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Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy

Dr Brian Christopher Jones, *Liverpool Hope University, UK*



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**DISPARAGING THE SUPREME COURT, PART II:
QUESTIONING INSTITUTIONAL LEGITIMACY**

BRIAN CHRISTOPHER JONES*

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INTRODUCTION

For all intents and purposes, it now appears time to welcome the Supreme Court to an unrelenting new world (to them) of intense and widespread disparagement. For the Court, drastic differences have taken place in recent years: no longer are talks at local colleges and universities immune from publicity;¹ no longer are holiday trips matters of utmost privacy;² no longer are significant textual changes made to post-announcement decisions exempt from scrutiny;³ no longer are changes of opinion on pending cases protected by confidentiality conventions;⁴ no longer are unsigned opinions actually “anonymous”;⁵ no longer is it just

* PhD, Lecturer in Public Law, Department of Law, Liverpool Hope University. The author can be reached at: brianchristopherjones@gmail.com.

1. Brian Bakst, *Scalia: ‘Wouldn’t surprise me’ if death penalty struck down*, ASSOCIATED PRESS (Oct. 20, 2015), <http://www.seattletimes.com/nation-world/scalia-wouldnt-surprise-me-if-death-penalty-struck-down/>. See also, Supreme Court website, *Speeches*, <http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx>. Although these are only released on the website “at the discretion of each Justice.”

2. Garance Franke-Ruta, *Justice Kagan and Justice Scalia Are Hunting Buddies—Really*, ATLANTIC (June 30, 2013), <http://www.theatlantic.com/politics/archive/2013/06/justice-kagan-and-justice-scalia-are-hunting-buddies-really/277401/>.

3. Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions: Bringing transparency to the Court's revisions*, 128 HARV. L. REV. 540 (2014).

4. See the controversy surrounding *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012), 132 S.Ct 2566. Such instances have been rare throughout the years, but are usually found

5. Adreinne LaFrance, *Robots Could Make the Supreme Court More Transparent*, ATLANTIC (Jan. 20, 2016),

a few learned and professional journalists and legal academics that report on and analyze the Court;⁶ and most importantly, no longer does the American public—including journalists, academics, lawyers and others—misunderstand or revere the Court so much that they are afraid to criticize and disparage the institution and its Justices.⁷ While analysis of the Court in the 20th century provided a realistic view of the extraordinary legal and political power of the institution,⁸ analysis in the 21st century appears to trending towards a de-formalization of the Court; which, perhaps unsurprisingly, has led to increased and widespread disparagement of the institution. This essay builds on my earlier work regarding disparagement and the Court,⁹ and hopes to provide further insights into the breadth of what the Court is now up against—especially as regards its institutional legitimacy.

The Supreme Court currently lumbers towards another politically charged term, with rulings due on abortion clinics, affirmative action, the death penalty, life sentencing for juveniles, an incursion into the meaning of “one person one vote,”¹⁰ and most recently, the acceptance of a case analyzing President Obama’s executive action on immigration.¹¹ The controversy surrounding the cases make it little different than any other year, however this unabashedly political docket comes on the heels of one of the most controversial terms in recent memory. 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, but in the way the American public, including journalists and others, now thinks and speaks about the institution.

http://www.theatlantic.com/technology/archive/2016/01/one-step-closer-to-a-robot-supreme-court/424800/?utm_source=SFFB.

6. Molly McDonough, *What is the State of the Legal Blogosphere?* ABA JOURNAL (Dec. 1, 2015),

http://www.abajournal.com/magazine/article/the_state_of_the_legal_blogosphere.

7. Richard Davis, *The Symbiotic Relationship Between the U.S. Supreme Court and the Press*, in RICHARD DAVIS (ed), *COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE* (2014), at 4-5.

8. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986), among many other works.

9. Brian Christopher Jones, *Disparaging the Supreme Court: Is SCOTUS in Serious Trouble?* WIS. L. REV. FORWARD 53 (2015).

10. Adam Liptak, *Supreme Court Agrees to Settle Meaning of ‘One Person One Vote’*, N.Y. TIMES (May 26, 2015), <http://nyti.ms/1BnxZD9>; Jacob Shamsian, *The 5 most controversial Supreme Court fights coming up*, BUSINESS INSIDER (Sept. 4, 2015), <http://www.businessinsider.com/5-controversial-supreme-court-fights-this-fall-2015-9?IR=T>.

11. Adam Liptak & Michael D. Shear, *Supreme Court to Hear Challenge to Obama Immigration Actions*, N.Y. TIMES (Jan. 19, 2016), <http://nyti.ms/1U9m59P>.

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Key to this new assessment is a widespread, increasing criticism; the institution and its members are being disparaged by a larger and more sophisticated audience than ever before.¹² As Richard Davis notes, “the press has undergone an evolution in its approach to the Court. Reporters have become less willing to view the justices as above political scrutiny, personalize Court coverage, and cover the Court with less formality than in the past.”¹³ Additionally, Strickler has found that the volume and content of Court coverage has changed over the past two decades.¹⁴ Tracking television and newspaper coverage of two major cases, *Casey*¹⁵ and *Sebelious*,¹⁶ he found that coverage of the Court has increased since 1992—at least in regard to these two major cases—and also that quotations from the arguments or opinions in stories had decreased, giving way to reactionary quotes by politicians and others.¹⁷ But change has not just arisen in the press. Indeed, frustration with the Court among the citizenry may now have reached a boiling point.¹⁸ Conservatives remain angry with the Court because of the health care¹⁹ and gay marriage²⁰ decisions, and suffice it to say that liberals are also unhappy

12. See, e.g., ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); STEPHEN E. GOTTLIEB, *UNFIT FOR DEMOCRACY: THE ROBERTS COURT AND THE BREAKDOWN OF AMERICAN POLITICS* (2016); IAN MILLHISER, *INJUSTICES: THE SUPREME COURT’S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED* (2015); ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT, AND ITS JUSTICES ARE NOT JUDGES* (2012); Brian Christopher Jones, *Erwin Chemerinsky: The Case Against the Supreme Court*, 42 J.L. & SOC’Y 464 (2015) (book review).

13. DAVIS, *supra* note 7 at 4. See also, David G. Savage, *How Traditional Journalists Cover the Court in the Age of New Media*, in DAVIS, *supra* note 7, at 175 (“Compared to the mid-1980s, when I began covering the Court, the news coverage these days is richer, deeper, more varied, but most of all, faster.”)

14. Vincent James Strickler, *The Supreme Court and New Media Technologies*, in DAVIS, *supra* note 7, at 63-65.

15. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

16. *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012).

17. Strickler, *supra* note 14, at 64-65.

18. October 2015 figures from Gallup reveal that a new high of 50% of respondents now disapprove of the way the Court is handling its job. Justin McCarthy, *Disapproval of Supreme Court Edges to New High*, GALLUP (Oct. 2, 2015), <http://www.gallup.com/poll/185972/disapproval-supreme-court-edges-new-high.aspx>. This is coming on the heels of July 2015 figures that showed Republicans’ view of the Court plummeted to a fifteen-year low, standing at 18%. 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>. Conversely, Democratic views of the institution surged to 76%. *Id.* However, it is worth noting that the wide party approval gap eased a bit in the October figures (Republicans: 26%, Democrats: 67%). McCarthy, *supra*.

19. *King v. Burwell*, No. 14–114 (U.S. June 25, 2015).

20. *Obergefell v. Hodges*, No. 14–556 (U.S. June 26, 2015).

with its work.²¹ 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 text,²² 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.²³

However, the Court's troubles go beyond legitimacy issues: since its powers of constitutional review are judicially rather than constitutionally constructed,²⁴ if the Court loses enough legitimacy such powers could be modified, perhaps significantly. As has been widely acknowledged, the power of the Court's judgments “depend on the acceptance by other political players—the executive, Congress, and the public.”²⁵ In fact 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 shifted over time.”²⁶ Indeed, “[j]udicial authority can be successfully challenged,”²⁷ and this is especially true from a presidential perspective.²⁸ Given the

21. 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, 7:28 PM), <http://www.politico.com/story/2015/06/supreme-courts-liberal-admirers-get-reality-check-119567>; Linda Greenhouse, *The Illusion of a Liberal Supreme Court*, N.Y. TIMES (July 9, 2015), <http://nyti.ms/1HhIDjB>.

22. U.S. CONST. art. I.

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

24. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

25. DAVIS, *supra* note 7, at 5.

26. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 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.”).

27. *Id.* at 286.

28. *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 cope 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

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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.²⁹ 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 Court interpretation.³⁰ In fact, as covered below, this may already be happening in relation to the Court’s same-sex marriage decisions.

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.³¹ The US Constitution fails in this regard;³² hence the need for the judiciary to establish this power in *Marbury v. Madison*.³³ 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 corporate speech rights,³⁴ hostility towards the institution will only increase. Without question, the Court should indeed worry about its constitutional future.

I. OFF THE HOOK?

While disparagement of the Court is more widespread, the institution has often received unequal and less severe treatment than the

and constitutional interpretation, but the scope of judicial authority is a recurring theme in the history of the presidency.” (footnote omitted)).

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

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

31. See, e.g., GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW) [CONSTITUTION] art. 93 (Ger.); MINGUO XIANFA [CONSTITUTION] art. 78 (2005) (Taiwan) (“The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and ordinances.”); *id.* at art. 171 (“Laws that contravene the Constitution shall be null and void. . . . In case of doubt as to whether a law contravenes the Constitution, the matter shall be settled by interpretation of the Judicial Yuan.”); *id.* at art. 173 (“The Constitution shall be interpreted by the Judicial Yuan.”).

32. See U.S. CONST. art. III.

33. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

34. All things that Chemerinsky points out in his recent case against the Court. CHEMERINSKY, *supra* note 12.

other branches, notably Congress, regarding similar issues. This phenomenon has been noted in previous works about the Court,³⁵ and in more recent ones as well.³⁶ The Court, in large part because of its own institutional considerations and in large part because of hesitation by journalists and others, has failed to receive the same scrutiny as the other branches.³⁷

An interesting example can be found in reactions to the productivity of two branches: Congress and the Court. Just as it is Congress's job to pass laws, it is the Court's job to maintain the uniformity of federal law, which it does by issuing decisions. But the difference in public reaction to the 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" (*The LA Times*);³⁸ "took incompetence to a higher level" (*The Daily Beast*);³⁹ "clowns" (*The Washington Times*);⁴⁰ and "least effective and most disliked" (*Business Insider*).⁴¹ Unsurprisingly, the 113th Congress received similar condemnation, receiving labels such as "worst Congress ever" (*The Week*);⁴² "[t]errible" (*The Huffington Post*);⁴³ and "set[] a

35. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

36. See, e.g., DAVIS, *supra* note 7; JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008).

37. Tyler Johnson, *How and Why the Supreme Court Remains Uncovered*, in DAVIS, *supra* note 7, at 23-35.

38. Harold Maass, *10 Insulting Labels for the Outgoing 112th Congress*, *THE WEEK* (Jan. 3, 2013), <http://theweek.com/articles/469058/10-insulting-labels-outgoing-112th-congress> (quoting David Horsey, *Derelict 112th Congress Sets New Record for Low Achievement*, *L.A. TIMES* (Jan. 3, 2013, 5:00 AM), <http://www.latimes.com/opinion/topoftheticket/la-na-tt-derelict-congress-20130102-story.html>).

39. *Id.* (quoting Howard Kurtz, *Why the 112th Congress Was the Worst, and the Next One Won't Be Much Better*, *DAILY BEAST* (Jan. 3, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/01/03/why-the-112th-congress-was-the-worst-and-the-next-one-won-t-be-much-better.html>).

40. *Id.* (quoting Charles Hurt, Opinion, *Hurt: Congress Doesn't Mend Its Old Ways*, *WASH. TIMES* (Jan. 3, 2013), <http://www.washingtontimes.com/news/2013/jan/1/hurt-congress-doesnt-mend-its-old-ways/>).

41. *Id.* (quoting Walter Hickey, *The 112th Congress Was the Least Effective and Most Disliked in History*, *BUS. INSIDER* (Dec. 31, 2012, 5:56 PM), <http://www.businessinsider.com/congress-unpopular-ineffective-2012-12>).

42. E.g., Jon Terbush, *Confirmed: This Is the Worst Congress Ever*, *THE WEEK* (Dec. 26, 2013), <http://theweek.com/articles/453744/confirmed-worst-congress-ever>; Jonathan Topaz, 'Worst Congress Ever,' *by the Numbers*, *POLITICO* (Dec. 17, 2014, 8:04 PM), <http://www.politico.com/story/2014/12/congress-numbers-113658>.

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standard for inertia” (*U.S. News and World Report*).⁴⁴ 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, a trend which continued into recent years.⁴⁵ Yet little hateful or extreme language about the institution emerged. And for those who 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.”⁴⁶ A 2013 *Washington Post* piece even described the Court as “busy looking for cases—but finding fewer than usual.”⁴⁷ Those phrases are a 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,”⁴⁸ 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.”⁴⁹ Ultimately, he calls the Court’s docket a “scarce, indeed precious national resource,”⁵⁰ and suggests that it may be time for SCOTUS to “put its shoulder to the wheel and work harder.”⁵¹ Recognizing Starr’s point about a lack of uniformity, in 2012, Owens and Simon wrote that “legal ambiguity may be rampant.”⁵² They further

43. Alissa Scheller & Katy Hall, *These Charts Show Just How Good Congress Was at Being Terrible in 2013*, HUFFINGTON POST (Dec. 26, 2013, 2:43 PM), http://www.huffingtonpost.com/2013/12/23/congress-2013_n_4479851.html.

44. Susan Milligan, *Setting a Standard for Inertia*, U.S. NEWS & WORLD REP. (Dec. 22, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/12/22/113th-congress-sets-standard-for-inertia>.

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

46. Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), <http://nyti.ms/1L5iG6x>.

47. Robert Barnes, *Supreme Court Busy Looking for Cases — but Finding Fewer than Usual*, WASH. POST (Dec. 1, 2013), <http://wapo.st/1fXnO1k>.

48. Kenneth W. Star, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1365–66 (2006).

49. *Id.* at 1366 (2006).

50. *Id.* at 1385.

51. *Id.*

52. Owens & Simon, *supra* note 45, at 1223–24.

note that a depleted docket could leave the institution “[o]ut of [t]ouch”⁵³ or perhaps even “[d]iminish the Court’s [l]egitimacy,”⁵⁴ remarking that “[f]ailure by the Court to send clearer signals could have damaging long-term consequences for the Supreme Court as an institution.”⁵⁵ 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.

II. EXTERNAL DISPARAGEMENT: CHANGING TIMES

While the Court has received favorable treatment compared to the other branches, books such as *The Brethren* ushered in new techniques regarding how journalists understood and covered the institution.⁵⁶ This newfound approach evolved over the next few decades—merging with the Internet era—to produce a level of sophisticated (and unsophisticated) coverage the Court had never witnessed. Not only does it have to contend with traditional press coverage, as the press area inside the courtroom has been enlarged to accommodate more journalists,⁵⁷ but it is now subject to widespread analysis and criticism through social media and blogs.⁵⁸ Blogs have probably made the most significant contribution to covering the Court in recent years. While some have lamented the death of the legal blogosphere, it indeed remains strong (and some say, growing).⁵⁹ In December 2015 the ABA reported that although some of the major blogs they enjoyed had gone on hiatus or shut down, “law blogging appears to be flourishing.”⁶⁰ They note that sites such as “SCOTUSblog” and “Above the Law” have never been as popular, and that almost 26% of law firms are actively engaged in blogging.⁶¹ Traditional journalists have also readily admitted that they

53. *Id.* at 1254–56 (“[T]he 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.”).

54. *Id.* at 1260–63 (“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.”).

55. *Id.* at 1285.

56. DAVIS, *supra* note 7, at 10. (“Following Woodward’s lead, some other reporters began to view the Court as an institution full of individuals with political goals”.)

57. DAVIS, *supra* note 7, at 13.

58. Strickler, *supra* note 14, at 78.

59. McDonough, *supra* note 6.

60. *Id.*

61. *Id.*

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follow the legal blogs and consider them good sources of information.⁶² The proliferation of blogs and social media related to the Court has occurred in conjunction with a wider availability of academic literature on the Internet through open-access websites like SSRN and Bepress.⁶³ The widespread availability of social media, legal blogs, and access to academic commentary has led to a reformulation of where people get information about the Court. Ultimately, it is quite evident that although the Justices have gone out of their way to avoid new media,⁶⁴ new media is certainly not avoiding them.

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,”⁶⁵ Elizabeth Warren said they were heading in “a very scary direction,”⁶⁶ and a sitting federal judge proclaimed it is time for the Court to “stfu” (shut the f**k up).⁶⁷ 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,⁶⁸ while Rachel Maddow employed hand puppets.⁶⁹ Justice Steven Breyer even concernedly mused at the American Law Institute that the Justices were being referred to as “junior varsity politicians,”⁷⁰ 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.”⁷¹ She’s right. But this chorus of discontent predominantly came from the left.

62. David G. Savage, *How Traditional Journalists Cover the Court in the New Media Age*, in DAVIS, *supra* note 7, at 176.

63. See, e.g., SSRN (www.ssrn.com), and Bepress (works.bepress.com).

64. Strickler, *supra* note 14, at 70.

65. Alex Lazar, *Seth Rogen Calls Hobby Lobby and Supreme Court Justices ‘A**holes,’* HUFFINGTON POST (July 1, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/07/01/seth-rogen-hobby-lobby_n_5548421.html.

66. Elizabeth Warren, TWITTER (June 30, 2014, 8:49 AM), <https://twitter.com/elizabethformastatus/483638535296409601> (“The current Supreme Court has headed in a very scary direction #scotus #hobbylobby”).

67. Richard G. Kopf, *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/>.

68. *Last Week Tonight with John Oliver: Real Animals, Fake Paws Footage*, YOUTUBE (Oct. 19, 2014), <https://youtu.be/tug71xZL7yc>.

69. Josh Duboff, *Maddow Mocks Supreme Court’s Lack of Tech Savvy via Puppetry*, N.Y. MAG. (Apr. 22, 2010, 1:02 AM), http://nymag.com/daily/intelligencer/2010/04/maddow_mock_supreme_courts_la.html.

70. Linda Greenhouse, Op-Ed., *Polar Vision*, N.Y. TIMES (May 28, 2014), <http://nyti.ms/1gBHU2O>.

71. *Id.*

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,⁷² while Mike Huckabee declared that the Court “unwr[o]te the laws of nature”⁷³ Governor Scott Walker suggested passing a constitutional amendment to let states decide the definition of marriage,⁷⁴ and, not to be outdone, Senator Ted Cruz proposed an amendment for SCOTUS retention elections.⁷⁵ 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.⁷⁶

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 asking “Is the Supreme Court Too Powerful?”⁷⁷ Some of the writers answered affirmatively to that question.⁷⁸ SCOTUSblog held a similar forum,⁷⁹ and a couple of writers made strong cases against the processes of change brought about by the *Obergefell v. Hodges*⁸⁰ ruling.⁸¹ Even prominent

72. Catherine Thompson, *Jindal: ‘If We Want To Save Some Money Let’s Just Get Rid Of The Court,’* TALKING POINTS MEMO (June 26, 2015, 2:10 PM), <http://talkingpointsmemo.com/livewire/bobby-jindal-get-rid-of-scotus>.

73. Kristen Wyatt, *GOP WH Hopefuls Deride Gay Marriage Ruling*, ASSOCIATED PRESS (June 28, 2015, 12:02 AM), <http://apne.ws/1IlpP4W>.

74. Daniel Strauss, *Walker Calls for Constitutional Amendment to Let States Define Marriage*, POLITICO (June 26, 2015, 11:55 AM), <http://www.politico.com/story/2015/06/scott-walker-ban-gay-marriage-constitutional-amendment-119470.html>.

75. Katie Zezima, *Ted Cruz Calls for Judicial Retention Elections for Supreme Court Justices*, WASH. POST (June 27, 2015), <http://wapo.st/1JdCnd9>.

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

77. *Is the Supreme Court Too Powerful?*, N.Y. TIMES (July 6, 2015), <http://nyti.ms/1KHTg37>.

78. Larry Kramer, *The Supreme Court’s Power Has Become Excessive*, N.Y. TIMES (July 6, 2015, 5:05 PM), <http://nyti.ms/1Hdptvc>; Richard Thompson Ford, *On Rights, the Supreme Court Has Done More Harm than Good*, N.Y. TIMES (July 6, 2015), <http://nyti.ms/1Kkk6aE>.

79. *Special Feature: Obergefell v. Hodges Symposium*, SCOTUSBLOG, <http://www.scotusblog.com/category/special-features/same-sex-marriage/same-sex-marriage-post-windsor/obergefell-v-hodges/> (last visited Oct. 6, 2015).

80. *Obergefell v. Hodges*, No. 14–556 (U.S. June 26, 2015).

81. Ryan Anderson, *Symposium: Judicial Activism on Marriage Causes Harm*, SCOTUSBLOG (June 26, 2015, 4:28 PM), <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, 4:26 PM),

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academic blogs like I-CONnect (the *International Journal of Constitutional Law*'s blog) have published material that questions whether the ruling was “unconstitutional” change.⁸²

High-court judges within the American judiciary have also criticized the *Obergefell* decision. A Louisiana Supreme Court justice called it “horrific,”⁸³ labelling it “a super-legislative imposition,”⁸⁴ and a fellow Louisiana Supreme Court justice noted that the “definition [of marriage] cannot be changed by legalisms.”⁸⁵ 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.⁸⁶ Just recently the Chief Justice of the Alabama Supreme Court, Roy S. Moore, issued an Administrative Order to halt same-sex marriages from being administered in his state, therefore directly and forcefully challenging the Court.⁸⁷ 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.

III. INTERNAL DISPARAGEMENT: 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 previous term. Justice Antonin Scalia begins his *King v. Burwell*⁸⁸ dissent by calling the

<http://www.scotusblog.com/2015/06/symposium-a-tremendous-defeat-for-we-the-people-and-our-posterity/>.

82. 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/>.

83. *Costanza v. Caldwell*, No. 2014-CA-2090, slip op. at 1 (La. July 7, 2015) (Knoll, J., concurring), *quoted in* Mark Joseph Stern, *Louisiana Supreme Court Justices Blast “Horrific” Marriage Equality Decision*, SLATE (July 8, 2015, 1:28 PM), http://www.slate.com/blogs/outward/2015/07/08/louisiana_supreme_court_justices_blast_horrific_marriage_equality_ruling.html.

84. *Id.* (Knoll, J., concurring).

85. *Id.*, slip op. at 1 (Hughes, J., dissenting).

86. *Alabama ex rel. Ala. Policy Inst.*, No. 1140460 (Ala. Mar. 3, 2015), *discussed in* Mark Joseph Stern, *Alabama Supreme Court Throws Tantrum, Defies Federal Judge, Halts Gay Marriages*, SLATE (Mar. 4, 2015, 8:57 AM), http://www.slate.com/blogs/outward/2015/03/04/alabama_supreme_court_defies_federal_judge_on_gay_marriage.html.

87. Alan Blinder, *Top Alabama Judge Orders Halt to Same-Sex Marriage Licenses*, N.Y. TIMES (Jan. 6, 2016), <http://nyti.ms/1mCQS4s>.

88. *King v. Burwell*, No. 14–114 (U.S. June 25, 2015).

majority’s opinion “absurd”⁸⁹ and “indefensible.”⁹⁰ He goes on to dramatically proclaim, “Words no longer have meaning,”⁹¹ and classifies the majority’s decision as “unheard of,”⁹² “jiggery-pokery,”⁹³ “pure applesauce,”⁹⁴ and “self-defeating.”⁹⁵ Scalia ends his dissent with noticeably ominous language, remarking that the two Affordable Care Act cases, *King v. Burwell* and *NFIB v. Sebelius*,⁹⁶ “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.”⁹⁷ While these decisions did not necessarily do this, the formal 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 Justice John Roberts prominently noted that the decision was “an act of will, not of legal judgment,”⁹⁸ and boldly asked of his colleagues, “[j]ust who do we think we are?”⁹⁹ In relation to one section of the majority’s decision, 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.”¹⁰⁰ In a separate dissent, Scalia calls the opinion a “threat to American democracy,”¹⁰¹ and a “naked judicial claim to legislative—indeed, *super*-legislative—power.”¹⁰² Justice Clarence Thomas is none

89. *Id.*, slip op. at 1 (Scalia, J., dissenting) (“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.”).

90. *Id.* at 12 (Scalia, J., dissenting).

91. *Id.* at 2 (Scalia, J., dissenting). “But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.” *Id.* at 2–3 (Scalia, J., dissenting).

92. *Id.* at 3 (Scalia, J., dissenting).

93. *Id.* at 8 (Scalia, J., dissenting).

94. *Id.* at 10 (Scalia, J., dissenting).

95. *Id.* at 16 (Scalia, J., dissenting).

96. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

97. *King*, No. 14–114, slip op. at 21 (Scalia, J., dissenting).

98. *Obergefell v. Hodges*, No. 14–556, slip op. at 3 (U.S. June 26, 2015) (Roberts, C.J., dissenting).

99. *Id.* (Roberts, C.J., dissenting).

100. *Id.* at 19. (Roberts, C.J., dissenting).

101. *Id.*, slip op. at 1 (Scalia, J., dissenting).

102. *Id.* at 5 (Scalia, J., dissenting) (“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: “The Supreme Court of the United States has descended from the disciplined

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softer, stating that the decision is a “distortion of our Constitution,”¹⁰³ and at odds “with the principles upon which our Nation was built.”¹⁰⁴ Finally, Justice Samuel Alito writes that the decision “is far beyond the outer reaches of this Court’s authority,”¹⁰⁵ claiming that it “usurps the constitutional right of the people,”¹⁰⁶ and will “have a fundamental effect on this Court and its ability to uphold the rule of law.”¹⁰⁷ 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,¹⁰⁸ such bold vitriol is expected from Scalia.¹⁰⁹ 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 Scalia employs in his *King* dissent, in addition to the many he has employed throughout the years, makes the Court’s work look insignificant or trivial.¹¹⁰ Moreover, the harshness of the language used in the *Obergefell* dissents taints 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.

IV. QUESTIONING INSTITUTIONAL LEGITIMACY

During the early years of the Supreme Court many chief justices were hesitant to allow dissenting opinions, as they thought these would take away from the legitimacy and certainty of the law.¹¹¹ While contemporary democracies recognize the importance of such valuable constitutional dialogue, the practicalities of these early notions remain an

legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.” *Id.* at 7 n.22 (Scalia, J., dissenting).

103. *Id.*, slip op. at 2 (Thomas, J., dissenting). “Distort” or “distortion” is used at many points in Thomas’s dissent. *Id.* at 2, 18 (Thomas, J., dissenting).

104. *Id.* at 1 (Thomas, J., dissenting).

105. *Id.*, slip op. at 5 (Alito, J., dissenting).

106. *Id.* at 6 (Alito, J., dissenting).

107. *Id.* at 7 (Alito, J., dissenting).

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

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

110. See, e.g., Katy Steinmetz, *This Is What ‘Jiggery-Pokery’ Means*, TIME (25 June 2015), <http://ti.me/1SNUIYk>; *The Human Dissentpede*, THE DAILY SHOW WITH JON STEWART (June 29, 2015), <http://on.cc.com/1KseZuM>.

111. MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT’S HISTORY AND THE NATION’S CONSTITUTIONAL DIALOGUE*, 9-12 (2015).

altogether valid concern: most opinions are not unanimous, and many significant decisions land 5-4. Yet it is difficult to imagine that the Founders could have foreseen the era of “body slam” dissents some members of the Court now routinely engage in.¹¹² One of the most striking aspects of the external and internal disparagement material above is that such criticism does not merely relate to specific cases, interpretative methods, or particular reasoning, but to the *legitimacy of Supreme Court constitutional review on the whole*: the Justices, journalists, academics and others are openly questioning Court’s role within American democracy and its right to intervene in the democratic process. Unsurprisingly, this inquiry has been passed down to the American public, including journalists, academics, and candidates for public office.¹¹³

The most confrontational comments regarding the legitimacy of the Court have come from Republican presidential candidates, who currently see the Court—or aspects of it—high on their list of problems. Much of this talk came to a head in the September 2015 CNN Republican debate, which posed an interesting question: whether or not George W. Bush made a mistake appointing John Roberts as Chief Justice? Although it was asked to Jeb Bush, the harshest response came from Sen. Ted Cruz, who said, Roberts was “a good enough lawyer that he knows in these Obamacare cases, he changed the statute, he changed the law, in order to force that failed law on millions of Americans for a political outcome.”¹¹⁴ He further noted that if two different people were nominated, then Obamacare would not be on the books, and same-sex marriage would still be illegal.¹¹⁵ This response, and others like them, are especially hazardous for the Court in terms of its institutional legitimacy; something that, ironically, Roberts was attempting to protect by switching his vote in favor of the law.¹¹⁶ To have (Harvard Law educated) presidential candidates attesting that different nominees would have produced different results certainly does little to mask the Court’s

112. Dahlia Lithwick, ‘*Dissent and the Supreme Court*,’ by Melvin I. Urofsky, NT TIMES (October 21, 2015), <http://nyti.ms/1kpH5xa>.

113. See, e.g., Ramesh Ponnuru, *Supreme Court & Gay Marriage: Judicial Supremacy Isn’t Constitutional Supremacy*, NATIONAL REVIEW (Sept. 10, 2015); Sarah Smith, *Huckabee slams ‘judicial supremacy’*, POLITICO (June 19, 2014), <http://www.politico.com/story/2014/06/mike-huckabee-march-for-marriage-gay-marriage-supreme-court-108085>.

114. Ryan Teague Beckwith, *Transcript: Read the Full Text of the Second Republican Debate*, TIME (Sept. 16, 2015), <http://time.com/4037239/second-republican-debate-transcript-cnn/>.

115. *Id.*

116. David L. Franklin, *Why Did Roberts Do It?*, SLATE (June 28, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_bro_ke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html.

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political nature. Furthermore, such comments rebrand the Court and its members from independent judges with interpretive differences into glorified party politicians.

But that was not the end of the matter. Governor Bobby Jindal added, “Justice Roberts twice rewrote the law to save Obamacare, the biggest expansion of government, creating a new entitlement when we can't afford the government we've got today.”¹¹⁷ Cruz struck again here, noting, “We have an out of control Court...If I'm elected president, every every [sic] single Supreme Court justice will faithfully follow the law and will not act like philosopher-kings.”¹¹⁸ Indeed, this has not been the only prominent occasion where the Chief Justice has drawn the scorn of Republican presidential candidates.¹¹⁹ Mike Huckabee has routinely gone even further, accentuating the fight against judicial supremacy as one of his main campaign talking points. He frequently discusses the Court's errors and its power within the American judicial system.¹²⁰ He has stated that, “Throughout our nation's history, the court has abused its power and delivered morally unconscionable rulings... Too much power concentrated in the courts is a threat to our republic.” Such statements, even after the election, will not be easily forgotten.

Exploration into the institution's legitimacy has not been limited to political candidates, and has been even broader throughout the academy. Stephen Gottlieb has written that “[i]n each area that political scientists, historians, jurists, and legal scholars, both in the United States and abroad, have identified as crucial to the survival of democracy, the Roberts Court has been leading in the opposite direction.”¹²¹ He further states that other top national courts take the “perfection and survival” of democracy seriously, and argues that if the Court's interpretative methods are not based on such reasoning, this will “generate law without logic, mind, or soul and reveal the partisanship of the Court.”¹²² Indeed, the politics of the Court remains a primary concern for academics. James Gibson has been investigating Supreme Court legitimacy for over three decades, and has some words of caution for the institution. He notes that if judges are seen as ordinary politicians, the American public tends to

117. *Id.*

118. *Id.*

119. David Jackson, *New issue in Trump-Cruz battle: John Roberts, USA TODAY* (Jan. 17, 2016), <http://www.usatoday.com/story/news/politics/onpolitics/2016/01/17/donald-trump-ted-cruz-john-roberts-supreme-court-obamacare/78931780/>.

120. Mike Huckabee, *Mike Huckabee: Fight gay marriage judicial tyranny*, USA TODAY (June 26, 2015), <http://www.usatoday.com/story/opinion/2015/06/25/supreme-court-obamacare-religious-freedom-huckabee-column/29175727/>.

121. Gottlieb, *supra* note 12, at 195.

122. *Id.*, at 238, 261.

support the judiciary less; in fact, some decrease in support for the Court may be due to “intemperate and politicized dissents by some justices.”¹²³ Gibson reasons that the Court “should worry less about angering the public with its policy decisions, and focus more on the public’s satisfaction with its processes, procedures, and politics, if it is to maintain its popular legitimacy.”¹²⁴ Indeed, in relation to those processes, procedures, and politics, the Court could learn much from their peers.

V. THE COURT IN COMPARATIVE PERSPECTIVE¹²⁵

An examination of the Court’s practices in relation to other constitutional courts may help to understand why the Court is under such intense disparagement. This section focuses on some issues that Chemerinsky covered¹²⁶ and also that I focused on in my book review.¹²⁷ Yet its main purpose is expand on these criticisms, providing a relevant point of comparative analysis. In doing so it compares the US Supreme Court (SCOTUS) and the relatively new UK Supreme Court (UKSC)—established in 2009—and attempts to articulate some areas in which SCOTUS may want to change their current practices. This section also takes a practical view of institutional change, noting that any type constitutional changes to the Court, such as setting term limits for justices or altering the way justices are selected, although highly desirable,¹²⁸ remains unlikely at this time.¹²⁹ Nevertheless, many practical changes inside the institution can be made by SCOTUS itself, and these changes may very well aid it in retaining legitimacy and carrying out its constitutional duties.

123. James L. Gibson & Michael J. Nelson, *Too Liberal, Too Conservative, or About Right? The Implications of Ideological Dissatisfaction for Supreme Court Legitimacy* (2015), 36. Paper presented at the Annual Meeting of the American Political Science Association, San Francisco, CA, September 3-6, 2015 (manuscript sent to author via email).

124. *Id.*

125. Much of this section’s material comes from a piece I wrote for I-CONnect, the *International Journal of Constitutional Law*’s blog. See, Brian Christopher Jones, *How Far Out of Step is the Supreme Court of the United States?*, INT’L J. CONST. L. BLOG (Sept. 23, 2015), <http://www.iconnectblog.com/2015/09/how-far-out-of-step-is-the-supreme-court-of-the-united-states>.

126. CHEMERINSKY, *supra* note 12.

127. Jones, *supra* note 12.

128. I also argued that the judicial selection process was one of the major contributors to a less legitimate court (Jones, *supra* note 126).

129. ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* (2007), at 2 (“The fact is that in most democratic polities, the basic constitutional arrangements are no longer up for grabs. ...small scale institutional design is all that is on offer.”).

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While newly implemented courts are more likely to take into consideration modern democratic expectations and problems—including technological innovations—than long-established courts, comparing the two demonstrates how far SCOTUS is from its newly established, trans-Atlantic peer.¹³⁰ Additionally, although the courts may differ in terms of their comprehensive democratic functions,¹³¹ there is no reason as to why long-established high courts cannot innovate to keep up with the times.

SCOTUS' communications are out of touch for a contemporary democracy, and especially for a court that decides such a plethora of highly significant political issues. Both government and private sector information communications now operate on fast-moving, open and accessible content.¹³² SCOTUS remains far behind in this regard, leaving other information suppliers attempting to do their job (no wonder, marvel that it is, that a site like SCOTUSblog has become so abundantly popular).¹³³ There have even been a couple recent instances in which television networks, in a moment of haste, have reported decisions incorrectly.¹³⁴ Yet this is not the press's fault, it is the Court's. There is simply no reason why SCOTUS' decisions cannot come with a brief and accurate press summary that is easily discernible not only for the press but also for laypeople; and it would be even better if it was sent (embargoed, of course) to members of the press *before* decisions are announced.¹³⁵ Not doing so displays a noticeable and undeserved distrust of the press. The UKSC has included such summaries since their inauguration in 2009. Every decision comes with a "Press Summary" PDF that contains: the justices presiding on the case,¹³⁶ a brief background on the appeals, the judgment, and the main reasons for the

130. However the UKSC is not immune from communication problems. (*See, e.g.,* Richard Cornes, *A constitutional disaster in the making? The communications challenge facing the United Kingdom's Supreme Court*, PUBLIC LAW 266 (April 2013)).

131. The major difference between the two is their extent of judicial review powers. Much simplified, SCOTUS has wide jurisdiction in terms of what it can review; the most significant power being that it can strike down federal and state statutes (primary legislation). The UKSC, operating in a system based on parliamentary sovereignty, cannot strike down primary legislation (Acts of Parliament), but under the Human Rights Act 1998, can now offer "statements of incompatibility" with HRA rights.

132. Regarding government, see: www.congress.gov.

133. <http://www.scotusblog.com/>.

134. Brian Stelter, *CNN and Fox Trip Up in Rush to Get the News on the Air*, NY TIMES (June 28, 2012), <http://nyti.ms/1bfaapH>.

135. Some may proclaim that the "syllabus" feature of SCOTUS decisions performs this role. It does not. Many such documents are convoluted and do not clearly express who won a case and the main rationales as to why. Also, even the syllabus is not sent to journalists before decisions are rendered.

136. The court has twelve "active" justices, who do not have term limits, but do have mandatory retirement ages (70 or 75, depending on when they were appointed).

judgment.¹³⁷ The “reasons for the judgment” section always cites specific paragraphs in the decision to make it easier for the reader to follow. The UK Supreme Court is also on Twitter,¹³⁸ and has their own YouTube and Flickr channels as well,¹³⁹ demonstrating a significant effort on their part for openness and increased public interaction. Suffice it to say SCOTUS has none of these.¹⁴⁰

The second issue addressed here is that of cameras in the courtroom. While other constitutional courts, such as Germany, have banned cameras inside their court,¹⁴¹ the UKSC has recently embraced it. In fact this May the UKSC even launched a “video on demand” service that includes recordings of both current and decided cases, and also includes videos of both the hearings and the judgment announcements.¹⁴² However UK news reports are not littered with journalists taking Supreme Court decisions out of context. This is because the website authorizes the use of a person to watch the material, but does not give them license to use the material outside of the UKSC website.¹⁴³ Yet many SCOTUS Justices have come out against cameras in the

137. See, e.g., *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; *John Mander Pension Trustees Limited v Commissioners for Her Majesty’s Revenue and Customs* [2015] UKSC 56.

138. UK Supreme Court Twitter, @UKSupremeCourt, <https://twitter.com/uksupremecourt>.

139. UK Supreme Court YouTube, <https://www.youtube.com/user/UKSupremeCourt>, UK Supreme Court Flickr, <https://www.flickr.com/photos/uksupremecourt>.

140. The “@scotus” twitter handle is admittedly “a private group”. Available at: <https://twitter.com/Scotus>.

141. Peer Zumbansen, *Federal Constitutional Court Affirms Ban of TV-Coverage of Court Proceedings*, 2(3) GERMAN L. J. 1 (2001).

142. UK Supreme Court, *News Release: Catch-up on court action: Supreme Court launches 'video on demand' service* (May 5, 2015), <https://www.supremecourt.uk/news/catch-up-on-court-action-supreme-court-launches-video-on-demand-service.html>. The service was available in 2014 for many of the decision announcements provided by the UKSC. However, in 2015 the Court has made hearings available for particular cases, in addition to the decision announcements.

143. The disclaimer to be able to watch the UKSC website content is the following:

“This footage is made available for the sole purpose of the fair and accurate reporting of the judicial proceedings of the UK Supreme Court.

Although you are welcome to view these proceedings, the re-use, capture, re-editing or redistribution of this footage in any form is not permitted.

You should be aware that any such use could attract liability for breach of copyright or defamation and, in some circumstances, could constitute a contempt of court.

Please click 'Accept' to confirm you understand these restrictions.”

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courtroom.¹⁴⁴ Some have cited Orwellian reasons for not doing so, such as that having them would “misinform the public rather than inform the public.”¹⁴⁵ This appears to imply that the press and others would distort their work. The Justices correctly point out that video clips could potentially be used by the press and others (if allowed to do so),¹⁴⁶ and that they themselves would be more widely recognised, but...welcome to democracy. If the complete recording can be found on SCOTUS’ website, then a full context of any comment could be obtained. Other reasons for not doing so, such as that it would create an “insidious dynamic” in the courtroom,¹⁴⁷ makes it seem as if the justices themselves could not handle such a change. And maybe they are right. Given how some of the justices behave at both hearings and decisions (being overly and unapologetically sarcastic,¹⁴⁸ or going years without ever questioning counsel),¹⁴⁹ does not exactly align with the behaviour of judges from other constitutional courts. Nevertheless, years from now when cameras are allowed inside the Court, it will be near impossible (and potentially laughable) to think of the time when citizens were unable to watch their highest court in operation.

Finally, one of the major—if not entirely symbolic—differences between the US and UK Supreme Courts is their wardrobes. As can be seen on the UKSC video feed, the Justices have abandoned gowns and wigs in favor of formal attire. This change has caused little, if any, response from the media or general public.¹⁵⁰ SCOTUS Justices, meanwhile, have attested that the black gowns signal a type of uniformity among the members, and that nobody is therefore signaled out or looked upon differently because of their attire. Yet beyond this, the black gowns are used much more symbolically. Justices have expressed the belief that they highlight the neutrality of the law. The black gowns purportedly demonstrate that the Justices are able to make independent assessments based on the notion of “equality before the

144. Jonathon Sherman, *End the Supreme Court’s Ban on Cameras*, NEW YORK TIMES (24 April 2015), at <http://nyti.ms/1z01qPV>.

145. Charles Lane, *From Justices, Static on Televising Proceedings*, WASH. POST (May 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/01/AR2005050100601.html>.

146. Although, this would not be the case if the website did not grant license to do so, such as with the UKSC website.

147. *Id.*

148. Richard L. Hasen, *The Most Sarcastic Justice* (2015) 18 GREEN BAG 2D 215-227.

149. Mark Walsh, *Experts sound off once again on Justice Thomas’ silence*, ABA JOURNAL (1 May 2014), available at http://www.abajournal.com/magazine/article/experts_sound_off_once_again_on_justice_thomas_silence.

150. I’m certainly not saying it does not happen, but not once have I read an article about a Supreme Court decision where the clothing of the justices was mentioned.

law,” the inscription that adorns the front of their building. Former Justice Sandra Day O’Connor has stated that the black robe “shows that all of us judges are engaged in upholding the Constitution and the rule of law. We have a common responsibility.”¹⁵¹ Even news outlets have bought into this. In PBS’s series on “The Court and Democracy,” they note that, “Today, some justices see the simple black robe as a symbol of the Court’s impartiality. The idea that the justices all wear the same unadorned attire downplays subjective tastes and identities, giving the Court the appearance of being one neutral and unified body.”¹⁵² Such rationales are highly questionable. As Griffith eloquently states, “It is when the claim to neutrality is seen, as it must be, as a sham that damage is done to the judicial system.”¹⁵³ Judicial independence does not form because of one’s attire, and judicial legitimacy is not contingent on seeing or not seeing the color of a person’s shirt. Moreover, judicial robes—as pointed out by PBS—are a symbol of authority, a prop hardly needed at America’s highest court. If the justices truly want to engage in constitutional dialogue inclusive of not only the judiciary, but the other branches and the wider American public, then they would rid themselves of the robes that distance themselves from the community in which they serve.

This section (intentionally) does not discuss some of the other changes SCOTUS could make to decrease widespread criticism. For example, not altering the text of official decisions after they have been publicly rendered without notifying the press or anyone else,¹⁵⁴ and granting press passes to journalists that should easily qualify for their press credentials,¹⁵⁵ certainly are aspects the institution could improve upon. Nevertheless, the above section demonstrates that there are many aspects of SCOTUS’ day-to-day processes and procedures that could easily change, hopefully increasing the institution’s legitimacy while decreasing its chances of disparagement; and above all, these could happen without having to make wholesale constitutional amendments.

151. Sandra Day O’Connor, *Justice Sandra Day O’Connor on Why Judges Wear Black Robes*, SMITHSONIAN MAGAZINE (November 2013), <http://www.smithsonianmag.com/history/justice-sandra-day-oconnor-on-why-judges-wear-black-robos-4370574/>.

152. PBS, *The Supreme Court and Democracy* (December, 2006), <http://www.pbs.org/wnet/supremecourt/democracy/authority4.html>.

153. J. A. G. GRIFFITH, *THE POLITICS OF THE JUDICIARY*, 5TH ED. (1997).

154. Lazarus, *supra* note 3.

155. Adam Liptak, *No Easy Way to Be Fair on Media Credentials*, N.Y. TIMES (June 2, 2014), <http://nyti.ms/1kxNbIO>.

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CONCLUSION

In late October 2012, Chemerinsky wrote that the Supreme Court was “the forgotten issue in this year's presidential election.”¹⁵⁶ That certainly does not appear to be the case this year, given the Court’s recent divisive and impending dockets, in addition to the provocative comments from Republican presidential candidates. But the larger question is whether or not the Court will maintain its institutional legitimacy in an era of increased and unrelenting disparagement. Of course, the Court has been criticized and put under significant pressure during earlier periods of its existence. The Reconstruction Era,¹⁵⁷ FDR’s New Deal Era (including his infamous “court packing” plan),¹⁵⁸ and the endless condemnation of the Warren Court during the Civil Rights Movement¹⁵⁹ are three such examples. The institution survived these episodes, however, and it could be argued that the power of the Court has only increased since these tumultuous periods.¹⁶⁰ Nevertheless, by intervening into the political process in such a distinct and resolute manner during recent years, the Court has unquestionably 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. Furthermore, new media technologies, in conjunction with traditional media, have created a different domain by which the institution is discussed and critically analyzed. The challenge for the Court—and it is a difficult, if not impossible, one—is convincing the American public that law remains separate from politics.

156. Erwin Chemerinsky, *What Nov. 6 means for the Supreme Court*, LA TIMES (October 30, 2012), <http://articles.latimes.com/2012/oct/30/opinion/la-oe-chemerinsky-scotus-future-20121030>.

157. See, e.g., Eugene Gressman, *The Unhappy History of Civil Rights Litigation*, 59(8) MICH. L. REV. 1323 (1952); Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 (1978).

158. Drew Pearson & Robert Allen, *The Nine Old Men* (1936); William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966); Gregory A. Calderia, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81(4) AM. POL. SCI. REV. 1139 (1987).

159. See, e.g., Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82(2) YALE L.J. 227 (1972); Arthur J. Goldberg, *The Warren Court and Its Critics*, 20 SANTA CLARA L. REV. 831 (1980).

160. WHITTINGTON, *supra* note 16, 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.”).