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THE CHANGING FACE OF THE SUPREME COURT

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INTRODUCTION

IN 1962, I found myself at the hem of history. That fall, I had the good fortune to begin clerking for U.S. Supreme Court Justice Hugo L. Black. Between the time I accepted the job and the day I began work, Felix Frankfurter had left the Court, and Arthur Goldberg took his place. The balance on the Court shifted, with a dedicated liberal replacing the Court's premier conservative. The Warren Court technically had begun in 1953, when Earl Warren became Chief Justice, but 1962 marked the beginning of the heyday of a memorably activist period in the Court's history. The Warren Court's historic decisions are both legion and legendary—*Brown v. Board of Education*,¹ one person, one vote in legislative apportionment,² and the nationalization of criminal procedure in state courts,³ to name but a few. The work of the Warren Court was, of course, highly controversial, spawning a debate over the Supreme Court's proper role that continues to this day.

More recently, many years after I had begun teaching law at the University of Virginia, the members of the *Virginia Law Review* asked me to make remarks at an annual luncheon at which a member of the faculty is invited to be the speaker. We agreed that I would talk, among other things, about my days clerking at the Court. Preparing my remarks, I fell to musing on how, and in what ways, the Court has changed since my days at Justice Black's elbow. Having given my talk, I decided to turn my remarks into a brief essay. That essay morphed, in turn, into this Article.

I do not intend, in this Article, to write about the Court's decisions and jurisprudence. There is much, of course, that one could write about in that regard. Think of the striking shifts in doctrine from the time of the Warren Court to the Rehnquist and Roberts eras. The Warren Court was little concerned about the Tenth Amendment and the prerogatives of the states; whatever use Congress wanted to make of the commerce power, the Court was content to let it do.⁴ We now know that the present Court's conservative justices see real limits on the commerce power.⁵

¹ 347 U.S. 483 (1954).

² *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

³ *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

⁴ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964).

⁵ This is evident in the discussion of the commerce power by the Court's more conservative justices in the Affordable Care Act case. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132

Another area of change involves the Constitution's religion clauses. Where the Warren Court set out to build a strict wall of separation between church and state, the Rehnquist and Roberts Courts have begun steadily to dismantle that wall.⁶ The conventional notion was that the Second Amendment assumed a collective right to bear arms (in militia), but the modern Court has given us an individual right.⁷ Business, especially big business, saw little to love about the Warren Court but finds itself more in favor in the current Court, which has an obvious distaste for class action suits.⁸ These are but a few examples of major innovation in the Court's decisions since the 1960s. Sometimes the Court moves incrementally, sometimes by large bounds, but the direction in which much of its jurisprudence is moving is in sharp contrast to the Court of Earl Warren.⁹

I propose to write here not about doctrine, but about changes in the Court itself—about the justices and how they do their business, about life at the Court, about the Court's relation to the country. Not everything has changed, of course. If a justice of the Warren Court could re-

S. Ct. 2566, 2585–91 (2012); *id.* at 2642–50 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *id.* at 2677 (Thomas, J., dissenting).

⁶ Compare *Engel v. Vitale*, 370 U.S. 421, 430–31 (1962) (holding state-composed prayer at schools unconstitutional), with *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825–26 (2014) (allowing prayers by private citizens before town meetings).

⁷ *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

⁸ See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013).

⁹ For discussions of recent terms of the Roberts Court, see A. E. Dick Howard, *Ten Things the 2012–13 Term Tells Us About the Roberts Court*, 99 *Va. L. Rev. Online* 48 (2013); A. E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 *Va. L. Rev. In Brief* 76 (2012) [hereinafter Howard, *Out of Infancy*]; A. E. Dick Howard, *Now We Are Six: The Emerging Roberts Court*, 98 *Va. L. Rev. In Brief* 1 (2012). For overviews of the Rehnquist and Roberts Courts, see Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* (2013); Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth & Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments* (4th ed. 2007); Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (2007); David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (10th ed. 2014); Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (2007); Laurence Tribe & Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (2014); Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (2005); Mark Tushnet, *In the Balance: Law and Politics on the Roberts Court* (2013) [hereinafter Tushnet, *In the Balance*]; Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 *Nw. U. L. Rev.* 1483 (2007); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court* (William & Mary Law Sch., Research Paper No. 09-276, 2014), available at <http://ssrn.com/abstract=2432111>.

turn to his old work place, he would see much that is familiar. He would find his successors working in the same “marble palace,” completed in 1935. Comparing notes with one of today’s justices, he would learn that cases go through a familiar sequence—the certiorari stage, conference, briefs on the merits, oral argument, conference, circulation of draft opinions, and the announcement of the Court’s decision. But he would be bemused by the ways in which life at the Court has changed. It is to that subject that I now turn.

I. THE JUSTICES

At the beginning of each Term, the justices gather for a photograph. Today’s photos look strikingly different from those taken of the Warren Court. In those days, the bench was all male and all white. Today’s Court includes one black man and three women, one of whom is Hispanic. What the picture does not show is that the Court is, in some respects, more elite than ever; all the justices attended Ivy League law schools. The Court is also less geographically diverse; many of the justices come from the Northeast. Nor does the picture show the justices’ religion. Today there are no Protestants; all the justices are either Catholic or Jewish.

Comparing the justices’ photograph from 1962 with current portraits—especially the differences in race and gender—one might speculate that the two Courts have interpreted the Constitution and laws differently. This surmise would be superficially correct. But where the observer might imagine that increased diversity has brought a slide to the left, that person might be surprised to learn that the 2014 Court is center-right. Today’s Court is, in many ways, different from that of the 1960s. But changes in the Court’s “representative” characteristics—race, ethnicity, religion, geography—have not led to predictable results.

A. Race and Ethnicity

In 1954, nine white justices issued a bold, unanimous opinion: “Separate educational facilities are inherently unequal.”¹⁰ The holding in *Brown v. Board of Education* was the outcome of years of strategic litigation shaped by talented attorneys at the NAACP, led by Thurgood

¹⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

Marshall.¹¹ In 1967, thirteen years after the Court's decision in *Brown*, Marshall became the first African American to sit on the Court. As President Lyndon Johnson told the country when he nominated Marshall, it was "the right thing to do, the right time to do it, the right man and the right place."¹²

1. *Desegregating the Court: Thurgood Marshall*

Marshall grew up in segregated Baltimore, ten years after the Democratic Party took control of Baltimore's government under the slogan, "This Is a White Man's City."¹³ Marshall encountered the Constitution in grammar school; his principal required him to learn sections of the document as punishment for classroom misbehavior.¹⁴ The oft-punished Marshall recalled that, by the end of grammar school, "I knew the whole thing by heart."¹⁵ After high school, he attended Lincoln University, a Pennsylvania school for African Americans with an all-white faculty. Because the University of Maryland did not admit black students, Marshall earned his law degree at Howard University.¹⁶ Upon graduation he entered a profession that was ninety-nine percent white.¹⁷

As Director-Counsel of the NAACP's Legal Defense and Educational Fund,¹⁸ Marshall carefully planned and executed the strategy that led to *Brown* and other significant civil rights cases.¹⁹ A brilliant advocate, Marshall won twenty-seven of the thirty-two cases that he argued before

¹¹ The Court first heard ten hours of oral argument for the parties in the consolidated cases in December 1952. The following June, the Court requested a re-argument to answer a number of questions, including whether the drafters of the Fourteenth Amendment had originally intended it to remove all segregation. Finally, on May 17, 1954, the Court issued its monumental decision. See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 564–81, 615, 700–02 (1975).

¹² Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961–1991*, at 25 (1997) [hereinafter Tushnet, *Making Constitutional Law*].

¹³ Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961*, at 9 (1994). The period immediately before Marshall's birth spurred heightened racial tensions, the institution of Jim Crow laws, and a sharp increase in segregation, both by law and by practice.

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Id.* at 9.

¹⁷ Deborah L. Rhode, *Thurgood Marshall and His Clerks*, in *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* 314 (Todd C. Peppers & Artemus Ward eds., 2012).

¹⁸ Tushnet, *Making Constitutional Law*, supra note 12, at 181.

¹⁹ *Id.* at 3.

the Supreme Court,²⁰ including *Morgan v. Virginia*,²¹ *Shelley v. Kraemer*,²² and *Sweatt v. Painter*.²³

As a member of the Court, Marshall was something of an outsider. His colleagues thought that he seemed disengaged.²⁴ At the same time, he sought to educate his colleagues; Justice White recalled that Marshall told the justices “things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our experience.”²⁵ There is little doubt that Marshall’s experiences with injustice shaped his jurisprudence. In cases like *Bounds v. Smith*,²⁶ *Ake v. Oklahoma*,²⁷ or his famous dissent in *United States v. Kras*,²⁸ Marshall continuously defended the rights of “the least of these.”²⁹

Throughout his tenure on the bench, Marshall lent his pen and his vote to issues involving civil rights, such as affirmative action. In *Regents of University of California v. Bakke*, Marshall reviewed the history of slavery and segregation in a separate opinion:

[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.³⁰

²⁰ Randall Walton Bland, *Justice Thurgood Marshall: Crusader for Liberalism: His Judicial Biography (1908–1993)*, at 238 (2001).

²¹ 328 U.S. 373, 373 (1946) (invalidating a state law forbidding bus passengers of different races to sit next to each other).

²² 334 U.S. 1, 2 (1948) (holding racially restrictive covenants on real estate unenforceable).

²³ 339 U.S. 629, 630 (1950) (requiring the University of Texas Law School to admit an African American student).

²⁴ Tushnet, *Making Constitutional Law*, supra note 12, at 64.

²⁵ *Id.* at 5.

²⁶ 430 U.S. 817, 817–18 (1977) (recognizing the right of prisoners to have access to law libraries).

²⁷ 470 U.S. 68, 83 (1985) (requiring the state to provide indigent criminal defendants a psychiatrist’s assistance in presenting the defense case if sanity is at issue).

²⁸ 409 U.S. 434, 458–60 (1973) (Marshall, J., dissenting) (arguing that the Court’s refusal to strike down a fifty dollar bankruptcy filing fee effectively denied the poor access to the courts).

²⁹ Matthew 25:40.

³⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978).

Marshall continued to defend affirmative action during his time on the Court.³¹

2. A Different Black Voice: Clarence Thomas

When Justice Marshall announced his retirement, it was hard to imagine President George H. W. Bush's not naming another black American to fill the seat.³² When Bush nominated Clarence Thomas, however, he disclaimed that the nomination had anything to do with a "quota," declaring that Thomas's life spoke "eloquently for itself."³³ Some scholars, however, argue that Bush "unquestionably chose Thomas primarily because of his race."³⁴

While his jurisprudence is very different from that of Marshall, Thomas has also been shaped by the struggle against racism. When he was a schoolboy, Thomas's white classmates teased him at lights out, asking him to smile "so they could see him in the dark."³⁵ As a young professional, he felt compelled to avoid civil rights work to avoid labels of being an affirmative action hire.³⁶ Thomas declared his confirmation hearings to be a "high-tech lynching."³⁷ Even after Thomas's confirmation to the High Bench, an elementary school initially barred the Justice from speaking at a graduation ceremony "because his views did not comport with those of the 'traditional' civil rights community."³⁸

Thomas's experiences with affirmative action left a bad taste in his mouth. In his memoir, *My Grandfather's Son*, Thomas describes a "double standard" being applied to affirmative action candidates.³⁹ He recalls how potential employers "asked pointed questions unsubtly suggesting that they doubted I was as smart as my grades indicated."⁴⁰ He

³¹ See, for example, Marshall's dissenting opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528–29 (1989) (Marshall, J., dissenting).

³² See Henry J. Abraham, *Justices, Presidents, Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, at 295 (5th ed. 2008).

³³ Bush Announces the Nomination of Thomas to Supreme Court, 49 Cong. Q. Wkly. Rep., 1851, 1851–52 (July 6, 1991).

³⁴ Barbara A. Perry & Henry J. Abraham, A 'Representative' Supreme Court? The Thomas, Ginsburg, and Breyer Appointments, 81 *Judicature* 158, 159 (1998).

³⁵ Scott Douglas Gerber, *First Principles: The Jurisprudence of Clarence Thomas* 69 (1999) [hereinafter Gerber, *First Principles*].

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 69–70.

³⁹ Clarence Thomas, *My Grandfather's Son: A Memoir* 74–75 (2007).

⁴⁰ *Id.* at 86.

became “humiliated” and “desperate” as he learned “what a law degree from Yale was worth when it bore the taint of racial preference.”⁴¹

Thomas’s Supreme Court confirmation process has been called “arguably the most dramatic and divisive ever conducted.”⁴² As biographer Ken Foskett explains, “leaders [in the black community] were torn” between a desire to see another African American on the Court and unease with Thomas’s conservative take on affirmative action.⁴³ After initial ambivalence, the NAACP and other major black groups came out against Thomas.⁴⁴ The only major civil rights organization to support Thomas was the Southern Christian Leadership Conference.⁴⁵

The disparagement continued after Thomas’s confirmation. Many critics saw his opposition to affirmative action as betraying his race. Reverend Al Sharpton led a “crusade” of 600 protestors to “pray for Thomas’s Black soul.”⁴⁶ In 1998, the National Bar Association, a prominent African American legal organization, generated controversy when they invited Thomas to speak, and several leaders tried to have him uninvited.⁴⁷

These experiences add background to our understanding of Thomas’s jurisprudence. Some believe that “central to Justice Thomas’s civil rights jurisprudence is his belief that individuals should be treated as *in-dividuals*, not as members of racial or ethnic *groups*.”⁴⁸ Thomas questions policies that seem to assume that African Americans need “help” to succeed. He stresses the value of black institutions.⁴⁹ In *Missouri v. Jenkins*, a 1995 desegregation case, Thomas criticized the notion of black inferiority that *Brown* had come to represent.⁵⁰ Thomas sees

⁴¹ *Id.* at 87.

⁴² Scott D. Gerber, Justice for Clarence Thomas: An Intellectual History of Justice Thomas’s Twenty Years on the Supreme Court, 88 U. Det. Mercy L. Rev. 667, 671 (2011) [hereinafter Gerber, Justice for Clarence Thomas].

⁴³ Ken Foskett, Judging Thomas: The Life and Times of Clarence Thomas 218 (2004).

⁴⁴ Manning Marable, Clarence Thomas and the Crisis of Black Political Culture, in *Racing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* 61, 70 (Toni Morrison ed., 1992); David Alistair Yalof, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees 195 (1999); Gerber, Justice for Clarence Thomas, *supra* note 42, at 671.

⁴⁵ Perry & Abraham, *supra* note 34, at 161.

⁴⁶ Gerber, First Principles, *supra* note 35, at 26.

⁴⁷ Foskett, *supra* note 43, at 290.

⁴⁸ Gerber, First Principles, *supra* note 35, at 109.

⁴⁹ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

⁵⁰ *Id.* at 119.

Brown as resting on “the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites.”⁵¹

Thomas opposes affirmative action. Concurring in *Adarand Constructors, Inc. v. Peña*, he wrote that affirmative action teaches that minorities must be patronized and cannot compete on their own merit. This, he argues, “stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”⁵²

The first two black justices have reached strikingly different conclusions on many civil rights issues. Even so, each has brought to the bench unique insights into matters of race and racial discrimination. Famous for going years without asking questions in oral argument, Thomas electrified the courtroom during arguments in *Virginia v. Black*, which considered the constitutionality of a Virginia statute that took cross burning to be *prima facie* evidence of intent to discriminate.⁵³ Thomas described how the KKK burned crosses to impose a “reign of terror.”⁵⁴

3. A Latina Justice: Sonia Sotomayor

The Court became yet more diverse with the addition of the first Latina justice. Advisors to President Bush had urged him to consider a Hispanic candidate as an alternative to Thomas,⁵⁵ but it was not until 2009, under President Barack Obama, that this suggestion came to fruition with the appointment of Sonia Sotomayor. This step may or may not mark the inauguration of a “Hispanic seat” on the Court, but Sotomayor’s nomination was nonetheless historic.

Having grown up in a predominantly Hispanic community, Sotomayor explained that “I didn’t think of myself as a minority in the environment I was in. . . . I don’t know that I had a sense of limitations until I got into the greater world and I saw that people saw me with limited eyes.”⁵⁶ Sotomayor openly acknowledges that she is “a product of affirmative action” and notes that her “test scores were not comparable to

⁵¹ *Id.*

⁵² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

⁵³ *Virginia v. Black*, 538 U.S. 343, 347–48 (2003).

⁵⁴ Transcript of Oral Argument at 22–23, *Black*, 538 U.S. at 343 (No. 01-1107).

⁵⁵ Yalof, *supra* note 44, at 194.

⁵⁶ Nichola D. Gutgold, *The Rhetoric of Supreme Court Women: From Obstacles to Options* 75 (2012).

[her] colleagues at Princeton and Yale.”⁵⁷ Unlike Thomas, she defends the use of affirmative action as an important tool to promote diversity, giving women and minorities more opportunities in the law and the judiciary.⁵⁸ Sotomayor’s college experiences affected her significantly. Sotomayor has said that, as an undergraduate at Princeton, she felt like a “visitor landing in an alien country.”⁵⁹ She has declared that it was at Princeton that she first “began a lifelong commitment to identifying [herself] as a Latina, taking pride in being Hispanic,” and recognizing an obligation to help her community “reach its fullest potential in society.”⁶⁰

Sotomayor’s pride in her Latino heritage prompted critics to accuse her of “identity politics.”⁶¹ In a speech entitled “A Latina Judge’s Voice,” Sotomayor remarked on the importance of diversity on the bench: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”⁶² This statement came back to haunt her at her confirmation hearings.⁶³

4. Evaluating the Impact of Race and Ethnicity: Substance and Symbol

The stories of Thurgood Marshall, Clarence Thomas, and Sonia Sotomayor invite several thoughts about the significance of the Court’s racial and ethnic composition. The appointment of minority justices reflects broader changes in American politics and culture. The civil rights movement that the Court supported has, in turn, changed the face of the Court itself. As African Americans overcame segregation and discrimination, they became an influential voice and an important constituency for presidents to consider. The growth in size and influence of the Hispanic population has also been significant, as Justice Sotomayor’s appointment indicates. The U.S. Census Bureau predicts that, by 2043, mi-

⁵⁷ Charlie Savage, *Videos Reveal Sotomayor’s Positions on Affirmative Action and Other Issues*, N.Y. Times, June 11, 2009, at A17.

⁵⁸ *Id.*

⁵⁹ Richard Lacayo, *A Justice Like No Other*, Time, June 8, 2009, at 24.

⁶⁰ Gutgold, *supra* note 56, at 77.

⁶¹ *Id.* at 87.

⁶² Sonia Sotomayor, *A Latina Judge’s Voice*, 13 Berkeley La Raza L.J. 87, 92 (2002).

⁶³ See, e.g., *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 7, 18, 23 (2009)* [hereinafter *Sotomayor Confirmation Hearing*].

norities will be in the majority in the United States, with the Hispanic demographic experiencing the most growth.⁶⁴ We will likely see even more minority justices on the Court in the future.

One should recognize the symbolism of a more racially and ethnically diverse Court. A young Clarence Thomas never imagined himself a judge because no African American judges existed in his hometown. Justice Sotomayor's speeches to Latino audiences demonstrate her acknowledgement of the value of placing minorities in positions of influence.

As to the Court's decisions, it would be a mistake to assume that members of racial and ethnic minorities have a monolithic approach to issues. Minority justices, like all judges, are molded by their pasts. The opinions of Marshall and Thomas reveal how personal experiences can lead justices down quite different paths. Marshall thought he advanced the interests of African Americans by supporting affirmative action and school desegregation; Thomas believes such policies can be harmful to the very groups that those programs claim to benefit.

Minority justices, by themselves, are unlikely to shift the overall direction of the entire Court, which is subject to larger ideological trends. Marshall found himself increasingly in dissent as the Court became conservative, while Thomas has found a more comfortable home for his conservative philosophy in the Rehnquist and Roberts Courts. Diversity of experience, however, surely enlarges the dialogue within the Court. Having Marshall, Thomas, or Sotomayor at the table provides added perspectives for other justices to consider, regardless of the conclusions the Court reaches.

B. Gender

In 1970, women comprised 4.7% of the bar and 7.1% of the bench.⁶⁵ Congress had only one woman in the Senate and ten in the House of

⁶⁴ Press Release, U.S. Census Bureau, U.S. Census Bureau Protections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), available at <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html>.

⁶⁵ Note that percentages were calculated using raw data from 1 U.S. Bureau of the Census, Detailed Occupation of Employed Persons by Race and Sex: 1970 in 1970 Census of Population 739 tbl.223 (1973), available at http://www2.census.gov/prod2/decennial/documents/1970a_us2-03.pdf; see also Cynthia Fuchs Epstein, *Women in Law* 4 (2d ed. 1993); Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 *Yale J.L. & Feminism* 243, 245 (2002) (noting

Representatives. No woman served as governor. On the Court, all the justices were male. Today, those numbers are drastically different. By 2013, women were approximately 33% of the bar and approximately 35% of the bench.⁶⁶ The 114th Congress has twenty female senators and eighty-four female representatives.⁶⁷ In 2015, there are six female governors.⁶⁸ Three women now sit on the Court.

In 1961, a unanimous Supreme Court upheld Florida's practice of limiting jury service to men, unless women went down to the courthouse and volunteered.⁶⁹ The Court explained that, despite women's recent entry into many aspects of community life traditionally reserved for men, a "woman is still regarded as the center of home and family life."⁷⁰ Ten years passed before the Court began to scrutinize gender distinctions more closely. In *Reed v. Reed*,⁷¹ the Court struck down an Idaho law that gave men preference over women in being selected as the administrator for a decedent's estate.⁷² The principal author of the petitioner's brief was a young law professor at Rutgers University, Ruth Bader Ginsburg.⁷³

1. *Breaking the Barrier: Sandra Day O'Connor*

Ginsburg later became a Supreme Court Justice, but she was not the first woman to break this gender barrier. This distinction belongs to Sandra Day O'Connor, who had overcome significant discrimination in

that when President Jimmy Carter took office in 1977, "there was only one woman among 97 judges on the federal courts of appeal and five women among 399 district court judges").

⁶⁶ Bureau of Labor Statistics, Current Population Survey, Household Data Annual Averages, Table 11: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity (2013), available at <http://www.bls.gov/cps/cpsaat11.pdf>; Biographical Directory of Federal Judges, History of the Federal Judiciary, Federal Judicial Center (dataset), <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx> (last visited Jan. 25, 2015).

⁶⁷ Press Release, Ctr. for Am. Women & Politics, 2014: Not a Landmark Year for Women, Despite Some Notable Facts (Dec. 16, 2014), available at http://www.cawp.rutgers.edu/press_room/news/documents/PressRelease_11-05-14-electionresults.pdf; see also Peter Sullivan, Most Diverse Congress in History Poised to Take Power, *The Hill* (Jan. 5, 2015), <http://thehill.com/homenews/news/228534-114th-congress-by-the-numbers>.

⁶⁸ *Id.*

⁶⁹ *Hoyt v. Florida*, 368 U.S. 57 (1961), overruled by *Taylor v. Louisiana*, 419 U.S. 522, 534–535 (1975).

⁷⁰ *Hoyt*, 368 U.S. at 57, 61–62.

⁷¹ 404 U.S. 71 (1971).

⁷² *Id.* at 74.

⁷³ Gutgold, *supra* note 56, at 49–50.

her career. At Stanford Law School, she was one of five women in her class.⁷⁴ Although O'Connor graduated in the top ten percent, law firms showed no interest in hiring her. One firm offered her a job as a legal secretary.⁷⁵ O'Connor opted for public service, becoming a deputy county attorney in San Mateo, then a civilian attorney in the military, and later an assistant state attorney in Arizona.⁷⁶ After spending five years at home as a full-time mother, O'Connor served as a state senator in Arizona, becoming the first female majority leader of an American state legislature.⁷⁷ Elected as a state superior court judge in 1974, she was appointed to the Arizona Court of Appeals in 1979.⁷⁸

While campaigning for the presidency, Ronald Reagan promised to appoint a woman to the Supreme Court. In 1981, Reagan kept that promise, naming O'Connor to fill the first vacancy that occurred during his administration.⁷⁹

Not everyone got the message. In 1981, shortly after O'Connor's confirmation to the Court, she and her husband, John, attended a formal dinner at the State Department.⁸⁰ As the couple approached their table, John introduced himself to a man already seated, saying, "Hello, I'm John O'Connor." The prompt reply: "Oh, Justice O'Connor, I'm so happy to meet you. I've heard so many wonderful things about you."⁸¹

2. Gender Equality Comes to the Court: Ruth Bader Ginsburg

Ginsburg, the daughter of Jewish immigrants, grew up in Brooklyn.⁸² When her husband, Martin, began the study of law at Harvard, Ginsburg also enrolled. She was one of nine women in her entering class at Har-

⁷⁴ Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* 25 (2005).

⁷⁵ *Id.* at 28.

⁷⁶ *Id.* at 28, 34.

⁷⁷ Gutgold, *supra* note 56, at 20.

⁷⁸ Nancy Maveety, *Justice Sandra Day O'Connor: Strategist on the Supreme Court* 15 (1996).

⁷⁹ Yalof, *supra* note 44, at 135.

⁸⁰ Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, Address to Washington University, St. Louis, Missouri (Apr. 4, 2001), in *67 Vital Speeches of the Day* 420, 424 (2001).

⁸¹ *Id.*

⁸² *Nomination of Ruth Bader Ginsburg To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 49 (1993) [hereinafter *Ginsburg Confirmation Hearing*].

vard Law School.⁸³ She later recalled the Dean questioning her as to why she was taking a space intended for a man.⁸⁴ Discrimination pervaded the law school: Men could invite their fathers, but not their wives or mothers, to the Harvard Law Review banquet.⁸⁵ Ginsburg became the first female member of the Harvard Law Review. When her husband (who had enrolled ahead of her) graduated and received a job in New York City, Ginsburg transferred to Columbia, where she became the first female member of the Columbia Law Review.⁸⁶

Although tied for first in her graduating class,⁸⁷ Ginsburg failed to receive a single offer from any law firm in New York City.⁸⁸ She turned to academe, becoming a professor at Rutgers University. She was the second woman to teach law at Rutgers and one of only twenty female law professors across the country.⁸⁹

In 1972, Ginsburg joined the faculty of Columbia Law School. There, she co-founded the ACLU's Women's Rights Project.⁹⁰ Over the next seven years, she argued a series of important gender discrimination cases before the Supreme Court.⁹¹ Much like Marshall before her, Ginsburg was a sophisticated strategist. Ginsburg sometimes brought challenges to laws that inadvertently disadvantaged men. For example, in *Weinberger v. Wiesenfeld*, Ginsburg argued on behalf of a widower who had been denied Social Security survivor's benefits after the death of his wife—benefits that would have been received if their genders had been reversed (widows automatically received benefits).⁹² Ginsburg later explained that the Court was made up of “men of a certain age in the 1970s,” men who “did not understand the notion of gender discrimination.”⁹³ At her confirmation hearings, Ginsburg had noted the discrepan-

⁸³ Ruth Bader Ginsburg, *The Changing Complexion of Harvard Law School*, 27 *Harv. Women's L.J.* 303, 303 (2004).

⁸⁴ Marcia Coyle, *Nominee's Mettle Will Be Tested Soon*, *Nat'l L.J.*, June 28, 1993, at 1.

⁸⁵ Gutgold, *supra* note 56, at 48.

⁸⁶ Toni J. Ellington et. al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 *U. Haw. L. Rev.* 699, 706 (1998); Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 *Cardozo L. Rev.* 1441, 1445 (1998).

⁸⁷ Joan Biskupic & Elder Witt, *The Supreme Court at Work* 239 (2d ed. 1997).

⁸⁸ Abraham, *supra* note 32, at 305.

⁸⁹ Gutgold, *supra* note 56, at 49.

⁹⁰ Biskupic & Witt, *supra* note 87, at 239; Gutgold, *supra* note 56, at 49.

⁹¹ The cases included *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Califano v. Goldfarb*, 430 U.S. 199 (1977).

⁹² 420 U.S. at 639–41.

⁹³ Gutgold, *supra* note 56, at 51.

cy in people's views: Race discrimination "was immediately perceived as evil, . . . odious, [and] intolerable," while laws discriminating on the basis of sex were justified as protecting women.⁹⁴

Ginsburg was not President Bill Clinton's first choice for the Supreme Court.⁹⁵ Yet when his original pick for the seat fell through, Clinton became fascinated by Ginsburg's life story and empathized with her fight against gender discrimination.⁹⁶ Ginsburg took her place alongside O'Connor on the Court.

3. *Evaluating the Impact of Gender: Gender and Judging*

While no single issue can define the interests of women or minorities in constitutional law, some might suggest abortion cases as a proxy for gender's impact on the Supreme Court. However, nine men decided *Roe v. Wade*,⁹⁷ with a strong majority of the Court (the vote was 7-2) recognizing a woman's right to an abortion. On the flip side, Justice O'Connor later supported certain procedural requirements that states had put in place for those wanting an abortion, including informed consent, a twenty-four-hour waiting period, parental notification, and record-keeping,⁹⁸ as long as the statutes had exceptions for the mother's health.⁹⁹

Sometimes gender manifestly matters. Differing perspectives surfaced clearly during oral argument in *Safford Unified School District v. Redding*.¹⁰⁰ In that case, a teenage girl sued her school following a strip search. Some of the male justices seemed to make light of the situation. Breyer asked how it was any different from his experience in boys' locker rooms in high school, prompting Ginsburg to interject, "it wasn't just that they were stripped to their underwear! They were asked to shake their bra out, to stretch the top of their pants and shake that out!"¹⁰¹ Ginsburg later told a reporter that the other justices, all males,

⁹⁴ Ginsburg Confirmation Hearing, *supra* note 82, at 122.

⁹⁵ Perry & Abraham, *supra* note 34, at 163.

⁹⁶ Abraham, *supra* note 32, at 305.

⁹⁷ 410 U.S. 113 (1973).

⁹⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁹⁹ See *Ayotte v. Planned Parenthood of New Eng.*, 546 U.S. 320, 325-326 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

¹⁰⁰ 557 U.S. 364 (2009).

¹⁰¹ Dahlia Lithwick, Search Me, *Slate* (Apr. 21, 2009), <http://www.slate.com/id/2216608/pagenum/2>.

“have never been a 13-year old girl.”¹⁰² She explained that a thirteen-year-old boy in a locker room might not have the same feeling about his body, while “a girl who’s just at the age where she is developing, whether she has developed a lot . . . or . . . has not developed at all (might be) embarrassed about that.”¹⁰³ Ginsburg’s reproach appears to have made a difference. To many Court watchers’ surprise, the Court ruled 8-1 that the search was unreasonable. In his majority opinion, Justice Souter noted: “Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as . . . degrading.”¹⁰⁴

As this example suggests, gender can influence how a justice thinks and approaches certain cases. Indeed, a study of lower court behavior found that plaintiffs in Title VII sexual harassment or discrimination cases were at least twice as likely to win when a female judge sat on the appellate panel.¹⁰⁵ Because the Supreme Court predominantly answers questions of law and not of fact, however, gender’s impact there may be more difficult to assess.

C. Religion

For most of the Court’s history, the justices were overwhelmingly Protestant. In 1969, when Earl Warren stepped down, seven of the Court’s nine justices were Protestant.¹⁰⁶ The Court’s first Catholic member, Roger B. Taney, became Chief Justice in 1836.¹⁰⁷ The first Jewish justice took his seat almost a century later, in 1916, when President Woodrow Wilson appointed Louis Brandeis.¹⁰⁸ Beginning with Chief Justice Edward White in 1894, at least one Catholic has served continuously to the present day, with the exception of seven years between 1949 and 1956.¹⁰⁹ Likewise, Brandeis’s 1916 appointment established an un-

¹⁰² Joan Biskupic, Ginsburg: Court Needs Another Woman, USA Today, (Oct. 5, 2009, 11:16 AM), http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm.

¹⁰³ Id. (alternation in original).

¹⁰⁴ 557 U.S. at 375. Only Justice Thomas dissented.

¹⁰⁵ Edward A. Adams, Race & Gender of Judges Make Enormous Difference in Rulings, Studies Find, A.B.A. J. (Feb. 7, 2010), http://www.abajournal.com/news/article/race_gender_of_judges_make_enormous_differences_in_rulings_studies_find_aba.

¹⁰⁶ Abraham, supra note 32, at 51 tbl.5.

¹⁰⁷ Id. at 150.

¹⁰⁸ Id. at 51.

¹⁰⁹ Some scholars date the “Catholic seat” to White’s appointment in 1894. See, e.g., Barbara A. Perry, A “Representative” Supreme Court?: The Impact of Race, Religion, and Gen-

official “Jewish seat.”¹¹⁰ That tradition, however, lapsed when President Richard Nixon replaced Abe Fortas with Harry Blackmun in 1970, leaving the Court without a Jewish justice until President Clinton’s nomination of Ruth Bader Ginsburg in 1993.

Today’s Court presents a markedly different picture from its Protestant past. Six justices are Catholic; the three others are Jewish. No justice is a Protestant. Indeed, since Rehnquist’s elevation to be Chief Justice in 1986, only one Protestant (David Souter, an Episcopalian) has been appointed to the Court. Justice Breyer’s appointment in 1993 ended the Protestant majority on the Court.¹¹¹ Catholics became the new majority when Roberts replaced Rehnquist in 2005.

These shifts in the Court’s religious composition have proved to be largely uncontroversial.¹¹² There was no uproar when President Harry S. Truman failed to replace Frank Murphy with a fellow Catholic, and the twenty-three year absence of a Jewish justice (between Fortas’s resignation and Ginsburg’s confirmation) seemed to have attracted little attention.¹¹³ The emergence in 1994 of a non-Protestant majority went largely unremarked.

When President George W. Bush nominated Samuel Alito, there was public concern about reducing the number of women on the Court but none about reducing the number of Protestants.¹¹⁴ Finally, while President Obama brought more women to the Court, there is no indication that he paused before replacing the Court’s lone Protestant, John Paul Stevens, with a third Jewish justice, Elena Kagan.

The decline of religion as a factor in Supreme Court nominations seems to parallel the atrophy of the image of the United States as a Protestant culture. The fact that only two faiths are represented on the

der on Appointments 13–14 (1991). Professor Abraham, however, notes that Taney’s appointment actually began the concept of a Catholic seat. Abraham, *supra* note 32, at 50.

¹¹⁰ Abraham, *supra* note 32, at 51.

¹¹¹ At that point there were four Protestants (Rehnquist, Stevens, O’Connor, and Souter), three Catholics (Scalia, Kennedy, and Thomas), and two Jews (Ginsburg and Breyer).

¹¹² Often, however, the media focuses briefly upon whether certain justices’ Catholicism may have affected their votes in the wake of major abortion decisions. See, e.g., Robin Toner, *The Supreme Court’s Catholic Majority*, N.Y. Times (Apr. 25, 2007), http://www.nytimes.com/2007/04/25/us/politics/26web-toner.html?_r=0.

¹¹³ Perry & Abraham, *supra* note 34, at 159. President Reagan nominated a Jewish appeals court judge, Douglas H. Ginsburg, in 1987.

¹¹⁴ See Mike Allen, *Why Bush Picked Alito*, Time (Oct. 31, 2005), <http://www.time.com/time/nation/article/0,8599,1124426,00.html>; David Kirkpatrick, *Judge Said He Struggled on ‘91 Abortion Opinion*, N.Y. Times, Nov. 3, 2005, at A24.

Court—neither of them Protestant—demonstrates how little religion seems to count when presidents name new justices to the Court.

Even in cases that strongly implicate religious matters, it is difficult to discern a definite relationship between justices' religion and their judicial philosophy. Justice Scalia publicly denies that his Catholic beliefs influence his actions on the bench.¹¹⁵ Catholics have been on both sides of issues that have religious overtones. Justice Brennan supported the pro-choice outcome of *Roe v. Wade*,¹¹⁶ a decision accepted by Justice Kennedy two decades later despite Scalia's attempts to use their shared Catholicism to sway Kennedy's opinion.¹¹⁷ On various occasions, Catholic Justices Kennedy, Scalia, and Thomas have reached opposing conclusions in church-state cases and in cruel and unusual punishment cases.¹¹⁸

What of the Jewish justices? Justice Ginsburg believes that Jewish justices—including Justices Brandeis, Cardozo, Frankfurter, Goldberg, Fortas, and herself—viewed the “[l]aw as protector of the oppressed, . . . the minority, the loner.”¹¹⁹ One way to interpret Ginsburg's observation would be to see the Jewish heritage as shaped in part by historic persecution, rather than flowing from a particular religious dogma. The first two Jewish justices, Brandeis and Frankfurter, sensed that their religion made them “outsider[s].”¹²⁰ Jewish justices have tended to support a strict separation of church and state; Professors Barbara Perry and Henry Abraham identify this as consistent with “the agenda of mainstream Jewish interest groups in religious establishment cases.”¹²¹ All in all, because the link between religion and a justice's jurisprudence is difficult

¹¹⁵ Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia 190–91* (2009).

¹¹⁶ 410 U.S. 113, 115 (1973). See John T. Noonan, Jr., *The Religion of the Justice: Does It Affect Constitutional Decision Making?*, 42 *Tul. L. Rev.* 761, 763 (2006).

¹¹⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 841 (1992). All five Catholic justices, however, joined the majority opinion in *Gonzalez v. Carhart*, 550 U.S. 124, 130, 168 (2007), upholding a ban on partial-birth abortion. See Geoffrey Stone, *Our Faith-Based Justices*, U. Chi. L. Sch. Faculty Blog (Apr. 20, 2007, 3:01 PM), http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html.

¹¹⁸ Noonan, *supra* note 116, at 764.

¹¹⁹ Ruth Bader Ginsburg, *Introduction to The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas 3, 4* (Jennifer M. Lowe ed., 1994).

¹²⁰ Robert A. Burt, *Two Jewish Justices: Outcasts in the Promised Land 2* (1988); see also Michael E. Parrish, *Justice Frankfurter and the Supreme Court*, in *The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas*, *supra* note 119, at 61, 62 (noting that Frankfurter hired the first black law clerk in 1948 and helped Warren forge the *Brown* majority).

¹²¹ Perry & Abraham, *supra* note 34, at 164.

to characterize, it may be reasonable to think of religion—like family, community, education, and professional experience—as part of the mix that helps shape a justice’s world view.

D. Geography

In the Republic’s early decades, presidents from George Washington to Ulysses S. Grant viewed geography—where a potential justice came from—as an important criterion when choosing a nominee.¹²² Politics played its part in such nominations: Presidents rewarded states and regions that supported them or used the appointment process to boost their popularity in contested areas. Franklin Roosevelt explicitly considered geography when he named Hugo Black, Felix Frankfurter, William O. Douglas, and Wiley Rutledge.¹²³

In the era of the Warren Court, the tribunal still reflected geographic diversity. The seventeen justices who served on the Warren Court hailed from thirteen states, covering all corners of the continental United States. The six justices who served on the Burger Court, but who had not been on the Warren Court, came from a broad—though less diverse—geographic spread. Burger and Blackmun were from Minnesota; Rehnquist and O’Connor were from Arizona; Powell was from Virginia; and Stevens was from Illinois.

How different the Court looks today. Four of the five boroughs of New York City are represented.¹²⁴ Only two justices, Breyer and Kennedy, grew up west of the Mississippi River, and only Kennedy spent any part of his professional career there.¹²⁵ In addition to New York, the current justices hail from California, Georgia, Maryland, Massachusetts, and New Jersey; all but one of those states have a shoreline on the At-

¹²² Perry, *supra* note 109, at 4.

¹²³ Abraham, *supra* note 32, at 166, 173, 177, 186; Roger K. Newman, *Hugo Black: A Biography* 233 (1994); Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years 274–75* (1960); Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* 166–67 (2003); Fowler V. Harper, *Justice Rutledge and the Bright Constellation* 25 (1965).

¹²⁴ See James Barron, *A Conservative Bloc, a Liberal Bloc and Now, a New York Bloc*, *N.Y. Times*, May 12, 2010, at A1. The article quotes Joan Biskupic: “Kagan is so Manhattan, Scalia is so Queens, Ginsburg is so Brooklyn and Sotomayor is so Bronx.” *Id.* (internal quotation marks omitted).

¹²⁵ Justice Breyer grew up in San Francisco, but he left California in 1959 after his undergraduate work at Stanford and has spent the entirety of his legal career in the East. See Abraham, *supra* note 32, at 310–11.

lantic Ocean. Justice Thomas is the only one from the South, and even he spent most of his professional career elsewhere.

Geography has obviously not played a significant part in recent presidents' nomination calculus. Justice Souter claimed that he did not expect to be nominated because he came from New Hampshire, "a politically insignificant state."¹²⁶ Similarly, O'Connor initially thought geography would doom her candidacy, since a fellow Arizonan, Rehnquist, already sat on the Court. She thought it "unimaginable" that two justices from Arizona could serve together.¹²⁷ Both Souter and O'Connor were mistaken.

Even those justices who are ostensibly from outside of the mid-Atlantic and northeastern parts of the country have spent the bulk of their professional careers in the BosWash corridor. Chief Justice Roberts grew up in Indiana, yet he has spent his professional career in Washington, D.C. Justice Thomas grew up in Georgia and worked in Missouri for five years after law school, but he has lived in the Washington, D.C. area since 1979.¹²⁸ The justices' law studies at Harvard and Yale make their place of birth even more remote. Justice Thomas notes that, regardless of their geographic origins, the justices "tend to be very heavily Northeastern in [their] mentality."¹²⁹

There was a time when religion and geography mattered in selecting Supreme Court Justices. Today, it seems that the president, senators, interest groups, and the public care more about politics and ideology.¹³⁰

E. Education and Experience

1. Elite Educational Pedigrees

A quick comparison of portraits of the Warren and Roberts Courts shows the obvious differences in race, ethnicity, and gender. An examination of the justices' *curricula vitae* reveals yet other differences: The professional and personal backgrounds of the justices serving today are

¹²⁶ Tinsley E. Yarbrough, David Hackett Souter: Traditional Republican on the Rehnquist Court 100 (2005) (internal quotation marks omitted).

¹²⁷ Interview by Susan Swain, C-SPAN, with Justice Sandra Day O'Connor, in Washington, D.C. (June 25, 2009), available at <http://supremecourt.c-span.org/assets/pdf/SDOconnor.pdf>.

¹²⁸ See Foskett, *supra* note 43, at 138–39, 149.

¹²⁹ Interview by Susan Swain, C-SPAN, with Justice Clarence Thomas, in Washington, D.C. (July 29, 2009), available at <http://supremecourt.c-span.org/assets/pdf/CThomas.pdf>.

¹³⁰ See *infra* Part V.

far more homogenous than were those of the Warren Court. The Supreme Court is, by definition, an elite institution. Only recently, however, did a pattern of “elite” professional experiences—from schooling to judgeships—begin to dominate the justices’ resumes.

The current justices have impressive educational pedigrees. All attended either Harvard or Yale Law School (although Ruth Bader Ginsburg graduated from Columbia Law School, she transferred from Harvard). The three most recent justices—Elena Kagan, Sonia Sotomayor, and Samuel Alito—all earned undergraduate degrees from Princeton. The other justices did their baccalaureate studies at Harvard, Stanford, Georgetown, Cornell, and Holy Cross. Members of the Court hold four international degrees: two from Oxford, and one each from the London School of Economics and the University of Fribourg.

The eleven justices who served on the Court in 1962 attended a broader range of law schools. Harvard and Yale were represented twice each. Other top law schools filled out some other spots on of the bench: Columbia, Berkeley (Boalt Hall), and Northwestern. Nevertheless, there were also graduates of the University of Texas School of Law (Tom Clark), New York Law School (John Harlan), the University of Alabama School of Law (Hugo Black), and Kansas City School of Law (Charles Whittaker). The justices attended similarly diverse undergraduate institutions. Some attended Ivy League schools (Princeton, Yale, and Penn), but others studied at the City College of New York, Whitman College, Colorado, and DePaul. Byron White and John Marshall Harlan also attended Oxford.

2. Political vs. Professional

Education does not tell the whole story. The justices’ professional backgrounds reinforce a pattern of elite qualifications. Unlike many Warren Court justices, today’s justices did not make their mark in politics. What most current justices had instead, at the time of their nomination, was a wealth of judicial experience. Of the current justices, all but Kagan came directly from a United States Court of Appeals. Of the eight current justices who had been appellate court judges, four served on the U.S. Court of Appeals for the D.C. Circuit (Roberts, Scalia, Thomas, and Ginsburg); the others served on the First Circuit (Breyer), Second Circuit (Sotomayor), Third Circuit (Alito), and Ninth Circuit (Kennedy). Kagan served as Solicitor General, Scalia held several positions in the Nixon Administration, and Thomas chaired the Equal Employment Op-

portunity Commission under Reagan. No current justice, however, has held an elected office, state or federal, or a cabinet-level appointed position.

How different things were in the era of Earl Warren. Only three of the eleven justices who served in 1962 had been federal appellate judges. Three others had some kind of judicial experience: William Brennan had served on the New Jersey Supreme Court, Frankfurter had been a Judge Advocate General during the First World War (overseeing courts-martial), and Hugo Black had spent a year as a part-time police court judge in Birmingham.¹³¹ The remaining five men had no judicial experience.

While these men may have lacked judicial experience, they boasted the seasoning of politics. Earl Warren, the Republican vice-presidential nominee in 1948, had also served as both Attorney General and Governor of California.¹³² A leading New Dealer, Hugo Black was serving his second term as a Democratic U.S. senator from Alabama when Franklin D. Roosevelt appointed him to the Court in 1937.¹³³ Arthur Goldberg spent his professional career as a labor union lawyer, representing the Congress of Industrial Organizations and the United Steelworkers of America. At the time of his appointment in 1962, he was Secretary of Labor in the Kennedy Administration.¹³⁴ William Douglas was a member of the Securities and Exchange Commission during the 1930s.¹³⁵ Tom Clark worked in the Justice Department during the Second World War, before Truman appointed him Attorney General—and then to the Court.¹³⁶ Byron White actively campaigned for John F. Kennedy in 1960 and became Deputy Attorney General in the administration before Kennedy elevated him to the Court in 1962.¹³⁷ Altogether, these men had been active players on the political scene. Many of them already had national reputations before they were nominated to the Court.

¹³¹ Newman, *supra* note 123, at 29.

¹³² G. Edward White, *Earl Warren: A Public Life* 10, 49 (1982).

¹³³ See Newman, *supra* note 123, at 234, 237.

¹³⁴ David L. Stebenne, *Arthur J. Goldberg: New Deal Liberal* 28, 309–10 (1996).

¹³⁵ Murphy, *supra* note 123, at 117.

¹³⁶ Richard Kirkendall, Tom C. Clark, *in* *The Justices of the United States Supreme Court: Their Lives and Major Opinions* 1347, 1348–49 (Leon Friedman & Fred L. Israel eds., 1995).

¹³⁷ Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* 243, 260 (1998).

Sometimes, one can see the connection between a justice's time in politics and his or her votes and opinions on the Court. As a senator, Black strongly supported the New Deal. In 1937, a few months before his appointment to the Court, Black helped Roosevelt's "Brain Trust" draft the Fair Labor Standards Act and then was floor leader for the bill in the Senate.¹³⁸ On the Court, Black played a crucial role in interpreting the Act more favorably for labor.¹³⁹ Black vividly recalled the day when the Court's "Nine Old Men" stood in the way of important Roosevelt Administration legislation.¹⁴⁰ On the Court, he was an important voice for burying judicial second-guessing of state and federal legislation regulating economic affairs.¹⁴¹

Compared to their colleagues, justices with prior political experience seemed more concerned with reaching the "right" result and stressing the practical applications of the laws at hand. Warren, concludes biographer Professor Ted White, "developed a theory of judging that combined an ethical gloss on the Constitution with an activist theory of judicial review."¹⁴² That theory of judging depended on the "values" that Warren believed the Constitution embodied.¹⁴³ Warren's "sense of the fairness or justice of a case . . . was crucial to his ultimate decision."¹⁴⁴

Warren's political instincts extended beyond how he would vote in a case, and, according to a former clerk, affected how he drafted opinions.¹⁴⁵ While the clerk was drafting two opinions upholding Sunday Closing Laws, Warren inserted his own paragraph. Warren told the clerk, "[T]hese opinions are going to be read from many church pulpits across the country. I think we ought to add something like this."¹⁴⁶ The clerk recalled, "Of the two major newspapers covering the opinions that I read, only one quoted from the opinions, and that was just a single paragraph—the Chief's."¹⁴⁷ Warren's long political career had taught him how to speak both to the legal community and to the public.

¹³⁸ Newman, *supra* note 123, at 214–19.

¹³⁹ See Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 *Sup. Ct. Rev.* 203, 208–09.

¹⁴⁰ Newman, *supra* note 123, at 594 (internal quotation marks omitted).

¹⁴¹ *Id.* at 280–81.

¹⁴² White, *supra* note 132, at 6.

¹⁴³ *Id.* at 218.

¹⁴⁴ *Id.* at 228.

¹⁴⁵ Jesse E. Choper, *Clerking for Chief Justice Earl Warren*, in *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*, *supra* note 17, at 267, 269.

¹⁴⁶ *Id.* (internal quotation marks omitted).

¹⁴⁷ *Id.*

For Arthur Goldberg, his job was not only about finding the “right” or “ethical” decision in a case before the Court. He sought to push his colleagues toward solving major problems. Professor Alan Dershowitz remembers his first day as Goldberg’s clerk in the summer of 1963. The Justice tossed him a short certiorari petition to read on the spot:

He then asked me, “What do you see in it?” I said, “It’s just another pro se cert petition in a capital case.” He said, “No, what you’re holding in your hand is the vehicle by which we can end capital punishment in the United States.”¹⁴⁸

Sandra Day O’Connor had the most political experience of any justice on the Rehnquist Court. Commentators have seen the influence of that experience in her jurisprudence. Her work was characterized not by a search for the “right” or “ethical” answer, but rather “by general pragmatism and life experiences that are atypical among the current justices.”¹⁴⁹ A former clerk said that O’Connor “never let theory trump reality.”¹⁵⁰ Justice Stevens has remarked that, because of her insights into the legislative process, O’Connor made a “very significant contribution” to deliberations.¹⁵¹ After O’Connor and David Souter (a former Attorney General of New Hampshire), no member of the Court has had significant political experience.

What the justices now have is prior judicial experience—lots of it—and the habits of mind that such experience brings. The new emphasis on judicial experience is even more striking when one considers that, in earlier years, there was no common assumption that such a background was necessary for success as a justice. In 1957, Frankfurter argued that there was no correlation between prior judicial experience and fitness for the Court.¹⁵²

¹⁴⁸ Alan M. Dershowitz, *Justice Arthur Goldberg and His Law Clerks*, in *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*, supra note 17, at 295, 296.

¹⁴⁹ Joan Biskupic, *O’Connor Not Confined by Conservatism*, USA Today (June 24, 2004), http://www.usatoday.com/news/washington/2004-06-23-oconnor-usat_x.htm; see also Linda Greenhouse, *A Court Infused With Pragmatism: Campaign-Law Ruling Turned on Concern for Real-World Effect*, N.Y. Times, Dec. 12, 2003, at A38 (suggesting pragmatism motivated O’Connor in a high-profile campaign finance case).

¹⁵⁰ Biskupic, supra note 149 (internal quotation marks omitted).

¹⁵¹ Interview by Brian Lamb, C-SPAN, with Justice John Paul Stevens, in Washington, D.C. (June 24, 2009), available at <http://www.c-span.org/video/?286081-1/supreme-court-justice-stevens>.

¹⁵² Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. Pa. L. Rev. 781, 795 (1957).

3. *Thinking About Changing Nomination Criteria*

Seeking to explain this new emphasis on judicial experience brings one to look at the presidents who nominate and the senators who confirm appointees. Ironically, as the confirmation process has become more politicized, it has become important for a nominee to appear less partisan. It is often more difficult to object to a judicial record than it is to pick apart a politician's public statements and votes. There are many interest groups dedicated to "scoring" particular legislators on a host of issues, an undertaking less readily pursued when assessing judicial decisions.

Another factor may be an obsession with resume points. "People are more likely to rise on the basis of grades, test scores, effort and performance," *New York Times* columnist David Brooks recently commented.¹⁵³ Naturally, the members of the country's most elite Court should have the most elite resumes in their field.

The rise of judicial interpretative methods may also help explain the new emphasis on judicial experience. As the debate over textualism and originalism has become more mainstream, so has the expectation that nominees will have a judicial, as opposed to political, outlook. Proponents of originalism have sought to counter what they see as the Warren Court's liberal activism.¹⁵⁴ Mark Tushnet maintains that some justices on the Warren Court saw themselves as acting politically,¹⁵⁵ while others simply approached constitutional adjudication in such a manner that "the public could hardly discern the line between interpreting the Constitution, what the justices thought they were doing, and advancing the program of liberal politics, what the justices were also doing."¹⁵⁶ Perceptions of the Warren Court's activism fueled a debate about the proper role of the judiciary; critics wanted the Court to stop legislating from the bench. Picking candidates with judicial (as opposed to political) experience may be seen as a way of pursuing this end.

¹⁵³ David Brooks, *Why Our Elites Stink*, N.Y. Times, July 13, 2012, at A23.

¹⁵⁴ A. E. Dick Howard, *The Constitution and the Role of Government*, 6 *Charleston L. Rev.* 449, 510 (2012).

¹⁵⁵ Mark Tushnet, *The Warren Court as History: An Interpretation*, in *The Warren Court in Historical and Political Perspective* 1, 13 (Mark Tushnet ed., 1993) [hereinafter *Tushnet, Warren Court*].

¹⁵⁶ *Id.*

II. INSIDE THE COURT

Turning our gaze inside the Court, we find it natural to ponder the leadership styles of successive Chief Justices—Earl Warren, Warren Burger, William Rehnquist, and John Roberts. Examining the hive solely by looking at the “queen bee,” however, has its limits. A more complete perspective requires us to look at the jobs of the Court’s “worker bees,” including its law clerks.

In the next few pages, we look at three facets of each Chief Justice’s leadership—the degree to which he was concerned with consensus, his management of conferences, and his assignment of opinions. We then turn to the justices and the law clerks and conclude by examining how these internal changes affect the Court’s public product—its opinions.

A. *The Four Chief Justices*1. *Earl Warren*

Earl Warren’s dogged and successful attempt to build a united front in *Brown v. Board of Education*¹⁵⁷ provides a memorable example of leadership at work. Following re-argument of *Brown* in late 1953, Warren made unanimity a prime goal. Framing the issue as a moral matter, Warren delayed the vote until he had achieved consensus.¹⁵⁸ His efforts included lobbying Justice Jackson while the latter was hospitalized following a heart attack and persuading Justice Reed to abandon his planned lone dissent—all, as Warren put it, for the sake of the Court’s legitimacy.¹⁵⁹

Warren’s “people skills” were not limited to lobbying justices behind the scenes; he also used them effectively to guide conference. Warren’s colleagues have pointed to his personal qualities—charm, wit, innate courtesy, and a commitment to fairness in allowing others to express their views¹⁶⁰—as helping him to manage conferences. Warren coupled this talent with a prodigious work effort to make sure everything ran smoothly, spending hours preparing for conferences so that he could present the issues in a lucid and concise manner.¹⁶¹

¹⁵⁷ 347 U.S. 483, 486 (1954).

¹⁵⁸ O’Brien, *supra* note 9, at 261–62.

¹⁵⁹ *Id.*

¹⁶⁰ William J. Brennan, Jr., Tribute to Chief Justice Earl Warren, 1989 *Y.B. Sup. Ct. Hist. Soc’y* 13, 14, available at http://supremecourthistory.org/pub_journal_1989.html.

¹⁶¹ *Id.*

When it came to assigning opinions, Warren took care not to abuse his power.¹⁶² He believed that an improper use of discretion would be disruptive;¹⁶³ indeed, Brennan described the Chief's assignments as reflecting "a deep-seated sense of fairness."¹⁶⁴ Warren also kept his eye on consensus when assigning opinions. His pursuit of equal labor notwithstanding, he assigned opinions somewhat strategically, often selecting the justice most likely to build the strongest majority on any given issue.¹⁶⁵ With that goal in mind, he tried not to assign opinions based on a justice's expertise in a particular area, fearing that specialists might care more about entrenching their own specific views than about fostering collective agreement.¹⁶⁶

The Warren Court, of course, had its share of vigorous dissents.¹⁶⁷ Even so, Warren's leadership style epitomized the old saying about being able to disagree without being disagreeable. Warren gets much of the credit for using his leadership skills and focus on consensus to make a Court sometimes referred to as "nine scorpions in a bottle"¹⁶⁸ into a more congenial place to work.¹⁶⁹

2. Warren Burger

Warren Burger was no Earl Warren. Burger's ability to guide the Court's internal decision-making processes left much to be desired. He struck many as being aloof and overly concerned with the dignity of his office. For example, he placed a desk in the conference room in order to receive visitors there rather than in his office, which he considered insufficiently august.¹⁷⁰ In relations with his colleagues, Burger lacked Warren's sense of courtesy and respect.¹⁷¹

¹⁶² Anthony Lewis, A Talk with Warren on Crime, the Court, the Country, *in* The Supreme Court Under Earl Warren 164, 176 (Leonard W. Levy ed., 1972).

¹⁶³ *Id.*

¹⁶⁴ Brennan, *supra* note 160, at 15.

¹⁶⁵ See O'Brien, *supra* note 9, at 277.

¹⁶⁶ *Id.* at 276.

¹⁶⁷ See, for example, Frankfurter's heated dissent in *Baker v. Carr*, 369 U.S. 186, 266 (1962).

¹⁶⁸ Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, at xiii (2010) (quoting Alexander Bickel).

¹⁶⁹ See, e.g., Bernard Schwartz, "Warren Court"—An Opinion, *in* The Supreme Court Under Earl Warren, *supra* note 162, at 48, 50–54.

¹⁷⁰ Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* 4 (1990).

¹⁷¹ See Linda Greenhouse, How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist, 154 U. Pa. L. Rev. 1365, 1368 (2006) (discussing Burger canceling

Burger Court conferences could be long, frustrating affairs. Burger rambled and allowed others to do so. He seemed to rely upon clerks' memoranda rather than forming a personal understanding of cases, and, by allowing the justices to interrupt one another, he failed to foster effective discussion.¹⁷² Blackmun openly lamented that Burger could not control conferences.¹⁷³ The jumbled conferences often led to unclear results, a problem compounded by Burger's repeated failure to record the votes accurately.¹⁷⁴

Burger has been faulted for the way he assigned opinions. His imprecision at keeping track of votes in conference allowed him to assign the majority opinion, then change his vote and join the dissent. This practice led other justices to suspect that Burger purposely manipulated his initial votes.¹⁷⁵ He became known for assigning his allies the more attractive cases and, as Brennan put it, giving his foes "crud."¹⁷⁶

Whatever his leadership shortcomings, Burger took an active interest in improving the Supreme Court building, in showcasing the Court's history (appointing the Court's first curator),¹⁷⁷ and, more broadly, in nurturing efficient management of the federal court system.¹⁷⁸ No Chief Justice since William Howard Taft has taken a more hands-on interest in the way the nation's courts are run.¹⁷⁹

3. *William Rehnquist*

When William H. Rehnquist was elevated to become Chief Justice, he was not associated with the idea of consensus. As a justice, he had often

Rehnquist's appointment to swear in new White House staff members, apparently out of jealousy).

¹⁷² See O'Brien, *supra* note 9, at 204–05; see also Schwartz, *supra* note 170, at 12 (discussing Chief Justice Burger's lack of leadership in conferences).

¹⁷³ See Greenhouse, *supra* note 171, at 1367.

¹⁷⁴ O'Brien, *supra* note 9, at 206.

¹⁷⁵ See *id.*; Schwartz, *supra* note 170, at 13–14.

¹⁷⁶ See Schwartz, *supra* note 170, at 4.

¹⁷⁷ O'Brien, *supra* note 9, at 155–56; Arthur R. Landever, Chief Justice Burger and Extra-Case Activism, 20 J. Pub. L. 523, 528 (1971). Burger converted the bench from a straight line into the curved shape still seen today, making it easier for the justices to see and hear the advocates and each other. See Schwartz, *supra* note 170, at 4.

¹⁷⁸ See Biskupic & Witt, *supra* note 87, at 230; Landever, *supra* note 177, at 528–29. Burger was also instrumental in the creation of the National Center for State Courts in Williamsburg, Virginia. Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969–1986*, at 11 (Herbert A. Johnson ed., 2000).

¹⁷⁹ See Maltz, *supra* note 178, at 11.

dissented alone,¹⁸⁰ proudly displaying a Lone Ranger figure—a gift from his clerks—in his chambers.¹⁸¹ Rehnquist believed that unanimity was not the highest value. He thought that “those who would insist on an artificial unanimity may mistake the rancorous exchanges in a particular case for a malfunction of the system.”¹⁸²

In the Chief’s chair, Rehnquist managed conferences with a briskness that contrasted with Burger’s wandering style.¹⁸³ Rehnquist saw the purpose of conference as simply an opportunity to determine the majority vote, rather than persuade one’s colleagues through impassioned advocacy.¹⁸⁴ He believed that justices came to conference already knowing how they felt about a case and that debate at that point rarely changed a colleague’s mind.¹⁸⁵ He discouraged lengthy exchanges, stating that disagreements could “come out in the writing.”¹⁸⁶

Rehnquist counted conference votes meticulously and was even-handed in assigning opinions. When making assignments, he considered each justice’s productivity in addition to the volume of previous assignments.¹⁸⁷

All in all, as Chief Justice, Rehnquist clearly exceeded Burger in managing conference and assigning opinions. As the Lone Ranger figure on his desk suggested, however, Rehnquist seems to have placed less weight on the value of building consensus.

4. *John Roberts*

Chief Justice Roberts has declared his belief in consensus. Roberts concedes that divisions on the Court “cannot and should not be artificially suppressed,” but he argues that each justice should “be open to the

¹⁸⁰ A. E. Dick Howard, Justice William H. Rehnquist: A Key Fighter in Major Battles, 72 A.B.A. J. 47, 47 (1986). Rehnquist filed about sixty lone dissents while on the Burger Court. David L. Hudson Jr., *The Rehnquist Court: Understanding Its Impact and Legacy* 15 (2007).

¹⁸¹ John R. Vile, Foreword to Hudson, *supra* note 180, at x.

¹⁸² Barbara A. Perry, *The Priestly Tribe: The Supreme Court’s Image in the American Mind* 63 (1999).

¹⁸³ See generally Greenhouse, *supra* note 171, at 1366–67 (suggesting that Rehnquist learned how not to be Chief Justice by watching Burger).

¹⁸⁴ See William H. Rehnquist, *The Supreme Court: Revised and Updated* 258 (2001).

¹⁸⁵ *Id.* at 258–59.

¹⁸⁶ O’Brien, *supra* note 9, at 206.

¹⁸⁷ See Greenhouse, *supra* note 171, at 1369. Mark Tushnet suggests that Rehnquist’s focus on efficiency and equity in assigning opinions may at times have allowed more liberal justices, like Stevens, to act tactically in writing for a majority. Mark Tushnet, *Understanding the Rehnquist Court*, 31 Ohio N.U. L. Rev. 197, 201 (2005).

considered views of the others.”¹⁸⁸ In Roberts’s mind, the best Chiefs—John Marshall being his model—have helped the Court to speak with one voice through temperament, neutrality, trustworthiness, and force of personality.¹⁸⁹ For Roberts, consensus has real benefits, such as “clarity and guidance for the lawyers and for the lower courts trying to figure out what the Supreme Court meant,”¹⁹⁰ more enduring precedent, and decisions “on the narrowest possible ground.”¹⁹¹

Roberts sees conference as an opportunity to foster consensus. He attempts to emphasize less controversial issues and seeks to define the questions presented as narrowly as possible—“the narrower the better, because people will be less concerned” about incremental decision-making.¹⁹² He permits fuller discussion than did Rehnquist, thinking that his colleagues are more open to compromise at conference than after opinion writing has begun.¹⁹³

Roberts tries to distribute opinion assignments equally, but he also considers which justices are likely to build the strongest consensus in any given case. This policy seems to reward justices willing to moderate ideological pre-commitments. In his first term, Roberts succeeded in producing “more consecutive unanimous opinions than at any other time in recent history,”¹⁹⁴ but, overall, the Court still issues its fair share of concurrences and dissents.¹⁹⁵

B. Nine Little Law Firms

1. The Justices’ Personal Interaction

Justice Powell coined the phrase “nine little law firms” to describe the Court.¹⁹⁶ This description implies the increasing isolation of the justices

¹⁸⁸ Chief Justice John Roberts, Commencement Address at Georgetown Law (May 21, 2006), available at http://www.law.georgetown.edu/webcast/assets/GL_2006523112710.mp3 [hereinafter Roberts, Georgetown Address].

¹⁸⁹ See Jeffrey Rosen, *Roberts’s Rules*, Atlantic, Jan.-Feb. 2007, at 104, 113, available at <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

¹⁹⁰ Roberts, Georgetown Address, supra note 188.

¹⁹¹ Id.

¹⁹² Rosen, supra note 189, at 110.

¹⁹³ See id.

¹⁹⁴ Id. at 105.

¹⁹⁵ See, e.g., Howard, *Out of Infancy*, supra note 9, at 92, 97 (counting twenty-three dissenting or concurring opinions from just two justices during the 2011–2012 term).

¹⁹⁶ Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* 6 (1996). Powell stated in his Report to the Labor Law Section of the American Bar Association that “for the

from each other and the fragmentation of the Court into nine separate “offices.” With other justices just down the hallway, it is easy for justices to talk face to face with their colleagues. It appears, however, that the level of such interaction among the justices began to decline during Burger’s time as Chief Justice.¹⁹⁷ As early as 1976, Justice Powell noted that a justice might “go through an entire term without being once in the chambers of all of the other eight members of the Court.”¹⁹⁸ This decrease in daily interaction among the justices continued into the Rehnquist years.¹⁹⁹

What explains less personal interaction among the justices? Some would point to the nature of the job as one factor. Justice Scalia describes a justice’s work as being “disembodied and intellectual.”²⁰⁰ Justice Breyer has noted that the justices are too busy to have time for frequent visits to another’s chambers.²⁰¹ There must, however, be other factors at work; surely, choice plays a role. Perhaps when more justices came from backgrounds other than the appellate bench—especially from the world of politics—they were, by temperament, more inclined to personal discussion and persuasion. Bureaucratization may also be a factor. Each justice has twice as many clerks as did their predecessors on the Warren Court. As the justices hire clerks who have more experience and who perform more duties, Powell’s image of “nine little law firms” seems to be an increasingly apt picture, with the justices acting as partners to their junior associate clerks.

2. *The Law Clerks*

Supreme Court law clerks share a recognizable profile. Most attended prestigious law schools, graduated near the top of their classes, served on law review managing boards, and often clerked for one of a few par-

most part, perhaps as much as 90 percent of our total time, we function as nine small, independent law firms.” Jeffrey A. Segal, Harold J. Spaeth & Sara C. Benesh, *The Supreme Court in the American Legal System* 358 (2005).

¹⁹⁷ See Lawrence S. Wrightsman, *The Psychology of the Supreme Court* 87 (2006).

¹⁹⁸ O’Brien, *supra* note 9, at 132.

¹⁹⁹ Lawrence M. Friedman, *The Rehnquist Court: Some More or Less Historical Comments*, in *The Rehnquist Court: A Retrospective* 143, 145 (Martin H. Belsky ed., 2002).

²⁰⁰ Interview by Susan Swain, C-SPAN, with Justice Antonin Scalia, in Washington, D.C. (June 19, 2009), available at <http://supremecourt.c-span.org/Video/JusticeOwnWords.aspx>.

²⁰¹ Interview by Brian Lamb, C-SPAN, with Justice Stephen Breyer, in Washington, D.C. (June 17, 2009), available at <http://supremecourt.c-span.org/Video/JusticeOwnWords.aspx>.

particular circuit court judges.²⁰² Academic backgrounds are somewhat more diverse than they once were, although clerks still come overwhelmingly from elite law schools.²⁰³ In terms of race and gender, however, today's law clerks are more diverse than were the clerks of the Warren Court.²⁰⁴

There are other ways the résumé of today's clerks look rather different from those of the Warren Court. In Warren's era, clerks often came directly from law school; only about half had been clerks for a lower court judge.²⁰⁵ By the 1970s, however, over ninety percent of clerks had previous clerkship experience.²⁰⁶ Moreover, we now have the phenomenon of the "feeder judge"; certain appellate judges often "feed" clerks to ideologically compatible chambers.²⁰⁷ This practice invites an obvious question: Does the hiring of clerks thought to be nurtured in a compatible appellate court judge's chambers reinforce their justice's ideological leanings? Some scholars lament what they see to be an increased politicization of law clerkships.²⁰⁸

The job of a Supreme Court law clerk has evolved through the years. There was a time when a clerk was like a personal assistant to the justice. Over time, clerks became secretaries, then stenographers, next sounding boards, and finally junior associates in the "nine little law firms" that constitute today's chambers.²⁰⁹ Now, clerks have a wide range of duties. In addition to reviewing cert petitions and helping craft opinions, a clerk is expected to monitor *in forma pauperis* petitions, take the "death watch" over last-minute appeals from inmates awaiting execution, and create "bench memos" to prepare their justices for oral arguments and conferences.²¹⁰

²⁰² O'Brien, *supra* note 9, at 134–35; Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* 30 (2006).

²⁰³ See Artemus Ward & David L. Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* 69–73 (2006).

²⁰⁴ See *id.* at 92, 96.

²⁰⁵ Peppers, *supra* note 202, at 31.

²⁰⁶ *Id.* at 175.

²⁰⁷ William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 *Vand. L. Rev.* 1749, 1779 n.102 (2009); see Peppers, *supra* note 202, at 32; Ward & Weiden, *supra* note 203, at 83.

²⁰⁸ O'Brien, *supra* note 9, at 136.

²⁰⁹ See *id.*; see also Leonard Baker, *Brandeis and Frankfurter: A Dual Biography* 415 (1984) (quoting Frankfurter, who called his clerks "junior partners").

²¹⁰ See O'Brien, *supra* note 9, at 139; Peppers, *supra* note 202, at 151–52; Ward & Weiden, *supra* note 203, at 37–38.

The reality of the Court's routines—especially a steady increase in the Court's workload—inevitably affects what clerks do. Justices Brennan and Frankfurter reviewed cert petitions themselves.²¹¹ This might have been less burdensome when there were around fifteen to twenty-five hundred petitions a year.²¹² By contrast, such personal attention is hardly possible today, when the Court's caseload approaches 10,000 petitions per term.²¹³ As the number of petitions grew, the justices naturally responded by hiring more clerks and dividing the labor. Around 1947, many justices began employing a second law clerk, and by 1970, most justices had added a third clerk.²¹⁴ Soon thereafter, the cert pool was born; clerks in the participating chambers divided up cert petitions rather than having each chamber review them separately.²¹⁵ In the Roberts Court, each clerk in the cert pool writes about 250 memoranda per year.²¹⁶ The clerks' memoranda seem to influence the disposition of petitions for certiorari.²¹⁷

Clerks are also involved in the drafting of opinions. This role began to expand during the Warren Court, one factor perhaps being that some justices' workloads increased as the Chief sought to assign equal numbers of opinions to each.²¹⁸ Today, law clerks tend to be heavily involved in the drafting process, especially of concurrences and dissents and during the hectic weeks toward the end of a term,²¹⁹ although the practice varies by justice.²²⁰

To the extent that the justices tend to become editors and managers, rather than scribes and sole practitioners, some observers worry that the Court's traditional institutional identity may deteriorate. Court-watchers have worried since at least the 1960s that the traditional image of the justices' "bringing the dispassioned reason of law to bear on problems

²¹¹ O'Brien, *supra* note 9, at 140–41; Ward & Weiden, *supra* note 203, at 137; Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 *Or. L. Rev.* 299, 313 (1961).

²¹² See Ward & Weiden, *supra* note 203, at 39 fig.I.4; Newland, *supra* note 211, at 313.

²¹³ Frequently Asked Questions (FAQ), Supreme Court of the U.S., <http://www.supremecourt.gov/faq.aspx> (last visited Oct. 21, 2014).

²¹⁴ Ward & Weiden, *supra* note 203, at 45; Newland, *supra* note 211, at 314.

²¹⁵ Ward & Weiden, *supra* note 203, at 45.

²¹⁶ O'Brien, *supra* note 9, at 140.

²¹⁷ *Id.* at 144–45.

²¹⁸ See Richard A. Posner, *The Federal Courts: Crisis and Reform* 62 (1985); Ward & Weiden, *supra* note 203, at 203–04.

²¹⁹ See O'Brien, *supra* note 9, at 142.

²²⁰ See, e.g., *id.* at 280.

may be blurred by the noise of typewriters and the scurry of subordinates.”²²¹

3. *The Court’s Opinions*

How do changes in the Chief Justices’ leadership skills and style, the level of day-to-day interaction among the justices, and the responsibilities of the clerks play out? One way to ponder that question is to read the end product—the Court’s opinions. In the Court’s early years, Chief Justice Marshall, emphasizing the importance of consensus, abolished seriatim opinions and wrote most decisions himself.²²² Today, the story is much different. Whatever Chief Justice Roberts’s hopes, his Court is a long way from speaking with one voice. Concurrences, dissents, and plurality opinions are commonplace.²²³ Modern opinions look more and more like law review articles (remember all those law review alumni now clerking?). The decision in *Citizens United v. Federal Election Commission*²²⁴ was over 48,000 words, spanning 183 pages in the U.S. Reports.²²⁵ Compare this to the Warren Court’s decision in *Brown v. Board of Education*, with only 1,848 words and spanning only 11 pages in the U.S. Reports.

Does the increasing internal fragmentation, isolation, and decline in consensus noted in these pages help explain changes in the Court’s opinions? Several studies, for example, reveal how the increase in the number of law clerks and their responsibilities has tracked the increase in longer opinions²²⁶ and the decline in consensus.²²⁷ For example, from 1969 to 1972—a time when many justices were taking on an additional clerk—“the number of opinions increased by about fifty percent and the number of words tripled.”²²⁸ In fairness to the clerks, however, if the jus-

²²¹ Newland, *supra* note 211, at 304–05. In our time, justices are spared the distraction of typewriters.

²²² R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* 157 (2001).

²²³ Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 *Hous. L. Rev.* 621, 633 fig.1 (2008).

²²⁴ 558 U.S. 310 (2010).

²²⁵ Adam Liptak, *Justices Long on Words but Short on Guidance*, *N.Y. Times*, Nov. 18, 2010, at A1.

²²⁶ See, e.g., Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 *Hastings L.J.* 167, 180–81 (1995); Liptak, *supra* note 225.

²²⁷ Bradley J. Best, *Law Clerks, Support Personnel, and the Decline of Consensual Norms on the United States Supreme Court 1935–1955*, at 140 (2002).

²²⁸ Posner, *supra* note 218, at 114.

trices wanted shorter drafts from their clerks, they have but to ask for them.²²⁹

Critics and observers debate the normative drawbacks²³⁰ or benefits of more and longer opinions. Chief Justice Roberts has argued that the justices should worry about the effect on the Court as an institution.²³¹ Necessity may drive some changes within the Court, such as in the explosion of cert petitions, while internal factors play a part, for example, in how the Chief Justices manage conferences. Certainly, what goes on within the Court matters, as it is the engine of the opinions that, in turn, shape both our nation's legal system and the country's perception of the Court.

III. CASES AND ARGUMENTS

The years since the Warren Court have seen major changes in the ways cases and arguments are delivered to the tribunal. Here we consider several transformations—pressures on the docket, the emergence of a Supreme Court Bar, an increase in amicus briefs, and livelier oral arguments.

A. *The Dwindling Docket*²³²

From the time of the Warren Court, the number of petitions for certiorari has steadily increased, from 1,131 in the 1953 Term²³³ to nearly 10,000 in recent Terms.²³⁴ However, with the exception of a brief period

²²⁹ See Black & Spriggs, *supra* note 223, at 645 (arguing justices “exert control over the final content of an opinion”). Justice Powell, for example, frequently instructed his clerks on the virtues of conciseness. *Id.*

²³⁰ See, e.g., *id.* at 628 (arguing that these opinions are inaccessible to the public); Hugh Hewitt, Op-Ed., One Way to Ensure Judges Be Brief, *Wall St. J.*, July 28, 1986, at 14 (describing long, fractured opinions as an abdication of judicial responsibility). Perhaps the most pressing problem with increasingly long opinions is the lack of guidance they provide to lower courts, leading to incoherent application of precedent. See, e.g., Liptak, *supra* note 225.

²³¹ Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* 7–8 (2006).

²³² In the literature on the Court, “docket” is used to include petitions presented to the Court as well as cases actually heard and decided on the merits. Sometimes it refers only to the latter. Here we mean “docket” in the latter sense.

²³³ History of the Federal Judiciary: Supreme Court of the United States, Petitions for Certiorari, 1923–1969, Federal Judicial Center, http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_petitions_for_certiorari (last visited Oct. 27, 2014).

²³⁴ See O'Brien, *supra* note 9, at 157–58.

during the Burger Court,²³⁵ the number of cases taken and decided has dropped sharply.²³⁶ In the 1953 Term, the Court decided 114 cases. By the 1982 Term, that figure had risen to 189.²³⁷ But in the 2013 Term, the number had fallen to 76.²³⁸ Speculation drives attempts to explain this shift. Some scholars posit that Congress's elimination of mandatory jurisdiction in 1988 spurred the decrease,²³⁹ but empirical analyses conclude that this action had at best a "miniscule role" in the plenary docket's overall decline.²⁴⁰ Indeed, several other factors may be in play: a reduction in petitions for certiorari by the United States, the creation and increased use of the cert pool, and turnover among the justices on the Court.

Fewer filings by the Solicitor General may be one factor in accounting for the Court's shirking docket. The Solicitor General is the most frequent and successful litigant before the Supreme Court;²⁴¹ about seventy percent of his or her petitions are granted each year.²⁴² So important is the Solicitor General that he or she is sometimes called the "Tenth Justice."²⁴³ In the 1983 Term, the Solicitor General filed petitions in for-

²³⁵ Three practices that the justices undertook during the Burger era provide possible explanations for this momentary increase: restricting oral arguments to thirty minutes; routinely using the "Join-3" vote (a vote to deny certiorari unless three others agreed to grant review); and more commonly writing and circulating dissents from denials of certiorari. The Court has largely abandoned the latter two practices. See O'Brien, *supra* note 9, at 216–17; Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 *Sup. Ct. Rev.* 403, 403; David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 *J.L. & Pol.* 779, 791–92, 799 (1997) [hereinafter O'Brien, *Join-3 Votes*].

²³⁶ See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 *Wm. & Mary L. Rev.* 1219, 1271 (2012).

²³⁷ *Id.*

²³⁸ October Term 2013: Term Index, SCOTUSblog Stat Pack (July 3, 2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_index_OT13.pdf.

²³⁹ Hellman, *supra* note 235, at 409.

²⁴⁰ *Id.* at 412. But see Owens & Simon, *supra* note 236, at 1267–68 (arguing that "the temporal coincidence of the docket's decline with the passage of the 1988 Act is too much to ignore"). Similarly, scholars disagree whether greater homogeneity in the lower courts may be a cause of the docket decline. Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 *Wash. & Lee L. Rev.* 737, 771–73 (2001) [hereinafter Cordray & Cordray, *Plenary Docket*].

²⁴¹ Cordray & Cordray, *Plenary Docket*, *supra* note 240, at 763.

²⁴² Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 *B.C. L. Rev.* 1323, 1344 (2010) [hereinafter Cordray & Cordray, *Solicitor General*].

²⁴³ Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 3 (1987).

ty-seven cases but in the 2013 Term sought review of only twenty-five cases.²⁴⁴ The office files fewer petitions for certiorari, perhaps due to decreased involvement in civil litigation by the government or to greater success in the lower courts.²⁴⁵ Whatever the reason, this “pullback” accounts for a decline of about fifteen cases per term.²⁴⁶

Created in 1972, the cert pool was originally designed to streamline review.²⁴⁷ Some commentators have criticized the use of a cert pool,²⁴⁸ but it is reasonable to ask if the pool played a role in the Court’s declining docket. Anecdote suggests that aversion to risk encourages clerks to find reasons to deny certiorari.²⁴⁹ Scholars, however, have debated whether empirical data support these statements.²⁵⁰

The high turnover in justices beginning in the mid-1980s probably helps explain the decrease in the plenary docket. Six justices retired around the time the docket decline began; each was replaced by a justice much less likely to vote in favor of certiorari.²⁵¹ In addition, there is evidence that Rehnquist altered his voting patterns after he became Chief Justice in 1986, voting to grant certiorari less often in later years.²⁵² One

²⁴⁴ 1984 Att’y Gen. Ann. Rep. 7 tbl.II-A; Briefs, USDOJ: Office of the Solicitor General, <http://www.justice.gov/osg/briefs/2013/2pet/7pet/toc3index.html> (last visited Oct. 24, 2014) (on file with the Virginia Law Review).

²⁴⁵ See Cordray & Cordray, Solicitor General, *supra* note 242, at 1325.

²⁴⁶ *Id.* at 1342. This number may be as high as twenty-five if one considers the office’s similar reluctance to file amicus briefs in recent years.

²⁴⁷ John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 270 (2001); Owens & Simon, *supra* note 236, at 1226; see also J. Harvie Wilkinson III, *If It Ain’t Broke . . .*, 119 *Yale L.J. Online* 67, 74 (2010) (arguing that the certiorari pool was intended to ease the burden placed on justices and “assure that most petitions had at least one hard look”).

²⁴⁸ See, e.g., O’Brien, *Join-3 Votes*, *supra* note 235, at 802 (arguing that the cert pool allows inter-circuit conflicts to percolate further); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 *Minn. L. Rev.* 1363, 1376–77 (2006) (highlighting clerks’ “prevailing spirit” to seek out undeserving petitions).

²⁴⁹ Owens & Simon, *supra* note 236, at 1235–36 (quoting Justice Stevens’s view that, to recommend a case for review, clerks have to “stick [their] neck out”).

²⁵⁰ See David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 *Tex. L. Rev.* 947, 977 (2007) (book review) (examining cert pool memoranda in Terms between the mid-1980s and 1990s and providing evidence that the cert pool was more “stingy” than the Court in its recommendations); see also Owens & Simon, *supra* note 236, at 1236–37 (discussing Stras’s findings). But see Cordray & Cordray, *Plenary Docket*, *supra* note 240, at 790 (arguing that the cert pool has had little systematic influence).

²⁵¹ Justice Scalia replaced Burger, Kennedy replaced Powell, Souter replaced Brennan, Thomas replaced Marshall, and Ginsburg replaced White.

²⁵² See Joan Biskupic, *The Shrinking Docket: Attorneys Try to Make an Issue Out of the Dramatic Decline in High Court Rulings*, *Wash. Post*, Mar. 18, 1996, at A15.

study concludes that these changes had a cumulative effect of eliminating about 100 votes to grant certiorari, “almost erasing the complement of votes cast by an average Justice for plenary review in a given Term.”²⁵³ The decline seemed to reflect an inclination that “a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance.”²⁵⁴ The justices explicitly embraced this notion in their 1995 amendments to the Court’s rules, declaring that the existence of an intercircuit conflict, without more, is an insufficient reason for granting certiorari. To merit Supreme Court review, such cases must also involve a “question of importance.”²⁵⁵

Studies have also found a correlation between a Court’s degree of ideological homogeneity and the number of cases decided in a Term; over time, less homogenous Courts have taken on a docket that is twenty-five percent smaller than average.²⁵⁶ Justices who are in the majority in a more unified Court may feel more confident about the likelihood of the Court’s reaching their preferred outcome.²⁵⁷ The relationship between the continuing decline of the docket size and the Roberts Court’s closely divided ideological makeup may offer support for this theory.

B. The Supreme Court Bar

The emergence of a Supreme Court Bar—a small group of elite, seasoned advocates who appear frequently before the Court—has unquestionably affected how cases are presented to and argued before the Court.

As late as 1987, Chief Justice Rehnquist stated emphatically, “I am quite firmly of the belief that there is no such Supreme Court bar at the present time.”²⁵⁸ Yet, even when he made this comment, a highly professionalized cadre of Supreme Court litigators was already nascent. Two years earlier, Sidley Austin had hired Rex Lee, a former Solicitor

²⁵³ See Cordray & Cordray, *Plenary Docket*, supra note 240, at 785 n.245; David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 *Const. Comment.* 151, 157–58 (2010). This was particularly true in the case of Justice White, who voted in favor of cert at an extraordinarily high rate, more than twice that of any other justice. Cordray & Cordray, *Plenary Docket*, supra note 240, at 789–90.

²⁵⁴ Hellman, supra note 235, at 430–31.

²⁵⁵ *Id.* at 432.

²⁵⁶ Owens & Simon, supra note 236, at 1278.

²⁵⁷ *Id.* at 1264.

²⁵⁸ William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 282 (1987).

General, to start a Supreme Court and appellate department.²⁵⁹ Lee's quick success was striking: In a single term, "the former Solicitor General had accomplished what no one else had done for decades and what the Bar had assumed was no longer economically feasible."²⁶⁰ Other firms soon took note, creating what Chief Justice Roberts termed a "snowball effect."²⁶¹ In 1980, fewer than 20% of non-governmental advocates before the Court had appeared previously; by 2002, over 40% were repeat players, with fully one-third having at least three previous arguments under their belts.²⁶² The creation of Supreme Court practices by private firms, usually catalyzed by hires of attorneys from the Solicitor General's Office and former Supreme Court clerks, has not only been a primary force driving the emergence of a distinct bar, but has also influenced state governments²⁶³ and Supreme Court litigation clinics in top law schools.²⁶⁴

The emergence of a Supreme Court Bar has affected many facets of the Court's work, from its agenda to its decisions on the merits. Studies suggest that advocates most versed in the ways of the Court have the greatest influence on the Court at the certiorari stage; a petitioner's depth of experience strongly correlates to the likelihood of the Court's granting the petition.²⁶⁵ While the Court hears only about 1% of the cases presented to it, major law firms with active Supreme Court practices

²⁵⁹ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *Geo. L.J.* 1487, 1498 (2008). While Lee was especially notable as a Supreme Court advocate, there was a small group of attorneys during the 1977–82 Terms who regularly litigated before the Court. See Kevin T. McGuire, *Advocacy in the U.S. Supreme Court: Expertise Within the Appellate Bar*, 11 *Const. Comment.* 267, 269 (1994). Other Supreme Court specialists existed at earlier periods in our nation's history, such as William Pinkney, who argued over half of the cases during one Term. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 *J. Sup. Ct. Hist.* 68, 79 (2005).

²⁶⁰ Lazarus, *supra* note 259, at 1498.

²⁶¹ Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 *Charleston L. Rev.* 59, 69 (2010); Adam Liptak, *Specialists' Help at the Supreme Court Can Come With a Catch*, *N.Y. Times*, Oct. 10, 2010, at 1 [hereinafter Liptak, *Specialists' Help*].

²⁶² Roberts, *supra* note 259, at 75.

²⁶³ James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 *J. App. Prac. & Process* 533, 535–36 (2001).

²⁶⁴ Jeffery L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 *Stan. L. Rev.* 137, 143 (2013). Most public interest organizations, with the notable exception of the ACLU, have continued to rely on the pro bono services of private firms rather than develop their own Supreme Court practices. Lazarus, *supra* note 259, at 1501.

²⁶⁵ McGuire, *supra* note 259, at 283–84.

have success rates as high as 25%.²⁶⁶ In 2000, 25% of the docket comprised cases for which experienced counsel had petitioned; by 2006, that proportion had risen to 39%.²⁶⁷ Today, Supreme Court specialists are responsible for over half of the cases in which certiorari is granted.²⁶⁸ These numbers suggest that the Bar has had a profound effect on shaping the Court's caseload, with some observers arguing that it has shifted the docket to topics "more responsive to the concerns of private business."²⁶⁹

The relative success of the Supreme Court Bar may simply tell us that experienced attorneys are better at writing petitions.²⁷⁰ However, the mere association of an expert lawyer with a petition may also lend credibility to its arguments regardless of the petition's quality. The well-known advocate's name conveys an implicit message to the Court: "[T]hese arguments can be taken seriously and the issues raised are worthy of . . . your attention."²⁷¹ Given that the Court reviews nearly 10,000 petitions each year, clerks often look to the briefs' writers—and possibly their reputation—to highlight the legal issues and flag the importance of a case.²⁷² Although increased petitions may seem at odds with the decrease in the Court's merits docket, the increasingly specialized Supreme Court Bar might actually be partially responsible for that decrease when one considers the advocates' desire to guard their reputation and the high price now expected for an effective petition.

Experienced Supreme Court advocates also achieve a higher success rate at the merits stage than do amateurs, although the difference is less pronounced than at the certiorari stage, perhaps because the justices themselves can devote more time to cases in which review has been

²⁶⁶ Lazarus, *supra* note 259, at 1515. This disparity remains apparent even when controlling for the possibility that expert counsel are just better at picking good cases. *Id.* at 1526.

²⁶⁷ *Id.* at 1517.

²⁶⁸ Liptak, *Specialists' Help*, *supra* note 261.

²⁶⁹ Lazarus, *supra* note 259, at 1522.

²⁷⁰ Chief Justice Burger used to complain about the quality of argumentation. See Interview with Justice Antonin Scalia, *supra* note 200. Rehnquist called the advocacy "slipshod." See David M. O'Brien, *supra* note 9, at 252. By contrast, Justice Alito recently noted that the lawyers are now "considerably better" than twenty years ago, when he was in the Solicitor General's Office. See Lawrence S. Wrightsman, *Oral Arguments Before the Supreme Court: An Empirical Approach* 21 (2008).

²⁷¹ McGuire, *supra* note 259, at 280; see also Sundquist, *supra* note 261, at 60 (arguing that the success of former Solicitors General may be derived from their "automatic reputation and special relationship with the Court and other repeat players").

²⁷² Lazarus, *supra* note 259, at 1526.

granted.²⁷³ Expert advocates are less likely simply to repeat arguments that succeeded in the lower courts; instead, they know how to tailor their strategies to specific justices.²⁷⁴ *Bailey v. United States*,²⁷⁵ a Fourth Amendment case in which the petitioner obviously hoped that Justice Scalia's vote would carry the day, illustrates this tendency. In that case, the petitioner cited Scalia three times in the opening brief and two more times in the reply, concluding both briefs with a direct Scalia quotation.²⁷⁶

Not only may skilled advocacy affect the ultimate outcome of the case at bar, but also it may be aimed at engendering more favorable precedents or enhancing the attorney's reputation, if the advocate hopes to appear before the Court again.²⁷⁷ Such long-term strategizing may also shape the robust pro bono practice of the Supreme Court Bar; conspicuous presence in the Court helps attract future business clients and recruit coveted young attorneys.²⁷⁸

C. More Amicus Briefs

The years since the Warren Court have seen a dramatic increase in the filing of amicus curiae briefs.²⁷⁹ The number of amicus briefs filed between 1986 and 1995 increased by 800% over the number filed between 1946 and 1955.²⁸⁰ At least one amicus brief is now filed in more than 95% of cases.²⁸¹ In addition, the likelihood of the Court's referring to an amicus brief in an opinion has risen sharply since 1950;²⁸² since 1994, about one-third of majority opinions have cited one or more such

²⁷³ Liptak, *Specialists' Help*, supra note 261.

²⁷⁴ Lazarus, supra note 259, at 1540–41. Supreme Court advocate John W. Davis famously described the advocates as fishermen, customizing their cast, flies, tackle, line, and rod in order to catch at least five fish. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 895 (1940).

²⁷⁵ *Bailey v. United States*, 133 S. Ct. 1031 (2013).

²⁷⁶ Brief for Petitioner at 25, 27, 40, *Bailey v. United States*, 133 S. Ct. 1031 (2013) (No. 11-770); Reply Brief at 14, 21, *Bailey*, 133 S. Ct. at 1031 (No. 11-770).

²⁷⁷ See Lazarus, supra note 259, at 1522.

²⁷⁸ *Id.* at 1557; Liptak, *Specialists' Help*, supra note 261.

²⁷⁹ Bruce J. Ennis, *Effective Amicus Briefs*, 33 *Cath. U. L. Rev.* 603, 604 (1984).

²⁸⁰ Joseph D. Kearney & Thomas M. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. Pa. L. Rev.* 743, 752 (2000).

²⁸¹ Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 *Judicature* 127, 128 (2005).

²⁸² Kearney & Merrill, supra note 280, at 757.

briefs.²⁸³ Marquee cases are magnets for amicus briefs; the 2012 case reviewing challenges to the Affordable Care Act, *National Federation of Independent Business v. Sebelius*,²⁸⁴ attracted the most amicus briefs ever filed in any case, with 136;²⁸⁵ the case involving California's Proposition 8, banning same-sex marriage, *Hollingsworth v. Perry*,²⁸⁶ came in second, garnering 96 amicus briefs.²⁸⁷

The Court's "open door" policy makes it easier to file amicus briefs. Supreme Court Rule 37 requires that a potential amicus file a motion for permission for leave to file if one of the parties to the case has withheld consent.²⁸⁸ In the 1940s and early 1950s, the Court often withheld permission.²⁸⁹ From the 1960s onward, however, the Court's attitude toward amicus briefs became more permissive.²⁹⁰ Currently, the Court grants nearly all motions for leave to file at both the certiorari and merits stages.²⁹¹ This open door policy has meant that the interests represented in amicus briefs are more diverse; amici in the modern era include individuals (often law professors), corporations, governments, charitable organizations, public interest law firms, advocacy groups, business and trade organizations, and unions.²⁹² In the Warren Court era, the amicus brief was predominantly associated with liberal causes, but today conservative interests are quite active in filing such briefs.²⁹³ Moreover, amici, who at one time were thought of as being involved only in constitutional cases, now appear in virtually the full range of Supreme Court litigation.²⁹⁴

The explosion in the number of amicus filings may reflect many Supreme Court practitioners' belief that amicus briefs influence the justic-

²⁸³ Owens & Epstein, *supra* note 281, at 130.

²⁸⁴ 132 S. Ct. 2566 (2012).

²⁸⁵ Eric Lichtblau, Groups Blanket Supreme Court on Health Care, *N.Y. Times*, Mar. 25, 2012, at A1.

²⁸⁶ 133 S. Ct. 2652 (2013).

²⁸⁷ Mark Walsh, It Was Another Big Term for Amicus Curiae Briefs at the High Court, 99 *A.B.A. J.* 16, 16 (2013).

²⁸⁸ Sup. Ct. R. 37 § 2(b).

²⁸⁹ Kearney & Merrill, *supra* note 280, at 763.

²⁹⁰ *Id.* at 764.

²⁹¹ *Id.* at 762.

²⁹² Gregory A. Caldeira & John R. Wright, Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?, 52 *J. Pol.* 782, 791 (1990).

²⁹³ Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 *J.L. & Pol.* 33, 50 (2004).

²⁹⁴ See Owens & Epstein, *supra* note 281, at 129.

es;²⁹⁵ empirically, however, the question remains hotly contested.²⁹⁶ The only findings that appear to have been consistently replicated are the Solicitor General's unique degree of success in filing amicus briefs, supporting the winning side around three-quarters of the time,²⁹⁷ and the statistical significance of the correlation between involvement of amici at the certiorari phase and the Court's granting certiorari.²⁹⁸ Surveys reveal that former Supreme Court clerks believe most amicus briefs to be duplicative; finding a truly useful amicus—one that presented new arguments and added to the understanding of either the justice or the clerk—was like finding “diamonds in the rough.”²⁹⁹ Once they found such a gem, however, clerks typically passed the brief along to the justice, who would usually read it.³⁰⁰

Organizations may also choose to file or co-sponsor an amicus brief for reasons unrelated to influencing the Court. An organization may wish to show its members that it is actively pursuing their interests, the better to generate recruits, contributions, or publicity.³⁰¹ The organization may hope to build relationships with like-minded groups.³⁰² Or, an organization may choose to sign on as a co-sponsor to an amicus brief simply because it supports the cause but wishes to avoid the expense of filing its own brief.

The rise in amicus briefs may also reflect a kind of arms race—the belief of adverse parties that they need to match each other amicus for amicus.³⁰³ Data support this theory, revealing that adverse parties often submit the same number of amicus briefs.³⁰⁴ This arms race hypothesis, which can lead to the amici effectively cancelling each other out, could

²⁹⁵ Kearney & Merrill, *supra* note 280, at 820.

²⁹⁶ Owens & Epstein, *supra* note 281, at 128.

²⁹⁷ Kearney & Merrill, *supra* note 280, at 773–74.

²⁹⁸ The extent to which amici influence decisions on the merits is much less certain, though the number of times that opinions cite amicus briefs has increased. Owens & Simon, *supra* note 236, at 1230; see also Owens & Epstein, *supra* note 281, at 130 (detailing the percentage of majority opinions that cite at least one amicus brief).

²⁹⁹ Lynch, *supra* note 293, at 45.

³⁰⁰ *Id.*

³⁰¹ Kearney & Merrill, *supra* note 280, at 824–25; see also Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *Law & Soc'y Rev.* 807, 825–26 (2004) (noting that some groups file amicus briefs in order to attract new group members and to show existing members that the group actively supports their interests).

³⁰² Collins, *supra* note 301.

³⁰³ Kearney & Merrill, *supra* note 280, at 821–23.

³⁰⁴ *Id.* at 821.

also help explain the sparse empirical support for the influence of amici at the merits stage: If there is parity in amici, the net influence of any individual brief may be significantly diminished.³⁰⁵ Because the reputation of the name on the brief may contribute to the brief's influence, a perceived need to match the influence of amicus briefs supporting an adverse party's position further contributes to the consolidation of a Supreme Court Bar.³⁰⁶ If one party hires an experienced advocate to file an amicus brief, the other party will likely do so as well, leading to a self-perpetuating cycle that has entrenched the elitism and professionalization of cases and arguments before the modern Court.

D. Oral Arguments

Since the Warren era, the Court has significantly restricted the time allotted to oral argument,³⁰⁷ and written briefs (including amicus briefs) have become more prominent.³⁰⁸ It is, however, oral argument that largely shapes lay conceptions of the Court. Oral argument is theatre; it offers a picture of the justices at work, often displaying a battle of wits and words that precedes the justices' initial votes.³⁰⁹

Like some other features of the Court—the docket, the advocates, and the briefs—oral arguments have undergone profound changes over the past five decades. Most striking among these changes is how much more engaged the justices themselves are. Few justices of the Warren and Burger Courts asked many questions at oral argument.³¹⁰ After Justice Scalia's appointment in 1986, however, this dynamic began to

³⁰⁵ *Id.* at 822–23.

³⁰⁶ Lazarus, *supra* note 259, at 1558.

³⁰⁷ In 1970, following a long history of the Court's gradually restricting speaking time at oral argument, the Court imposed a thirty-minute speaking limit. *Inside the Supreme Court: The Institution and Its Procedures* 808 (Susan Low Bloch et al. eds., 2d ed. 2008).

³⁰⁸ For example, Justice Alito has said that he looks “for as much help as [he] can get from the advocates in the form of the brief, and then to clean up anything else that is not taken care of in the briefs in the oral argument.” Samuel Alito et al., *The Inaugural William French Smith Memorial Lecture: A Look at Supreme Court Advocacy with Justice Samuel Alito*, 35 *Pepp. L. Rev.* 465, 469 (2008).

³⁰⁹ John Roberts, while a judge on the D.C. Circuit, stressed that “oral argument is terribly, terribly important” in part because the conference immediately follows. Roberts, *supra* note 259, at 69–70.

³¹⁰ See Toobin, *supra* note 9, at 106.

change.³¹¹ Other justices, having been in the habit of allowing lawyers to speak uninterrupted before asking questions, found Scalia's aggressive questioning of counsel surprising. Powell asked Marshall, "Do you think he knows that the rest of us are here?"³¹² Powell's question was as prescient as it was sarcastic. Following Scalia's lead, today's justices frequently ask questions "directed more to a colleague than to the lawyer," as Ginsburg recently explained.³¹³

Paul Clement, a former Scalia clerk and later Solicitor General, explained how the modern "hot bench" evolved from Scalia's influence: "[O]ther justices, including justices who had been on the court for a while, were kind of like: If the new guy gets to ask all these questions, I'm going to step up and ask some questions, too."³¹⁴ With the exception of Thomas, who rarely speaks at oral argument, the justices appointed to the bench since Scalia have intensified this dynamic. The newest additions, Sotomayor and Kagan, interrupt advocates as often as Scalia, or even more frequently.³¹⁵ One study revealed that, by the mid-2000s, the justices were averaging over 120 questions per case.³¹⁶

There is more at work here than the influence of Antonin Scalia. The high quality of the Supreme Court Bar's advocacy may inspire the justices to heightened engagement. Also, today's justices come from backgrounds that may dispose them to be more active in oral argument. Eight of the current justices previously served on the federal bench; the ninth, Kagan, frequently appeared before the Court as Solicitor General. Current justices may also be better prepared for oral argument. While Frankfurter and Douglas did not even read the parties' briefs before argument, all the justices now receive "bench memos" prepared by their clerks detailing the salient issues of every case, enabling the justices to ask more

³¹¹ See Joan Biskupic, *Benchmark for Antonin Scalia: 25 Years on Court*, USA Today (Oct. 3, 2011), <http://www.usatoday.com/news/washington/judicial/story/2011-10-03/scalia-25-years-on-court/50644926/1> [hereinafter Biskupic, *Benchmark for Antonin Scalia*].

³¹² See Jeffries, *supra* note 247, at 534.

³¹³ Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. Times, Oct. 8, 2013, at A14.

³¹⁴ Bill Mears, *Justice Kagan's Eagerness To Speak Bumps Tradition*, CNN.com (Oct. 5, 2011), <http://www.cnn.com/2011/10/05/us/scotus-hot-bench/>.

³¹⁵ See O'Brien, *supra* note 9, at 256–57; Biskupic, *Benchmark for Antonin Scalia*, *supra* note 311.

³¹⁶ See Lee Epstein, William M. Landes & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. Legal Stud. 433, 442 (2010).

probing and sophisticated questions.³¹⁷ The justices' activism during oral argument contrasts with their limited interaction outside of the courtroom. Conferences are more compressed than they were in Burger's day, and the justices now tend to communicate in writing. Oral arguments thus have become an obvious venue for advocacy within the Court; the other justices cannot help but listen.³¹⁸ Reflecting the view expressed by several justices, Roberts has acknowledged using oral argument to direct statements to other justices, admitting that he may pose an aggressive question so that the advocate will "come up with a good answer that might help respond to [an]other justice's concern."³¹⁹

The last five decades have brought significant changes to how cases are presented and argued before the Court. Some of these shifts, such as a dwindling docket and livelier oral arguments, are essentially internal to the institution. Others, including the rise of a Supreme Court Bar and the flood of amicus briefs, come from outside the Court. These changes obviously affect how cases and arguments flow through the Court. But the respective roles of the advocates and the justices are the same as they were when the Warren Court sat: The advocates plead, and the justices decide.

IV. OUTSIDE THE MARBLE PALACE

A. *The Court's Relation with the Media*

It is natural for justices to be concerned about what others think of the Court's work. This concern dates as far back as the time of Chief Justice John Marshall, who described the judiciary as the weakest branch of the federal government.³²⁰ How people perceive what the Court does is crucial to the Court's institutional function. As it acknowledged in *Planned*

³¹⁷ Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 *Duke L.J.* 81, 102 n.85 (2011); see generally Peppers, *supra* note 202 (describing the responsibilities of Supreme Court clerks).

³¹⁸ See Toobin, *supra* note 9, at 129; see also Bob Woodward & Scott Armstrong, *The Brethren* 427 (1979) (describing how Justice Stevens employed oral argument as a tool of arguing his points to the other justices).

³¹⁹ See Interview by Susan Swain, C-SPAN, with Chief Justice John Roberts (June 19, 2009), available at <http://supremecourt.c-span.org/Video/JusticeOwnWords.aspx>; see also Liptak, *Specialists' Help*, *supra* note 261 (noting the aggressive questioning by justices of specialists at oral argument).

³²⁰ John Marshall, *A Friend of the Constitution* No. 1, June 30, 1819, reprinted in 21 *Stan. L. Rev.* 456, 456 (1969).

Parenthood v. Casey, “the Court cannot buy support for its decisions by spending money and . . . it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy”³²¹ The Court must be seen fit to exercise the judicial power in order to give effect to its pronouncements and elicit compliance with its decrees. This is where the media come in. The need to engage the public drove even members of the Marshall Court to seek ways to cultivate relationships with the media, and thereby the wider populace, including writing pseudonymous essays for newspapers in defense of the Court and granting interviews to reporters.³²²

1. A More Open Court

The Court’s relationship with the media in the last half-century has an air of ambivalence, marked by the Court’s competing needs: engaging with the public while at the same time keeping an appropriate distance. On the one hand, the Court exercises a high level of control over its public perception. The justices deliberate in secret, interact with the press largely through formal, written opinions, and isolate themselves from day-to-day controversy to a degree unique among Washington institutions.³²³ This distance has purchased “a considerable measure of immunity from public scrutiny of any kind.”³²⁴ On the other hand, the Court has progressively taken steps to open itself to the press.

For instance, Chief Justice Burger provided background briefings to reporters and reached out to them for suggestions in altering Court procedures relating to the media.³²⁵ He also expanded the press section, which had housed roughly a half dozen reporters, to provide seats for as many as thirty.³²⁶ Chief Justice Rehnquist further accommodated the

³²¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

³²² Richard A. Posner, *The Court of Celebrity*, *The New Republic* (May 5, 2011), <http://www.newrepublic.com/article/books/magazine/87880/supreme-court-burger-blackmun-media-celebrity>; see also Newmyer, *supra* note 222, at 324 (describing “remarkable” newspaper articles Justice Marshall wrote defending certain opinions).

³²³ Keith J. Bybee, *Open Secret: Why the Supreme Court Has Nothing to Fear from the Internet*, 88 *Chi.-Kent L. Rev.* 309, 314–15 (2013); Woodward & Armstrong, *supra* note 318, at 1.

³²⁴ Posner, *supra* note 322.

³²⁵ See generally Everette E. Dennis, *Another Look at Press Coverage of the Supreme Court*, 20 *Vill. L. Rev.* 765 (1974) (referencing a series of newspaper articles Justice Marshall wrote).

³²⁶ Richard Davis, *Decisions and Images* 37 (1994).

press, allowing television cameras in the Court building, disseminating more information on the justices' travel and health, and participating in on-camera interviews.³²⁷ Now, the Court makes available copies of many speeches given by the justices,³²⁸ as well as same-day copies of opinions and oral argument transcripts.³²⁹

In 1965, the Court changed its policy of delivering opinions only on Mondays, a practice that had pushed a large number of opinions to the final day of the Court's term.³³⁰ The Warren Court also began notifying reporters as to when it would announce decisions.³³¹ Nonetheless, press complaints about "judicial dumping"—the Court's release of multiple major opinions on the same day³³²—continued through subsequent decades. The Court, however, has been willing to go only so far; when one reporter suggested to Chief Justice Rehnquist that coverage of the Court might be better if it spaced out major decisions, he jokingly responded, "Just because we announce them all on one day doesn't mean you have to write about them all on one day. Why don't you save some for the next day?"³³³

While the general trajectory of the Court has been toward increased transparency and media accommodation, there have also been episodes of Court pushback. When CBS News broadcasted excerpts from oral argument in *New York Times v. United States*,³³⁴ Chief Justice Burger retaliated by cutting off the limited access to recordings of oral arguments and calling on the FBI to open an investigation.³³⁵

2. *The Demands of Media in the Electronic Age*

Changes at the Court have been driven in part by the changing character of the news media generally. The Warren Court did its work in an

³²⁷ Id. at 155.

³²⁸ Speeches, Supreme Court of the U.S., <http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx> (last visited Oct. 23, 2014).

³²⁹ Transcripts and Recordings of Oral Arguments, Supreme Court of the U.S. (October 2010), http://www.supremecourt.gov/oral_arguments/availabilityoforalargumenttranscripts.aspx (last visited Feb. 12, 2015).

³³⁰ Davis, *supra* note 326, at 36.

³³¹ Id. at 37.

³³² Id. at 36 n.41.

³³³ Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 *Yale L.J.* 1537, 1558 (1996).

³³⁴ 403 U.S. 713 (1971).

³³⁵ Bybee, *supra* note 323, at 310.

age of newspapers, and debate over press coverage focused largely on the print media.³³⁶ Today, major newspapers continue to provide extensive coverage of the Court, reporting on almost seventy-five percent of cases.³³⁷ By the advent of the Burger Court, however, Americans were increasingly getting their news from television, and those reports tended to focus heavily on a decision's political, rather than legal, aspects.³³⁸ However, television coverage was anything but comprehensive; during the period from October 1976 to July 1981, only one in five Supreme Court decisions was covered on television.³³⁹ More reporters showed up at the Court; the size of the press corps steadily expanded from a small group of congressional beat reporters doing double-duty to cover the Warren Court,³⁴⁰ to a contingent of fifty reporters working the Supreme Court beat by the Rehnquist era.³⁴¹

The explosion of twenty-four-hour cable and internet news has fundamentally changed the way that decisions are covered. As recently as the 1990s, decision day began with distribution of the morning's opinions to reporters, who sat together, discussed the opinions, and filed stories by 5:00 p.m.³⁴² Now, reporters are lucky to have two hours to review the opinions before their editors expect stories to be filed for prompt posting to the internet. Misreporting of the Court's ruling in *National Federation of Independent Business v. Sebelius*³⁴³ showcased the dangers posed by reporters having too little time to sift through opinions. Moments after the printed opinion's release, interns broke into sprints from the Court's Public Information Office, desperate to put cop-

³³⁶ See, e.g., Chester A. Newland, Press Coverage of the United States Supreme Court, 17 W. Pol. Q. 15, 15–18 (1964) (using newspaper wire service reporting on Supreme Court decisions as a proxy for press coverage generally).

³³⁷ Todd A. Collins & Christopher A. Cooper, Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure, 65 Pol. Res. Q. 396, 405 (2012).

³³⁸ Eliot E. Slotnick & Jennifer A. Segal, Television News and the Supreme Court: All the News That's Fit To Air? 112 (1998); see also Eliot E. Slotnick, Television News and the Supreme Court: A Case Study, 77 Judicature 21, 25–27 (1993) (describing how the media coverage of *Bakke* focused on the political aspects of the case).

³³⁹ Ethan Katsch, Supreme Court Beat: How Television Covers the Supreme Court, 67 Judicature 6, 8 (1983).

³⁴⁰ Lyle Denniston, The Shrinking Supreme Court and Its Dwindling Press Corps, 59 Syracuse L. Rev. 417, 420 (2009).

³⁴¹ Davis, *supra* note 326, at 63–64.

³⁴² Dahlia Lithwick, Slate, Remarks on the Changing Nature of Covering the Supreme Court given at the University of Virginia School of Law (Nov. 11, 2013); see also Davis, *supra* note 326, at 45–47 (describing the decision day “ritual” circa the mid-1990s).

³⁴³ 132 S. Ct. 2566 (2012).

ies into the hands of reporters outside the Court.³⁴⁴ In their haste, FOX News and CNN incorrectly reported that the Affordable Care Act's individual health insurance mandate had been struck down as unconstitutional under the Commerce Clause.³⁴⁵ Such an episode demonstrates how a news culture demanding immediate turnaround and comment threatens the quality of reporting on the Court.

Having too little time is not the only hazard. Fewer than half of the reporters who cover the Court have law degrees. One may debate the necessity of formal legal education for Supreme Court beat writers,³⁴⁶ but, in any event, law students (and their professors) will tell you how difficult it can be to decipher the Court's opinions. The Court's long opinions—often replete with different forms of dicta, footnotes, and multiple concurring or dissenting opinions—can easily lead to misunderstanding. Today's emphasis on instant news only compounds the problem.³⁴⁷

The news industry's economic difficulties have also affected the Supreme Court press corps. Newspaper staffs have been cut in recent years, with Washington bureaus thinning considerably.³⁴⁸ Decreasing advertising revenues have physically squeezed the space available for traditional news coverage in printed publications.³⁴⁹ The result has been a dramatic reduction in the number of reporters in the Supreme Court press corps (as few as three full-time reporters may show up to the Court on any given day).³⁵⁰ Reporters are often forced to split their attention between the Court and other areas, such as the Department of Justice.³⁵¹

³⁴⁴ Scott Hensley, *Supreme Court Health Care Ruling Prompts Foot Race in Press Corps*, NPR (June 29, 2012, 10:37 AM), <http://www.npr.org/blogs/health/2012/06/29/155972981/supreme-court-health-care-ruling-prompts-foot-race-in-press-corps>.

³⁴⁵ Brian Stelter, *Rushing To Report the Health Ruling, and Getting It Wrong*, N.Y. Times (June 28, 2012, 4:36 PM), <http://thecaucus.blogs.nytimes.com/2012/06/28/rushing-to-report-the-health-ruling-and-getting-it-wrong/>. Of course, both companies quickly discovered their mistake and reported correctly that the individual mandate had been upheld as an exercise of the taxing power.

³⁴⁶ O'Brien, *supra* note 9, at 320.

³⁴⁷ *Id.* at 321.

³⁴⁸ Denniston, *supra* note 340, at 422.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 420–21.

³⁵¹ Lithwick, *supra* note 342.

3. Blogging

In some respects, the growth of internet media has improved the quality of reporting. The advent of new media outlets allows quick and widespread dissemination of primary documents, news, and commentary about the Supreme Court. This allows greater access to the Court's inner workings and facilitates ready analysis of the Court. Gone are the days when a professor seeking to comment on a case had no choice but to await the publication of his or her law review article.³⁵² Today, academics and practitioners across the country contribute to a growing array of legal blogs (or "blawgs"³⁵³). Some focus on specialized topics, like tax law or intellectual property.³⁵⁴ Others are open to broad commentary about law, politics, and life.³⁵⁵ And yet others, like *SCOTUSblog*, look exclusively at the Court.

SCOTUSblog has revolutionized the ability of news outlets and the public to follow the workings of the Court. The website presents live coverage of oral arguments and opinions as they become available. It provides links to lower court opinions, the parties' briefs, and amicus filings, giving interested individuals instant access to all the materials that the Court itself possesses when deciding a case.³⁵⁶ *SCOTUSblog* includes a "Petitions We're Watching" section, providing certiorari briefing materials and analysis for prominent and interesting cases.³⁵⁷

Through its coverage of healthcare litigation, a conservative legal blog, *The Volokh Conspiracy*, provided an example of the influence that legal blogging may have. As challenges to the Affordable Care Act's individual mandate began to work their way through the federal courts, most legal professionals and academics considered arguments against

³⁵² Randy E. Barnett et al., *A Conspiracy Against Obamacare: The Volokh Conspiracy and the Health Care Case 1* (2013).

³⁵³ Blawg Directory, A.B.A. J., <http://www.abajournal.com/blawgs> (last visited Feb. 25, 2015).

³⁵⁴ See, e.g., Tax Prof Blog, <http://taxprof.typepad.com/> (last visited Feb. 25, 2015); Patently O, <http://www.patentlyo.com/> (last visited Feb. 25, 2015).

³⁵⁵ See, e.g., The Volokh Conspiracy, <http://www.washingtonpost.com/news/volokh-conspiracy/> (last visited Feb. 25, 2015).

³⁵⁶ About Us, SCOTUSblog, <http://www.scotusblog.com/about/> (last visited Oct. 20, 2014).

³⁵⁷ Petitions We're Watching, SCOTUSblog, <http://www.scotusblog.com/case-files/petitions-were-watching/> (last visited Oct. 20, 2014).

the mandate to be “simply crazy.”³⁵⁸ *The Volokh Conspiracy*, however, provided a forum for conservative legal scholars to develop arguments against the individual mandate, helping to break down the perception of expert consensus on the constitutional issues in play.³⁵⁹ Authors writing for the blog were eventually invited to file an amicus brief in *Sebelius*; in their brief, they raised an issue about the Necessary and Proper Clause that Justice Scalia would bring up at oral argument.³⁶⁰ Andrew Koppelman, a prominent defender of the individual mandate, has suggested that this brief may have influenced Chief Justice Roberts’s approach to the case.³⁶¹

4. *Seeing the Court as Political*

It was a book, rather than technological change, that proved to be a historic turning point in media coverage of the Supreme Court. In 1979, Bob Woodward and Scott Armstrong published *The Brethren*. Relying heavily on Woodward’s access to Justice Potter Stewart and leaks from the Court’s clerks, *The Brethren* tells the story of an intensely political and ideological Court, pervaded by horse-trading and deal-making.³⁶² After the appearance of this story of life inside the Court, reporters and readers alike were more inclined to look for gossip and politics at the Court.³⁶³

Politics drive today’s news coverage of the Court. The cases most likely to get the media’s attention involve contentious issues, particularly those relating to political hot buttons like abortion, free speech, and freedom of religion.³⁶⁴ Coverage of the Court peaks when its composition changes (retirements, nominations, and confirmations) and when the justices display political factionalism.³⁶⁵ Court news focuses increasing-

³⁵⁸ Jack Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, Atlantic (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

³⁵⁹ Barnett et al., *supra* note 352, at 272.

³⁶⁰ *Id.* at 271.

³⁶¹ See Andrew Koppelman, “Necessary,” “Proper,” and Health Reform, *in* *The Health Care Case: The Supreme Court Decision and Its Aftermath* 105, 111–12 (Nathaniel Persily et al. eds., 2013).

³⁶² See David J. Garrow, *The Supreme Court and the Brethren*, 18 *Const. Comment.* 303, 303–04 (2001).

³⁶³ Lithwick, *supra* note 342.

³⁶⁴ Katsch, *supra* note 339, at 8, 10.

³⁶⁵ Tyler Johnson & Erika Socker, *Actions, Factions, and Interactions: Newsworthy Influences on Supreme Court Coverage*, 93 *Soc. Sci. Q.* 434, 460 (2012); Keith J. Bybee, *Will the*

ly on the personal. In the wake of the Court's decision in *National Federation of Independent Business v. Sebelius*, one of the most heavily covered angles dealt with reports that Chief Justice Roberts defected from the conservative bloc of justices and, midway through deliberations, upheld the constitutionality of the Affordable Care Act's individual mandate.³⁶⁶ This leak was unprecedented in its proximity to the decision and in the informant's presumed seniority.³⁶⁷

Has the press's heightened emphasis on the personal and the political undermined the Court in the public eye? Conventional wisdom suggests that people are able to entertain two seemingly inconsistent beliefs: acceptance that the Court is a political body and a trust in the Court as a fair arbiter.³⁶⁸ The Court has a historical institutional legitimacy,³⁶⁹ and it traditionally has enjoyed more deference in news media than that afforded other political institutions. In part, this may speak to how small the audience is for coverage of the Supreme Court. Media attention to the Court, by and large, has been said to be episodic, selective, and less intense than attention to the President or Congress.³⁷⁰ Only one in three Americans can name even a single Supreme Court justice.³⁷¹

Popular confidence in the Court is not, however, what it used to be. A Gallup poll taken in 2014 showed that confidence in the Court had fallen to thirty percent—the lowest figure since Gallup began keeping score in 1973.³⁷² Another poll, this one by *The New York Times* and CBS News in 2012, also showed the Court's slippage in the public's eye, from sixty-six percent approval in the late 1980s to forty-four percent in 2012.

Real Elena Kagan Please Stand Up?: Conflicting Public Images in the Supreme Court Confirmation Process, 1 Wake Forest J.L. & Pol'y 137, 145–52 (2011).

³⁶⁶ See Jan Crawford, Roberts Switched Views to Uphold Healthcare Law, CBS News (July 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/>.

³⁶⁷ Katharine Taylor Schaffzin, The Great and Powerful Oz Revealed: The Ethics and Wisdom of the SCOTUS Leaks in *National Federation of Independent Business v. Sebelius*, 7 Charleston L. Rev. 317, 320–22 (2012).

³⁶⁸ Bybee, *supra* note 323, at 319–20.

³⁶⁹ *Id.* at 318.

³⁷⁰ Roy B. Flemming et al., One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947–92, 41 Am. J. Pol. Sci. 1224, 1227 (1997).

³⁷¹ Steve Eder, Most Americans Can't Name a U.S. Supreme Court Justice, Survey Says, Wall St. J. (Aug. 20, 2012, 11:56 AM), <http://blogs.wsj.com/law/2012/08/20/most-americans-cant-name-a-u-s-supreme-court-justice-survey-says/>.

³⁷² Justin McCarthy, Americans Losing Confidence in All Branches of U.S. Gov't, Gallup (June 30, 2014), <http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx>.

Just one in eight of those polled thought the justices decided cases based only on the law, and the poll showed only one-third approving of life tenure.³⁷³

What accounts for this loss of confidence in the Court? One obvious candidate is the Court's deservedly controversial decision in *Bush v. Gore*.³⁷⁴ People still debate whether the justices in that 5-4 decision, especially the majority, acted as partisans. Justice Stevens, dissenting, declared, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."³⁷⁵ Jack Balkin, however, writing soon after the opinion, had no doubt that the Court would "eventually regain whatever trust and confidence among the American public that it lost in *Bush v. Gore*."³⁷⁶

It may be that the drop in public confidence in the Court is due in good part to the widespread disaffection for all three branches of government and the capacity of government in general to solve problems. The same Gallup poll that registered a favorable vote of only thirty percent for the Court showed even less confidence in the other branches—twenty-nine percent for the presidency and a meager seven percent for Congress.³⁷⁷ The justices have their job for life or good behavior, but they may not be immune to the loss of enthusiasm many people feel for government in an age of gridlock and heightened partisanship.³⁷⁸

B. Justices' Extrajudicial Involvement

Compared to today's justices, members of the Warren Court were more involved in activities associated with other branches of government. Perhaps the most significant modern example of a justice's extrajudicial involvement occurred just before the start of the Warren era,

³⁷³ Adam Liptak & Allison Kopicki, Approval Rating for Justices Hits Just 44% in New Poll, N.Y. Times, June 8, 2012, at A1.

³⁷⁴ 531 U.S. 98 (2000).

³⁷⁵ Id. at 128–29 (Stevens, J., dissenting).

³⁷⁶ Jack M. Balkin, *Bush v. Gore* and the Boundary Between Law and Politics, 110 Yale L.J. 1407, 1453 (2001); see also Stephen P. Nicholson & Robert M. Howard, Framing Support for the Supreme Court in the Aftermath of *Bush v. Gore*, 65 J. Pol. 676, 692 (2003) (arguing that while individual justices might have taken a blow, the Court as an institution maintained its legitimacy two years after *Bush v. Gore*).

³⁷⁷ McCarthy, *supra* note 372.

³⁷⁸ See discussion *infra* Part V.

when President Truman appointed Justice Jackson as chief American prosecutor at Nuremberg.³⁷⁹ His prosecutorial role forced Jackson to be absent from the Court for months, which one author called “an embarrassment to the Court.”³⁸⁰

When President Johnson appointed a commission to investigate the assassination of President Kennedy, Chief Justice Warren initially refused to be brought on board, citing the divisiveness within the Court that had resulted from Justice Jackson’s appointment as Nuremberg prosecutor.³⁸¹ Warren relented when Johnson, famous for being persuasive, appealed to Warren’s sense of patriotism.³⁸² The Chief Justice continued, however, to fulfill his role on the Court, despite presiding at the Commission for up to eight and ten hours per day.³⁸³

The Warren Commission’s report stirred controversy. Warren’s decision to chair the Commission embroiled his name and the Supreme Court’s prestige “in one of the most controverted and bizarre episodes in American history.”³⁸⁴ One academic believes that the Chief Justice’s involvement raised constitutional questions—that judicial involvement in a criminal investigation crossed into the realm of the executive branch and raised conflicts of interest.³⁸⁵

Another Warren Court justice who crossed over into the political world was Abe Fortas. He was a frequent visitor to the White House during Lyndon Johnson’s presidency, consulting on such issues as the war in Vietnam and the sending of federal troops into the 1967 Detroit riots.³⁸⁶ He helped the President to draft legislation and to write the 1966 State of the Union address.³⁸⁷ Fortas’s activities provoked the Senate

³⁷⁹ See Louis L. Jaffe, *Mr. Justice Jackson*, 68 *Harv. L. Rev.* 940, 982 (1955).

³⁸⁰ Jonathan Lippman, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench*, 33 *Cardozo L. Rev.* 1341, 1368 n.155 (2012).

³⁸¹ Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 *Cornell L. Rev.* 1045, 1137 (1994).

³⁸² Robert A. Caro, *The Years of Lyndon Johnson: The Passage of Power* 444–46 (2013); Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court, A Judicial Biography* 495–96 (1983).

³⁸³ Schwartz, *supra* note 382, at 496.

³⁸⁴ Calabresi & Larsen, *supra* note 381, at 1137.

³⁸⁵ Lippman, *supra* note 380, at 1378 (“[C]oncerns about judicial independence and bias were quite serious. In the American legal tradition, criminal investigations fall squarely within the realm of the executive branch, and this investigation in particular was rife with potential conflicts of interest for the federal judiciary and the Supreme Court.”).

³⁸⁶ Laura Kalman, *Abe Fortas: A Biography* 228, 293–95, 307 (1990).

³⁸⁷ Calabresi & Larsen, *supra* note 381, at 1137 n.459.

Subcommittee on the Separation of Powers to undertake an investigation into the extrajudicial activities of federal judges.³⁸⁸ Since the 1960s, however, such high-profile extrajudicial activity has largely ceased, though not for lack of potential opportunities.³⁸⁹

There are some instances when a sitting justice has taken positions on specific legislation. Chief Justice Burger lobbied against conferring Article III status on bankruptcy judges when Congress contemplated that change in the late 1970s.³⁹⁰ Similarly, Chief Justice Rehnquist was outspokenly critical of the Violence Against Women Act (“VAWA”) during its development and passage in the early 1990s.³⁹¹ He later wrote the majority opinion striking down VAWA, holding that neither the Commerce Clause nor the Fourteenth Amendment could support the legislation.³⁹²

C. Speaking and Writing Outside the Court

How visible a justice makes himself or herself away from the Court is, by and large, a matter of personal taste and judgment. A contemporary of Chief Justice Warren described him as “a constant speaker, but completely in the tradition of the broad, generalized, ceremonial commentator.”³⁹³ Similarly, most of Warren’s colleagues—Justices Black, Whittaker, Stewart, Clark, and Harlan—were guarded in what they would discuss and how open they would be.³⁹⁴ In contrast, Justice Douglas was quick to speak out on a variety of topics, legal and non-legal; his writings and speeches covered matters ranging from foreign policy and the Soviet Union, to the Court’s caseload and its relationship with Con-

³⁸⁸ *Id.* at 1137–38.

³⁸⁹ For example, a justice could have been appointed to the International Criminal Tribunal for the former Yugoslavia (ICTY), which had some similarities to the Nuremberg trials; however, no Supreme Court Justice was sent to the ICTY as a prosecutor or judge.

³⁹⁰ Judith Resnik & Lane Dilg, Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States, 154 U. Pa. L. Rev. 1575, 1611–12 (2006) (internal footnote omitted).

³⁹¹ *Id.* at 1613–15.

³⁹² *United States v. Morrison*, 529 U.S. 598, 613, 617–19, 626–27 (2000).

³⁹³ Alan F. Westin, Out-of-Court Commentary by United States Supreme Court Justices, 1790–1962: Of Free Speech and Judicial Lockjaw, 62 Colum. L. Rev. 633, 659 (1962).

³⁹⁴ *Id.*

gress and administrative agencies.³⁹⁵ Both Justices Douglas and Brennan spoke with such frequency that they retained booking agents.³⁹⁶

Justices also write books. Justice Douglas was a prolific author; he wrote some thirty books during his time on the Court. Douglas relied on his publications to supplement his income and to fund personal travels.³⁹⁷ Chief Justice Rehnquist liked writing about history.³⁹⁸ Justices sometimes write books airing their jurisprudence and philosophy. In his book, *A Matter of Interpretation: Federal Courts and the Law*, Justice Scalia argues for a jurisprudence of original meaning, while Justice Breyer, in *Active Liberty: Interpreting Our Democratic Constitution*, urges judges to interpret the Constitution in light of its purpose and a ruling's consequences.³⁹⁹ Some of their tracts are autobiographical; notable examples include Douglas's *Go East, Young Man*,⁴⁰⁰ O'Connor's reflections on ranch life,⁴⁰¹ and Thomas's *My Grandfather's Son*.⁴⁰²

Justices sometimes take to the road. Justice Sotomayor went on tour in 2013 to promote her widely heralded autobiography, *My Beloved World*.⁴⁰³ She held book signings, engaged in televised interviews, and appeared on satirical news shows such as "The Daily Show" and "The Colbert Report."⁴⁰⁴ She has also engaged extensively with popular culture. For example, she has appeared twice on the children's television

³⁹⁵ Id. at 658.

³⁹⁶ Peter Alan Bell, Note, Extrajudicial Activity of Supreme Court Justices, 22 Stan. L. Rev. 587, 601 (1970).

³⁹⁷ Murphy, supra note 123, at 289.

³⁹⁸ See, e.g., Rehnquist, supra note 258, at 248. Chief Justice Rehnquist also wrote *The Centennial Crisis: The Disputed Election of 1876* (2004), *All the Laws but One: Civil Liberties in Wartime* (1998), and *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992).

³⁹⁹ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37–39 (Amy Guttmann et al. eds., 1997); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 4–7 (2005); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 83–85 (2012) (arguing that originalism is what prevents majorities on courts from revising constitutional text); Stephen Breyer, *Making Our Democracy Work: A Judge's View* 80–84 (2010) (arguing that there are many factors, including original intent, that a judge should consider in his decision-making).

⁴⁰⁰ William O. Douglas, *Go East, Young Man: The Early Years: The Autobiography of William O. Douglas* (1974).

⁴⁰¹ Sandra Day O'Connor & H. Alan Day, *Lazy B: Growing up on a Cattle Ranch in the American Southwest* (2002).

⁴⁰² Thomas, supra note 39.

⁴⁰³ Sonia Sotomayor, *My Beloved World* (2013).

⁴⁰⁴ See *My Beloved World Tour Schedule for Family and Friends*, <http://gallery.mailchimp.com/73554fae97d85d69bb372441c/files/BookTourScheduleForFriends.pdf>.

show Sesame Street, and she pressed the button to lower the Times Square countdown ball to celebrate the beginning of the year 2014.⁴⁰⁵

Justices have sometimes appeared on venues with a liberal or conservative perspective. Justice Thomas was the keynote speaker at the conservative Federalist Society's 2013 National Lawyers Convention.⁴⁰⁶ Justice Alito attended the annual fundraiser gala for the conservative magazine, *American Spectator*.⁴⁰⁷ On the Court's more liberal side, Justice Ginsburg spoke at an event hosted by the American Constitution Society for Law and Policy, a progressive organization.⁴⁰⁸

One should be wary of easy generalizations about the extent to which today's justices are willing to engage openly in the public arena. It may be that, in our time, people do not suppose that justices need to be detached, Olympian figures. Moreover, we live in an age when modern technology makes it easier for justices to balance outside engagements with their duties at the Court. They are hardly likely to be impeached for what they say off the bench.⁴⁰⁹ Ultimately, like their predecessors, the justices decide for themselves when, how, and on what subjects to air their ideas in print or on public platforms.

D. Coverage of Oral Arguments

For years, justices have pondered and debated whether oral arguments should be televised. While some justices on the current Court seem open

⁴⁰⁵ Dan Amira, *Sonia Sotomayor Is Soft on Sesame Street Crime*, N.Y. Mag. (Feb. 8, 2012, 4:07 PM), <http://nymag.com/daily/intelligencer/2012/02/sotomayor-soft-on-sesame-street-crime.html>; *Sotomayor To Officiate at Times Square New Year's Eve*, Wash. Post (Dec. 29, 2013), http://www.washingtonpost.com/politics/sotomayor-to-officiate-at-times-square-new-years-eve/2013/12/29/c4278372-70d7-11e3-9389-09ef9944065e_story.html (last visited Oct. 27, 2014).

⁴⁰⁶ 2013 National Lawyers Convention, The Federalist Society, <http://www.fed-soc.org/events/detail/2013-national-lawyers-convention> (last visited Aug. 1, 2014).

⁴⁰⁷ Lippman, *supra* note 380, at 1381.

⁴⁰⁸ Ruth Bader Ginsburg, *Remarks for the American Constitution Society*, Washington, D.C. (June 15, 2012), available at http://www.supremecourt.gov/publicinfo/speeches/Remarks_for_ACS.pdf. Similarly, Justice Stevens spoke at the 2013 National Convention of the American Constitution Society for Law and Policy, though he spoke at this event after his retirement from the Court. See John Paul Stevens, *Remarks for the American Constitution Society Convention*, Washington, D.C. (June 14, 2013), available at http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech_6-14-13.pdf.

⁴⁰⁹ One recalls Congressman Gerald Ford's effort to impeach Justice Douglas. 116 Cong. Rec. 11912-14 (1970) (statement of Rep. Gerald R. Ford); Murphy, *supra* note 123, at 430-38.

to the idea of cameras in the courtroom, one doubts that the Roberts Court will in fact take a step that the Warren Court did not.

Chief Justice Warren strongly opposed the idea. He has been quoted as declaring that “we will have a man on the moon before there will be cameras in this courtroom.”⁴¹⁰ His contemporaries shared his distaste.⁴¹¹ At first, Chief Justice Burger was equally opposed, declaring in 1984 that television cameras are “the most destructive thing in the world” and there would be “no cameras in the Supreme Court of the United States while I sit there.”⁴¹² A few years later, however, he adjusted his position, suggesting that he might be in favor of television coverage of oral arguments in the Court if the arguments were aired in their entirety.⁴¹³

Beginning in the mid-1980s, some justices became vocal supporters of permitting at least limited use of cameras in the Court. In 1986, Justice Brennan stated, “I feel strongly that we should allow television and radio broadcasts of our proceedings.”⁴¹⁴ He argued that such a move would help to create “a better understanding of the court’s functioning and the way the court operates.”⁴¹⁵ Justice Stevens⁴¹⁶ and Justice Powell⁴¹⁷ signaled varying degrees of willingness.

When state courts started opening their courtrooms to television coverage,⁴¹⁸ federal courts continued in their refusal to do so.⁴¹⁹ That began to change when Chief Justice Rehnquist appointed an Ad Hoc Commit-

⁴¹⁰ Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 *Tex. L. Rev.* 1053, 1094 (1993) (alteration in original).

⁴¹¹ See, e.g., William O. Douglas, *The Public Trial and the Free Press*, 33 *Rocky Mtn. L. Rev.* 1, 9–10 (1960).

⁴¹² No Cameras in Burger’s Court, *Broadcasting*, Nov. 19, 1984, at 71, available at <http://www.americanradiohistory.com/Archive-BC/BC-1984/BC-1984-11-19.pdf>.

⁴¹³ Philip Hager, *Burger Hints of Opening Court to Live Coverage*, *L.A. Times*, Apr. 12, 1986, at 6.

⁴¹⁴ Piccus, *supra* note 410, at 1095.

⁴¹⁵ *Id.*

⁴¹⁶ Henry Weinstein, *Televised High Court Hearings Backed: Public Understanding Would Be Enhanced, Stevens Believes*, *L.A. Times*, July 14, 1989, at 3.

⁴¹⁷ Piccus, *supra* note 410, at 1096.

⁴¹⁸ Today, “[e]very state judiciary, but not the District of Columbia Courts system, permits some televising of its proceedings, generally in both civil and criminal courts, and at the trial as well as appellate levels.” Bruce G. Peabody, “Supreme Court TV”: *Televising the Least Accountable Branch?*, 33 *J. Legis.* 144, 148 (2007).

⁴¹⁹ Audrey Maness, *Does the First Amendment’s “Right of Access” Require Court Proceedings To Be Televised? A Constitutional and Practical Discussion*, 34 *Pepp. L. Rev.* 123, 149 (2006).

tee on Cameras in the Courtroom in 1988.⁴²⁰ The Committee's pilot program, which the Judicial Conference adopted, allowed Second and Ninth Circuit judges, along with judges from six district courts, to permit cameras in the courtroom.⁴²¹ The Conference allowed the program to expire, but the Second and Ninth Circuits continue to allow media to broadcast proceedings after approval from the presiding judge.⁴²²

There is no clear consensus among justices on the Roberts Court as to cameras in the courtroom. During his confirmation hearings, Chief Justice Roberts said he had no "set view" on the matter.⁴²³ Justices Breyer, Ginsburg, and Sotomayor have indicated that they are open to or even support the notion, but they would respect or defer to the views of their colleagues.⁴²⁴ Justice Kagan said that "it would be a terrific thing to have cameras in the courtroom."⁴²⁵ In contrast, Justices Scalia, Kennedy, and Thomas have expressed their disapproval of the idea.⁴²⁶

Even if cameras do not appear in the courtroom, other developments may take some of the steam out of the debate. In 2006, the Court began releasing transcripts of oral arguments the same day as arguments occur, posting the transcripts to the Court's website.⁴²⁷ In 2010, the Court began releasing the audio recordings of all oral arguments on the Court's

⁴²⁰ History of Cameras in the Federal Courts, Admin. Office of the U.S. Cts., <http://www.uscourts.gov/Multimedia/Cameras/history.aspx> (last visited Aug. 1, 2014).

⁴²¹ *Id.*

⁴²² Maness, *supra* note 419, at 151. However, the eleven remaining circuits have "adopted policies expressly prohibiting cameras." *Id.*

⁴²³ Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 324 (2005) (statement of Judge John G. Roberts) [hereinafter Roberts Confirmation Hearing].

⁴²⁴ See Nomination of Stephen G. Breyer To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 103d Cong. 159–60 (1994) (statement of Judge Stephen G. Breyer); Sotomayor Confirmation Hearing, *supra* note 63, at 83 (statement of Judge Sonia Sotomayor); Nomination of Ruth Bader Ginsburg To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 103d Cong. 198–99 (1993) (statement of Judge Ruth Bader Ginsburg).

⁴²⁵ Confirmation Hearing on 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., 83 (2010) (statement of Elena Kagan) [hereinafter Kagan Confirmation Hearing].

⁴²⁶ Interview by Maria Bartiromo, CNBC, with Justice Antonin Scalia, in New York, N.Y. (Oct. 10, 2005), available at <http://archives.nbclearn.com/portal/site/k-12/flatview?cuecard=3804>.

⁴²⁷ Press Release, Supreme Court of the United States (Sept. 14, 2006), available at http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-14-06.

website at the end of each argument week.⁴²⁸ And the Roberts Court has repeatedly granted same-day release of the audio of oral arguments in high-profile cases, including *National Federation of Independent Business v. Sebelius*, *Hollingsworth v. Perry*, and *United States v. Windsor*.⁴²⁹

V. POLITICS, PARTISANSHIP, AND POLITICIZATION

A. Doctrine and Methodology

In the years since Earl Warren's departure, the balance on the Court has shifted from a liberal majority, guided by what the justices saw as the "spirit" of the Constitution, to a conversation, fueled by the Court's conservatives, focusing on text and judicial philosophies.

Chief Justice Warren led a coalition of liberal justices who were largely "unconcerned with general matters of constitutional theory."⁴³⁰ A just result was more important than doctrine. The justices treated the Constitution as a set of "ethical imperatives," which the Court had to defend and strengthen⁴³¹—a task for which they felt they had been chosen because of their sound judgment.⁴³² Rebuffing Frankfurter's concept of judicial restraint, the Warren Court embraced the idea of the "living Constitution."

The Burger years did not bring the anticipated "counter-revolution" on the Court.⁴³³ The Court continued the Warren era's move to the left

⁴²⁸ Press Release, Supreme Court of the United States (Sept. 28, 2010), available at http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-28-10.

⁴²⁹ Press Release, Supreme Court of the United States (Mar. 19, 2013), available at http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-19-13; Press Release, Supreme Court of the United States (Mar. 16, 2012), available at http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-12. C-SPAN has compiled a list covering the first five years of the Roberts Court and comparing the number of requests for early audio release made by C-SPAN to the number of those requests granted by the Court. See C-SPAN, Oral Arguments Same-Day Releases: The Roberts Court, available at <http://www.scotusblog.com/wp-content/uploads/2010/04/SCt-audiotape-release-table-4-14-10.xls>.

⁴³⁰ Tushnet, Warren Court, *supra* note 155, at 1, 16.

⁴³¹ White, *supra* note 132, at 228.

⁴³² Tushnet, Warren Court, *supra* note 155, at 1, 18–19; see also Michal R. Belknap, The Supreme Court Under Earl Warren, 1953–1969, at 19–20 (2005) (discussing Chief Justice Warren's instinct for activism and his firmly held beliefs).

⁴³³ See Anthony Lewis, Foreword to *The Burger Court: The Counter-Revolution That Wasn't*, at vii (Vincent Blasi, ed., 1983); A. E. Dick Howard, *The Burger Court: A Judicial Nonet Plays the Enigma Variations*, 43 *Law & Contemp. Probs.* 7, 9, 16 (1980).

in a number of areas—significant personal rights, the death penalty, and the Equal Protection Clause—despite a tentative shift to the right in the areas of criminal justice and statutory business regulation,⁴³⁴ and a mixed record on the Establishment and Free Exercise Clauses.⁴³⁵ The Burger Court’s decision in *Roe v. Wade* nationalized the abortion issue, galvanized the formation of the New Right, and ramped up the debate over proper constitutional methodology.⁴³⁶

Nixon had attacked the Warren Court’s activism on the campaign trail in 1968, railing against the Court’s coddling of “criminal forces” at the expense of “peace forces.”⁴³⁷ With four Nixon appointees on the bench, the Burger Court’s conservatives showed signs that they were looking for limiting principles, particularly separation of powers and federalism.⁴³⁸

The Rehnquist and Roberts Courts have seized on the Burger Court’s budding concern for structuralism and judicial philosophy. The Court has transformed its approach to constitutional and statutory questions.⁴³⁹ Some arguments are familiar. For example, in debating the scope of rights protected by substantive due process,⁴⁴⁰ the justices draw upon rhetoric long familiar in procedural due process cases in deciding whether the right being claimed is “deeply rooted in this Nation’s history” or “implicit in the concept of ordered liberty.”⁴⁴¹ But there is also new methodological turf. Especially prominent is the debate over originalism. The Court’s concern with original meaning often leads to politically conservative destinations, but sometimes to liberal deci-

⁴³⁴ Tinsley E. Yarbrough, *The Burger Court: Justices, Rulings, and Legacy* 193 (2000).

⁴³⁵ Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 *Ind. J. Global Legal Stud.* 503, 521–22 (2006).

⁴³⁶ Jeffries, *supra* note 247, at 355–58.

⁴³⁷ Richard M. Nixon, *Presidential Nomination Acceptance Speech at the Republican National Convention* (Aug. 8, 1968), available at <http://www.presidency.ucsb.edu/ws/?pid=25968>.

⁴³⁸ See, e.g., *INS v. Chadha*, 462 U.S. 919, 946 (1983); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976); *Nat’l League of Cities v. Usery*, 426 U.S. 833, 845, 852 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539 (1985) (finding the “traditional state functions” inquiry to be unworkable) (internal brackets omitted).

⁴³⁹ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1051 (2001).

⁴⁴⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (invalidating a Texas statute that had criminalized homosexual intercourse).

⁴⁴¹ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 703, 721, 728 (1997) (holding that the Due Process Clause does not protect a right to assistance in committing suicide).

sions.⁴⁴² This “originalist” philosophy commonly coincides with a textual focus, with the Court closely examining the words of documents rather than discerning intent from legislative history or seeking what is “right.”⁴⁴³

The search for limiting principles evolved through the Rehnquist years⁴⁴⁴ and seems to be in full bloom under Chief Justice Roberts.⁴⁴⁵ One who defends government action is called upon to demonstrate that such power is definite, not just in terms of federalism and separation of powers, but also between all governments and the individual. Even Roberts’s decision to accept the Affordable Care Act as grounded in the taxing power, despite his personal doubts about the law’s “wisdom or fairness,”⁴⁴⁶ reveals a common theme of the modern Court. Some of the justices of the current Court seem to take pride in upholding actions they find politically abhorrent but legally sound.⁴⁴⁷

⁴⁴² Justice Scalia, in particular, has become the leader of an unlikely band of compatriots that rules in favor of criminal defendants based on the Fourth and Sixth Amendments. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (holding that the government’s attachment and use of a GPS on the defendant’s vehicle constituted a search under the Fourth Amendment); *Maryland v. King*, 133 S. Ct. 1958, 1980–82 (2013) (Scalia, J., dissenting) (disagreeing that taking and analyzing a cheek swab from an arrestee was reasonable under the Fourth Amendment).

⁴⁴³ Exemplifying this view, Rehnquist wrote: “The justices were not appointed to roam at large in the realm of public policy and strike down laws that offend their own ideas of what is desirable and what is undesirable.” Rehnquist, *supra* note 258, at 275.

⁴⁴⁴ See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000); *United States v. Lopez*, 514 U.S. 549, 552 (1995). The following sources also discuss the Court’s search for limiting principles: Ann Althouse, *Chief Justice Rehnquist and the Search for Judicially Enforceable Federalism*, 10 *Tex. Rev. L. & Pol.* 275, 276 (2006); Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O’Connor: Is Half a Loaf Enough?*, 58 *Stan. L. Rev.* 1793, 1793 (2006); Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 *Harv. J.L. & Pub. Pol’y* 761, 763 (2008).

⁴⁴⁵ In just one day of the oral arguments on the consolidated healthcare cases, “limiting principle” was spoken sixteen times and alluded to several more. Transcript of Oral Argument, *U.S. Dep’t. of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398). The government’s inability to provide a limiting principle satisfying to the Court’s majority ultimately doomed its Commerce Clause defense.

⁴⁴⁶ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012).

⁴⁴⁷ For example, Scalia frequently points to *Texas v. Johnson*, a case in which the Supreme Court invalidated state prohibitions on burning the American flag, as an example of the Constitution demanding a result contrary to what he feels is right. See, e.g., Interview by Piers Morgan, CNN, with Justice Antonin Scalia (July 18, 2012), available at <http://transcripts.cnn.com/TRANSCRIPTS/120718/pmt.01.html>. Similarly, in guarding a First Amendment right to protest even at the funeral of an American soldier, Roberts stressed that, “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1220. (2011).

The rise of a focus on doctrine and structuralism over the past twenty-five years does not mean that the Court has consistently moved to the right. To be sure, the Court has moved unmistakably rightward in some areas, for example, in its opinions touching church and state,⁴⁴⁸ business,⁴⁴⁹ and voting rights.⁴⁵⁰ Yet in other areas, such as substantive due process, equal protection, and criminal law, the Court's record has been more mixed.⁴⁵¹ Many of the Warren Court's pivotal achievements still largely stand.⁴⁵²

While the role of political ideology in shaping the justices' positions may be debatable, there is undeniably an increased concern with the methods through which that ideology is forged into opinions.⁴⁵³ Similarly, the confirmation process has focused increasingly on judicial philosophy and a nominee's beliefs. Signifiers of sound judgment into which earlier confirmations delved, like work experience or professional reputation, have fallen by the wayside.

⁴⁴⁸ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (holding it constitutional to allow state-provided educational vouchers to pay for enrollment at a religious school); *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (holding that the Establishment Clause does not prohibit public school teachers from teaching at religious schools in some circumstances).

⁴⁴⁹ See, e.g., *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (de-certifying a class action gender discrimination lawsuit brought by 1.6 million women); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that the Federal Arbitration Act of 1925 preempts California's judicial rule forbidding contracts to preclude class arbitration).

⁴⁵⁰ See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking a central feature of the Voting Rights Act of 1965). See generally Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. Pa. L. Rev. 1331, 1342–43 (2006) (listing "six major themes" that demonstrate the Court's conservative tilt).

⁴⁵¹ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 578–85 (2009) (holding that a fire department seeking to avoid disparate-impact liability violated Title VII of the Civil Rights Act of 1964 by discarding employees' test results); *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008) (finding it unconstitutional to impose the death penalty for the crime of raping a child); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (ruling it a violation of the Eighth Amendment to execute minors); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating a Texas statute that had criminalized homosexual intercourse); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding it a violation to execute the mentally disabled); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (applying strict scrutiny to racial classifications imposed by the federal government).

⁴⁵² Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* 254 (2001) (arguing that the Warren Court's accomplishments stand because the Court "got it right").

⁴⁵³ For an excellent discussion of the relationship between the Court and political ideology, see Devins & Baum, *supra* note 9.

B. Politics in the Nomination and Confirmation Process

Arguments over methodology and doctrine—particularly charges of judicial activism in the Warren and Burger eras—have made a nominee’s judicial philosophy and ideology critical for success or failure in the confirmation process. A combination of doctrinal and methodological shifts and the general polarization of the political system helps to explain the changes in how presidents pick, how the Senate vets, and how the public perceives a nominee to the Supreme Court.

1. Qualifications of Character: White, Goldberg, and Fortas

Politics have always played a role in the nomination process. Presidents have long seen filling vacancies on the Supreme Court as opportunities to draw the Court more in line with their own political and ideological goals.⁴⁵⁴ The Senate, too, brings politics into the equation, a practice that began as early as Washington’s presidency.⁴⁵⁵ Historically, the rate of confirmations has hovered between 87% and 89%; that rate soared, however, to 97% during the period from 1900 to 1955.⁴⁵⁶ With a success rate like that, presidents could look forward to routine confirmations.

President Kennedy’s nomination of Byron White in 1962 illustrates what some might call the “golden age” of the confirmation process, when senators focused on whether the nominee was of sound character and an able lawyer. An all-American football player from the University of Colorado, White was a star student at Yale Law School and a Rhodes Scholar at Oxford.⁴⁵⁷ White had no judicial experience, but, at the time of his nomination, he was serving as the Deputy Attorney General.⁴⁵⁸ Senators from both parties praised him.⁴⁵⁹

⁴⁵⁴ O’Brien, *supra* note 9, at 32–33.

⁴⁵⁵ Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, *Sup. Ct. Rev.* 381, 391 (2010) (including John Rutledge, nominated by Washington; Alexander Wolcott, nominated by Madison; Roger Taney, nominated by Jackson; George Woodward, nominated by Polk; Louis Brandeis, nominated by Wilson; and John J. Parker, nominated by Hoover). For a general discussion of politically divisive Supreme Court confirmation battles throughout American history, see Abraham, *supra* note 32, at 16.

⁴⁵⁶ See Stone, *supra* note 455, at 384.

⁴⁵⁷ Hutchinson, *supra* note 137, at 1.

⁴⁵⁸ *Id.* at 322–23; Abraham, *supra* note 32, at 218–19.

⁴⁵⁹ White’s Court Choice Hailed by Senators, *Chi. Daily Trib.*, Mar. 31, 1962, at 4.

The remarks of Democratic Senator James Eastland from Mississippi encapsulate how qualifications and character trumped ideology at that time. A Southern Democrat from an ex-Confederate state, Eastland was among those senators who detested the Court's decision in *Brown* (not to mention the Warren Court's overall liberalism), and who hoped to forestall school desegregation. Eastland acknowledged that he had disagreements with White, but supported the nomination, predicting that White would make "an able Supreme court justice."⁴⁶⁰ The transcript from White's hearing is only thirty pages long and contains barely a whiff of concern about White's judicial ideology.⁴⁶¹

The next two confirmations—Arthur Goldberg and Abe Fortas—largely followed the same pattern. A member of President Kennedy's Cabinet,⁴⁶² Goldberg was confirmed by a Senate voice vote on September 25, 1962; only Senator Strom Thurmond (D-SC) noted for the record that he was against Goldberg, without supplying any reason.⁴⁶³ After Goldberg left the Court to serve as Ambassador to the United Nations, President Johnson nominated Abe Fortas to fill the vacancy in July 1965.⁴⁶⁴ Fortas, a partner at the powerful Washington law firm of Arnold, Fortas & Porter, was a close friend and confidant of President Johnson.⁴⁶⁵ Fortas's connection with Johnson and involvement in cases dealing with some shady characters were the main points of contention in the confirmation process.⁴⁶⁶ The Senate nevertheless approved him by a voice vote, with Strom Thurmond and two other Republicans speaking against the nomination.⁴⁶⁷

These confirmations illustrate how, in the 1960s, a general focus on the judges' character and professional qualifications characterized the nomination process. Even senators with ideological objections put those

⁴⁶⁰ Id.; Hutchinson, *supra* note 137, at 322.

⁴⁶¹ One senator did ask White his opinion about "legislating by the courts," to which he responded: "It's clear that the Constitution vests the power to legislate in Congress, not the Supreme Court." Anthony Lewis, *Senate Approves White for Bench*, N.Y. Times, Apr. 12, 1962, at 25.

⁴⁶² Stebenne, *supra* note 134, at 234.

⁴⁶³ Abraham, *supra* note 32, at 221; Goldberg Confirmed as Justice, Wash. Post, Sept. 26, 1962, at A7.

⁴⁶⁴ Abraham, *supra* note 32, at 223.

⁴⁶⁵ See Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* 546–47 (2002).

⁴⁶⁶ See Kalman, *supra* note 386, at 241–48.

⁴⁶⁷ Fortas Assailed and Defended in Angry Congressional Clash, N.Y. Times, July 30, 1965, at 10; Senate Confirms Fortas for Court, N.Y. Times, Aug. 12, 1965, at 13.

aside during the vote. Still, Southern senators were acutely aware of how the composition of the Court would affect decisions on civil rights. That concern set the stage for a new era of nominations, when nominees would face greater scrutiny, tougher questioning, and a real possibility of rejection.

2. *Toward a Concern with Ideology: Marshall to Rehnquist*

President Johnson's nomination of Solicitor General Thurgood Marshall marked a shift towards a heightened concern with a nominee's philosophy and the Court's ideological balance. *The Wall Street Journal* predicted that Marshall would "almost certainly" side with the Court's "hard-core liberals" (Warren, Douglas, Black, and Brennan), continuing the Court's "expansionist" decisions on civil rights.⁴⁶⁸ Marshall's ideology was crucial because he was a "change nominee," that is, he would replace the more conservative Justice Tom Clark.⁴⁶⁹ Conservative columnist Jack Kilpatrick fulminated that the nomination produced "cries of jubilation" from liberals and "sharp dismay" from conservatives. Kilpatrick complained that the "judicial activists" would be in "full control" and that "the consequences of this replacement cannot be emphasized enough."⁴⁷⁰

Southern senators, like the press, immediately grasped the implications of Marshall's nomination. Although Marshall's confirmation was never in doubt,⁴⁷¹ this bloc of senators used several tactics to impede his confirmation. They dragged out the hearings,⁴⁷² attempted to impeach Marshall's credibility,⁴⁷³ and pressed him on his judicial philosophy. Marshall's confirmation marked a distinct shift from White's; senators opposed to Marshall publicly cited his ideology.⁴⁷⁴ At his confirmation hearings, Marshall fielded questions about the Constitution's general

⁴⁶⁸ Louis M. Kohlmeier, Thurgood Marshall Chosen for High Court; First Negro Will Bolster Liberal Sentiment, *Wall St. J.*, June 14, 1967, at 3.

⁴⁶⁹ James J. Kilpatrick, Marshall Tips Court Balance, *L.A. Times*, June 20, 1967, at A5.

⁴⁷⁰ *Id.*

⁴⁷¹ John P. MacKenzie, Southerners Delay Action on Marshall, *Wash. Post*, July 15, 1967, at A4.

⁴⁷² *Id.*

⁴⁷³ For example, Senator Eastland asked Marshall if he knew that a book he had cited in one of his opinions was written by a Communist. Fred P. Graham, Marshall is Questioned on Fine Points of the Law, *N.Y. Times*, July 20, 1967, at 17.

⁴⁷⁴ Senator Ervin said that Marshall "is by practice and philosophy a constitutional iconoclast." Philip Dodd, Marshall OK'd for High Court, *Chi. Trib.*, Aug. 31, 1967, at 4.

meaning and the “proper” methods of interpreting it.⁴⁷⁵ Ten Democrats and one Republican—all but one hailing from former Confederate states—voted against Marshall.⁴⁷⁶ After the Marshall hearings, ideology would have a more central and open role in the senators’ deliberations and vote.⁴⁷⁷

This shift came into sharper relief when President Nixon took office. Nixon stated that he wanted to use nominations to transform the liberal Warren Court into a conservative one.⁴⁷⁸ After a fairly easy confirmation of Nixon’s first nominee, Warren Burger, Nixon twice failed to fill Fortas’s seat—first, with Clement Haynsworth and then with G. Harold Carswell, both Southerners. The Senate rejected them ostensibly because of Haynsworth’s financial dealings and Carswell’s judicial incompetence,⁴⁷⁹ but concerns about their views on racial equality and civil rights issues played a major role.⁴⁸⁰ These were not total losses for Nixon; he portrayed the negative votes as votes against the South.⁴⁸¹ When Minnesotan Harry Blackmun was nominated to fill the same vacancy, a relieved Senate easily confirmed him, 94-0.⁴⁸²

The twin retirements of Justice Hugo Black and John Marshall Harlan gave Nixon two more chances to make good on his campaign promise. Nixon nominated moderately conservative Richmond lawyer Lewis F. Powell, Jr., and staunchly conservative William Rehnquist, a young assistant United States Attorney General.⁴⁸³ Although Powell was from the

⁴⁷⁵ Tushnet, *Making Constitutional Law*, supra note 12, at 26.

⁴⁷⁶ Roll-Call Vote in Senate on Marshall Nomination, *N.Y. Times*, Aug. 31, 1967, at 19.

⁴⁷⁷ When President Johnson nominated Associate Justice Fortas to fill the position of Chief Justice, Southern senators continued to use the nomination process as a way to lambast the liberal direction of the Court, using an unprecedented five-day filibuster to force Fortas to withdraw from consideration. Johnson elected not to nominate anyone else, leaving the position for President Nixon to fill. Senate Panel’s Report Hails Fortas, *Decries Filibuster Plan*, *Wash. Post*, Sept. 22, 1968, at A9. See Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 24 (2005).

⁴⁷⁸ Stuart H. Loory, *Nixon Goal: a Supreme Court with Conservative Philosophy*, *L.A. Times*, May 23, 1969, at A1.

⁴⁷⁹ Abraham, supra note 32, at 12; Jeffries, supra note 247, at 225–26.

⁴⁸⁰ Carswell Renounces Segregation Speech, *L.A. Times*, Jan. 22, 1970, at A1; Warren Weaver, Jr., *Rights and Labor Leaders Oppose Court Nomination*, *N.Y. Times*, Aug. 19, 1969, at 27.

⁴⁸¹ See Abraham, supra note 32, at 11 (noting that Nixon blamed Haynsworth’s defeat on “anti-Southern, anti-conservative, and anti-strict constructionist’ prejudice”); Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 *Am. J. Legal Hist.* 261, 265 (1998).

⁴⁸² Tinsley E. Yarbrough, *Harry A. Blackmun: The Outsider Justice* 138 (2008).

⁴⁸³ Hudson, supra note 180, at 6–7; Yarbrough, supra note 482, at 115–16.

South, his nomination was never seriously in jeopardy. Powell's extensive professional network gave him friends on all points of the ideological spectrum to provide endorsements and support. Powell also benefited from the fact that Senate liberals were far more interested in stopping Rehnquist.⁴⁸⁴

The Rehnquist hearings were marked by a focus on civil rights issues and the involvement of outside interest groups.⁴⁸⁵ Further, Rehnquist's nomination underscored the key role that ideology was playing in Senate hearings.⁴⁸⁶ In contrast to the Fortas, Haynsworth, and Carswell nominations, senators could not reasonably question Rehnquist's legal intellect, professional qualifications, or ethical integrity. The hearings morphed into an examination of judicial ideology.⁴⁸⁷ Some senators called Rehnquist a "racist" and a "right wing zealot."⁴⁸⁸ Rehnquist, like Powell, was confirmed. The ideological objections, however, were clear; the most liberal senators all voted against him.⁴⁸⁹

3. After *Roe v. Wade*: From *Stevens* to *O'Connor*

Roe v. Wade galvanized the forces of the New Right and gave fuel to the debate over the methodology justices should use to interpret the Constitution. *Roe*'s effects did not reach the first nomination to follow the landmark decision; the Senate unanimously confirmed President Gerald Ford's nominee, John Paul Stevens, a moderate centrist judge on the Seventh Circuit,⁴⁹⁰ after only five minutes of floor debate.⁴⁹¹

The fallout from *Roe*, however, surfaced dramatically when President Reagan nominated Sandra Day O'Connor.⁴⁹² Abortion quickly became the central issue. Notably, his fellow conservatives gave Reagan much grief. Anxious to calm conservative fears, the White House lobbied influential conservative senators.⁴⁹³

⁴⁸⁴ Jeffries, *supra* note 247, at 229.

⁴⁸⁵ Abraham, *supra* note 32, at 252.

⁴⁸⁶ See Devins & Baum, *supra* note 9, at 43.

⁴⁸⁷ Jeffries, *supra* note 247, at 229.

⁴⁸⁸ Abraham, *supra* note 32, at 252.

⁴⁸⁹ Ronald J. Ostrow, Rehnquist Gets Senate OK as Justice, 68-26, L.A. Times, Dec. 11, 1971, at A1.

⁴⁹⁰ Hudson, *supra* note 180, at 40-41.

⁴⁹¹ Senate Unanimously OKs Stevens for Supreme Court, L.A. Times, Dec. 18, 1975, at B23.

⁴⁹² Biskupic, *supra* note 74, at 84.

⁴⁹³ *Id.* at 84-86.

Although O'Connor's nomination had wide support—the Senate Judiciary Committee approved her 17-0⁴⁹⁴—the pro-life forces brought a no-compromise attitude to the issue. At no point during the hearings did any senator question O'Connor's qualifications to serve on the Court.⁴⁹⁵

Upon Burger's retirement in 1986, President Reagan nominated Rehnquist to be Chief Justice and D.C. Circuit Judge Antonin Scalia to fill Rehnquist's seat. Commentators viewed Rehnquist's elevation and the appointment of an unabashed conservative like Scalia as a “watershed”⁴⁹⁶ moment in moving the Court in a conservative direction.⁴⁹⁷ Scalia's nomination, however, was uneventful. His credentials were impeccable. His status as the first Italian-American named to the Supreme Court helped gain him support from both parties. His stance on abortion pleased conservatives. As with Powell's nomination, liberals trained their fire on Rehnquist, who faced four tough days for hearings over his record on civil rights and women's issues.⁴⁹⁸ The Judiciary Committee's report on Rehnquist ran to 114 pages, Scalia's only 76 words.⁴⁹⁹ The Committee approved Rehnquist by a 13-5 vote and Scalia by an 18-0 vote, sending them to the floor for successful confirmations.⁵⁰⁰

4. *The Battle over Bork*

Robert Bork's nomination is correctly seen as a major chapter in this history, but the conventional view that it “changed everything”⁵⁰¹ ap-

⁴⁹⁴ Senate Judiciary Panel Gives O'Connor Unanimous Approval, L.A. Times, Sept. 15, 1981, at A1.

⁴⁹⁵ Arthur Siddon, Judge O'Connor Has Charmed All But One Senator, Chi. Trib., Sept. 12, 1981, at 4.

⁴⁹⁶ Benno C. Schmidt Jr., The Rehnquist Court: A Watershed, N.Y. Times, June 22, 1986, at E27.

⁴⁹⁷ David S. Broder, Finally the Reagan Stamp, Wash. Post, June 22, 1986, at C8 (“Reagan likely has steered the course of jurisprudence along his chosen conservative channel for the next two decades or more.”).

⁴⁹⁸ Steven V. Roberts, Selection Praised by G.O.P. Senators: Party Leaders Predict an Easy Confirmation of Rehnquist—Democrats Doubtful, N.Y. Times, June 18, 1986, at A32; David G. Savage & Ronald J. Ostrow, Panel OKs Rehnquist, 13-5—Scalia Is Approved, 18-0, L.A. Times, Aug. 15, 1986, at 1; Stuart Taylor, Jr., Liberals Portray Scalia as Threat but Bar Group Sees Him as Open, N.Y. Times, Aug. 7, 1986, at A19; see also O'Brien, *supra* note 9, at 71 (contrasting the Senate Judiciary Committee's “scrutiny of Rehnquist” with the “little time” it spent on Scalia).

⁴⁹⁹ O'Brien, *supra* note 9, at 71.

⁵⁰⁰ *Id.*; Savage & Ostrow, *supra* note 498.

⁵⁰¹ See, e.g., Nina Totenberg, Robert Bork's Supreme Court Nomination ‘Changed Everything, Maybe Forever,’ NPR (Dec. 19, 2012, 4:33 PM), <http://www.npr.org/blogs/>

proaches hyperbole. The salient characteristics of Bork's failed confirmation—the intense focus on a “change” nominee who would tip the balance of the Court, concern over the nominee's ideology and views of the Constitution, opponents' use of an organized strategy to impede the nomination, and the pressure that outside groups brought to bear on senators—had begun to surface in other nominations since Marshall's. Viewed in light of then-recent nominations, what the battle over Bork's nomination did was not so much to “change everything” as to “intensify everything.”

Much of the struggle over Bork's nomination is familiar history. For our purposes, Bork's nomination is instructive because it marked the culmination of several trends that were inchoate at the time of White's nomination and developed over the ensuing twenty-five years. First, like Marshall and Rehnquist, Bork was a “change nominee” (replacing Powell). In contrast to Powell, however, who found his place close to the center of the Court,⁵⁰² Bork, a die-hard conservative, might be more aptly described as the “ultimate” change nominee. Not only was Bork a conservative, he was also a leading advocate of originalism.⁵⁰³ When Justice Powell announced his retirement, Republicans and Democrats alike knew what was possible: a true conservative majority for the first time in recent years, one that would include a brilliant advocate of a judicial philosophy that threatened the very foundations of the Warren Court's achievements.⁵⁰⁴

Second, the Bork nomination reframed ideology as an integral and central component of a senator's confirmation vote.⁵⁰⁵ Democrats did not question Bork's integrity or criticize his intellect; both were unim-

itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.

⁵⁰² See Jeffries, *supra* note 247, at 560–61.

⁵⁰³ See, e.g., Dennis J. Goldford, *The American Constitution and the Debate Over Originalism* 34 (2005) (quoting Bork's statements that judges must interpret the Constitution according to the intent of its drafters); Antonin Scalia, Steven G. Calabresi, John Harrison & William B. Reynolds, *In Memoriam Robert H. Bork*, 36 *Harv. J.L. & Pub. Pol'y* 1235, 1238–39 (2013) (calling Bork “the intellectual point-man for the movement” toward original intent).

⁵⁰⁴ David G. Savage & Ronald J. Ostrow, *Powell Retiring; Court Fight Seen: Democrats Likely to Resist Reagan Bid for High Bench Conservative Majority*, *L.A. Times*, June 27, 1987, at OC1.

⁵⁰⁵ Ideology became a defining factor in the appointments of Republican Presidents George H.W. Bush and George W. Bush. See Devins & Baum, *supra* note 9, at 45.

peachable.⁵⁰⁶ The inability to pursue this line of attack left the opposition only one choice: “to challenge Bork on the basis of his judicial philosophy.”⁵⁰⁷ Democrats sought to make senators feel comfortable with voting solely based on Bork’s ideology.⁵⁰⁸ Reagan and the GOP sought to turn the discussion back toward Bork’s undoubted credentials. Senator Bob Dole posited that someone outside the ideological mainstream could never have worked as Solicitor General, taught at Yale Law School, or served as a federal appellate judge.⁵⁰⁹ Likewise, President Reagan argued that “each senator must decide which criteria is [sic] right for casting this critical vote: qualifications or politics,” urging senators to opt for merits.⁵¹⁰

The third development in the Bork nomination was the disciplined strategic planning that both sides, particularly Democrats, brought to bear on the process. Focusing the Senate’s and the public’s attention on Bork’s ideology was part of a larger, well-executed Democratic campaign to which the GOP had no ready answer. It began with Ted Kennedy’s famous “Robert Bork’s America” speech, which he delivered in order to freeze senators and prevent any momentum for Bork.⁵¹¹ Democrats then delayed the hearings for two months in order to drum up opposition.⁵¹² They hired a polling firm to assess what lines of attack against Bork would resonate most strongly with the public.⁵¹³ Democrats focused on his opposition to civil rights legislation and to a constitutional right to privacy. The former targeted Southern Democrats, and the latter moderate Northern Republicans.⁵¹⁴ The Democrats’ relentless attacks on Bork’s ideology drowned out the Republican response, which focused on Bork’s ideology of judicial restraint and professional qualifica-

⁵⁰⁶ See David Lauter & Ronald J. Ostrow, *Nominee’s Strategists Overwhelmed: How Liberal Spectrum Fought to Block Bork*, L.A. Times, Oct. 8, 1987, at 14 (stating that Bork seemed “immune” to attacks based on integrity or qualifications).

⁵⁰⁷ *Id.*

⁵⁰⁸ Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* 123 (1989).

⁵⁰⁹ Linda Greenhouse, *G.O.P. Challenges Bork’s Opponents: Senators Assail a Democratic View That Judge’s Judicial Philosophy Is an Issue*, N.Y. Times, July 24, 1987, at A12.

⁵¹⁰ James Gerstenzang, *Consider Bork’s Merit, Not His Ideology, Reagan Asks*, L.A. Times, July 30, 1987, at 15.

⁵¹¹ See Bronner, *supra* note 508, at 98–100.

⁵¹² *Administration Assails Biden Over Delay on Bork*, N.Y. Times, July 10, 1987, at A12 (noting that Biden stated he would “not rush the review because too much was at stake”).

⁵¹³ See Bronner, *supra* note 508, at 158; Lauter & Ostrow, *supra* note 506.

⁵¹⁴ Bronner, *supra* note 508, at 158.

tions.⁵¹⁵ The strategy worked. Key moderate Northern Republicans voted against him, and all but one Southern Democrat voted “no.” Had Bork gained support from just over half of the seventeen Southern Democrats, he would have been confirmed.⁵¹⁶

The fourth critical development in the Bork nomination—and another area where anti-Bork forces out-maneuvered Bork’s supporters—was the involvement of outside groups. Even before Reagan made his announcement, forty-five organizations met in Washington to plot strategy. A week after Kennedy’s “Bork’s America” speech, that number had doubled.⁵¹⁷ Many groups that had never weighed in on Supreme Court nominations got involved.⁵¹⁸ Groups ranging from the National Education Association (the largest teachers union in the country, with 1.8 million members) to liberal lobbying groups, to feminist organizations, pledged efforts against Bork.⁵¹⁹ Conservative groups likewise jumped into the fray.⁵²⁰ Ultimately, the liberal groups were simply too many and too effective. Bork was defeated by a 58-42 vote on the Senate floor.⁵²¹

5. Nominations Since Bork

Robert Bork’s failed nomination epitomizes the transformation of how presidents select their Supreme Court candidates, how the Senate evaluates nominations, and how nominees conduct themselves during the confirmation process. Edwin Meese, Reagan’s Attorney General, stated, upon Bork’s death, “Bork’s nomination turned what had sometimes been a contentious confirmation process into literally a political campaign.”⁵²² Bork’s name has become a verb; the Oxford English Dictionary defines “to bork” as “defame or vilify (a person) systematical-

⁵¹⁵ *Id.*

⁵¹⁶ David Lauter, *South Had Key Role in Bork Rejection: White House Misjudged Black Voting Power, Area’s Senators*, L.A. Times, Oct. 24, 1987, at 30.

⁵¹⁷ See Lauter & Ostrow, *supra* note 506.

⁵¹⁸ Ruth Marcus, *Growing Array of Groups Fights Bork Confirmation: Many Traditionally Neutral on Judgeships*, Wash. Post, Sept. 25, 1987, at A16.

⁵¹⁹ Ruth Marcus & Gwen Ifill, *Lobbying Groups Gather Steam for Bork Confirmation Battle: Conservatives, Liberals Cultivate Grass-Roots Pressure on Senators*, Wash. Post, July 6, 1987, at A4.

⁵²⁰ *Id.*

⁵²¹ Tushnet, *In the Balance*, *supra* note 9, at 72.

⁵²² Mark Sherman, *Robert Bork Nomination Fight Altered Judicial Selection*, Huffington Post (Dec. 19, 2012, 4:38 PM), http://www.huffingtonpost.com/2012/12/19/robert-bork-nomination_n_2332933.html.

ly.”⁵²³ Even though no subsequent nominee has faced the same level of intense scrutiny and resistance as Bork did, his defeat paved the way for overt lobbying, public opinion polls, advertising campaigns, focus groups, and public appeals to become routine parts of the nomination process.⁵²⁴

Sometimes accusations about improprieties in the candidates’ personal lives also arise. After Bork’s defeat, President Reagan nominated Douglas Ginsburg, a judge on the D.C. Circuit, to fill Powell’s seat, but Ginsburg withdrew from consideration only nine days later after he admitted to having smoked marijuana as a professor at Harvard Law School a decade earlier.⁵²⁵ The confession was especially embarrassing to Reagan, who had endorsed Ginsburg’s nomination as “vitally important to the fight against crime.”⁵²⁶

After two stinging failures in his efforts to put a strong conservative on the bench, President Reagan settled on Anthony Kennedy, a nominee described as “thoughtful and fair.”⁵²⁷ Kennedy provided a calm but emphatic response to the media’s immediate questioning whether he had ever smoked marijuana: “No, firmly, no.”⁵²⁸ To prevent another embarrassment, the President left little room for surprises during the confirmation process. The White House Counsel had demanded that Kennedy complete a twenty-one-page list of questions, and the FBI had undertaken an extensive investigation.⁵²⁹ Reagan determined that Kennedy could safely dodge the ideological and personal barbs that had ensnared the prior two nominees. Although Kennedy was understood to be a moderately conservative judge, the consensus view was that, unlike Bork, he did not “have an ideological brief in [his] back pocket.”⁵³⁰ Kennedy’s

⁵²³ Oxford English Dictionary 196 (3d ed. 2002).

⁵²⁴ Abraham, *supra* note 32, at 282 (quoting John Anthony Maltese, *The Selling of Supreme Court Nominees* 143 (1995)).

⁵²⁵ See Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana ‘Clamor,’* N.Y. Times, Nov. 8, 1987, at 11.

⁵²⁶ *Id.*

⁵²⁷ Robert Reinhold, *Restrained Pragmatist: Anthony M. Kennedy,* N.Y. Times, Nov. 12, 1987, at A1.

⁵²⁸ Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court: President Conciliatory—Some Conservatives Angered by Choice of Judge, Whom They Think Too Liberal,* N.Y. Times, Nov. 12, 1987, at A1.

⁵²⁹ Lawrence Baum, *The Selection and Confirmation of Justices: Criteria and Process,* in *The Supreme Court* 34 (7th ed. 2001), available at http://www.cqpress.com/incontext/SupremeCourt/the_selection.htm.

⁵³⁰ Abraham, *supra* note 32, at 284.

relatively calm confirmation hearings supported this perception, as his witnesses declared that he approached each case “with an open mind.”⁵³¹ The Senate unanimously confirmed Kennedy.⁵³²

The contrast between Bork’s and Kennedy’s confirmation processes may have suggested to future presidents an advantage to selecting individuals with few publicly available writings on ideologically-charged issues. As Jonathan Nash explains, a president might hope to slip a candidate by a wary Senate by selecting someone who “will adhere to the desired judicial philosophy while not arming opposition senators with ammunition to oppose the nomination.”⁵³³ The best-known “stealth” nominee during the latter half of the twentieth century was David Souter. A longtime New Hampshire state judge, Souter had served briefly on the First Circuit Court of Appeals and had a scant record of opinions on major constitutional issues.⁵³⁴ President George H.W. Bush chose Souter, in part, to avoid a bruising confirmation battle over past decisions or writings.⁵³⁵ The contemporary media and their audience seemed resigned to knowing little about the new nominee.⁵³⁶ Ultimately, Souter was easily confirmed with ninety affirmative votes.⁵³⁷

Conservatives, however, had early reservations, and those moments of doubt proved accurate.⁵³⁸ Once on the Court, Souter drifted toward the middle of the bench’s ideological spectrum after the appointment of Clarence Thomas, a far more conservative jurist.⁵³⁹ President Bush had wanted to nominate Thomas, recently confirmed to the D.C. Circuit, to the Supreme Court seat that eventually went to Souter, but Bush’s staff persuaded the President that the relatively new federal judge was not yet

⁵³¹ See *Nomination of Anthony M. Kennedy To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 100th Cong. 551 (1987)* (statement of Henry Scott Wallace, Legislative Director, Nat’l Ass’n Criminal Def. Lawyers).

⁵³² Abraham, *supra* note 32, at 285.

⁵³³ See Jonathan Remy Nash, *Prejudging Judges*, 106 *Colum. L. Rev.* 2168, 2186 (2006).

⁵³⁴ See Terry Eastland, *Editorial, When Anonymity Becomes a Virtue*, *L.A. Times*, July, 25, 1990, at B7.

⁵³⁵ Devins & Baum, *supra* note 9, at 45.

⁵³⁶ See, e.g., Linda Greenhouse, *An ‘Intellectual Mind’: David Hackett Souter*, *N.Y. Times*, July 24, 1990, at A1 (noting that Souter as a candidate “could scarcely have been more different from Robert H. Bork”).

⁵³⁷ Hudson, *supra* note 180, at 48.

⁵³⁸ See Yarbrough, *supra* note 126, at 222.

⁵³⁹ Devins & Baum, *supra* note 9, at 23.

sufficiently experienced.⁵⁴⁰ When Thurgood Marshall announced his retirement the following year, President Bush gave Thomas the nod.⁵⁴¹

Controversy over Thomas's nomination exploded when Anita Hill alleged that he had sexually harassed her when he was serving as Chairman of the Equal Employment Opportunity Commission. The earlier inquiry into Douglas Ginsburg's marijuana use paled in comparison to public scrutiny of Thomas's perceived personal flaws.⁵⁴² Even before Hill's claims surfaced, the Judiciary Committee had deadlocked on whether to endorse Thomas's nomination for the floor vote, an unprecedented event.⁵⁴³ Thomas, an ardent conservative, was the epitome of a "change nominee;" he would replace one of the Court's most liberal justices.⁵⁴⁴ Furthermore, Thomas's race may have shaped his image among liberal senators. Some commentators stigmatized the choice of Thomas as merely filling a "black seat," and his conservative ideology led many liberals and African Americans to view Thomas as unfit to represent minority interests.⁵⁴⁵ The Senate ultimately confirmed him by a vote of 52-48; eleven Democrats (seven from the South) joined Republicans to support the nomination.⁵⁴⁶ Even a decade after Thomas's confirmation, Senator Biden derisively claimed that "the only reason Clarence Thomas is on the Court is because he is black."⁵⁴⁷

When Democrats had their first opportunities in over two decades to select a Supreme Court nominee (upon the retirements of Justices White and Blackmun), President Clinton appointed D.C. Circuit Judge Ruth Bader Ginsburg and First Circuit Judge Stephen Breyer. The prospect of

⁵⁴⁰ Jan Crawford Greenburg, Clarence Thomas: A Silent Justice Speaks Out, ABC News (Sept. 30, 2007), <http://abcnews.go.com/TheLaw/story?id=3664944&page=1>.

⁵⁴¹ Gerber, First Principles, *supra* note 35, at 13.

⁵⁴² *Id.* at 14. The Senate Judiciary Committee delayed its vote and held a series of televised hearings, engaging in what became an intense and unprecedented probing of a nominee's personal, indeed sexual, life. See Mitchell Locin & Elaine S. Povich, Outcry Stalls Vote on Thomas: Inquiry Set into Woman's Allegations, *Chi. Trib.*, Oct. 9, 1991, at 1.

⁵⁴³ David Savage & William Eaton, Panel Deadlocks, 7 to 7, on Thomas Nomination, *L.A. Times*, Sept 28, 1991, at A1.

⁵⁴⁴ See Stone, *supra* note 455, at 400-01.

⁵⁴⁵ See Angela Onwuachi-Willig, Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity, 90 *Iowa L. Rev.* 931, 974 n.208 (2005); Lori A. Ringhand, Aliens on the Bench: Lessons in Identity, Race, and Politics From the First "Modern" Supreme Court Confirmation Hearing to Today, 2010 *Mich. St. L. Rev.* 795, 829; see also discussion *supra* Subsection I.A.2 (discussing the controversy surrounding Justice Thomas's nomination).

⁵⁴⁶ Abraham, *supra* note 32, at 299.

⁵⁴⁷ Jules Witcover, Joe Biden: A Life of Trial and Redemption 283 (2010).

seeking confirmation from a Senate controlled by his own political party left President Clinton unconcerned about the need to shield his candidates' ideologies.⁵⁴⁸

When, on the retirement of Justice O'Connor, the Republicans' next turn arrived, their hope to avoid what had become known as the "Souter surprise" shaped the Party's approach to its nominees.⁵⁴⁹ Speculation that President George W. Bush might nominate his White House Counsel, Alberto Gonzales, to be the first Hispanic on the Court triggered a harsh reaction from the political right, in part because of fear that Gonzales might not vote in lockstep with the Court's conservative base.⁵⁵⁰ Bush did not nominate Gonzales; instead, he named his White House Counsel, Harriet Miers. She was the first nominee in over three decades without a day of judicial experience, and her nomination quickly foundered.⁵⁵¹ Her blank slate was initially viewed as an asset allowing her to bypass ideological scrutiny,⁵⁵² but Miers's inexperience, coupled with uncertainty about her political views and competence, led to her eventually withdrawing.⁵⁵³ Republican senators had requested that Bush turn over Miers's White House memoranda so that they could measure her political leanings.⁵⁵⁴ Invoking executive privilege, the administration refused the request, and Miers cited her desire to preserve this presidential

⁵⁴⁸ Some scholars have argued that, unlike Republican nominations, Democratic selections place less emphasis on a nominee's ideology and more emphasis on candidates who embrace the rhetoric of judicial restraint and have rich personal histories. Scholars also suggest that the two most recent liberal presidents, Bill Clinton and Barack Obama, have focused on a demographic strategy, rather than an ideological one. See Devins & Baum, *supra* note 9, at 46; Tushnet, *In the Balance*, *supra* note 9, at 74.

⁵⁴⁹ Devins & Baum, *supra* note 9, at 45 (explaining that the conservatives' "battle cry" for the next nomination was "No more Souters").

⁵⁵⁰ Gonzales's prior statements regarding affirmative action and abortion concerned conservatives in particular. Abraham, *supra* note 32, at 318; Ramesh Ponnuru, *Judging Gonzales: Conservatives Worry About Bush's Supreme Court Pick*, *Nat'l Rev. Online* (Feb. 11, 2003, 9:00 AM), <http://www.nationalreview.com/articles/205885/judging-gonzales/ramesh-ponnuru> (discussing Republicans' refrain that "Gonzales is Spanish for Souter").

⁵⁵¹ O'Brien, *supra* note 9, at 82; Alex Markels, *Why Miers Withdrew as Supreme Court Nominee*, *NPR* (Oct. 27, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4976787>.

⁵⁵² See Michael A. Fletcher, *White House Counsel Miers Chosen for Court*, *Wash. Post*, Oct. 4, 2005, at A1.

⁵⁵³ See Greenburg, *supra* note 9, at 278 (sharing senators' description of Miers as "less an attorney than a law firm manager and bar association president" and their assessment that she had "flunked" in her meetings with legislators); Tushnet, *In the Balance*, *supra* note 9, at 51.

⁵⁵⁴ See Greenburg, *supra* note 9, at 282.

prerogative as the primary reason for stepping aside.⁵⁵⁵ Underlying this face-saving excuse, however, was the Bush Administration's conclusion that questions about Miers's competence and conservatism would make the Senate's Republican base reluctant to confirm her.⁵⁵⁶

6. *Modern Nominees: The Roberts Court*

President Bush's next choice to succeed Justice O'Connor was John Roberts. A one-time clerk to Rehnquist, Roberts had served in the Reagan White House and then had entered private practice, where he became a highly successful appellate advocate, arguing thirty-nine cases before the Supreme Court. Named to the federal bench, he had served two years on the D.C. Circuit before Bush nominated him for the Supreme Court.⁵⁵⁷

While Roberts's nomination was pending, Chief Justice Rehnquist unexpectedly died. Bush then tapped Roberts to take the Chief's seat, naming Samuel Alito to fill the O'Connor vacancy.⁵⁵⁸ In his confirmation hearing, Roberts wove his way with consummate skill through senators' questions. Insisting that he had no overarching constitutional philosophy, Roberts declared it was his job as judge "to call balls and strikes, and not to pitch or bat."⁵⁵⁹ Roberts showed an impressive knowledge of constitutional decisions, expounding on them without notes. The Senate confirmed Roberts by a vote of 78-22. Every Republican senator voted to confirm; the Democrats were evenly split.⁵⁶⁰ Although this vote was relatively narrow by historical standards, subsequent confirmations have been even closer.

Samuel Alito drew intense scrutiny from his reluctance to classify *Roe v. Wade*⁵⁶¹ as settled law,⁵⁶² and his endorsement of Bork as "one of

⁵⁵⁵ See Elisabeth Bumiller & Carl Hulse, *Bush's Court Choice Ends Bid After Attack by Conservatives*, N.Y. Times, Oct. 28, 2005, at A1.

⁵⁵⁶ *Id.*

⁵⁵⁷ Tushnet, *In the Balance*, *supra* note 9, at 45-47.

⁵⁵⁸ O'Brien, *supra* note 9, at 81-82.

⁵⁵⁹ Roberts Confirmation Hearing, *supra* note 423, at 56.

⁵⁶⁰ O'Brien, *supra* note 9, at 81-82.

⁵⁶¹ 410 U.S. 113 (1973).

⁵⁶² See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 454-55 (2006) [hereinafter *Alito Confirmation Hearing*].

the most outstanding nominees of this century.”⁵⁶³ The committee sent Alito’s nomination to the Senate floor on a straight party-line vote of approval.⁵⁶⁴ Democratic attempts at a filibuster failed,⁵⁶⁵ and Alito was approved. Only one Republican senator voted “no”; only four Democrats voted for him.⁵⁶⁶ One factor in the vote on Alito being closer than that on Roberts is that Alito (replacing O’Connor) was a change nominee, while Roberts (succeeding Rehnquist) was not.⁵⁶⁷

In 2009, when Justice Souter retired, President Obama nominated Sonia Sotomayor, whose seventeen years on federal trial and appellate courts provided a voluminous record.⁵⁶⁸ Sotomayor’s appointment reflected liberals’ greater focus on ideology compared to the nominations of earlier Democratic presidents—Truman, Kennedy, and Johnson. Before deciding on Sotomayor,⁵⁶⁹ President Obama read long memoranda on the leading candidates and asked to review their original writings in order to select a nominee whose record provided strong evidence of liberalism.⁵⁷⁰ Votes for and against Sotomayor’s confirmation fell along largely partisan lines.⁵⁷¹ Some Republicans initially described Sotomayor’s judicial record as mainstream,⁵⁷² but, ultimately, partisanship colored the confirmation process.⁵⁷³ Senators on both sides of the aisle observed the pressure applied by interest groups like the National Rifle Association (“NRA”), which took the unusual step of declaring that the NRA would factor senators’ votes into its legislative scorecard for the upcoming midterm elections.⁵⁷⁴ Justice Sotomayor was confirmed by a

⁵⁶³ See Tom Lininger, *The Third Branch: On Dworkin and Borkin*, 105 *Mich. L. Rev.* 1315, 1331 (2007).

⁵⁶⁴ See Kathy Kiely, *Alito Debate Begins Today in Full Senate*, *USA Today* (Jan. 24 2006, 10:30 AM), http://usatoday30.usatoday.com/news/washington/2006-01-24-alito-senate_x.htm.

⁵⁶⁵ See David D. Kirkpatrick, *Alito Clears Final Hurdle for Confirmation to Court*, *N.Y. Times*, Jan. 31, 2006, at A1.

⁵⁶⁶ See David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, *N.Y. Times*, Feb. 1, 2006, at A21.

⁵⁶⁷ Roberts was nominated to replace a staunch conservative, William Rehnquist. By contrast, Alito replaced the more moderate Sandra Day O’Connor, threatening to alter the Court’s ideological balance. See Stone, *supra* note 455, at 401.

⁵⁶⁸ Tushnet, *In the Balance*, *supra* note 9, at 73–74.

⁵⁶⁹ Devins & Baum, *supra* note 9, at 47.

⁵⁷⁰ *Id.*

⁵⁷¹ Sotomayor had the unanimous support of Democratic senators. *Id.* at 31.

⁵⁷² *Sotomayor Confirmation Hearing*, *supra* note 63, at 135.

⁵⁷³ Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court: First Hispanic Is Approved by 68-31 Vote*, *N.Y. Times*, Aug. 7, 2009, at A1.

⁵⁷⁴ *Id.*

vote of 68-31. The partisan contours of the confirmation battle may have reflected senators' looking to future nominations, even those to positions on the lower courts.⁵⁷⁵

When, in 2010, Justice Stevens announced he would retire, President Obama chose his Solicitor General, Elena Kagan, to be Stevens's successor. Unlike every Court nominee since Rehnquist, Kagan had never been a judge.⁵⁷⁶ Kagan's nomination generated far less passion in either party than Sotomayor's did. One observer describes Kagan as having been a "quasi-stealth" nominee and suggests that this kind of choice may have special appeal to a president.⁵⁷⁷ Just as Roberts's service in the Reagan Administration signaled to conservatives his ideological affiliation,⁵⁷⁸ Kagan's service in the Clinton White House and her tenure as Obama's Solicitor General left little doubt regarding her political leanings.⁵⁷⁹

Recent nominees have proved skilled at side-stepping ideological controversy in their Senate testimony, parrying partisan questions with carefully crafted, but substantively evasive, answers.⁵⁸⁰ Pressed for windows into their jurisprudence, these nominees are nimble.⁵⁸¹ Even laypersons can quote Roberts's "balls and strikes" metaphor. Kagan was similarly adept at dodging questions on how she would rule on controversial issues, like abortion and gay marriage.⁵⁸²

Nominees have often been able to distance themselves, not only from pointed questions during Senate hearings, but also from their own prior statements.⁵⁸³ Pressured on memoranda he had written on abortion in the

⁵⁷⁵ Id.

⁵⁷⁶ O'Brien, *supra* note 9, at 85. In 1999, President Clinton had nominated Kagan to the D.C. Circuit, but because the Republican chairman of the Senate Judiciary Committee, Orrin Hatch, refused to convene a hearing, Kagan's nomination was effectively scuttled. See Tushnet, *In the Balance*, *supra* note 9, at 85.

⁵⁷⁷ Nash, *supra* note 533, at 2191. Nash describes a quasi-stealth candidate as one who has not left a large judicial footprint, but whose activities, affiliations, and statements nonetheless assure the party's followers of his or her ideological purity. Id.

⁵⁷⁸ Abraham, *supra* note 32, at 318; Nash, *supra* note 533, at 2191.

⁵⁷⁹ See Jeffrey Toobin, *The Oath* 220–21 (2012); Devins & Baum, *supra* note 9, at 47.

⁵⁸⁰ See Toobin, *supra* note 579, at 228; see also Elena Kagan, *Confirmation Messes, Old and New*, 62 U. Chi. L. Rev. 919, 941 (1995) ("[R]epetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.").

⁵⁸¹ See Charles Fried, *Balls and Strikes*, 61 Emory L.J. 641, 642 (2012).

⁵⁸² See Kagan Confirmation Hearing, *supra* note 425, at 96, 174–75; see also Alito Confirmation Hearing, *supra* note 562, at 454–55 (commenting on *Roe v. Wade*).

⁵⁸³ Kagan dismissed her earlier critique of nominees' lack of forthrightness. See Kagan Confirmation Hearing, *supra* note 425, at 79–80. Roberts shot down any personal association

Reagan Administration, Roberts said, “Senator, I was a staff lawyer. I didn’t have a position.”⁵⁸⁴

In recent hearings, we may be witnessing a process that encourages nominees responding to questions from the Senate Judiciary Committee to say “nothing at all candid, specific, or profound about their judicial philosophies or views of the law.”⁵⁸⁵ This has not made the confirmation process any less partisan—far from it—nor has it made the Court any less ideological.⁵⁸⁶ The appointment of Elena Kagan marked the first time in the Court’s history that the ideological lines of the Court have coincided with partisan lines—that is, each justice appointed by a Republican president has a more conservative voting record than any Democratic appointee does.⁵⁸⁷

As Elena Kagan, in her days as an academician, put it, the post-Bork era has brought a diminishing of the confirmation process’s “educative function.”⁵⁸⁸ She lamented that nominations and confirmations no longer offer “serious substantive questioning of nominees.”⁵⁸⁹ Thus, we lose the opportunity for a genuine “evaluation of the Court and a determination whether the nominee would make it a better or worse institution.”⁵⁹⁰

C. Changes in the Nomination Process and in the Senate

A review of the nomination and confirmation process from Byron White to Elena Kagan reveals three important areas of change between the era of the Warren Court and that of the Roberts Court: (1) a shift in focus from personal and professional qualifications to a nominee’s ideology; (2) heightened tension surrounding “change” nominees; and (3) a felt necessity of running a campaign-style effort to bring about a nominee’s confirmation or defeat. Together, these changes make the process of nomination and confirmation today more politicized than it was in

with controversial memoranda laying out conservative positions on a range of civil rights issues. See Roberts Confirmation Hearing, *supra* note 423, at 146–47.

⁵⁸⁴ Roberts Confirmation Hearing, *supra* note 423, at 193.

⁵⁸⁵ Andrew Cohen, *The Sad Legacy of Robert Bork*, Atlantic (Dec. 19, 2012), <http://www.theatlantic.com/politics/archive/2012/12/the-sad-legacy-of-robert-bork/266456/>. But see Tushnet, *In the Balance*, *supra* note 9, at 70 (noting that recent studies indicate only a slight decline in nominees’ candor during hearings).

⁵⁸⁶ Devins & Baum, *supra* note 9, at 4.

⁵⁸⁷ *Id.* at 75.

⁵⁸⁸ Kagan, *supra* note 580, at 941.

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

1962, when Justice White's hearings and confirmation occurred on the same day.⁵⁹¹ Justice White's nomination provides an example of a nomination decided on the basis of qualifications. Bork's nomination, in turn, marked a shift toward greater focus on ideology.

Much of this change reflects a reciprocal relation between presidents and senators. As senators became more willing to oppose nominees with whose views they disagreed, presidents became reluctant to submit poorly qualified candidates, lest credentials provide "cover" to those senators to vote against their nominee. Today, a president would be foolhardy to nominate a candidate without thoroughly vetting him or her and ensuring that the nominee's qualifications are impeccable. (Bush's nomination of Harriet Miers proves the point.) Rather than tempering ideology, however, the nomination process has become more overtly political.⁵⁹²

What explains this shift from qualifications to ideology? As this history shows, the Warren Court's civil rights decisions and other liberal judgments played a critical role, as did *Roe*. As the implications of the divide between those advocating for a textual reading of the Constitution and those arguing for a more elastic "living Constitution" became more obvious, nominees' interpretive philosophy became more important. Moreover, the rise of conservative voices in academic discourse has contributed to the hardening of the right—a distinctive feature of polarization on and off the Supreme Court.⁵⁹³

Focusing on a nominee's judicial philosophy makes any candidate who would change the balance of the Court a flashpoint for heightened controversy. Critics perceived the more controversial nominations—Thurgood Marshall, William Rehnquist, Robert Bork, Clarence Thomas, and Samuel Alito—as threatening to tip the Court's balance in one direction or the other. Indeed, studies using various statistical modeling techniques suggest that nominees who can tip that balance likely face a tougher nomination process.⁵⁹⁴

⁵⁹¹ See also Devins & Baum, *supra* note 9, at 47 (explaining that party polarization has led to greater homogeneity in each political party, and that presidents are more attentive to ideology and more careful in vetting potential nominees).

⁵⁹² See Lauter & Ostrow, *supra* note 506; Devins & Baum, *supra* note 9, at 75.

⁵⁹³ See Devins & Baum, *supra* note 9, at 37–38.

⁵⁹⁴ See, e.g., P.S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 *J. Pol.* 793, 798, 801–02 (1993) (finding that "critical" nominees—those that will have a stronger than usual impact on the balance of the Court—are twelve times less likely to be confirmed than non-critical nominees).

As ideology becomes more important and both parties become more sensitive to the balance of the Court, neither side will risk anything less than an all-out effort at getting their nominee on the Court. Scholars have shown that delaying nominees is a particularly effective tactic,⁵⁹⁵ as it gives the opposition time to gather information and build a case against the candidate. The battle over the Bork nomination illustrates how effective this strategy can be.

One might think of these three changes to the nomination process as being specific to the Court; they have been driven in good part by the Court's own decisions and by the methodological divide between more conservative and liberal justices. However, ideological disagreements and controversial cases are nothing new for the Court. To fully understand the increasing politicization from Warren to Roberts, we must look outside the Court—in particular, to the increasing polarization of American politics, and, in particular, of Congress.

A full discussion of the increased polarization in American politics in our time is beyond the scope of this piece, but two observations are in order.⁵⁹⁶ First, members of Congress (including the Senate) are today more ideologically distant than they have been at any other time in the country's history, let alone in the Warren Court era. No Democrat in the House or the Senate is more conservative than the most liberal Republican of the same chamber.⁵⁹⁷ There was a time when the Democrats had conservative members from the South, and the GOP had a greater number of Northern liberals in its ranks. Today, however, the parties have sorted themselves out more neatly along ideological and partisan lines.⁵⁹⁸ Writing in 2004, Richard Fleisher and Jon R. Bond stated that it

⁵⁹⁵ See, e.g., Charles R. Shipan & Megan L. Shannon, *Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations*, 47 *Am. J. Pol. Sci.* 654, 666 (2003) (“[O]ur results confirmed our primary hypothesis that ideological disagreement between the president and the Senate would increase the duration of the confirmation process.”).

⁵⁹⁶ For a discussion of America's “slash and burn” politics, see Howard, *supra* note 154, at 489–94. A recent Pew Research Center study has concluded that political polarization is now both more deeply imbedded and more intense than at any time in recent history. See Dan Balz, *Pew Poll: In Polarized United States, We Live as We Vote*, *Wash. Post* (June 12, 2014), http://www.washingtonpost.com/politics/pew-poll-in-polarized-america-we-live-as-we-vote/2014/06/12/0b149fec-f196-11e3-914c-1fbd0614e2d4_story.html.

⁵⁹⁷ Devins & Baum, *supra* note 9, at 28.

⁵⁹⁸ *Id.*

“is clear that moderate and cross-pressured members have largely disappeared from Congress.”⁵⁹⁹

Such polarization has given presidents greater incentives to nominate individuals whose ideological orientations match those of the president’s political party.⁶⁰⁰ Thus, the disappearance of moderate members who will cross party lines, and the shift toward a no-holds-barred-style nomination process focused on the Court’s ideological balance completes the transition toward a more politicized nomination process. Senator Eastland might have been able to put his ideological disagreements with Justice White aside and vote for White based on his character and skill as a lawyer.⁶⁰¹ Today, it would be hard to find senators thinking along those lines.

CONCLUSION

Thinking about such things as the justices, their clerks, and the Court’s relationships with the media and politics, I find that much has changed since my days with Justice Black. A justice from the Warren Court would find much that is familiar, but there would be surprises, too. Some of the changes he would observe could be fairly described as paradoxical.

Today’s justices are more diverse than were those of the Warren era. Yet, in some respects, the Court’s members are more elite and homogeneous than were those of fifty years ago. A quick glance at the modern justices’ credentials and geographic backgrounds brings home the point. Moreover, the current Court is presented with thousands more petitions than was the Warren Court. While the number of clerks available to assist with the caseload has grown substantially, today’s High Bench issues fewer opinions on the merits. The Warren Court faced criticism for its living constitutionalism and for doing politics; today’s Court faces even lower approval ratings and seems to be more politically and ideologically driven and divided than ever.

Changes at the Court naturally invite musing on theories to identify the causes and effects. A simple explanation may be that external politics have affected the inner workings of the institution. Perhaps life at

⁵⁹⁹ Richard Fleisher & John R. Bond, *The Shrinking Middle in the US Congress*, 34 *Brit. J. Pol. Sci.* 429, 450 (2004).

⁶⁰⁰ Devins & Baum, *supra* note 9, at 75.

⁶⁰¹ See *White’s Court Choice Hailed by Senators*, *supra* note 459.

the Court is different in good part because politics outside the Court have become more polarized. The increased diversity on the bench, a decline in consensus, the combative nomination process, the hiring of clerks from ideologically compatible “feeder judges,” and media portrayals of the Court all carry political overtones. The Court issues opinions many of which fundamentally affect the lives of American citizens. It may also be that these same citizens—how they live, how they think, for whom they vote—have fundamentally altered the Court itself.