

THE SUPREME COURT AS A BABYSITTER:  
MODELING *ZUBIK V. BURWELL* AND *TRUMP V.*  
*INTERNATIONAL REFUGEE ASSISTANCE*  
*PROJECT RIGHTS*

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ABSTRACT

*This Article reveals for the first time the emergence in two recent Supreme Court decisions of an innovative adjudicative function in constitutional cases, which we suggest calling the “Babysitter Model.” According to this model, as implemented in *Zubik v. Burwell* and *Trump v. International Refugee Assistance Project*, the Supreme Court does not provide a well-founded resolution, but rather accompanies, attends, and encourages other branches to carry out their constitutional obligations. The case is ongoing until the dispute is resolved. This Article analyzes the reasons that motivated the Court’s dispositions of *Zubik* and *Trump*, presents the Babysitter Model and distinguishes it from other judicial review methodologies, and proposes an initial normative evaluation of the model.*

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## INTRODUCTION

In recent years, the constitutional discourse regarding the role of the Supreme Court was shaped around the minimalist<sup>1</sup> versus the maximalist<sup>2</sup> decision-making paradigms. While the precepts of these two paradigms are put in opposition to one another (narrow and shallow as opposed to wide and deep legal reasoning), they share a common denominator. Both paradigms are decision oriented: They are focused on the features, elements, and qualities of the Courts'

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1. For judicial minimalism in general, see generally RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998); Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008); Diane S. Sykes, *Minimalism and Its Limits*, 2015 CATO SUP. CT. REV. 17 (2015). For an early discussion of judicial minimalism, see Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84 (1993). For minimalism in specific areas of law, see generally Cass R. Sunstein, *Minimalism at War*, in THE SUPREME COURT REVIEW 55 (Dennis J. Hutchinson, David A. Strauss & Geoffrey R. Stone eds., 2005); Richard C. Boldt, *Decisional Minimalism and the Judicial Evaluation of Gun Regulations*, 71 MD. L. REV. 1177 (2012); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411 (2002); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005); Kara M.L. Young, *Prudent Use of Judicial Minimalism: Why Minimalism May Not Be Appropriate in the Context of Same-Sex Marriage*, 27 U. HAW. L. REV. 501 (2005).

2. The maximalist decision-making paradigm is often associated with Ronald Dworkin's life-long project. See generally RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011); RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005). For examples of maximalist Supreme Court justices, see generally Cynthia L. Cates & Wayne V. McIntosh, *Retail Jurisprudence: The Judge As Entrepreneur in the Marketplace of Ideas*, 11 J.L. & POL. 709 (1995).

decisions, i.e., the justices' use of reasons, rules, principles, precedents, and analogies.<sup>3</sup>

This Article reveals and discusses for the first time the emergence in two recent Supreme Court decisions of an innovative model of constitutional adjudication, which we suggest calling the "Babysitter Model." This Model, unlike the minimalist and maximalist paradigms, is not decision oriented. According to the Babysitter Model, the Supreme Court does not provide a well-founded resolution, but rather accompanies, attends, and encourages other branches to carry out their constitutional obligations. The case is ongoing until the dispute is reasonably resolved.

The *Zubik v. Burwell* decision examined whether nonprofit religious institutions (which are not churches) should be exempt from government regulations that mandate contraceptive coverage as part of the health insurance plans provided to their employees.<sup>4</sup> The *Trump v. International Refugee Assistance Project* decision dealt with an application for a stay of preliminary injunctions issued by lower courts against a travel ban signed by President Donald J. Trump, which restricted entry to the United States of foreign nationals from several Muslim countries.<sup>5</sup> This Article does not examine the substantive constitutional questions brought before the Court<sup>6</sup> but rather offers a new modeling of the *Zubik* and *Trump* judicial strategies. It analyzes the judicial approach, which the Court has taken in these cases, while suggesting comparative and normative insights in regard to it.

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3. The ability of both the minimalist and maximalist paradigms to guide judicial decision making has been questioned from early stages. See generally Stanley Fish, *Theory Minimalism*, 37 SAN DIEGO L. REV. 761 (2000); Thomas Nagel, *The Supreme Court and Political Philosophy*, 56 N.Y.U. L. REV. 519 (1981). Attempts to break through the minimalist versus maximalist decision-making paradigms are still decision oriented. See, e.g., Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693 (2012); John F. Muller, *The Constitutional Incompleteness Theorem*, 15 U. PA. J. CONST. L. 1373 (2013).

4. See *Zubik v. Burwell*, 136 S. Ct. 1557, 1559-60 (2016).

5. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2082-83 (2017).

6. For a discussion of some of the substantive questions raised in the *Zubik* and *Trump* cases, see generally Jennifer M. Chacon, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243 (2017); Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771 (2016); Ilya Somin, *Does the Constitution Require Due Process Abroad?*, JOTWELL (July 12, 2017), <http://conlaw.jotwell.com/does-the-constitution-require-due-process-abroad/> [<https://perma.cc/WWJ2-GJ2Z>].

The Article proceeds as follows: In Part I, we describe the *Zubik* and the *Trump* cases. In Part II, we analyze the reasons that motivated the Court's dispositions of *Zubik* and *Trump*. In Part III, we present the Babysitter Model and distinguish it from other judicial review models. In Part IV, we highlight the Babysitter Model, which is common in Israel and serves as a comparative test case. Finally, in Part V, we propose an initial normative evaluation of the Babysitter Model. We present its advantages and disadvantages in addition to suggesting our view, which is that the Model shall be implemented only in those exceptional cases that are appropriate for its application.

## I. THE SUPREME COURT DECISIONS

### A. The *Zubik v. Burwell* Case

The petitioners, nonprofit religious organizations, were required to provide health insurance covering certain contraceptives to their employees under the federal regulations of Obamacare.<sup>7</sup> Under federal regulations, the petitioners were allowed to declare that they objected to providing contraceptive coverage on religious grounds.<sup>8</sup> The petitioners argued that the very imposition of requiring a declaration to receive exemption from the duty to provide their employees contraceptives coverage “substantially burden[ed] the exercise of their religion in violation of the Religious Freedom Restoration Act of 1993.”<sup>9</sup> They argued that the regulations made them complicit in providing access to birth control methods equivalent to abortion.

Three days after hearing the oral arguments, the Supreme Court—in the period following the passing of Justice Antonin Scalia, in which only eight justices served on the Court—directed the parties “to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioners’ employees through petitioners’ insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees.”<sup>10</sup> The Court also directed the parties “to address whether

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7. See *Zubik*, 136 S. Ct. at 1557.

8. See *id.*

9. *Id.* at 1559.

10. Order for Parties to File Supplemental Briefs, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 WL 1203818, at \*2 (Mar. 29, 2016).

contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners."<sup>11</sup> The Court mentioned that "[f]or example, the parties should consider a situation in which petitioners would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds."<sup>12</sup> The Supreme Court added that "[t]he parties may address other proposals along similar lines, avoiding repetition of discussion in prior briefing."<sup>13</sup>

After the parties filed the supplemental briefs, the Supreme Court issued a per curiam decision, and "[g]iven the gravity of the dispute and the substantial clarification and refinement in the position of the parties," the Court vacated the circuit courts of appeals' judgments.<sup>14</sup> The Supreme Court noted that the parties should be given sufficient time to resolve any outstanding issues between them and eventually come to agree upon an approach that would accommodate the petitioners' religious exercise while providing to employees full and equal coverage, including contraceptive coverage.<sup>15</sup> The Court acknowledged that there may still be areas of disagreement between the parties regarding implementation.<sup>16</sup> However, the Court asserted that the "importance" of these areas of disagreement, as well as the necessity to resolve the disagreement by judicial decision, is uncertain.<sup>17</sup> The Court noted that it had taken similar action in other instances in the past.<sup>18</sup> In a concurring opinion, Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, emphasized that the per curiam opinion expressed no view on the merits of the cases and lower courts should not construe it or the request for supplemental briefing "as signals of where this Court stands."<sup>19</sup> Justice Sotomayor expressed discomfort

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Zubik*, 136 S. Ct. at 1560.

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.* (citing *Villarreal v. United States*, 134 S. Ct. 1939, 1939 (2014); *Madison Cty. v. Oneida Indian Nation of N.Y.*, 562 U.S. 42, 43 (2011)); *Kiyemba v. Obama*, 559 U.S. 131, 132 (2010).

19. *See Zubik*, 136 S. Ct. at 1561 (Sotomayor, J., concurring).

with “some lower courts” that have ignored similar explicit disclaimers in previous orders.<sup>20</sup>

### B. The *Trump v. International Refugee Assistance Project* Case

On March 6, 2017, President Trump signed an executive order suspending the entry of foreign nationals from six Muslim-majority countries for ninety days to the United States.<sup>21</sup> The order suspended the U.S. Refugee Admission Program for 120 days and reduced the number of refugees eligible for admission in 2017.<sup>22</sup>

The order prompted legal challenges. Petitioners, Muslim individuals and their representative advocacy organizations, obtained preliminary injunctions barring enforcement of several of the order’s provisions.<sup>23</sup> Two federal appellate courts upheld injunctions issued by lower courts against the order.<sup>24</sup> The Fourth Circuit Court of Appeals reasoned its decision by stating that the order violated the Establishment Clause of the First Amendment because the order was motivated by animosity toward Islam.<sup>25</sup> The Ninth Circuit Court of

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20. *Id.* (citing *Sharpe Holdings, Inc. v. Dep’t of Health & Human Servs.*, 801 F.3d 927, 944 (8th Cir. 2015)).

21. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,213 (Mar. 6, 2017).

22. *Id.* at 13,215-16. This order was not the Trump administration’s first effort to restrict entry of foreign nationals from predominantly Muslim countries. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017). On January 27, 2017, President Trump signed Executive Order No. 13,769, *Protecting the Nation from Foreign Terrorist Entry into the United States*. *See id.* The order suspended the entry of foreign nationals from seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) for ninety days, suspended the U.S. Refugee Admission Program for 120 days, and reduced the number of refugees eligible to be admitted in 2017. *Id.* at 8978, 8979. This order was immediately challenged, and a federal district court in Seattle issued a nationwide temporary restraining order, which blocked the enforcement of certain provisions of the order. *See* *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*2 (W.D. Wash. Feb. 3, 2017). The federal administration filed an emergency motion to stay the order pending appeal with the Court of Appeals for the Ninth Circuit, which was denied. *See* *Washington v. Trump*, 847 F.3d 1151, 1155-56 (9th Cir. 2017). The Trump administration revoked the order and issued the March 6 order, which was different in certain details from the previous order. *See* Exec. Order No. 13,780, 82 Fed. Reg. at 13,218.

23. *See* *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 544 (D. Md. 2017).

24. *See* *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 606 (4th Cir. 2017).

25. *See* *Int’l Refugee Assistance Project*, 857 F.3d at 572 (pointing to the predominantly Muslim character of the designated countries and to campaign statements made by then-candidate Trump); Jenna Johnson, *Trump Calls for ‘Total*

Appeals concluded the President overreached the statutory authority granted to him by Congress.<sup>26</sup>

The Trump administration petitioned the Supreme Court for certiorari as well as moved to stay the preliminary injunctions entered by the lower courts.<sup>27</sup> The Supreme Court issued a per curiam decision, granting review and a partial stay.<sup>28</sup> The Court held that the President's travel ban may go into effect with respect to foreign nationals "who lack any bona fide relationship with a person or entity in the United States."<sup>29</sup> The Court noted, however, that the ban may not be enforced against foreign nationals "who have a credible claim of a bona fide relationship with a person or entity in the United States."<sup>30</sup>

Expecting litigation over the question of what constitutes a credible bona fide connection to the United States, the decision provided some general guidelines. A person with a close familial relationship (i.e., a spouse or a mother-in-law) clearly has such a bona fide relationship.<sup>31</sup> Similarly, such an affiliation is held by those who have a "formal" and "documented" relationship with an entity in the United States (i.e., a student admitted to a university, a worker with an employment offer, or a lecturer invited to address an American audience).<sup>32</sup> The Court noted that these restrictions will

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*and Complete Shutdown of Muslim Entering the United States*, WASH. POST (Dec. 7, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.67db2128a93a](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.67db2128a93a) [<https://perma.cc/9EN9-Z4QU>].

26. See *Hawaii*, 859 F.3d at 755-56. The Ninth Circuit stated:

The Immigration and Nationality Act ('INA') gives the President broad powers to control the entry of aliens, and to take actions to protect the American public. But immigration, even for the President, is not a one-person show. . . . [T]he President did not meet the essential precondition to exercising his delegated authority: The President must make a sufficient finding that the entry of these classes of people would be 'detrimental to the interest of the United States.' Further, the Order runs afoul of other provisions of the INA that prohibit nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees.

*Id.*

27. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (2017) (seeking an injunction as well as certiorari).

28. See *id.* at 2082, 2088 (granting, per curiam, a partial stay and narrowing the scope of the remainder of the injunction).

29. *Id.* at 2087.

30. *Id.* at 2088.

31. See *id.*

32. See *id.*

apply as long as the relations were not formed in order to evade the travel ban.<sup>33</sup>

While the *Trump* decision was per curiam,<sup>34</sup> it was not supported by the entire Court.<sup>35</sup> In a dissenting opinion, Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, noted that the preliminary injunctions issued by lower courts should have been stayed in full.<sup>36</sup> Justice Thomas criticized the majority's willingness to provide a relief that neither party asked for "with regard to an unidentified, unnamed group of foreign nationals abroad."<sup>37</sup> Justice Thomas further argued that the majority's formula would be proved "unworkable," burdening the executive officials to decide under duress of contempt whether foreign nationals have sufficient connections to the United States.<sup>38</sup> Justice Thomas predicted that the majority's approach would result in a "flood of litigation" on factual and legal issues in the same two district courts—in Maryland and Hawaii—whose orders the Supreme Court has stayed until the case is finally resolved on the merits.<sup>39</sup> Although the Court did not state a position on the merits, Justice Thomas argued that the implicit conclusion incorporated in the majority's decision is that "the [g]overnment has made a strong showing that it is likely to succeed on the merits,"<sup>40</sup> that the "judgments below will be reversed,"<sup>41</sup> and that failure to lift the injunctions "will cause irreparable harm by interfering with [the government's] 'compelling need to provide for the Nation's security.'"<sup>42</sup>

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33. *See id.*

34. For the shifts in usage and function of Supreme Court per curiam decisions, see generally Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000); Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATOR 29 (1992).

35. *See Trump*, 137 S. Ct. at 2089 (Thomas, J., concurring in part and dissenting in part).

36. *See id.*

37. *Id.* at 2090.

38. *See id.*

39. *See id.*

40. *Id.*

41. *Id.*

42. *Id.* Some commentators question Justice Thomas's reasoning regarding the implicit conclusion that should be inferred from the decision. *See id.*; see, e.g., Michael C. Dorf, *Trump's Travel Ban Heads to the Supreme Court*, VERDICT (June 27, 2017), <https://verdict.justia.com/2017/06/27/trumps-travel-ban-heads-supreme-court> [<https://perma.cc/XL2H-EAYD>].



There may never be a decision on the merits of the case. The Court asked the parties to brief the question of whether the challenges to President Trump's executive order became moot on June 14, when the original ninety-day travel ban included in the order expired.<sup>43</sup>

## II. REASONING THE *ZUBIK* AND *TRUMP* DECISIONS

How can we account for the Court opting in *Zubik* and *Trump* to resort to half measures, a "mixed bag,"<sup>44</sup> "middle ground,"<sup>45</sup> compromises,<sup>46</sup> and conflict-management maneuvers? The Court's disposition of these cases correlates to the specific circumstances surrounding the decisions as well as other reasons they share.

Regarding the *Zubik* decision, the common wisdom is that Justice Scalia's death in February 2016, enhancing the possibility of a four-four split,<sup>47</sup> motivated the Supreme Court's disposition.<sup>48</sup> The

43. See Leah Litman, *Symposium: The Mootness Games*, SCOTUSBLOG (July 11, 2017, 10:49 AM), <http://www.scotusblog.com/2017/07/symposium-mootness-games/> [<https://perma.cc/KF2C-HVZX>].

44. Ilya Somin, *Supreme Court Issues Mixed Ruling on Trump's Travel Ban*, VOLOKH CONSPIRACY (June 26, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/26/supreme-court-issues-mixed-ruling-on-trumps-travel-ban/?tid=a\\_inl&utm\\_term=.d42cc4f77006](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/26/supreme-court-issues-mixed-ruling-on-trumps-travel-ban/?tid=a_inl&utm_term=.d42cc4f77006) [<https://perma.cc/E2EV-JR7N>] ("[The] Supreme Court ruling is a mixed bag. It offers something to both sides, while also giving both some potentially bad news.").

45. Amy Howe, *An Introduction to the Travel Ban: In Plain English*, SCOTUSBLOG (July 10, 2017, 1:19 PM), <http://www.scotusblog.com/2017/07/introduction-travel-ban-plain-english/> [<https://perma.cc/AQ3E-HH72>] ("[T]he justices took a middle ground on what should happen with the order during that time.").

46. See S.M., *Shrewd Justice: The Supreme Court's Curious Compromise on the Travel Ban*, THE ECONOMIST (June 26, 2017), <https://www.economist.com/blogs/democracyinamerica/2017/06/shrewd-justice> [<https://perma.cc/ABP8-XAMN>].

47. See Lyle Denniston, *Argument Analysis: On New Health Care Case, A Single Word May Tell It All*, SCOTUSBLOG (Mar. 23, 2016), <http://www.scotusblog.com/2016/03/argument-analysis-on-new-health-care-case-a-single-word-may-tell-it-all/> [<https://perma.cc/PDL5-STUY>]. The widespread speculation is that the Supreme Court was trying to avoid a tie vote. See *id.* An analysis of oral arguments before the Court indeed suggests that the Court was headed toward a tie vote. See *id.*

48. See Todd E. Pettys, *Eight in the Eye of a Political Storm: Civil Cases in the Supreme Court's October 2015 Term*, 52 CT. REV. 102, 107-08 (2016); Miller W. Shealy, *Eight is [Not] Enough: A Review of the 2015-2016 U.S. Supreme Court Term*, 28 S.C. LAW. 18, 20 (2016) ("Justice Scalia's death also seems to have affected results in the companion cases of *Zubik v. Burwell* and *Little Sisters of the*

question remains: Why did the Court aim to avoid a tie vote rather than affirm the lower courts' rulings by an equally divided Court, much like in other cases<sup>49</sup> handled since Justice Scalia's death? Why not write complete opinions?

A potential reason for the Court's motivation to avoid the tie vote and its unique disposition in *Zubik* is the administration of justice by federal courts—namely, the problem of circuit splits and the Supreme Court's role to clarify and unify law.<sup>50</sup> Due to the contradiction between the rulings of the Eight Circuit Court of Appeals and the other circuit courts of appeals,<sup>51</sup> a tie vote, which would have affirmed the other circuit courts' decisions, would have no precedential value.<sup>52</sup> Furthermore, a tie vote would have created inconsistency, confusion, and indeterminacy in the application of the federal law. The regulations would have been enforceable in eight

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*Poor Home for the Aged v. Buriuell*. These were two very anticipated and highly charged cases. The Court seemed to work hard to avoid a 4-4 ruling on this very contentious issue. These cases, and others, involved rights to contraception coverage under the Affordable Care Act. The Court ruled 8-0 to remand the cases and directed the lower court to find a compromise, in effect, accommodating those with religious scruples against providing contraception for now. Scalia's replacement is likely to produce a 5-4 ruling in the near future, squarely resolving the issue.”)

49. See *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083, 1083 (2016); see also *United States v. Texas*, 136 S. Ct. 2271, 2271 (2016); *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1279 (2016); *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 2159 (2016); *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072, 1072 (2016).

50. See Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 206 (2007). Rule 10(a) of the Rules of the Supreme Court of the United States (2017) brings a circuit split as an example of the considerations controlling the Supreme Court's discretion in granting a writ of certiorari.

51. See Timothy Jost, *Eleventh Circuit Upholds Religious Accommodation on Contraceptive Coverage*, HEALTH AFF. BLOG (Feb. 19, 2016), <https://www.healthaffairs.org/doi/10.1377/hblog20160219.053255/full> [<https://perma.cc/YTS9-LDXL>].

52. Denniston mentions another option that the Supreme Court had to avoid a tie vote in *Zubik*: postponing the decision to the next term. See Denniston, *supra* note 47. The Court deployed this tactic in another religious-liberty case, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, which the Court agreed to review nearly one month before Justice Scalia's death. See Amy Howe, *Court Releases April Calendar*, SCOTUSBLOG (Feb. 17, 2017), <http://www.scotusblog.com/2017/02/court-releases-april-calendar/#more-252317> [<https://perma.cc/WXC2-5NN3>]. Under the Court's regular procedures, the arguments would have been heard in either April or fall of 2016. See *id.* While there is no certainty as to the reasons for the delay, one possibility provided by observers is that the justices were hoping to avoid a 4-4 tie. See *id.*

circuits and not applicable to the Eighth Circuit as well as to the remaining three circuits in which the constitutional dispute had not been decided. Similarly, although a circuit split had not occurred prior to the *Trump* decision,<sup>53</sup> since the Ninth and Fourth Circuits upheld injunctions against the presidential order, the legal grounds for the conclusions of the two circuit courts were different.<sup>54</sup> With the Trump administration questioning the legal soundness of lower courts' rulings on the travel ban,<sup>55</sup> and in light of the protests as well as nationwide confusion in regard to the implementation of the first executive order,<sup>56</sup> it seems that the justices felt an obligation to clarify and unify the law.

A second possible explanation for the Supreme Court's motivation to issue the per curiam decisions in *Zubik* and *Trump* concerns separation of powers problems<sup>57</sup>—namely, the difficulty of gridlock government and the will to leave major social, economic, and political questions to democratic deliberation and determination by Congress.<sup>58</sup> As Congress becomes increasingly polarized and decreasingly able to resolve such major issues, the President takes action on issues that the Congress has declined to solve.<sup>59</sup> In turn, the Court is called upon by petitioners affected by the President's action to assess whether he overreached his authority and violated the separation of powers.<sup>60</sup>

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53. See Dara Lind, *The Trump Administration Just Lost Its Best Chance at a Legal Win on the Travel Ban*, VOX (May 25, 2017), <https://www.vox.com/2017/5/25/15692698/trump-muslim-ban-fourth-circuit> [<https://perma.cc/2JXX-Y3BE>].

54. See *Hawaii v. Trump*, 859 F.3d 741, 755-56 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017).

55. See, e.g., Eugene Scott & Allie Malloy, *Trump Attacks Another Federal Judge*, CNN (Feb. 5, 2017), <https://edition.cnn.com/2017/02/04/politics/donald-trump-attacks-federal-judge-travel-ban/index.html> [<https://perma.cc/8259-WPAT>]; David Wright, *Trump Again Thunders Against Judiciary*, CNN (Apr. 27, 2017), <https://edition.cnn.com/2017/04/26/politics/trump-tweets-ninth-circuit-sanctuary-cities-order/index.html> [<https://perma.cc/F6M5-VVD7>].

56. See Evan Perez, Pamela Brown & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), <https://edition.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> [<https://perma.cc/NZN2-P2SS>].

57. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

58. See Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 242 (2016).

59. See *id.* at 242-43.

60. Jonathan H. Adler, *Of Kings to Come: The Future of Health Care Reform Still Remains in Federal Court*, 20 EMP. RTS. & EMP. POL'Y J. 133, 134 (2016) ("ACA lawsuits are certain to continue for years on end as the statute, the

In *Zubik*, had the Court invalidated the President's action, the issue would have been returned to Congress,<sup>61</sup> leaving the substantive legal question unresolved. When the Supreme Court decided to hear *Zubik*, the Court likely expected to strike down the challenged regulations and leave to Congress and the President the task of devising a new scheme of balancing the conflicted interests. However, with Justice Scalia's death, the Court itself went into a deadlock.<sup>62</sup> This was another fallout of Congress's gridlock. In a deeper sense, Congress's gridlock in conferring a new justice is another result of the polarization and fragmentation of American politics. The gridlock has become especially significant in light of greater presidential involvement in appointing federal justices vis-à-vis an opposing (yet polarized) Congress<sup>63</sup> and the nomination of a justice to the Court generating national debate.<sup>64</sup>

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way it was enacted, and the way it is being implemented, create a perfect storm for continued litigation.”).

61. See Blackman, *supra* note 58, at 243.

62. Michael Ellement, *The Supreme Court Meets a Gridlocked Congress*, 84 GEO. WASH. L. REV. ARGUENDO 115, 127-28 (2016) (“The political branches . . . remain divided . . . . This dysfunction has begun directly affecting the Court’s work, as Congress’s unwillingness to consider President Obama’s nominee to replace Justice Scalia has left the Court with only eight members—causing the Court to deadlock in controversial cases. This confluence of politically charged cases and a dysfunctional Congress means the relationship between the Court and Congress will be tested in the coming years. The Court will be tasked with fulfilling its judicial role while navigating the difficult separation of powers questions it confronts.”).

63. See Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 235, 246-63 (John E. Chubb & Paul E. Peterson eds., 1985) (pointing out that over time the White House has adopted organizational strategies by which judicial selection, at all levels, has been fashioned into an instrument of policy, which is manifested in two successful strategies: the selection of like-minded justices by the President, and the strengthening of the role of the White House in judicial appointments at the expense of the Justice Department and other institutions); see also David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479, 485 (2005).

64. But the Senate “logjam,” as Barry McDonald points out, exists because the Court transformed itself into a major political actor. See Barry McDonald, *Eight Justices Are Enough*, N.Y. TIMES (May 26, 2016), <https://www.nytimes.com/2016/05/26/opinion/eight-justices-are-enough.html> [<https://perma.cc/MRT4-HGNG>]. On the politicization of the appointment process of federal judges, see Jess Bravin, *Presidential Election Will Shape Supreme Court, and National Policies, for Years to Come*, WALL STREET J. (July 22, 2016), <https://www.wsj.com/articles/presidential-election-will-shape-supreme-court-and-national-policies-for-years-to-come-1469207258> [<https://perma.cc/WA7M-HEDA>]; Albert R. Hunt, *The Supreme Court Really Matters in This Election*, 2016 SUP. CT. PREVIEW 23, 23 (2016). See also Michael Stokes Paulsen, *The Constitutional Property of Ideological “Litmus Tests” for Judicial Appointments*, 83 U. CHI. L. REV. ONLINE 28, 33 (2016).

In *Trump*, the Ninth Circuit Court of Appeals ruled that the President overreached the authority given to him by Congress.<sup>65</sup> While Trump's executive order roiled many in Congress,<sup>66</sup> it failed to act. With lower courts stepping in and staying the first executive order, President Trump could not wisely appeal to the Supreme Court, which remained equally divided with only eight justices. Republicans in the Senate overcame Congress's gridlock by using the "nuclear option" to confirm Neil Gorsuch to the Court by the time the second executive order was stayed in lower courts.<sup>67</sup> It could be deduced that Chief Justice John Roberts and Justice Anthony Kennedy—the swinging votes in many national security cases—were not satisfied with Trump's executive order. However, they believed that some of the national security concerns argued by the administration were legitimate. Additionally, Congress could not be trusted to resolve these concerns. The disposition of *Trump* bought time for the administration to come up with a new scheme for vetting foreign nationals from countries identified as presenting heightened terrorism risks without counting on Congress to save the day.

A third possible reason for the dispositions of *Zubik* and *Trump* relates to the unique difficulties faced by the Court in preserving social legitimacy—namely, the Court's difficulty in maintaining public confidence in a fractious society.<sup>68</sup> The *Zubik* case involved a high public profile dispute, engaging religious, social, economic, and political features.<sup>69</sup> A tie vote in *Zubik* probably would have further

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65. See *Hawaii v. Trump*, 859 F.3d 741, 755-56 (9th Cir. 2017).

66. See Susan Milligan, *Donald Trump's Executive Order Roils Congress*, U.S. NEWS (Jan. 30, 2017), <https://www.usnews.com/news/politics/articles/2017-01-30/donald-trumps-executive-order-roils-congress> [<https://perma.cc/3FRP-RSB9>].

67. See Ashley Killough & Ted Barrett, *Senate GOP Triggers Nuclear Option to Break Democratic Filibuster on Gorsuch*, CNN (Apr. 7, 2017), <https://edition.cnn.com/2017/04/06/politics/senate-nuclear-option-neil-gorsuch/index.html> [<https://perma.cc/628M-J555>]; Matt Flegenheimer, *Senate Republicans Deploy "Nuclear Option" to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/4H2W-9F3A?safari=1>].

68. See Sanford Levinson, *Trash Talk at the Supreme Court: Reflection on David Pozen's Constitutional Good Faith*, 129 HARV. L. REV. F. 166, 175 (2016); see generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (discussing the different meanings of legitimacy in constitutional law).

69. The Court can craft its specific decision, taking into account the social and political context. See Olga Frishman, *Court-Audience Relationships in the 21st Century*, 86 MISS. L.J. 213, 215 (2017); Amnon Reichman, *The Dimensions of Law*:

discredited the Court's legitimacy by reinforcing the public perceptions of the politicization of the Supreme Court. This would have been a heavy price for a nonprecedential ruling.<sup>70</sup> Furthermore, a tie vote decision, signifying judicial impotence, would have increased the erosion of public trust in the Supreme Court.<sup>71</sup> The requirement of supplemental briefs and remanding the cases to further proceedings in the respective circuit courts of appeals delayed the justices' determination of the constitutional merits of the case. The per curiam decision could also be based on a tactic of the justices to leave themselves the freedom, in a future case, to interpret what constitutes a substantive burden of religious practice. This tactical decision enables the justices to dispose of the case in an acceptable way—or even to point to a win-win solution as suggested by Mark Rienzi<sup>72</sup>—without being embarrassed in a future case for taking a stand on the record about the issues in dispute.<sup>73</sup>

The Supreme Court faced a similar problem in *Trump*. The political and legal battle over Trump's executive orders had been raging for five months when it was laid before the Court.<sup>74</sup> It seemed that any path taken by the Court would generate partisan hostility.<sup>75</sup> Had the Supreme Court taken a side favoring one of the parties in this initial phase, the Court would have paid a high price in terms of its social capital on a matter relating to a temporary executive order. The Court took the middle ground—splitting the baby in two—by granting each side partial and temporary gains and postponing the

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*Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CALIF. L. REV. 1619, 1625 (2007).

70. See generally Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011 (2007) (arguing that especially in controversial cases the Court is at least as much concerned with presenting its holding in a way that will win allegiance from its audience—or at least deflect and soften criticism).

71. See Justin R. Pidot, *Tie Votes and the 2016 Supreme Court Vacancy*, 101 MINN. L. REV. HEADNOTES 107, 120 (2016); Henry P. Monaghan, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, 94 HARV. L. REV. 296, 308 (1980) (book review) ("In a society in which judicial declarations as to substantive constitutionality have increasingly become a touchstone of legitimacy, a sudden refusal by the judiciary to continue its canonical role would be disquieting.").

72. Mark L. Rienzi, *Fool Me Twice: Zubik v. Burwell and the Perils of Judicial Faith in Government Claims*, 2016 CATO SUP. CT. REV. 123, 126 (2016).

73. See Levinson, *supra* note 68, at 174; see generally Sanford Levinson, *Compromise and the Constitution*, 38 PEPP. L. REV. 821 (2011).

74. See S.M., *supra* note 46.

75. See *id.*

Court's involvement at least until October 2017 and maybe indefinitely if the issue became moot.<sup>76</sup>

While these three possible reasons may provide some explanation to what had transpired behind closed doors in *Zubik* and in *Trump*, we find none of them wholly satisfactory. A circuit split, as well as a need to clarify the law, neither controls nor fully measures the Supreme Court's discretion in granting certiorari. Some circuit splits are deemed tolerable.<sup>77</sup> Therefore, avoiding a circuit split on an issue of clear national importance<sup>78</sup> might have played a key role in the Supreme Court's disposition of *Zubik* but was likely not the only influencing factor. The same is true of the need to clarify the law regarding issues concerning immigration and national security as well as the President's executive powers in this regard.

While Justice Scalia's death and the gridlock government are mentioned by many scholars as the direct causes for the *Zubik* decision,<sup>79</sup> other cases have been affected by these factors in which the Court did not act in the same manner. For example, in Josh Blackman's view, *Zubik* and *United States v. Texas*<sup>80</sup> "are the judicial fallout from our gridlock government."<sup>81</sup> Nonetheless, this explanation cannot account for the fact that *Zubik* is a per curiam decision, while *Texas* affirmed the lower courts' rulings by an equally divided Court.<sup>82</sup> On the contrary, Justin Pidot argues that the

76. See *id.*

77. See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 380-81 (2d ed. 1996); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376 (2006); Paul A. Holton, Comment, *The "Do Nothing" Court: Why a Reduced Supreme Court Docket Is a Good Thing*, 50 U.S.F. L. REV. 291, 297-300 (2016); Henry T. Scott, Note, *Burkean Minimalism and the Roberts Court's Docket*, 6 GEO. J.L. & PUB. POL'Y 753, 761, 763 (2008).

78. See Scott, *supra* note 77, at 779.

79. Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 170-71 (2016) ("To be sure, some of these piecemeal outcomes, including almost certainly the ones in *Texas* and in *Zubik*, resulted directly from Justice Scalia's unanticipated absence from the bench. In that sense, they are more poignant than illuminating.").

80. See *United States v. Texas*, 136 S. Ct. 2271, 2271 (2016).

81. Blackman, *supra* note 58, at 242.

82. See generally *id.* Blackman tried to explain the difference between the *Zubik* and *Texas* decisions by the circuit split. See *id.* at 275-78, 282, 304. However, this explanation is also not wholly convincing, since as explained above, a circuit split does not control the Court's discretion, and it is also deemed tolerable at least temporarily. See *supra* notes 77-79 and accompanying text. Furthermore, since the Court's inability to decide the case is due to the absence of a ninth justice, the justices could have anticipated that the confirmation of "Scalia's replacement is

Court in *Zubik* deployed a similar strategy as it applied in *Spokeo, Inc. v. Robins*.<sup>83</sup> In the *Spokeo* decision, the Supreme Court declined to address the contentious question of standing to sue in federal court when Congress creates statutory rights and remanded for further consideration by the lower courts as to whether the alleged injury was sufficiently concrete.<sup>84</sup> This explanation does not illuminate the Court's request for supplemental briefs, the instruction to discuss solutions, and the relieving of the penalties in *Zubik*.<sup>85</sup>

Though the Supreme Court's will to maintain its public political status could provide an explanation to its unique decision in *Zubik*, it would seem unlikely as the Court did not avoid a tie vote in five other high profile cases around the same time period.<sup>86</sup> There seem to be fundamental differences between *Zubik* and the other cases, as *Zubik* involved a more contentious and polarizing issue than *Texas* and *Spokeo*. Additionally, a substantive ideological component differentiates *Zubik* from the other decisions. Ryan Owens and David Simon have observed that ideology drives much of the Supreme Court's decision-making, including whether the justices negotiate over the content of opinions and the justices' decisions to join final-opinion coalitions.<sup>87</sup> What kind of ideological component could explain *Zubik*'s unique features? What is the ideological component that *Zubik* possesses but *Texas*, *Spokeo*, and the other cases do not?

While ideology includes the justices' views on disputed legal questions—i.e., substantive burden on the exercise of religion and the rights of foreign nationals to enter the United States—judicial ideology includes the justices' philosophy of judging,<sup>88</sup> or the role of

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likely to produce a 5-4 ruling in the near future, squarely resolving the issue.” Shealy, *supra* note 48, at 20.

83. See Pidot, *supra* note 71, at 118; see generally *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

84. See *Spokeo*, 136 S. Ct. at 1550 (finding the Ninth Circuit's standing analysis inadequate and declining to rule on the issue).

85. See *Zubik v. Burwell*, 136 S. Ct. 1557, 1559-61 (2016).

86. See *supra* note 49.

87. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1224 (2012) (“Ideology . . . drives much of Supreme Court decision making. It motivates whether the Justices grant review in cases, to whom the Chief Justice assigns opinions, whether the Justices bargain and negotiate over the content of opinions, Justices' decisions to join final opinion coalitions, and the Court's review of lower court decisions.”).

88. See Erwin Chemerinsky, *Of Course Ideology Should Matter in Judicial Selection*, 7 NEXUS 3, 4 (2002); Erwin Chemerinsky, *Political Ideology and Constitutional Decisionmaking: The Coming Example of the Affordable Care Act*, 75 L. & CONTEMP. PROBS. 1, 12 (2012).



the Court in American society.<sup>89</sup> We suggest that this component of judicial ideology motivated the Court's disposition of *Zubik* and *Trump*. As noted in the *Zubik* decision, "The Court find[s] the foregoing approach [of remanding and devising an appropriate accommodation] more suitable than addressing the . . . views of the parties . . ." <sup>90</sup> While "there may still be areas of disagreement," it is uncertain as to "the necessity of this Court's involvement."<sup>91</sup> The dissenting opinion in *Trump* took issue with the majority on the role of the Supreme Court vis-à-vis the political branches of government and the scope of the injunctive relief tailored:

[A] court's role is "to provide relief" only "to claimants . . . who have suffered, or will imminently suffer, actual harm." . . . In contrast it is the role of the "political branches" to "shape the institutions of government in such fashion as to comply with the laws and the Constitution."<sup>92</sup>

This argument could also be compared to the approach taken by the Ninth Circuit Court of Appeals, according to which the "[g]overnment's 'authority and expertise in matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals,' even in times of war."<sup>93</sup> These are competing conceptions regarding the judiciary in American democracy.

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89. For the role of the Court in a democratic society, see, for example, AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 4 (2006); RONALD DWORKIN, *JUSTICE IN ROBES* 50 (2006); DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW* 3 (2008); RICHARD POSNER, *HOW JUDGES THINK* 20 (2008); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 1 (2008); JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 3 (2005); LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 2 (2004); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 124 (1999); Ronald Dworkin, *The Judge's New Role: Should Personal Convictions Count?*, 1 J. INT'L CRIM. JUST. 4, 5 (2003).

90. *Zubik*, 136 S. Ct. at 1560.

91. *Id.*

92. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part) (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

93. *Washington v. Trump*, 847 F.3d 1151, 1163 (9th Cir. 2017) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)); see also Eric K. Yamamoto, Maria Amparo Vanaclocha Berti & Jaime Tokioka, "Loaded Weapon" Revisited: *The Trump Era Import of Justice Jackson's Warning in Korematsu*, 24 ASIAN AM. L.J. 5, 45 (2017) (noting that "[t]he judges in [the lower courts' travel ban cases] evinced—in Justice Sotomayor's words—a 'modicum of progress'

The Supreme Court in the *Zubik* and *Trump* cases was of the opinion that it should assume the role of a babysitter: encouraging parties to fulfill their constitutional commitment to respect the free exercise of religion while providing full and equal health insurance coverage including contraceptives, like in *Zubik*, and not to discriminate while protecting national security, like in *Trump*.<sup>94</sup> This judicial approach signifies a break from the Supreme Court's traditional role. The Court stated in *Zubik* that it "has taken similar action in other cases in the past."<sup>95</sup> As noted by Josh Blackman, in each of the precedents cited by the Supreme Court,<sup>96</sup> it had sent the case back to the lower court due to circumstances changed by the parties: "Here, the remand was caused by the Justices' own instigation."<sup>97</sup>

We assume that the division and polarization of the justices led the Court to utilize a unique tool within its constitutional decision-making model. Legal reforms are characterized as being "internal" and "incremental."<sup>98</sup> The exegesis of decided cases carries with it "the correct messages with regard to the future shape of the law."<sup>99</sup> This is the reason for which the Supreme Court's similar actions in other cases in the past signal that the *Zubik* decision is only an internal and incremental change in the role of the Court. Fearing that the *Zubik* decision itself might be used as a message in future cases in regard to the substantive merits, Justice Sotomayor, joined by Justice Ginsburg, urged lower courts not to construe the *Zubik* decision as a "signal of where [the] Court stands."<sup>100</sup> It is clear that Justices Sotomayor and Ginsburg agreed with the "other message" regarding the Court's role as a babysitter concerning the possible new shape of future constitutional adjudication.<sup>101</sup>

Justice Thomas's dissent challenged the legal tool introduced in *Zubik*, as it does not correspond with the traditional conception of the

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toward shaping the judicial role and affirmatively blocking or removing the law's stamp of approval on government sponsored injustice").

94. See *Trump*, 137 S. Ct. at 2089; *Zubik*, 136 S. Ct. at 1560.

95. *Zubik*, 136 S. Ct. at 1560.

96. See *id.* (citing *Villarreal v. United States*, 134 S. Ct. 1939, 1939 (2014); *Madison Cty. v. Oneida Indian Nation of N.Y.*, 562 U.S. 42, 43 (2011)); *Kiyemba v. Obama*, 559 U.S. 131, 132 (2010).

97. Blackman, *supra* note 58, at 277.

98. See Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 L. & CONTEMP. PROBS. 7, 13-14 (2002).

99. *Id.* at 14.

100. *Zubik*, 136 S. Ct. at 1561 (Sotomayor, J., concurring).

101. See *id.*

judicial role.<sup>102</sup> This decision model probably was not the optimal judicial decision-making model for each of the justices had he or she operated alone.<sup>103</sup> Considering that the justices do not write seriatim opinions in every case,<sup>104</sup> the Babysitter Model could reflect a “sufficient” or “permissible” stand to take in regard to the role of the Supreme Court from each justice’s point of view.

### III. THE BABYSITTER MODEL

In accordance with the Babysitter Model, the role of the Supreme Court is not grounded in a well-founded resolution; rather, it is grounded in guiding and encouraging Congress and the executive branch to carry out their constitutional responsibilities. The case is ongoing until the dispute is reasonably resolved. The Court pushes the parties to clarify and refine their constitutional positions and maintain their constitutional rights and duties.<sup>105</sup> The Supreme Court may require supplemental briefs and propose solutions or a constitutional scheme that would resolve the dispute. While the Court may encourage the parties to negotiate amongst themselves, judicial babysitting is not an ADR (alternative dispute resolution) mechanism in search of a compromise that is acceptable to both parties.<sup>106</sup> The main objective of the Babysitter Model is to maintain the dispute until legal and political circumstances change, allowing it to be resolved reasonably from a constitutional perspective.

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102. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089-90 (Thomas, J., concurring in part and dissenting in part).

103. There are two main versions of theories concerning the role of judges: optimal theories, which deal with the question of how would “the best” or “the ideal” judge act; and permissible theories, which assess the judicial review according to its ability to answer legal, social, or moral thresholds even if the judicial answer is not legally, socially, or morally optimal. See Joshua Segev, *Justifying Judicial Review: The Changing Methodology of the Israeli Supreme Court*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 105, 111-12 (Gideon Sapir et al. eds., 2013).

104. See Levinson, *supra* note 68, at 174.

105. See *Trump*, 137 S. Ct. at 2090.

106. Some courts prohibit the use of ADR in constitutional cases. See Carrie Menkel-Meadow, *Alternative and Appropriate Dispute Resolution in Context: Formal, Informal, and Semiformal Legal Processes*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 1, 18 (Peter T. Coleman et al. eds., 3d ed. 2014); see also Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the ‘Semi-Formal’*, in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419, 443 (Felix Steffek et al. eds., 2013).

A distinction should be made between babysitter proceedings and public-law litigation. In public-law litigation, federal trial courts handle the implementation of constitutional policies determined by the Supreme Court to the situation at hand but normally do not babysit the determination of constitutional interpretation.<sup>107</sup> When the Court engages the parties in the babysitter mode, it has not made a definite constitutional determination. While the distinction between babysitting proceedings and public-law litigation may blur, babysitting is focused upon substantive constitutional law prior to a definite constitutional determination, whereas public law litigation is focused upon constitutional remedies.

The Babysitter Model should also be distinguished from the dialogue model of judicial review.<sup>108</sup> According to the dialogue model, the Court declares constitutional rights; yet often, this judicial decision is diluted by other branches of government or over time by the public through popular constitutional channels.<sup>109</sup> In contrast, the Babysitter Model engages the three branches of government in a process of constitutional interpretation as the case is not dismissed with prejudice or the petition granted; instead, it is ongoing with no definite end in sight.<sup>110</sup>

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107. For a discussion on the public-law litigation movement (known also as structural reform) ,see generally, for example, OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121 (1982); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007); Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647 (1988); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

108. For the dialogue model of judicial review, see generally, for example, Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109 (2006); Raoul Berger, *The Scope of Judicial Review: A Continuing Dialogue*, 31 S.C. L. REV. 171 (1980); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Michael E. Solimine & James L. Walker, *The Supreme Court, Judicial Review, and the Public: Leadership Versus Dialogue*, 11 CONST. COMMENT. 1 (1994).

109. See Friedman, *supra* note 108, at 653-54.

110. The Babysitter Model should also be distinguished from the concept of popular constitutionalism, according to which the people establish the Constitution's meaning by voting, petitioning, and, if need be, mobbing. For an explanation of popular constitutionalism, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7, 208-09 (2004).

## IV. A COMPARATIVE TEST CASE: THE ISRAELI SUPREME COURT AS A BABYSITTER

The practice of conducting Supreme Court proceedings in constitutional and administrative matters in the babysitter form is common in Israel.<sup>111</sup> In such proceedings, known in Israel as “rolling proceedings,” the Israeli Supreme Court does not examine the legality of the governmental decision under attack as it was at the time when the petition was filed or is heard and therefore does not decide in accordance with it.<sup>112</sup> The Court admonishes the respondent authority for prima facie flaws in the decision and encourages it to correct them.<sup>113</sup> As a result, in many cases, the proceedings go on for many years. For instance, in 2016 the Israeli Supreme Court ruled upon fifty-four petitions filed before 2011.<sup>114</sup> Some proceedings

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111. For the Israeli Babysitter (Rolling Procedures) Model, see Ariel L. Bendor, *The Purpose of the Israeli Constitution*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 41, 46-47 (Gideon Sapir et al. eds., 2013). See also VARDA BONDY & MAURICE SUNKIN, THE DYNAMICS OF JUDICIAL REVIEW LITIGATION: THE RESOLUTION OF PUBLIC LAW CHALLENGES BEFORE FINAL HEARING 1 (2009) (describing settlements in judicial review proceedings in England and Wales).

112. According to Justice Eliezer Rivlin’s definition, normally in babysitter proceedings the court follows up on the behavior of the authorities and does not examine the existence of grounds for judicial intervention in the dispute and resolve it—in one way or another—right away. See HCJ 1527/06 Movement for Fairness in Government v. Ministry of Transport (2006) (Isr.) (Rivlin, J., concurring).

113. See DAVID SCHARIA, JUDICIAL REVIEW OF NATIONAL SECURITY 8 (2014).

114. This statistic is based on an examination of the leading Israeli legal database Nevo. The Nevo database, which is comparable to Lexis or Westlaw (see Binyamin Blum, Note, *Doctrines Without Borders: The “New” Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131, 2135, n.19 (2008)), is used in many empirical studies on Israeli law. See, e.g., Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 J. EMPIRICAL LEGAL STUD. 556, 568 (2011); Oren Perez, *Judicial Strategies for Reviewing Conflicting Expert Evidence: Biases, Heuristics, and Higher-Order Evidence*, 64 AM. J. COMP. L. 75, 94, n.8 (2016). In an interim decision dated February 5, 2017, in regard to a petition filed in 2004, the Vice-President of the Israeli Supreme Court, Elyakim Rubinstein, wrote:

The issue before us is depressing; Petition of 2004, a *decree nisi* in 2008 and the results are meager, and possibly a withdrawal over the years, whether considering the proposals up and down. All succeeded over nearly thirteen years is starting a tiny pilot in one place, and who could foretell the outcome. [A] Commission [established] . . . has for sure had its moments, and of course its deliberations to be welcomed. We expect to review the summary report, but do not seem to see still the safe haven.

ended in a determination by the Court. Others were terminated by the denial of the petition because it had “run its course”<sup>115</sup> in light of the changes that took place while the proceeding was under way.

Israeli justices have expressed different views regarding the extent to which judicial babysitting is desirable. Israeli Supreme Court President Dorit Beinisch reasoned that “sometimes issues reach the court, the decisions for which require preparations that are different from the ordinary, *inter alia*, by giving the opportunity to the various entities, including the executive authority and the legislative authority, to examine the extent of their involvement in the matter and render the judicial decision superfluous.”<sup>116</sup>

The transformation of Supreme Court babysitter proceedings into a commonly preferred phenomenon in Israel, in a considerable number of cases, can be interpreted as reflecting several objectives. Such proceedings may effectively promote a complete solution of the legal problem that the petition before the Court raises in cases where judicial remedies cannot achieve such a solution. For instance, when the petitioner claims that the regulations under which the governmental authority acts are illegal, the Court normally can only invalidate the existing regulations but cannot issue new regulations. Babysitting proceedings can promote enactment of lawful regulations and thus bring the conflict to an end. As Justice Rubinstein pointed out,

The role of the Court in this case, as in many similar cases within the scope of administrative law, was not to write a legal scholarly decision, but to accompany the authorities while encouraging them and expediting their action, like a nanny or babysitter; this is done [by the Court] in order

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HCJ 3336/04 Movement for Fairness in Government v. Israel’s Chief Rabbinate Council (2017) (Isr.).

115. The phrase “has run its course” characterizes a petition that “rolled” until the legal or the practical problem was resolved, and there was no longer a need for a judicial decision. According to an examination of the Nevo database, by the end of 2016, there were 238 petitions to the Supreme Court sitting as a High Court of Justice that were rejected or deleted, in whole or in part, once it was determined by the Court that the petition had “run its course.” In 1998 there were two such petitions; in 1999, one petition; in 2000, one petition; in 2001, five petitions; in 2002, one petition; in 2003, nine petitions; in 2004, three petitions; in 2005, fifteen petitions; in 2006, nine petitions; in 2007, fifteen petitions; in 2008, eleven petitions; in 2009, twenty-four petitions; in 2010, twenty-one petitions; in 2011, thirty-three petitions; in 2012, twenty-two petitions; in 2013, forty petitions; in 2014, nineteen petitions; in 2015, twenty-three petitions; and in 2016, twenty-three petitions.

116. HCJ 4124/00 Yekutieli v. Minister of Religious Affairs, 1 IsrLR 1, 15 (2010) (Isr.), [http://elyon1.court.gov.il/files\\_eng/00/240/041/n43/00041240.n43.htm](http://elyon1.court.gov.il/files_eng/00/240/041/n43/00041240.n43.htm) [https://perma.cc/YXH2-KCWV].

to promote the realization of their legal obligations in the labyrinth of public administration, not to say bureaucracy. This function means that the case is not closed and shelved but remain[s] alive until a reasonable settlement of the issue raised in the petition.<sup>117</sup>

According to the Court's view, babysitter proceedings "are encouraging, if not forcing, the authorities to promote the care of the issues at hand."<sup>118</sup>

Babysitting proceedings enable the Israeli Supreme Court to press governmental authorities to accept or revoke their decisions even when substantive law does not require it. The Court babysits the petition when the justices believe that the applicable law does not provide a just solution to the dispute. For example, Justice Rubinstein noted that the petition before the Court "raised, in a matter of fact, mainly a practical problem with only a secondary legal character . . . . While handling it . . . were achieved many welcomed changes . . . that probably would not have been come, and in any case not in an appropriate pace, without the petition . . . . This case is not isolated in the context of the role of the Court in such cases; far from that."<sup>119</sup>

Babysitting proceedings may be institutionally favorable for the Israeli judiciary in cases that involve special national security or political sensitivity. Under Israeli law, there is no political question doctrine in the same sense and scope as it prevails in the United States.<sup>120</sup> Also the requirement of *locus standi* under Israeli law is much narrower than the standing demand in American law.<sup>121</sup> Determinations in questions of a political dimension may be institutionally disadvantageous for the Israeli justices, which unlike the American justices, are selected in a relatively nonpoliticized

117. H CJ 5587/07 Uziel v. Property Tax and Compensation Fund, para. 6 (2008) (Isr.).

118. H CJ 2235/14 Sanduka v. The Governmental Authority for Water and Sewage (2017) (Isr.).

119. H CJ 1254/10 Doe v. Agency of Population, Immigration and Border Crossings – Ministry of Interior, para. 2 (2012) (Isr.).

120. See, e.g., Ariel L. Bendor, *Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience*, 7 *IND. INT'L & COMP. L. REV.* 311 (1997); Elad Gil, *Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel*, 23 *B.U. PUB. INT. L.J.* 245 (2014).

121. See, e.g., Aharon Barak, *The Supreme Court, 2001 Term — Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 19, 106-10 (2002); Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, 38 *N.Y.U. J. INT'L L. & POL.* 67, 94-95 (2006).

process and usually have no clear political branding.<sup>122</sup> The babysitter proceedings may produce consensus among the political branches, and the petitioners thereby exempt the justices from expressing a firm stand in a fully reasoned decision. For example, it was noted that “[t]he Israeli Supreme Court indeed views sometimes its role as a ‘babysitter’ whose job is to follow up on the respect for human rights and humanitarian law by the other branches” during times of combat.<sup>123</sup> Another example is sensitive petitions relating to the relationship between religion and state, such as the definition of who is a “Jew” entitled to immigrate to Israel under the Law of Return. Such petitions require a ruling—which the Court is not enthusiastic to make—on questions in dispute between different religious streams of Judaism.<sup>124</sup> It can be asserted that the babysitting practice involves the judiciary directly in the decision making by the other branches and hence may derogate from the impartiality of the Israeli Supreme Court.

The Israeli Supreme Court, which is comprised of fifteen justices, hears about 10,000 petitions, appeals, and requests in all fields of law every year.<sup>125</sup> Although the Court usually sits in panels of three, and many requests are even decided by a single justice, the burden on the justices is enormous. While Israeli justices do not mention it explicitly in their decisions, the babysitter policy may stem from the difficulty of issuing carefully explained, written decisions in such a large number of cases.

There are also Israeli justices who have expressed reservations about the judicial babysitting. For example, Justice Eliezer Rivlin noted:

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122. For the Israeli process of electing judges in comparison with the American process, see, for example, Malvina Halberstam, *Judicial Review, a Comparative Perspective: Israel, Canada, and the United States*, 31 *CARDOZO L. REV.* 2393, 2395-407 (2010); Gidon Sapir, *Law or Politics: Israeli Constitutional Adjudication As a Case Study*, 6 *UCLA J. INT’L L. & FOREIGN AFF.* 169, 173-74, 198-99 (2001).

123. SCHARIA, *supra* note 113, at 190.

124. For instance, in H CJ 7625/06 Regachova v. Ministry of Interior (2016) (Isr.), the Israeli Supreme Court babysat for a decade—without success—petitions that raised the question of whether petitioners who came to Israel from different places around the world and passed through conversion processes that are not part of the state conversion system should be recognized as Jews.

125. For an official overview of the Supreme Court of Israel, see <https://supreme.court.gov.il/sites/en/Pages/Overview.aspx> [<https://perma.cc/K8Q7-NMVB>].



Normally, I do not believe that the role of the Court is to serve as a “babysitter” of the authorities and follow up in a “rolling petition” on their behavior. I believe that [the duty] usually rests with the Court to examine the existence of grounds for judicial intervention in the dispute and resolve it—in one way or another—right away.<sup>126</sup>

These objections remain within the minority and therefore do not prevent the judicial babysitting practice of the Israeli Supreme Court.

#### V. AN INITIAL NORMATIVE EVALUATION OF THE BABYSITTER MODEL

In this Part, we conduct an initial normative evaluation of the Babysitter Model. We present the advantages and disadvantages of the Model. Additionally, we suggest that although the Model should not be entirely rejected, it should be implemented with caution and restraint and in appropriate cases only.

As we have shown in detail in Part II, the *Zubik* and *Trump* cases are unique in the combination of several factors that may explain the exceptional decisions that the United States Supreme Court made.<sup>127</sup> The Babysitter Model may have several additional benefits, which go beyond the specific situations of the *Zubik* and *Trump* cases.

The Supreme Court selects roughly eighty cases a year for oral arguments and fully reasoned opinions.<sup>128</sup> This extremely limited number of cases directly correlates with the institutional constraints on the number of detailed decisions that the justices are able to write.<sup>129</sup> An advantage of the Babysitter Model is that the Court can lead the parties to a reasonable layout of constitutional interpretation without writing reasoned decisions. By implementing the Model, the Supreme Court would be able, in the appropriate cases, to make more determinations.

The Babysitter Model rests upon reaching a consensus between all relevant parties. This has a broad positive impact on society as a

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126. H CJ 1527/06 Movement for Fairness in Government v. Ministry of Transport (2006) (Isr.) (Rivlin, J., concurring).

127. See *supra* Part II.

128. *Frequently Asked Questions (FAQ)*, SUP. CT. U.S., [https://www.supremecourt.gov/about/faq\\_general.aspx](https://www.supremecourt.gov/about/faq_general.aspx) [https://perma.cc/NL7M-MNNF]; Harv. L. Rev., *The Supreme Court – The Statistics*, 127 HARV. L. REV. 408, 416 (2013).

129. See LAWRENCE BAUM, *THE SUPREME COURT* 98-99 (11th ed. 2013); JEFFREY A. SEGAL, HAROLD J. SPAETH & SARA C. BENESH, *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 238 (2005).

whole as certain constitutional disputes, which had previously divided it, are resolved by way of broad consensus, as well as in terms of the public trust in the Supreme Court and its public legitimacy.<sup>130</sup> Indeed, “[e]ven genuinely objective judges may be perceived as procedurally biased by the public.”<sup>131</sup> By implementing the Model, the Court does not have to split on sensitive issues with a political dimension. A split is likely to strengthen the public perception that the Supreme Court decides in accordance with partisan interests rather than appropriate legal considerations.<sup>132</sup> As demonstrated in the *Zubik* case, the Babysitter Model has special advantages in circumstances in which the Supreme Court or elected branches are unable to reach a decision.<sup>133</sup>

Along with its considerable advantages, judicial babysitting also has a line of drawbacks. The significance of babysitting by the Supreme Court in major constitutional issues is that the Court largely waives its role and responsibility as the supreme interpreter of the Constitution.<sup>134</sup> Judicial babysitting of legislative or governmental procedures, at least on matters related to constitutional interpretation, could be considered incompatible with the very essence of the judicial role, which is determining cases and controversies arising

130. For the value of a broad consensus for the public legitimacy of the Court’s decisions, see, for example, Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 216 (2003); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1216 (2012). For the importance of the public legitimacy in the Court in general, see, for example, KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 4 (2006); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387, 1397, 1402-20 (2001); Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, 77 U. CHI. L. REV. 781, 783 (2010).

131. Andre P. Audette & Christopher L. Weaver, *Faith in the Court: Religious Out-Groups and the Perceived Legitimacy of Judicial Decisions*, 49 L. & SOC’Y REV. 999, 999 (2015).

132. Keith J. Bybee, *Open Secret: Why the Supreme Court Has Nothing to Fear from the Internet*, 88 CHI.-KENT L. REV. 309, 312 (2013) (“[T]he greatest potential delegitimizing factor for the Court is the perception that the justices render their decisions on the basis of personal partisan preference rather than legal principle and impartial reason.”).

133. See *Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016).

134. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1, 3 (2014). For an opposite approach, see, for example, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 217, 219 (1994).

from the Constitution, laws of the United States, and treaties made under their authority. Indeed, “the Supreme Court’s interpretations of the Constitution should be taken by all other officials, judicial and non-judicial, as having an authoritative status equivalent to the Constitution itself.”<sup>135</sup>

Interpreting the Constitution is not similar to compromises in civil trials or to plea bargaining in criminal trials. Resolving constitutional disputes by mediation can be found in one-party states such as China.<sup>136</sup> It is improbable that major constitutional disputes are suitable for ADR. Constitutional interpretation is dissimilar to practical settlements relating to the manner of implementation of fundamental constitutional decisions of the Supreme Court that in the past, as part of the public-law litigation, which was controversial in itself,<sup>137</sup> were customary in federal trial courts.<sup>138</sup> Judicial mediation to implement the Supreme Court’s constitutional interpretation does not directly contradict contemporary perceptions of the judiciary’s role. For example, by the various forms of “problem-solving” courts,<sup>139</sup> judicial babysitting of major constitutional disputes raises severe legitimacy difficulties. Babysitting initiated by the Supreme Court may, as a result, undermine the separation of powers by shifting the authority to interpret the Constitution from the judiciary to the legislative and executive branches.

Babysitting involves the Court in political negotiations, thus undermining the role of the Court as a neutral interpreter of the

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135. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455 (2000).

136. See Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 105 (2012).

137. For critical views on public law litigation, see, for example, John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1122-23 (1996); William A. Fletcher, *The Discretionary Constitution Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635-36 (1982); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266; Paul J. Mishkin, *Federal Courts As State Reformers*, 35 WASH. & LEE L. REV. 949, 950-51 (1978).

138. See *supra* note 107 and accompanying text.

139. For problem-solving courts, see, e.g., GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (2005); JOANN MILLER & DONALD C. JOHNSON, *PROBLEM SOLVING COURTS: NEW APPROACHES TO CRIMINAL JUSTICE* (2009); Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120 (2014).

Constitution.<sup>140</sup> This role of neutral interpreter fulfills a separate function from the functions of the legislatures and the administration. Hence, the meaning of the Constitution—“the supreme law of the land”<sup>141</sup>—might be publicly perceived as negotiable with the courts, including the Supreme Court, as a party to the negotiation. The authority of the courts, as well as the authoritative essence of the judicial review mechanism,<sup>142</sup> may be harmed.

As part of the babysitting, the Supreme Court, while taking advantage of its position, may urge the parties to reach agreements in major constitutional issues without the Court itself interpreting the Constitution and writing a fully reasoned decision after careful consideration. As mentioned in the *Zubik* decision, Justices Sotomayor and Ginsburg noted the suggestion of the Court expressed no explicit view on the merits of the cases.<sup>143</sup> The other justices did not necessarily undergo the process of thoroughly researching and discussing the issues, which usually precedes the writing of a fully reasoned constitutional decision.<sup>144</sup> The result can be rotting, in a de

140. See, e.g., Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 769. For the Supreme Court’s neutrality crisis, see Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 2 (2011).

141. U.S. CONST. art. VI, cl. 2.

142. Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2121, 2175 (1993) (“[D]ifferent groups within society have different views about how constitutional disputes should be resolved . . . . If the extent of government power or the sphere of individual rights is undefined, the potential for conflict between officials and citizens is great. If the allocation of powers between the branches of government cannot be resolved through an authoritative mechanism, then the stability of the government is threatened.”).

143. See *Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016).

144. See Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 907, 910 (2013). Prof. Sullivan also states:

The judge will have read the briefs, studied the record, heard oral arguments, discussed the case with her clerks, and agreed on the proper outcome in conference with her fellow judges. But when the time comes for writing the opinion, the judge finds that “the opinion won’t write”—the reasons needed to support the outcome that everyone agreed on are just not there. . . . What matters to “the legal mind” . . . is not simply the practical attractions of an answer that may be offered, but the quality of the reasons that support one or another plausible resolution of the problem. In either case, the persuasiveness of the reasons supporting the decision will depend, at least in part, on the degree of connection between the reasons assigned for the decision and the articulable, pre-existing, and pre-announced legal principles that are relevant to the decision. It is in the

facto status, of binding constitutional precedents, of positions that did not undergo full judicial scrutiny.

Babysitter proceedings may take an extended amount of time. In Israel, there have been several cases where such proceedings have lasted more than a decade,<sup>145</sup> potentially resulting in a delaying of justice for the petitioners. Cases where babysitting failed, a consensus was not reached, and the Supreme Court concluded the law or the administrative action was unconstitutional retrospectively appear as ongoing constitutional violations under the patronage of the Court.

Judicial babysitting may have both significant advantages and disadvantages. In our view, the proper approach to the Babysitter Model should not be dogmatic. The Model can be a part of the Supreme Court's toolbox but shall be utilized with caution and restraint. There are circumstances, such as those that arose in the *Zubik* and *Trump* cases, where the Babysitter Model is appropriate. By contrast, the Court must be aware of the drawbacks of the Model, as it is not normatively desirable that the Supreme Court would babysit cases routinely. The Babysitter Model should be implemented only in those exceptional cases that are appropriate for its application.

#### CONCLUSION

The unique tactics employed by the Supreme Court in the handling of the *Zubik* and *Trump* cases can be understood as resting upon the exceptional situation that the Court encountered following the death of Justice Scalia. It can be reasonably assumed that following the *Zubik* and *Trump* precedents, the Supreme Court will consider implementing the same tactics in the future under different circumstances.

This Article offers, for the first time, a broader conceptualization of the *Zubik* and *Trump* decisions as the Babysitter Model. This Model has, as put forth in the Article, several benefits that go beyond the specific situations of the *Zubik* and *Trump* cases. But along with the advantages, it also has a line of drawbacks. These drawbacks require caution and restraint in the implementation of the

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effort to explain and justify our conclusions that we determine whether those conclusions are in fact explicable and justifiable.

*Id.*

145. See HCJ 3336/04 Movement for Fairness in Government v. Israel's Chief Rabbinate Council (2017) (Isr.).

Model. A valuable example of both the advantages of judicial babysitting and its drawbacks can be drawn from the Israeli experience. Along with the contribution of the Babysitter Model to the effective resolution of many disputes placed before the Israeli Supreme Court, the overly frequent application of the Model in Israel also eroded the ability of the Court to fully fulfill certain significant functions of its supreme legal authority. It is therefore possible to rely on the modeling and analysis that we propose in this Article not only for an understanding of the *Zubik* and *Trump* decisions in a broader context, which expresses a distinct stream of judicial philosophy, but also for better conceptualization and normative evaluation of future rulings by the Supreme Court.



