Law Equity: An Introduction to a Theory of What Civil Rights Has Become*, 78 WASH. & LEE L. REV. 1889, 1924 (2022) ("the contested, hedged, and primarily equitable structure of the Civil Rights Act").

⁷² Cf. Evan J. Mandery & Zachary Baron Shemtob, *Supreme Convolution: What the Capital Cases Teach Us About Supreme Court Decision-Making*, 48 NEW ENG. L. REV. 711, 712–13 (2014) (taking a somewhat similar approach by distinguishing between a surface-level assessment of decision's text and more holistic consideration of other sources to explain the Justices' behavior).

⁷³ See *The Court as an Institution*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/institution.aspx> [<https://perma.cc/34EN-BTFC>] ("[T]he Justices handed down their first opinion on August 3, 1791 in the case of *West v. Barnes*.").

importance. From these one hundred decisions, those with companion cases were identified.⁷⁴

Identifying companion cases can be more of an art than a science because the Court sometimes does not use those specific words in the text of its opinions. This means that confirming companion cases' existence (or lack thereof) involved reviewing the syllabi of every case that the Court handed down on the same day as the decision of interest. This Note did that for the one hundred "most influential" decisions, and categorized decisions as companion cases if they dealt with substantially similar legal or factual matters. As it was sometimes difficult to apply this standard on the margins, there very well might be colorable arguments for qualifying some decisions as companion cases despite this Note's decision to the contrary.⁷⁵

The idea behind this Note is not that the Court has issued companion cases unusually frequently within this subgroup of canonical cases, but rather that—as the first piece to focus exclusively on companion cases—this Note would be wise to study the most impactful manifestations of this phenomenon.⁷⁶ If anything, the existence of even more companion cases than those identified herein indicates that this topic is ripe for further research. Because previous scholarship has already identified many if not all of the individual sets of companion cases that this Note has collected, this Note's original contribution is primarily its systematic aggregating and taxonomizing of these pairs.⁷⁷

⁷⁴ Companion cases that came out the same day as one of the one hundred most influential decisions, but that had nothing to do with that canonical case, are not included.

⁷⁵ See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972) (holding that revoking parole implicated liberty interests under the Fourteenth Amendment's Due Process Clause and requiring certain procedural protections). The Court decided *Morrissey* the same day as *Roth* and *Perry* and assessed procedural due process claims in all three cases. But this Note categorizes only the latter two decisions as companion cases, because of the very different facts undergirding *Morrissey* relative to the other two cases. Whereas *Morrissey* dealt with the reimposition of incarceration, *Roth* and *Perry* dealt with educators seeking contract renewals. *Id.*; *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Despite this Note's decision, it would nonetheless be reasonable to understand *Morrissey* as a companion case to *Roth* and *Perry*. Alternatively, some readers may feel that this Note identifies decisions as companion cases that do *not* deserve this designation. See, e.g., *infra* note 168 (mentioning two companion cases that do not expressly refer to each other, which may lead some to question their status as companion cases).

⁷⁶ The possibility that this subset of Supreme Court decisions is not representative of the broader population—meaning that companion cases occur with different frequency or serve alternative functions for non-landmark decisions (i.e., that there is "sample bias")—is left for future scholarship.

⁷⁷ *But see* Wasby, *supra* note 15, at 84–98 (exploring the Court's "consolidation, grouping, and linkage" of decisions—where "grouping" is essentially equivalent to issuing companion cases—and providing some historical and recent examples of each practice). Wasby's article demonstrates that some previous literature has in fact identified the issuance of companion cases as an alternative to consolidation and GVR. But this Note

Table 1 summarizes which of the Court's one hundred landmark decisions had at least one companion case. This table also places each set of companion cases into one of two general categories, based on the constitutive decisions' relationships to each other. Companion cases either "reinforce" each other by reaching substantively similar outcomes or "hedge" each other by reaching ostensibly opposite outcomes. Table 1 further categorizes reinforcing companion cases as "applicative" or "extensional." Applicative reinforcing companion cases involve one decision merely leveraging the reasoning of its partner to reach its holding. Alternatively, extensional reinforcing companion cases consist of one opinion that establishes a legal principle and another opinion that doctrinally innovates on said principle.

The table also sorts hedging companion cases into two subcategories: "coordinated hedges" and "contested hedges." Coordinated hedges occur when five or more of the same Justices vote to decide similar cases in superficially opposite ways. Coordinated hedges reflect an apparently collaborative effort to circumscribe the import of either of the two constitutive decisions and imply that most Justices are prioritizing incrementalism over drastic change. In contrast, contested hedges occur when four or fewer of the same Justices vote in the majority across both facially contradictory companion cases. Contested hedges are likely the product of discordant groups of Justices struggling to advance their competing visions of how to address a certain issue. An example is *Gratz v. Bollinger* and *Grutter v. Bollinger*.⁷⁸ In these companion cases addressing affirmative action, only Justices O'Connor and Breyer were in the majority for both decisions. The other seven Justices cast votes that were uniformly pro- or anti-affirmative action in both cases.

This Note's taxonomy is far from perfect. Some may argue that certain sets of companion cases are sorted incorrectly, or that certain sets cross multiple categories.⁷⁹ Some decisions may even straddle the

goes beyond such scholarship by developing and applying a taxonomy for companion cases. Further, this Note devotes comparatively more attention to why the Court engaged in this practice. *See id.* at 85, 92 (postulating only briefly as to why the Court "grouped" certain cases).

⁷⁸ *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). Neither constitutive case of this pair fell within this Note's definition of the one hundred most influential cases. *See also* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 62 n.284 (2003) (discussing how *Gratz* and *Grutter* reflected the Justices' contrasting perspectives about affirmative action).

⁷⁹ For instance, although this Note categorizes *Doe v. Bolton* as an application of *Roe v. Wade*, because *Doe* applied *Roe*'s holding that there is a right to have an abortion during the first trimester of a pregnancy, *Doe* arguably served an extensional function too. *Roe v. Wade*, 410 U.S. 113, 153, 164 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*,

divide between “reinforcing” and “hedging” opinions.⁸⁰ Conversely, some of the companion cases in Table 1 do not fit neatly into *any* of the four subgroups, despite this Note’s decision to sort each set of decisions for the sake of completeness.⁸¹ This may imply that using only four categories to organize these cases is overly simplistic.⁸² Despite these potential shortcomings, the taxonomizing in Table 1 serves as a useful starting point for future consideration of companion cases. This analysis provides a helpful vocabulary and basic framework that future scholars can refine.⁸³

142 S. Ct. 2228 (2022); *Doe v. Bolton*, 410 U.S. 179, 195 (1973). The same may be said of *Associated Press v. NLRB*, 301 U.S. 103 (1937) vis-à-vis *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In contrast, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) and *Kaplan v. California*, 413 U.S. 115 (1973) are examples of cases that this Note categorizes as extensional relative to *Miller v. California*, 413 U.S. 15 (1973), despite their significant applicative elements.

⁸⁰ For example, although *Terry* and *Sibron* are classified as a coordinated hedge, *Sibron* arguably also has applicative aspects. After all, the Court applied the “reasonable suspicion” standard that it articulated in *Terry* to reach the conclusion that the search of *Sibron* violated the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *Sibron v. New York*, 392 U.S. 40, 64–66 (1968).

⁸¹ *Compare, e.g., Strickland v. Washington*, 466 U.S. 668 (1984), with *United States v. Cronin*, 466 U.S. 648 (1984). This pair of companion cases does not fit neatly into any of the four categories that Section II.A articulates.

⁸² According to this thinking, the relationship between two constitutive cases is as unique as the legal and factual details undergirding each controversy.

⁸³ It is not strictly necessary to cabin the idea of something like a “contested hedge” to cases released on the same day. One could transpose this taxonomy onto decisions that the Court issues across time. But possible changes in the Court’s composition, plus other shifting circumstances, caution against grouping companion cases with other decisions that address the same topic.

TABLE 1. COMPANION CASES OF THE ONE HUNDRED "MOST INFLUENTIAL" SUPREME COURT DECISIONS

Rank	Case Name	Decision Date	Companion Case	Category
68	Abrams v. United States	Nov. 10, 1919	Stilson v. United States	Reinforce – Applicative
17	Meyer v. Nebraska	June 4, 1923	Bartels v. Iowa	Reinforce – Applicative
76	Whitney v. California	May 16, 1927	Burns v. United States	Reinforce – Applicative
			Fiske v. Kansas	Hedge – Coordinated
69	NLRB v. Jones & Laughlin Steel Corp.	Apr. 12, 1937	NLRB v. Fruehauf Trailer Co.	Reinforce – Applicative
			NLRB v. Friedman-Harry Marks Clothing, Co.	Reinforce – Applicative
			Associated Press v. NLRB	Reinforce – Applicative
			Washington, Virginia & Maryland Coach Co. v. NLRB	Reinforce – Applicative
19	West Virginia State Board of Education v. Barnette	June 14, 1943	Taylor v. Mississippi	Reinforce – Extensional
25	Korematsu v. United States	Dec. 18, 1944	<i>Ex parte</i> Endo	Hedge – Coordinated
46	Shelley v. Kraemer	May 3, 1948	Hurd v. Hodge	Reinforce – Extensional
1	Brown v. Board of Education	May 17, 1954	Bolling v. Sharpe	Reinforce – Extensional
82	Bolling v. Sharpe	May 17, 1954	Brown v. Board of Education	Reinforce – Extensional
54	Roth v. United States	June 24, 1957	Kingsley v. Brown	Reinforce – Extensional
84	Trop v. Dulles	Mar. 31, 1958	Perez v. Brownell	Hedge – Contested
			Nishikawa v. Dulles	Reinforce – Extensional
9	Gideon v. Wainwright	Mar. 18, 1963	Douglas v. California	Reinforce – Extensional
47	Reynolds v. Sims	June 15, 1964	WMCA, Inc. v. Lomenzo	Reinforce – Applicative
			Maryland Committee for Fair Representation v. Tawes	Reinforce – Applicative
			Davis v. Mann	Reinforce – Applicative
			Roman v. Sincock	Reinforce – Applicative
			Lucas v. Forty-Fourth General Assembly	Reinforce – Applicative
77	Duncan v. Louisiana	May 20, 1968	Bloom v. Illinois	Reinforce – Extensional
			Dyke v. Taylor Implement Manufacturing Co.	Hedge – Coordinated

Rank	Case Name	Decision Date	Companion Case	Category
22	Terry v. Ohio	June 10, 1968	Sibron v. New York	Hedge – Coordinated
35	Goldberg v. Kelly	Mar. 23, 1970	Wheeler v. Montgomery	Reinforce – Applicative
55	Lemon v. Kurtzman	June 28, 1971	Tilton v. Richardson	Hedge – Coordinated, Contested ⁸⁴
31	Furman v. Georgia	June 29, 1972	Moore v. Illinois	Reinforce – Applicative
98	Board of Regents v. Roth	June 29, 1972	Perry v. Sindermann	Hedge – Coordinated
2	Roe v. Wade	Jan. 22, 1973	Doe v. Bolton	Reinforce – Applicative
67	Miller v. California	June 21, 1973	Paris Adult Theatre I v. Slaton	Reinforce – Extensional
			Kaplan v. California	Reinforce – Extensional
			United States v. 12 200-Ft. Reels	Reinforce – Extensional
			United States v. Orito	Reinforce – Extensional
65	Gertz v. Robert Welch	June 25, 1974	Old Dominion v. Austin	Hedge – Contested ⁸⁵
43	Gregg v. Georgia	July 2, 1976	Proffitt v. Florida	Reinforce – Applicative
			Jurek v. Texas	Reinforce – Applicative
			Woodson v. North Carolina	Hedge – Contested
			Roberts v. Louisiana	Hedge – Contested
87	Central Hudson Gas & Electric Corp. v. Public Service Commission	June 20, 1980	Consolidated Edison Co. v. Public Service Commission	Reinforce – Extensional
93	Strickland v. Washington	May 14, 1984	United States v. Cronin	Reinforce – Applicative

B. General Reflections

Table 1 highlights a few points that deserve mention. First, it shows a substantial number of landmark decisions have at least one accompanying companion case. This Note counted twenty-five such instances—one fourth of the cases reviewed—which suggests that this

⁸⁴ *Lemon* and *Tilton* are categorized as both a coordinated hedge and a contested hedge because out of the five Justices who voted in the majority in *Tilton*—to uphold most of a statute that provided for federal government funding of construction at sectarian colleges—four of those same Justices voted to strike down a Rhode Island law funding private school teachers in *Lemon* (contested), but all five of them voted to strike down a Pennsylvania statute in *Lemon* (coordinated).

⁸⁵ Table 1 classifies *Robert Welch* and *Old Dominion* as hedge cases because one of *Robert Welch*'s two holdings refused to apply a recklessness requirement to a publication's liability for its falsehoods, whereas *Old Dominion* did apply that standard to a labor dispute-related document. *Robert Welch*'s other holding favored the publisher in that case but is not taken into account for classification purposes.

practice is not an isolated phenomenon. Second, among those landmark decisions that have at least one companion case, many have *several* of them. In this sense, conceiving of companion cases as pairs is sometimes inaccurate. The Court often produces multi-decision groups instead.

The high-level function of some of these companion cases is also surprising. Although most of the companion cases listed above serve to reinforce each other, this is not always the case.⁸⁶ Indeed, nine landmark decisions have at least one companion case that points in the opposite direction (acting as a “hedge”). This means it would be a mistake to think of companion cases as always achieving similar substantive outcomes.⁸⁷ To complicate matters further, the Court has sometimes handed down a landmark decision along with both a reinforcing companion case and a hedging companion case on the same day.⁸⁸ The next several Sections consider the four basic categories of companion cases in more detail.

C. Hedge Cases: Further Analysis

Perhaps the most surprising aspect of hedge companion cases is that they exist at all. After all, if the Court embraces a certain position for one case, it is strange that the Court would release another decision leaning in the opposite direction on the same day. Unraveling this mystery requires a more in-depth study of the two types of hedge companion cases. To this end, the next two Sections will consider specific instances of coordinated hedges and contested hedges.

⁸⁶ A landmark case need not be the base decision that its companion case applies, extends, or hedges. The roles could be reversed or ambiguous. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (extending the First Amendment rights of a utility company from political speech—protected in its companion case—to commercial speech); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530 (1980) (*Central Hudson’s* companion case).

⁸⁷ *See Whitney v. California*, 274 U.S. 357 (1927); *Korematsu v. United States*, 323 U.S. 214 (1944); *Trop v. Dulles*, 356 U.S. 86 (1958); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁸⁸ *See Whitney*, 274 U.S. 357; *Burns v. United States*, 274 U.S. 328 (1927) (reinforcing *Whitney*); *Fiske v. Kansas*, 274 U.S. 380 (1927) (hedging *Whitney*); *Trop*, 356 U.S. 86; *Perez v. Brownell*, 356 U.S. 44 (1958) (hedging *Trop*); *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (reinforcing *Perez*); *Duncan*, 391 U.S. 145; *Bloom v. Illinois*, 391 U.S. 194 (1968) (reinforcing *Duncan*); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) (hedging *Duncan*); *Gregg*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242 (1976) (reinforcing *Gregg*); *Jurek v. Texas*, 428 U.S. 262 (1976) (reinforcing *Gregg*); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (hedging *Gregg*); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (hedging *Gregg*).

1. *Coordinated Hedge*

A “coordinated hedge” occurs when at least five of the same Justices vote in the majority on both superficially contradictory decisions. A coordinated hedge suggests a certain level of intentionality in reaching seemingly opposite holdings. Indeed, it demonstrates that most of the Justices desired this split. The Supreme Court decided some of its most famous cases as parts of coordinated hedges. *Korematsu v. United States*⁸⁹ stands as an especially clear example. The Court decided *Korematsu* and its companion case *Ex parte Endo*⁹⁰ on the same day in December 1944. In *Korematsu*, the plaintiff challenged a government policy requiring the involuntary evacuation and exclusion of Japanese Americans from certain areas on the West Coast. The U.S. military had issued the relevant directive after Executive Order 9066 emphasized the need for “every possible protection against espionage and against sabotage.”⁹¹ The Court upheld the contested practice in a six-to-three decision that modern observers recognize as one of the Court’s most odious “anticanonical” holdings.⁹² The majority applied strict scrutiny to the race-specific removal policy, but nonetheless found it justified, because “our shores are threatened by hostile forces, [and] the power to protect must be commensurate with the threatened danger.”⁹³

Ex parte Endo instead examined the federal government’s power to continue to detain a Japanese American woman whom the government had forced to leave her home in 1942. The government had forcibly removed Mitsuye Endo from her home in California based on a military order similar to the one challenged in *Korematsu*.⁹⁴ Endo had been in government detention ever since,⁹⁵ even though the government acknowledged she was “a loyal and law-abiding citizen.”⁹⁶ Perhaps surprisingly in light of *Korematsu*, the Court ruled unanimously in her favor. The Justices held that Executive Order 9066, which had formed the basis for these wartime measures, did not justify the continuing detention of loyal citizens like Endo.⁹⁷ The Court had thus

⁸⁹ 323 U.S. 214 (1944).

⁹⁰ 323 U.S. 283 (1944).

⁹¹ *Korematsu*, 323 U.S. at 217.

⁹² See, e.g., Greene, *supra* note 13, at 380–81, 387 (describing *Korematsu* as part of “the American anticanon,” meaning it is one of the “decisions the legal community regards as the worst of the worst.”).

⁹³ *Korematsu*, 323 U.S. at 220.

⁹⁴ *Endo*, 323 U.S. at 284–85, 288.

⁹⁵ *Id.* at 285.

⁹⁶ *Id.* at 294.

⁹⁷ See *id.* at 297–98, 300–04 (finding Endo should be granted liberty and examining the purpose and language of the military orders).

considered the scope of Executive Order 9066 twice on the same day and had ruled in ostensibly opposite directions. Because six of the same Justices had voted in the majority in both cases, and thus desired the results despite their apparent tension, this constituted a coordinated hedge.⁹⁸

This is not the only time that the Court used a coordinated hedge in connection with a landmark case. *Terry v. Ohio*⁹⁹ and its companion case *Sibron v. New York*¹⁰⁰ illustrate this point. In *Terry*, the Court assessed whether a police officer can stop a person and search that person's outer clothing for weapons based on something less than probable cause. An eight-Justice majority held that this practice did not violate the Fourth Amendment.¹⁰¹ The Court explained that police can briefly stop individuals based on what later became known as "reasonable suspicion."¹⁰² In *Sibron*, the Court applied the rule that it had articulated in *Terry* to a different set of circumstances. The facts giving rise to *Sibron* involved a police officer who had observed a man for eight hours and had seen the individual speak with known users of narcotics.¹⁰³ The officer concluded his surveillance by bringing *Sibron* outside of the restaurant where he was eating, thrusting his hand into *Sibron*'s pocket, and finding heroin.¹⁰⁴ *Sibron* alleged that this search violated the Fourth Amendment.¹⁰⁵ The Court

⁹⁸ The Court's rejection of *Korematsu* in recent years is a welcome development. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("[*Korematsu*] has been overruled in the court of history, and—to be clear—has no place in the law under the Constitution." (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))). But this does not undermine *Korematsu* and *Ex parte Endo*'s status as a coordinated hedge. After all, a coordinated hedge merely indicates that a majority of the Justices voted to decide two similar cases in superficially contradictory ways. Later societal recognition that one of those decisions was improper does not change the initial designation's accuracy.

⁹⁹ 392 U.S. 1 (1968).

¹⁰⁰ 392 U.S. 40 (1968).

¹⁰¹ *Terry*, 392 U.S. at 30–31.

¹⁰² *Id.* at 27 ("[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual . . ."); see also Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1200 n.67 (2017) (noting that *Terry* majority opinion does not use the phrase "reasonable suspicion").

¹⁰³ *Sibron*, 392 U.S. at 45.

¹⁰⁴ *Id.* The Court in *Sibron* addressed a second fact pattern, where an off-duty police officer had searched a man, Peters, that he suspected of burglary. *Id.* at 48–49. The Court held that the search of Peters was not unconstitutional because it was incident to an arrest, which involved different considerations than a pre-arrest search would. *Id.* at 66–67. Despite this finding as to Peters, this Note nonetheless categorizes *Terry* and *Sibron* as a coordinated hedge, because the Justices applied the same newly developed standard for pre-arrest searches to the lead fact pattern in both cases and reached opposite results.

¹⁰⁵ *Id.* at 44.

agreed, eight-to-one.¹⁰⁶ Because the lone dissenter was a different Justice in each case, seven Justices voted in the majority across both *Terry* and *Sibron*, agreeing there was a constitutional violation in the latter but not in the former, and thus making this a coordinated hedge.¹⁰⁷ The next Section shows that not all hedges are coordinated.

2. *Contested Hedge*

Recall that a “contested hedge” features four or fewer of the same Justices voting with the majority across a pair of seemingly contradictory companion cases. The remaining Justices have staked out consistent positions on the issue du jour, voting the same way in both cases.

*Trop v. Dulles*¹⁰⁸ and its companion case *Perez v. Brownell*¹⁰⁹ show what a contested hedge looks like in practice. In *Trop*, the Court considered whether the government can divest a soldier of his United States citizenship for committing desertion. The Nationality Act of 1940 authorized such a divestiture in certain circumstances under section 401(g).¹¹⁰ The case at bar involved an Army private (Albert L. Trop) who had temporarily committed desertion in Morocco, faced disciplinary proceedings thereafter, and lost his nationality as a result.¹¹¹ Trop challenged this consequence years later after the government denied his passport application, and the Court held in his favor and struck down section 401(g).¹¹² Four Justices found that Congress lacked the power to pass the statute in the first place,¹¹³ and that this practice constituted a punishment that violated the Eighth Amendment.¹¹⁴ Justice Brennan provided the fifth vote. In his concurrence, he “conclude[d] that § 401(g) is beyond the power of Congress to enact.”¹¹⁵

¹⁰⁶ *Id.* at 62–66.

¹⁰⁷ *Terry*, 392 U.S. at 35 (Douglas, J., dissenting); *Sibron*, 392 U.S. at 79 (Black, J., concurring and dissenting). These two dissents demonstrate that seven of the nine Justices voted in the majority across both cases, making it a coordinated hedge. For a discussion of the Justices’ deliberations surrounding *Terry* and *Sibron*, see generally John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749 (1998) (providing an account of the Justices’ process for deciding these cases).

¹⁰⁸ 356 U.S. 86 (1958).

¹⁰⁹ 356 U.S. 44 (1958).

¹¹⁰ *Trop*, 356 U.S. at 88 & n.1.

¹¹¹ *Id.* at 87–88; see also *Trop v. Dulles*, OYEZ, <https://www.oyez.org/cases/1956/70> [<https://perma.cc/8L6U-ZBQS>] (providing Trop’s full name).

¹¹² *Trop*, 356 U.S. at 92–93, 101.

¹¹³ *Id.* at 92.

¹¹⁴ *Id.* at 101.

¹¹⁵ *Id.* at 114 (Brennan, J., concurring).

The Court released its decision in *Perez* on the same day. Clemente Martinez Perez had been born in Texas but had spent significant portions of his life in Mexico.¹¹⁶ The United States government had determined that Perez had lost his American citizenship because he had “remained outside of the United States to avoid military service and . . . voted in political elections in Mexico.”¹¹⁷ Sections 401(j) and 401(e) of the Nationality Act of 1940 articulated that these actions would lead to the forfeiture of a person’s American citizenship.¹¹⁸ The Court ruled in the government’s favor regarding section 401(e). It found that the government’s inherent “power to enact legislation for the effective regulation of foreign affairs”¹¹⁹ justified stripping a person of citizenship if that person voted in a foreign election.¹²⁰ Six Justices voted in the majority in this case. Notably, only Justices Brennan and Whittaker voted with the majority in both *Trop* and *Perez*, meaning that only two of the nine Justices favored both resulting holdings. The seven other Justices voted consistently to uphold or strike down the citizenship divestiture provisions of the statute in question. Thus these companion cases served as a contested hedge rather than a coordinated one.

Another example of a contested hedge is *Gregg v. Georgia*¹²¹ and two of its four companion cases. All of these decisions addressed states’ efforts to reimpose the death penalty after the Court had invalidated several death penalty laws in 1972.¹²² Whereas the Court upheld certain states’ renewed use of the death penalty in *Gregg* and two other cases,¹²³ the Court rejected the use of capital punishment proposed in *Woodson v. North Carolina*¹²⁴ and *Roberts v. Louisiana*.¹²⁵ Only three Justices voted in the majority across *Gregg*, *Woodson*, and *Roberts*. Six Justices had staked out consistent positions in this trio of cases. That means these decisions embodied a contested hedge.¹²⁶ The next Section pivots from considering hedging companion cases to reinforcing ones.

¹¹⁶ *Perez v. Brownell*, 356 U.S. 44 (1958).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 45–46.

¹¹⁹ *Id.* at 57.

¹²⁰ *Id.* at 62.

¹²¹ 428 U.S. 153 (1976).

¹²² *See, e.g., Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (concluding “that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments”).

¹²³ *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

¹²⁴ 428 U.S. 280 (1976).

¹²⁵ 428 U.S. 325 (1976).

¹²⁶ *Gregg* is also part of a reinforcing set of companion cases. *See supra* Table 1.

D. Reinforce Cases: Further Analysis

Rather than reaching contradictory substantive outcomes, reinforcing companion cases reach similar conclusions. Since reinforcing companion cases often feature at least five of the same Justices voting in favor of each individual decision, many reinforcing companion cases are “coordinated” in some sense.¹²⁷ Instead of understanding reinforcing companion cases in terms of coordination and contestation, a more fruitful approach conceptualizes these reinforcing pairs as either “extensional” or “applicative.”¹²⁸ These terms focus less on how individual Justices voted across cases (the way that “contested” and “coordinated” do), and instead assess the function of the decisions themselves. An extensional case builds upon its companion case’s rationale in order to make an additional doctrinal innovation. In contrast, an applicative case merely applies the logic of its companion case to a different set of circumstances to reach a similar outcome.¹²⁹ Subsequent Sections consider these two varieties of reinforcing companion cases in turn.

1. Reinforce Through Extension

*Shelley v. Kraemer*¹³⁰ and its companion case¹³¹ is a paradigmatic example of how reinforcing through extension works in practice. In 1948, *Shelley* held that state courts’ enforcement of racially restrictive covenants constituted state action.¹³² This meant that state court orders requiring compliance with such covenants violated the Fourteenth Amendment’s Equal Protection Clause.¹³³ But because the Equal Protection Clause applied only to the states, *Shelley*’s holding did not prohibit discriminatory covenants in places like Washington, D.C.¹³⁴ The Court reinforced its holding in *Shelley* by

¹²⁷ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (featuring the same seven Justices voting in the majority for both this matter and its companion case), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Doe v. Bolton*, 410 U.S. 179 (1973) (companion case to *Roe*).

¹²⁸ See Chen, *supra* note 61, at 743 (using similar concepts in the context of summary dispositions, by distinguishing between cases that “illustrat[e] the operation of the standard” and those that “adjust or refine it”).

¹²⁹ See *id.* at 743–44.

¹³⁰ 334 U.S. 1 (1948).

¹³¹ *Hurd v. Hodge*, 334 U.S. 24 (1948) (companion case to *Shelley*).

¹³² *Shelley*, 334 U.S. at 19–21.

¹³³ *Id.* at 23.

¹³⁴ Although the Court had obliquely suggested that certain Equal Protection obligations could apply to the federal government in the years before *Shelley* and *Hurd*, the most famous importation of the logic used in the Fourteenth Amendment’s Equal Protection Clause into the Fifth Amendment’s Due Process Clause (known as “reverse incorporation”) was still several years away. See generally Primus, *supra* note 14

issuing a companion case, *Hurd v. Hodge*, which struck down racially restrictive covenants in D.C. on the very same day that *Shelley* came out.¹³⁵

The “extensional” aspect of *Hurd* stems from the fact that it needed a different legal justification for its holding. Since the legal rationale supporting the application of the Equal Protection Clause did not apply—given Washington, D.C.’s federal nature—the Court instead turned to the Civil Rights Act of 1866, which draws its meaning in part from the Fourteenth Amendment. The Court noted:

In *Shelley v. Kraemer* . . . we have held that the Fourteenth Amendment also forbids such discrimination where imposed by state courts in the enforcement of restrictive covenants. That holding is clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act in their application to the Courts of the District of Columbia.¹³⁶

The Court thus leveraged its simultaneous decision in *Shelley* to justify its interpretation of the Civil Rights Act in *Hurd*. *Hurd* cited *Shelley* again for the proposition that allowing restrictive covenants in D.C. would contravene “public policy.”¹³⁷ Writing for the Court, Justice Vinson continued: “It is not consistent with . . . public policy . . . to permit federal courts in the Nation’s capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws.”¹³⁸ When *Hurd* built upon the framework that *Shelley* had laid out the same day, it cemented its status as a reinforcing extensional companion case.

*Brown v. Board of Education*¹³⁹ is another decision whose reinforcing companion case plays an extensional role. *Brown* held that the Equal Protection Clause prohibited racial discrimination in states’ primary and secondary schools.¹⁴⁰ It rejected the concept of “separate but equal” in the process.¹⁴¹ *Brown*’s companion case, *Bolling v. Sharpe*, addressed school segregation in the District of Columbia,

(addressing *Bolling*’s status as the prime example of using reverse incorporation of the Equal Protection Clause to prohibit the federal government’s racial discrimination); Jay S. Bybee, *Reverse Incorporation*, 48–54 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3878430 [<https://perma.cc/GP3C-HC4P>] (discussing the concept of reverse incorporation of the Equal Protection Clause before, during, and after *Bolling v. Sharpe*).

¹³⁵ *Hurd*, 334 U.S. at 30.

¹³⁶ *Id.* at 33.

¹³⁷ *Id.* at 34.

¹³⁸ *Id.* at 35.

¹³⁹ 347 U.S. 483 (1954).

¹⁴⁰ *Id.* at 495.

¹⁴¹ *Id.*

where the Equal Protection Clause did not apply.¹⁴² The Court again needed a different constitutional basis for invalidating segregation in the nation's capital. To this end, the Justices invoked the Fifth Amendment's Due Process Clause. The Court in *Bolling* explained that "discrimination may be so unjustifiable as to be violative of due process." Thus, if *Brown* deemed school segregation unlawful in states, *Bolling* found it *so* unlawful as to constitute a deprivation of liberty in D.C. The Court also noted that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."¹⁴³ *Bolling* thus invoked the state-level reality—which *Brown* had created that very same day—in order to establish that continued segregation in D.C. would be absurd.¹⁴⁴ Section II.E returns to these cases when considering the Court's motivations for issuing companion cases.

2. Reinforce Through Application

Reinforcing companion cases are not always extensional. They are sometimes applicative instead. Applicative companion cases tend to involve a "lead case"¹⁴⁵ that stands for a certain legal proposition. The lead case's companion case(s) will then apply that proposition to other fact patterns. Several examples show how this concept works in practice.

*Reynolds v. Sims*¹⁴⁶ and its reinforcing companion cases serve as a prime illustration of the applicative dynamic. *Reynolds* involved a challenge to the state of Alabama's procedures for apportioning seats in the state legislature.¹⁴⁷ The plaintiffs alleged that the allocation of

¹⁴² *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

¹⁴³ *Id.* at 500.

¹⁴⁴ An extensional reinforcing case does not always reference its companion case to justify its holding. Sometimes, an extensional case instead invokes different precedent to legitimize its reasoning. However, this Note still characterizes such a decision as extensional if it contains a distinct doctrinal assertion that nonetheless accords with the substantive import of its companion case. *See, e.g.*, *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958) (specifying that the government bore the burden of proof in expatriation cases, without discussing *Trop v. Dulles*, decided on same day, which rejected an effort to divest an American soldier of his nationality).

¹⁴⁵ *See* Reagan S. Bissonnette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859, 866 (2009) (using the term "lead case" to refer to one of several companion decisions that the Court handed down on the same day).

¹⁴⁶ 377 U.S. 533 (1964).

¹⁴⁷ *Id.* at 536–37.

seats diluted the voting power of densely populated areas.¹⁴⁸ The Court agreed. It struck down Alabama's outdated apportionments, which were based on the population distribution at the turn of the century.¹⁴⁹ The Court also invalidated two suggested revisions to the state's political districts.¹⁵⁰ All three of these plans violated the Equal Protection Clause.¹⁵¹

The Court handed down five other decisions addressing similar questions that day. Specifically, the Justices considered claims of unequal apportionment in Colorado, Delaware, Maryland, New York, and Virginia.¹⁵² In striking down each state's existing or proposed framework for allocating seats in its state legislature, the Court repeatedly referred back to *Reynolds's* core idea, that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."¹⁵³ These applicative decisions also cited *Reynolds* for other propositions. For example, four companion cases invoked *Reynolds's* reasoning to counter the argument that the unequal allocation of seats in the federal Senate justified similar practices at the state level.¹⁵⁴ This is not to say that these decisions were identical; differences existed.¹⁵⁵ But the overarching point remains: These companion cases primarily applied *Reynolds's* reasoning to other factual contexts.

Other sets of companion cases also involve an applicative function.¹⁵⁶ Consider *NLRB v. Jones & Laughlin Steel Corp.*¹⁵⁷ and its four companion cases.¹⁵⁸ *Jones* held that Congress had the constitu-

¹⁴⁸ *Id.* at 540, 542 & n.7.

¹⁴⁹ *Id.* at 540, 568.

¹⁵⁰ *Id.* at 568.

¹⁵¹ *Id.*

¹⁵² *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Davis v. Mann*, 377 U.S. 678 (1964).

¹⁵³ *Reynolds*, 377 U.S. at 568; see *WMCA*, 377 U.S. at 653; *Md. Comm. for Fair Representation*, 377 U.S. at 674; *Davis*, 377 U.S. at 690; *Roman*, 377 U.S. at 708; *Lucas*, 377 U.S. at 734.

¹⁵⁴ *Md. Comm. for Fair Representation*, 377 U.S. at 675; *Davis*, 377 U.S. at 692; *Roman*, 377 U.S. at 708–09; *Lucas*, 377 U.S. at 738.

¹⁵⁵ See, e.g., *Lucas*, 377 U.S. at 730 (noting that the apportionment situation in Colorado differed from that of the state considered in *Reynolds*).

¹⁵⁶ Applicative companion cases are sometimes perfunctory. The laconic implementation of one case's logic in its companion case demonstrates that applicative companion cases may sometimes resemble summary dispositions (although only the former involve oral argument).

¹⁵⁷ 301 U.S. 1 (1937).

¹⁵⁸ *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937).

tional authority to pass the National Labor Relations Act (NLRA).¹⁵⁹ According to *Jones*, the statute's reach was facially limited to matters affecting "interstate or foreign commerce" and Congress thus had authority to enact it.¹⁶⁰ Moreover, the Court found that the NLRA could constitutionally apply to this specific dispute between a "manufacture[r] of iron and steel products"¹⁶¹ and previous employees.¹⁶² The Court applied *Jones*'s logic to companion cases on the very same day. Namely, it upheld the NLRA's application to disputes in the trailer,¹⁶³ garment,¹⁶⁴ news,¹⁶⁵ and transportation industries,¹⁶⁶ based in part on *Jones*'s holding. Although legal and factual variations distinguished *Jones* from several of its companion cases in important respects, suggesting that a partially extensional dynamic was at play,¹⁶⁷ the cases' applicative strands establish their functional similarity to *Reynolds* and its companions.¹⁶⁸ Table 1 indicates that there are many other instances of applicative reinforcement among the Court's landmark decisions. The next Section turns to the question of why the Court decided to issue companion cases at all, using the four categories explored above to inform that discussion.

E. Why Companion Cases?

As mentioned in the Introduction, this Note ultimately does not seek to "thread the needle" and assess if pairs of companion cases are consistent doctrinally. Rather, this Note's preceding discussion of specific decisions serves primarily as a prelude to answering the following question: Why did the Court decide these matters *as companion cases*? This Section identifies seven possible motivations: increasing

¹⁵⁹ *Jones*, 301 U.S. at 30.

¹⁶⁰ *Id.* at 31–32.

¹⁶¹ *Id.* at 12.

¹⁶² *Id.* at 43, 49.

¹⁶³ *Fruehauf*, 301 U.S. at 53, 57.

¹⁶⁴ *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 72, 75.

¹⁶⁵ *Associated Press v. NLRB*, 301 U.S. 103, 128, 133 (1937).

¹⁶⁶ *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 144, 146–47 (1937).

¹⁶⁷ *See, e.g., Associated Press*, 301 U.S. at 130–33 (considering the NLRA's relevance to a news agency—rather than to a company in the industrial or manufacturing realm—and addressing whether the application of the NLRA against the Associated Press violated the First Amendment); *Washington*, 301 U.S. at 146 (upholding the NLRA's application to a busing company that operated interstate routes, further illustrating that the Act was not limited to the industrial or manufacturing context).

¹⁶⁸ An applicative decision does not always expressly mention its companion case. *Abrams v. United States*, 250 U.S. 616 (1919) and *Stilson v. United States*, 250 U.S. 583 (1919) demonstrate this. *Stilson* did not explicitly refer to *Abrams*. But one scholar has noted that the Court took the same high-level approach to both cases. David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 206 n.69 (1972) (noting similarity between *Stilson* and previous cases' approaches).

the scope of the Court's binding precedent, more fully explaining the reasoning for the Justices' holdings, avoiding prospective errors by lower courts, clarifying doctrinal differences between similar decisions, creating precedent for immediate use in another case, shaping narratives to mitigate public backlash, and distracting from one case's somewhat innovative reasoning. The subsequent paragraphs explore each of these ideas. To organize the reader's thinking, one should remain cognizant of the alternative techniques for disposing of cases¹⁶⁹ and consider how issuing companion cases achieved something that these other procedural options would not have.

First, the practice of deciding companion cases allows the Supreme Court to increase the scope of the binding guidance that it promulgates in an area. In general, only the holdings necessary to resolve a case act as formal constraints on lower courts' future decisions.¹⁷⁰ Any superfluous guidance is nonbinding dicta. This means that when the Court grants certiorari for and decides only one case in a specific area, the power of its decision to constrain future judges may be relatively narrow. Therefore, Justices interested in making wide-ranging yet binding pronouncements on a certain topic may have an incentive to grant certiorari for multiple cases involving that issue.¹⁷¹ This approach may be especially appealing when many Justices want to immediately limit the scope of one of their holdings, as they do in coordinated hedges. For example, the Court was perhaps motivated to hear *Terry* at the same time as *Sibron* in order to endow the police with more flexibility to fight crime while simultaneously articulating the limits of this new power. One of Chief Justice Warren's law clerks at that time suggested as much in retrospect. The clerk recalled that "the Justices . . . were unwilling to . . . tie[] the hands of the police in dealing with intensely dangerous and recurring situations on city streets," but that "[o]n the other hand, many of the Justices were skeptical about the scope of the authority claimed by the police."¹⁷² Granting certiorari for *Terry*, after *Sibron* had arrived on the Court's docket through appeal, allowed the Court to finesse this dilemma. Deciding both cases allowed the Court to both expand the

¹⁶⁹ See *supra* Section I.B.

¹⁷⁰ Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 187–88, 230 (2014) (describing, although ultimately challenging, the "classic account" that "precedential effect attaches to the application of a targeted legal rule to a discrete set of facts that were actually presented in the underlying dispute").

¹⁷¹ Admittedly, the Court did not have this option to deny review for every case that this Note discusses. For example, the Court had mandatory jurisdiction over *Sibron v. New York*.

¹⁷² Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 893 (1998).

police's power *and* restrict lower courts' application of this new power simultaneously.

Second, issuing companion cases is advantageous because it explicates the Court's thinking about a certain area of law—for the lower courts and the public—in a way that summary dispositions do not. This may be especially beneficial for applicative and extensional reinforcing decisions. For example, consider *Roe v. Wade*¹⁷³ and *Doe v. Bolton*.¹⁷⁴ In 1973, these two reinforcing companion cases struck down somewhat different laws restricting abortion in Texas and Georgia, respectively.¹⁷⁵ In the process, *Roe* held that there was a constitutional right to have an abortion.¹⁷⁶ If the Court had issued a full decision in *Roe* but only a short summary reversal in *Doe*, the lower courts would have then had one plenary decision explaining the unconstitutionality of Texas's broad abortion restrictions, but only a relatively brief holding that explains why Georgia's more graduated statute was also unconstitutional. Fully understanding why Georgia's law was invalid would have required some guesswork. Releasing plenary opinions for both cases helped fill out observers' understanding of the Court's thinking on this topic.¹⁷⁷ Indeed, a law clerk assisting Justice Blackmun with his opinions in *Roe* and *Doe* emphasized that the reasoning in both decisions would be crucial guideposts for the rest of the country. He wrote that “the vagueness ground in the Texas case is an important complementary holding to that of the Georgia case, and will be necessary for a complete exposition of what the Court thinks would and would not be constitutional in this whole area.”¹⁷⁸ This indicates an attentiveness to providing the nation with a

¹⁷³ 410 U.S. 113 (1973) (holding that there is a constitutional right to have an abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Supreme Court's decision to overturn *Roe* will undoubtedly have an enormous impact on both constitutional law and on the lives of those residing in the United States. However, this recent development does not change *Roe* and *Doe*'s status as companion cases to each other. Nor does it undermine the usefulness of studying these two cases to better understand why the Justices engage in the practice of releasing two decisions on the same exact day that deal with extremely similar legal or factual issues.

¹⁷⁴ 410 U.S. 179 (1973) (functioning as the companion case to *Roe*).

¹⁷⁵ *Roe*, 410 U.S. at 116, 164 (differentiating between the Texas law and the Georgia law and holding that Texas's abortion ban was unconstitutional); *Doe*, 410 U.S. at 182, 201 (reiterating that “[t]he Georgia legislation, however, is different and merits separate consideration” but ultimately striking down parts of that law too).

¹⁷⁶ *Roe*, 410 U.S. at 153, 164.

¹⁷⁷ See Chen, *supra* note 61, at 697, 725, 736 (contending that the Court's issuance of summary dispositions allows it to “fill in the contours of general legal standards” and arguing that such dispositions are not unduly short, but recognizing that the practice may not be well-suited for “adjust[ing] or refin[ing] . . . doctrinal principles”).

¹⁷⁸ Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 519 (2011). Of course, the Court did not

sufficient explanation for why the Court ruled the way that it did in each case. Companion cases serve that purpose in a way that summary dispositions sometimes would not.¹⁷⁹

Third, the Court may decide companion cases when it suspects that lower courts may not reach the “correct” decision for one of the similar cases on remand.¹⁸⁰ This problem is especially likely in situations where the Justices believe that the proper resolution of the second case should ultimately constitute a hedge or an extensional reinforcement of the lead case. In those situations, the lead case would serve as a poor guidepost for how a lower court should rule in the remanded case. For example, if the Court had remanded *Endo* after deciding *Korematsu* on the merits, the Court’s most recent guidance on Executive Order 9066 would have been *Korematsu* itself. It may have been difficult for an appellate court to divine—in light of the affirmed *constitutionality* of the forced relocation of American citizens—the *unconstitutionality* of continuing to detain those same individuals. As such, the Justices may have had an incentive to decide both cases at once. Otherwise, a lower court may well have decided the other case “incorrectly,”¹⁸¹ forcing the Supreme Court to reintervene.

Fourth, issuing decisions as companion cases helps maintain clarity as to what the resolution of each dispute signifies doctrinally, in a way that consolidation would not. A single decision addressing too many different factual and legal variations can become unwieldy.¹⁸² In contrast, resolving companion cases individually maintains a formal separation between the decisions. This is particularly useful when two

ultimately strike down the Texas statute because of vagueness. *Id.* at 520. It instead invalidated both laws under the Fourteenth Amendment. *Id.*

¹⁷⁹ In 1988, the Supreme Court acknowledged the frequently unhelpful nature of summary dispositions. This concession lends support to the notion that summary dispositions are inapt for providing adequate guidance on complicated issues. *See* H.R. REP. NO. 100-660, app. at 28 (1988) (“Because they are summary in nature these dispositions often also provide uncertain guidelines for the courts that are bound to follow them and, not surprisingly, such decisions sometimes create more confusion than they seek to resolve.”).

¹⁸⁰ “Correct” in this sentence refers only to what the Justices who voted in the majority in both cases perceived to be proper outcomes. It does not signify agreement with *Korematsu*’s abhorrent holding. *See generally* Greene, *supra* note 13, at 402 (“It is fair to say that *Korematsu* is almost uniformly recognized by serious lawyers and judges to be bad precedent, indeed so bad that its use by one’s opponent is likely to prompt a vociferous and public denial.”).

¹⁸¹ *Id.*

¹⁸² *See* Wasby, *supra* note 15, at 92 (“Perhaps the Court only grouped rather than consolidated because there were enough differences in individual states’ new procedures that a broad statement—similar to *Furman*—was thought inappropriate, but whatever the reason, the way the Court handled the cases did differ from strict consolidation.”).

similar decisions rely on different legal justifications, as do extensional reinforcements. Consider *Brown* and *Bolling*.¹⁸³ The clerk who helped Chief Justice Warren draft *Brown* confirmed that the decision to pen two separate decisions arose out of their distinct legal reasoning. He has recalled that *Brown* and *Bolling* were initially included in the same opinion, but that he advocated successfully to separate *Bolling* precisely because it did not rely on the Equal Protection Clause.¹⁸⁴ Pulling these cases apart thus created a nominal distinction that allowed each case to encapsulate a separate idea.¹⁸⁵ The practice of issuing companion cases instead of resorting to consolidation thus ensures that each decision does not stand for too much.

Fifth, not consolidating potential companion cases allows the Court to anchor an extensional case's somewhat novel legal reasoning externally. For example, deciding *Brown* first and separately meant that the Court in *Bolling* could invoke it as precedent to substantiate its reasoning. To this end, it is worth noting that the *Bolling* decision refers to *Brown* in the past tense.¹⁸⁶ Whether intentional or not, deciding these cases successively underscored *Brown*'s status as a *fait accompli* and as a legitimizing source of authority.¹⁸⁷ Consolidating the cases would have sacrificed this rhetorical advantage. It would have also forced the Court to travel more doctrinal distance in one decision. Doing so would have implied radicality more than incre-

¹⁸³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁸⁴ John David Fassett, Earl E. Pollock, E. Barrett Prettyman, Jr. & Frank E.A. Sander, *Supreme Court Law Clerks' Recollections of Brown v. Board of Education*, 78 ST. JOHN'S L. REV. 515, 550–51 (2004) (“I brought my . . . revision into the office . . . with a cover memo, . . . saying that I’ve tried to carry out your instructions, and . . . this draft included all five cases, but I strongly recommended . . . the District of Columbia case be stripped out because we could not rely on the Equal Protection Clause . . .”).

¹⁸⁵ One of Chief Justice Warren’s law clerks, Earl C. Dudley, Jr., had suggested using a different case as the companion to *Terry v. Ohio*, 392 U.S. 1 (1968). According to Dudley, that other case provided a better vehicle through which the Court could address the constitutionality of police stops. In contrast, Dudley understood the primary issue in *Terry* to be police frisks. Although the Court ultimately did reach the question of stops in *Terry* and paired that case with *Sibron* rather than the other case Dudley mentioned, his proposal arguably reflected an understanding of companion cases as vessels for addressing similar yet discrete legal questions. Barrett, *supra* note 107, at 817–18, 819 n.431. Ultimately, the Court dismissed the case that Dudley had considered as a possible alternative companion to *Terry*, without reaching the merits. *Wainwright v. City of New Orleans*, 392 U.S. 598, 598 (1968) (per curiam); see Barrett, *supra* note 107, at 835–37 (providing details on the dismissal of *Wainwright*).

¹⁸⁶ *Bolling*, 347 U.S. 497.

¹⁸⁷ See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1821 (2005) (“Throughout constitutional history, Supreme Court Justices have assumed with near unanimity that they are legally authorized and sometimes bound to follow precedents, sometimes even when prior cases were themselves erroneous at the time of their decision.”).

mentalism. Admittedly, one can easily exaggerate the importance of this point. It is doubtful that the general public often reads Court cases in full, let alone pays meticulous attention to citations, verb tenses, and whether the decision arrived in the form of one case or two. But these apparent trifles may matter a great deal to those who spend their lives working in the judiciary. Plus, maintaining the separateness of companion cases only costs the Court the time it takes to pen the second opinion. That calculus may make issuing companion cases worthwhile.

Sixth, releasing companion cases on the same day may allow the Court to shape narratives and influence public perception in a way that issuing similar holdings over time would not. For example, handing down two decisions several weeks or months apart may cause the first case to nestle into the public consciousness, dominate news coverage, and crystallize narratives surrounding the Court's approach to civil liberties or criminal procedure. The second case would then face an uphill battle for recognition upon its release.¹⁸⁸ Issuing decisions on the same day arguably minimizes these concerns by improving the chances that observers will understand the cases in tandem.¹⁸⁹ This result may be especially appealing if the Justices know that a certain decision will engender controversy. Releasing such a decision as part of a coordinated hedge, for example, may serve to mitigate public outcry by bookending the reach of a particularly unpopular holding through its companion case.

Lastly, the Justices may release companion cases on the same day to divert attention away from one of the constitutive case's slightly adventurous reasoning. This may be useful in the context of an extensional reinforcement. For example, the Justices may have preferred to allow the more straightforward Equal Protection reasoning in *Shelley* to overshadow the doctrinal innovations in *Hurd*.¹⁹⁰ The point here is

¹⁸⁸ The concern would likely be most acute for a set of cases that hedge each other, because such decisions reach facially contradictory results. In contrast, the Court's release over time of cases that reinforce each other may actually bolster its legitimacy by reflecting an incremental approach, whereby the second decision builds upon the first decision's logic and cites it as precedent. *See generally id.* (explaining the important place of precedent in judicial decisionmaking).

¹⁸⁹ It is unlikely that the Justices are unaware of such realities. *Cf.* DEL DICKSON, *THE SUPREME COURT IN CONFERENCE, 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 693 (2001) (explaining that Chief Justice Stone postponed the Court's release of its decision in *Endo* to accommodate President Roosevelt's political concerns). This anecdote does not exactly uncover the Court's motivation for releasing these companion cases on the same day, but it does demonstrate Justice Stone's awareness of how the timing of *Endo*'s announcement could have serious repercussions.

¹⁹⁰ *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948).

not that the Court decided *Hurd* incorrectly. Rather, the idea is that the Justices may have sought to minimize public attention to the slightly creative reasoning that allowed the Court to reach a morally necessary result.¹⁹¹ Issuing companion cases on the same day perhaps prevented the public from focusing singularly on *Hurd*'s doctrinal underpinnings.¹⁹²

It is unlikely that all of these motivations were at work each and every time that the Court issued companion cases. Indeed, some of these seven reasons seem to be at odds with each other. For example, the explicative function seems to be at cross-purposes with the distractive one. Further research may provide useful insight into the various interactions between these seven motivations and may uncover additional functions that this Note does not identify. Nonetheless, this discussion serves as a valuable initial catalogue of the reasons why the Justices may decide companion cases *as* companion cases in light of the available procedural alternatives.

III

PROPOSAL TO ISSUE MORE COORDINATED HEDGES TO UNDERScore THE SUPREME COURT'S JUDICIAL FUNCTION

This Part adds a normative dimension to the discussion of companion cases. Section III.A posits that to help bolster the Court's institutional legitimacy, the Justices may find it desirable to more frequently issue one specific type of companion case—the coordinated hedge. Section III.B suggests two small modifications to the Rules of

¹⁹¹ It is important not to overstate the benefits of the *Shelley* and *Hurd* decisions for Black Americans. See Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/UTK8-8ZWE>] (explaining that racially discriminatory covenants were just one of many tools used to impose and maintain segregation in the twentieth century).

¹⁹² See generally George Rutherglen, *The Improbable History of Section 1981: CLIO Still Bemused and Confused*, 55 SUP. CT. REV. 303, 329 (2003) (arguing that the Court's decisions in *Shelley* and *Hurd* demonstrated "inconsisten[cy]" with one of its previous opinions and noting that the *Hurd* Court's assessment of the statute forming the basis for its decision was largely derivative of constitutional analysis that was not explicitly part of the decision); Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 489–90 (2007) (arguing that the Court misunderstood the statutory basis for its decision in *Hurd*, where the correct reading would have actually strengthened the decision's logic). A similar argument may apply to *Brown* and *Bolling*. But see Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1882 (2006) (contesting the characterization of *Bolling* as a "dramatic doctrinal departure").

the Supreme Court that would encourage the Court to hear and decide more coordinated hedges.

A. *When Are Companion Cases Desirable?*

This Note suggests that the Court's use of companion cases may impact its institutional legitimacy.¹⁹³ The concept of institutional legitimacy may seem like a strange metric to consider in this context. After all, issuing companion decisions is a procedural mechanism at its core. Why would handing down two similar decisions on the same day have any impact on the Court's legitimacy?¹⁹⁴ In short, issuing a certain type of companion case—a coordinated hedge—may bolster the Court's reputation by underscoring its status as an independent and judicial (rather than political) institution. The next several paragraphs unpack this argument by explaining how deciding coordinated hedges may enhance the Court's legitimacy, providing an example, describing why other types of companion cases do not offer similar benefits, and responding to several possible criticisms of this proposal.

Coordinated hedges may reflect positively upon the Court because they accentuate the Justices' sensitivity to the subtle factual and legal variations in each constitutive case.¹⁹⁵ As a reminder: a coordinated hedge occurs when at least five Justices vote in the majority across two similar cases that reach ostensibly contradictory results. Handing down these companion cases broadcasts that a majority of the Justices agreed that closely related cases nonetheless possessed distinctions that necessitated their resolution in opposite ways. This, in turn, may prevent observers from pigeonholing the Justices as zealous

¹⁹³ Previous scholars have assessed the procedural mechanisms that the Court uses to manage its docket according to criteria like "judicial economy." See, e.g., Ku, *supra* note 56, at 395 (employing this phrase during an analysis of the Court's use of GVR and providing insight as to the Court's procedural management "of scarce judicial resources").

¹⁹⁴ Other scholars have recognized that procedural mechanisms may impact the court system's legitimacy. See, e.g., Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581, 622–34 (2018) (positing that "the politicization of the cert[jorari] process" harms the Supreme Court's legitimacy and proposing reforms to counter that danger); Baude, *supra* note 63, at 10, 11 (asserting that "procedural regularity begets substantive legitimacy" because "[a] sense that its processes are consistent and transparent makes it easier to accept the results of those processes" and contrasting this with the Supreme Court's approach to issuing certain orders).

¹⁹⁵ The underlying assumption here is that the federal judiciary's constitutional responsibility to exercise "judicial Power" to resolve "Cases" and "Controversies" is not adequately fulfilled when a Justice relies primarily on personal policy preferences to guide her analysis. U.S. CONST. art. III, § 2. See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 49–50, 73–74 (7th ed. 2015) (discussing "judicial power" and "'dispute resolution' model" of decisionmaking).

ideologues or political marionettes.¹⁹⁶ At present, many Americans conceive of the Court as acting at least somewhat politically.¹⁹⁷ Some observers understand the Justices as advancing the agenda of whichever party appointed them.¹⁹⁸ Coordinated hedges may serve as counterweights to this perception. After all, when a Justice votes to resolve two similar cases differently, the Justice's status as "liberal" or "conservative" does not fully predict how she will rule. In this sense, coordinated hedges display the Justices in their most "judicial" light. This perception, and reality, are worth cultivating.

An example clarifies this idea. In 1968, the Court's decisions in *Terry*¹⁹⁹ and *Sibron*²⁰⁰ pointed in apparently opposite directions. Had the Court handed down opinions that ruled for the defendants in both *Terry* and *Sibron*, observers would likely have characterized the Court as opposed to protections for law enforcement. In contrast, two decisions in favor of the government could have contributed to a narrative about how the Court was making life miserable for people interacting with police. Instead, the Court's coordinated hedge stifled such simplistic analysis. The Court did not come across as uniformly pro-police or pro-defendant.²⁰¹ Those who wanted to understand and

¹⁹⁶ See, e.g., Alex Rogers, *Republicans Attack Biden Supreme Court Pick as Pawn of 'Radical Left,'* CNN (Feb. 25, 2022), <https://www.cnn.com/2022/02/25/politics/republicans-biden-supreme-court-nominee/index.html> [<https://perma.cc/BN5Y-QD64>]; Robert Reich, *Containing the Catastrophe: Now that Kavanaugh Is on the Supreme Court, You Can Forget About the Court Constraining Trump*, AM. PROSPECT (Oct. 9, 2018), <https://www.prospect.org/power/containing-catastrophe> [<https://perma.cc/U578-FXFV>].

¹⁹⁷ *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), <https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement> [<https://perma.cc/PY6K-4YM2>] ("Among the large majority of adults (84%) who say . . . justices should not bring their own political views into how they decide cases, just 16% say the justices are doing an excellent or good job in doing so.")

¹⁹⁸ Cf. Alex Pareene, *Supreme Court Justices Are Politicians, Too*, NEW REPUBLIC: THE SOAPBOX (Oct. 14, 2020), <https://www.newrepublic.com/article/159744/amy-coney-barrett-conservative-judges-politicians> [<https://perma.cc/CNY4-N4JA>] (referring to the Court's "overt politicking" and noting that "most court observers are already operating on [the] assumption, that these robed sages are in fact mere grubby politicians").

¹⁹⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

²⁰⁰ *Sibron v. New York*, 392 U.S. 40 (1968).

²⁰¹ Barrett, *supra* note 107, at 835 ("The decisions made headlines, and the Court generally was applauded for its sensitivity to the safety interests of law enforcement officers."); Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 435–40 (2004) (describing the context in which the Court heard *Terry* by noting that the Court's prior "decisions in *Mapp* and *Miranda* were attacked as coddling criminals, and the criminal justice system and the Supreme Court had become issues in the upcoming 1968 presidential election"). The fact that some people were likely receptive to *Terry*'s holding at the time should not overshadow the fact that many now see that holding and subsequent related cases as enabling harassment and oppression of marginalized communities, including Black Americans. See Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 N.Y.U. J. LEGIS. &

reconcile these two opinions would have to dig deeper into the details. The Court would be smart to issue more coordinated hedges going forward, to highlight its primarily non-political character.²⁰²

Other types of companion cases are more likely to harm the Court's standing. For instance, a contested hedge sends a very different message to the public. Whereas a coordinated hedge suggests that most of the Justices reached contextually sensitive decisions that happened to point in opposite directions, a contested hedge advertises rancor and division. Rival factions may appear to have taken essentially political sides on a certain topic. Observers may view these competing camps as struggling to capture the Justices that inhabit the Court's ideological center, with each side enjoying limited success.²⁰³ This is especially true of contested hedges that involve only a single Justice who sides with the majority across both decisions. Likewise, reinforcing companion cases addressing polarizing topics may be harmful to the Court's legitimacy. Legal observers may interpret such decisions as reflective of a Court in a hurry to actualize its policy preferences without providing lower courts with the autonomy to apply the Court's logic to similar fact patterns gradually and independently over time.

PUB. POL'Y 883, 902–06 (2013) (presenting “a handful of descriptive examples documenting the abuse of people of color that has been permitted by a liberal reading of *Terry*” as part of an article about the doctrine and how to reform it). Another scholar has convincingly noted that the facts giving rise to *Terry* itself likely involved racial discrimination, despite the majority's efforts to minimize that reality. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 964, 967, 971 (1999) (describing how “[t]he Court [largely] stripped away the racial dimension of the case”—despite the fact that it involved a white police officer stopping two Black men and one white man—in order to obfuscate the likely role that unacceptable bias played in the stop).

²⁰² Cf. Justice Sandra Day O'Connor, *The Importance of Judicial Independence*, STAN. LAW. MAG. (May 15, 2008), <https://www.law.stanford.edu/stanford-lawyer/articles/the-importance-of-judicial-independence> [<https://perma.cc/F9VF-MP79>] (“[J]udges should not be selected based on their policy preferences, nor . . . influenced by voter preferences. . . . [T]hey must be accountable to the law as it is and independent from political pressure. . . . The citizens are the ultimate guardians of this function of the courts, and thus they must understand it.”). See generally Justice Sonia Sotomayor, *Reflections About Judicial Independence*, 97 N.Y.U. L. REV. 875, 884 (2022) (noting—in the context of a broader discussion about the independence of the judiciary—that “[i]f the public does not perceive its judges as impartially rendering decisions, whether popular or unpopular, there will not be continued support for the norms that keep the judiciary independent and keep people believing in the trustworthiness of their government”).

²⁰³ See generally Maya Sen, *Is an Emboldened Conservative Majority Taking the Supreme Court in an Unpopular New Direction?*, HARV. KENNEDY SCH. (May 4, 2022), <https://www.hks.harvard.edu/faculty-research/policy-topics/politics/emboldened-conservative-majority-taking-supreme-court> [<https://perma.cc/2NJU-RKBN>] (discussing the Court's shifting ideological balance and noting that each of the two most recent “swing” Justices were in fact rather conservative).

This proposal to use more coordinated hedges raises three key concerns that deserve some attention here.

First, this Note is not advocating for the Court to decide cases differently on the merits than it otherwise would, in order to issue more coordinated hedges and bolster its prestige. That would be unfair to the litigating parties and to all those whom the decisions would subsequently impact through precedential effect. Instead, the Court should manage its docket to increase the number of cases it may ultimately resolve as coordinated hedges.²⁰⁴ This means that the Justices might vote differently when granting certiorari in order to prioritize the possibility of issuing a coordinated hedge after briefing and oral argument.²⁰⁵ For example, if the Court has already voted to grant certiorari on a First Amendment case, it could search for a similar case in the cert pool that might help provide more nuanced analysis on the issue than the Court could provide in a single case. The Justices would *not* ultimately vote any differently on the merits than they otherwise would. If they choose to decide the cases as something other than a coordinated hedge, so be it. But if they do issue a coordinated hedge, the Court may emphasize its independent judicial character along the way.²⁰⁶

Second, readers may question this Note's contention that coordinated hedges are quintessentially judicial rather than political in character. After all, it is arguably the province of the legislature to make

²⁰⁴ In a sense, this Part's suggestion is a prudential one. *Cf.* FALLON ET AL., *supra* note 195, at 248–49 (discussing Alexander Bickel's view that “judicial judgments on the merits . . . must be unyieldingly principled” whereas “determinations of justiciability . . . should turn largely on prudential concerns”).

²⁰⁵ Those who question the appropriateness of the Justices' handling the Court's docket to bolster its legitimacy should note that the judiciary's standing cuts to the core of public confidence in our democratic system. *See* Calvin Woodward & Hannah Fingerhut, *Supreme Court Leak Further Erodes Public Trust in Government*, PBS (May 8, 2022, 11:27 AM), <https://www.pbs.org/newshour/nation/supreme-court-leak-further-erodes-public-trust-in-government> [<https://perma.cc/KQB6-J2YC>] (chronicling a recent decrease in the public's opinion of the Supreme Court and explaining that “[t]he poor ratings of government couple with grim views of U.S. democracy and a disenchantment with the pillars of society”). There is nothing improper about the Justices recognizing and acting in light of this weighty reality. Preserving the Court's image should thus be one relevant factor, among many, that influences how the Court manages its docket.

²⁰⁶ At least some of the current Justices have expressed concern that the public may increasingly perceive the Court as acting in a political rather than judicial manner. Justice Sotomayor expressed concern about this matter during oral argument for the case that ultimately led to the overruling of the constitutional right to have an abortion. *See* Transcript of Oral Argument at 15, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?”).

value-laden distinctions between similar factual circumstances.²⁰⁷ In contrast, the judicial function demands that judges and Justices follow their logic to the extreme if the text of the Constitution demands such an outcome. The public may thus interpret coordinated hedges as political and see the Justices as enacting their own centrist policy preferences. For instance, the Court's recent ruling that vaccine mandates were acceptable for healthcare providers but not for large companies may smack of moderate policymaking rather than judicial craftsmanship.²⁰⁸ However, coordinated hedges should ideally involve decisions that are only *ostensibly* contradictory. The holdings of these cases should nonetheless have principled justifications based on an honest reading of the relevant law and facts. In this sense, coordinated hedges retain their judicial nature and stand apart from middle-of-the-road legislative decisions that do not require such principled distinctions.²⁰⁹

Third, critics may question the idea that issuing coordinated hedges—or any companion cases for that matter—enhances the Court's legitimacy in a way that is independent of the decisions' actual contents. This line of thinking rejects studying companion cases in the abstract and insists on the greater importance of the underlying substance of the decisions: A holding will bolster the Court's reputation if it applies the law faithfully and furthers widely-shared core values and will harm the Court's legitimacy if it does not.²¹⁰ *Korematsu* would seem to be a case in point. While the case was one half of a coordinated hedge, the decision itself permitted awful discrimination and

²⁰⁷ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (arguing that leaving questions regarding same-sex intimacy and marriage to the political branches is, in light of the possibility that people would prefer to legalize the former but not the latter, preferable because a “benefit[] of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion”). Although this Note does not endorse the substance of Justice Scalia's dissent in *Lawrence*, his conception of the judiciary's role relative to the legislature is important to address.

²⁰⁸ See, e.g., ManhattanWilliam, *supra* note 7 (“There is absolutely no doubt that this court has lost all sense of impartiality and where once it was political but still shrouded in a veil of fairness, that veil is long gone.”). Admittedly, the Court decided these COVID-related cases as a contested, rather than coordinated, hedge. As such, critics would perhaps most readily direct accusations of moderate policymaking toward Chief Justice Roberts and Justice Kavanaugh—the two Justices who voted in the majority across both cases.

²⁰⁹ Although all companion cases ideally reinforce or hedge each other for legitimate doctrinal reasons, coordinated hedges still stand apart in terms of desirability because of the collaborative and context-specific connotations that they convey about judicial decision making.

²¹⁰ Cf. Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 91–92 (2016) (arguing that actors support allocations of power, such as those of federalism, based on what will advance political preferences, rather than due to abstract organizational preferences).

was morally repugnant.²¹¹ As a result, it sapped the Court's standing over time rather than fortifying it.²¹² This Note acknowledges readily that procedural packaging only does so much.²¹³ A decision's substantive outcome plays an enormous role in determining if the case will strengthen or weaken the Court's reputation. This is especially true when the Justices must confront fundamental questions of equality and human dignity in the cases they hear. This Note merely suggests that—holding all other things equal—issuing decisions as coordinated hedges may help to improve the public's perception of the judiciary on the margins. Releasing coordinated hedges reminds American society that the Justices are collectively capable of discerning subtle distinctions between apparently similar cases, which thereby cultivates the Court's institutional legitimacy as a judicial rather than political branch.

B. Encouraging the Court to Hear and Decide Coordinated Hedges

The Court could actualize this suggestion to hear and decide more coordinated hedge companion cases in several steps. First, the Supreme Court could review certiorari petitions with an eye toward identifying multiple cases with legal or factual similarities. The Court would need to collect several cases that appear reasonably likely to garner broad consensus among the Justices and result in holdings that point in ostensibly contradictory directions while further clarifying the

²¹¹ See generally Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 77, 110, 128 (1996) (emphasizing that the Court in *Korematsu* “did not provide any specific evidence supporting the military necessity for the exclusion beyond the cursory allusion to the questionnaire data” nor make “any effort to explain or discredit the racist narratives supporting the military order” and arguing that the decision’s “persistence, as a legal precedent and as a memory of the internment itself, must serve to remind us to be vigilant in protecting our civil liberties”).

²¹² See Robert L. Tsai, *How Activists Resisted—and Ultimately Overturned—an Unjust Supreme Court Decision*, WASH. POST (Jan. 30, 2019), <https://www.washingtonpost.com/outlook/2019/01/30/how-activists-resisted-ultimately-overturned-an-unjust-supreme-court-decision> [<https://perma.cc/EU69-BKGT>] (describing the “decades of work by activists, educators and government officials” that led to societal recognition of the *Korematsu* decision’s illegitimacy).

²¹³ Observers now regard *Korematsu* as one of the Court's worst decisions and understand *Brown* as one of its best. Greene, *supra* note 13, at 385 (referring to *Brown* and several other cases as “the fixed stars in our constitutional constellation”). The fact that the former was part of a coordinated hedge whereas the latter was part of an extensional reinforcement shows that decisions enhancing the Court's legitimacy may come in a variety of different formats, and that issuing a coordinated hedge by no means guarantees a long-term boost to the Court's reputation. See also Thompson, *supra* note 201 (detailing how racial discrimination was likely involved in the facts giving rise to *Terry* and thus further illustrating how a case that constitutes part of a coordinated hedge may authorize horrendous behavior).

law. Admittedly, it may be challenging for individual Justices to know how they will vote on cases before briefing and oral argument, and to intuit the other Justices' intentions. But the Justices could communicate amongst themselves to identify pairs of cases for which coordinated hedges appeared feasible. The Justices could then grant certiorari for the promising set of cases.

As the potential companion cases move through the Court's docket, the Justices would refuse to consolidate the cases. This is because the desirable aspect of a coordinated hedge (projecting Court consensus about oppositional results) is most pronounced when the decisions remain separate. After oral argument, if a coordinated hedge is attainable, the Justices voting in the majority on both cases could pen decisions emphasizing the distinctions between the cases that justify the different outcomes. This would underscore the intentional character of the coordinated hedge. Then, the Court would issue these decisions on the same day. This simultaneous release would spur discussion about the majority's holdings by maximizing the likelihood that the public thinks about the cases in relation to each other. Ready-made explanations related to political preferences would prove unsatisfactory given the facially contradictory results of the companion cases. Although not strictly necessary, the Court could also formalize its preference for deciding more coordinated hedges.

Formalizing this preference would involve making two amendments to the Rules of the Supreme Court of the United States.²¹⁴ The first change would involve Rule 10, which articulates non-exhaustive factors that the Court considers when assessing certiorari petitions.²¹⁵ Currently, Rule 10 specifies three categories of cases for which granting certiorari may be appropriate.²¹⁶ The first category describes "circuit splits": situations where a Court of Appeals has issued a decision at odds with that of another federal appellate court or that of a state high court.²¹⁷ The second category refers to state high court decisions that clash with those of other state courts or federal circuit courts.²¹⁸ The third category encompasses federal appellate or state high court decisions that address "an important question of federal law that has not been, but should be, settled by this Court."²¹⁹ The

²¹⁴ SUP. CT. R. 10; SUP. CT. R. 27.

²¹⁵ SUP. CT. R. 10.

²¹⁶ *Id.*

²¹⁷ SUP. CT. R. 10(a). Decisions that "depart[] from the accepted and usual course of judicial proceedings" also receive a mention. *Id.*

²¹⁸ SUP. CT. R. 10(b).

²¹⁹ SUP. CT. R. 10(c). This subsection also includes cases that fail to accord with the Supreme Court's prior guidance. *Id.*

three subparts also stipulate that the case should involve an “important matter,”²²⁰ “an important federal question,”²²¹ or “an important question of federal law.”²²²

The Supreme Court could amend Rule 10 to include a fourth category. This proposed addition would encourage the Justices to grant certiorari for the potential companion cases of decisions for which the Court has already granted certiorari under Rules 10(a)–(c). This fourth category would apply primarily to companion cases for which a coordinated hedge on the merits appears likely. A draft of this proposed Rule 10(d), describing when to grant a writ of certiorari, reads as follows:

This Court has recently granted a writ of certiorari for a similar case according to the criteria outlined in Rules 10(a), 10(b) or 10(c), the present case also involves a “federal question” of importance, and there is a substantial possibility that this Court will resolve the two cases on the merits in contrary ways due to the legal or factual variations of each matter.

This revision would formally reflect the Justices’ resolve to decide more coordinated hedges. In making and adhering to this change, the Court could give itself a slight lift in its institutional legitimacy, as hypothesized above.²²³

Rule 27.3, meanwhile, addresses the Court’s practice of consolidating cases for oral argument. It provides that:

The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.²²⁴

Because consolidation is a procedural alternative to issuing companion cases, decreasing the use of the former could help promote more frequent use of the latter.²²⁵ The Court could modify Rule 27.3 to specifically reflect an increased commitment to deciding coordinated hedges, by signaling an aversion to consolidating similar cases

²²⁰ SUP. CT. R. 10(a).

²²¹ SUP. CT. R. 10(a) and 10(b).

²²² SUP. CT. R. 10(c).

²²³ See *supra* Section III.A.

²²⁴ SUP. CT. R. 27.3.

²²⁵ Those who see little difference between releasing a consolidated decision and issuing companion cases should note the following: Consolidation may mute the facially contradictory nature of multiple holdings by combining them into one amorphous decision. In contrast, coordinated hedge cases that remain separate put the Justices’ ostensibly contradictory holdings in sharper relief. In turn, this may encourage the public to ponder the Justices’ reasoning and to appreciate the judicial character of their work.

that the Justices may ultimately decide in facially contradictory ways. The proposed addition to Rule 27.3 would read as follows:

The Court shall disfavor consolidation, before and after argument, of cases that involve similar factual or legal matters, where there is a substantial possibility that the Court will ultimately resolve the cases on the merits in contrary ways.

In tandem with the proposed revision to Rule 10, this modification of Rule 27.3 would reflect the Court's intention to decide more coordinated hedge companion cases.²²⁶ While there is no illusion that deciding more coordinated hedges will singlehandedly solve the Court's legitimacy crisis, issuing more of these sorts of companion cases may offer a slight boost to the Court's legitimacy.

CONCLUSION

This Note concludes by returning to the COVID-19-related decisions that the Introduction addressed and applying Part II's taxonomy to these cases. Because *Biden* and *OSHA* featured superficially contradictory decisions, for which only two Justices voted consistently in the majority, this pair of cases represents a contested hedge.²²⁷ If Part III's suggestion that contested hedges broadcast rancor and division is correct, one might worry not only about what these two cases mean for an enduringly complicated public health situation. One may also fear that these decisions are the product of an increasingly polarized set of Justices, who struggle to collaboratively identify the sorts of factual and legal distinctions between similar cases that would instead lead to a coordinated hedge. In the coming years, the way that the Justices resolve companion cases may serve as a bellwether for the prospects that the Supreme Court will continue to act as a truly judicial branch.

²²⁶ Of course, these proposed amendments to the Supreme Court's Rules will be neither necessary nor sufficient for the Court to decide more coordinated hedges. The Justices themselves ultimately choose which cases to hear, meaning that this proposal's implementation depends largely on their decisionmaking. *See* Chen, *supra* note 61, at 750 (suggesting a change to the Supreme Court's Rules to address summary dispositions, conceding that "the Court would retain significant discretion on when it uses the tool," but arguing that the benefit of the amendment would be that "the Court's practices overall will have a degree of coherence").

²²⁷ *Biden v. Missouri*, 142 S. Ct. 647 (2022); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022).

APPENDIX

TABLE 2. THE ONE HUNDRED “MOST INFLUENTIAL” SUPREME COURT DECISIONS AS OF JANUARY 5, 2022

Rank	Case Name	Decision Date	Companion Case(s) in Table 1
1	Brown v. Board of Education	May 17, 1954	Yes
2	Roe v. Wade	Jan. 22, 1973	Yes
3	Griswold v. Connecticut	June 7, 1965	
4	Miranda v. Arizona	June 13, 1966	
5	New York Times Co. v. Sullivan	Mar. 9, 1964	
6	Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.	June 25, 1984	
7	Erie Railroad Co. v. Tompkins	Apr. 25, 1938	
8	Mapp v. Ohio	June 19, 1961	
9	Gideon v. Wainwright	Mar. 18, 1963	Yes
10	Lochner v. New York	Apr. 17, 1905	
11	Katz v. United States	Dec. 18, 1967	
12	Talbot v. Seeman	Aug. 11, 1801	
13	Plessy v. Ferguson	May 18, 1896	
14	Baker v. Carr	Mar. 26, 1962	
15	Loving v. Virginia	June 12, 1967	
16	Planned Parenthood of Southeastern Pennsylvania v. Casey	June 29, 1992	
17	Meyer v. Nebraska	June 4, 1923	Yes
18	United States v. Carolene Products Co.	Apr. 25, 1938	
19	West Virginia State Board of Education v. Barnette	June 14, 1943	Yes
20	Pierce v. Society of Sisters	June 1, 1925	
21	San Antonio Independent School District v. Rodriguez	Mar. 21, 1973	
22	Terry v. Ohio	June 10, 1968	Yes
23	Buckley v. Valeo	Jan. 30, 1976	
24	Olmstead v. United States	June 4, 1928	
25	Korematsu v. United States	Dec. 18, 1944	Yes
26	Wisconsin v. Yoder	May 15, 1972	
27	Lawrence v. Texas	June 26, 2003	
28	Regents of the University of California v. Bakke	June 28, 1978	
29	Griggs v. Duke Power Co.	Mar. 8, 1971	
30	Eisenstadt v. Baird	Mar. 22, 1972	
31	Furman v. Georgia	Jun. 29, 1972	Yes
32	Mathews v. Eldridge	Feb. 24, 1976	
33	<i>In re Gault</i>	May 15, 1967	
34	International Shoe Co. v. Washington	Dec. 3, 1945	
35	Goldberg v. Kelly	Mar. 23, 1970	Yes
36	Bowers v. Hardwick	Jun. 30, 1986	
37	Skinner v. Oklahoma <i>ex rel.</i> Williamson	June 1, 1942	
38	Shapiro v. Thompson	Apr. 21, 1969	
39	Youngstown Sheet & Tube Co. v. Sawyer	June 2, 1952	

TABLE 2. THE ONE HUNDRED “MOST INFLUENTIAL” SUPREME COURT DECISIONS AS OF JANUARY 5, 2022 CONTINUED

Rank	Case Name	Decision Date	Companion Case(s) in Table 1
40	Yick Wo v. Hopkins	May 10, 1886	
41	Cantwell v. Connecticut	May 20, 1940	
42	Tinker v. Des Moines Independent Community School District	Feb. 24, 1969	
43	Gregg v. Georgia	July 2, 1976	Yes
44	Sherbert v. Verner	June 17, 1963	
45	<i>In re</i> Winship	Mar. 31, 1970	
46	Shelley v. Kraemer	May 3, 1948	Yes
47	Reynolds v. Sims	June 15, 1964	Yes
48	Washington v. Davis	June 7, 1976	
49	Boyd v. United States	Feb. 1, 1886	
50	United States v. Lopez	Apr. 26, 1995	
51	Daubert v. Merrell Dow Pharmaceuticals, Inc.	June 28, 1993	
52	Craig v. Borden	Dec. 20, 1976	
53	Palko v. Connecticut	Dec. 6, 1937	
54	Roth v. United States	June 24, 1957	Yes
55	Lemon v. Kurtzman	June 28, 1971	Yes
56	Powell v. Alabama	Nov. 7, 1932	
57	Chaplinsky v. New Hampshire	Mar. 9, 1942	
58	Village of Euclid v. Ambler Realty Co.	Nov. 22, 1926	
59	Employment Division, Department of Human Resources v. Smith	Apr. 17, 1990	
60	United States v. O'Brien	May 27, 1968	
61	Weeks v. United States	Feb. 24, 1914	
62	The Civil Rights Cases	Oct. 15, 1883	
63	Prince v. Massachusetts	Jan. 31, 1944	
64	Everson v. Board of Education	Feb. 10, 1947	
65	Gertz v. Robert Welch, Inc.	June 25, 1974	Yes
66	Brandenburg v. Ohio	June 9, 1969	
67	Miller v. California	Jun. 21, 1973	Yes
68	Abrams v. United States	Nov. 10, 1919	Yes
69	NLRB v. Jones & Laughlin Steel Corp.	Apr. 14, 1937	Yes
70	Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.	May 24, 1976	
71	McDonnell Douglas Corp. v. Green	May 14, 1973	
72	A.L.A. Schechter Poultry Corp. v. United States	May 27, 1935	
73	Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics	June 21, 1971	
74	Schenck v. United States	Mar. 3, 1919	
75	NAACP v. Button	Jan. 14, 1963	
76	Whitney v. California	May 16, 1927	Yes
77	Duncan v. Louisiana	May 20, 1968	Yes
78	Gitlow v. People of New York	June 8, 1925	

TABLE 2. THE ONE HUNDRED “MOST INFLUENTIAL” SUPREME COURT DECISIONS AS OF JANUARY 5, 2022 CONTINUED

Rank	Case Name	Decision Date	Companion Case(s) in Table 1
79	Penn Central Transportation Co. v. New York City	June 26, 1978	
80	Reynolds v. United States	Jan. 6, 1879	
81	Voorhees v. Bonesteel and Wife	Jan. 6, 1873	
82	Bolling v. Sharpe	May 17, 1954	Yes
83	Johnson v. Zerbst	May 23, 1938	
84	Trop v. Dulles	Mar. 31, 1958	Yes
85	Frontiero v. Richardson	May 14, 1973	
86	NAACP v. Alabama <i>ex rel.</i> Patterson	June 30, 1958	
87	Central Hudson Gas & Electric Corp. v. Public Service Commission	June 20, 1980	Yes
88	Pennsylvania Coal Co. v. Mahon	Dec. 11, 1922	
89	Plyler v. Doe	June 15, 1982	
90	Brown v. Board of Education	May 31, 1955	
91	Dennis v. United States	June 4, 1951	
92	School District of Abington Township v. Schempp	June 17, 1963	
93	Strickland v. Washington	May 14, 1984	Yes
94	Standard Oil Co. of New Jersey v. United States	May 15, 1911	
95	City of Boerne v. Flores	June 25, 1997	
96	Moore v. City of East Cleveland	May 31, 1977	
97	City of Cleburne v. Cleburne Living Center, Inc.	July 1, 1985	
98	Board of Regents of State Colleges v. Roth	June 29, 1972	Yes
99	Stanley v. Illinois	Apr. 3, 1972	
100	Near v. Minnesota <i>ex rel.</i> Olson	June 1, 1931	