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## Supreme Court Journalism: From Law to Spectacle?

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### Recommended Citation

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# Supreme Court Journalism: From Law to Spectacle?

Barry Sullivan\* and Cristina Carmody Tilley\*\*

## *Abstract*

*Few people outside certain specialized sectors of the press and the legal profession have any particular reason to read the increasingly voluminous opinions through which the Justices of the Supreme Court explain their interpretations of the Constitution and laws. Most of what the public knows about the Supreme Court necessarily comes from the press. That fact raises questions of considerable importance to the functioning of our constitutional democracy: How, for example, does the press describe the work of the Supreme Court? And has the way in which the press describes the work of the Court changed over the past several decades?*

*This Article seeks to address those questions by comparing the print media coverage of two highly salient cases involving similar legal issues decided fifty years apart. Our study suggests that, at least in highly salient cases, the nature of print media coverage may well have changed dramatically during that fifty-year interval. More specifically, our study suggests that while the mid-twentieth century press described the Court's decisions largely in terms of the legal questions presented, the contemporary press seems more likely to describe the Court's decisions in non-legal terms—as something resembling a spectacle, in which unelected judges are presumed to*

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\*\* Associate Professor, University of Iowa College of Law. The authors wish to thank John Dehn, James Gathii, and Michael Kaufman for helpful comments on earlier drafts of this article. We are also indebted to our research assistants, including Emily Ancona, Emily Eggmann, Rachel Groves, Stephen Hilfer, Pilar Mendez, and especially Helaina Metcalf, whose enthusiasm for the project matched her expertise and attention to detail. We are also grateful for financial support from the Cooney & Conway Chair Fund, the Loyola University Chicago Law Faculty Research Fund, and the University of Iowa College of Law Empirical Research Fund. The usual stipulation applies.

*decide cases, not on properly contested legal grounds, but based on their respective political commitments.*

*That conclusion is striking. First, it suggests that in the ongoing scholarly debate over the nature of the Justices' approach to their work, the press has chosen sides. Rather than closely interrogating the Court's work to determine whether particular analyses and results can be defended on legal grounds, contemporary reporting seems to proceed on the assumption that that question lacks salience—because we already know that the Justices' political views and allegiances are the true drivers of Supreme Court decisions. Thus, contemporary press coverage tends to emphasize such factors as the political affiliation of the president who appointed a particular Justice. Second, it raises questions about the way in which the contemporary press is discharging its responsibility to educate the public about the Court and its work. It also raises the possibility that the public will become predisposed to doubt the Court's legitimacy, and, indeed, the very legitimacy of the American system of judicial review.*

*If the Court's decisions really reflect nothing more than the Justices' political predilections and commitments, or those of the elites to which they belong, it is important for the public to know that. Nothing could be more important than discovering and documenting the fact that the Justices wear no clothes. On the other hand, whether Supreme Court decisions deserve to be viewed in that way is a question that needs to be tested through a careful examination of the Court's work product. It is something to be proved rather than presumed. The contemporary print media's seemingly casual assumption that the main point about reporting on the Supreme Court is not to test the validity of the Court's reasoning, and explore its flaws, but to try to trace connections between the Justices' voting behavior and their political or other commitments, may well corrode public confidence in the Court. If that occurs unnecessarily, and without adequate justification, the consequences for the institution of judicial review may well be dire. Moreover, if the public's expectations are lowered, so too may be the standards the Justices set for themselves and each other. In other words, if the press leads us to believe that the Court's work product is nothing more than politics, that may well become a self-fulfilling prophesy—if it has not already happened.*

*Not surprisingly, social science research indicates that the public prefers a Supreme Court that operates within the constraints of legal doctrine to one that simply incarnates the Justices' political or other commitments. In fact, public willingness to accept the Court's decisions, and to protect its independence against incursions by the political branches, has been linked to the public's recognition that the Court has a unique institutional role to play in interpreting the Constitution and laws. When the public is conditioned to believe that the proper way to think about the Court is to assume that the Justices do politics first and law second, however, the public will necessarily view the Court as redundant and illegitimate, having usurped the legitimate authority of the elected branches. Consequently, we conclude that the contemporary press's depictions of the Court as an institution unduly influenced by politics may well undermine public confidence in the institution, and also, perhaps, diminish the public's faith in the Constitution itself as a legitimate and effective basis for democratic government.*

*As other scholars have pointed out, extreme party polarization has characterized the conduct of American politics in recent years. While that fact initially had the greatest impact on the House of Representatives, it has also increasingly affected both the workings of the Senate and the relations among the political branches. In recent years, the judicial confirmation process has become more overtly and consistently partisan, with presidents and senators consciously seeking to nominate and confirm (or defeat) candidates who are thought to be most likely to affect the perceived political balance of the federal courts, including the Supreme Court. The dynamics of the selection process play out differently, of course, depending on a particular president's attitude towards the judiciary and on whether the presidency and the Senate are firmly in the hands of the same or different political parties. The Senate has effectively altered the number of votes necessary to confirm all judicial nominees, including those nominated for positions on the Supreme Court, so that nominees may now be confirmed with the barest of Senate majorities. In addition, senators of both parties (to say nothing of various highly partisan and well-financed special interest groups) have routinely engaged in something like trench warfare to promote or defeat judicial nominees; and some nominees have willingly undertaken the role of partisan warrior in their confirmation hearings, knowing that their confirmations do not*

*depend on bipartisan support. One recent presidential candidate not only put the Supreme Court at the center of his election campaign, he went so far as to publish a list of jurists from which he pledged to fill a vacancy that his allies in the Senate had kept open for him.*

*In these circumstances, there is much reason to question whether the courts can and will apply the law in an even-handed way. If politicians, the public, and the judges become conditioned to think that there is no distinction worth making between law and politics, this will undoubtedly become the case. It seems all the more important, therefore, that the press should hold the courts accountable, not giving in to the easy assumption that judges necessarily base their decisions on their own extra-legal commitments, but constantly testing the work of the courts to determine whether their analyses and results are grounded in law.*

### *Table of Contents*

I. Introduction .....	347
II. The Public and the Court .....	353
A. The Constitution, the Court, and the Process of Interpretation .....	353
1. The “Pure Legal” Model.....	356
2. The “Pure Political” Model .....	359
3. The “Principled Discretion” Model .....	365
B. The Process of Interpretation: Public Understanding and Public Support.....	377
1. Public Understanding.....	378
2. Public Support .....	381
III. Media Depictions of the Supreme Court.....	388
A. Media Coverage of the Court: A Crucial Conduit.....	388
B. Media Framing of the Court and Its Work: The Known and the Unknown.....	395
IV. The Evolution of Media Framing in Supreme Court Coverage .....	400
A. Study Design .....	401
B. Study Results—Numeric.....	406

- 1. Legal References Versus Political References .....407
  - a. Legal Versus Internal Political.....407
  - b. The Rise of “External Political” References ....408
  - c. Institutional Versus Individual Coverage .....409
  - d. Legal Versus Political Overall.....413
- 2. Direct Versus Filtered Coverage .....416
- C. Study Results—Narrative.....419
  - 1. Legal Descriptions of the Court in *Brown*.....419
  - 2. Political References to the Court in *Brown*.....424
  - 3. Legal References to the Court in *Parents Involved* .....426
  - 4. Political References to the Court in *Parents Involved* .....429
  - 5. References to Individual Justices in *Brown* and *Parents Involved* .....432
- D. Study Results—Discussion .....437
- V. Ramifications.....442
- VI. Conclusion.....452

“Journalists are the managers of the political life of judicial decisions.”<sup>1</sup>

*I. Introduction*

This Article is divided into six parts. Part II, which follows this introduction, briefly traces the history of our national community’s collective thinking about the legitimacy and proper function of the Supreme Court. It summarizes the longstanding expert debate about how the Court should exercise its power of judicial review, that is, the authority to invalidate laws that conflict with the Constitution. For present purposes, we rely on descriptive theories of judicial review that may be thought to fall into three broad categories: the first posits that the Justices reach decisions by

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1. FLORIAN SAUVAGEAU ET AL., THE LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA 8 (2006) (quoting Peter Russell, *Comments for Media Supreme Court Research Workshop*, Ottawa, Nov. 7, 2002).

deductive reasoning; the second posits that they reach decisions by acting on their own personal and political preferences; and the third posits that they decide cases through the exercise of “principled discretion.”<sup>2</sup> The first two categories are self-explanatory. This third category is more complicated. It views the Justices as neither proceeding deductively nor simply acting on their own political preferences, but wrestling in good faith with the many opaque or indeterminate questions involved in constitutional litigation, choosing amongst various interpretive archetypes, and necessarily exercising judgment as they reason towards a conclusion.<sup>3</sup>

Social science studies suggest that most Americans prefer this third model of constitutional adjudication.<sup>4</sup> Those studies indicate that the public prefers the Justices to be guided by constitutional text and precedent, but also recognizes the need for them to exercise individual judgment.<sup>5</sup> Further, according to social science literature, Americans largely accept even decisional outcomes they dislike so long as they believe them to be the product of reasoned judgment.<sup>6</sup> When the public believes that the Court is guided by legal principles—even when the Justices must exercise judgment and discretion in the application of those principles—the public supports the judiciary as a branch of government that should be free from executive or legislative dominance.<sup>7</sup> The public shows no similar tolerance for judicial decisions that they perceive to be the product of unvarnished political will.<sup>8</sup> Thus, the public seems to support the Court when it perceives that the Court is acting in a purely legal fashion; tolerate it when the Justices exercise

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2. See *infra* Part II.A. for a discussion of the descriptive theories of judicial review.

3. See *infra* Part II.A.3.

4. See Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW & SOC'Y REV. 385, 391 (1974) (finding that two-thirds of Americans believe the Court's main job is to act as a “legal” institution functioning based on “pure law”).

5. *Id.*

6. See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 788 (1994) (finding that the public generally prefers that “the law, not personal values and opinions, should drive outcomes”).

7. *Id.*

8. *Id.*

judgment in legal decision-making, based in part on individual judgment and values; and disapprove when the Court appears to decide cases solely with a view to furthering external goals sought by political organizations.

Part III shows that decisional narratives emphasized by the press exert an outsized influence on the public's understanding of the Court's work. How the press depicts the Justices' reliance on legal considerations versus political considerations is therefore crucial. Previous studies have shown that press coverage of the Court is now rife with political language, but one cannot fully appreciate how press coverage may influence public confidence in the Court without also inquiring into whether the press's focus on political framings has come at the expense of the public's understanding of the legal issues with which the Court deals.<sup>9</sup> Because the public seemingly accepts the proposition that the Court will inevitably consider policy concerns when legal texts are not dispositive (as will often be the case), reporting on non-legal factors involved in the Court's work is far from problematic in itself. On the other hand, social science literature indicates that public confidence in the Court will likely drop when the media depict the Court in a way that suggests that it is eschewing legal reasoning altogether in favor of naked political calculation.<sup>10</sup> It is therefore essential that the press get it right. While researchers have extensively documented public preferences for judicial decision-making, and have studied the potential for media narratives to inform the public about whether their preferences are being met, there has been little examination of how the press actually assigns weight to the legal and political drivers of the Court's work, and whether that assignment has changed over time.<sup>11</sup> To assess how journalism about the Court might correlate with diminished public confidence in the institution, it is necessary to track the relative weight that journalists have given to "legal"

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9. See *infra* Part III.

10. See RonNell Andersen Jones, *Media Politicization of the United States Supreme Court*, 4 ONATI SOCIO-LEGAL SERIES 613, 621 (2014) ("The suggestion has been that these politicizing references run the risk of damaging public support for the Court and its work . . .").

11. See *infra* Part III.B.



as opposed to “political” descriptions of judicial activity. This Article attempts to do that.

Part IV reports on our efforts to fill the gap. We have sought to investigate the question whether, over time, the popular print media has shifted from a predominantly legal narrative of the Court’s work to one that is at least equally concerned with political considerations. Specifically, we studied media linguistics in two high-impact civil rights cases, *Brown v. Board of Education*<sup>12</sup> and *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>13</sup> which were decided fifty years apart. Both cases required the Court to determine the constitutionality of state or local laws concerning the use of race in public school pupil assignments.<sup>14</sup> Scrutinizing newspaper coverage of these decisions showed what appears to be a striking change in the characteristics of Supreme Court reporting.<sup>15</sup> Coverage of the 1954 *Brown* case mainly discussed constitutional text, precedent, and statutes as the presumed drivers of judicial decision-making.<sup>16</sup> The final decision in *Brown* was unanimous, of course, while the decision in *Parents Involved* was not. On the other hand, *Brown* explicitly overruled a longstanding precedent (which defined the legal, political, and social life of a large part of the nation), while *Parents Involved* did not. Throughout its coverage of *Brown*, the press gave little if any attention to the individual Justices’ personal backgrounds or political orientations,<sup>17</sup> and few third-party interest groups were

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12. 347 U.S. 483 (1954).

13. 551 U.S. 701 (2007).

14. See *Brown*, 347 U.S. at 487–88 (stating the question presented as whether the Constitution prohibited the segregation of students by race); *Parents Involved*, 551 U.S. at 711 (stating the question presented as whether school officials are categorically precluded from considering race in connection with pupil assignments).

15. See *infra* Part IV.B.

16. See *infra* Part IV.B.1.

17. See *infra* Part IV.B.1 (contrasting press characterizations of the Court’s decisions in *Brown* and *Parents Involved*). Although the ultimate decision in *Brown* was unanimous, there was no reason to anticipate that fact while the case was pending and the subject of pre-decisional reporting. The *Brown* Justices (except for Chief Justice Warren, a Republican and Eisenhower appointee) were all appointed by Democratic presidents, but they reflected the political and geographical diversity of the Roosevelt Coalition. See generally WILLIAM DOMNARSKI, THE GREAT JUSTICES 1941–54: BLACK, DOUGLAS, FRANKFURTER &

asked to comment on the political implications of the case.<sup>18</sup> By contrast, coverage of the 2007 *Parents Involved* case focused on the political leanings and backgrounds of the Justices as important drivers of the Court's decision. In addition, from the grant of certiorari to the announcement of the decision, third-party interest groups were quoted at length, explaining the case in political terms; the relevant legal texts received much less attention.<sup>19</sup> The two cases were remarkably comparable in terms of the issue presented and the kinds of legal argumentation the parties employed.<sup>20</sup> Nevertheless, the mainstream media portrayed the result in *Brown* as largely the product of law,<sup>21</sup> while fifty years later they described the decision in *Parents Involved* as one owing at least as much to political considerations.<sup>22</sup>

Part V considers some possible ramifications of this altered focus for maintaining public confidence in the institutional integrity and legitimacy of the Court. Clearly, popular confidence in the independence and integrity of the courts facilitates the litigants' compliance with judicial orders in individual

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JACKSON IN CHAMBERS (2006); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 424–33 (1960) (discussing the Roosevelt Coalition); JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 246–88 (1956) (same). In *Parents Involved*, only two Justices (Justices Ginsburg and Breyer) were Democratic appointees. See JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 5 (2007) (noting President Clinton's appointment of Ginsburg and Breyer). In recent years, critics have often commented on the Court's socio-educational homogeneity. See Natasha Bach, *One Thing Trump Nominee Brett Kavanaugh Won't Change Is the Supreme Court's Harvard-Yale Monopoly*, FORTUNE (July 10, 2018) <https://perma.cc/DQ4T-NZFT> (last visited Oct. 20, 2019) ("Nine of the . . . Justices, including outgoing Justice Kennedy, received their law degree from an Ivy League school. Five . . . went to Harvard, three to Yale, and Justice Ginsburg attended Harvard before . . . graduating from Columbia Law School.") (on file with the Washington and Lee Law Review).

18. See *infra* Part IV.B-C.

19. See *infra* Part IV.B-C.

20. See *infra* Part IV.A.

21. Ironically, the *Brown* Court was strongly criticized not only by segregationists, but by many academic lawyers and jurists, for having overstepped proper judicial bounds. See, e.g., LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 54–55 (1958) (critiquing the Court's performance in *Brown*); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (same).

22. See *infra* Part IV.B-C.

cases—which is obviously critical to the proper functioning of the judicial system.<sup>23</sup> But public confidence in the courts is also important for reasons that radiate beyond individual cases. If the public believes that the Court’s decisions are mainly the product of politics, those decisions will necessarily lack both legitimacy and long-term predictive value; their continued validity will largely depend on whatever the current composition of the Court is. Decisions will soon be understood as something like “restricted railway ticket[s], good for this day and train only.”<sup>24</sup> In that case, the public may justifiably come to believe that the content of constitutional law depends on nothing more than presidential elections and the appointments, retirements, and deaths of the Justices.<sup>25</sup> This perception may ultimately erode the public’s faith, not only in the Court and the Constitution, but in the very notion of the rule of law as a normative principle undergirding the nation itself. Not insignificantly, it may also affect the ways in which future Justices (and lower court judges) view the nature of the Court’s work and their own responsibilities as judges.<sup>26</sup> It will certainly affect the attitude of presidents and senators as they contemplate the nomination and confirmation processes.<sup>27</sup> Finally, Part VI closes the Article with some concluding observations.

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23. See *infra* Part V.

24. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Justice Roberts added: “I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject.” *Id.*

25. See Christine Kexel Chabot, *Do Justices Time Their Retirements Politically? An Empirical Analysis of the Timing and Outcomes of Supreme Court Retirements in the Modern Era*, 2019 UTAH L. REV. 527, 575 (2019) (discussing the timing of retirements from the Court and concluding that “political timing has played only a limited role in Justices’ retirement decisions in the modern era”).

26. See TOOBIN, *supra* note 17, at 207–08 (describing Justice Souter’s alleged perception of the majority’s decision in *Bush v. Gore* as “so transparently, so crudely partisan that [he] thought he might not be able to serve with them anymore”).

27. See *infra* Part V.

## *II. The Public and the Court*

### *A. The Constitution, the Court, and the Process of Interpretation*

Under the American system of judicial review, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>28</sup> The Supreme Court has the last word therefore—at least normally and as a formal matter—when it comes to ascertaining the meaning and proper application of the Constitution, the constitutionality of federal statutes and regulations, and the constitutionality of federal executive action.<sup>29</sup> The Court also has the last word concerning the constitutionality of state laws and administrative practices—an arrangement that is essential to ensuring the supremacy of federal law, but one that often has caused friction between the national and state governments.<sup>30</sup> The Supreme Court is not the only authoritative

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28. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“A constitution . . . must be regarded by the judges as a fundamental law . . . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”).

29. The enforcement of judgments depends mainly on voluntary compliance, but the coercive power of the executive branch is sometimes required. *See, e.g.*, Clifford J. Carrubba & Christopher Zorn, *Executive Discretion, Judicial Decision-Making, and Separation of Powers in the United States*, 72 J. POL. 812, 812 (2010) (“Ever since Hamilton’s famous observation that the . . . Court has neither the power of the ‘purse nor the sword,’ scholars have recognized that the courts . . . must rely upon other actors to ensure that their decisions are followed.”); *United States v. Barnett*, 346 F.2d 99, 109 (5th Cir. 1965) (Wisdom, J., dissenting) (noting that the Fifth Circuit’s orders requiring desegregation of the University of Mississippi were enforced only because President Kennedy deployed more federal forces to Oxford, Mississippi than George Washington had ever commanded at one time during the American War of Independence); *see also* PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945–1992*, at 69–136 (2005) (discussing deployment of federal troops to Oxford, Mississippi). Congress may overrule the Court on non-constitutional questions and frequently does so. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1320 (2014) (describing instances in which Congress legislates to effectively overrule the Supreme Court).

30. *See* U.S. CONST. art. VI, cl. 2 (establishing that under the U.S. Constitution, treaties and laws made pursuant to the Constitution shall be “the supreme law of the land”); *see also* *Ware v. Hylton*, 3 U.S. 199, 200

interpreter of the Constitution and laws, or even in some ways the most important;<sup>31</sup> but it does have the last word—at least when the resolution of constitutional questions is necessary to the decision of an actual controversy that the Court has deemed justiciable and worthy of its attention.<sup>32</sup> That much is clear. Of course, the constitutional text does not expressly provide for judicial review.<sup>33</sup> The courts' power to review governmental action for constitutionality is nonetheless settled because the Court so held in *Marbury v. Madison*,<sup>34</sup> and, as the Court said with some

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(1796) (invalidating a Virginia statute as being inconsistent with the Treaty of Paris); John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 SW. L.J. 411, 412 (1967) (discussing the tensions between state and federal authorities that federal court decisions sometimes cause).

31. See, e.g., *United States v. Nixon*, 418 U.S. 684, 703 (1974) (Burger, C.J.) (“[E]ach branch . . . must initially interpret the Constitution, and the interpretation of its powers . . . is due respect from the others . . . . [H]owever . . . [i]t is emphatically the province and duty of the judicial department to say what the law is.” (citation omitted)). The Court’s output is miniscule, compared not only to that of other state and federal courts, but also to that of executive branch lawyers, whose constitutional advice only rarely results in litigation. See H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 56 (2008).

32. See U.S. CONST. art. III, § 2 (outlining the role and jurisdiction of the federal courts); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (holding that the Court is bound to decide cases properly before it, even those it “would gladly avoid”). But the Court has created several limitations on federal jurisdiction, and the Court’s current statutory jurisdiction is almost entirely discretionary. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 42 (7th ed. 2016) (outlining several limits on federal court jurisdiction); Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958–60 and 2010–12*, 2015 UTAH L. REV. 1005, 1006 (2015) (describing the Court’s current statutory jurisdiction as almost entirely discretionary).

33. Although the constitutional text does not specifically authorize the Court to invalidate legislation, Federalist 78 so contemplates, see THE FEDERALIST NO. 78, *supra* note 28, at 525, and the Court assumed that to be the case as early as 1796. See *Hylton v. United States*, 3 U.S. 171, 172 (1796) (assuming the existence of a power to declare legislation unconstitutional).

34. 5 U.S. 137, 177 (1803). That task is complicated by the fact that the Constitution is “one of enumeration, and not of definition,” as Chief Justice Marshall said in *Gibbons v. Ogden*. 22 U.S. 1, 72 (1824). “[T]he extent of the powers actually granted . . . will probably continue to arise, as long as our system shall exist.” *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). As Chief Justice Rehnquist noted in *United States v. Lopez*, “[t]he Constitution mandates this uncertainty [concerning the extent of the commerce power] by withholding from Congress a plenary police power that would authorize the enactment of every type

degree of exaggeration 150 years later, “that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”<sup>35</sup> As a practical matter, few would now doubt that judicial review for constitutionality is a fundamental part of our law.<sup>36</sup>

Less clear to many people is what the Supreme Court actually does—or should do—when it reviews the constitutionality of legislative or executive action and thereby discharges its duty “to say what the law is.”<sup>37</sup> The Constitution does not expressly say what the Court should do, and even what the Court does in practice has long been contested. Over time, three archetypal models of judicial review have developed. The first is a “pure legal” model, in which judges are said to reason deductively from legal texts. The second is a “pure political” model, in which judges are thought to reach policy outcomes without feeling bound by legal texts. The third is an intermediate model, in which judges take seriously the commands of legal texts but necessarily make individual interpretive and consequentialist judgments when giving specific meaning to those texts in concrete circumstances. Although these models are somewhat over-simplified, they are nonetheless useful for present purposes. Of the three models, we think that the intermediate model, which we dub “principled discretion,” best captures both the ideal of the judicial task and the method that most judges probably follow in actually deciding cases.<sup>38</sup> Most

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of legislation.” 514 U.S. 549, 566 (1995).

35. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The Court’s assertion has often been criticized as self-aggrandizing and inaccurate. *See, e.g.*, Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?* 67 *LAW & CONTEMP. PROBS.* 105, 106 (2004) (reciting criticism).

36. Of course, not everyone thinks that judicial review is a good idea. *See, e.g.*, Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 *ILL. L. REV.* 673, 674 (2004). On a broader stage, commentators have suggested that other forms of judicial review may be preferable to the American form. *See, e.g.*, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *AM. J. COMP. L.* 707, 708 (2001) (suggesting that other forms of judicial review, particularly those used in Canada and other Commonwealth countries, may be preferable to the American model).

37. *Marbury*, 5 U.S. at 177.

38. Indeed, the “principled discretion” model may well describe the only way in which judges actually can decide cases. Joseph Vining has made this point in

important, at least for present purposes, we think that this model best reflects what the public believes that the Court does and should do. A brief description and discussion of the three models follows.

### 1. The “Pure Legal” Model

An early, formalist understanding of the judicial role posited that judges simply find or deduce law by applying preexisting rules and taxonomies to the specifics of a case to generate “correct answers.”<sup>39</sup> For example, Justice Owen Roberts once suggested that the Court’s “only one duty” in determining the constitutionality of a statute is “to lay the article of the Constitution . . . beside the statute . . . and decide whether the latter squares with the former.”<sup>40</sup> That model continues to exert

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a compelling way:

In fact, lawyers are notoriously misleading when they talk about law. They speak—we speak—constantly of rules, borrowing the language of physics, rules that carry with them a vision of discrete entities that can be manipulated logically, definitions that capture the phenomena they define, and intellectually coercive demonstration, from which the dissenter can escape only by accepting his own irrationality. Lawyers speak the language of rules, but when they engage in law and are observed to engage in law, their rules are nowhere to be found. There is only a vast surround of legal texts, from which they draw in coming to a responsible decision, what to do, what to advise, what to order, which responsible decision of their own they may cast in the form of a rule, just before it takes its place among competing statements in the great surround of texts upon which other lawyers are drawing.

Joseph Vining, *Theorists’ Belief: A Comment on the Moral Tradition of American Constitutionalism*, 72 NOTRE DAME L. REV. 15, 23 (1996).

39. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 26 (2002).

40. *United States v. Butler*, 297 U.S. 1, 62–63 (1936). According to Richard Fallon,

[C]ourts [sometimes] assert that value choices are never for them to make but are solely the domain of the political branches. However, protestations of this kind are simply not credible. Indeed, [such protestations may] signal that the court is about to implement a value choice so controversial that denial is easier than explanation.

Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1204 (1987). Indeed, as Professor Fallon notes, “[t]he essence of good judging lies in judgment.” *Id.* at 1223; see also Barry

some hold on the public imagination, in part, no doubt, because Supreme Court nominees routinely stress the straightforward nature of the work that the Justices do.<sup>41</sup> Chief Justice John Roberts famously observed at his confirmation hearing that legal interpretation is analogous to an umpire's work in calling balls and strikes,<sup>42</sup> and, although Justice Elena Kagan offered somewhat more nuanced testimony at her confirmation hearing, she

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Sullivan, *Just Listening: The Equal Hearing Principle and the Moral Life of Judges*, 48 LOY. U. CHI. L.J. 351, 366–70 (2016) [hereinafter Sullivan, *Listening*] (discussing decisional process). Justice Scalia observed that an “originalist” interpretation of the Constitution was desirable, not because it obviated the need for judgment, but because it required fewer judgments. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 856–57 (1989).

41. They undoubtedly do so in recognition of the awesome power inherent in the Court's duty to determine the constitutionality of legislation. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893) (arguing that courts should afford legislation a strong presumption of constitutionality and invalidate legislative enactments only when they are shown to be unconstitutional beyond a reasonable doubt).

42. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005). The metaphor may be inapposite in any event. See Jim Evans, *Sorry, Judges, We Umpires Do More Than Call Balls and Strikes: Calling A Game Requires Plenty of Interpretation*, WASH. POST (Sept. 7, 2018), <https://perma.cc/X8M6-CSP5> (last visited October 20, 2019) (detailing a professional umpire's critique of umpiring as metaphor for judging) (on file with the Washington and Lee Law Review); LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 37 (1989) (suggesting that judges may be “like [the] baseball umpire [who says] . . . ‘[t]here's balls and there's strikes and they ain't nothin' till I calls 'em’”). Morton Horwitz has reflected on the emergence of textualism and the disavowal of discretion:

A return to the traditional conservative emphasis on stare decisis hardly seemed sufficient, because the prevailing precedents were precisely what needed to be overthrown . . . . There thus began a search for some more fundamental source of authority that would permit a new majority to overturn the Warren Court precedents without itself being considered illegitimately “political.”

Morton J. Horwitz, *Foreword: The Constitutionality of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 35 (1993); see also Barry Sullivan, *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, 51 U.C. DAVIS L. REV. 1105, 1142 (2018) [hereinafter Sullivan, *Power*] (“What they actually mean to affirm is that the law is certain, and that absolutely correct answers to legal questions can be found through reason and logic. On this view, there is no need for interpretation, and the character, life experience, judgment, and imagination of the judge are irrelevant.”).



emphasized that interpretation involves “law all the way down.”<sup>43</sup> While that statement may well be true in some respects, depending on one’s understanding of “law,” it may also send a false or misleading message about legal certainty to lay people.<sup>44</sup>

Despite these public statements, belief in “mechanical jurisprudence” declined during the twentieth century.<sup>45</sup> The “scientific” approach to law celebrated in the late nineteenth century<sup>46</sup> gave way to a greater understanding that judges often have an opportunity to take policy considerations into account.<sup>47</sup> During this period, many scholars derided a “pure legal” approach to judging as impossible to execute and unlikely to yield “workable

43. The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 8, 103 (2010) (Testimony of Elena Kagan). In response to questions from Senator Kyl, Justice Kagan answered:

I think it’s law all the way down. When . . . parties come before the Court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is . . . what the law requires. Now, there are cases in which it is difficult to determine what the law requires. Judging is not . . . robotic . . . . A lot of [cases that get to the Court] are very difficult and people can disagree . . . . But it’s law all the way down, regardless . . . . [W]hat the judge does is to apply the law. And as I said, it might be hard sometimes to figure out what the law requires in any given case, but it’s all the way down.

44. See MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 8 (2013) (suggesting that Kagan “was making a subtle and pretty deep point: Law all the way down involves the exercise of judicial judgment”); see also LLOYD WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 50–51 (2d ed. 2016) (“A . . . distinctive feature of adjudication is that the court’s decision is to be based entirely on the law . . . . [N]o one doubts that a court is to look to those sources and nowhere else.”); PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 44–45 (1999) (“No matter how much legal scholars question the distinction [between applying the law and making new law], the rule of law as a social practice is bound to it. We can imagine a policy science that is wholly unbounded by the past, but it is not law’s rule.”).

45. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 16–19 (1992).

46. See *id.*

47. See, e.g., Barry Sullivan, *The United States Supreme Court: Empirical Studies and the Case of Oral Submissions*, Lecture Given for an Invitation of the Polish Constitutional Tribunal, Warsaw, 27.10.2015, at 72:12, in PANSTWO I PRAWO at 110 (2017) (discussing the opportunity that judges have to consider policy implications when making decisions).

and just result[s].”<sup>48</sup> Notably, the “legal model” that was debunked in the mid-twentieth century was something of a caricature—positing a transparent constitutional text from which deductively ascertainable results automatically flow.<sup>49</sup> A more realistic account of the “legal model” would acknowledge that judges are not reasoning deductively, but drawing on an array of sources including the most salient facts, the text of the applicable constitutional provision, original meaning, and case law to shape outcomes.<sup>50</sup> Nevertheless, the essential characteristic of the “legal model” of judging posits that the production of opinions involves only considerations *internal* to the law, narrowly defined, and even the most moderate understanding of this description of judging is thought by many to be unrealistic.<sup>51</sup>

## 2. The “Pure Political” Model

Many twentieth century critics began to call the legal model a “myth,” incapable of explaining, let alone predicting, case outcomes.<sup>52</sup> They claimed that the so-called “attitudinal” approach, which presumes that judges decide cases based on factors *external* to law, provides a better basis for understanding the Court’s work.<sup>53</sup>

The “attitudinalist” model contends that courts are not effectively constrained by law; that their decisions reflect personal preferences; and that, at least at the Supreme Court level, judges

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48. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 622 (1908).

49. See HORWITZ, *supra* note 45, at 18 (“While judges and lawyers of the nineteenth century clearly believed that there were identifiable bright-line boundaries . . . it is all too easy to caricature their position.”).

50. See SEGAL & SPAETH, *supra* note 39, at 388 (describing the new approach to the legal model). But that model would seem to be indistinguishable in fact from the “principled discretion” model.

51. See *id.* at 26 (describing the legal model as one that posits the existence of certain “correct answers” that result from the application of clear legal rules).

52. See John M. Scheb & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000) [hereinafter Scheb & Lyons I] (describing the legal model as a “myth”).

53. See SEGAL & SPAETH, *supra* note 39, at 88–97 (describing criticisms of the legal model).

“can . . . usually rule for either party within the boundaries of what most people would agree is reasonable judicial decision-making.”<sup>54</sup> Because law is infinitely malleable, judges are freed to follow political intuition without showing that they have disregarded law.<sup>55</sup> On this view, the Justices’ opinions are mainly the product of a pre-existing “interrelated set of beliefs about . . . the [types of] parties to the suit [and] the dominant legal issue[s].”<sup>56</sup> Some scholars also claim that judicial decisions are better explained by judicial “ideology” and judicial outcome bargaining than by

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54. ERIC SEGALL, ORIGINALISM AS FAITH 6 (2018).

55. See SEGAL & SPAETH, *supra* note 39, at 88–97 (describing the appeal the attitudinalist approach has garnered among judges).

56. *Id.* at 86, 89–91. The attitudinalists assume that the Justices’ preexisting beliefs about how certain litigants and issues should be treated can be “ideologically scaled.” *Id.* Thus, the explanation for various Justices’ votes in a given case arises not from complicated legal doctrines, but from the “simple” fact that some Justices are “extremely conservative,” while others are “extremely liberal.” *Id.* Thus, when a Justice is identified as “conservative,” that is not because the Justice is an “originalist” or “textualist,” but because the Justice votes for case outcomes that align with “conservative” political preferences. *Id.* More recently, Neal Devins and Lawrence Baum have suggested the importance of the Justices’ respective “social identities,” which “lead them to seek approval and respect from individuals and groups that are important to them.” NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 147 (2019). In the case of the Justices, those individuals and groups whose respect they esteem are the elites to which the Justices belong, and to which they owe their positions. *Id.* at 148. According to Devins and Baum, “the strongest sources of influence on the Justices from outside the Court are the various elites with which the Justices are connected . . . . For this reason, the state of opinion among relevant elites at a given time can shape decision making by the Justices.” *Id.* Devins and Baum point to the increased political polarization among elites, suggesting that this increased polarization has had an effect, for various reasons, on both the selection and the performance of the Justices.

To a considerable degree, Supreme Court Justices have become part of this new polarized world. Justices increasingly come to the Court with strong ties to conservative or liberal elites, ties that they maintain as Justices . . . . Justices are like other Americans in that the circles of friends and acquaintances around them are more likely to have homogeneous ideological orientations than was true in prior eras. As a result, Justices are reinforced in the ideological tendencies that they bring to the Court [and] the ideological content of Justices’ votes and opinions is less susceptible to change than it was in the preceding period.

*Id.* at 151.

reference to legal texts or interpretive methodologies.<sup>57</sup> Thus, legal rules are incapable of explaining or predicting actual case outcomes.<sup>58</sup>

In this vein, two leading political scientists confidently declared in 2002 that the Justices' votes could be very simply explained: "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."<sup>59</sup> According to these political scientists, it is puerile to think that judges actually treat legal questions seriously as legal questions, at least in salient cases; they decide cases according to their personal or political commitments and then dress up their decisions in legal language after the fact.<sup>60</sup>

Although the attitudinalist approach has gained ground in many quarters,<sup>61</sup> it arguably oversimplifies the Court's work as much as the "pure legal" or mechanical model did.<sup>62</sup> The

57. See, e.g., PIONEERS OF JUDICIAL BEHAVIOR 6 (Nancy Maveety ed., 2002) (asserting that judicial decisions are better explained by judicial ideology). Indeed, Supreme Court expert Gregory Caldeira has said that no political scientist "would take plain meaning, intent of the framers, [or] precedent as good explanations of what the justices do in making decisions." John M. Scheb & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 182 (2001) [hereinafter Scheb & Lyons II] (quoting Gregory Caldeira, *Review: The Supreme Court and the Attitudinal Model*, 3 L. & POL. BOOK REV. 98, 98–100 (1993) (book review)).

58. See Scheb & Lyons I, *supra* note 52, at 929 (contending that ideology explains judges' decisions much more than legal rules).

59. SEGAL & SPAETH, *supra* note 39, at 86.

60. Some political scientists maintain that the Justices are merely "dressing their actions in . . . legalistic trappings" when they explain their decisions in those terms. See RORIE SPILL SOLBERG & ERIC N. WALTEBURG, *THE MEDIA, THE COURT, AND THE MISREPRESENTATION: THE NEW MYTH OF THE COURT 2* (2014) (citing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE 8* (1998)). But others have begun to acknowledge that judges are *not* pure politicians any more than they are pure legal technicians: "[M]ost scholars recogniz[e] that judging at the level of the Supreme Court involves a complicated blend of legal, policy, and ideological considerations." James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC. REV. 195, 198 n.7 (2011). Still, they suggest that this complexity eludes "the vast majority of the American people," who "hold simplified views of judging, views that can be adequately captured by a rough continuum bounded by [mechanical jurisprudence] on one end and realism on the other." *Id.* at 196.

61. See Caldeira, *supra* note 57, at 98–100.

62. See Carolyn Shapiro, *The Context of Ideology: Law, Politics, and*

attitudinalists are certainly right to note that text, precedent, and original intent will not lead ineluctably to undeniably “correct” results in very many cases.<sup>63</sup> But they have been less effective in describing the factors that *do* lead judges to decide cases as they do. For example, some scholars have pointed out that the ostensibly crucial determinants of judicial decision-making in the attitudinal model—values, attitudes, policy preferences, and ideology—have not been fully defined or theorized.<sup>64</sup> Nor is it clear whether “values,” “policy preferences,” and “ideology” are rhetorical variants meant to describe the same concept, or distinct influences that can be measured separately.<sup>65</sup>

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*Empirical Legal Scholarship*, 75 MO. L. REV. 79, 82 (2010) (arguing that the attitudinal model and its “rational choice” variant “at best ignore and at worst reject any role for law in Supreme Court judging” and presume that “the ideological nature of each case can be characterized along a single liberal-conservative dimension”). That assumption is highly questionable, as demonstrated, for example, by the alignment of Justices Stevens and Scalia in *Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that Congress’ Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law); *id.* at 33 (Scalia, J., concurring) (writing separately but concurring in the judgment).

63. See Sullivan, *Power*, *supra* note 42, at 1141 (“[W]e yearn for a world in which law is certain and transparent and unencumbered by the need for interpretation. While that is not our world, it seems to give us comfort to think it is.”); JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW 97 (1985)

It is not a defect but a merit of our system that judges are acknowledged to have discretion, that legal questions are seen as open and difficult . . . . It is the aim of our law not to obliterate individual judicial judgments . . . but to structure and discipline them, to render them public and accountable.

See also Thomas S. Morawetz, *The Epistemology of Judging: Wittgenstein and Deliberative Practices*, 3 CAN. J.L. & JURIS. 35, 59 (1990) (noting that judges “are constrained individually by a particular way of addressing and understanding interpretive questions and they are constrained collectively by the fact the shared practice embraces a limited range of ways of proceeding,” which “is mutually understood and recognized”).

64. See, e.g., Joshua Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y 133, 136 (2009) (“[S]cholars use the term ‘judicial ideology’ in the absence of any widespread agreement or clear understanding as to what the term means in the first place.”).

65. See Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 261–65 (1996) (discussing the various methods that scholars use in attempting to measure the political preferences of judges).

The difficulty of defining one of these concepts—ideology—illustrates the problem. Indeed, as John Gerring has noted, “it has become customary to begin any discussion of ideology with some observation concerning its semantic promiscuity.”<sup>66</sup> In the field of judicial review, “ideology” could be understood to describe purely exogenous considerations such as a judge’s partisan affiliation or her issue outcome preferences.<sup>67</sup> On the other hand, it could be understood to describe her preferred interpretive methodology, which some would consider endogenous to law, while others would describe it as exogenous.<sup>68</sup> This definitional ambiguity also complicates the search for a workable method for measuring the influence of ideology on judicial behavior.<sup>69</sup> If ideology were defined in terms of factors exogenous to the legal process, for example,<sup>70</sup> those factors presumably could be identified and measured by examining markers such as the Justices’ political statements, involvement in party politics, or advocacy of particular political positions in their pre-judicial careers.<sup>71</sup> If ideology were defined in terms of factors endogenous to the legal process, such as commitment to various interpretive schools, that factor could also be identified and

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66. John Gerring, *Ideology: A Definitional Analysis*, 50 POL. RES. Q. 957, 957 (1997).

67. *See id.* at 958 tbl. 1 (“We may speak of an individual’s total ideology or of his ideology with respect to different areas of social life; politics, economics, religion, minority groups, and so forth.” (quoting THEODOR ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* 2 (1950))).

68. *See id.* (“[Ideology is t]he reflection of process and structure in the consciousness of those involved—the *product*—of action.” (quoting Herbert McClosky et al., *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361, 362 (1964))).

69. *See* Fischman & Law, *supra* note 64, at 159 (stating that before deciding on an approach for measuring judicial ideology, one must first “arrive at a substantively satisfying definition of ideology”).

70. The choice of interpretive technique problem demonstrates the fundamental nature of the definitional issue. An attitudinalist might consider a Justice’s choice of interpretive technique as a marker of exogenous ideology, but others would view that choice as necessary and wholly endogenous to the process of legal interpretation. *See infra* notes 95–112 and accompanying text.

71. *See* Epstein & Mershon, *supra* note 65, at 263–65 (listing the various approaches that scholars have used to measure political preferences, including extracting values from pre-nomination speeches).

measured.<sup>72</sup> But the scholarship generally does not identify which of these factors is indicative of “ideology,” and it does not suggest a method for weighing them.<sup>73</sup> Instead, the discipline has widely adopted what can only be characterized as a blunt instrument: a measurement scheme based on confirmation-stage characterizations of the Justices as “conservative” or “liberal” in the editorial pages of four national newspapers.<sup>74</sup> This measurement scheme generates a “score” for each Justice, by which his or her “ideology” can be compared with that of his or her colleagues.<sup>75</sup>

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72. See, e.g., Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2012–2013) (discussing commitment to precedent).

73. Although difficult to classify as purely legal or purely political, weight might also be given to factors such as the Justice’s geographic, cultural and professional background, his or her personal values, or his or her understandings of professional values and standards. See, e.g., James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 166–74 (2003) (“A number of studies have shown a significant association between judicial voting patterns and certain personal or professional background factors . . .”). Attitudinalists wishing to debunk the extreme legal in favor of the extreme political sometimes overlook the elusive role of “personal judgment.” See, e.g., Fischman & Law, *supra* note 64, at 141 (acknowledging that law and politics need not be mutually exclusive and that judges have freely admitted a role for personal discretion and judgment). In fact, some have rejected outright the view that judging can be non-mechanical and still involve a good-faith effort to give relevant contemporary meaning to the constitutional text and jurisprudence. See, e.g., SEGAL & SPAETH, *supra* note 39, at 52 (rejecting attitudinalist Herman Pritchett’s late-in-life conclusion that the political model had gone awry when it ignored the possibility that judges used personal calibrations to balance legal and political considerations).

74. See SEGAL & SPAETH, *supra* note 39, at 204 (“To determine perceptions of a nominee’s qualifications and judicial philosophy, we use a content analysis from statements in newspaper editorials from the time of the nomination until the Senate voted.”). The newspapers are the “liberal” *New York Times* and *Washington Post* and the “conservative” *Chicago Tribune* and *Los Angeles Times*. *Id.*

75. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989). Notably, Segal and Cover acknowledged that editorial writers are imperfectly positioned to measure such things as judicial philosophy and partisanship, that they are likely to be most interested in a nominee’s positions on civil liberties issues, and that their scores likely reflect attitudes on matters relevant to only a limited portion of the Court’s docket. See Epstein & Mershon, *supra* note 65, at 263–65 (“Segal and Cover explicitly recognized that their measures are not broad-gauged surrogates for all attitudes but supply a reasonable evaluation of preferences over civil liberties and rights issues.”). Notwithstanding these limitations, their

In reality, the simplest and most extreme versions of both the legal and political models fail to fully explain judicial behavior. But both are grounded in accurate observations about judicial practice. As we explain below, the legalists' claim that judges genuinely honor the authority of relevant texts has merit, but so does the attitudinalists' claim that judges often exercise individual judgment when dealing with vague words or phrases. Expecting either model to fully capture the dynamics of responsible judging is somewhat unrealistic.<sup>76</sup> A "principled discretion" model of judicial review, in contrast, acknowledges that successful judging cannot wholly reject dynamics outside the law any more than it can reject internal dynamics.

### 3. The "Principled Discretion" Model

Many Americans undoubtedly think of constitutional interpretation as simple and straightforward, even mechanical, and they may well suppose that any difference of opinion among the Justices must be the result of judicial incompetence or bad faith, adherence to political commitments, or personal bias.<sup>77</sup> That is hardly surprising. Many of the Justices' opinions employ a

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method is the most widely used measure of judicial ideology. A more recent method, the so-called Martin Quinn index, simply tracks individual Justice votes over time to show patterns of coalition and disagreement without specifically attempting to score the Justices ideologically. See Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. COLLOQUY 143, 144 (2007) ("The method does not pay attention to what the case was about; the method itself has nothing to do with politics or ideology (or, for that matter, law)."). This derivation of "ideology" is especially circular for purposes of measuring the extent to which the press depicts the Court as political in its news pages, given that the same publication predicting a Justice's ideology before he takes the bench then has the opportunity to confirm that prediction when it depicts his work on cases.

76. See PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 8 (1982) ("My typology of constitutional arguments is not . . . the only plausible division of constitutional arguments. The various arguments illustrated often work in combination.")

77. See, e.g., Scheb & Lyons II, *supra* note 57, at 185 tbl. 1 (reporting that 85.1% of people surveyed believed that ideology impacted Supreme Court decisions, while 69.9% believed that partisanship did).



rhetoric of certainty, strongly suggesting that no reasonable person could have reached a different conclusion.<sup>78</sup> Seldom does one now encounter the kind of honest admission—that the problem is indeed a difficult one—that Justice Jackson famously made in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>79</sup> In addition, most students of constitutional law would doubtless agree with Justice Owen Roberts that the normal first step in determining the constitutionality of a statute would be to lay the two texts side-by-side, but few would describe the entire process of constitutional interpretation in that way.<sup>80</sup> Indeed, the Court often considers the constitutional text in great detail, even if it sometimes gives short shrift to seemingly relevant constitutional language.<sup>81</sup>

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78. See, e.g., Erwin Chemerinsky, *A Failure to Communicate*, 2012 B.Y.U. L. REV. 1705, 1715 (2012)

In dissenting opinions, Justice Scalia describes the majority's approaches as "nothing short of ludicrous" and "beyond the absurd," "entirely irrational," and not "pass[ing] the most gullible scrutiny." He has declared that a majority opinion is "nothing short of preposterous" and "has no foundation in American constitutional law, and barely pretends to." He talks about how "one must grieve for the Constitution" because of a majority's approach. He calls the approaches taken in majority opinions "preposterous," and "so unsupported in reason and so absurd in application [as] unlikely to survive." He speaks of how a majority opinion "vandaliz[es] . . . our people's traditions."

See also Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2D 215 (2015).

79. 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring)

Just what our forefathers did envision [with respect to executive power], or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result. . . . And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

80. See, e.g., Fallon, *supra* note 40, at 1244 (noting that arguments from text are entitled to the greatest weight, but seldom unambiguously point to a single result).

81. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 12 (1890) (criticizing the Court in *Chisholm v. Georgia*, 2 U.S. 419 (1793), for being "more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage"); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 100–02 (1996) (Souter, J., dissenting) (advancing original meaning interpretation of Eleventh Amendment); SEGALL, *supra* note 54, at 134

In some cases, the founders used words that are open-ended and sufficient to convey a general idea or principle, without necessarily commanding a particular result. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,<sup>82</sup> for example, Justice Frankfurter pointed to “the imprecision of . . . many . . . provisions of the Constitution dealing with . . . vital aspects of government,”<sup>83</sup> a feature that he did not think the result of “chance or ineptitude.”<sup>84</sup> On the contrary,

[g]reat concepts like “[c]ommerce . . . among the several States,” “due process of law,” “liberty,” “property” were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded the Nation knew too well that only a stagnant society remains unchanged.<sup>85</sup>

In this respect, the law of the Constitution necessarily changes, as Chief Justice Rehnquist acknowledged in *United States v. Morrison*,<sup>86</sup> when he observed that “our interpretation of the Commerce Clause has changed as the nation has developed.”<sup>87</sup> In

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[Justice Souter, t]he only Justice . . . who ever [analyzed] the original meaning of the text [in detail] . . . persuasively demonstrated that there is no evidence [that those] who ratified the Eleventh Amendment would have interpreted it to block federal question lawsuits against states brought by [its] citizens . . . .

In addition, in the case of heavily litigated provisions, the disputed issue may focus on the proper reading of prior jurisprudence to the point that the underlying textual provision receives little or no specific attention. *See, e.g.*, Brittany Boatman, *United States v. Jones: The Foolish Revival of the “Trespass Doctrine” in Addressing GPS Technology and the Fourth Amendment*, 47 VAL. U. L. REV. 677, 681–83 (2013) (discussing the dominance of jurisprudence in Fourth Amendment analysis).

82. 337 U.S. 582 (1949).

83. *Id.* at 646 (Frankfurter, J., dissenting).

84. *Id.*

85. *Id.*; *see also* *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Frankfurter, J.)

Due process of law . . . conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. . . . The real clue . . . is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of “inclusion and exclusion.”

86. 529 U.S. 598 (2000).

87. *Id.* at 607.

addition, the constitutional text is far from single-minded or univocal.<sup>88</sup> For example, the Constitution seeks to ensure security while also promoting liberty, and to ensure energy in the executive while also investing Congress with the resources necessary to resist executive tyranny.<sup>89</sup> Insofar as individual rights are concerned, the Constitution purports to protect numerous interests and values that often conflict in practice.<sup>90</sup> The circumstances of any particular case may therefore require the courts to prioritize individually recognized interests and values, but the text of the Constitution offers no certain hierarchy for doing so.<sup>91</sup>

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88. See BOBBITT, *supra* note 76, at 12 (“[E]ven in the brief records we do have [of the Constitutional Convention], we encounter the phenomenon of delegates urging the adoption of the same language for dissonant purposes.”).

89. Of course, specific rights are protected both in the text of the original Constitution and in the Bill of Rights. See, e.g., U.S. CONST. art. I, § 9 (habeas corpus); *id.* art. III, § 3 (proof of treason requirements); *id.* amend. IV (freedom from unreasonable searches); *id.* amend. V (due process of law). In addition, many of the framers thought that the very structure of the Constitution, particularly those provisions meant to give effect to the concepts of federalism and the separation of powers, were sufficient to protect individual liberty, and that no bill of rights was therefore necessary. Thus, Hamilton wrote in Federalist 84: “The truth is, after all the declamations we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” THE FEDERALIST NO. 84, at 581 (Alexander Hamilton) (Jacob Cooke ed., 1961). In his view, the Constitution, “founded upon the power of the people, and executed by their immediate representatives and servants,” is “a better recognition of popular rights than volumes of those aphorisms” that are found in bills of rights. *Id.* at 578–79. See also U.S. CONST. art. I–III; *id.* amend. X (establishing three separate branches of government and limiting the powers of the federal government). The Constitution establishes the three great departments of the federal government, but it sketches out the executive and judicial branches in only the broadest strokes; it leaves Congress to fill in the details, while the courts must then decide whether Congress’s gloss is consistent with the constitutional framework. Once again, the text provides only limited guidance. See, e.g., *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) (“A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power.”); *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) (“The great ordinances of the Constitution do not establish and divide fields of black and white.”).

90. See, e.g., Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1056 (1981) (“The various provisions of the Constitution reflect a multitude of values.”).

91. For example, one person’s constitutional right to the free exercise of religion may conflict with another person’s freedom of speech or freedom to marry,

Alternatively, the disputed point may involve a problem that earlier generations could not have anticipated because it is a problem uniquely ours—one made possible because of technological, scientific, or social changes that have occurred in the intervening years.<sup>92</sup> Thus, as Justice Jackson noted in *West Virginia Board of Education v. Barnette*,<sup>93</sup> “the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.”<sup>94</sup> One need only contemplate such innovations as modern telecommunications or thermal imaging.<sup>95</sup> The founders could not have anticipated all of the constitutional questions engendered by such developments because they could not have anticipated the developments themselves.<sup>96</sup>

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and the application of the establishment clause may well conflict with that of the free exercise clause. *See, e.g.*, Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 89 (1990) (seeking to find a middle ground between free exercise and establishment clauses—seemingly “clashing or divergent value systems” in a “battle of interpretation”). *See also* Tom Gjelten, *In Religious Freedom Debate, Two American Values Clash*, NPR (Feb. 28, 2017, 4:47 AM), <https://perma.cc/PEG3-ZMED> (last visited Oct. 4, 2019) (discussing how two core American values—freedom of religion and freedom from discrimination—collided in courts) (on file with the Washington and Lee Law Review). Similarly, laws that protect one person’s right to speak may conflict with another person’s property interest. *See, e.g.*, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding state law recognizing peaceful expressive activity on private property in certain circumstances); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (upholding private shopping center’s prohibition of handbill distribution when distribution was possible on public property); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (upholding the rights of individuals to distribute religious materials in company town).

92. *See, e.g.*, *Riley v. California*, 573 U.S. 373, 385 (2014) (addressing how the search incident to arrest exception to the Fourth Amendment should apply to “modern cell phones”).

93. 319 U.S. 624 (1943).

94. *Id.* at 639.

95. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (requiring a warrant for non-trespassory monitoring activities within a dwelling through thermal imaging).

96. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (requiring a warrant to wiretap a public phone booth); Sandalow, *supra* note 90, at 1060

The possibility of mining definitive answers from constitutional text is further limited by the inherent inadequacy of language. Madison recognized this fact in Federalist 37, where he wrote that “[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>97</sup> Indeed,

no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. . . . [H]owever accurately objects may be discriminated in themselves, . . . the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.<sup>98</sup>

Much of the challenge for constitutional interpretation arises not from any judicial propensity to proceed without appropriate regard for the relevant text, but from the text’s understandable failure to answer the precise question presented, and, thus, the felt need to consult additional interpretive aids.<sup>99</sup> Moreover, the

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The reality of our tradition . . . has not been to determine the meaning of the Constitution by reference to the sense originally intended to be put into it, but rather for the sense which can be quarried out of it. The “quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the new light of what was originally unforeseen.”

(quoting KARL LLEWELLYN, *THE COMMON LAW TRADITION* 374 (1960)).

97. *THE FEDERALIST* NO. 37, at 236 (James Madison) (Jacob Cooke ed., 1961).

98. *Id.* Madison noted that even God has difficulty making his meaning clear when required to communicate in human language. *See id.* (“When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.”); *see also* *McCulloch v. Maryland*, 17 U.S. 316, 414 (1819)

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. . . . [A word gains meaning from its connection] with other words. . . . [I]n its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

99. *See* BOBBITT, *supra* note 76, at 38 (“More important, in a Constitution of

constitutional text does not prescribe any particular method for interpreting its provisions; and most judges would undoubtedly acknowledge the need for individual judgment, albeit one disciplined by the requirements of principled decision-making and adherence to recognized professional standards.<sup>100</sup> Judges are not

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limited powers what is *not* expressed must also be interpreted.”). In addition, the nation’s circumstances and problems have changed dramatically since the drafting of the Constitution, the Bill of Rights, or even the Civil War Amendments. *See supra* notes 92–96 and accompanying text.

100. *See, e.g.,* Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 165 (2016)

A judge is a member of a political institution. He must constantly safeguard the conditions of his own legitimacy by respecting past precedents and norms of decision-making. On a multimember court, he must negotiate with others who may not share his substantive or methodological commitments. For a judge, theories of interpretation cannot and do not exist apart from theories of adjudication.

*See also* POWELL, *supra* note 31, at 119 (“Under our practices . . . questions of constitutional meaning are questions of law, to be resolved through the forms of legal argument.”); Morawetz, *supra* note 63, at 59 (Judges “are constrained individually by a particular way of addressing and understanding interpretive questions and they are constrained collectively by the fact that the shared practice embraces a limited range of ways of proceeding”); David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1801 (2009) (reviewing RICHARD POSNER, *HOW JUDGES THINK* (2008))

[T]he observation that in [most] cases judges of different political stripes, genders, religions, races, ages, and experience all reach the same conclusion might be seen as the important point if one were to describe how judges think most of the time, instead of how appellate judges think a little bit of the time in uncertain cases.

Max Bloom, *The Supreme Court Still Knows How To Find A Consensus*, NATIONAL REVIEW (June 29, 2017, 4:00 PM), <https://perma.cc/4HUG-CLJA> (last visited Oct. 16, 2019) (noting that in a typical, recent term, “[o]ver half of the [the Supreme Court’s] cases were unanimous, and only 14% were decided by a 5–3 or 5–4 split.”) (on file with the Washington and Lee Law Review). *See also* Paul H. Edelman, David Klein & Stefanie A. Lindquist, *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129 (2012) (concluding that Supreme Court consensuses cannot be explained by ideology alone); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 770 (2015) (noting that most significant cases often result in 5–4 decisions and that Chief Justice Roberts views such decisions as making it “harder for the public to respect the Court as an impartial institution that transcends partisan politics”); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 283 (2007)

When John Roberts acceded to the position of Chief Justice . . . , he stated that one of his top priorities was to reduce the number of

free to do whatever they want.<sup>101</sup> They necessarily exercise individual judgment, but they do so within a tradition—an area circumscribed by precedents, acknowledged conventions, and common craft values.

There are several recognized interpretive approaches that a particular judge may favor, either generally or as an appropriate method for tackling particular kinds of constitutional issues. Philip Bobbitt has identified five of them: historical arguments (based on the intent of those who drafted and ratified the relevant provision), textual arguments (based on the present sense of the words of the Constitution), structural arguments (based on the structure of the Constitution and the relationships it creates between citizens and the government), prudential arguments (based on the courts'

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dissenting opinions. . . . Roberts believes dissent is a symptom of dysfunction. This belief is shared with many justices past and present, the most famous [being] John Marshall, who squelched virtually all dissent during his 35 years as Chief Justice. One of their arguments is that dissent weakens the Court by exposing internal divisions publicly.

101. Precedents may be overruled, for example, but most judges would insist that there must be a very good reason for doing so. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law . . . requires such continuity over time that a respect for precedent is . . . indispensable.”); *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (Kennedy, J.) (“[*Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision.”); *id.* at 378 (Roberts, C.J., concurring) (“[*Stare decisis*’s] greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more damage to this constitutional ideal than to advance it, we must be more willing to depart from that precedent.”). When precedents are overruled,

[T]here is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

*Anastasoff v. United States*, 23 F.3d 898, 905 (8th Cir.) (Arnold, J.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000). In other words, the principle of *stare decisis* carries great weight, but it is ultimately a matter for judicial discretion or judgment, and not, as Senator Susan Collins recently stated in explaining her vote in favor of Justice Kavanaugh’s confirmation, a constitutional command. *See* Abigail Abrams, *Sen. Susan Collins’ Full Speech About Voting to Confirm Kavanaugh*, TIME (Oct. 5, 2018), <https://perma.cc/B92S-Y8QS> (last visited Oct. 16, 2019) (on file with the Washington and Lee Law Review).

self-conscious institutional needs), and doctrinal arguments (based on precedent and academic commentary on precedent).<sup>102</sup>

But these approaches are simply illustrative. For example, Justice Scalia professed to be primarily interested in the meaning that the words of the text conveyed when they were adopted.<sup>103</sup> In some cases, he also looked to long-standing governmental practice<sup>104</sup> and he clearly recognized the practical importance of adhering to precedent.<sup>105</sup> He was not interested in “textual or “historical” arguments, at least insofar as Bobbitt understood those terms.<sup>106</sup> On the other hand, Justice Breyer is interested, not just in the words of a particular provision, but in why the provision was adopted, in what its drafters meant to accomplish, and in what the practical consequences might be of adopting one or another

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102. BOBBITT, *supra* note 76, at 7. Bobbitt calls these approaches “archetypes” because “many arguments take on aspects of more than one type,” and, in fact, “these five types are not all there are.” *Id.* Other scholars might describe them in different terms. *See, e.g.,* Fallon, *supra* note 40, at 1189–90 (describing forms of argument in different terms).

103. *See* Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. PUB. POL’Y 1, 1 (1989)

Many, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the historical background in which they were adopted. For example, the phrase “due process of law” would have meant something quite different to a sixteenth-century Tahitian from what it in fact meant to an eighteenth-century American.

(footnotes omitted) (quoting U.S. CONST. amend. V).

104. *See* Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1945–46 (2017) (discussing Justice Scalia’s view that longstanding and uncontested governmental practice should be regarded as essentially conclusive).

105. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–39 (Amy Gutmann ed., 1997) (“Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.”); Barrett, *supra* note 72, at 1711 (discussing respective views of Justices Scalia and Thomas on *stare decisis*). *See also* Frank H. Easterbrook, *Foreword to ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxv (2012) (discussing Justice Scalia’s acceptance of the Fourteenth Amendment incorporation theory as a matter of precedent).

106. *See generally* SCALIA, *supra* note 105 (discussing the manner in which he approached statutory and constitutional interpretation); Scalia, *Originalism*, *supra* note 40 (examining Chief Justice Taft’s originalist approach).



plausible interpretation.<sup>107</sup> Justice Breyer also believes that “active liberty” is the central value of the Constitution, and that the text should always be read with that value in mind.<sup>108</sup> Justice Brennan, on the other hand, thought that human dignity was the central value of the Constitution, and that the text should be read with that value in mind.<sup>109</sup>

The Justices also approach the process of interpretation from various theoretical perspectives that may be relevant to specific parts of the Constitution. For example, some Justices have thought that the anti-discrimination principle of the Fourteenth Amendment is predominantly an anti-classification principle, whereas others have thought that the anti-discrimination principle is mainly an anti-subordination principle.<sup>110</sup> In the area of separation of powers, some Justices have approached problems from the standpoint of formalism, while others have taken a more

107. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 856–57 (1992) (discussing the utility of legislative history when the text of a statute does not answer the question facing the court).

108. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5–6 (2006) (“My thesis is that courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts. . . . In a word, my theme is democracy and the Constitution. I illustrate a democratic theme—‘active liberty’—which resonates throughout the Constitution.”).

109. See, e.g., Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223, 223–24 (1998) (discussing the centrality of human dignity for Justice Brennan throughout his time on the Court). See also Barry Sullivan, *Prophesy, Public Theology, and Questions of Justice: Some Modest Reflections*, 50 LOY. U. CHI. L.J. 45, 55–56 (2018) (noting that Justice Brennan followed Justice Murphy in this regard). Later Justices, especially Justice Kennedy, have made the concept of human dignity central to their constitutional jurisprudence. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 1039, *passim* (2015). It should be emphasized, however, that none of the Justices’ judicial work can fully be explained in terms of their reliance on only one form of constitutional interpretation, whatever their judicial and extra-curial protestations to the contrary might be. They all resort to various interpretive techniques in actually deciding cases. See, e.g., SEGALL, *supra* note 54, at 122 (showing that the opinions of Justices Scalia and Thomas cannot be explained solely in terms of their professed commitment to originalism).

110. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1477 (2004) (providing an overview of how the law of equal protection is affected according to whether the equal protection clause is understood to serve either anti-subordination or anti-classification purposes).

functionalist approach.<sup>111</sup> Similarly, the Justices may approach questions of presidential power from the perspective of “presidentialist” theory or that of pluralist theory.<sup>112</sup>

It seems inevitable that the Justices will have their own understandings of the various parts of the Constitution, how those parts fit together, what the text settles and does not settle, the rules that properly should be applied in ascertaining the meaning of the Constitution, what materials should be consulted in interpreting the Constitution, and how those materials should be weighed when they point in different directions.<sup>113</sup> When the meaning of the Constitution appears self-evident to most of the Justices, none of these understandings will matter.<sup>114</sup> But often, as Justice Breyer has said, “[L]egal questions that reach the Supreme Court are difficult, uncertain, and close ones.”<sup>115</sup> When that is the case, different interpretive methods and considerations may point

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111. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983). Chief Justice Burger’s majority opinion in *Chadha* provides a strong formalist argument, while Justice White’s dissent is an excellent example of the functionalist approach. See also FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 30–35 (2009) (observing that judicial “formalism” operates to discourage judges from making discretionary decisions that challenge the primacy of legislative power).

112. See e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring) (arguing that nonliteral separation-of-powers questions should be resolved in light of the need for a “workable government”).

113. See, e.g., *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion of Rehnquist, J.)

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would not be merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

114. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 54 (2012) (“But more often the language is not plain and unambiguous, so that to figure out its meaning, the implicit process of interpretation . . . must be made express.”).

115. Stephen G. Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 *YALE L.J.* 1999, 2013 (2011).

to different results, and that will require the making of judgments about the relative relevance and strengths of those interpretive strategies, and, ultimately, the development of some means of harmonizing or prioritizing methods and results.<sup>116</sup> The inescapable role of judges is to evaluate the possible solutions to legal problems that have no incontrovertibly correct answer and to choose amongst them, not incarnating their personal and political preferences, but exercising professional judgment and justifying their choices according to professional standards and values.<sup>117</sup> The Court's ultimate answer to a particular question will necessarily depend on the terms in which the question is argued by the parties and their lawyers, the understandings of the individual Justices, the ways in which the individual Justices view the issues presented, and the ways in which the individual Justices communicate with each other about their respective understandings of the law of the Constitution and of the issues presented in the case at bar.<sup>118</sup> In addition, that "ultimate answer" will necessarily be provisional by definition.<sup>119</sup>

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116. See Fallon, *supra* note 40, at 1190 ("The commensurability problem is to show how arguments of all of these various kinds fit together in a single, coherent constitutional calculus."). Professor Fallon posits a case in which arguments in two categories point in one direction, but arguments in the other three point in a different direction. *Id.* at 1191. He continues: "Should arguments in one or more of the categories necessarily have taken precedence? Was some sort of balancing required, and, if so, what sort? Or was the problem of the best arguments in different categories yielding opposite results somehow false or illusory?" *Id.* at 1191. These questions are "among the most important in constitutional law." *Id.*

117. See SEGAL & SPAETH, *supra* note 39, at 49 ("[I]t is law—and not the personal politics of individuals judges—that controls judicial decision making . . ." (internal quotations omitted)).

118. See Breyer, *supra* note 108, at 8 ("But the fact that most judges agree that these basic elements—language, history, tradition, precedent, purpose, and consequence—are useful does not mean they agree about just where and how to use them."). Whatever a Justice's predispositions or understandings might be, it is important, as a normative matter, that he or she listen carefully, honestly, and with an open mind to the arguments that are made, both by the lawyers involved in the case and by his or her colleagues on the Court. See Sullivan, *Listening*, *supra* note 48, 355–58 (2016); Sullivan & Canty, *supra* note 32, at 1005 (discussing the public perception (and professional norm) that judges should take seriously what they hear, engaging rigorously and respectfully, reflecting on the issues presented in a case as seriously as they would if their personal interests were at stake).

119. See, e.g., Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.*

Strongly contested cases raise an important question in the minds of the American public: How can it be that different Justices reach different conclusions? Are they simply calling balls and strikes according to a clear “legal” rulebook?<sup>120</sup> Or are they simply voting according to their personal and political preferences?<sup>121</sup> Many commentators have indicated that these mutually exclusive propositions are the only ones that can supply the answer to this singularly important question. We do not think that that is the case. On the contrary, we think that a third possible explanation—one that acknowledges the complexities of constitutional interpretation on its own terms—is more accurate descriptively and more desirable normatively. But our judgment in that regard is beside the point. More important is the fact that most Americans seem to prefer this model of judicial review to the oversimplified extremes that have often dominated press coverage and popular discourse.

*B. The Process of Interpretation: Public Understanding and Public Support*

Scholarly perceptions of what the Court does or should do seem far less important for present purposes than what the public believes is—and should be—the case. After all, it is ultimately the public that has the greatest power to approve or disapprove the Court’s performance in the long term. To assess whether public confidence in the Court is contingent on the public’s perception that the Court follows any one of the three models of judicial decision-making described above, one must first establish that the public understands the various ways of describing the Court’s work and appreciates the differences amongst them. Only then can one

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1365, 1366 (1997) (“Readings of the Constitution change. This is the brute fact of our Constitutional past. The Constitution is read at one time to mean one thing; at another to mean something quite different.”).

120. See Scheb & Lyons II, *supra* note 57, at 183 (“The myth of legality holds that . . . judges should make their decisions on the basis of nonpolitical factors.”).

121. See *id.* (“‘Crude legal realism’ . . . implies a belief that judges make their decisions on the basis of overly political factors: partisanship, justices’ ideologies, public opinion, and the influence of Congress and the president.”).

ask which model the public prefers, and whether it will extend or withdraw its loyalty to the Court on that account.

### 1. Public Understanding

In recent decades, academics have attempted to ascertain the public's preferred modes of judicial decision-making.<sup>122</sup> Much of this literature maps onto the scholarly "law-or-politics" debate concerning the most appropriate model of judicial review.<sup>123</sup> Consequently, many studies are designed to measure whether Americans understand the Court to be a "pure law" institution or a "pure politics" institution; whether they prefer a "legal" or "political" model of judicial review; and whether they perceive a gulf between their preference and the Court's actual performance of its adjudicatory function.<sup>124</sup> The studies are designed in a way that generally does not present their informants with the alternative of a "principled discretion" model as such. Nevertheless, reading the studies closely, and drawing inferences from the results, suggests that Americans not only appreciate the difference between legal decision-making and political decision-making, but that they understand (without disapproving) that the Court often decides cases using a mode of decision-making that draws on both.

For example, two-thirds of Americans polled by Gregory Casey in 1974 (the year after the Supreme Court's controversial decision in *Roe v. Wade*<sup>125</sup>) indicated their belief that the Court's "main job" is to act as either a "legal" institution or as an institution devoted to deciding "unresolved questions" in American society.<sup>126</sup>

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122. See, e.g., Scheb & Lyons I, *supra* note 52, at 928 (investigating the extent to which the public subscribes to the "myth of legality"). See also Casey, *supra* note 4, at 393 (discussing the ways in which the public may view the Supreme Court).

123. See, e.g., Casey, *supra* note 4. See also Scheb & Lyons II, *supra* note 57, at 183 (considering only legality and "legal realism").

124. See, e.g., Scheb & Lyons II, *supra* note 57 at 183 (indicating that their study was designed to determine whether the public believes that the Supreme Court should make its decisions based on legal or political factors).

125. 410 U.S. 113 (1973).

126. Casey, *supra* note 4, at 393. Some 39% of respondents said the Court's

Moreover, respondents who indicated that the Court's job was to do "law," also said that they understood "law" not as a "static" system, but as a "dynamic and adaptive" one.<sup>127</sup> That is, they seemed to appreciate that some conflicts could be decided in a rule-based fashion, by consulting precedent or the founders' intent, while others might require more flexible strategies.<sup>128</sup> Thus, Professor Casey's respondents appeared to conceive of judicial decision-making as proceeding on the basis of "pure law," where possible, or on an adaptive approach that may take additional considerations into account where emerging questions are beyond the purview of dispositive legal texts.<sup>129</sup> Another 30% identified the Court's role as "policymaking," which was defined as "openly and visibly making political decisions and exercising social choices comparable to Congress."<sup>130</sup> In other words, the Casey study suggests that the public is at least conversant with all three possible models of judicial review.

The public's apparent understanding of these various approaches to judicial review was underscored in a 2001 study that presented the study respondents with a menu of possible factors thought to drive judicial decisions, including founders' intent, precedent, "public good" (judges' personal views of what is good for the public when the Constitution is silent), ideology (defined as "whether judges are liberals or conservatives"), party affiliation, and the preferences of the political branches or the public.<sup>131</sup> Most

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task was linked to the Constitution, the law, and the practice of law, while 30% of respondents indicated that the Court's job was to be a final arbiter of "unresolved questions." *Id.* at 393–95.

127. *Id.*

128. *Id.* at 394.

129. *Id.*

130. *Id.* at 395–96.

131. Scheb & Lyons I, *supra* note 52, at 932. Founders' intent was mentioned by 93.8% of respondents as an element that should have some or a large impact on Court decisions; precedent by 85.4%; and public good by 73.5%. Scheb & Lyons II, *supra* note 57, at 185 tbl. 1. Both of the Scheb and Lyons works cited were based on the same underlying survey and dataset, although the authors presented the data somewhat differently in each piece. See Scheb & Lyons I, *supra* note 52, at 932 tbl. 1; *cf.* Scheb & Lyons II, *supra* note 57, at 184 tbl. 1. Precedent was mentioned by 89.7% as actually having some or a large impact on Court decisions; ideology by 85.1%; public good by 80.0%; and framer intent by 77.9%.

respondents selected founders' intent, precedent, and public good as the most appropriate drivers of judicial decisions.<sup>132</sup> Only 27% of respondents said that partisanship *should* have some or a large impact on the Court's work.<sup>133</sup> These results echo the Casey study, and suggest that the public discerns a genuine difference between decision-making guided exclusively by legal commands, decision-making following legal commands but integrating individual beliefs and experiences, and decision-making designed solely to facilitate external political goals.<sup>134</sup> In addition, 70% of respondents reported thinking that, even though ideology should play no role in decision-making, it actually *did* have either some or a large impact.<sup>135</sup> One might infer from these results that a majority of the public understands that the Court may not always act strictly in accord with public preferences for decision-making, and that disfavored factors might sometimes drive judicial decisions. However, because a majority identified "legal" drivers as appropriate and "partisan" drivers as inappropriate, it stands to reason that most respondents would be less offended by a "mixed" model that gave greater weight to legal factors than political ones.<sup>136</sup> This raises the possibility that the judiciary may forfeit its

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132. Scheb & Lyons I, *supra* note 52, at 932.

133. Scheb & Lyons I, *supra* note 52; *see also* Scheb & Lyons II, *supra* note 57.

134. *See* Casey, *supra* note 4, at 393. To be sure, inferring from these studies that the public fully appreciates the differences amongst "pure law," "pure politics," and "principled discretion" models—and has discernable preferences amongst them—is somewhat challenging. That is the case, at least in part, because of the terminology that was used in the survey instruments. Researchers do not clearly define "ideology," "partisanship," or the differences between them. Consequently, the extent of public tolerance for extralegal factors influencing judicial decision-making is hard to assess. It does appear, however, that the public understands that there is a distinction to be drawn amongst beliefs, values, and party affiliation. And the public seems to believe that each of those factors exerts a different influence on the Court. For example, in surveys conducted in 2005–2006, Gibson and Caldeira found that about 57% of those polled agreed that judges take individual *beliefs* into account. Gibson & Caldeira, *supra* note 60, at 207. About 48% agreed with the proposition that political values influence judicial decision-making, while only 39% seemed to think that party affiliations influence decision-making. *Id.* Notably, only about 2% of respondents seemed to think that judges engaged only in pure legal deduction. *Id.*

135. Scheb & Lyons II, *supra* note 57, at 185.

136. *See id.* (showing that the majority of respondents preferred court decisions based on legal drivers opposed to partisan or ideological drivers).

necessary, but largely intangible, legitimacy, if the public suspects that it has veered too far towards the “pure political” model.

## 2. Public Support

Alexander Hamilton suggested as early as 1788 that public confidence in the Court was a necessary precondition if judges were to review (and possibly invalidate) legislation adopted by the political branches.<sup>137</sup> That is the case because the Court operates, in many practical ways, at the sufferance of the political branches, and, ultimately, the people.<sup>138</sup> Congress funds the Court and determines the scope of its appellate jurisdiction,<sup>139</sup> while the President controls the hard power that must occasionally be deployed to compel adherence to the courts’ orders.<sup>140</sup> Consequently, those branches have some leverage to exert if they are displeased with the Court’s decision-making, subject, of course, to further objection by the public. When, at least in recent times,

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137. See THE FEDERALIST NO. 78, *supra* note 28, at 522–24 (discussing the judicial department and the need for judicial independence).

138. See *id.* at 523 (“The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”).

139. See, e.g., Eugenia Froedge Tona, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 146 (1991) (“Congress signals its overall approval or disapproval of the Court’s direction through budgetary allocations.”); *Daniels v. Rock Island R.R. Co.*, 70 U.S. 250, 254 (1865) (“[I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law.”). Congress also determines the size of the Court, and the Senate passes on the acceptability of nominees for the Court. See, e.g., Judiciary Act of 1869, ch. 22, 16 Stat. 44 (setting the full complement of Supreme Court Justices at nine).

140. See, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 752–54 (1975) (discussing President Eisenhower’s apparent reluctance to support and enforce desegregation after the Court’s decision in *Brown*); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 497–98 (2018) (discussing President Eisenhower’s eventual position that “all Americans” have a “solemn duty” to comply with court orders); JOEL WILLIAM FRIEDMAN, CHAMPION OF CIVIL RIGHTS: JUDGE JOHN MINOR WISDOM 147–78 (2009) (discussing the Kennedy Administration’s actions to enforce court orders requiring the admission of James Meredith to the University of Mississippi).



the political branches have been tempted to use that power to dilute or curtail the Court's authority, an American public loyal to the Court has opposed those efforts.<sup>141</sup>

Because the Court's power, as a practical matter, is arguably coextensive with the public's "loyalty" to the Court, Court-watchers have been tracking public attitudes towards the institution for some time; and they have more recently begun to ask what drives Americans towards or away from this branch of government.<sup>142</sup> While short-term "approval" of the Court tends to fluctuate in response to specific case outcomes, long-term "loyalty" to the Court tends to reflect impressions about how the Court more generally reaches decisions across multiple cases.<sup>143</sup> In other words, loyalty has been identified as correlating with perceptions of which decision-making model the Court uses.<sup>144</sup> Loyalty to the Court appears to intensify when the public believes that the Justices are deciding cases based on "pure law"; to hold steady when the public believes that the Justices are calling on abstract personal values in legal decision-making; and to decline when the public believes the Court is deciding cases solely to further the external goals of

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141. See, e.g., Barry Friedman, *"Things Forgotten" in the Debate over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 760 (1998)

[W]ith regard to the few techniques for controlling the judiciary with which the country has experimented [such as Court-packing and jurisdiction-stripping], history plainly shows a trend of gradual refutation by the body politic. Not only has the public gradually come to reject these strategies for controlling the courts, . . . (for what it is worth), no politician has profited in the long run from attacking the courts.

During the Court-packing controversy of 1937, Max Lerner observed (somewhat disparagingly) that the Court's power and legitimacy depended on the American public's naive belief that the Court "protected" the Constitution by exercising the power of judicial review without regard to politics. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1308–12 (1937). As Barry Friedman has suggested, the "give-and-take between the courts and the people is of the utmost consequence, for through it the substance of constitutional law is forged. . . . As judicial rulings respond to social forces, and vice versa, constitutional law is made." BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 384 (2009).

142. See Roger Handberg, *Public Opinion and the United States Supreme Court, 1935–1981*, 59 INT'L SOC. SCI. REV. 3, 10–11 (1984) (discussing the public's changing perception of the Court).

143. *Id.*

144. *Id.*

political organizations.<sup>145</sup> Of course, what the public believes the Court to be doing turns largely on what the media tells them that the Court is doing, as discussed in Part III below.<sup>146</sup>

Formal attempts to measure the public's response to the Court seem to have begun in earnest in the mid-twentieth century.<sup>147</sup> Those attempts have taken two primary forms: polling, which is thought to be effective at capturing contemporaneous approval for the Court's decisional output, and social science studies, which measure long-term, so-called "diffuse" loyalty to the Court as an institution.<sup>148</sup>

Although the Gallup poll first included a question about the Supreme Court in 1935, an annual measurement of public approval for the Court did not begin until the mid-1970s.<sup>149</sup> In early polling, support for the Court appeared to vary widely from year to year, as pollsters revised their questions in ways that apparently elicited fluctuating responses.<sup>150</sup> For example, in 1956 (not long after the Court's controversial decision in *Brown*), pollsters asked whether the Court was taking on more authority than the Constitution delegated, and 76% of respondents disagreed, suggesting a high level of support for the Court.<sup>151</sup> The following year, pollsters asked whether respondents trusted the Court more than Congress, and only 30% answered affirmatively, suggesting a low level of support that may be more attributable to the change in the framing of the question than to a sudden change in public sentiment.<sup>152</sup> Consequently, the early polls are not

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145. *Id.*

146. *See infra* Part III.

147. *See* Handberg, *supra* note 142, at 5 ("[N]ational surveys of attitudes toward the United States Supreme Court were sporadic until essentially the 1960s and 1970s.").

148. *See id.* (describing polling practices in the mid-twentieth century).

149. *Id.* at 10–11.

150. *See id.* at 10 ("[P]ublic evaluations of the Court are very volatile and subject to wide fluctuations, depending upon context.").

151. *Id.* at 6–9.

152. *See id.* at 9 (stating that the "wide swing" in results is related to question format—the 1956 question "was essentially a civics textbook type probe" and the 1957 question was "comparative" in nature). These superficially different numbers are likely less attributable to a sharp change in opinion about the Court than to a public intuition that although the Court had been acting within its

reliable indicators of public support for the Court. From the mid-1970s onward, however, the pollsters consistently have asked the same question about how much confidence respondents had in the Court, and these polls are therefore thought to track more reliably the upward and downward fluctuations in public confidence in the Court.<sup>153</sup> The percentage of respondents stating that they had “a great deal or quite a lot” of confidence in the Court plateaued at about 50% from 1997 to 2003.<sup>154</sup> Since then, it has fallen—hitting a low of 32% in 2008.<sup>155</sup> Although the level of expressed public confidence occasionally rose in the next eight years, it has never again exceeded 40%.<sup>156</sup> The AP-NORC General Social Survey (GSS) shows the same longitudinal decline in “confidence” for the Supreme Court between 1973 and 2013, with 31% of respondents reporting “a great deal of confidence” in the Court in 1973 and just 23% reporting the same level of confidence by 2013.<sup>157</sup> In 2013, 54% said they had only “some” confidence in the Court and 20% reported having hardly any, demonstrating the Court’s worst performance ever on the GSS to that date.<sup>158</sup>

Political scientists have contended, however, that falling poll results do not necessarily indicate a “crisis of confidence” in the Court.<sup>159</sup> Because the Court is designed to be a

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delegated authority in *Brown*, a legislative solution to school segregation might have been preferable. The fluctuations in the percentages of “supportive” responses from 1935 to 1957 (53%, 59%, 40%, 66%, 36%, 76%, and 30% for the sequence of polls during that period) likely reflect this phenomenon. Notably, once Gallup began asking standardized questions from year to year in 1963, the results could be more legitimately attributed to genuine changes in public support for the Court. From 1963 to 1969, the results from Gallup polls were uniformly in the 30s or 40s. *Id.*

153. CONFIDENCE IN INSTITUTIONS (2019), GALLUP ORGANIZATION, <https://perma.cc/258Z-5ZAW> (PDF). Notably, there are some minor discrepancies between Gallup’s summary of its polling history and Handberg’s summary of the same work during the same period.

154. *Id.*

155. *Id.*

156. *Id.*

157. Sofi Sinozich, *Public Opinion on the US Supreme Court, 1973–2015*, 81 PUB. OPINION Q. 173 tbl.6 (2017).

158. *Id.*

159. See, e.g., James. L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J.

counter-majoritarian institution, they explain, many respondents can be expected to object to some of the Court's decisions at any particular time.<sup>160</sup> In other words, spikes and valleys in "confidence" may well suggest that the Court is actually functioning as intended. More important than contemporaneous or short-term approval, political scientists suggest, is the public's long-term institutional loyalty or "diffuse support,"<sup>161</sup> which they define as "opposition to making fundamental structural and functional changes in the institution."<sup>162</sup> It is therefore more important for the public to be "loyal" to the Court than to have "confidence" in its decisions.<sup>163</sup> Such loyalty can serve to discourage the political branches from encroaching on the Court's authority by attempting to curb its jurisdiction or manipulating its composition.<sup>164</sup>

Over time, the public seems to have been quite "loyal" to the Court, and some research has indicated that this loyalty correlates with the public's perceptions about judicial behavior. As early as 1994, researchers found that public esteem for the Court was driven by the public's perception about whether the Justices were "neutral." When researchers asked about the Court's authority on the controversial issue of abortion, for example, they found that

[p]eople's views about whether the Court should be empowered to make abortion decisions were not related either to general agreement or disagreement with Court decisions or to judgment about the general fairness of Court decisions; rather, procedural fairness concerns predominated in judgments of whether the Court should be [so] empowered . . . .<sup>165</sup>

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POL. SCI. 354, 354–56 (2003) (stating that the existence of an actual "crisis of confidence in the Court" depends on whether "confidence [is] synonymous with institutional legitimacy," and on what is actually meant by having "only some' or 'hardly any' confidence in the leaders of an institution").

160. *See id.* at 359 (noting that substantial segments of society may disagree with specific Court decisions).

161. *Id.* at 356–59.

162. *Id.* at 358.

163. *See id.* at 358–59 (highlighting the "remarkably high level of loyalty toward the Supreme Court on the part of most Americans").

164. *See id.* (reporting that the majority of Americans "generally" trust the Court and would not choose to abolish it).

165. Tyler & Mitchell, *supra* note 6, at 770.

As to what the respondents meant by this concern with procedural fairness, the researchers found that

[t]he most significant component of procedural justice with regard to the Supreme Court involves perceptions of neutrality. Justices who are viewed as honest, impartial, and deliberative, basing their decision on case-relevant information, rather than as driven by political pressures and personal opinion, are performing legitimately in the eyes of the public.<sup>166</sup>

The study authors interpreted the respondents' affinity for "neutrality" as a general preference that "the law, not personal values and opinions, should drive outcomes."<sup>167</sup> They acknowledged that judicial adherence to this model is sometimes difficult, but observed that it was nevertheless "deeply rooted in our history and in our shared principles of political legitimacy."<sup>168</sup>

The public's disapproval of a "political" model of judicial review seems as strong as its approval of the "legal" model. In a 2001 study, researchers found that respondents with "hardly any" confidence in the Court were also deeply suspicious that the Court followed a "political" model of judicial review; only 21.3% of those who lacked confidence in the Court agreed with the statement that the "Court does *not* favor some groups," and only 21.2% of that group agreed with the statement that the "Court does *not* get too mixed up in politics."<sup>169</sup> Among those who had "a great deal" of confidence in the Court, 55.6% agreed with the statement that the "Court does *not* favor some groups," and 61.7% agreed with the statement that the "Court does *not* get too mixed up in politics."<sup>170</sup> This study therefore suggests a possible correlation between

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166. *Id.* at 786.

167. *Id.* at 788. The authors also noted that some theorists have linked "neutrality" to jurisprudential approaches that are understood to reflect policy orientations, but they specified that the definition of neutrality that they supplied to respondents was not designed to incorporate jurisprudential connotations of the word. *Id.*

168. *Id.* (quoting Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975)).

169. Gibson, Caldeira & Spence, *supra* note 159, at 362 tbl.6 (emphasis added). The table indicates that 179 respondents out of 1,418 had "hardly any" confidence in the Court.

170. *Id.* (emphasis added).

perceptions of politicization and loss of institutional loyalty to the Court.<sup>171</sup>

At the same time, it appears that the public may have a very specific and narrow understanding of what it means for the Court to be unacceptably “politicized.” The same researchers found in a later study that support for the Court was highest “among those . . . asserting that [the political views of the Justices] are relevant” and among those who assert that, “judges are not simply politicians in robes.”<sup>172</sup> These results, the researchers surmised, indicated a distaste for Justices who “describe their decisionmaking processes in insincere ways.”<sup>173</sup> In other words, they concluded that, “support for the Court is not damaged by acceptance of [the attitudinal model], but support depends upon seeing judges as different from ordinary politicians, in part because, unlike politicians, they are principled in their decisionmaking.”<sup>174</sup>

In other words, although the public might strongly prefer that the Court act in a mechanistically “legal” fashion, it seems to accept that where textual sources do not provide a clear answer, the Justices must resort to principled discretion, and employ policy- or value-infused interpretive tools. What the public rejects as inappropriate “judicial” behavior appears to be “pure political” activity marked by group-favoring, outcome-oriented decision-making analogous to that of the political branches but hidden behind claims of neutrality.

In short, social science research has raised the possibility that public loyalty to the Court is linked to the public’s perceptions about which decision-making model best accounts for its decisions. And because public perceptions of the Court are heavily influenced by journalistic depictions of its work, it stands to reason that whether journalists frame the Court’s work as consistent with a “legal” or “principled discretion” decision-making model—or as one that is “purely political”—will have implications for public loyalty to the institution. In other words, press linguistics matter; they

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171. *Id.* Notably, even among those with little confidence in the Court, 70.4% reported that they would not do away with the Court if given the opportunity.

172. Gibson & Caldeira, *supra* note 60, at 209.

173. *Id.*

174. *Id.* at 209, 210 tbl.1.

have the potential to influence the Court's standing with the public.

### *III. Media Depictions of the Supreme Court*

Most Americans learn about the Court primarily through news coverage. Press depictions of the Court's decision-making processes therefore have the power to inform the public about whether the Court is following legal commands, political convictions, or some combination of the two. For this reason, public loyalty to the Court may well be influenced by choices that journalists make in the way that they cover this least visible branch of government.

#### *A. Media Coverage of the Court: A Crucial Conduit*

Americans typically know far less about the Supreme Court than they do about the political branches of the national government.<sup>175</sup> And the public's interest in the Court's work is uneven at best.<sup>176</sup> “[I]ndividual knowledge of how the Court works or who sits on the Court is minimal [and] most Americans fail to grasp the reach of the Supreme Court or how what the Court does might matter in their lives.”<sup>177</sup> This is not surprising for several reasons.

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175. See, e.g., ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR? 3 (1998) (noting that Congress and the president “are certainly the most visible and obviously political in our national government; they are also the two national institutions to which American citizens are linked directly by elections”). For example, a 2015 study by the Annenberg Public Policy Center indicated that 35% of Americans who knew that there are three branches of government could not identify the judiciary as one of those branches, and 15% thought that once the Court decided a case by a 5–4 vote, the matter would be sent back to Congress for reconsideration. ANNENBERG PUBLIC POLICY CENTER, 2015 *Constitution Day Civics Study*, <https://perma.cc/L22N-R8BT> (PDF).

176. See SLOTNICK & SEGAL, *supra* note 175, at 8–9 (distinguishing between “two publics that receive Supreme Court messages: a ‘continuous public’ (composed of attorneys, judges, law enforcement officers, and lawmakers) and a less attentive ‘intermittent public’”).

177. Tyler Johnson & Erica Socker, *Actions, Factions, and Interactions:*

Unlike members of the judiciary, the president and members of the legislative branch stand for election and undergo the public scrutiny that the electoral process necessarily entails.<sup>178</sup> These extended rituals (the duration of which has increased dramatically in recent years) provide “media-ready drama,” and serve to inform voters about candidate agendas that will presumably serve as the foundation for long-term governing, while simultaneously functioning as a kind of “entertain[ment].”<sup>179</sup> In contrast, federal judges obtain their posts by being nominated by the president and having their suitability for the position tested through Senate confirmation hearings. While these hearings are conducted in public, the rituals are far more compressed, are conducted solely by (and technically, for) senators, and tend to focus heavily on legal issues with little consideration of the nominees’ personalities, families, or lives.<sup>180</sup>

Further, only a small fraction of the Supreme Court’s work is done in the public eye. The Supreme Court does much of its work in the privacy of the Justices’ chambers or in the secrecy of the conference room.<sup>181</sup> Oral arguments—at least at the Supreme Court—are not televised, and only limited seating is available.<sup>182</sup>

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*Newsworthy Influences on Supreme Court Coverage*, 93 SOC. SCI. Q. 434, 439 (2012).

178. See, e.g., Daniel Sutter, *Media Scrutiny and the Quality of Public Officials*, 129 PUB. CHOICE 25, 25–26 (2006) (acknowledging that public officials are scrutinized by the media).

179. Todd A. Collins & Christopher A. Cooper, *Making the Cases “Real”*: *Newspaper Coverage of U.S. Supreme Court Cases 1953–2004*, 32 POL. COMM. 23, 23 (2015).

180. See Michael Evans & Shanna Pearson-Merkowitz, *Perpetuating the Myth of the Culture War Court? Issue Attention in Newspaper Coverage of U.S. Supreme Court Nominations*, 40 AM. POL. RES. 1026, 1027–29 (2012) (discussing the incongruity between the Court’s agenda and the issues focused on by the media). Concededly, the “personal” dimension of confirmation hearings has increasingly moved to the foreground. See, e.g., Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES, Sept. 27, 2018, at A1 (describing the 2018 testimony of Court nominee Brett Kavanaugh and witness Christine Blasey Ford about highly personal interactions as teenagers).

181. See generally Arthur Selwyn Miller & D. S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799 (1973).

182. See, e.g., Collins & Cooper, *supra* note 179, at 24 (discussing the Supreme



In addition, the practice of oral argument has developed in such a way that an understanding of what is being argued in a case generally depends, even in the case of lawyers in the audience, on having studied the written materials ahead of time; it is highly unlikely that a casual, lay observer would leave the courtroom with much understanding of what he or she had heard.<sup>183</sup> And most of the Justices, for a variety of reasons, traditionally have chosen to keep a low profile and seldom have given interviews.<sup>184</sup> Finally, the

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Court's resistance to the televising of oral arguments).

183. See, e.g., Sullivan & Canty, *supra* note 32, at 1020–33 (observing that the current form of oral argument, which affords counsel little opportunity to develop a narrative or coherent statement and is dominated by the Justices' comments, is not particularly accessible to those who have not read the written materials beforehand).

184. See *id.* This ethos seems to be shifting. For example, while Justice Kennedy was mocked in 1993 for giving a self-described “brooding” interview to the *Legal Times* hours before the judgment in *Planned Parenthood v. Casey* was announced, see, e.g., Terry Eastland, *The Tempting of Justice Kennedy*, THE AMERICAN SPECTATOR (1993), Justice Sotomayor has been lionized as “the people’s justice” for her willingness to pen a revelatory memoir and give supporting media interviews in 2013, see, e.g., David Fontana, *The People’s Justice?*, 123 YALE L.J. FORUM 447 (2014). In addition, Justice Ginsburg has become something of an icon of popular culture in recent years and has recently been the subject of two feature films. See, e.g., Robert Barnes, *The New Film “RBG” Reveals How Ruth Bader Ginsburg Became A Meme—And Why That’s So Surprising*, WASH. POST (May 3, 2018) (discussing Justice Ginsburg’s influence in popular culture). The Justices may have become more visible in recent years, but they still do little to aid the press or the public in developing an early understanding of their work product. Until the 1920s, the Court did not distribute written opinions on the day they were issued from the bench. Collins & Cooper, *supra* note 179, at 24 (citing JOE MATHEWSON, THE SUPREME COURT AND THE PRESS 149 (2011)). The Court still does not advise reporters in advance of decision day as to which opinions to expect and be prepared to cover. A Court employee prepares a summary or “syllabus” of each opinion, which is published at the time the opinion is announced, but the syllabi apparently are not formally reviewed by the entire Court, and, since 1906, all opinions have carried the warning that the syllabus “constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.” See J. David Kirkland, Jr., *Rethinking United States v. Detroit Timber & Lumber Co.*, 9 J.L.: A PERIODICAL LABORATORY OF LEGAL SCHOLARSHIP 98, 98 (2019). The virtual flood of important opinions at the close of the Term also leaves reporters with limited time to prepare in-depth coverage by deadline and news outlets have limited space to devote to the lengthy, multiple opinions that the modern Court often delivers. See Collins & Cooper, *supra* note 179, at 24; Johnson & Socker, *supra* note 177, at 436. In fact, the Court did not supply reporters with written copies of opinions on decision days until 1935. See Everette E. Dennis, *Another Look at Press Coverage of the Supreme Court*, 20

most public aspect of the Court's work—the issuing of opinions and other rulings—may actually be the most opaque. Even those citizens who are interested in the Court's work product may be stymied by opinions that are “difficult for the ordinary citizen to obtain or to understand.”<sup>185</sup>

The media therefore play a “vital” role in identifying for the public the most important aspects of what the Court is doing, and in translating judicial pronouncements into digestible narratives.<sup>186</sup> In doing that work, members of Supreme Court press corps, together with other members of the mainstream press, aspire to a norm of accuracy and objectivity.<sup>187</sup> But even journalists

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VILL. L. REV. 765, 770 (1974). Other constitutional courts take various steps to improve the media's and the public's understanding of their work. For example, the Canadian Supreme Court now issues summaries of its opinions in non-legal language, among other things. See *News Releases*, SUPREME COURT OF CANADA (Mar. 22, 2018), <https://perma.cc/6Q5H-U3LT> (last visited Oct. 20, 2019) (on file with the Washington and Lee Law Review). See generally SAUVAGEAU ET AL., *supra* note 1 (discussing the ways in which the Supreme Court of Canada seeks to improve press coverage of its decisions, including the institution of a “lock-up” period, in which reporters are given advance access to opinions under controlled conditions); Thomas Hochmann, *La Communication de la Cour Constitutionnelle Allemande*, ANNUAIRE INTERNATIONALE DE JUSTICE CONSTITUTIONNELLE 33-2017 (2018) (discussing some of the ways in which the Constitutional Court of Germany has sought to improve press coverage of its decisions). The Supreme Court of the United States has resisted innovations such as the “lock-up” period. See MATHEWSON, *supra*, at 365 (“[T]he Court continues to frown on a hoary proposal by the news media that they be granted advance reading time under secure conditions, a ‘lock-up’ to prepare to report decisions as they are announced from the bench.”).

185. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1538 (1996) [hereinafter Greenhouse, *Story*].

186. See generally Johnson & Socker, *supra* note 177, at 434. The same is doubtless true in other countries as well. See, e.g., SAUVAGEAU ET AL., *supra* note 1 (Canada); Anat Peleg & Bryna Bogoch, *Removing Justitia's Blindfold: The Mediatization of Law in Israel*, 34 MEDIA, CULTURE & SOC. 961 (2012) (Israel); Or Bassok, *Television Coverage of the Israeli Supreme Court 1968–1992: The Persistence of the Mythical Image*, 42 ISR. L. REV. 306 (2009) (Israel); Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, 33 LAW & SOC. INQUIRY 53 (2008) (Israel).

187. See, e.g., SOC'Y OF PROF. JOURNALISTS, CODE OF ETHICS (2014), <https://perma.cc/BL7H-6DNA> (PDF) (defining “ethical journalism” and encouraging its use “by all people in all media”); Greenhouse, *Story*, *supra* note 185, at 1548–51 (examining the personal values journalists hold and how those values influence their choices on what, and what not, to report).

who strive to comply with this norm necessarily are making choices about how to describe the Court's work. Scholars of political communications agree that most issues can be understood in a variety of ways. Consequently, choices about which institutional actions to cover, and how to describe the actions that are chosen for coverage, are really choices about which understanding of an issue to emphasize and which to de-emphasize.<sup>188</sup> In news coverage, these choices can take two forms—"agenda-setting" and "framing." Agenda-setting occurs at a high level of generality—in decisions about which stories to cover and which to ignore.<sup>189</sup> Framing occurs in the linguistic choices that journalists make in the writing and editing of particular stories.<sup>190</sup> This "framing" process has the capacity to promote "particular definitions and interpretations of . . . issues."<sup>191</sup> Consequently, frames can influence the attitudes and behaviors of news consumers, particularly where the audience lacks direct personal experience with the subject.<sup>192</sup>

Media framing occurs when journalists "select some aspects of a perceived reality and make them more salient in a communicating text," leading the reader to interpret the cause of the event in a particular way.<sup>193</sup> Journalists, whether inadvertently or not, frame information in a way that influences

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188. See, e.g., Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 104 (2007) (examining how slight changes in the presentation of an issue can produce changes of opinion in regard to that issue).

189. See Dietram A. Scheufele, *Framing as a Theory of Media Effects*, 49 J. COMM. 103, 107 n.3 (1999) (explaining the differences between "agenda setting" and "framing").

190. See *id.* at 105 ("Mass media actively set the frames of reference that readers or viewers use to interpret and discuss public events."). Some political communications scholars blur or collapse the distinction between agenda-setting and framing.

191. Chong & Druckman, *supra* note 188, at 106 (quoting D.V. Shah et al., *News Framing and Cueing of Issue Regimes, Explaining Clinton's Public Approval in Spite of Scandal*, 66 PUB. OP. Q. 339, 339–70 (2002)).

192. See *id.* at 109–10 (examining the effects of frames in communication on individuals); Catherine Happer & Greg Philo, *The Role of the Media in the Construction of Public Belief and Social Change*, 1 J. SOC. POL. PSYCH. 321, 326–28 (2013) (examining the impact of media content on public belief and attitudes).

193. Scheufele, *supra* note 189, at 107.

the reader's understanding when they construct "patterns in the arrangements of words or phrases"; when they "impose a causal theme on their news stories, either in the form of explicit causal statements [or in linking] observations to the direct quote of a source"; and when they make rhetorical or "stylistic choices . . . in relation to their intended effects."<sup>194</sup> In Supreme Court coverage, journalists do not typically "frame" when they report the outcome of the parties' dispute. As a general matter, this information is fairly binary; there is little descriptive latitude available in reporting which party won. However, journalists do have considerable framing latitude in describing how the Court exercised its power to decide the case.<sup>195</sup> The journalists' syntactic, thematic, and rhetorical choices can depict the Court as an institution that is primarily legal, primarily political, or necessarily more complex.<sup>196</sup> In these descriptions, they are

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194. *Id.* at 111.

195. See Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 J. POL. 676, 680–81 (2003) (identifying "partisan, legal, and election" as potential frames for that opinion).

196. Of course, journalistic choices about which Supreme Court events should be covered also influence public understanding about the institution. These choices operate on an "agenda-setting" level to identify for the public the *scope* of the Court's work. Studies indicate that over time the press has moved from treating *all* of the Court's work as newsworthy per se to covering only a select portion of the Court's work, typically focusing on cases involving socially divisive issues such as civil rights, speech rights, and criminal procedure. According to Collins & Cooper's 2015 study of four major national newspapers, aggregate coverage of Court cases declined from 1953 to 2004. Collins & Cooper, *supra* note 179, at 30. From 1954 to 1968, more than 98% of argued cases received some coverage. *Id.* From 1968 to 1980, however, the pattern of universal coverage began to deteriorate, with a downward slope of two percentage points a year. *Id.* From 1980 to 2004, the decline in coverage grew steadier and more pronounced, with a four-percentage point per year downward slope. *Id.* Further, the press has historically found cases involving civil rights and civil liberties "coverage-worthy," along with speech cases, criminal justice, and privacy. *Id.* In contrast, judicial power and tax cases are rarely covered. *Id.* at fig. 2. Undeniably, agenda-setting choices that suggest the Court's docket is full of culturally divisive issues contributes to a public perception of the institution as political. However, this Article focuses on framing choices that have the capacity to influence the public's understanding of the tools and craft values that the Court draws upon in reaching its decisions.

conveying to readers a “perceived reality” about how the Court exercises its decision-making power.<sup>197</sup>

How journalists frame their explanations of the Court’s work can dramatically influence the public’s understanding of the institution and their support for it. In a recent study, researchers have shown that reader support for the Justices’ work rises when journalists represent the Court as legally motivated and fall when they represent it as politically motivated.<sup>198</sup> That study involved presenting readers with one of several dummy news articles describing a Court opinion on the constitutionality of an anti-terror law that gave sweeping new powers to law enforcement.<sup>199</sup> Two versions of the story reported that the Court upheld the law, while two versions reported that it struck down the law as unconstitutional; within each outcome pair, one story described the Court’s decision-making in legalistic terms, while the other described the same outcome in political terms.<sup>200</sup> The respective characterizations were shown to influence the respondents’ views of the Court’s actions.<sup>201</sup> The researchers found that

receiving information that [J]ustices bargain and compromise produces more negative evaluations of Court procedures relative to when the process is portrayed as guided largely by legal factors. The results lend strong support for the notion that there is an important link between how the media covers Court decision-making and public perceptions and evaluations of the institution.<sup>202</sup>

However, the researchers further investigated the question whether it “is . . . the presence of legalism or the absence of

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197. Scheufele, *supra* note 189, at 107 (“To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation.”).

198. Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media’s Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCH. 597, 605 (2006).

199. *See id.* at 599–601 (describing the design and measures of the experiment).

200. *Id.*

201. *Id.* at 603.

202. *Id.*

political processes that matters for people's fairness evaluations."<sup>203</sup> The researchers concluded that the

[r]espondents who perceived that [J]ustices largely followed legal procedures are much more likely to evaluate the process as fair compared to those who did not perceive legal procedures to be predominant in the deliberations, independent of the outcome. Perceptions that [J]ustices bargain and compromise, however, do not have a significant negative impact on assessments of procedural fairness . . . . [S]ubjects reward the Court for its perceived legalism but do not punish it when it is perceived to bargain and compromise.<sup>204</sup>

In other words, "it is not so much the perceived *absence* of political wrangling among [J]ustices but . . . the *presence* of legal guidelines [that drives] . . . the perception of fairness."<sup>205</sup> What appears crucial to public support is the public's perception that the Court is drawing on law foremost, and political intuitions only secondarily, to resolve the disputes before it.<sup>206</sup> So, the mere mention of politics is not fatal to public support.<sup>207</sup> On the other hand, public loyalty seems to be jeopardized when the media depicts the Justices as simply eschewing law in favor of politics.<sup>208</sup> The researchers concluded that, "if the media were consistently to portray the Court as a site of political bargaining and compromise, we might expect a decline in public support for the institution over time."<sup>209</sup>

### *B. Media Framing of the Court and Its Work: The Known and the Unknown*

Given the social science literature indicating that news reporting has the potential to influence the public's attitudes toward the Court, researchers have begun to examine how the

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203. *Id.* at 604.

204. *Id.* at 605.

205. *Id.* at 597 (emphasis in original).

206. *Id.* at 603.

207. *Id.* at 605.

208. *See id.* at 607 (highlighting how public perception of the Court is influenced by media coverage of judicial processes).

209. *Id.*

press frames its accounts of the Court's work. While ambitious, these studies have thus far shed only a limited amount of light on the subject, in part because the studies have sought to understand whether coverage is "political," but not whether the political has drowned out the legal. Because research indicates that the *presence* of legal narrative is more important than the *absence* of political narrative in terms of creating public perceptions of the Court, studies that do not compare the relative weight of each narrative may be conceptually incomplete.

For example, one comprehensive eight-year study of daily newspaper coverage of the Court was explicitly designed to determine whether coverage was "political" or "apolitical," and concluded that it was the latter.<sup>210</sup> However, the study was premised on an assumption that legal and political explanations of the Court's work were mutually exclusive.<sup>211</sup> Therefore, the coding scheme called for every paragraph of coverage containing one or more coded words to be designated as either political or apolitical, even when the paragraph contained words representing both concepts.<sup>212</sup> By utilizing this characterization on a paragraph basis at the coding stage, rather than coding in a more granular fashion, the study aimed at determining whether Supreme Court framing was legal *or* political, without entertaining the possibility that it could be both, and, moreover, that both aspects might appear in the same paragraph. Further, because the study covered a relatively short timeframe, it did not attempt to determine how coverage conventions might have changed over time. Finally, some of the words that were included in the coding bore a fairly loose or inconclusive relationship with the concepts they were meant to identify, raising the possibility that the study may have identified as "legal" coverage some language that did not actually explain the Court's decision-making as a product of law-based reasoning.<sup>213</sup>

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210. See Nicholas LaRowe, *On and Off the Supreme Court Beat: A Content Analysis of Newspaper Coverage of the Supreme Court from 1997–2004*, APSA 2010 ANN. MEETING PAPER 26 (2010) ("[T]he Supreme Court is in fact described and discussed as an apolitical institution . . .").

211. *Id.* at 9–16.

212. *Id.* at 14.

213. For example, the "legal" words included references to laws and constitutional provisions, but not to precedent. Further, the author coded as

A more recent study, which reviewed articles in the *New York Times* from the 1950s to the 2000s, asked whether “political” framing had increased over that period.<sup>214</sup> The study confirmed anecdotal suspicion that in recent years the press has increasingly employed political language in its descriptions of the Court’s work.<sup>215</sup> Between 1950 and 1959, the *Times* referred to some Justices as “conservative” only twice and to others as “liberal” just six times, whereas the paper referred to some Justices as “conservative” 107 times, and to others as “liberal” 62 times, between 2000 and 2009.<sup>216</sup> Similarly, references to the presidents who appointed individual Justices appeared just 38 times from 1950 to 1959, but 76 times in coverage from 2000 to 2009.<sup>217</sup> The study effectively documents an increasing incidence of political framing at the *Times*.<sup>218</sup> However, while this inquiry was premised on the somewhat incomplete theory that “political” descriptions of the Court, without more, are damaging to the Court’s public support,<sup>219</sup> research actually suggests that the public does *not* withdraw support for the Court simply because it perceives that political factors may have entered the decisional mix. Rather,

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“legal” verbs that described the Court’s mechanisms for acting, such as rule, affirm, certiorari, uphold, and strike down. *Id.* at 12. These words do not convey any information about whether the Court’s decision resulted from legal factors, so counting them as “legal” descriptions of the Court’s work may be unwarranted and may weaken the soundness of the author’s finding that the media’s depiction of the Court is more often “legal” than “political.”

214. Jones, *supra* note 10, at 619. And while *New York Times* references to 5–4 decisions rose during the fifty years studied, the upward trend was consistent with the steady rise in the issuance of such closely divided decisions by the Court. *Id.* at 626–27, 626–27 figs. 6 & 7. On the other hand, while the Court’s percentage of unanimous opinions rose almost 10% during the fifty years studied, the percentage of articles that mentioned unanimity declined during that same period from about 2% to about 1%. *Id.* at 627–28, 627–28 figs. 8 & 9.

215. *Id.* at 629.

216. *Id.* at 621–22.

217. *Id.* at 624.

218. *See generally id.* Because it was restricted to a single newspaper’s coverage of the Court’s changing docket, however, the validity of its insights may be somewhat limited. *See id.* at 616 (explaining that the case study is limited to the *New York Times*). For example, it does not account for the possibility that one newspaper might have a distinctive or unique approach to reporting on the Court.

219. *See id.* at 617 (suggesting politicized explanations for Court decisions erode public faith in the Court).



research shows that support declines when the decisional mix is shown to have inflated the significance of politics in a way that crowds out consideration of law. Consequently, the rise of political framing is significant *only* if it comes at the expense of legal framing.

This question—whether political framing crowded out legal framing—has been investigated in a project that tallied the relative frequency of legal and political references in wire service coverage.<sup>220</sup> Although the project was ambitious in conception, the significance of its results was somewhat limited by the researchers' coding protocol. Specifically, the words and phrases that researchers selected to capture "legal" framing of the Court's decision-making tended to be terms of art used at the trial stage of litigation, and were therefore unlikely to capture "legal" explanations for the decision-making of an appellate court.<sup>221</sup> Moreover, the words and phrases that the researchers used to capture "political" framing excluded many potentially significant ones, such as "liberal," "conservative," "Democrat," "Republican," "president" / "appoint" / "party."<sup>222</sup> Accordingly, although this study attempted to assess the relative weight given to the "legal" and "political" frames in the *Associated Press's* coverage of the Court, the validity of its conclusions may be limited by the study design.<sup>223</sup>

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220. See Johnson & Soeker, *supra* note 177 (examining all *Associated Press* coverage of the Court from 1979 to 2006).

221. See *id.* at 444 n.4 (listing "legal" words used in the study). The "legal" words included several that were unlikely to arise in news coverage of the Court—some by virtue of their being obsolete or outdated, and others by virtue of their greater relevance to trial-level proceedings: affidavit, arraignment, bail, caseload, case file, chambers, hearsay, high bench, in camera, inculpatory, marble temple, pro tem, pro se, robes, tort, and the like. *Id.*

222. *Id.* at 444 n.5.

223. That said, the study found no steady upward or downward pattern in "legal" linguistics during the relevant period. See *id.* at 455–56, 456 tbl.3 (presenting the data collected regarding the use of legal and political language). Nor was there a discernable trajectory for "political" linguistics. *Id.* Further, although the study tracked both "political" and "legal" framing, it did not explicitly compare the relative strength of the political and legal frames within stories or Court terms. A third study—often relied on by political scientists who claim that journalists frame the Court's work legally—also features a problematic design that limits its reliability. Rorie L. Spill & Zoe M. Oxley, *Philosopher Kings or Political Actors? How the Media Portray the Supreme Court*, 87 JUDICATURE 22,

Social scientists have suggested that public loyalty to the Court correlates with the public's perceptions about how the Court reaches its decisions.<sup>224</sup> According to these studies, the public's view of the Court remains positive so long as law appears to be a primary driver, but destabilizes when ideology and political calculation appear more influential.<sup>225</sup> Further, studies demonstrate that media narratives have an important influence on the public's understanding about the factors that play a role in judicial decision-making.<sup>226</sup> But there is little information available on whether media narratives are mainly pitched towards the legal or the political, and there is even less information available on whether the direction of those narratives has changed over the past several decades. It is difficult to apply social science insights about the link between public perceptions of the Court's decision-making process and public loyalty to the institution without having information about what frames the press has actually used in recent history. All things considered, has the press depicted the Court as doing law first, and politics second? Or has it depicted the institution as privileging politics and relegating law

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25 (2003). There, researchers coded television and newspaper stories on a single (unnamed) Court case for references to case facts, case outcome, vote breakdown, history of issue, and the Court's "justifications" for its decision. *Id.* According to the researchers, only two-thirds of the stories discussed the Court's justification for its outcome. *Id.* at 27. Although the study coded the Constitution, a statute, legal precedent, legislative history, the Justices' ideologies, the Justices' personal viewpoints, founder intent, and literalism as potential justifications, researchers did not tally how many references to each of those justifications appeared within any given story. *Id.* Instead, they reported only that the leading justifications mentioned were the Constitution and a statute, with "few" mentions of ideology or precedent. *Id.* While one could infer from this summary that journalists framed the opinion as a product of "legal" decision-making, the brevity of the discussion, the lack of detailed numerical findings, and the researchers' failure to compare the incidence of references to each of the coded justifications provide some basis for questioning the utility of these findings.

224. See generally Baird & Gangl, *supra* note 199 (studying the impact of media reports concerning the Court's processes on public perceptions of the Court); Gibson & Caldeira, *supra* note 60 (proposing that public perceptions of the Court may be influenced by the model of judicial review that they believe the Court's members follow).

225. Baird & Gangl, *supra* note 199, at 607.

226. *Id.*; see Spill & Oxley, *supra* note 223 (discussing newspaper and television coverage of the Court and its impact on the public).

to a secondary role? And has that depiction changed over time? In Part IV, we present the results of our study, which was designed to investigate that question.

#### *IV. The Evolution of Media Framing in Supreme Court Coverage*

Our study attempts to assess the relative emphasis that journalists have placed on legal and political explanations for Supreme Court decision-making over a recent fifty-year period. We do so by comparing the print-press coverage of two somewhat similar, highly significant civil rights cases that were decided a half century apart: *Brown v. Board of Education* and *Parents Involved v. Seattle School District No. 1*. The two cases involved variations of an important and highly controversial question: the constitutionality of racial classifications in pupil assignment, albeit in quite different contexts.<sup>227</sup> In *Brown*, the question presented was whether the Constitution prohibited the segregation of students by race, with the result that students of color were relegated to separate schools as a matter of law.<sup>228</sup> In *Parents Involved*, by contrast, the question was not whether school officials could take race into account for the purpose of assigning students to racially-segregated schools; the question was whether a large urban public school district could take some notice of race for the purpose of promoting racial balance within its various attendance districts.<sup>229</sup>

Our researchers pulled print media coverage of those cases from a variety of national and local newspapers. They tracked the

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227. The *Brown* case involved consolidated cases from Kansas, South Carolina, Virginia, and Delaware, all of which dealt with plaintiffs seeking admission to public schools on a non-segregated basis. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486–87 (1954). Notably, this case presented the opportunity to reevaluate the “separate but equal” doctrine that the Court announced in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Id.* at 488. The *Parents Involved* case involved the consolidation of cases from the Seattle, Washington, and Jefferson County, Kentucky (Louisville), school districts; both cases involved pupil assignment plans that depended in part on the use of racial classifications to maintain some degree of racial balance. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710 (2007).

228. *Brown*, 347 U.S. at 493.

229. *Parents Involved*, 551 U.S. at 711.

content of every story about the cases that appeared in those newspapers from the respective announcements of impending Supreme Court consideration to the announcements of the decisions. They then coded words describing the Court's decision-making process in both "legal" and "political" terms. Measuring the relative use of legal and political linguistics indicated whether the thematic "frames" presented to readers reinforced models of judicial review the public accepts as legitimate or those it rejects as illegitimate.

We found that the *Brown* journalists explained the Court's decision-making in legal terms almost twice as often as they did in political terms.<sup>230</sup> By contrast, the *Parents Involved* journalists relied on political terms to explain the Court's work almost as often as they relied on legal terms.<sup>231</sup> Based on these two cases, it seems that when it comes to press coverage of the Court's work, the legal frame that was decidedly dominant in the press coverage of *Brown* no longer is.<sup>232</sup>

### A. Study Design

The study was designed to compare Supreme Court coverage across two eras, namely, that of the "traditional" press and that of the "modern" press.<sup>233</sup> We wished to focus on a legal subject with broad public impact that was likely to be covered by the press and consumed by the public.<sup>234</sup> Because of limited resources and the lack of electronic databases for some newspapers—particularly,

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230. See *infra* Part IV.B.

231. See *infra* Part IV.B.

232. See *infra* Part IV.C.

233. See Katherine Fink & Michael Schudson, *The Rise of Contextual Journalism, 1950s–2000s*, 15 JOURNALISM 3, 13 fig. 1 (2014) (documenting a shift from "conventional," fact-based reporting at midcentury towards "contextual," interpretation-based reporting by the early twenty-first century).

234. In that respect, of course, our conclusions about press coverage of Supreme Court cases are necessarily limited to high profile, salient cases. Press coverage necessarily varies with the perceived salience of the issues presented, and, of the thousands of cases that the Supreme Court will have decided during the period between *Brown* and *Parents Involved*, it is a fair assumption that many cases received no press coverage at all.

but not exclusively, with respect to earlier periods and more local newspapers—we decided to limit our inquiry to an in-depth study of the press’s coverage of two significant, representative cases. We also wished to identify two cases in which there would be sufficient local and national press coverage to permit consideration of both.<sup>235</sup> Further, the relevant issue had to be one that was presented in cases arising during both eras, in order to minimize the possibility that any differences in press coverage were due, not to changes over time in the way in which the press approaches cases, but to differences in the issues and their respective degrees of perceived salience.

We selected the 1954 case of *Brown v. Board of Education* and the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*. *Brown* posed the question whether legally imposed racial segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment.<sup>236</sup> *Parents Involved* posed the question whether some limited efforts by school officials to increase racial diversity in individual schools violated the Equal Protection Clause.<sup>237</sup> The two cases have been described

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235. Although we initially considered the inclusion of non-print media in our study, we soon determined that such a project was not practicable, not only because of resource support issues, but also because primary materials relating to non-print media coverage of the Supreme Court were not readily available (if available at all), and that was particularly the case with respect to *Brown*. Even with respect to print media, we found that there was no single electronic database on which to draw for all the newspapers we wished to study, and some papers were not digitized at all. Our research therefore necessarily included searching microform and microfiche records for some newspapers. In some cases, local newspapers had neither electronic nor print archives, and we were able to research relevant editions of those newspapers only because of the kind assistance of public libraries in the relevant geographical areas. Other newspapers were simply unavailable.

236. See *Brown v. Board of Educ.*, 347 U.S. 483, 487 (1953) (“The plaintiffs contended that segregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws.”). The Court decided a companion case, *Bolling v. Sharpe*, under the Fifth Amendment Due Process Clause, rather than under the Fourteenth Amendment Equal Protection Clause, because it involved the District of Columbia, rather than a state. 347 U.S. 497, 498–99 (1954). The press essentially treated the two cases as one.

237. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007) (“Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found

as having a “doctrinal and moral equivalence,” but they are temporally remote from one another, allowing us to compare two instances of press coverage fifty years apart.<sup>238</sup>

For each case, two sets of newspapers were identified: leading national newspapers, and local newspapers in the state or states where the cases arose.<sup>239</sup> For each case, the key events in the chronology of the Supreme Court litigation were identified, and a multi-day window preceding and following each key event date was

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to be unitary may choose to classify students by race and rely upon that classification in making school assignments.”).

238. Cedrick Merlin Powell, *Justice Thomas, Brown, and Post-Racialism*, 53 WASHBURN L.J. 451, 460 (2014) (citing Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1605 (2009)). It is also the case, of course, that *Parents Involved* did not garner the same degree of attention from the press or the public that the *Brown* litigation engendered. That may well be understandable. *Brown* was understood from the beginning to be a case of momentous importance, regardless of how it was to be decided. *Id.* at 451. *Parents Involved* may not have seemed equally momentous, but many civil rights scholars would have considered it to be a very serious threat to the “anti-subordination” understanding of *Brown*. See, e.g., Reva B. Siegel, *supra* note 110, at 1474–75 (discussing two views as to the central meaning of *Brown*). Nonetheless, the case received less attention in the press than might have been expected.

239. Specifically, the national newspapers studied for *Brown* were the *Atlanta Journal Constitution*, the *Chicago Tribune*, the *Los Angeles Times*, the *New York Times*, the *San Francisco Chronicle*, the *Wall Street Journal*, and the *Washington Post*. The local newspapers studied for *Brown* were the *Charleston (S.C.) News & Courier*, the *Richmond Times Dispatch*, the *Roanoke Times*, the *Topeka Daily Capital*, the *Virginian Pilot*, the *Wichita Eagle*, and the *Wilmington Morning News*. The same seven national newspapers were studied for *Parents Involved*. The relevant local newspapers for *Parents Involved* were the *Louisville Courier-Journal*, the *Seattle Post-Intelligencer*, and the *Seattle Times*. Although some local newspapers contained original reporting, many relied, at least in part, on national wire service coverage. The project originally aimed to investigate possible differences between national and local coverage, but the use of national wire service sources by local newspapers made it difficult to pursue that comparison in a meaningful way. As television networks did not yet feature regular “nightly news” broadcasts when *Brown* was decided, the study did not attempt to capture television news. See CHARLES L. PONCE DE LEON, *THAT’S THE WAY IT IS: A HISTORY OF TELEVISION NEWS IN AMERICA* 65–66 (2015) (describing the rise of evening news programs in the 1960s). The study design originally contemplated including Court coverage by online-only outlets, but after identifying the highest-traffic sites on both sides of the political spectrum, our researchers documented very uneven coverage of the Court. Some sites regularly reported on the Court, while others virtually ignored it. Any inferences to be drawn from such an imperfect dataset were thought likely to be unreliable, so online coverage was excluded from the study.

identified.<sup>240</sup> Within those calendar windows, the selected newspapers were searched to locate any stories on the relevant case. For *Brown*, a total of twenty-six days were identified in this way. For *Parents Involved*, a total of eleven days were identified. These days are referred to in this Article as “story days.” Some newspapers were available on searchable databases, such as ProQuest; others were available only on microfiche, which was not automatically searchable. For searchable databases, a set of search words was entered, and a universe of articles was returned; for non-searchable databases, a research assistant read each page of the relevant newspaper on microfiche to locate relevant articles.

The large universe of articles that resulted from this search was then split into two categories: “primary” coverage consisted of news articles that directly referenced the activity of the Supreme Court in relation to a case. These articles might, for example, summarize the oral arguments held before the Court or explain that the Court had decided to hear the case. “Secondary” coverage discussed the cases without specifically providing the public with any new information about Court activity on the case. This coverage might, for example, include commentary or editorials related to the case, or articles limited to summarizing the reactions to developments in the case by certain public figures or constituencies. Our study was limited to “primary” coverage articles.

A coding outline was developed to identify various linguistic categories that would capture relevant concepts. The goal of coding article content was to develop an empirical understanding of the relative journalistic weight given to “legal” explanations of the Court’s behavior as opposed to “political” explanations. Specifically, to identify legal explanations, coders identified all mentions of constitutional provisions, legislation (federal, state, local, and international), and Supreme Court precedents. These words were thought to signal factors internal to law and are

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240. The relevant *Brown* events were the setting of oral arguments in the consolidated state cases, the first oral argument, the order calling for reargument, the second oral argument, and the decision announcement. The relevant *Parents Involved* dates were the grant of certiorari, the oral argument, and the decision announcement. An appendix summarizing the daily coding results in PDF format is on file with the authors and available upon request.

therefore indicative of a “pure legal” model of judicial decision-making.

To identify political explanations of the Court’s work, the coders identified and coded two kinds of language. First, all mentions of a Justice’s appointing president, political party affiliation, and ideology were coded.<sup>241</sup> In our discussion below, we refer to this language as “internal political” language, as it suggests considerations that are not commands internal to law but also are not considerations entirely exogenous to the Court. Second, coders recorded mentions of any person who was not a Justice or a party or a lawyer directly involved in the case. Coding these mentions was not as straightforward as one might expect. For example, the coding protocol called for all amici curiae to be classified as third parties. In the *Brown* case, of course, the United States was technically an amicus curiae, although, at least in terms of the District of Columbia component of the litigation, its function was effectively that of a litigant; the United States played a prominent role in the overall litigation, and it might just as plausibly have been classified as a “litigant.” Pursuant to the “amicus curiae” convention, mentions of the United States were therefore counted as “third-party” mentions, which may have artificially inflated the count of “third-party” mentions in coverage of the case. These “third-party mentions” are referred to below as “external political,” as they suggest considerations that are not internal to law or to the Court or its personnel.<sup>242</sup>

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241. Despite our misgivings about what precisely political scientists mean when they refer to a Justice’s “ideology,” the most commonly used understanding of “ideology” in the literature is the liberal-conservative scale employed by the Segal-Cover score. See, e.g., Epstein & Mershon, *supra* note 65, at 263–65. Consequently, we coded for references to the Justices as liberal or conservative.

242. See *infra* Part IV.B.1. Some individuals also could be characterized in several ways. For example, the coders classified Governor Byrnes of South Carolina as a third-party commentator, but he was also a former Justice of the Supreme Court and the governor of a state whose school systems were targets of the litigation. Because Governor Byrnes was not technically a party to the case, and despite the fact that he was a former Supreme Court Justice, it seemed most appropriate to classify him as a third-party commentator. Like the question involving the classification of the United States, this question clearly was a close one. The statistical effect of these choices is insignificant, but the opposite choices would, if anything, have increased the magnitude of the difference between the two cases in terms of the press’s focus on political versus legal factors.



In addition to these categories, coders also recorded all mentions of individual Justices in the coverage of a case. The categorical significance of these mentions can be viewed in two ways. One could categorize Justice mentions as neutral facts necessary to accurate reportage. However, one could also categorize them as having political weight when they are invoked in connection with a description of judicial coalitions or with regard to the formulation of intra-curial strategy. For that reason, we offer below alternate calculations of “political” language: one that does not include mentions of individual Justices, and one that does include those mentions. Finally, coders recorded any time in a news story that a journalist quoted from legal briefs filed with the Court; quoted direct statements of a Justice or party to the case (most frequently during oral argument); or quoted from the opinions in the cases.

### *B. Study Results—Numeric*

The relative use of legal and political terms to describe the Court’s work shifted significantly between *Brown* and *Parents Involved*. Most strikingly, the ratio of legal to political references to the Court’s behavior has changed significantly, with the midcentury press’s law-leaning depiction giving way to a more politics-oriented depiction fifty years later. Further, the contemporary journalists focused more on individual Justices than on the Court as a unitary institution.<sup>243</sup> In addition, the study found that contemporary reporters are far less likely to transmit the Court’s work directly to the public by reprinting opinions,

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243. See *infra* Part IV.B.1.c. Undoubtedly, some of the difference may be explained by the fact that *Brown* was a unanimous decision, while *Parents Involved* was badly splintered, and also by the fact that all of the *Brown* Justices (with the exception of the Chief Justice) had been appointed by Presidents Roosevelt and Truman, while the composition of the *Parents Involved* Court was more diverse in terms of appointing presidents. See *supra* note 17 and accompanying text (discussing the respective compositions of the Court during the periods in which these cases were decided). As previously noted, however, the Warren Court was diverse in different ways, and that diversity was reflected both in the questions the Justices asked at the *Brown* oral arguments and in their previous decisions. See *supra* notes 242–243 and accompanying text. In addition, the unanimity with which *Brown* ultimately was decided was not foreseeable while the proceeding was ongoing. *Id.*

quoting from those opinions, or quoting statements at oral argument. Instead, they now paraphrase the Justices and directly quote representatives of third-party advocacy groups who evaluate the Court's work, often in terms of their own preferred political outcomes.

### *1. Legal References Versus Political References*

The *Brown* coverage described the factors relevant to the Court's work in primarily "legal" language. On the other hand, the *Parents Involved* coverage describes the Court's work more often in "political" language. For purposes of this section, "legal" language includes references to legal texts, including the Constitution or any of its provisions; any Court precedent; or any statute under review in a given case. As a general matter, "political" language can be roughly divided into two categories. The first involves explicitly political descriptions of individual Justices, such as information about their appointing president, political affiliation, or ideology. These have been labelled "internal political" references. The second category of political language involves references to ideologically motivated people or groups outside of the case itself, such as lobbying or advocacy groups, government officials who were not directly involved in the case, and "public intellectuals." These have been labeled "external political" references.

#### *a. Legal Versus Internal Political*

The comparative weight given to legal references and internal political references shifted noticeably from *Brown* to *Parents Involved*. While the incidence of "internal political" references rose markedly from the first case to the second, the gross number of legal references exceeded that of "internal political" references in the coverage of both cases.

The Constitution, statutes, and case precedents were referenced 1659 times over the entirety of the *Brown* coverage studied. Throughout that same coverage, individual Justices' appointing presidents, political party affiliation, and ideology were referenced twenty-nine times. In other words, the ratio of "legal"

to “internal political” references in the *Brown* coverage was about 57:1.

The Constitution, statutes, and case precedents were referenced 745 times over the entirety of the *Parents Involved* coverage. Throughout that same coverage, the Justices’ appointing presidents, political party affiliation, and ideology were referenced 158 times. In other words, the ratio of “legal” to “internal political” references was about 5:1.

### *b. The Rise of “External Political” References*

To locate “external political” references, coders recorded mentions of any parties who were not Justices, litigants, or attorneys representing litigants. This “third-party” category included those who had filed amicus curiae briefs in the case,<sup>244</sup> outside interest groups, government officials with no direct role in the case, and “public intellectuals” such as law professors.<sup>245</sup>

Unlike the “internal political” references to individual Justices as politically motivated decision-makers, these references go beyond indicating to readers that the Supreme Court decision-making process is infused with the values and beliefs held by the Justices as members of the Court. The attitudinal theory of judging essentially holds that the Justices’ decision-making is

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244. Generally speaking, many more amicus curiae briefs are filed today than was the case during the *Brown* era. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Brief on the Supreme Court*, 148 U. PA. L. REV. 743, 751–52 (2000) (discussing increased incidence of amicus filings over time). In *Brown*, only nine amicus briefs (including two by the United States) were filed. See generally 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland & Gerhard Casper eds., 1975). In *Parents Involved*, the dockets reflect that a total of 116 amicus briefs were filed in the two consolidated cases. Docket Sheet, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701 (2007) (No. 05-908), <https://perma.cc/8DXE-4D97> (last visited Oct. 16, 2019) (on file with the Washington and Lee Law Review); Docket Sheet, *Meredith v. Jefferson Cty. Bd. of Educ.*, 551 U.S. 701 (2007) (No. 05-915), <https://perma.cc/BNX2-UKJM> (last visited Oct. 16, 2019) (on file with the Washington and Lee Law Review).

245. See THE PUBLIC INTELLECTUAL: BETWEEN PHILOSOPHY AND POLITICS xi (Arthur M. Melzer, Jerry Weinberger and Richard M. Zinman eds., 2003) (defining “public intellectuals” as “a class of hybrid beings standing with one foot in the contemplative world and the other in the political”); see also Arthur Austin, *The Law Academy and the Public Intellectual*, 8 ROGER WILLIAMS U. L. REV. 243 (2003) (discussing Judge Richard Posner’s concept of the public intellectual).

motivated by preferred political outcomes and influences external to law. As previously noted, one conspicuous possible cause for the public's loss of faith in the Court's institutional competence is the perception that the Justices' decision-making process is driven more by outcome preference than by legal reasoning. These "third-party" references often describe the merits of the competing viewpoints in terms of political outcomes. The people and interest groups mentioned often correlate strongly with the leading political parties and are wholly exogenous to the Court and its members. Consequently, we categorized these mentions as "external political" language. "External political" language was first tallied in its own freestanding category. It was then added to "internal political" language to compare the overall ratio of legal to political explanations of the Court's work within the press coverage of the two cases.

In 199 total *Brown* stories, there were 898 "external political" mentions, or an average of 4.5 such mentions per individual story. In sixty-two total *Parents Involved* stories, there were 555 such mentions, or an average of 8.9 such mentions per individual story. In other words, there was a 99% increase in such mentions per story between *Brown* and *Parents Involved*. For twenty-six *Brown* story days, there were 898 external political references, or 34.5 references per story day. For eleven *Parents Involved* story days, there were 555 external political references, or 50.5 per story day. In other words, there was a 46% increase in external political references per story day.

### *c. Institutional Versus Individual Coverage*

This evolving depiction of the Court as a collection of individuals presumably driven by subjective policy preferences, as opposed to an institution constrained by objective legal commands, is reinforced by the media's references to individual Justices in its reportage.

Comparing references to individual Justices in the two cases is complex for several reasons. Most important, *Brown* was a unanimous decision, while *Parents Involved* was decided by a 5–4 vote, featuring two dissenting opinions as well as a separate concurring opinion. Consequently, it is inevitable that the overall

coverage of *Parents Involved* would require more mentions of individual Justices simply to report the identities and respective views of the several opinion writers. It might be expected that the inclusion of stories covering the opinion announcements in the case is likely to skew the statistics for this reason, and that is indeed the case. If one compares all the stories covering *Brown* with all the stories covering *Parents Involved*, one finds 526 references to individual Justices over twenty-six story days (20.23 references per day) in *Brown*, compared with 1062 references to the individual Justices over eleven story days (96.55 references per day) in *Parents Involved*. If one compares only pre-decisional story days in the two cases (and thereby removes the most obvious possible explanation for the difference), however, one finds that the number of references to individual Justices in *Parents Involved* still greatly exceeds the number of such references in *Brown*, albeit less dramatically so. Notably, even once the data are stripped of decision-day reporting—where law-based factors such as a split decision can be expected to yield a higher number of individual Justice references—there remains a significant increase in such references between the two cases. For *Brown*, there were 375 pre-decisional references to individual Justices over twenty-three story days (16.3 references per day), compared to 208 such references over six days (34.7 references per day) in *Parents Involved*.<sup>246</sup> In sum, pre-decision-day coverage by itself saw a 113% increase in individual Justice mentions from *Brown* to *Parents Involved*.<sup>247</sup>

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246. To the extent that the Court's rate of split decisions increases, this may reflect an increasingly politicized institution, so that coverage ignoring that dynamic would be inaccurate or at least incomplete. Further, studies suggest that split votes generate both a greater net number of news stories concerning the decision than do cases decided by unanimous votes, and that they are covered more "negatively," or in ways that indicated they might be disadvantageous to some Americans. See MICHAEL A. ZILLS, *THE LIMITS OF LEGITIMACY, DISSENTING OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS* 49–76 (2015).

247. One might also look exclusively to press coverage of oral argument to test the relative distribution of individual Justice mentions. That might make sense because the Justices' work in asking questions is by definition conducted individually. In addition, the incidence of individual references would not be influenced by the eventual vote and any differences in media convention would necessarily reflect dynamics other than those related to rates of judicial

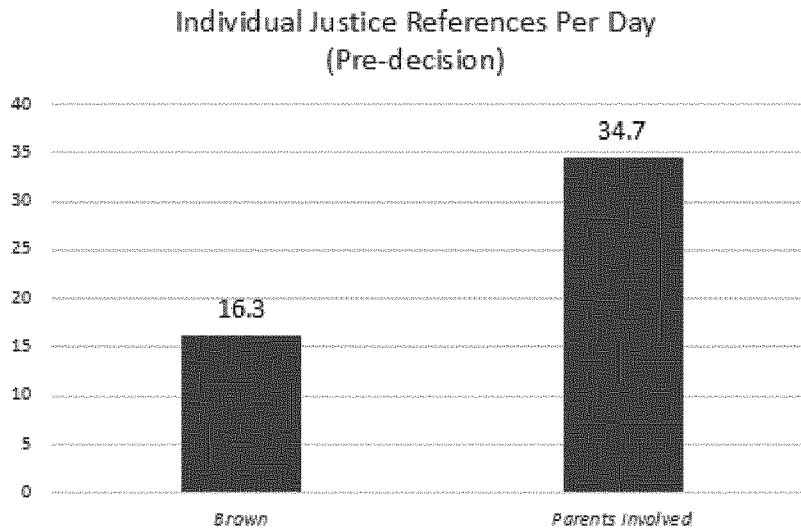


Figure 1

disagreement. On the other hand, *Brown* was argued for multiple days in 1953 and then set for a re-argument in 1954, when the arguments again encompassed multiple days. 347 U.S. at 483. *Parents Involved*, in contrast, followed a more orthodox single-day, single-argument format. 551 U.S. at 701. Not surprisingly, the study found a far greater number of oral argument stories in connection with *Brown*, and a straight numerical comparison of references to individual Justices would likely be misleading for that reason. Instead, to get an apt comparison of the individual Justice mentions for each case, we have calculated the average number of references to individual Justices per oral argument story. Using these measures, the study nonetheless found that media emphasis on individual Justices rose significantly from one case to the other. We located a total of ninety-one stories on *Brown's* two multi-day sets of oral argument. Within those ninety-one stories, individual Justices were mentioned a total of 304 times. In other words, each story mentioned individual Justices an average of 3.34 times. We located a total of sixteen stories on *Parents Involved's* single, partial day of oral argument. Within those sixteen stories, individual Justices were mentioned a total of 152 times. In other words, each story mentioned individual Justices an average of 9.5 times. Thus, media mentions of individual Justices during oral argument rose 184 percent between the two cases. An additional factor to be considered in evaluating this data, of course, is the fact that the Justices are likely to have been more active questioners in 2006 than they were at the time of *Brown*, which might also be expected to result in a greater number of individual Justice mentions in connection with oral argument coverage. See Sullivan & Canty, *supra* note 32, at 1042.

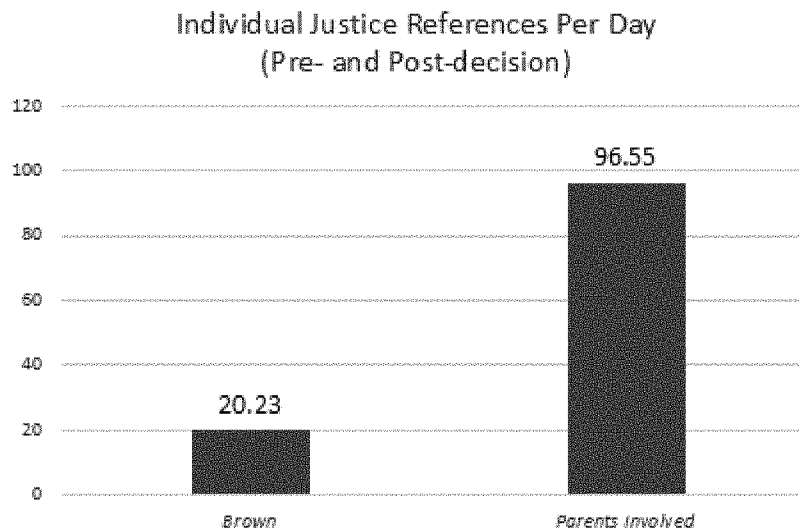


Figure 2

To be clear, we do not contend that mentioning individual Justices amounts to an explicit suggestion that the Court's work is simply the product of politics. It is also not analogous to references to third-party political advocacy groups, which implicitly suggest that the Court's work may be influenced by external political considerations. At the same time, it is impossible to discount the possibility that media emphasis on individual Justices has contributed to public perceptions of the Court as an institution whose members pursue personal preferences and engage in political contestation.<sup>248</sup> And it almost certainly detracts from public perceptions of the Court as an institution whose members can be expected to work together in a lawyer-like way to arrive at agreed legal conclusions for objective reasons based on shared texts such as the Constitution or case precedents.

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248. See *infra* Part IV.B.5.

*d. Legal Versus Political Overall*

When the entirety of “political” language is compared with the entirety of “legal” language used in the coverage of the two sample cases, a substantial shift in emphasis between the legal and the political is evident.

As mentioned above, we offer two different calculations based on two possible definitions of “political.” In one model, “external political” language describing outside actors’ views of a case is added to “internal political” language describing the “policy priors” that individual Justices bring to a case. This overall “political” total can then be compared with the “legal” total to yield a ratio of “legal” to “political” language used by the media in describing the two cases.

In the *Brown* coverage, there were 1659 total “legal” references and 927 total “political” references. In other words, in a universe of 2586 references to factors influencing the Court’s decision-making, about 64% were “legal” and 36% were “political.” Throughout the *Parents Involved* coverage, in contrast, there were 745 total “legal” references and 713 total “political” references. In a universe of 1458 references to factors influencing the Court’s decision-making, about 51% were “legal,” and 49% were “political.”



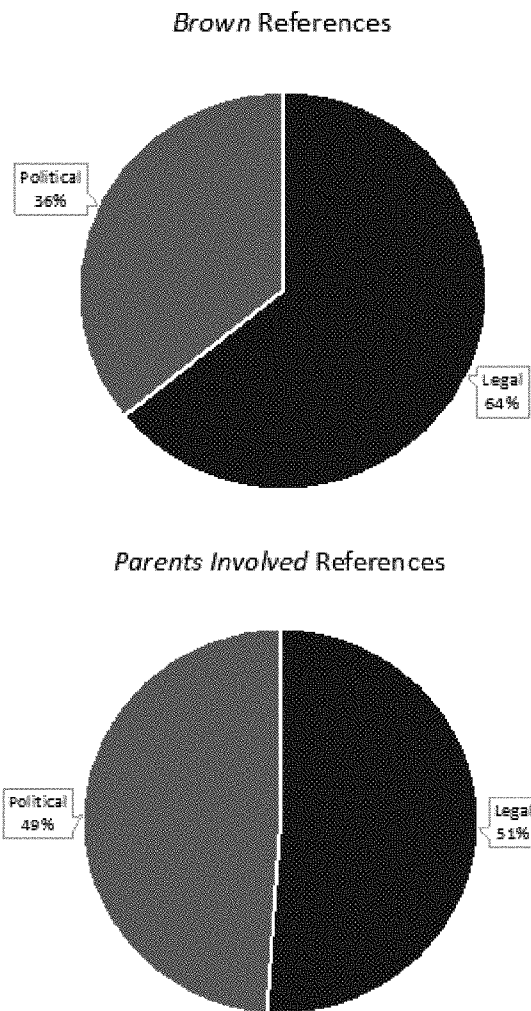


Figure 3

In an alternate model, “political” was defined to include references to judicial background, third-party mentions, and to the individual justices themselves. Using this model, in *Brown*, there were 1659 total legal references, and 1453 total political references. In a universe of 3112 total references in *Brown*, 53% were legal, and 47% were political. In *Parents Involved*, there were 745 total legal references and 1775 total political references. In a

universe of 2520 references in *Parents Involved*, 30% were legal, and 70% were political.

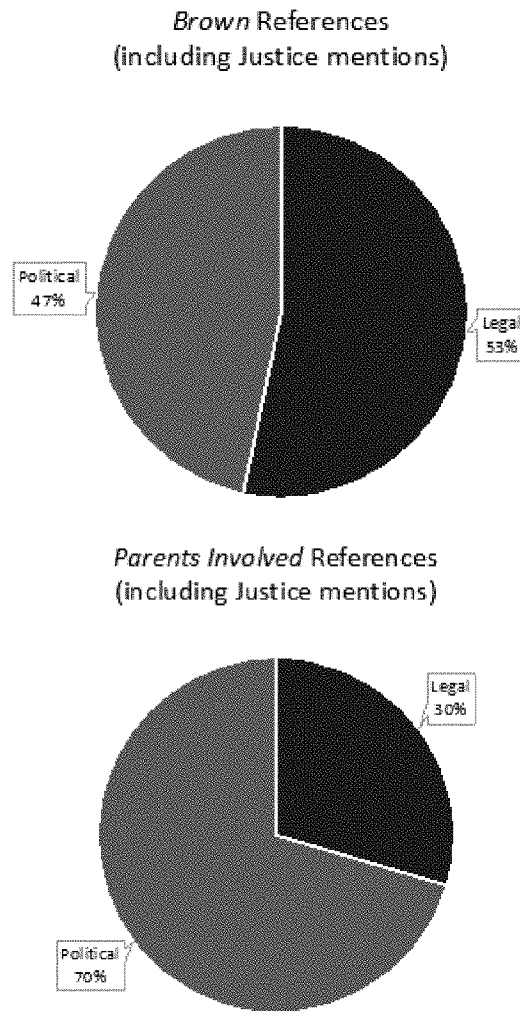


Figure 4

Broadly speaking, the *Brown* journalists depicted the Court as an institution primarily concerned with honoring internal legal principles in its decision-making. The *Parents Involved* journalists,

by contrast, depict the Court as an institution more substantially influenced by external political principles in its decision-making. In both cases, press coverage identified roles for both law and politics, but the *Brown* coverage treated political concerns as secondary to law, while the *Parents Involved* coverage assumed a far more substantial role for the Justices' political preferences or those of outside constituencies.

## 2. Direct Versus Filtered Coverage

A final comparison between the language used by journalists to describe actions in the two cases is worth noting. Coverage of the *Brown* case included 2178 direct quotations from the opinion, legal briefs, and oral statements made by the Justices, the parties, and counsel for the respective parties. Based on a total of 199 stories studied, there was an average of 10.94 quotations per individual story from legal documents or direct case participants. Coverage of the *Parents Involved* case included 472 such direct quotations. Based on a total of sixty-two total stories, there was an average of 7.61 such direct quotes per individual story. In other words, the number of direct quotations from legal briefs, opinions, and people directly involved in the cases per story dropped about 30.4% from one case to the other. When direct quotation coverage is calculated by story day, the drop is even more dramatic. In *Brown*, there were 83.77 such quotations per story day, whereas in *Parents Involved*, there were 42.9 such quotations per story day, amounting to a roughly 50% drop in direct quotation coverage between the two cases.

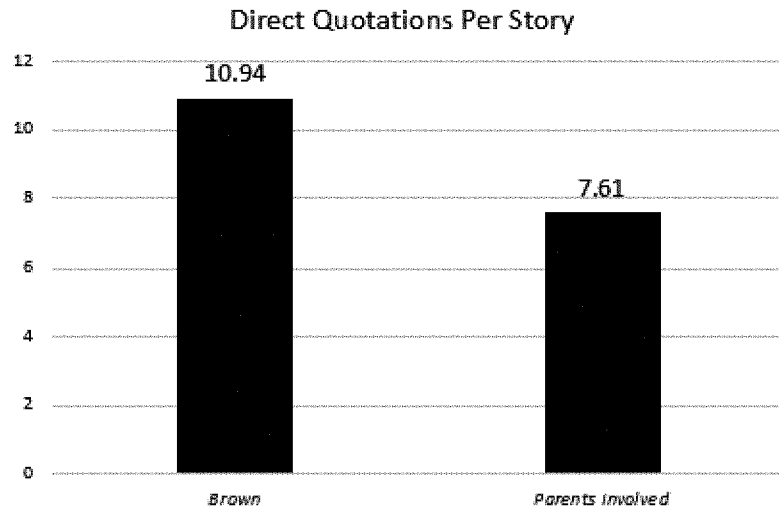


Figure 5

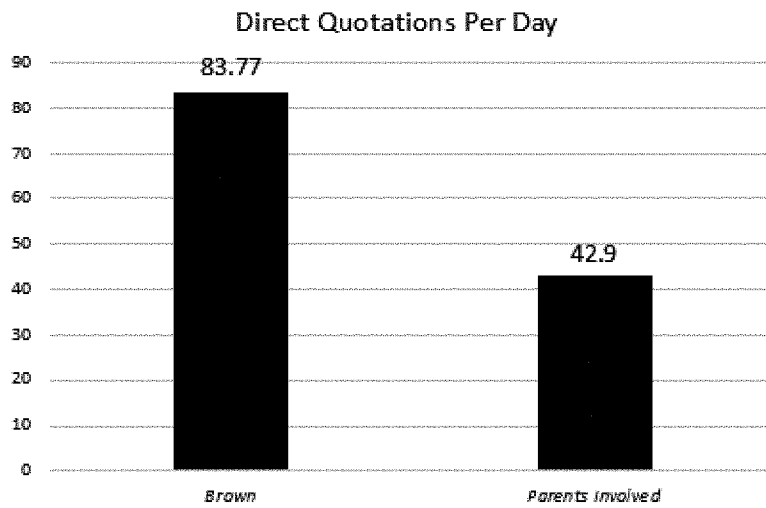


Figure 6

Further, the *Brown* journalists were far more likely to transmit the Court's actual work to the public. Of the seven national newspapers studied,<sup>249</sup> five reprinted the full text of the *Brown* decision.<sup>250</sup> None of those same seven newspapers reprinted the full text of the *Parents Involved* decision. Just three (the *New York Times*, the *Washington Post*, and the *Los Angeles Times*) printed short excerpts. Of the six local newspapers studied in *Brown*,<sup>251</sup> five reprinted the full opinion text.<sup>252</sup> In contrast, of the three local newspapers studied in *Parents Involved*,<sup>253</sup> none reprinted the full opinion text. One, the *Seattle Times*, reprinted excerpts.<sup>254</sup>

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249. *New York Times*, *Washington Post*, *Wall Street Journal*, *Los Angeles Times*, *Chicago Tribune*, *San Francisco Chronicle*, and *Atlanta Journal Constitution*.

250. *Text of Supreme Court Decision Outlawing Negro Segregation in the Public Schools*, N.Y. TIMES, May 18, 1954, at 15; *Text of Opinion on Schools in States*, WASH. POST, May 18, 1954, at 4; *Text of Court Ruling on School Segregation*, S.F. CHRON., May 18, 1954, at 14; *Supreme Court's Decision in U.S. School Segregation Cases*, CHI. TRIB., May 18, 1954, at 8; *Text of Supreme Court's Ruling on School Segregation*, ATLANTA J. CONST., May 18, 1954, at 10.

251. *Charleston News Courier*, *Roanoke Times*, *Wilmington Morning News*, *Wichita Eagle*, *Richmond Times Dispatch*, and *Virginian Pilot*.

252. *Text of Supreme Court's Ruling in School Segregation Case*, RICH. TIMES DISPATCH, May 18, 1954, at 8; *Text of Supreme Court's Ruling Which Declared Segregated Schools Illegal*, VA. PILOT, May 18, 1954, at 12; *Text of Supreme Court Decision on School Segregation*, WILMINGTON MORNING NEWS, May 18, 1954, at 5; *Segregation Decision Text*, ROANOKE TIMES, May 18, 1954, at 15; *Full Text of Supreme Court's Segregation Decision*, CHARLESTON NEWS COURIER, May 18, 1954, at 11.

253. *Seattle Post-Intelligencer*, *Seattle Times*, and *Louisville Courier Journal*.

254. Chief Justice Warren later observed that he had wanted the Court to issue a short opinion in *Brown*, in part because he wanted to maximize the likelihood that it would be published in general circulation newspapers, so that people could read it. See EARL WARREN, THE MEMOIRS OF EARL WARREN 3 (1977) ("It was not a long opinion, for I had written it so it could be published in the daily press throughout the nation without taking too much space."). Interestingly, veteran Supreme Court correspondents Fred Graham and Joe Mathewson have noted that Chief Justice Warren was not generally mindful of the needs of the press or its dependence on the Court with respect to accurate reporting: "Chief Justice Earl Warren, unusual among justices in that he had faced the electorate many times and was highly experienced in public communication, was nevertheless indifferent to the Court's reliance on the news media to tell the citizenry of its decisions." MATHEWSON, *supra* note 184, at 363. Quoting from Fred

### C. Study Results—Narrative

The statistical results of the study suggest a shift in the direction of press coverage, from one that principally was concerned with legal issues to one that is at least equally concerned with a political framing of the Court's work. This impression is reinforced by examining narrative examples from the coverage itself.

#### 1. Legal Descriptions of the Court in *Brown*

Coverage of the *Brown* case relied heavily on reporter explanations of the constitutional provisions and precedents that provided the relevant decisional framework for the issue at hand. For example, the *New York Times* October 9, 1952 story on the consolidation of the *Brown* cases included a total of eight legal references.<sup>255</sup> Three references described the state and local segregation statutes under review.<sup>256</sup> Three described the relevant precedent: one of these named *Plessy v. Ferguson*,<sup>257</sup> a second explained the holding in *Plessy* that “‘separate but equal’ facilities satisfied demands to strike down [historical] segregation statutes,” and the third explained that in the *Brown* case, the NAACP was arguing that “the ‘separate but equal’ thesis is obnoxious and contravenes the constitutional guarantees for protection of all citizens.”<sup>258</sup> Two additional references were to the Constitution:

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Graham's memoir, they note that, “‘As the figurehead and moving force behind a Court that was upsetting applecarts throughout the country,’ Chief Justice Warren ‘made a point of being oblivious to the outcry that it created. He was the Rhett Butler of judicial public relations; frankly, he didn't give a damn.’” *Id.* The opinion in *Brown* was short, even for its time, but, as a general matter, the length of Supreme Court opinions has increased greatly since the early 1950s. *See, e.g.*, Ryan E. Black & James F. Spriggs II, *An Empirical Analysis of the Length of Supreme Court Opinions*, 45 HOUS. L. REV. 621, 634 (2008) (stating the length of Court majority opinions has quintupled between the first period and most recent period analyzed in the study).

255. Lewis Wood, *High Court Defers School Bias Issue*, N.Y. TIMES, Oct. 9, 1952, at 12.

256. *Id.*

257. 163 U.S. 537 (1896).

258. *Id.*

one referred to the “guarantees for protection of all citizens,” while the other explicitly referred to the Fourteenth Amendment.<sup>259</sup>

Stories on the two lengthy rounds of oral argument in *Brown* were also replete with references to legal concepts. For example, the *New York Times*’s coverage of the first day of oral arguments on December 9, 1952, included nine references to the state and local statutes under review and ten references to the Constitution and its provisions.<sup>260</sup> Specifically, the reporter referred to the “Federal Constitution” twice; to the “Fourteenth Amendment” five times; to the Equal Protection Clause or equality of civil rights twice; and to the “constitution” once.<sup>261</sup>

In the *Times*’s coverage of the second day of the 1952 oral argument, there were ten references to state, local, and international laws; ten references to the Constitution and its provisions; and two references to precedent.<sup>262</sup> The references to the Constitution included two mentions of the Constitution itself.<sup>263</sup> Several references to the Fourteenth Amendment endeavored to explain the nature of that provision.<sup>264</sup> For example, the reporter wrote that NAACP attorney Thurgood Marshall<sup>265</sup>

259. *Id.*

260. Luther A. Huston, *Supreme Court Asked to End School Segregation in Nation*, N.Y. TIMES, Dec. 9, 1952, at 1.

261. *Id.* Huston was already a seasoned reporter when he was assigned to cover the Supreme Court in 1951. *See Luther A. Huston, Ex-Reporter Dies*, N.Y. TIMES, Nov. 27, 1975, at 36.

Assigned, again at his request, to the Supreme Court in 1951, Mr. Huston reported the historic school-segregation case, not only from the court but also in the battlefield of the Southern and border states. Walter White, then executive secretary of the National Association for the Advancement of Colored People, described Mr. Huston’s summary of the cases as “brilliant,” and Mr. Huston received the George Polk Memorial Award for his coverage of the story in 1954.

262. Luther A. Huston, *Segregation Held Legislative Issue*, N.Y. TIMES, Dec. 11, 1952, at 1.

263. *Id.*

264. *See, e.g., id.* (“Segregation is unconstitutional under the Fourteenth Amendment, which forbids any abridgement by the states of the rights of United States citizens.”).

265. Marshall would later become a judge of the Second Circuit, Solicitor General, and, ultimately, a Justice of the Supreme Court. *See generally* WIL HAYGOOD, *SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA* (2016); JUAN WILLIAMS, *THURGOOD*

had stated that “[s]egregation is unconstitutional under the Fourteenth Amendment, which forbids any abridgement by the states of the rights of United States citizens.”<sup>266</sup> In other words, the reporter summarized Marshall’s constitutional argument in terms of the language of the Fourteenth Amendment itself. The reporter also referred to the Fourteenth Amendment in summarizing a line of questions regarding whether Congress, rather than the Court, would be better positioned to set public policy on segregation.<sup>267</sup> He reported that Spottswood Robinson III, another of the NAACP lawyers, was skeptical that “Congress could adopt legislation, under the Fourteenth Amendment, that would remedy the situation.”<sup>268</sup> Finally, the reporter summarized the argument of John W. Davis, the Wall Street lawyer and former Solicitor General who was counsel for the South Carolina parties;<sup>269</sup> Davis argued that segregation was “set up under” the Fourteenth Amendment because the Reconstruction Congress permitted it in the District of Columbia schools, which it was responsible for overseeing.<sup>270</sup> The reporter also referred to other constitutional provisions in his story, explaining that the segment of the case challenging the District of Columbia segregation policy did not arise under the Fourteenth Amendment, but under Article I of the Constitution “which defines the powers of Congress, and [under] the due process clause of the Fifth Amendment . . . because the District of Columbia is under Federal rule.”<sup>271</sup>

Similarly intricate references to governing law are found in the December 9, 1953 coverage of the last day of the second round

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MARSHALL: AMERICAN REVOLUTIONARY (1998).

266. Huston, *supra* note 262, at 1.

267. *See id.*

268. *Id.*

269. *Id.* Davis was nearing the end of a distinguished career. A native of West Virginia, he had been a law professor at Washington and Lee University, a congressman from West Virginia, Solicitor General of the United States, an ambassador to Great Britain, an unsuccessful Democratic presidential candidate, a powerful Supreme Court advocate, and a successful Wall Street lawyer. *See generally* WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973).

270. Huston, *supra* note 262, at 1.

271. *Id.*



of oral arguments.<sup>272</sup> The *New York Times* story on that day included ten legal references.<sup>273</sup> Of these, three were to the segregation statutes under review.<sup>274</sup> Three were to Court precedent.<sup>275</sup> Of these, one stated that the Justices were being asked to “set aside a doctrine, laid down by the Supreme Court, nearly sixty years ago, that school segregation is not unconstitutional if equal facilities are provided for each race.”<sup>276</sup> A second summarized a party’s argument that “the doctrine of ‘separate but equal’ facilities [was] laid down by the Supreme Court in the case of *Plessy v. Ferguson* in 1897 [and] had been used since that time to perpetuate unconstitutional practices and should now be set aside.”<sup>277</sup> A third paraphrased attorneys for the states who called *Plessy* “sound doctrine” and said “that the high court lacked judicial power to invalidate the doctrine.”<sup>278</sup> One reference to the Fourteenth Amendment stated that it “forbids any states to make or enforce laws that infringe on the rights or privileges of any citizen of the United States.”<sup>279</sup> Another reference summarized the NAACP position that the Fourteenth Amendment’s purpose was “to abolish segregation in the public schools and ‘wipe out the last vestige of slavery.’”<sup>280</sup> A third summarized John W. Davis’s position that, “it was not the intent of the Thirty-Ninth Congress in passing the Fourteenth Amendment in 1866 and submitting it to the states that it then, or at any future time, would outlaw school segregation.”<sup>281</sup>

Frequent and expository references to legal concepts are also found in the coverage of the Court’s actual opinion rejecting school segregation. In its story on the opinion announcement, the *New York Times* included thirty-one references to the Constitution, case

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272. Luther A. Huston, *School Bias Arguments End; High Court Will Rule Later*, N.Y. TIMES, Dec. 10, 1953, at 1.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

precedents, or relevant statutes.<sup>282</sup> Of those, seventeen references were to constitutional provisions and eleven were to precedents.<sup>283</sup> The article quoted the opinion's statement that segregation "deprived Negroes of 'the equal protection of the laws guaranteed by the Fourteenth Amendment.'"<sup>284</sup> It also explained that while the Fourteenth Amendment determined the constitutionality of the state statutes at issue, the Fifth Amendment governed the constitutionality of the District of Columbia policy because the District was a federal enclave subject to the jurisdiction of Congress.<sup>285</sup> The article went on to explain that "[t]he Fourteenth Amendment provides that no state shall 'deny to any person within the jurisdiction the equal protection of the laws,'" and that the Fifth Amendment provides that "no person shall be 'deprived of life, liberty or property without due process of law.'"<sup>286</sup>

One lengthy passage in the May 18 *New York Times* article summarized the relevant constitutional history and doctrine:

[Attorneys for the students had argued] that segregation, of itself, was unconstitutional. The Fourteenth Amendment, which was adopted July 28, 1868, was intended to wipe out the last vestige of inequality between the races, the Negro side argued. Against this, lawyers representing the states argued that since there was no specific constitutional prohibition against segregation of the schools, it was a matter for the states, under their police powers, to decide. The Supreme Court rejected the "states rights" doctrine, however, and found all laws ordering or permitting segregation in the schools to be in conflict with the Federal Constitution.<sup>287</sup>

In addition, the reporter gave detailed information about *Plessy v. Ferguson*, the relevant precedent in the case. One long passage explained that:

The "separate but equal" doctrine demolished by the Supreme Court today involved transportation, not education. It was the

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282. See Luther A. Huston, 'Separate but Equal' Doctrine Held Out of Place in Education, N.Y. TIMES, May 18, 1954, at 1.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

case of *Plessy vs. Ferguson*, decided in 1866. The court then held that segregation was not unconstitutional if equal facilities were provided for each race. Since that ruling six cases have been before the Supreme Court, applying the doctrine to public education. In several cases, the court has ordered the admission to colleges and universities of Negro students on the ground that equal facilities were not available in segregated institutions. Today, however, the court held the doctrine inapplicable under any circumstances to public education.<sup>288</sup>

## 2. *Political References to the Court in Brown*

The “political” references in the same set of *Brown* stories are few in number and fairly dry. For example, the *New York Times* story on the consolidation of the *Brown* cases for purposes of oral argument contains no references to judicial political affiliations or ideology and no third-party advocates commenting on the case.<sup>289</sup> In the three selected stories covering the various oral argument days, there are no references to judicial ideology and only eight references to third parties.<sup>290</sup> Of those eight references, three summarized the federal government’s arguments to the Court as *amicus curiae*, and three summarized the Eisenhower administration’s position on the desirability of segregated schools in the District of Columbia. One quoted South Carolina Governor (and former Supreme Court Justice) James F. Byrnes, who “suggested that if the [Court] [held] segregation to be violative of the Federal Constitution, South Carolina should abolish its public school system.”<sup>291</sup> The final third-party reference described a woman who waited in line to hear the second day of oral arguments.<sup>292</sup> The story on the opinion handed down in *Brown*

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288. *Id.*

289. See Wood, *supra* note 255, at 12 (reporting on the Court’s decision to postpone oral argument for certain school segregation cases).

290. Huston (Dec. 9, 1952), *supra* note 260, at 1; Huston (Dec. 11, 1952), *supra* note 262, at 1; Huston (Dec. 10, 1953), *supra* note 272, at 1.

291. Huston (Dec. 10, 1952), *supra* note 260, at 1.

292. See Huston (Dec. 11, 1952), *supra* note 262, at 1 (“Mrs. Helen W. Hobart, Dean of Women and Associate Professor of Psychology at Roanoke College, Va., was waiting when the doors of the Supreme Court Building were opened this morning.”).

contains no “internal political” mentions regarding judicial background or ideology, and just five references to third parties.<sup>293</sup> Three of the latter were to the Supreme Court press officer’s efforts to move the media into the courtroom for the announcement.<sup>294</sup> Two others were references to states that had announced they would abolish the public schools if required to desegregate.<sup>295</sup>

In addition to the main story on the announcement of the *Brown* opinion, the *New York Times* ran a brief sidebar that explicitly was “internal political.” Taken from the *Associated Press* wire,<sup>296</sup> it stated in its entirety:

Five of the nine Supreme Court Justices who today outlawed race segregation in public schools were appointees of President Franklin D. Roosevelt. Three were named to the Court by President Truman and one by President Eisenhower. Here is the line-up: Chief Justice Earl Warren, a Californian, named by President Eisenhower. Justices Hugo Black (Alabama), Stanley F. Reed (Kentucky), Felix Frankfurter (born in Austria with a New York-Massachusetts adult background), William O. Douglas (born in Minnesota, resident of Washington State), and Robert H. Jackson (born in Pennsylvania, resident of New York State)—named by President Roosevelt. Justices Harold H. Burton (born in Massachusetts, resident of Ohio), Tom C. Clark (Texas) and Sherman Minton (Indiana)—named by President Truman.<sup>297</sup>

The geographical references may be suggestive of the individual Justices’ respective degrees of familiarity with Southern Jim Crow laws. Notably, the story simply provided the information, with no elaboration as to how the Justices’ backgrounds might have influenced their work on the case.<sup>298</sup>

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293. Huston (May 18, 1954), *supra* note 282, at 1.

294. *See id.* (mentioning that Mr. Banning E. Whittington, the press officer of the court, was said to have notified the reporters of the reading of the decision).

295. *See id.* (explaining that South Carolina and Georgia had announced such plans).

296. *See* Associated Press, *5 of 9 Justices Named by President Roosevelt*, N.Y. TIMES, May 18, 1954, at 15.

297. *Id.*

298. *Id.*

### 3. Legal references to the Court in Parents Involved

Both the numeric emphasis and the narrative quality of the *Parents Involved* coverage are more politically pitched. For example, the *New York Times* story covering the grant of certiorari includes nine “legal” references.<sup>299</sup> Of these, six are references to the state and local laws under review or relevant to the state plans at issue.<sup>300</sup> Two references were to Supreme Court precedent, and one was to a federal desegregation order that applied to the Kentucky school district whose eventual plan to replace federal oversight was the basis for the constitutional challenge being heard by the Court.<sup>301</sup> One reference was to the “Equal Protection Clause of the 14th Amendment to the Constitution.”<sup>302</sup> Specifically, the reporter explained that the Seattle integration plan had been challenged in the Washington State Supreme Court, and that the

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299. See David Stout, *Justices to Rule on Race and Education*, N.Y. TIMES (June 5, 2006), <https://perma.cc/4MF9-BAC8> (last visited Nov. 6, 2019) (discussing issues concerning “affirmative action” and “racial gerrymandering”) (on file with the Washington and Lee Law Review). The *Times*’s coverage of *Parents Involved* was handled by two different reporters—Linda Greenhouse, the *Times*’s regular Supreme Court correspondent, and Continuous News Correspondent David Stout. According to Stout, his role was to produce quick copy for the *Times*’s online services while beat reporters like Linda Greenhouse worked on stories that would eventually appear in the print edition, during a period when the paper was striving for an effective marriage between its streaming and daily services. Stout has described his version of stories about Supreme Court opinions as “quicker, and therefore less detailed” than those that eventually appeared in the print edition. *Talk to the Newsroom: Continuous News Correspondent*, N.Y. TIMES (July 14, 2008), <https://perma.cc/8MKG-82QX> (last visited Oct. 2, 2019) (on file with the Washington and Lee Law Review). We have used two Stout stories and one Greenhouse story as “narrative” examples of the *Times*’s coverage of *Parents Involved*. All Stout stories and all Greenhouse stories on the case were included in the universe of “primary coverage” of *Parents Involved*, meaning that the data discussed in Part III.A represent the full complement of “legal” and “political” references in both reporters’ stories.

300. Stout (June 5, 2006), *supra* note 299.

301. See *id.* (noting that the other reference was to the holding of *Grutter v. Bollinger*, 539 U.S. 306 (2003), which permitted colleges and universities to take race into account, albeit in a limited way, in the context of student admissions decisions).

302. *Id.*

state court had found the plan permissible under state law and the Federal Constitution.<sup>303</sup>

In the coverage of the *Parents Involved* oral argument, we found eighteen “legal” references.<sup>304</sup> Of these, thirteen were references to or explanations of the integration plans being challenged.<sup>305</sup> Three “legal” references were to Court precedent. Specifically, the reporter stated that the cases being argued “generated high interest, since they reached the court three years after the tribunal upheld, 5–4, a racially conscious admissions plan used at the University of Michigan Law School.”<sup>306</sup> He also said that “the majority opinion in that case, *Grutter v. Bollinger*, was written by Justice Sandra Day O’Connor, who has since retired and been replaced by Justice Samuel A. Alito Jr., who is considered more conservative.”<sup>307</sup> Finally, after noting that Justice Kennedy was identified by one of the parties as the swing vote in the case under review, the reporter stated that “Justice Kennedy was one of the four dissenters in the Michigan decision.”<sup>308</sup> The final two “legal” references were to the Fourteenth Amendment and the Equal Protection Clause.<sup>309</sup> Specifically, the reporter quoted the attorney for the parents challenging the integration plan: “This strikes at the heart of the Equal Protection Clause, which commends that government treat people as individuals, not simply

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303. *See id.*

The plan was upheld by the Washington State Supreme Court, which found that it did not violate the state’s Civil Rights Act, as its opponents argued. . . . But it was struck down by a three-judge panel of the United States Court of Appeals for the Ninth Circuit—and then upheld by a 7-to-4 vote of that court, [the majority of which] concluded that the Seattle plan was narrowly enough tailored that it did not violate the Equal Protection Clause of the 14th Amendment to the Constitution.

304. *See* David Stout, *Supreme Court Case Focuses on Race and Schools*, N.Y. TIMES (Dec. 4, 2006), <https://perma.cc/6XB3-DEVL> (last visited Nov. 7, 2019) (discussing the Supreme Court’s “narrow tailoring” concern in relation to an “open choice” school enrollment plan) (on file with the Washington and Lee Law Review).

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

as members of a racial class,' Mr. Korrell said, alluding to a section of the 14th Amendment to the Constitution."<sup>310</sup>

Finally, coverage of the decision in *Parents Involved* featured twenty "legal" references.<sup>311</sup> Of these, eight were references to the integration plans under review.<sup>312</sup> Another five were references to the Constitution itself, including one to the "Constitution," two to the Constitution as "colorblind," one to the "Constitution's guarantee of equal protection," and one to "the 'narrow tailoring' required to meet the equal protection demands of the 14th Amendment."<sup>313</sup> Finally, seven references were to Court precedent.<sup>314</sup> The reporter made three references to *Brown*.<sup>315</sup> The first described the "competing blocs of justices [in *Parents United* both] claiming the mantle of *Brown v. Board of Education*."<sup>316</sup> The second described Chief Justice John G. Roberts Jr.'s statement that his majority was "more faithful to the heritage of *Brown*,' the landmark 1954 decision that declared school segregation unconstitutional."<sup>317</sup> The third described dissenting Justice John Paul Stevens as calling the Chief Justice's "invocation of *Brown v. Board of Education* . . . 'a cruel irony' when the [Chief Justice's] opinion in fact 'rewrites the history of one of this court's most important decisions.'"<sup>318</sup> Apart from *Brown*, the story included two references to the case of *Bakke v. University of California Board of Regents*.<sup>319</sup> The reporter referred to the *Bakke* case in describing Justice Kennedy's vote with the majority as carrying a "special resonance" because he

holds the seat once occupied by Justice Lewis F. Powell Jr. who, 29 years ago to the day, announced his separate opinion in the

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310. *Id.*

311. Linda Greenhouse, *Justices Reject Diversity Plans in Two Districts*, N.Y. TIMES (June 28, 2007), <https://perma.cc/DG4Z-DCN9> (last visited Nov. 7, 2019) (on file with the Washington and Lee Law Review).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. 438 U.S. 265 (1978).

*Bakke* case. That solitary opinion, rejecting quotas but accepting diversity as a rationale for affirmative action in university admissions, defined the law for the next 25 years.<sup>320</sup>

The final reference to precedent came in the same discussion of Justice Kennedy, where the reporter noted that *Bakke* was refined and strengthened in “the University of Michigan Law School decision,” from which Justice Kennedy dissented.<sup>321</sup> Notably, even these references to “legal” drivers of the Court’s decision often arose in the context of deconstructing the political coalition building that had produced the split vote.<sup>322</sup>

#### 4. Political References to the Court in Parents Involved

The *Times* story on the grant of certiorari in *Parents Involved* included thirteen “external political” references.<sup>323</sup> Eleven of those references introduced or quoted representatives from third-party advocacy groups such as the Pacific Legal Foundation or the NAACP.<sup>324</sup> Two references were to a law professor.<sup>325</sup> The quotations from these individuals are instructive. Law professor Davison Douglas is quoted as saying that “the constitutionality of affirmative action [is] looming in the background of this.”<sup>326</sup> Arthur Mark of the Pacific Legal Foundation called the kind of plans under review “racial gerrymandering.”<sup>327</sup>

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320. Greenhouse, *supra* note 311.

321. *Id.*

322. *See, e.g., id.* (“It was June of last year before the court, reconfigured by the additions of Chief Justice Roberts and Justice Alito, announced, over the unrecorded but vigorous objection of the liberal justices, that it would hear both appeals.”).

323. Stout (June 5, 2006), *supra* note 299.

324. *See, e.g., id.* (“Arthur B. Mark III, a lawyer for the Pacific Legal Foundation, said the procedure amounts to ‘racial gerrymandering,’ and that the victims are ‘students who are pulled from their local schools for no good reason.’”).

325. *Id.*

326. *Id.*

327. *Id.* It is worth noting, perhaps, that the number of non-governmental organizations has greatly increased since the time of *Brown*, and that law professors (and others) undoubtedly see the opportunity to gain national visibility by providing commentary to be a more important part of their jobs than previously was the case. Some years ago, it was widely reported that one law



Coverage of the *Parents Involved* oral argument included one “internal political” reference and five “external political” references.<sup>328</sup> The internal political reference mentioned Justice Alito as the replacement for retired Justice O’Connor and as being “more conservative” than Justice O’Connor had been.<sup>329</sup> One external political reference was to the Bush administration’s alignment with parents challenging the integration plans.<sup>330</sup> The remaining external political references all identified political activists who either supported or opposed integration programs.<sup>331</sup> One such activist, the president of the Center for Individual Rights, was quoted as saying that “[t]he court needs to put an end to state-mandated tinkering with race.”<sup>332</sup>

Coverage of the *Parents Involved* opinion featured two “internal political” references.<sup>333</sup> The first explained that the decision “came on the final day of the court’s 2006–2007 term, which showed an energized conservative majority in control across many areas of the court’s jurisprudence.”<sup>334</sup> The second noted that the Justices originally agreed to hear the case “over the unrecorded but vigorous objection of the liberal [J]ustices.”<sup>335</sup>

Notably, the story featured no “external political” references to third parties commenting on the outcome.<sup>336</sup> It is worth noting, however, that a follow-up “News Analysis” the next day was

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school professor had left student telephone calls unreturned but leapt at the chance to speak with the press. See David Segal, *He’s Here, He’s There, He’s Everywhere on Air*, WASH. POST (Oct. 5, 1998), <https://perma.cc/JVC6-83YP> (last visited Nov. 7, 2019) (on file with the Washington and Lee Law Review). The professor contested the accuracy of the story in a letter to the Post. See Jonathan Turley, *Just Doing My Job*, WASH. POST (Oct. 10, 1998), <https://perma.cc/X59T-HAWV> (last visited Nov. 7, 2019) (on file with the Washington and Lee Law Review).

328. Stout (Dec. 4, 2006), *supra* note 304.

329. *Id.*

330. See *id.* (noting that the administration agreed with parents who wished to have the Seattle and Louisville programs struck down).

331. See *id.* (explaining that unnamed political demonstrators were referenced in addition to named activists).

332. *Id.*

333. Greenhouse, *supra* note 311.

334. *Id.*

335. *Id.*

336. *Id.*

replete with such references.<sup>337</sup> In addition to two “internal political” references (referring to the “four conservatives on the court” and to the “four liberals”), the News Analysis story featured twenty-four total third-party references.<sup>338</sup> Among the third parties interviewed and quoted opining about *Parents Involved* were two professors (Laurence Tribe and Charles Ogletree); three attorneys who had worked on *Brown* (Judge Robert L. Carter, Dean Jack Greenberg, and former Ford administration Secretary of Transportation William T. Coleman Jr.); and one representative of a political advocacy group, Roger Clegg of the Center for Equal Opportunity, “a research group . . . that supports colorblind government policies.”<sup>339</sup> Tribe said the split opinion represented “two dramatically different visions . . . of the Constitution”; Ogletree stated that the “hidden story” of the opinion was Justice Kennedy’s reluctance to wholly dismantle *Brown*; and Greenberg described the majority opinion as “preposterous.”<sup>340</sup> Only Clegg spoke approvingly of the opinion.<sup>341</sup> The story concluded by quoting Greenberg’s statement suggesting that the decision was not based on the law, but on political factors: “You can’t really say that five [J]ustices are so smart that they can read the law and precedents and four others can’t, . . . [s]omething else is going on.”<sup>342</sup>

This secondary story provides an interesting comparison to the sidebar accompanying the *Brown* opinion story, which detailed which Presidents had appointed which Justices.<sup>343</sup> Notably, this

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337. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), <https://perma.cc/E5QV-BY6R> (last visited Nov. 7, 2019) (on file with the Washington and Lee Law Review). This story was coded as “primary” coverage because it appeared in the news pages of the paper and transmitted information about the Court’s action in the case.

338. *Id.*

339. *Id.*

340. *Id.*

341. *See id.* (“Roger Clegg, the president and general counsel of the Center for Equal Opportunity, a research group in the Washington area that supports colorblind government policies, disagreed, saying the majority honored history in yesterday’s decision.”).

342. *Id.* Although our research did not attempt to measure whether “political” references seemed to privilege any particular ideological point of view, in this instance, at least, the reporter appeared to quote more liberally (so to speak), from one point on the ideological spectrum.

343. *Compare* Liptak, *supra* note 337 (recounting various third-party

“external political” follow-up to *Parents Involved*,<sup>344</sup> unlike the “internal political” sidebar in the Times’s *Brown* coverage,<sup>345</sup> was not limited to conveying verifiable factual information about the Justices. Instead, the language of third parties is heavily charged with value judgments about the plausibility and the political genesis of the *Parents Involved* opinion, and its likely political ramifications.<sup>346</sup>

##### 5. References to Individual Justices in *Brown* and *Parents Involved*

A final distinction between the two cases provides additional evidence of an enhanced “political” framing of *Parents Involved* as compared to the primarily “legal” frame used to cover *Brown*. In the entirety of the *New York Times*’s *Brown* coverage, individual Justices were mentioned sixty times.<sup>347</sup> Most of these references related that particular Justices had asked questions at oral argument, with no attempt to characterize the question as predictive of a particular result or consistent with any particular political or judicial philosophy.<sup>348</sup>

In comparison, there were sixty-two references to individual Justices in the paper’s single-day coverage of the *Parents Involved* opinion.<sup>349</sup> A close reading of these references seems to suggest

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reactions to the Court’s decision in *Parents Involved* and discussing the implications of these views), *with* Associated Press, *supra* note 296 (“Five of the nine Supreme Court Justices who today outlawed race segregation in public schools were appointees of President Franklin D. Roosevelt. Three were named to the Court by President Truman and one by President Eisenhower.”).

344. See Liptak, *supra* note 337 (analyzing commentary of third parties involved in various policy groups).

345. See Associated Press, *supra* note 296.

346. See, e.g., *id.* (“The hidden story in the decision today is that Justice Kennedy refused to follow the lead of the other four justices in eviscerating the legacy of *Brown*,” Professor Ogletree said.”).

347. See *supra* Part IV.B.1.c.

348. See *supra* Part IV.B.1.c; see also *supra* notes 246–247 and accompanying text.

349. See *supra* Part IV.B.1.c.

that judicial identity politics and intra-curial “horsetrading” are more reliable indicators of case outcome than legal reasoning.<sup>350</sup>

For example, references to Chief Justice Roberts, who wrote the Court’s opinion, described him as defending “[h]is side of the debate.”<sup>351</sup> In the same story, the Chief Justice’s “control” of the Court is characterized as “not quite complete.”<sup>352</sup> A third reference to Chief Justice Roberts explained that the Court had declined to hear a challenge to a similar integration plan just months before granting certiorari in *Parents Involved*.<sup>353</sup> The article noted that the grant in *Parents Involved* occurred only after the Court had been “reconfigured by the additions of Chief Justice Roberts and Justice Alito,” and that it was “announced over the unrecorded but vigorous objections of the liberal justices.”<sup>354</sup>

Individual references to Justices Kennedy and Breyer also added to the depiction of the Court as a partisan political institution.<sup>355</sup> Justice Kennedy wrote separately in the case, so that individual references to him were necessary to provide an accurate and complete recounting of the contents of the opinions. Many of the references explained that Justice Kennedy’s separate opinion attempted to permit some “narrowly tailored” means of accounting for race in the assignment of students to public schools and was an effort to achieve some moderation in the application of the majority opinion by school districts.<sup>356</sup>

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350. See *supra* Part IV.B.1.c.

351. Greenhouse, *supra* note 311.

352. *Id.*

353. See *id.*

The appeals provoked a long internal struggle over how the court should respond. Months earlier, when Justice Sandra Day O’Connor was still on the court, the [J]ustices had denied review in an appeal challenging a similar program in Massachusetts. With no disagreement among the federal appellate circuits on the validity of such programs, the new appeals did not meet the criterion the court ordinarily uses to decide which cases to hear. It was June of last year before the court, reconfigured by the additions of Chief Justice Roberts and Justice Alito, announced, over the unrecorded but vigorous objection of the liberal [J]ustices, that it would hear both appeals.

354. *Id.*

355. *Id.*

356. See Greenhouse, *supra* note 311 (“Justice Kennedy said achieving racial diversity, ‘avoiding racial isolation’ and addressing ‘the problem of de facto

However, in addition to these statements summarizing the legal basis for Justice Kennedy's opinion, the author also dwelled on the power that Justice Kennedy enjoyed as a result of placing himself at the ideological center of the Court.<sup>357</sup> The author noted that the opinion was one of the last to be announced during the Court term, and speculated that "[w]hat consumed the court during the seven months the cases were under consideration, it appears likely, was an effort by each side to edge Justice Kennedy closer to its point of view."<sup>358</sup> The author went on to note that "it is hardly uncommon to find Justice Kennedy in the middle of the court,"<sup>359</sup> and then stated that he "holds the seat once occupied by Justice Lewis F. Powell, who [wrote a similarly limiting] separate opinion in the *Bakke* affirmative action case."<sup>360</sup> Finally, the author noted that Justice Kennedy had dissented from the Court's recent cases upholding affirmative action plans, but "surprisingly" relied on those cases in crafting his separate opinion.<sup>361</sup>

These descriptions, while obviously informative, also may be seen to carry political implications. For example, describing his reliance on past cases with which Justice Kennedy disagreed as "surprising" might suggest to the lay reader that Justices rarely follow precedents with which they had personally disagreed when they were handed down.<sup>362</sup> The article never explicitly identifies

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resegregation in schooling' were 'compelling interests' that a school district could constitutionally pursue as long as it did so through programs that were sufficiently 'narrowly tailored.'").

357. *See id.* (postulating that the reason for the seven month consideration of the case was that each "side" of the Court tried to sway Justice Kennedy's vote).

358. *Id.*

359. *Id.*

360. *Id.* *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–324 (1978) (Powell, J.) for Justice Powell's analysis and reasoning in the plurality opinion upholding the order that Mr. Bakke be admitted to the medical program and placing a limit on the reach of special admissions programs based on race alone. *See also* Sullivan, *Power*, *supra* note 50, at 1116–22 (discussing Justice Powell's opinion in *Bakke*).

361. *See* Greenhouse, *supra* note 311.

362. Of course, the dissents filed by various Justices have sometimes expressed their intentions to adhere to the views they have expressed and to refuse to follow the Court's holdings in future cases. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) ("I dissent from today's decision, and, until § 3501 is repealed, will continue to apply it in all cases where

Justice Kennedy's appointing President, political party, or ideology.<sup>363</sup> Nevertheless, the references contained in the article may be viewed as reinforcing an image of the Court as an entity engaged in strategic tactics and vote seeking. A description grounded in political rhetoric is more often associated with the political branches than with the ostensibly objective and constrained judicial branch, and it is precisely this kind of described behavior that has been shown most likely to diminish public confidence in the Court.<sup>364</sup>

References to Justice Breyer added a political valence to the story, albeit one less concerned with strategy and vote seeking.<sup>365</sup> Again, given Justice Breyer's position as the author of the main dissenting opinion,<sup>366</sup> it is to be expected that a complete account of the case would mention him individually. As was the case with Justice Kennedy, however, the rhetorical choices made in describing Justice Breyer's actions are value-laden. For example, the author noted that Justice Breyer spoke from the bench "for more than 20 minutes," and that he "made his points to a courtroom audience that had never seen the coolly analytical [J]ustice express himself with such emotion. His most pointed words, in fact, appeared nowhere in his 77-page opinion."<sup>367</sup> The

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there has been a sustainable finding that the defendant's confession was voluntary."); *Smith v. Hopper*, 436 U.S. 950 (1978) (Brennan & Marshall, JJ., dissenting from denial of certiorari) (noting their continued disagreement with the Supreme Court's Eighth Amendment jurisprudence). More commonly, the Justices tend to minimize the influence of precedents they deem to be uncongenial by not citing them or by giving them a limiting construction, rather than by asserting their illegitimacy. See, e.g., Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1864–65 (2014) (discussing the historical practice of Supreme Court "narrowing" and debunking the view that this strategy is unique to the Roberts Court).

363. See Greenhouse, *supra* note 311.

364. See, e.g., Baird & Gangl, *supra* note 199, at 598 (comparing the positive public perception resulting when the Court is described in an apolitical fashion with the more critical lens through which citizens evaluate the political branches).

365. See Greenhouse, *supra* note 311 ("In his written opinion, Justice Breyer said the decision was a 'radical' step away from settled law . . .").

366. Justices Stevens, Souter, and Ginsburg joined Justice Breyer in the principal dissent. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting).

367. Greenhouse, *supra* note 311.

article went on to describe Justice Breyer's view that the opinion was a "radical" departure from settled law, which would upset the existing framework for public education in favor of a "disruptive round of race-related litigation."<sup>368</sup> Notably, the descriptions of Justice Breyer's dissent and his oral remarks did not refer to the Constitution or legal doctrine as the basis for his disagreement with the majority.<sup>369</sup>

Finally, many of the individual references to Justices arose during the author's discussion of the changing composition of the Court. For example, the author noted that the Court's willingness to hear challenges to public school integration plans seemed to have shifted dramatically when Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor, respectively.<sup>370</sup> The author also quoted Justice Stevens's assertion that "no member of the court [that Justice Stevens] joined in 1975 would have agreed with today's decision"<sup>371</sup> and went on to note that one of the members of that court was former Chief Justice Rehnquist, for whom Chief Justice Roberts once clerked.<sup>372</sup>

In sum, although the story included just two "internal political" references, the many value-laden references to individual Justices combined to signal to readers a view that the Court's work was heavily influenced by politics and intra-curial strategy considerations. Undoubtedly, some such references were necessary to produce an accurate account of the 5–4 split. But the language used to describe each Justice's voting background and participation in the case emphasized intra-curial coalition building as a major outcome determinant in salient cases. Few of the descriptions of individual Justices described them as applying objective legal principles to decide the case.

Perhaps the main question in the case was whether the central meaning of the Equal Protection Clause is to be found either in a simple, categorical anti-classification principle, so that classifications can never be made on the basis of race for any reason or in any circumstances, or, alternatively, in an

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368. *Id.*

369. *Id.*

370. *See supra* note 353 and accompanying text.

371. Greenhouse, *supra* note 311.

372. *Id.*

anti-subordination principle, which would allow some considerations of race to be taken into account, for some purposes and within certain limits, so long as it is not for the purpose of subordinating a disadvantaged racial group. That would indeed explain the seriousness of the split, but, unfortunately, there was little discussion of that profound legal point in the press coverage.

#### *D. Study Results—Discussion*

The results of this study suggest that whereas the news media at midcentury described the Court's work in terms that were primarily "legal," the modern media has described the Court's work in political terms far more often than was previously the case. Specifically, journalists increasingly characterize specific Justices or voting blocs as "conservative" or "liberal"; allude to the Justices' "ideology" in explaining their votes; and present case outcomes in terms of the Justices' respective presidential sponsors. In addition, they increasingly rely on third-party outsiders aligned with particular interest groups, who describe the case as a loss or victory for their respective positions.<sup>373</sup> Finally, the increasing practice of highlighting the positions of individual Justices and the personal tensions amongst them also contributes to an impression that Court decisions are more heavily influenced by who sits on the bench than by "legal" factors.<sup>374</sup> Conversely, the ratio of "legal" language to "political" language has declined substantially. The *Parents Involved* journalists were less likely than their *Brown* counterparts to refer to specific constitutional provisions, doctrines, or precedents to explain judicial outcomes.

The picture of the Court that emerges from the work of the *Brown* journalists is that of an essentially legal institution staffed by technically skilled interpreters of the Constitution. This "legal"

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373. See, e.g., Liptak, *supra* note 337 (including commentary from five third-party policy advocates in his discussion of *Parents Involved*).

374. In *Brown*, the ratio of "legal" to "internal" and "external" political references was 1.79 to 1. In *Parents Involved*, the ratio was approximately 1 to 1. If references to individual justices are included in the "political" category, the legal to political ratios are 1.14 to 1 for *Brown* and .42 to 1 for *Parents Involved*. See *supra* Part IV.B.



depiction was sometimes leavened by acknowledgments that the Justices also may have had to fall back on their individual life experiences and interpretive archetypes to give meaning to constitutional language that was opaque, outdated, or indeterminate.<sup>375</sup> In other words, the *Brown* journalists were not unduly simplistic or indifferent to “realism” in the judicial process, but the primary frame for their coverage of the Court was legal. The media of the 1950s presented the Court as an institution doing law within an inescapably political system of government. The *Parents Involved* journalists, by contrast, tended to depict the Court in much more “political” terms. Their narratives represented the Court as a site where individuals are not simply concerned with law, but where they also bargain and converge to advance their political preferences. This “political” depiction alluded to the legal posture of particular cases, but it did not treat law as a primary driver of judicial decision-making.<sup>376</sup>

Social science research suggests that Americans are able to appreciate the Court’s work at a fairly sophisticated level.<sup>377</sup> When asked to choose between extreme “legal” models of decision-making and extreme “political” models of decision-making, respondents repeatedly report a preference for “legal” decision-making.<sup>378</sup> However, they have also demonstrated an understanding that the Justices will sometimes need to supplement inconclusive or multilayered texts with reference to interpretive methodologies, personal values, and even policy-infused belief systems, thus expressing approval for the model we call “principled

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375. See *supra* notes 289–297 and accompanying text.

376. Two related caveats may be in order. First, it seems obvious that the Court was perceived to be a more “political” institution in 2007 than it was in 1954. If that perception is correct, some of the modern shift towards political framing may reflect changes in the Court as well as in the media. At the same time, the media’s development of a popular political narrative of the Court may have contributed to the conditions that facilitated the presumed politicization of the institution. This leads to a second caveat: we are not claiming a causal connection between media framing and the presumed politicization of the Court. At most, we are observing that social science literature suggests a correlation between political framing and public perceptions of procedural unfairness, which in turn may be related to diminished “loyalty” to the Court; our study simply supplies data that shows a rise in the comparative frequency of political framing.

377. See *supra* Part II.B.

378. See *supra* notes 131–135 and accompanying text.

discretion.”<sup>379</sup> Americans have simultaneously indicated that they will withdraw their loyalty to the Court as an institution when they perceive its members to be following a “political” decision-making model.<sup>380</sup> Although the surveys that reflect these preferences are often somewhat ambiguous concerning the line between permissible judicial “discretion” and disfavored judicial “politics,” respondents appear to be disapproving when judges seem to be acting as “politicians in robes” or to be serving the agendas of an exogenous partisan apparatus.<sup>381</sup>

In other words, the public prefers judicial decision-making in a “pure legal” model, is not uncomfortable with a “law-leaning” model in which personal and policy values play a role, and rejects a “politics-leaning” model. Based on these findings, one might conclude that media coverage of the Court’s work does not have the power to threaten public loyalty so long as it includes both law and politics, mollifying readers with evidence that the Court’s work is influenced by both internal and external factors. And one might further argue that so long as stories about the Court refer to both law and politics, it matters little if journalists emphasize one aspect more than the other.

But we think it does matter. First, some of the increase in “political” language that we found may suggest to the public that the Justices are influenced by precisely the kind of non-legal considerations that the public considers particularly offensive. Specifically, the public has indicated that while it tolerates judicial infusion of law with some personal values and policy preferences, it does not believe that the Justices should mimic the preferences of partisan groups outside the Court in its decision-making.<sup>382</sup> The modern convention of interviewing and quoting representatives of third-party interest groups—a relatively insignificant part of the *Brown* coverage—may give readers the impression that the Justices are themselves concerned with deciding cases to satisfy or

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379. See *supra* Part II.A.3.

380. See *supra* notes 159–171 and accompanying text.

381. See Gibson & Caldeira, *supra* note 60, at 208 (reporting that while a slim majority of Americans do not think judges are “politicians in robes,” those who do are more skeptical of the judicial decision-making process).

382. See *supra* notes 113–174 and accompanying text.

align with those groups.<sup>383</sup> Similarly, the public has indicated its distaste for intra-curial bargaining that resembles congressional logrolling.<sup>384</sup> And the modern practice of describing how individual Justices behave during oral argument and on decision days may reinforce the image that the Justices are doing just that.<sup>385</sup>

Second, without regard to whether the political language used by the modern media reinforces the tropes that most repel the public, the relatively greater amount of political language, compared to legal language, is significant. Media framing theory suggests that in a “competitive environment,” where multiple issue frames are offered to the public, the sheer numeric dominance of a particular frame has great persuasive force.<sup>386</sup> In other words, when political explanations for the Court’s behavior equal or exceed the number of legal explanations within a given story, readers are likely to believe that political considerations are the primary driver of the Court’s decision. That result has the demonstrated capacity to undermine public confidence in the Court, which is a structurally crucial resource when the Court acts in a counter-majoritarian fashion.

A politics-leaning frame of the Court’s work is problematic for a third reason. Media experts have learned that news stories with “human interest” elements penetrate the public consciousness more deeply than stories that are complex and abstract.<sup>387</sup> Political explanations that boil down to liberal-conservative or Democratic-Republican divides among the Justices are dramatic, and easy for readers to understand. Explanations of “legalistic” decision-making, replete with references to competing or

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383. Compare, e.g., Associated Press, *supra* note 296, with Greenhouse, *supra* note 311 (distinguishing the modern practice of including commentary from policy-focused interest groups from the 1950s when policy groups were rarely included in coverage of major court decisions).

384. See *supra* notes 137–141 and accompanying text.

385. Cf. Greenhouse, *supra* note 311 (describing Justice Breyer’s atypically emotional delivery of his dissent).

386. See Chong & Druckman, *supra* note 188, at 111 (enumerating factors that influence how individuals evaluate the strength of a frame including a competitive environment).

387. See DORIS GRABER, MASS MEDIA AND AMERICAN POLITICS 90 (2d ed. 1984) (hereinafter MASS MEDIA) (stating that in coverage of “serious” stories, “[c]omplex issues are presented as simple human interest dramas”).

conflicting constitutional provisions or to less than conclusive case law, make for dry and sometimes challenging reading.<sup>388</sup> Consequently, there is good reason to believe that when readers encounter a story that emphasizes politics and mentions law—or even one that gives equal weight to both—the combined dominance and dramatic resonance of political storytelling will drown out legal language.<sup>389</sup> In other words, the mere presence of legally framed information may not be sufficient to convince readers that legal reasoning actually plays a meaningful role in the Court’s work.<sup>390</sup> In contrast, when readers encounter a story that emphasizes law and mentions politics, the dominance of legal references combined with the drama of political references increases the likelihood that readers will retain both accounts of

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388. See Greenhouse, *Story*, *supra* note 185, at 1538 (“[E]very generalization . . . about the barriers to public understanding of the judicial system is particularly true of the Court: To the public at large, the Supreme Court is a remote and mysterious oracle that makes occasional pronouncements on major issues . . . and then disappears from view . . .”).

389. For example, the *Times* reported in the same story that Justice Kennedy wrote a separate concurrence in *Parents Involved*, urging the use of a “narrowly tailored” local measure to take race into account in pupil assignments; the article also discussed at length Justice Kennedy’s penchant for inflating his power by staking out centrist positions that required his colleagues to court him throughout the term prior to the resolution of divisive cases. See Greenhouse, *supra* note 311. These linguistic and thematic choices can be described as “good” reporting because they explain both the constitutional doctrine that allows for some consideration of race and the manner in which Justice Kennedy tried to shift the doctrinal discussion towards the moderate policy outcome which he preferred and obviously thought to be more consistent with the Court’s existing jurisprudence, particularly *Bakke* and *Bollinger*. At the same time, when the political account occupies many more column inches than the legal account, and is rendered in more vivid, accessible language, it could also be described as “bad” reporting because it is likely that the reader will uptake only the political explanation of Justice Kennedy’s work. Ideally, a reporter would attempt to explain Justice Kennedy’s legal gambit in equally digestible language, and at equal length. And an outstanding story might endeavor to document whether the legal doctrines invoked by the various voting blocs plausibly justified their eventual votes in the case, thus treating law and judgment as a complex hybrid rather than mutually exclusive choices. That may be difficult, of course, given the time constraints under which contemporary reporters labor, together with the Court’s seeming unwillingness to adopt any measures that might help reporters to improve their coverage of the Court, as some courts in other countries have done. See *supra* notes 205–207 and accompanying text.

390. See, e.g., Chong & Druckman, *supra* note 216, at 111.

the Court's work.<sup>391</sup> Thus, a law-leaning portrayal that includes political context is more likely than its opposite to convey that the Court typically honors both factors internal to the law and some external to it.

### V. Ramifications

In 2010, Christopher Johnston and Brandon Bartles wrote that the media “empties the ‘reservoir of goodwill’ that the courts have enjoyed” over the years, and thereby diminishes support for the Supreme Court, as media coverage leans towards “greater sensationalism, derogating judges, [and] highlighting political decision-making.”<sup>392</sup> By focusing on the press's reporting of *Brown* and *Parents Involved*, our study suggests the possibility that a strong shift in the nature of Supreme Court reporting has occurred since the 1950s. It is a shift that de-emphasizes the legal aspects of Supreme Court decision-making, the reporting of which naturally requires a substantial reservoir of legal knowledge and much attention to the detail of individual cases, in favor of a kind of reporting that emphasizes non-legal aspects of the decision-making process, which are less difficult to understand and may give rise to a more lively narrative. In other words, the conditions that scholars have identified as constituting a threat to continued support for the Court as an institution seem to be present.<sup>393</sup> Whether the diminution in public support for the Court that Johnston and Bartles have predicted will come to pass

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391. *See id.* (stating that “framing effects depend on a mix of factors including [both] the strength and [the] repetition of the frame . . . [and that] the aggregate impact of a mix of frames may differ from sum of their individual effects.” As a result, when a strong (political) frame is competing with an infrequently repeated weak (legal) frame, the strong frame might be expected to win, but when a strong (political) frame is itself infrequent and is competing with a frequently repeated but weak (legal) frame, the two might be expected to make equally significant impressions on a reader).

392. Christopher D. Johnston & Brandon L. Bartles, *Sensationalism and Sobriety: Differential Media Exposure and Attitudes Toward American Courts*, 74 PUB. OPINION Q. 260, 276 (2010).

393. *See* Johnston & Bartles, *supra* note 392, at 276 (predicting “deleterious consequences” for the public's opinion of the judiciary if the media continue to portray the court in political terms).

remains to be seen, but the snapshots provided by recent polls strongly suggest that that may well be the case.

Our goal has been to test the possibility that media framing of the Supreme Court's work has shifted. We have not undertaken to explain the reason for that shift. However, scholars of framing have suggested that frames serve multiple purposes: (1) they allow journalists to structure their work and quickly synthesize incoming information; (2) they allow individual journalists or outlets to examine information in terms of its relevance to the political commitments of the author or publisher; and (3) they reflect the views of external actors such as politicians, interest groups, and other elites who may be sources for an individual story or recognized experts on a broad topic.<sup>394</sup> The shift away from the relative dominance of legal framing serves all three of these purposes.

First, a political frame provides an easy structure for journalists. As the news cycle has evolved from a daily to an hourly rhythm,<sup>395</sup> reporters are expected to digest the content of Court opinions almost instantaneously, rather than taking several hours between a morning opinion announcement and an evening deadline to read the various opinions in each case in which a decision has been rendered, digest the fine points of the legal reasoning contained in those opinions, and translate the legal concepts discussed in the several opinions into readable prose.<sup>396</sup> Identifying a case outcome, the vote breakdown, and the political "winner" is a far faster and simpler task than working through, in an exceedingly short period of time, the legal analyses in what may be a lengthy set of opinions, determining what the Justices are actually saying in their opinions, what the real nature of their disagreement is, and drafting a comprehensible story for lay

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394. See Scheufele, *supra* note 189, at 107–111 (defining the concept of "frames," suggesting a typology for framing, and analyzing the effect of framing in the consumption of modern media).

395. See Christopher Bergland, *How Has News Changed Over the Past 30 Years?*, PSYCHOL. TODAY (May 14, 2019), <https://perma.cc/RQ8B-SN3B> (last visited Oct. 16, 2019) (documenting changes in the way news is reported against the backdrop of technological advances) (on file with the Washington and Lee Law Review).

396. See *id.* (asserting that reporting may have become more subjective, as the American news cycle has become almost instantaneous).

readers in terms of the legal sources that have been cited. This is especially true as the Supreme Court press corps has shrunk and general assignment reporters have been asked to cover important opinion announcements as soon as they break.<sup>397</sup> It is also especially true in the final weeks of the Supreme Court Term, when a large number of important opinions in particularly difficult cases are released together on a small number of opinion days.<sup>398</sup> Finally, it is especially true when the Court, unlike some other constitutional courts, has decided to provide very little assistance to help journalists understand the Court and its work.

Second, some individual journalists and particular news outlets have become increasingly candid and straightforward about their own political commitments.<sup>399</sup> Indeed, the prominence of certain individual journalists and the success of certain news outlets may depend on the loyalty of a particular segment of the news-consuming public, so that casting Court opinions as victories or defeats for viewpoints favored by their readers may be a particularly appealing approach to coverage.<sup>400</sup> This factor has obviously increased in importance in recent years as the economics of publishing has put greater and greater pressure on the print news industry.<sup>401</sup>

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397. See, e.g., Greenhouse, *Story*, *supra* note 185, at 1540–41 (describing the changing landscape of reporting at the Supreme Court and lamenting the loss of understanding of the workings of the Court as news outlets have scaled back their full-time presence at the Court).

398. See *id.* at 1549–50 (highlighting certain landmark decisions that received very little press coverage because the reporters were faultlessly ignorant of their legal significance); see also *id.* at 1548–49 (“[A]lthough it would certainly be rewarding to have behind-the-scenes discussions with the Justices about the Court’s work, there is a certain liberation in not having the kind of personal, mutually beneficial relationships that many political journalists have with the people they cover.”).

399. See, e.g., S. Robert Lichter, *Theories of Media Bias* in THE OXFORD HANDBOOK OF POLITICAL COMMUNICATION 7 (2017) (discussing a “shift toward more partisan news,” the “development of avowedly partisan electronic media organs,” and a “tendency in recent years for news outlets to become more opinionated”).

400. See, e.g., AMY MITCHELL ET AL., POLITICAL POLARIZATION AND MEDIA HABITS 22–24 (PEW RES. CTR. 2014) (analyzing data collected regarding public perception of popular news outlets and demonstrating that consumers tend to prefer news outlets that are aligned with their ideological views).

401. See, e.g., *Impartiality—The Foxification of News*, THE ECONOMIST (July

Third, reporters seeking expert assistance and commentary may be drawn into an assumption that the Court's work is largely political, as that may well be the view of those to whom they are most likely to go for expert help.<sup>402</sup> This trend may continue as the number of interest groups filing policy-oriented amicus curiae briefs in Supreme Court litigation has grown exponentially,<sup>403</sup> strikingly similar to the operations of lobbying groups in relation to the executive and legislative branches. Moreover, legal scholars and other prominent lawyers increasingly have publicly identified themselves with various ideological and political positions,<sup>404</sup> and they often compete to advance those positions using a media platform. Finally, the legal academy has arguably shifted from formalism to various forms of "realism,"<sup>405</sup> so that journalists seeking academic legal sources are more likely to receive "realist" explanations of the Court's work.

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7, 2011), <https://perma.cc/AQ42-5J4S> (last visited Oct. 17, 2019) (evaluating the hyper-partisan impact that technology has had on news outlets) (on file with the Washington and Lee Law Review).

402. For one reporter's experience covering the Supreme Court and her observations on the ramifications of not properly educating reporters on the legal aspect of the Court's work, see generally Greenhouse, *Story*, *supra* note 185.

403. See Kearney & Merrill, *supra* note 244, at 828–30 (concluding that the number of amicus curiae briefs has increased to previously unprecedented levels while casting some doubt on the actual legal effect of briefs filed by policy groups as opposed to state actors).

404. For one detailed analysis of the ideology of American lawyers that outlines the general political leanings of the legal profession, geographic ideology, the relationship of a legal professional's educational background and ideology, the ideology of law firms, and the ideology of legal professionals by practice area, see generally ADAM BONICA, ADAM S. CHILTON, & MAYA SEN, *THE POLITICAL IDEOLOGIES OF AMERICAN LAWYERS* (HARV. KENNEDY SCH. 2015).

405. It is also the case, of course, that some Supreme Court journalists are themselves either law graduates or journalists who have received special legal training, often in special programs at Harvard or Yale. As of 2005, for example, Yale Law School had enrolled "over 120 talented mid-career journalists in a one-year program of intensive legal studies culminating in the Master of Studies in Law degree. Scores of graduates of the school have gone on to fill the daily airwaves, newspapers, and websites, including such well-known and diverse journalists as Jeff Greenfield, Linda Greenhouse, Ben Stein, Steven Brill, and Jeffrey Rosen." Harold Koh, *Yale Law School, Lex et Veritas*, *LEGAL AFFAIRS* (Feb. 2005) <https://perma.cc/V72B-EWGH> (last visited Oct. 17, 2019) (on file with the Washington and Lee Law Review). Yale has long been at the forefront of legal realism. See generally LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960* (G. Edward White ed., 1986).



In addition to the structural and environmental factors that may have drawn reporters towards political framing, the sociology (as well as the economics) of journalism has shifted since the time of *Brown*. In the post-Watergate years, the press increasingly saw itself as standing in an adversarial position with respect to many institutions, obliged to discredit surface explanations and seek “behind-the-scenes” truth.<sup>406</sup> For example, Bob Woodward applied the same techniques used in his Watergate coverage to write the first “exposé” of the Supreme Court in 1979,<sup>407</sup> and other reporters have periodically followed suit with additional books that claim to lay bare the true personality and ideological struggles that seemingly beset the Court.<sup>408</sup> It is also the case, of course, that the Supreme Court has provided more fertile ground for such inquiries in recent years, as the Court has sometimes reached out to decide cases in derogation of its ordinary norms, as it did most notably in *Bush v. Gore*;<sup>409</sup> and as some of the Justices’ treatment of each other in opinions and at oral argument has come under scrutiny.<sup>410</sup>

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406. MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 168 (1978).

407. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979) (offering a look “behind-the-scenes” at the inner workings of the Court from 1969 to 1975 including a critique of various Justices and a discussion of their personalities).

408. See generally JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE SUPREME COURT* (Penguin Press 2007); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008); JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* (2013).

409. 531 U.S. 98, 103–04 (2000) (per curiam) (deciding the outcome of the 2000 presidential election by overruling the Florida courts on a question of Florida state law, contrary to the Court’s practice of not deciding state law issues, and stating, contrary to accepted norms, that the Court’s decision should not be treated as precedent for other cases); see also Margaret Moses, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 174–75, 202 (2011) (calling into question the Supreme Court’s recent practice of “reaching out” to decide issues not properly presented by analyzing the Court’s consideration of four recent cases and questioning whether the Court was acting legitimately in its treatment of those cases); Linda Greenhouse, *Can the Supreme Court Save Itself?*, N.Y. TIMES, Nov. 24, 2019, at SR3 (discussing the politically-charged cases being presented to the Court in the current Term and the challenges they represent for the Court’s credibility and reputation for political independence).

410. See Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as*

Why does it matter if the press persuades the public—even inadvertently—that legal reasoning is a chimera in Supreme Court decision-making? It is a commonplace that governmental power in a constitutional democracy must be exercised “within the law.”<sup>411</sup> Citizens are therefore likely to consider adjudication legitimate when they “have respect for the [Court’s] reasons, not agreement with [its] results.”<sup>412</sup> Translating the Court’s reasoning about text and precedent into understandable language is difficult, and journalists may appear less committed to the task today than they were decades ago. Increasingly, journalists merely allude to text and caselaw within extended political deconstructions of the Justices’ work. Such allusions do not help readers understand the Justices’ explanations of their reasoning or their votes. To the contrary, they insulate citizen readers from an understanding of the complexities inherent in judicial decision-making in a constitutional democracy. These allusions invite the public to infer that when it comes to the Supreme Court, results *are* reasons. This, in turn, suggests that Supreme Court adjudication is not a legitimate act of judicial review according to law, but an anti-democratic usurpation by a life-tenured, unelected body.

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*Advocates*, 94 NOTRE DAME L. REV. 1161, 1168–78 (2019) (characterizing the “new oral argument” as more adversarial and rife with commentary from the Justices than traditional practice); Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1485 (2017) (noting the frequency with which the Justices interrupt counsel and each other during oral arguments); Sullivan & Canty, *supra* note 32, at 1037; *see also* Chemerinsky, *supra* note 78, at 1715 (criticizing certain Justices for using sarcasm and ridicule in their opinions).

411. STEVEN BURTON, *JUDGING IN GOOD FAITH* xi (1992) (explaining that a court’s ethical duty to uphold the law is critical and should not be taken for granted). *See also* STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 95 (2000) (“No one is expected to believe . . . [that the Supreme Court’s] decisions are infallibly just in matters of substance; but everybody is expected to believe [that the] procedures are just because they conform to the basic principle governing adversary reasoning: . . . both sides in a conflict should be equally heard.”); TOM BINGHAM, *THE RULE OF LAW* 90–91 (2010) (noting the elements of fairness in decision-making, including judicial independence); Thomas Jefferson, *Opinion on the Constitutionality of a National Bank*, in *THOMAS JEFFERSON: WRITINGS* 416 (Merrill D. Peterson ed., 1984) (“To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”).

412. BURTON, *supra* note 412, at xii.

The proper role of the press certainly is not to hide the truth about the Court, artificially inflate its claims to legitimacy, or present a romanticized picture of judicial review. The opposite is true. The press's role is to inform and educate a free and self-governing people, and that necessarily includes subjecting the Court's work to careful scrutiny to determine whether the reasons the Justices give for their decisions are valid and legitimate.<sup>413</sup> The fact is, of course, that whether the Justices decide cases primarily according to law is fiercely contested, with many political scientists and some lawyers firmly convinced that they do not. Indeed, the evidence strongly suggests that the Justices who have been selected in the recent past have been nominated and confirmed primarily because those responsible for the nomination and confirmation processes were convinced that the nominees would decide cases precisely as their political sponsors hoped.<sup>414</sup> Some, indeed, have barely concealed their partisan stripes in the course of their confirmation hearings, no doubt reacting to what they have considered to be unfair partisan treatment meted out by those on the other side of the aisle.<sup>415</sup>

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413. See, e.g., Joe Concha, *The Washington Post: "Democracy Dies in Darkness"*, THE HILL (Feb. 22, 2017), <https://perma.cc/37EZ-85X6> (last visited Oct. 17, 2019) (discussing the *Washington Post's* adoption of a new editorial motto emphasizing the indispensable role of the press in a democratic system that presumes citizen engagement) (on file with the Washington and Lee Law Review); Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633–34 (1975) (stating Justice Stewart's view that the existence of a free press is indispensable to the constitutional design).

414. See Robert Barnes, *Justices Tend to Agree with Presidents that Pick Them—But Stray Later*, WASH. POST (Dec. 20, 2015), <https://perma.cc/3BU7-F5YG> (last visited Oct. 17, 2019) (“Most members of the court make more decisions favorable to the president who brought them to the dance than they do to subsequent presidents . . . . [T]he ‘loyalty effect’ is evident even when other factors such as ideology and a personal relationship with the appointing president are taken into account.”) (on file with the Washington and Lee Law Review).

415. Cf. Tom Donnelly & Brianne Gorod, *None to the Right of Samuel Alito*, THE ATLANTIC (Jan. 20, 2016), <https://perma.cc/V8FD-2NRE> (last visited Oct. 17, 2019) (on file with the Washington and Lee Law Review)

When Justice Samuel Alito was nominated to the U.S. Supreme Court by President George W. Bush 10 years ago, it represented a triumph for the conservative legal movement. Haunted for decades by the ghosts of Supreme Court nominees they found disappointing—most notably, David Souter and Anthony Kennedy—conservatives finally

If the Justices profess to be making decisions according to law, however, the best way to prove or disprove that claim is to scrutinize their opinions to determine whether that is what they are doing, rather than merely assuming that law does not enter into the Justices' decision-making process except, perhaps, as window dressing. While the work of the contemporary press seems to have been increasingly influenced by the "political" account of the Court, it seems to have adopted that normative view without explicitly acknowledging to its readers the bias it represents. Gravitating towards a political frame for Court decision-making leaves the public with an understanding of the judiciary that is dangerously incomplete (at best) and biased (at worst). It is worth asking whether—given complete freedom to describe and explain the Court's work as they wish—reporters are making choices that help to educate Americans about their Constitution and its role in modern life, or, alternatively, choices that depict the Court as exerting power "outside the law." It is also worth asking what has motivated those choices. One explanation, as we have noted, may be found in the extreme time constraints under which reporters and editors now typically work, together with the fact that really getting to the bottom of Supreme Court opinions is hard work and extremely time-consuming. On the other hand, to the extent that political framing reflects an effort either to win market edge by generating quick stories or to advance a reporter's own political commitments, those choices are not consistent with the press's stated mission of contributing to the democratic process by providing citizens with accurate and objective information about important matters of civic life.

Real consequences flow from these framing practices. In the short term, studies indicate, rising perceptions of the Court as a politically motivated institution correlate with falling perceptions of the Court as an institution worthy of deference or protection. When the public lacks confidence in the Court, whether reasonably and justifiably or not, serious consequences may follow, as was the

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had their man. As the law professor Jonathan Turley noted when Alito was nominated, "No one on the conservative base can be unhappy with Sam Alito." A decade into his tenure on the Court, Alito hasn't disappointed.

case on various past occasions when segments of the community have opposed the authority of Court decrees, most notably in the enforcement of equitable orders flowing from the *Brown* decision and its progeny,<sup>416</sup> and more recently in the refusal of state officeholders to comply with the Court's same-sex marriage decisions.<sup>417</sup>

Reporting that has the effect of unduly encouraging the public to view the Supreme Court and its work through the prism of politics may also have a more far-reaching, albeit more diffuse, consequence. The American project creates space for both constitutionalism and democracy,<sup>418</sup> and it draws strength from

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416. See, e.g., Roberts, *supra* note 27, at 94–98 (2015) (using the story of Sheriff Tom Poppell in McIntosh County, Georgia to illustrate the serious problems that arise when authority acts outside legitimate grants of power or with less than savory motivations).

417. See Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1, 3–13 (2015) (explaining the procedure for issuing marriage licenses in Alabama and how individual judges circumvented law to achieve desired political outcomes). Recent refusals to obey court orders have not been limited to state officials or highly controversial cultural issues. In one recent case, the federal government simply ignored the mandate of a federal appellate court, choosing instead to follow the Attorney General's legal interpretation, which provoked a strong response from the court on a subsequent appeal. See *Baez-Sanchez v. Barr*, No. 19-1642 (7th Cir., Jan. 23, 2020) (Easterbrook J.)

What happened next beggars belief. The Board of Immigration Appeals wrote, on the basis of a footnote in a letter the Attorney General wrote after our opinion, that our decision is incorrect. Instead of addressing the issues we specified, the Board repeated a theme of its prior decision that the Secretary has the sole power to issue U visas and therefore should have the sole power to decide whether to waive inadmissibility. . . . In sum, the Board flatly refused to implement our decision.

See also Adrienne Mahsa Varkiani, *Will CBP Get Away With Deporting an Iranian Student Against a Court Order?*, SLATE (Jan. 22, 2020), <https://perma.cc/QFE8-BYJK> (last visited Feb. 6, 2020) (describing case in which the government deported a student, notwithstanding court order and representations apparently made to the court by government lawyers) (on file with the Washington and Lee Law Review).

418. See Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399, 399–400 (1998) (identifying the tension between democracy and constitutionalism as a constant struggle for Justices to balance politics and the black letter law); see also Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3 (Douglas Greenberg et al. eds., 1993) (explaining differences between

the tension between them.<sup>419</sup> Democracy is predicated upon a faith in human nature and involves majority rule: “the people of a country deciding for themselves the contents of laws that organize and regulate their political association” in real time.<sup>420</sup> Constitutionalism, on the other hand, is based on a distrust of majority rule and a belief that restraints must be placed even on the majority; decisions by the people must be limited by a “supervening . . . law of lawmaking” that takes the long view.<sup>421</sup> The American system of government fuses these potentially conflicting elements into an integrated whole, giving full-throated voice to both parts. With respect to the role of the Court in this mixed system of government, Americans have repeatedly expressed their tolerance for legally reasoned decisions with which they strongly disagree; that is, for constitutionalism.<sup>422</sup> And they repeatedly have expressed their distaste for politically based judicial decisions regardless of outcome; that is, for what they believe to be judicial usurpation of democracy.<sup>423</sup> Citizens intuitively grasp the symbiotic relationship between these two ideals. When they suspect that the Court is upsetting the balance between the two, they may struggle to support the most “constitutionalist” branch of government, or the text that claims authority to restrain the majority in the service of long-term ideals. Constitutions “articulate, preserve, or construct the highest values of the nation and its people”<sup>424</sup> and “protect the demos from

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constitutionalism and democracy and their fusion).

419. See Barry Sullivan, *The Irish Constitution: Some Reflections From Abroad*, in *THE IRISH CONSTITUTION: GOVERNANCE AND VALUES* 1, 3 (Oran Doyle & Eoin Carolan eds., 2008) (“Virtually all [constitutions] create some framework for government, identify rights, and, in one way or another, give voice to the nation’s aspirations as to what kind of a people the nation wishes to be.”); Mila Versteeg, *Unpopular Constitutionalism*, 89 *IND. L.J.* 1133, 1136–37 (2014) (stating that the role of a constitution is to instill high-minded goals and codify a society’s values while ordinary legislation serves to further short-term interests).

420. Michelman, *supra* note 418, at 400.

421. See *id.* (describing the how the high ideals of a constitution should interact with popular opinion and sentiments in moments of tension).

422. See *supra* notes 161–168 and accompanying text.

423. See *supra* notes 169–173 and accompanying text.

424. Versteeg, *supra* note 419, at 1135.

itself.”<sup>425</sup> If the public’s loyalty to the Constitution evaporates, the search for shared values may well evaporate with it.

### *VI. Conclusion*

To be sure, the work of judges eludes simplistic description. While lawyers and political scientists have occasionally tried to distill the work of judges to “legal” or “political” models, neither model can account for the whole story. Americans seem to grasp that fact and understand that constitutional adjudication requires the exercise of judgment and choice, as well as scholarly and dispassionate attention to the sources of law. And Americans mainly seem to accept that discretion is essential to the judicial process, so long as it is exercised within acknowledged and accepted bounds. But when Americans perceive that claims of judgment or discretion are simply a cover for political decision-making, their trust runs out. Consequently, when the press emphasizes the legal aspects of judicial decisions, Americans are more likely to support the institution, notwithstanding their disagreement with individual decisions. On the other hand, they are not inclined to do so when the press’s narrative suggests that politics drives the Court. That is why the manner in which the press chooses to describe the work of the Court is critical. The press must hold the Court accountable. That is the necessary role of the press in a democratic society. But the criteria that the press uses to describe the Court’s work must also be fair, accurate, and transparent. That is particularly true today, when there are unmistakable signs that the courts are considered by many, including those responsible for the nomination and confirmation of judges and Justices, to be convenient institutions for achieving political ends, rather than discharging their duty of “saying what the law is,” albeit according to their own best, individual judgment.

This study of the conventions of Supreme Court reportage, predicated on a comparison of the print media’s coverage of two salient cases decided fifty years apart, suggests that journalists may have shifted from telling a mainly legal story about the Court to telling one that is largely political. Of course, two cases do not

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425. *Id.*

prove the point, no matter how extensive and varied the reportage, and the results of this study are necessarily provisional. Further studies of the print media's coverage of additional cases are needed, and it would be helpful as well to study the non-print media from which so many Americans now typically receive their news. But the results of this limited study are striking. The frequency and depth of references to the Constitution, precedents, and other sources of law that was apparent in the press coverage of *Brown* seem to have given way in *Parents Involved* to discussions of such things as the Justices' political pedigrees and sponsors and the goals of external political groups.

Moreover, if one properly can generalize from these two cases, it seems that the press has changed its approach to Supreme Court reporting without acknowledging—to itself or the public—the nature or possible consequences of that change. Press coverage that tells an easily digestible but oversimplified story—depicting the Justices either as mere technicians or as naked politicians—will not enlighten the public; but coverage that treats the Justices as mere political actors may well—and possibly without adequate justification—undermine the public's confidence in the Court's performance of its indispensable role in our constitutional democracy. This study suggests that the press may operate from the assumption that the Court is, above all, a locus of political struggle. It is not clear whether that story is entirely true. Whether it is true or not, however, it may well be self-fulfilling.



