

Liverpool Hope University, UK

From the Selected Works of Brian Christopher Jones

Fall 2015

Disparaging the Supreme Court: Is SCOTUS in Serious Trouble?

Brian Christopher Jones



Available at: https://works.bepress.com/brian_jones/32/

Disparaging the Supreme Court: Is SCOTUS in Serious Trouble?

By Brian Christopher Jones, PhD

Another turbulent Supreme Court term has left liberals pleased and conservatives disenchanted; exactly the opposite of last year's conclusion, when liberals were gloomy and conservatives elated. And while the Court is certainly no stranger to controversy, at this point in the Roberts Era, something is different. The difference appears not through the divisiveness of the Court's docket, which has remained consistent throughout the years, but in the way the American public, including journalists and others, now think and speak about the institution. As its political nature becomes more easily discerned—both because of the issues it is deciding and the language used in the Court's decisions—reverence to the institution, its justices, and more importantly, its decisions, appears to be increasingly scarce.

Key to this new assessment is a widespread, increasing criticism; the institution and its members are being disparaged by a wider and more sophisticated audience than ever before.¹ Given both Republican and Democratic discontent, frustration with the Court may now have reached a boiling point.² And if you think liberals are overwhelmingly positive about the Court's latest term merely because of the health care³ and gay marriage⁴ decisions, think again.⁵ Such sentiments could be shrugged off as the whims of a partisan electorate, if not for the increased sophistication of the Court's critics. Recent disparagement has rivaled what other branches have dealt with throughout the years, especially Congress. Yet Congress need not worry about its primary roles: most of them (and the most important of all—legislating) are explicitly enshrined in the Constitution's

Lecturer in Public Law, Liverpool Hope University

¹ See, e.g., ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); IAN MILLHISER, *INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED* (2015); (forthcoming) Brian Christopher Jones, *Book Review of Erwin Chemerinsky's The Case Against the Supreme Court*, 42 *JOURNAL OF LAW AND SOCIETY* (2015) (“This review argues that Chemerinsky's book is just the beginning in regard to a more sophisticated disparaging of the Supreme Court...many people, including the media and others, are disparaging the Court at unprecedented levels.”)

² According to the latest Gallup figures, Republicans view of the Court recently plummeted to a 15 year low, standing at 18%. Conversely, Democratic views of the institution surged to 76% (Jeffrey M. Jones, *Republicans' Approval of Supreme Court Sinks to 18%*, GALLUP (July 16, 2015), <http://www.gallup.com/poll/184160/republicans-approval-supreme-court-sinks.aspx>).

³ *King v. Burwell*, 576 U.S. ____ (2015).

⁴ *Obergefell v. Hodges*, 576 U.S. ____ (2015).

⁵ Linda Greenhouse, *The Illusion of a Liberal Supreme Court*, NY TIMES (July 9, 2015), <http://nyti.ms/1J5YW0I>; Josh Gerstein, *Supreme Court's liberal admirers get reality check: Report of the Supreme Court's leftward turn have been greatly exaggerated*, POLITICO (June 29, 2015), <http://www.politico.com/story/2015/06/supreme-courts-liberal-admirers-get-reality-check-119567.html>.

text,⁶ and any contestation of these powers in the near future appears highly unlikely. In fact, in the face of relentless adversity, Congress has been a resilient institution.⁷

However the Court resides on shakier ground: since its powers of constitutional review are judicially rather than constitutionally constructed,⁸ if the Court loses enough legitimacy such powers could be modified, perhaps significantly. Indeed, no formal amendment to the Constitution is required in order to change the nature of Supreme Court constitutional review. While some may believe that judicial supremacy of constitutional interpretative authority has been the long-established norm throughout American history, this view is manifestly incorrect; such “authority is not fixed,” and “has [dynamically] shifted over time.”⁹ Indeed, “[j]udicial authority can be successfully challenged,”¹⁰ and this is especially true from a presidential perspective.¹¹ Given the animosity citizens from all political stripes have had towards the institution in recent years, an increase in popular constitutionalism or an enhanced form of departmentalism—including direct challenges from the President or Congress—could thus significantly reduce the Court’s role in American democracy.¹² Alternatively, lower federal courts or state courts may become more hostile to Supreme Court precedent, carving out their own constitutional paths that run contrary to Supreme Court interpretation.¹³

The lack of explicitly provided constitutional review is no small matter. In other countries powers of constitutional review for high courts or constitutional courts are clearly expressed;¹⁴ the US Constitution fails in this regard;¹⁵ hence the need for the

⁶ U.S. Const., art. I.

⁷ Although, when it comes to constitutional interpretative authority, the branch’s low approval rating may prevent them from gaining more influence.

⁸ *Marbury v Madison*, 5 U.S. 137 (1803).

⁹ KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 290, 292 (2007) (“The judicial authority to interpret the Constitution has been dynamic over the course of American constitutional history. The supremacy and leadership of the judiciary in setting the meaning of the Constitution was neither fixed at any particular moment in time nor strictly a function of the Court’s own interpretation of its powers under the Constitution.”)

¹⁰ *Id.*, at 286.

¹¹ *Id.*, at 292 (“For those who wish to understand the political foundations of judicial authority, the pressures and constraints of the White House are crucial. At the same time, those who want to understand how presidents with the leadership challenges that they face would do well to attend to how the judiciary can be and has been a help or a hindrance to that effort. The Court has been a resource, a stimulus, and a constraint on the president. Not all presidents have been equally engaged with the Court and constitutional interpretation, but the scope of judicial authority is a recurring theme in the history of the presidency.”).

¹² *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert C. Post and Reva B. Seigel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2005); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

¹³ *See, e.g.*, Steven Ferrey, *Can the Ninth Circuit Overrule the Supreme Court on the Constitution?* 93(4) NEB. L. REV. 807, 810 (“The Ninth Circuit decision reconfigured the past half-century of Supreme Court interpretation of the dormant Commerce Clause.”).

¹⁴ *See, e.g.*, German Basic Law, art. 93; Taiwan const., art. 78, 171 & 173. (Art. 78: The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders; Art. 171: Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan; Art. 173: The Constitution shall be interpreted by the Judicial Yuan.)

¹⁵ U.S. Const., art. III.

judiciary to establish this power in *Marbury*. Nevertheless, if the Court continues to inject itself into the political process (adjudicating the most contentious political issues), fail to protect minorities, and expand both unchecked governmental power and corporation speech rights,¹⁶ hostility towards the institution will only increase. Without question, the Court should indeed worry about its constitutional future.

Off the Hook?

While disparagement of the institution is more widespread, the Court has often received unequal and less severe treatment than the other branches, notably Congress, regarding similar issues. An interesting example can be found as regards reactions to the productivity of the two branches. Just as it is Congress's job is to pass laws, so it is the Court's job to maintain the uniformity of federal law, which it does by issuing decisions. But public reaction as regards decreasing productivity of the two branches is striking. For instance, near the end of the conspicuously unproductive 112th Congress, *The Week* put together a list of the most insulting media labels for the governing body, which included: "the most worthless, incompetent, do-nothing gathering of lawmakers in the nation's history," (*LA Times*); "took incompetence to a higher level," (*The Daily Beast*); "clowns," (*Washington Times*); and "least effective and most disliked," (*Business Insider*).¹⁷ Unsurprisingly, the 113th Congress received similar condemnation, receiving labels such as "worst Congress ever";¹⁸ "terrible";¹⁹ and "set a standard for inertia."²⁰ While depictions such as these are relatively common for the lawmaking body, the Court is not—or at least was not—attuned to such disparagement.

Beginning in the late 1980s, the Court saw a decline in the cases on the plenary docket and in the merits opinions it delivered,²¹ yet little hateful or extreme language about the institution emerged. And for those that did criticize the Court, the language was more genteel, as opposed to intolerable of the institution. A 2009 *New York Times* article used the phrases "not operating at peak capacity" and "not an active enough participant in a dialogue with the lower courts."²² A 2013 *Washington Post* piece even described the Court as "busy looking for cases—but finding fewer than usual."²³ Those phrases are a

¹⁶ All things that Chemerinsky points out in his recent case against the Court. CHEMERINSKY, *supra* note 1.

¹⁷ Harold Maas, *10 insulting labels for the outgoing 112th Congress*, THE WEEK (January 3, 2013), <http://theweek.com/articles/469058/10-insulting-labels-outgoing-112th-congress>.

¹⁸ Jonathan Topaz, *'Worst Congress ever,' by the numbers*, POLITICO (Dec. 17, 2014), <http://www.politico.com/story/2014/12/congress-numbers-113658.html>; Jon Terbush, *Confirmed: This is the worst Congress ever*, THE WEEK (Dec. 26, 2013), <http://theweek.com/articles/453744/confirmed-worst-congress-ever>.

¹⁹ Alissa Scheller & Katy Hall, *These Charts Show Just How Good Congress Was At Being Terrible In 2013*, HUFFINGTON POST (Dec. 26, 2013), http://www.huffingtonpost.com/2013/12/23/congress-2013_n_4479851.html.

²⁰ Susan Milligan, *Setting a Standard for Inertia*, U.S. NEWS AND WORLD REPORT (Dec. 22, 2014), <http://www.usnews.com/news/articles/2014/12/22/113th-congress-sets-standard-for-inertia>.

²¹ Ryan J. Owens and David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229 (2012).

²² Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, NY TIMES (September 28, 2009), http://www.nytimes.com/2009/09/29/us/29bar.html?_r=1&.

²³ Robert Barnes, *Supreme Court busy looking for cases — but finding fewer than usual*, WASHINGTON POST (Dec. 1, 2013), http://www.washingtonpost.com/politics/supreme-court-busy-looking-for-cases--but-finding-fewer-than-usual/2013/12/01/d6fd1194-5aa0-11e3-a66d-156b463c78aa_story.html.

far cry from the demonstrative “Congress is useless” rhetoric seen above, most of which came from reputable news sources.

Even the law review audience, at times the institution’s harshest critics, has not condemned the Court too severely for its depleted docket. Kenneth Star provided the bitterest words for the Court in 2006, remarking that they do “not even pretend to maintain the uniformity of federal law,” and that “the facts show beyond the slightest doubt that the Court is willing to allow conflicts in federal law to exist—and, even worse, to persist.”²⁴ Ultimately, he calls the Court’s docket a “scarce, indeed precious national resource,”²⁵ and suggests that it may be time for SCOTUS to “put its shoulder to the wheel and work harder.”²⁶ Recognizing Starr’s point about a lack of uniformity, in 2012 Owens and Simon wrote that “legal ambiguity may be rampant.”²⁷ They further note that a depleted docket could leave the institution out of touch²⁸ or perhaps even diminish the Court’s legitimacy,²⁹ remarking that “[f]ailure by the Court to send clearer signals could have damaging long-term consequences for the Supreme Court as an institution.”³⁰ Yet again, while these words are indeed critical, they are not altogether severe or extreme; if anything such phrases sound thoughtful and inquisitive.

However all that may be changing.

Changing Times

After the 2014 session ended, many people (including celebrities, politicians, journalists, etc.) used unabashedly strong language towards for the Court. Seth Rogen publicly called them “a**holes,”³¹ Elizabeth Warren said they were heading in “a very scary direction,”³² and a sitting Federal Judge proclaimed it is time for the Court to “stfu” (shut the f**k up).³³ Given the lack of televised proceedings, some late night comedy news shows found innovative ways to cover the Court. John Oliver used dogs to represent different justices,³⁴ while Rachel Maddow employed hand puppets.³⁵ Justice Steven Breyer even concernedly mused at the American Law Institute that the justices were

²⁴ Kenneth Star, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1365, 1366 (2006).

²⁵ *Id.* at 1377.

²⁶ *Id.* at 1385.

²⁷ Owens & Simon, *supra* note 16, at 1223-1224.

²⁸ *Id.* at 1254-1256, 2155 (“the smaller the docket, the more likely that the Court will fail to decide an important case and, when it does decide a case, it could decide the wrong issue.”)

²⁹ *Id.* at 1260-1263 (“Because decisions influence whether the public perceives the Court as legitimate, a smaller docket has the potential to catalyze the erosion of the Court’s legitimacy. That is important because people are more likely to follow a legitimate Court.”)

³⁰ *Id.* at 1285.

³¹ Alex Lazar, *Seth Rogen Calls Hobby Lobby And Supreme Court Justices 'A**holes'*, HUFFINGTON POST (July 1, 2014), http://www.huffingtonpost.com/2014/07/01/seth-rogen-hobby-lobby_n_5548421.html.

³² Elizabeth Warren, TWITTER (June 30, 2014) (“The current Supreme Court has headed in a very scary direction #scotus #hobbylobby”), <https://twitter.com/elizabethwarren/status/483638535296409601>.

³³ *Remembering Alexander Bickel's passive virtues and the Hobby Lobby cases*, HERCULES AND THE UMPIRE (July 5, 2014), <http://herculesandtheumpire.com/2014/07/05/remembering-alexander-bickels-passive-virtues-and-the-hobby-lobby-cases/>.

³⁴ John Oliver, *Supreme Court*, LAST WEEK TONIGHT (Oct. 19, 2014), <https://youtu.be/tug71xZL7yc>.

³⁵ *Rachel Maddow's Supreme Court Puppets*, NEW YORK MAGAZINE, [http://videos.nymag.com/video/Rachel-Maddows-Supreme-Court-Pu#c=1ZLZ5C2MY2SDYGMD&t=Rachel Maddow's Supreme Court Puppets](http://videos.nymag.com/video/Rachel-Maddows-Supreme-Court-Pu#c=1ZLZ5C2MY2SDYGMD&t=Rachel%20Maddow's%20Supreme%20Court%20Puppets)

being referred to as “junior varsity politicians,” and prominent *New York Times* columnist Linda Greenhouse insightfully remarked “that instead of blaming our politics for giving us the court we have, we should place on the court at least some of the blame for our politics.”³⁶ She’s right. But this chorus of discontent predominantly came from the left.

Given the monumental health care and same-sex marriage decisions, the end of the 2015 session was as replete with rebukes, this time from the right. Republican politicians thoroughly trashed the Court. Bobby Jindal mused about getting rid of the Court,³⁷ while Mike Huckabee declared that the Court “unwrote the laws of nature.”³⁸ Governor Scott Walker suggested passing a constitutional amendment to let states decide the definition of marriage,³⁹ and not to be outdone, Senator Ted Cruz proposed an amendment for SCOTUS retention elections.⁴⁰ Although much of this political theatre was anticipated (at least in regard to the same-sex marriage decision), should one of these presidential contenders be voted into the White House, SCOTUS’s constitutional interpretative authority could certainly be challenged, as it was by Reagan in the 1980s.⁴¹

What was unforeseen was the wider and deeper investigation—which seems to have only just begun—focusing on the Court’s proper role in American democracy. The *New York Times* held a forum questioning “Whether the Supreme Court [is] Too Powerful?”⁴² Some of the writers decided affirmatively to that question.⁴³ SCOTUSblog held a similar forum, and a couple writers made strong cases⁴⁴ against the processes of change brought about by the *Obergefell* ruling. Even prominent academic blogs like I-CONNECT (the *International Journal of Constitutional Law*’s blog) have published material that questions whether the ruling was “unconstitutional” change.⁴⁵

³⁶ Linda Greenhouse, *Polar Vision*, NY TIMES (May 28, 2014), <http://nyti.ms/1gBHU2O>.

³⁷ Catherine Thompson, *Jindal: 'If We Want To Save Some Money Let's Just Get Rid Of The Court'*, TALKING POINTS MEMO (June 26, 2015), <http://talkingpointsmemo.com/livewire/bobby-jindal-get-rid-of-scotus>.

³⁸ Associated Press, *Huckabee says supreme court 'unwrote laws of nature' on same-sex marriage*, THE GUARDIAN (June 27, 2015), <http://www.theguardian.com/us-news/2015/jun/27/mike-huckabee-supreme-court-gay-marriage>.

³⁹ Daniel Strauss, *Scott Walker calls for Constitutional amendment to let states define marriage*, POLITICO (June 26, 2015), <http://www.politico.com/story/2015/06/scott-walker-ban-gay-marriage-constitutional-amendment-119470.html>;

⁴⁰ Katie Zezima, *Ted Cruz calls for judicial retention elections for Supreme Court justices*, WASHINGTON POST (June 27, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/06/27/ted-cruz-calls-for-judicial-retention-elections-for-supreme-court-justices/>.

⁴¹ See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1986-1987).

⁴² Room for Debate, *Is the Supreme Court Too Powerful?*, NY TIMES (July 6, 2015), <http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful>.

⁴³ Larry Kramer, *The Supreme Court's Power Has Become Excessive*, NY TIMES (July 6, 2015); Richard Thompson Ford, *On Rights, the Supreme Court Has Done More Harm Than Good*, NY TIMES (July 6, 2015).

⁴⁴ Ryan Anderson, *Symposium: Judicial activism on marriage causes harm: What does the future hold?*, SCOTUSBLOG (June 26, 2015), <http://www.scotusblog.com/2015/06/symposium-ryan-anderson/>; David Upham, *Symposium: A tremendous defeat for "We the People" and our posterity*, SCOTUSBLOG (June 26, 2015), <http://www.scotusblog.com/2015/06/symposium-a-tremendous-defeat-for-we-the-people-and-our-posterity/>.

⁴⁵ Mikołaj Barczentewicz, *The US Same-Sex Marriage Decision: Unconstitutional Constitutional Change?*, I-CONNECT (July 8, 2015), <http://www.iconnectblog.com/2015/07/the-us-same-sex-marriage-decision-unconstitutional-constitutional-change/>.

High court judges within the American judiciary have also criticized the *Obergefell* decision. A Louisiana Supreme Court Justice called it “horrific,” labelling it “a super-legislative imposition,” and a fellow LA Supreme Court Justice noted that the definition of marriage “cannot be changed by legalisms.”⁴⁶ This all happened after the end of the most recent term. Yet a few months before the *Obergefell* decision, in a bold and at times meandering 148-page decision the Alabama Supreme Court publicly questioned whether the doctrine of federal supremacy should remain part of the American Constitution.⁴⁷ Thus merely over the past few years a range of citizens have been thinking and speaking about the Court—and its place within American society—in remarkably different terms than previously.

The Court’s Own Denunciations

But perhaps some of the harshest rhetoric—and analysis regarding the institution’s proper role in American democracy—has come from the justices themselves. This was abundantly evident in the latest term. Justice Scalia begins his *King v. Burwell* dissent by calling the majority’s opinion “absurd”⁴⁸ and “indefensible.”⁴⁹ He goes on to dramatically proclaim that “words no longer have meaning,”⁵⁰ and he classifies the majority’s decision as “unheard of,”⁵¹ “jiggery-pokery”⁵² “pure applesauce,”⁵³ and “self-defeating.”⁵⁴ Justice Scalia ends his dissent with noticeably ominous language, remarking that the two ACA cases, *King v. Burwell* and *NFIB v. Sebelius*, “will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.”⁵⁵ While these decisions did not necessarily do this, the acknowledgement in Scalia’s dissent certainly does so. And although this line did not get as much play in the media as the Justice’s other decadent language, it casts a gloomy shadow over the Court, acknowledging it as an overtly political institution.

The *Obergefell* decision brought forth more disparaging rhetoric amongst the Justices. In his dissent Chief Judge Roberts prominently noted that the decision “was an act of will, not of legal judgment,” and boldly asked of his colleagues, “just who do we think we

⁴⁶ Mark Joseph Stern, *Louisiana Supreme Court Justices Blast “Horrific” Marriage Equality Decision*, SLATE (July 8, 2015), http://www.slate.com/blogs/outward/2015/07/08/louisiana_supreme_court_justices_blast_horrific_marriage_equality_ruling.html.

⁴⁷ Mark Joseph Stern, *Alabama Supreme Court Throws Tantrum, Defies Federal Judge, Halts Gay Marriages*, SLATE (March 4, 2015), http://www.slate.com/blogs/outward/2015/03/04/alabama_supreme_court_defies_federal_judge_on_gay_marriage.html.

⁴⁸ *King v. Burwell*, 576 U.S. ____ (2015), Scalia, J., dissenting, at 1 (“The Court holds that when the Patient Protection and Affordable Care Act says “Exchange established by the State” it means “Exchange established by the State or the Federal Government.” That is of course quite absurd, and the Court’s 21 pages of explanation make it no less so.”)

⁴⁹ *Id.* at 12.

⁵⁰ *Id.* at 2 (“But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.”)

⁵¹ *Id.* at 3.

⁵² *Id.* at 8.

⁵³ *Id.* at 10.

⁵⁴ *Id.* at 16.

⁵⁵ *Id.* at 21.

are?”⁵⁶ In relation to one section of the majority’s decision, Justice Roberts notes, “At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.”⁵⁷ In a separate dissent Scalia calls the opinion a “threat to American democracy,”⁵⁸ and a “naked judicial claim to legislative—indeed, super-legislative—power.”⁵⁹ Justice Thomas is none softer, stating that the decision is a “distortion of our Constitution,”⁶⁰ and at odds “with the principles upon which our nation was built.”⁶¹ Finally, Justice Alito writes that the decision is “is far beyond the outer reaches of this Court’s authority,”⁶² asserting that it “usurps the constitutional right of the people,” and will “have a fundamental effect on this Court and its ability to uphold the rule of law.”⁶³ All of these accusations are undeniably serious and constitutionally significant, especially as regards the proper role of the judiciary in constitutional review and, ultimately, in American democracy.

Well known for being the most sarcastic justice,⁶⁴ such bold vitriol is expected from Justice Scalia.⁶⁵ But such sweeping and divisive rhetoric is not accustomed to the other justices. Given the increasing disparagement of the institution, these attacks will receive more attention than ever. This compromises the Court on two levels. First, the flamboyant attacks Justice Scalia employs in his ACA dissent, in addition to the many he’s employed throughout the years, makes the Court’s work look insignificant or trivial.⁶⁶ Moreover, the harshness of the language used in the *Obergefell* dissents taint the Court’s authentic constitutional discourse, making it appear abundantly and overtly political. This type of internal disparagement will only deepen external ridicule of the institution.

Conclusion

Of course the Court has been criticized and put under significant pressure during earlier periods of its existence. The Reconstruction Era, FDR’s New Deal Era (including his infamous “court packing” plan) and the endless condemnation of the Warren Court during the Civil Rights Movement are three such examples. The institution survived these episodes, however, and it could be argued that the power of the Court has only increased

⁵⁶ *Obergefell v. Hodges*, 576 U.S. ____ (2015), Roberts, J. dissenting, at 3.

⁵⁷ *Id.* at 19.

⁵⁸ *Obergefell v. Hodges*, 576 U.S. ____ (2015), Scalia, A. dissenting, at 1.

⁵⁹ *Id.* at 5. (“A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.”) And let us not forget perhaps his most whimsical line of the dissent (at 8), that “The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”

⁶⁰ *Obergefell v. Hodges*, 576 U.S. ____ (2015), Thomas, C. dissenting, at 2. “Distort” or “distortion” is used at many points in Thomas’s dissent.

⁶¹ *Id.* at 1.

⁶² *Obergefell v. Hodges*, 576 U.S. ____ (2015), Alito, J. dissenting, at 5.

⁶³ *Id.* at 7.

⁶⁴ Adam Liptak, *Scalia Lands at Top of Sarcasm Index of Justices. Shocking.*, NY TIMES (January 19, 2015), <http://nyti.ms/1yC4grT>.

⁶⁵ Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 215 (2015).

⁶⁶ See, e.g., THE DAILY SHOW, *The Human Dissentipede* (June 29, 2015), <http://thedailyshow.cc.com/videos/fnb7mg/the-human-dissentipede>; Katy Steinmetz, *This Is What ‘Jiggery-Pokery’ Means*, TIME (25 June 2015), <http://time.com/3936188/scalia-jiggery-pokery/>.

(forthcoming) *Wisconsin Law Review Online* (2015) – please do not cite or circulate without author permission

since these tumultuous periods.⁶⁷ Nevertheless, by intervening into the political process in such a distinct and resolute manner during recent years, the Court has absolutely brought this increased disparagement upon itself. After all, the amplified vilification and questioning of the institution’s reasoning and proper democratic role comes not only from the media and the other sources listed above, but through the Court’s own decisions. Decisions that some—both within and outside the judiciary—are taking less seriously.

⁶⁷ Whittington, *supra* note 9, at 293 (“The reconstructive challenge to judicial authority plants the seeds for the future resurgence of the courts, however. Far from subverting the foundations of American constitutionalism, these episodes of reconstructive politics have served to strengthen and renew them.”)