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Does the Public Care Whether the Court is Political?

Randy Wagner
DOES THE PUBLIC CARE
WHETHER THE COURT IS POLITICAL?

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Abstract

Many argue whether the Supreme Court makes law or practices politics. Justice Felix Frankfurter, in his dissent in Baker v. Carr, offered this proposition for why the distinction is important: “The Court’s authority—possessed of neither purse nor sword—ultimately rests on sustained public confidence in its moral sanction.” It’s an important idea never put to test. This Article enters that gap. Parsing Frankfurter’s words unpacks their meaning and shows the reliance placed on them by today’s justices. Results from polls and surveys taken over the past half-century make clear the public expresses positive views of the Court, just as Frankfurter presumed, especially relative to the coordinate departments of government his proposition mentions. At the same time, however, members of the public are well aware the Court sometimes acts politically. Importantly, they do not necessarily disapprove. It follows that public support for the Court rests, in no small part, on something other than its ability to sustain “public confidence in its moral sanction.” Besides, in this polity, the Court holds no monopoly on the wish or the need to convince the public that more than mere politics motivates its actions. Here the Court may hold considerable advantage over the other branches. Frankfurter’s proposition, eloquent and stated so strongly, may be a useful warning to the Supreme Court, and to the other branches, too, for that matter, but it’s no prime directive to the former.

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Ph.D., Yale University; J.D., University of Arizona; A.B., Davidson College. I wrote most of this paper during time I spent at the University of Arizona, where I was an adjunct assistant professor in the Department of Political Science, and a student and then an administrator at the James E. Rogers College of Law. I owe thanks to many there. For their encouragement and comments on this particular project, I gratefully acknowledge Jack Chin, Charles Ares, and RonNell Andersen Jones. E-mail: ran.wagner@gmail.com.
Introduction

“Judges are like umpires. Umpires don’t make the rules; they apply them.”¹

The voice belongs to (then) Chief Justice-designate John Roberts. He drew this comparison at Senate Hearings convened to vet his nomination. It is a simple notion, and it was put forth to disarm. But it says much. (Now) Chief Justice Roberts stated a common and important proposition about judges and judging: The Court conducts itself differently than and maintains separation from the other, political branches. The

strongest, finest, and most complete statement of this idea was by Justice Felix Frankfurter in *Baker v. Carr*. Dissenting there, Frankfurter wrote that “[t]he Court’s authority—possessed of neither purse nor sword—ultimately rests on sustained public confidence in its moral sanction.”

This important idea has never been put to test. The Court’s authority has been tested by other branches and levels—when Congress confounded a Court ruling, when a president asserted executive power against a lower court’s order, when an obdurate state ignored the Court’s directive. In each instance the Court asserted and defended its position in this system of divided government. But the proposition that the legitimacy of the Supreme Court “rests on public confidence in its moral sanction” is not well-examined. Accepted, relied upon, still current in Court discourse, it never has been proven.

This paper tests the hypothesis Frankfurter advanced. It begins by unpacking the statement to get at its meaning and then argues for its import and relevance. Next, whether public support for the Court that Frankfurter imagined actually exists is examined. Finding the answer is yes, the paper then challenges, in sundry ways and from different directions, whether support for the Court “rests on sustained public confidence in its moral sanction.”

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3 See *Ex parte McCardle*, 74 U.S. 506 (1868). (After arguments were heard in a case, but before the Court rendered a decision, Congress expressly repealed the statute creating appellate jurisdiction of the Court over the defendant appearing in the case.)
5 See *Cooper v. Aaron*, 358 U.S. 1, 4 (1958). (“[T]his case involves a claim by the governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution.”)
6 See infra Part I.
7 See infra Part II.
constructs political scientists advance, form a body of evidence thrown at Frankfurter’s statement about public support for the Court. Whether and where and how well any of this evidence sticks will shape an answer to the question that motivates this paper: Is Frankfurter’s proposition supported or not by what we know and suppose about public views of the Court? The final portions of the paper discuss how the Court manages to preserve public confidence in judging.

I. Frankfurter’s Formulation is Important

It’s fair to ask why anyone should spend time thinking (or reading) about the passage Frankfurter authored. This answer is simple. Dissenting, the Justice stated, in strong and succinct language, a definitive and popular view about the role the Supreme Court properly plays in this polity. It’s true the statement is not precedent and not settled case law, and the exact words are cited verbatim only a dozen times in federal and state cases since Frankfurter wrote them. Still, the Justice stated in this formulation

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9 See infra Part III.
10 See infra Part IV.
11 See Cannon v. University of Chicago, 441 U.S. 745, fn15. (1979) There J. Powell, dissenting, introduced a long quotation including Frankfurter’s formulation this way: “Mr. Justice Frankfurter described these dangers with characteristic eloquence . . . .”
12 A Westlaw search based on Frankfurter’s phrasing turned up: Montgomery Cnty. Council v. Garrott, 243 Md. 634, 650 (1966) (J. Barnes, concurring) (Concurring in result to affirm lower court order to county to rearrange and create council districts in accord with the principle of “one-man, one-vote,” but registering the view that U.S. Supreme Court decisions establishing that principle “were erroneous and fraught with grave danger to the foundations of our federal republic.”); Warren Consol. Schools v. Michigan Employment Relations Comm’n, 67 Mich.App 58, 59 (1976) (Vacating an Employment Relations Commission ruling in which one of the commissioners was a brother and former law partner of the attorney for the prevailing party, because the rule of absolute disqualification, not followed here, is “a shield against any suspicion on the part of the litigants and the public that any subjectivity, bias and partiality contributed to the outcome of the dispute.”); Stern Bros., Inc. v. McClure, 160 W.Va. 567, 576 (1977) (It was improper for a recused judge to take part in selecting his replacement, for “the cornerstone of any judicial system rests upon the integrity of its judges.”); In re Interrogatories of Governor Regarding Certain Bills of Fifty-First General Assembly, 195 Colo. 198, 219 (1978) (J. Carrigan, dissenting) (“[W]eighty considerations of sound judicial administration, in my opinion, mandate this court’s non-participation [in replying to Governor’s interrogatories whether his vetoes of certain legislation were effective].”); Cannon v. University of Chicago, 441 U.S. 677, 745 (1979) (J. Powell, dissenting) (The Court, when it recognizes an implied private cause of action in a regulatory scheme silent on that right, unwisely arrogates to the judiciary powers that belong to the legislature); City of Mobile, Ala. V. Bolden, 446 U.S. 55 (1980) (J. Stevens, concurring) (To invalidate an at-large election system, absent evidence that it was instituted or
something very important. What was it exactly?

A. Unraveling Frankfurter’s proposition

What does it mean that “[t]he Court’s authority . . . ultimately rests on sustained public confidence in its moral sanction?”13 Begin with “moral sanction.” Sanction is a form of authority.14 Is that the point—the Court’s authority rests in public confidence in its authority?

No. There’s more to Frankfurter’s proposition than tautology. The “moral sanction” he believed the public attributes to the Court is a higher form of authorization or approval. Higher than what? Politics, of course. That notion drove Frankfurter’s theory of judicial legitimacy. He once counseled his brethren to stay aloof from politics.15 His caution to the majority in Baker v. Carr, to not inject the Court into the

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13 369 U.S. at 267 (J. Frankfurter, dissenting).
14 Black’s Law Dictionary 620 (2nd pocket ed. 1996). The first definition of “sanction” is “Official approval or authorization.”
15 Colegrove v. Green, 328 U.S. 549, 553 (1946). “From the determination of [party contests] this Court has traditionally held aloof.”
controversy how to draw electoral district lines for the Tennessee state legislature, played

**forward the observation Frankfurter placed at the heart of his opinion written sixteen

**years prior for a Court plurality in Colegrove v. Green:**

Nothing is clearer than that this controversy concerns

**matters that bring courts into immediate and active

**relations with party contests. From the determination of

**such issues this Court has traditionally held aloof. It is

**hostile to a democratic system to involve the judiciary in

**the politics of the people.**

When Frankfurter wrote, “It is hostile to a democratic system to involve the

**judiciary in the politics of the people,” he meant that the Court respects or otherwise

**favors the democratic process—shows no hostility toward it—by staying aloof from it.

**The word “aloof” stands out here. It’s the gist of his observation. The Oxford English

**Dictionary teaches that aloof, at its root, relates to nautical practice.** Its general sense,

**to “steer clear of” or “give wide berth to,” originated in the “idea of keeping a ship’s head

**to the wind and thus clear of the lee-shore or quarter toward which she might drift.”

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In modern usage, “aloof” connotes detachment, to the point of showing no sympathy.

**“Distant,” reports a second dictionary, “especially in manner or interest; not

**. . . desiring to associate with others.” “[W]ith indifference to the feelings, opinions, or

**interests of others,” a third lexicon states. And to a fourth source, aloof means “[a]t a

**distance; intentionally apart from others, as from want of . . . involvement.”

16 Id. at 553-54.
17 Id.
19 Id.
20 Id. “[T]o hold back, keep clear, to take no part in . . . .”
21 Id. “At a distance; distant; hence, detached, unsympathetic.”
23 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 60 (1961).
That’s an odd brand of respect, expressed by remaining unsympathetic to, intentionally apart and detached—“aloof”—from what is respected. Jane Austen—is there higher authority on social relations?—held that indifference and detachment, exhibited by one in high position, signals hostility, disagreeability. But Frankfurter did not see things this way, not in the standard he defined for a plurality of the Court in *Colegrove* and refined as a dissenter in *Baker v. Carr*. He believed that, when the Court shows respect for the democratic process, by holding itself aloof from the political fray, the Court earns the public’s confidence in its higher—non-political—claim to authority.

**B. Frankfurter’s proposition still matters**

Frankfurter’s standard of judicial disinterest survives today. Recall John Roberts words to the Senators charged with the duty of advice and consent on his appointment: “Judges are like umpires. Umpires don’t make the rules; they apply them.”

That portrays a judicial demeanor much warmer than the chilly detachment Frankfurter counseled. But the sentiment—that the Supreme Court must avoid “the politics of the people” and remain aloof from “matters that bring courts into immediate and active relations with party contests”—is very much the same, brought closer to home when Judge Roberts continued: “And I will remember that it’s my job to call balls and

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25 JANE AUSTEN, *PRIDE AND PREJUDICE* 10 (R. W. Chapman ed., 1988) (1813). “The gentlemen pronounced [Mr. Darcy] to be a fine figure of a man . . . till his manners gave a disgust which turned the tide of his popularity; for he was discovered to be proud, to be above his company, and above being pleased . . . .”

26 *Id.* “[A]nd not all his large estate in Derbyshire could then save him from having a most forbidding, disagreeable countenance . . . .”


28 Judge Roberts offered “my view that a certain humility should characterize the judicial role.” *Id.* Contrast this sentiment with the cooler tone Justice Frankfurter adopted when he counseled the Court to hold itself apart from politics. See supra notes 17-26 and accompanying text.
strikes and not to pitch or bat.”

What matters first in the picture (now) Chief Justice Roberts sketched is position. On the diamond, a gap separates the umpire, the arbiter, from the two teams who are parties to the fray. The umpire dresses in black and, with hands free of bat or glove, calls the game from a spot intentionally taken to not interfere with the players competing. In exactly the same way, the Supreme Court occupies a place apart from the other two branches, absent the tools they possess, disconnected from “party contests.”

What matters second is posture, the aloofness to which the judge in both settings aspires. “Umpires don’t want to attract attention,” one ballpark arbiter has explained. “You’d like to work the whole game without anyone even noticing you’re out there—ideally.” Roberts’ analogy to a baseball umpire captures the sense and the purpose of Frankfurter’s formulation exactly.

C. It matters to the Supreme Court

On the record, justices have distinguished their position and posture in this political system relative to elected representatives. “We are not asked in this case to say whether we think of this law as unwise, or even asinine,” wrote Justice Stewart in his dissent in *Griswold v. Connecticut*. One hopes that, by contrast to Supreme Court justices, legislators—at least some of them, at least some of the time—do feel they’re asked by citizens delegating them power, or compelled by responsibilities of their positions as trustees of the public good, to consider criteria such as asinine or unwise

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29 *Id.*
31 Colegrove v. Green, 328 U.S. 553.
33 381 U.S. 479, 527 (1965) (J. Stewart dissenting). “We are asked to hold that [Connecticut’s law forbidding the use of contraceptives] violates the United States Constitution. And that I cannot do.”
when casting their votes on pending laws. But justices, we are told, don’t make these kinds of calculations. Thus, in \textit{Lawrence v. Texas}, Justice Thomas, dissenting, voted to uphold the state’s law criminalizing sodomy, and added this caveat: “If I were a member of the Texas legislature, I would vote to repeal….”\textsuperscript{34} In his dissent, Justice Scalia criticized the \textit{Lawrence} majority for setting itself up as a “governing caste that knows best” when it voted down a law “well within the range of traditional democratic action.”\textsuperscript{35}

In objecting to the direction the majority took in \textit{Griswold} and in \textit{Lawrence}, the dissenters cited above relied on their understanding that the Court properly leaves politics to the political branches. The sentiment is Frankfurter’s exactly. And, in Supreme Court opinions, it does not live on only in dissents. Take the 1991 case \textit{Gregory v. Ashcroft}.\textsuperscript{36} There the Supreme Court carefully and comprehensively fashioned a view of judges—not just of Court members, but of judges in general—as non-political. To show how requires a bit about how the case was decided.

1. \textit{Making a federalism case out of it}

\textit{Gregory} tested whether either the ADEA, which makes it illegal for an employer (including a state government) to discharge any individual forty or older because of his or her age, or the Equal Protection Clause, prohibited Missouri from mandating, in its constitution, that state judges must retire at age 70. The Supreme Court upheld the power of “[t]he people of Missouri [to establish] a qualification for those who would be their judges. It is their prerogative as citizens of a sovereign State to do so.”\textsuperscript{37}

In her opinion for the Court, Justice O’Connor wrote expansively on principles of

\textsuperscript{34} 539 U.S. 558, 605 (2003) (J. Thomas dissenting). “Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated.”
\textsuperscript{36} 501 U.S. 452 (1991) (Missouri’s mandate that appointed state judges must retire at age 70 violates neither the ADEA nor the Equal Protection Clause).
\textsuperscript{37} \textit{Id.} at 473.
state sovereignty. 38 Eskridge and Frickey argue that Gregory is an example of the Rehnquist Court’s great enthusiasm for decisions “reflecting federalism-based values.” 39 This approach, those scholars show, was not necessary: The Court could have decided this case in Missouri’s favor simply by finding that the state’s appointed judges fit within this excepted category in the statute: “an appointee on the policymaking level.” 40 Accept this description of judges—they are “appointee[s] on the policymaking level”—and Missouri lawfully applies its age requirement to them. Case closed.

That reasoning is more than plausible. 41 That reasoning “relies on the plain language of the statute.” 42 It follows, in spirit, the canon that counsels interpreting a statute to avoid a constitutional question, 43 by grounding Missouri’s power in reasoning that falls far short of bold expressions of federalism and state sovereignty made by Justice

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38 501 U.S. at 457. “The Constitution created a Federal Government of limited powers. ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’ The States thus retain substantial sovereign authority under our constitutional system.” And: “[The federal structure of joint sovereigns] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in the democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.” Id. at 458. “Perhaps the principal benefit of the federalist system is a check on abuses of government power.” Id.

39 William N. Eskridge, Jr. and Philip P. Frickey, Quasi-constitutional law: Clear statement rules as constitutional lawmaking, 45 VAND. L. REV. 593, 619 (1992) (arguing, from a review of its record on statutory interpretation cases, that the Rehnquist Court has engaged in interpretive activism, and characterizing this jurisprudence as “quasi-constitutional law”).


41 See Eskridge & Frickey (1992), supra note 39, at 623-24 (“[A]ppointed state judges also arguably came within a different exception, one for ‘appointees on the policymaking level.’ We did not expect this to be a difficult case; in our view, the admitted ambiguity of the ‘policymaker’ exception should have been resolved through well-established canons and conventional statutory interpretive approaches, and appointed judges should fall outside the ADEA and be subject to state rules about retirement.” (footnotes omitted)).

42 Gregory, 501 U.S. at 465 (“Governor Ashcroft relies on the plain language of the statute: It exempts persons appointed ‘at the policymaking level.’”).

43 The “constitutional question” is the reliance the Court puts on federalism values. For the canon, see, e.g., J. Rehnquist writing for the Court in U.S. v. Security Industrial Bank, 459 U.S. 70, 78 (“We consider the statutory question because of the ‘cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.’ Lorillard v. Pons, 434 U.S. 575, 577 (1978), quoting Crowell v. Benson, 285 U.S. 22, 62 (1932).”)
O’Connor. To reach those grander principles, the Gregory Court had to find a way to permit Missouri’s age limit without relying on the simple argument that worked—that state judges are “appointees on the policymaking level,” and therefore excluded from the ADEA’s reach.

A variation of the “plain statement rule” did the trick. The Court wrote it did not require from Congress “a plain statement that judges are not ‘employees,’” and thus are excluded from the ADEA. On the other hand, “[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are included.” The statute plainly excludes important state officials, the Court explained. “In this context . . . ‘appointee on the policymaking level’ is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges.” And finally: “It is at least ambiguous whether a state judge is an ‘appointee on the policymaking level.’” Unless it says so very, very plainly, Congress (and through Congress the national government) has not applied standards states must follow for selecting (or de-selecting) their judges.

2. Fashioning a view of judging

Gregory was not a unanimous decision, but all who wrote in it expressly denied that judges make policy or that judges are in any way political. For the majority, Justice O’Connor recounted how Missouri argued that “state judges, in fashioning and applying

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44 Eskridge & Frickey, see supra note 39, at 624-25 (In their estimation, that the Court eschewed the simpler route for a decision “[reached] in a far more dramatic manner,” is “a breathtaking example of the Rehnquist Court’s transformation from constitutional to interpretive activism on questions of federalism.”).
45 501 U.S. at 467 (“But in this case we are not looking for a plain statement that judges are excluded.”).
46 Id. (emphasis in the original).
47 Id. These are: elected officials; persons elected officials choose for their personal staff; and immediate advisors. 29 U.S.C. § 630(f).
48 Id. In effect, the category is too general to include the specific example.
49 Id.
the common law, make policy.”

50 They make policy, too, said Missouri, because upper level courts “have supervisory authority over inferior courts.”

51 Accept that judges are policymakers in only these ways (employing common law, supervising lower courts) and no more, and the result is that judges who are policymakers do not act politically. But the Court counseled Missouri that its argument, that judges are policymakers in even these non-political ways, is not necessary. “The statute refers to appointees ‘on the policymaking level,’ not to appointees ‘who make policy.’”

52 The upshot is, an appointed judge could be fashioned to fit the legislated category, policymaker, without ever making a policy, even non-political policy.

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Next, Justice White, writing to concur in part and dissent in part, reasoned that the policymaker exception captured judges: “[I]t is clear that the decisionmaking engaged in by common-law judges, such as petitioners, places them ‘on the policymaking level.’” Then he clarified that statement. Placing judges on the policymaking level does not make their actions political. Judges, he wrote, “do not operate with unconstrained discretion . . .”

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Finally, Justice Blackmun, dissenting, rejected out-of-hand the notion that judges make policy: “A judge is first and foremost one who resolves disputes, and not one charged with the duty to fashion broad policies establishing the rights and duties of citizens. That task is reserved primarily for legislatures.”

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The three opinions written in Gregory—the Court’s, one dissenting, one

50 501 U.S. at 465.

51 Id. at 466.

52 Id.

53 Recall that the Court rejected application of this non-political definition of policymaker. See supra notes 40-49 and accompanying text.

54 Id. at 482 (J. White, concurring in part and dissenting in part).

55 Id.

56 Id. at 488 (J. Blackmun, dissenting).
concurring and dissenting—found common ground on the issue defined clearly by Frankfurter in Baker v. Carr. Each determined that judges are not political actors.

D. The testable proposition that Frankfurter stated in Baker v. Carr

The proposition that Frankfurter stated starkly and with eloquence, the comforting and familiar allusion to baseball that Roberts made to the U.S. Senate, and the unanimous denial that judges are political actors written into all three opinions in Gregory, are voices in the debate “whether and in what sense law is political.” 57 Conversation 58 on this topic is intense, is never-ending. This paper avoids that thicket, 59 except to assess whether the distinction is something that matters to the people, as Justices Frankfurter supposed. Is the wish to keep law distinct from politics, and to keep the Court distinct from the kind of activity that engages the other two branches, something about which the public cares deeply, is concerned with somewhat, or does not even register as important at all?

This is an empirical question. Facts exist from which to shape an assessment of the hypothesis that public respect for the Court depends on (follows from, is predicted by, requires) the Court’s careful avoidance of any and all things political.

II. Public Perceptions of the Supreme Court

To empirically test Frankfurter’s proposition requires, first, an inquiry into the predicted or dependent variable—whether or not the public expresses sustained

58 See e.g. CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 2 (2004) (“But the ambition of law goes further: each legal decision should be referable to a rule or principle; it should be justifiable not just by the good that it does, but as part of the fabric of the law . . . . [This] is what is necessary if constitutional law is to be law, rather than just a set of political decisions made by politicians.”). See, e.g., Richard A. Posner, Foreward: A Political Court, 119 HARV. L. REV. 31, 34 (2005) (“Part II presents my main thesis, which is that to the extent the Court is a constitutional court, it is a political body.”).
59 Paying respect to the adage most famously attaching to Justice Felix Frankfurter: “Courts ought not to enter this political thicket.” Colegrove v. Green, 328 U.S. at 556 (J. Frankfurter, for a plurality.)
confidence in the Supreme Court. Happily, evidence presented below shows the American public consistently expresses positive feelings toward the Supreme Court.

A. Public positivity toward the Court

Support for the Supreme Court, measured in public opinion polls, is consistently solid, shown in three ways: First, in polls recently taken, the Supreme Court is rated positively. Second, these generally positive feelings toward the Court exist consistently across time. Third, ratings of the Court are higher, on average, than ratings of the Executive branch and Congress.

Recent soundings demonstrate the high regard the public holds for the Supreme Court. A nationwide poll conducted in December, 2004 found that 50% of respondents approved of the way the Court is handling its job.60 The Gallup Poll reported that 52% answered the same question the same way in September, 2003.61 A 56% approval rating was measured in the spring of 2003.62 41% of respondents to a national poll taken in the fall of 2004 expressed “a great deal” or “quite a lot” of confidence in the United States Supreme Court; 39% reported “some” confidence, and only 17% had “very little” confidence in the Court.63 Over half of respondents to a poll completed in July, 2003, felt that the Supreme Court “is in touch with what is going on in the country.”64

Positive orientation toward the Supreme Court in the past handful of years continues generally supportive views expressed by the public throughout the 1980s and

60 Quinnipiac University Poll. Dec. 7-12, 2004. 1,529 respondents were interviewed. At http://www.pollingreport.com/Court.htm.
64 FOX News/Opinion Dynamics Poll. June 30-July 1, 2003. Respondents were 900 registered voters; 51% gave the reported response. At http://www.pollingreport.com/Court.htm.
Support for the Court is characterized by a relatively high level of stability over [that period].”\textsuperscript{66} It’s true that public confidence in the Supreme Court declined somewhat in the late 1960s and early 1970s, likely “in step with patterns for other political and social institutions.”\textsuperscript{67} A quick rebound occurred in the mid-1970s, however, when it appears the Court profited from public response to Watergate.\textsuperscript{68} A dip following that upswing paralleled a downturn in evaluations of other institutions, and probably reflected the public’s very generalized discontent with the nation’s economic fortunes, in decline, in the late 1970s.\textsuperscript{69}

Positive attitudes toward the Court are also shown in comparative evaluations by the public of the coordinate departments of government. Across the 1970s and 1980s, reports political scientist Gregory Caldeira, “the public has bestowed greater confidence in the incumbents of the Court than those of Congress and usually by quite a large margin.”\textsuperscript{70} Other authority holds, through the mid-1990s, “public support for the Court consistently exceed[ed] support for the other institutions.”\textsuperscript{71}

Figure 1 makes this claim nicely. It shows the percentage of respondents to the Harris Poll from 1971 to 2006 who said they had “a great deal of confidence” in the people in charge of running the Supreme Court, the White House, and Congress. Note that the trends for all three branches follow a similar pattern, evidence supporting the view, stated above, that Court evaluations are apparently colored, to some degree, by

\textsuperscript{65} See Jeffrey J. Mondak & Shannon Ishiyama Smithey, \textit{The Dynamics of Public Support for the Supreme Court}, 59 J. OF POLITICS 1114, 1118-19 (1997).
\textsuperscript{66} Id. at 1119.
\textsuperscript{67} Gregory A. Caldeira, \textit{Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court}, 80 AM. POLITICAL SCI. REV. 1209, 1213.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 1214.
\textsuperscript{71} Mondak & Smithey (1997), \textit{see supra} note 65, at 1119.
evaluations of politics and the political system generally. But the most remarkable result to draw from Figure 1 is the steady and the marked degrees to which public evaluations of the people running the Supreme Court exceeds ratings of those running the other two branches. Two findings are apparent: First, at nearly every point in time during the thirty-plus years graphed there, the public consistently expressed more support for the Court. Second, positive feelings for the Court are often decidedly greater than like support for the White House and, especially, Congress.

From 1971 to 2006, for every year when comparative measures were taken, a higher percentage of respondents expressed great confidence in the Court than in Congress. The percentage of the public expressing great confidence in the Court
exceeded that expressing the same in the White House for 26 of the 33 years for which evaluations of both institutions were measured. The degree of difference between public ratings of the Court and the other two branches is also worth noting. Table 1 presents this comparison over the course of thirty-one years, 1976 through 2006.  

### Table 1. Public confidence in three branches of government, 1976-2006.

<table>
<thead>
<tr>
<th>% respondents expressing &quot;great confidence&quot; in the people running</th>
<th>Average</th>
<th>High (year)</th>
<th>Low (year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>the Supreme Court</td>
<td>31</td>
<td>42 (1999)</td>
<td>22 (1976)</td>
</tr>
</tbody>
</table>

Source for data on which above numbers are based:  

Throughout this span, on the average, less than half the number of respondents expressing great confidence in the Court did so for the Congress, and the comparison of Court ratings to White House ratings is clearly in the Court’s favor, too. Just how wide was the discrepancy between Court and congressional ratings is made clear by this simple comparison of relative extremes of public support for three branches of government: In only three years was the percentage of respondents expressing great confidence in the Court (22% in 1976, 27% in 1980, and 26% in 1993) less than the highest percentage of

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72 Evaluations for all three institutions were reported for each year since and including 1976, but not during every year prior to 1976.
respondents ever expressing great confidence in the Congress (28% in 1984). The Court’s low point of 22% is even more remarkable when taking into account that positive ratings of the White House and Congress bottomed out at different points to, respectively, 11% and 8%.

Results from Figure 1 and Table 1 show clearly that the Supreme Court’s ratings are more positive, and steadily so, than are evaluations by the public of the coordinate branches. Compared to the other branches, the public expresses far greater support for the Court. One thing not clear from these data is the basis for this positivity. The next section examines what polls and public opinion studies have to say about the sources of public support expressed by individual citizens.

B. Correlates of public positivity toward the Court

In Justice Frankfurter’s formulation (“The Court’s authority—possessed of neither purse nor sword—ultimately rests on sustained public confidence in its moral sanction.”), the purse and the sword are shorthand for authority the Constitution grants Congress and the executive. But because these two are the expressly political branches, whose officials are more directly linked to the people, their legitimacy, too, necessarily draws on public sources. To examine the basis of positivity toward the Court, then, it makes sense take a short side-trip in order to ask this question: What underlies public

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73 The close reader of Figure 1 and Table 1 above will note that, on an absolute scale, even Court ratings, as measured by this Harris Poll question, are not overwhelmingly positive. At no time from 1985 until 2004, for example, did even close to 50% of the public express great confidence in the Court. This is largely, perhaps entirely, an artifact of the item measuring support, which offered respondents only three alternatives: “A great deal of confidence,” “only some confidence,” or “hardly any confidence at all.” Thus, the respondent who trusts the Court is compelled to select between statements of extremely high confidence (“a great deal”) and extremely moderated confidence (“only some”) with no alternative in between (e.g., “a good deal of confidence”). It is possible to adjust the data for this artifact, one result being higher absolute ratings for all three branches. See Mondak and Smithey (1997), see supra note 65 at 1117-19. I present the data in its raw form because, without any manipulation at all, it firmly supports exactly the point I want to make in this section: Compared to its ratings of the executive and of Congress, the public consistently and strongly expresses more positive feelings toward the Supreme Court.

74 369 U.S. at 267 (J. Frankfurter, dissenting).
support for the coordinate departments?

1. Public evaluations of the President and Congress

The ebbs and flows of presidential popularity are well-understood. Seminal work published in the 1970s, still relied upon today, explained public perceptions of the President the following way: An inauguration effect pushes presidential popularity at the start of the term well above levels of electoral support for the winning candidate recorded the previous November. Popularity thereafter rises and (more often) falls on economic news, for example, inflation and unemployment rates. An unpopular war pushes presidential ratings down.

Inside these long-term, secular trends lies the potential at any moment for popularity to spike dramatically upwards, in response to an international event. Political flashpoints—like the taking of American hostages in Tehran, Iran, during Carter’s term, or the invasion of Grenada during the Reagan years—trigger immediate, potent upswings in presidential ratings. Examples of this uncritical and highly emotional “rally round the flag” effect on popularity are apparent in Figure 1. Note there how ratings of the White House jumped from 1983 to 1984, following the bombing in Beirut of U.S. Marines barracks and the U.S. invasion of Grenada (both occurring in late 1983); and from 2001 to 2002, undoubtedly a reaction to 9/11.

Note, too, that ratings of the Court and Congress rose at the same two points in time, though not nearly as sharply. Public evaluations of the President, where they are

76 See esp. Kernell, supra note 75.
77 See Mueller, supra note 75.
78 The term owes its aegis to Mueller. See id.
the product of instantaneous reactions to dramatic events, are likely more volatile across
time, more sensitive to immediate fluctuation, than are those directed toward the other
branches. Figure 1, because it charts support measured only once per year, does not
speak to this hypothesis.

Public evaluations of Congress differ from those directed toward the President. For example, they surface an interesting contradiction existing in the public mind. Members of the public simultaneously love their congressperson and hate Congress. While 95%+ of Congresspersons are routinely re-elected to office, public ratings of Congress are typically very low. They run far behind ratings of the Court, and nearly always behind executive ratings, too.

A classic study of Congresspersons’ behavior accounted for their astronomical
success at being re-elected by pointing out how ably an incumbent uses his or her office
to keep his or her office. Drawing and maintaining “safe” electoral districts also
contributes to the tendency of Congresspersons to win re-election. Despite the nearly
perfect re-election rates recorded by individual Representatives and Senators, however,
public perceptions of Congress the institution, and even of members of Congress
generally, are incredibly negative.

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79 A dramatic, international event focuses the public’s attention on the President. Consider, for example, media treatments of these historical moments, which typically portray a President standing at the fore. Too, these kinds of events focus public emotions on the President. The affective component of public response is harder to measure. But its consequences show up in these poll results.

80 See Richard F. Fenno, *If, as Ralph Nader says, Congress is 'The broken branch,' how come we love our congressmen so much?* in *CONGRESS AND CHANGE: EVOLUTION AND REFORM* (Norman J. Ornstein ed., 1975).

81 DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974) (Based on examining such behaviors as constituent assistance through casework, use of the franking privilege for “free” publicity, and media-attracting events, concluding these provided a formidable advantage to incumbents, compared to their challengers.).

The authors of a recent study of public attitudes about Congress\textsuperscript{83} argue that perceptions of the congressional process are an important element of the public’s dislike for the institution. Congress, they write,

\begin{quote}
embodies practically everything Americans dislike about politics. It is large and therefore ponderous; it operates in a presidential system and is therefore independent and powerful; it is open and therefore disputes are played out for all to see; it is based on compromise and therefore reminds people of the disturbing fact that most issues do not have right answers. Much of what the public dislikes about Congress is endemic to what a legislature is. Its perceived inefficiencies and inequities are there for all to see.\textsuperscript{84}
\end{quote}

Attitudes toward Congress, no doubt, arise from the public’s reactions to political circumstances (the economy, for example) and events. These same elements shape public evaluations of the President.\textsuperscript{85} But research described in this section supports the view that additional, important factors shape public perceptions of the people in Congress and of the institution. Three factors were identified above, and the third one is especially interesting: Public perceptions of the way Congress conducts its political work appear to be the basis for how the public rates Congress the institution. Those ratings, it turns out, are very negative. The next section presents and discusses results from studies attempting to account for public evaluations of the Supreme Court.

2. \textit{Variables that (do and don't) correlate with public support for the Court}

Research investigating empirical correlates of public support for the Court has examined two classes of factors: Personal characteristics defining individual respondents, and other political attitudes and beliefs they express.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 60. The authors draw these conclusions from analyzing data collected in a series of focus group interviews, and in a national survey, all done under their direction. For full methodological details, see \textit{id.} at 163-73.

\textsuperscript{85} \textit{See supra} notes 75-79 and accompanying text.
Partisanship was strongly related to opinions about the Court-packing crisis in 1937. While seventy percent or more Democrats supported President Roosevelt’s plan to change the Court, less than ten percent of Republicans did.\textsuperscript{86} Note, however, that this poll probed opinions about a particular Court policy or plan. Where the focus is on more generalized expressions of support for the Court, it seems party identification does not strongly cue opinions. From the early 1940s until the mid-1960s, Democrats expressed greater support for the Court than did Republicans; the results were consistent but the differences not overwhelming during this time-span.\textsuperscript{87} And partisanship did not influence change in support for the Court from 1966 to 1975, a period when the make-up of the Court was changing with appointments made by President Nixon.\textsuperscript{88} Similarly, in a survey conducted in 1987, respondents’ support for the Supreme Court was not associated with their political party identification.\textsuperscript{89}

Social class, the division between white- and blue-collar workers, made little difference, overall, in whether respondents expressed positive or negative opinions toward the Court in a series of polls taken from 1941 to 1964.\textsuperscript{90} Race, on the other hand, was strongly related to support for the Court in a survey taken in 1987.\textsuperscript{91} There, the findings were consistent and strong: African-American respondents expressed much higher levels of positivity toward the Court on each of five indicators gauging Court

\textsuperscript{86} Kenneth M. Dolbeare & Phillip E. Hammond, \textit{The political party basis of attitudes toward the Supreme Court}, 32 \textit{PUBLIC OPINION QUARTERLY} 16, 22 (1968).
\textsuperscript{87} Id. at 24.
\textsuperscript{90} Dolbeare & Hammond (1968), \textit{see supra} note 86, at 28.
\textsuperscript{91} Caldeira & Gibson (1992), \textit{see supra} note 89, at 640.
In the same study, respondents’ ideology, whether they self-identified as liberal or conservative, did not differentiate support for the Court. Positions on some political issues, however, did make a difference. In 1987, for example, respondents opposing racial segregation in neighborhoods were significantly more likely than those supporting segregation to support the Supreme Court. The link between attitudes about racial policy and Court support also existed, but in reverse direction, in results gathered one and two decades prior. Respondents to a 1966 survey who expressed support for civil rights were more likely to express support for the Court. When re-interviewed in 1975, the same respondents made the same link.

This much seems clear regarding empirical correlates of opinions toward the Court: Race, and attitudes about racial issues, make a difference in public support for the Supreme Court. Another issue where opinions are related to their feelings about the Court is abortion. In a 1987 survey, respondents who supported a woman’s right to abortion under any circumstances tended to express higher levels of support for the Supreme Court. In that poll, however, respondents’ stands on the following issues failed to differentiate Court support at all: Capital punishment, gun control, and leniency

92 Id. at 641.
93 Id. at 643.
94 Id. at 644.
96 Id. at 30 and 37.
97 The relationship has been confirmed in complicated ways. For example, southern Democrats questioned in 1949 supported the Court; but support among southern Democrats responding to a 1956 survey—following the decision in Brown v Topeka Board of Education—declined sharply. See Dolbeare & Hammond (1968), see supra note 86, at 25. The role of racial attitudes in evaluations of the Court comes as no surprise. Racial sentiments powerfully shape American public opinion in all its expression. See, e.g., Donald R. Kinder, Belief systems after Converse, in 18 ELECTORAL DEMOCRACY 20 (George Rabinowitz & Michael MacKuen eds., 2003) (“Group sentiment is not the only thing driving opinion in . . . various policy disputes, but it is always present, and of all the diverse ingredients that make up opinion, it is often the most powerful.”).
98 Caldeira & Gibson (1992), see supra note 89, at 644.
in criminal courts. And relationships were extremely weak between Court support and attitudes on these issues: Marijuana legalization and pornography.

3. Characterizing individual-level support for the Court

Findings related above indicate that no personal characteristics, with the notable exception of race, and only a very few attitudes about political issues are systematically related to public support for the Court. An important caveat informs this statement: Research about the correlates of Court support has not advanced very far. Collectively, these empirical studies have not yet produced anything near the more comprehensive and detailed picture drawn by studies of public opinion toward Congress and especially toward the President, the broad outlines of which are sketched above.

An alternative explanation is possible for why the portrait of public Court evaluations is sparer: Perhaps the picture of Supreme Court support is not incomplete, so much as it is different. Perhaps the public basis of Supreme Court legitimacy is not to be found in attributes or attitudes of persons expressing support (or lack of support) for the Court. What if support for the Supreme Court is itself a stable, underlying orientation, relatively impervious to change? Two pieces of evidence from studies reviewed in the prior section suggest exactly this.

First, a panel study—based on data collected in interviews of the same persons in 1966 and then again in 1975—reported a very high correlation between support for the Court expressed in both interviews. Respondents supporting or not supporting the Supreme Court in 1966 overwhelmingly expressed similar opinions in 1975. This fact is

\[\text{99 Id. at 645.}\]
\[\text{100 Id.}\]
\[\text{101 See supra notes 75-85 and accompanying text.}\]
\[\text{102 Tanenhaus & Murphy (1981), see supra note 88, at 30. See also id. at 30 (“One should also note the strong autocorrelation between diffuse support in 1966 and 1975, a relationship of fundamental consequence . . . .”).}\]
remarkable—the decade from 1966 to 1975 was highly volatile. The Vietnam War split
the public into opposing camps. Assassins took the lives of Martin Luther King, Jr. and
Robert Kennedy in 1968. The Watergate scandal forced President Nixon, elected by
landslide in 1972, to resign in disgrace less than two years later. National economic
indicators, especially the rate of inflation, moved sharply in a negative direction during
the same time frame.

Despite the distress and upheaval, general support for the Supreme Court,
measured at the individual level, remained very stable throughout these ten years.103 A
reasonable conclusion to draw is that Court support is an enduring orientation. That’s
why it exists independent of personal characteristics and other political attitudes.

Second, consider these results from the 1987 survey analyzed by Caldeira and
Gibson: General support for the Supreme Court was positively associated with support
for the norms of democracy, measured by five items testing whether respondents express
agreement with a list of legal and constitutional rights.104 Court support was negatively
related to what the authors of the study call, “Commitment to political order,” a six-item
scale gauging whether respondents tend to attach greater value to community order or to
individual liberty.105 Commitment to democratic norms and commitment to liberty, the
authors argue, “constitute more basic and fundamental opinions than do positions on
ordinary policies. . . . [T]hese correlations may indicate that diffuse support (for the

103 We paddle through swirling waters here: The scope and variety of events from 1966 to 1975 were
broad, and the impact of these events on political opinions was intense. It makes sense to condition claims
made in this paragraph and the prior one. For example, note that there exists some evidence that because of
Watergate, public support for the Supreme Court rose. See skyrocketing support for the Court as Watergate
unfolded, evident in Figure 1 above. See Tanenhaus & Murphy (1981), supra note 88, at 38-39
(‘[Watergate] substantially enhanced specific support for the Court . . . .’) See Caldeira (1986), supra note
67, at 1213 (“For the Court, ‘Watergate’ translated into a major temporary gain of public support.”).
104 See Caldeira & Gibson (1992), supra note 89, at 662, for the exact wording of these items.
105 See id. at 661-62 for the items composing the “Commitment to political order” scale.
Court) flows from those who are sympathetic to the function of the Supreme Court—the protection of liberty and democracy.”\textsuperscript{106}

Caldeira and Gibson take their analysis further. As reported above, these authors found that attitudes about race and about abortion both varied systematically with Court support.\textsuperscript{107} But when they included in their multivariate analysis the measures of respondents’ commitment to democratic norms and commitment to liberty, both strongly related to Court support, the association between Court support and attitudes about racial and abortion policy became extremely weak;\textsuperscript{108} that is, they washed away. The authors draw these conclusions:

Those who are strongly committed to liberty are substantially more likely to support the Supreme Court than those who place particular value on social order. And, similarly, support for democratic norms has an independent impact on support . . . . These basic value orientations constitute important sources of diffuse support (for the Court); relatively ephemeral policy positions make little or no difference.\textsuperscript{109}

A similar finding arises from these authors’ analysis of a survey they directed in early 2001, asking for reactions to \textit{Bush v. Gore}.\textsuperscript{110} There, respondents expressing support for democratic institutions (the rule of law and a multi-party system) also tended to exhibit loyalty toward the Supreme Court (were more likely to say they did not wish to change the institution).\textsuperscript{111} Opinions whether the Court’s decision in \textit{Bush v. Gore} was

\begin{flushleft}
\textsuperscript{106} \textit{Id}. at 649.
\textsuperscript{107} See supra notes 91-94 and accompanying text, and \textit{supra} notes 98-100 and accompanying text.
\textsuperscript{108} Caldeira & Gibson (1992), \textit{see supra} note 89, at 651.
\textsuperscript{109} \textit{Id}. at 652.
\textsuperscript{111} \textit{Id}. at 540.
\end{flushleft}
fair or unfair, however, were not systematically related to loyalty toward the Court.\footnote{Id.} Respondents readily expressed opinions about what the Court did in \textit{Bush v. Gore}.\footnote{Id.} Over forty percent called the decision unfair.\footnote{Id.} But those negative reactions apparently did not affect, and were not affected by, more general support for the Court, which in the aggregate was strong: In this survey taken just a month after the decision was announced, over three-quarters of respondents said the Court can be trusted.\footnote{Id., see Table 1.} In a survey taken in 1995 where the same question was asked, by comparison, two-thirds gave this opinion.\footnote{Id., see Table 2.} Thus, it can safely be said that, in the public mind, \textit{Bush v. Gore} did not cause support for the Court to suffer.

\textbf{III. Does Court Support Depend On Belief in Its “Moral Sanction?”}

Public support for the Court that Justice Frankfurter hoped would exist, does exist. Here are the facts: At the aggregate level, positivity expressed toward the Court is consistent over time; it’s greater than support for the legislative and executive branches. At the individual level, support for the Court is a stable characteristic, enduring over time, not related to issue stands but perhaps associated with commitment to democratic norms. The question remains whether this public support for the Court is dependent, as Frankfurter supposed, on perceptions that the Court’s authority has a moral dimension, that is, that the Court exercises something higher than mere political authority. The next

\footnote{Id. Republicans, more often than Democrats, described the decision as fair. \textit{Id.} That discrepancy survived: In a poll taken two years later, 90 percent of Republicans and 19 percent of Democrats said they agreed with “the decision in the 2000 Presidential election that ruled for George W. Bush and against Al Gore.” Results are from a national survey conducted by Quinnipiac University from 2/26 to 3/3, 2003. http://www.quinnipiac.edu/x1284.xml?What=bush%20gore&strArea=;&strTime=120&ReleaseID=383#Question025.}

\footnote{Gibson, Caldeira & Spence \textit{see supra} note 110, at 540. (“[N]early all of our respondents (97.2 per cent) have an opinion on this issue. Finally, opinions are firmly held, with the proportion of those holding strong views on the matter (80.5 per cent) greatly outnumbering those with more moderately held opinions (16.6 per cent.”)}

\footnote{\textit{Id.} (“[A] very large minority (41.9 per cent) thought the decision unfair.”)}

\footnote{\textit{Id.}, see Table 1.}

\footnote{\textit{Id.}, see Table 2.}
sections examine Frankfurter’s hypothesis in light of two theories advanced by political scientists.

A. Two theories explaining support for the Court

1. Theory 1: Diffuse support cushions specific disagreement

In a study published in 1965 that gained totemic status in political science, David Easton proposed “a systems analysis of political life.”117 Here’s the story told too briefly: Easton applied cybernetics to the polity. Elections and lobbying, for example, are the inputs; government, in all its forms, is the black box; policies, for instance, legislation and judicial decisions, are the outputs. To complete the circle, there is feedback: Each set of outputs influences subsequent inputs.

Easton’s theory emphasizes and rationalizes, above all else, the polity’s continuity and maintenance. Crucial to system survival is the process of political socialization, during which deep-seated positive feelings about the system are created in young citizens-in-training.118 This reservoir of positivity, says Easton, represents “diffuse support.” It becomes the basis, in later years, for sustaining faith in the system when particular outcomes disappoint citizens or thwart their preferred political aims. The gist of this part of Easton’s theory goes something like this: “Specific support,” citizens’ reactions to the constant parade of political outputs, will go up and down. But “diffuse support” never wavers. It cushions disappointments that develop in response to specific political outcomes.

The political science literature treats Easton’s construct “diffuse support” very

117 DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965).
seriously. It’s not hard to take from it something sounding very similar to Frankfurter’s view of what underlies Supreme Court legitimacy—sustained and sustaining public confidence in the Court’s higher authority. But Easton’s theory presents two problems for Frankfurter’s proposition: First, the theory places responsibility for developing and maintaining public support for the Court out of the Court’s hands. Justice Frankfurter counseled the Court not to challenge public confidence in its moral sanction. That warning fails to register if public support for the Court is the product of political socialization, and not reactions to what the Court does. Second, in Easton’s world, with a well-socialized public in place, the Court has more room to operate, in a political way and as an independent branch of government, than Frankfurter would prescribe for it. Exactly what Frankfurter believed the Court must earn and keep by remaining aloof from all political matters—“sustained public confidence in its moral sanction”—Easton’s theory supplies as a feature of the well-maintained polity. The public basis of Supreme Court legitimacy is not something to be earned or kept or protected. It is part and parcel of the systems analysis of political life.

Two empirical challenges to Easton’s theory bear mention. First, research on political socialization has challenged Easton’s account how diffuse support develops, when it comes to beliefs about the Court. The first comprehensive survey of political knowledge in young children, inspired by Easton’s theory, relied on answers to questions which supplied highly-structured response categories, and argued that young children are

119 See Tanenhaus & Murphy (1981), supra note 88, at 24 (“Political support has, in the decade and a half since the publication of David Easton’s A System’s Analysis of Political Life, bid fair to join the handful of concepts central to political science.”).

120 Note how neatly this statement fits the conclusions drawn from findings described above that individual-level support for the Court (1) endures across time, (2) is related to commitment to democratic values, but (3) is not associated with stands taken on political issues. See supra notes 101-09 and accompanying text.
aware, generally, of the Court’s power. But a subsequent study of children’s political views, where they were asked to express their views with respondent-generated answers to open-ended items, “found no evidence that children possess any detailed knowledge of the Court and its functions or see the justices as particularly omnipotent, omnicompetent, and benificent; for the most part, children view the Court with indifference.” How can diffuse support for the Court develop in childhood when children know so little about the institution? Research failing to locate the source of generalized respect for the Court in political socialization presents the possibility that respect for the Court develops and is sustained when the public observes that body has adopted the aloof posture Frankfurter prescribed.

But a second set of findings that test Easton’s account muddy the waters for anyone attempting to find in Frankfurter’s hypothesis a reason for the Court to stay away from politics. Recall that Easton’s theory distinguishes “specific support” (opinions based on specific political outcomes) from ‘diffuse support” (more deep-seated beliefs in favor of the political system). When measuring diffuse and specific support, however, it has proven difficult not to surface elements of one when trying to gauge the other. How can the two kinds of support be said to exist independently if they cannot be independently measured? It’s a profound challenge to Easton’s theory. There are

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121 ROBERT D. HESS & JUDITH V. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (1967)
122 Caldeira (1986), see supra note 67, at 1210-11.
123 See James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, On the legitimacy of national high courts, 92 AM. POLITICAL SCI. REV. 343, 345 (1998) (“[O]ur measure (of specific support) may come close to encroaching on diffuse support, or it may tap an orientation somewhere between diffuse and specific support.”). See Caldeira & Gibson (1992), supra note 89, at 637 (“Unfortunately, previous studies of the Supreme Court have not escaped the peril of mixing together elements of specific support in measures of diffuse support.”).
124 Perhaps this objection shows some fine-tuning of Easton’s theory is in order. Does a finer gradation of Court support exist, lying between diffuse support for the institution proper and specific support for the decisions it makes? See Gibson, Caldeira & Baird (1998) supra note 123, at 345. Or, “perhaps diffuse
consequences for Frankfurter’s proposition, too.

Just as Easton’s construct diffuse support shares attributes with Frankfurter’s “sustained public confidence in the Court’s moral sanction,” the construct specific support approximates the kind of political calculations Frankfurter feared would become the basis for judging the Court. It’s true the study demonstrating that specific and diffuse support are not necessarily separable employs measures for each that do not expressly estimate their surrogates in Frankfurter’s formulation, but this critical point is made: Evaluations of the Court are based, to some degree, in reactions to particular decisions. The Justice’s standard requires the Court to remain aloof from politics. If it’s not possible to empirically distinguish diffuse support (belief in the Court’s moral authority) and specific support (judgments of the Court grounded in political calculations), Frankfurter’s concerns make little sense.

A model attempting to account for how these different forces—general support for the Court and reactions to particular, politically-charged Court actions—interact is described, critiqued, and applied to Frankfurter’s formulation in the next sub-section.

2. Theory 2: Constant, dynamic renewal of Court support

In their paper published in 1997, Mondak and Smithey modeled a dynamic process that might underlie the Court’s legitimacy, one that might even challenge Easton’s theory. Their model is built on a complex of observations, hunches, and

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125 See id. at 349-51. There, Gibson, Caldeira and Baird estimate specific support from response to this question: “From what you have heard or read, would you say that you are very satisfied or not satisfied at all with the way the Supreme Court has been working?” and diffuse support thusly: “If the Supreme Court started making a lot of decisions that most people disagreed with, it might be better to do away with the Supreme Court altogether.” The second question undoubtedly taps a deeper, more global opinion about the Court, but it does not directly tap into the public’s belief in the Court’s moral authority.

126 Mondak & Smithey (1997), see supra note 65.
assumptions. Public support for the Court is stable across time. 127 But “aggregate opinion toward the Court may remain stable despite a great deal of individual-level fluctuation.” 128 Supreme Court rulings more often than not match mass policy preference. 129 On the other hand, any decision will violate the preference of some portion of the public and inspire some kind of negative response in that group. 130 Still, “democratic values fuel what is, for many people, an enduring positive predisposition toward the Court.” 131 Though a controversial decision might shake a person’s confidence in the Court, “the eventual reassertion of democratic values means that the individual’s confidence in the Court may be restored.” 132

What these statements sum to, roughly, is the authors’ view that stability in Court support at the societal level is consistent with an attentive public, made up of diverse individuals and groups, who react, sometimes in volatile and negative ways, to decisions the Court hands down. But any offended group’s faith in the system rebounds, even as another group takes offense at another decision. This on-going renewal, among many, diverse groups, of the Court’s legitimacy results, at the system level, in the stable and relatively high level of Court support to which all the empirical evidence presented or reviewed above attests. 133

To prove their theory the authors construct a regression equation, in which they include terms meant to model the hypothesized short-term declines in Court support and terms designed to capture the hypothesized rebound in the same. They apply their

127 Id. at 1119.
128 Id. at 1120.
129 Id.
130 Id. at 1122.
131 Id. at 1124.
132 Id.
133 See supra Part II.
equation to change in the aggregate level of Court support from 1972 to 1974.\textsuperscript{134} They achieve a close fit. They conclude that their equation aptly captures the relatively stable aggregate performance of their study’s dependent variable, public support for the Court, accounting as well for temporary, group-based fluctuations within it.

This second theory of Court support, which proposes an on-going, constant renewal of positive evaluations of the Court, is highly speculative. The authors have shown the empirical possibility and not offered a definitive test of their theory.\textsuperscript{135} Still it can be said their account adds the following to an understanding of the public basis of Court legitimacy: First, stable and strong support for the Court expressed in the aggregate may veil more volatile reactions to the Court’s work at the individual or community levels.\textsuperscript{136} Second, under the right circumstances, the public is very aware of

\textsuperscript{134} The data set includes the measures from which Figure 1 in this paper was constructed—the Harris Poll ratings of public confidence in the people in charge of running the Supreme Court. See Mondak & Smithey (1997), supra note 65, at 1115.

\textsuperscript{135} The question that occurs is whether the equation really captures the process their theory proposes. The equation contains no terms directly measuring the two key independent variables, decline in Court support among individuals or groups disappointed with particular decisions, and the subsequent rebound in their evaluations of the Court. Thus, as the authors admit, this is a highly abstract demonstration. Id. at 1139 (“One may be tempted to view insight produced by dynamic models as the product of either mysticism or trickery. . . .”). On the other hand, they continue, the process the theory describes is reasonable. Id. (“Yet, in actuality, the logic of our model is quite straightforward.”). And many of the assumptions underlying the theory are consistent with empirical findings from other studies of court support. See, e.g., Valerie J. Hoekstra, \textit{The Supreme Court and local public opinion}, 94 AM. POLITICAL SCI. REV. 89, 96-97 (2000) (It makes sense that some Court decisions capture the public’s attention more than do others, but inside that tendency it has been shown that respondents from the immediate community where a case originated are especially attuned to the decision that results; they also are more likely to rate the decision important. And, in some cases, these same respondents, when they disagree with the Court’s decision, react by expressing sharply more negative evaluations of the Court. This latter effect was true in two of four cases the author investigated. The study producing evidence of these effects did not attempt to assess whether a subsequent rebound in Court support occurred for individuals disappointed in the decisions.).

\textsuperscript{136} For purposes of this article, this is the single, most compelling point to take away from Mondak & Smithey (1997), see supra note 65, at 1132. “The analysis suggests that an attentive public which frequently reevaluates the Court on the basis of its actions is remarkably consistent with stable aggregate support.” Also, note there is room in this theory to define “community” reactions in terms other than just a geographic community. See Hoekstra (2000), supra note 135, at 98 (“[T]here are many types of communities other than geographical where [reaction] may occur. Future research should examine other audiences for Supreme Court decisions to arrive at a more thorough description of the bases of individual support for the Court.”).
and reactive to the business the Court undertakes.\textsuperscript{137} Third, perhaps judgments about the Court are not determined by deeply-held, difficult to measure constructs, like diffuse support. Perhaps individuals “develop a running tally, a summary of past satisfactions. This attitude is a judgment about how well the institution has been performing its job in general.”\textsuperscript{138}

The theory of on-going, constant renewal of support for the Court presents to Justice Frankfurter’s formulation a pair of observations, one consistent with his view, the other not. First, a public composed of individuals and groups attuned to the work of the Court, and forming judgments based on those observations, places the Court on notice that it must protect the public basis of its legitimacy. Frankfurter counseled precisely this.

But, second, the Mondak-Smithey theory proposes that public reactions to the Court’s work arise from judgments the public makes about political outcomes, and then manages to show that these reactions can be volatile and sharply negative, and still remain, in the aggregate, positive. How starkly different is Frankfurter’s hypothesized relationship between the Court’s political aloofness and “public confidence in its moral sanction.” Where the Justice counseled the Court to remain apart and distant from politics in order to sustain public confidence, the Mondak-Smithey theory proposes the public readily reads Court outcomes as political in nature. The next section plumbs survey data to more directly determine whether the public sees the Court as a political institution.

\textsuperscript{137} Valerie J. Hoekstra & Jeffrey A. Segal, \textit{The shepherding of local public opinion: the Supreme Court and Lamb’s Chapel}, 58 J. OF POLITICS 1079, 1088 (1996) (“We find the general level of awareness of our samples, in light of previous research on the public’s awareness of the activities of the Court, to be nothing less than astounding.”).

\textsuperscript{138} Gibson, Caldeira & Baird (1998), see supra note 123, at 356.
B. Does the public judge the Court along political dimensions?

Public opinion toward the Court is positive, as Frankfurter wished. Both theories discussed above account for that positivity, but each challenges the Justice’s view that the Court must aspire to moral and not merely political stature in the public mind. This section returns to evidence from public opinion polls, organizing those results around a discussion, first, whether the public believes the Court is political, and, second, whether the public believes the Court should be political.

1. Does the public think that the Court acts politically?

When discussing the Supreme Court, Americans quite easily make a judgment on the institution’s ideology. Table 2 shows results from polls, conducted during the past dozen years, asking respondents to rate whether the Court is too liberal, too conservative, or about right. Routinely, less than one in ten or less respondents reply that they have no opinion. Thus, typically, more than 90% easily make this judgment. The results are consistent across time and even, with some variation, across polling organizations.

Note that a little under half of all respondents, on the average, say that the Court is neither too far to the left nor too far to the right, but is “about right.” It’s hard to decide exactly what to make of this finding. Do these respondents believe the Court does not act ideologically? The actual text of the response indicates they believe that the Supreme Court is not too far left or right, and is, instead, “about right.” On these data, either interpretation is possible and sensible. Nonetheless, the high percentage of respondents calling the Court’s ideology “about right” does no damage to the main finding from Table 2: Respondents readily make an ideological assessment of the Supreme Court; few (5 to 13%) are reluctant to answer this question. This evidence shows the public is willing and
able to apply an expressly political standard to the Court.

Similarly, the public readily acknowledges the expressly political nature of opportunities President Bush is given to appoint individuals to the Court. Few respondents show reluctance to predict the likely ideological stance of his nominees. A series of polls taken in 2002, then repeated shortly after President’s Bush’s re-election, and again just prior to his second inauguration, indicate that a robust 90% or more of respondents expressed an opinion whether any nominees the President might make would be too conservative, not conservative enough, or about right.139 Asked to predict the ideology of a nominee to the high court, the public does not shy from making expressly political judgments about the Supreme Court.

This willingness to predict the political leanings of any possible Court nominees

139 CBS News/New York Times Polls, taken 11/2002, 11/2004, and 1/2005. The percent in each poll saying they were “unsure” about the likely ideological leanings of President Bush’s possible nominees were, respectively, 11, 11, and 8. At http://www.pollingreport.com/Court.htm.
extends past general ideology to specific issue stands. Half the respondents to a January, 2005, poll stated they disbelieved the President’s claim that he would impose no litmus test to make his high Court selections.\textsuperscript{140} Significantly, only one in twenty respondents said they were unsure about the President’s claim. The implication is clear: Americans understand the political stakes of who sits on the Supreme Court. Nearly half think that a Court nominee “should publicly state his or her position on abortion before being approved by the Senate.”\textsuperscript{141}

On balance, these poll results consistently support this view: Invited to do so, most Americans readily judge the Supreme Court against expressly political standards. The public, it seems, is not reluctant to see the Court and the justices as political actors. Do they approve of this?

2. \textit{Does the public think the Justices should be political actors?}

A clear majority of Americans believe the President should overtly consider ideology when nominating a new justice to the Supreme Court. According to a poll taken in December, 2004, twenty-one percent think he should pick a person who is more of a liberal, and thirty-three percent think he should opt for a person who is more of a conservative.\textsuperscript{142}

A poll taken the prior year focused directly on whether the President should base his choice on how the nominee will behave once he or she is put on the bench.\textsuperscript{143} There, while fifty-nine percent of respondents stated that the President should only “consider

\textsuperscript{140} Los Angeles Times Poll, taken 1/2005. Here is the text of the question: “As you know, President Bush said that he would not use a nominee’s beliefs on abortion as the deciding factor for his selection of a United States Supreme Court justice. Do you believe Bush when he says he will not use an abortion test for his selection of a United States Supreme Court justice, or do you not believe that?” \textit{At} http://www.pollingreport.com/Court.htm.
\textsuperscript{141} See \textit{id}.
\textsuperscript{143} Quinnipac University Poll, taken 2-3/2003. \textit{At} http://www.pollingreport.com/Court.htm.
that person’s legal qualifications and background,” a third of respondents agreed that the President “should also consider how that nominee might vote on major issues the Supreme Court decides.”

After Justice O’Connor announced her intention to leave the Court, a Harris Poll informed respondents that “During her time on the Court, she has been known as a moderate justice or the ‘swing vote’ on many decisions.” Asked what type of judge President Bush should nominate to replace O’Connor, over forty percent chose the reply, “Moderate,” nearly a quarter selected “Conservative,” and fifteen percent said, “Liberal.” Relatively few respondents could not apply, or chose not to apply, an express ideological marker to O’Connor’s successor—less than two in ten respondents chose the answer, “Not sure.”

Tighten the focus onto particular issues, and the percentage of Americans who state that the political views of judicial nominees should be taken into account increases. For example, sixty percent of respondents to a December, 2004, poll said that the Senate, when considering whether to confirm federal court (not just Supreme Court) nominees, should consider, in addition to the candidate’s background, his or her “views on such issues as abortion, gun control and affirmative action.” In a poll taken one month later, forty-six percent agreed that “any nominee to the Supreme Court should publicly state his or her position on abortion before being approved by the Senate.”

Interpreted collectively, the results discussed in this sub-section align this way:

144 Id.
146 Id.
147 Id.
There’s no indication that most Americans resist the notion that politics should play a role in selecting justices for the Supreme Court. To the contrary, a majority think that the President should consider a nominee’s ideology, and that a Court candidate’s position on controversial issues of the day, for example abortion, are properly one thing to be considered during confirmation. Most Americans believe justices should be evaluated in terms of how they will likely perform politically.

3. Do public views of the Court square with Frankfurter’s formulation?

Return again to the proposition: “The Court’s authority . . . ultimately rests on sustained public confidence in its moral sanction.” Frankfurter instructed the Court to remain detached from and above—aloof from—politics in order to retain public confidence. But evidence shows that the public understands that justices possess and act from ideological frameworks. The public knows the Court acts in political ways.

One way to interpret these findings is to recognize that we all—the public, leaders from the executive and congressional branches, the Court and its members—live in the same, real world. There the Supreme Court is correctly seen as exercising authority in a way that affects public policy. It comes as no surprise to anyone that members of the Court vote in cases and write opinions in ways that express particular views. Don’t Presidents carefully vet nominees precisely for this? No justice comes to the Supreme Court as an individual unshaped by experience, either. No justice possesses a clean slate on which opinions in the cases that come before him or her will be written. To expect this is folly.

Follow this road only a bit further, and Justice Frankfurter’s stern and starkly

150 369 U.S. at 267 (J. Frankfurter, dissenting).
151 See J. Scalia for the Court in Republican Party of Minnesota v. White, 536 U.S. 765, 777 (2002) (“[I]t is virtually impossible to find a judge who does not have preconceptions about the law.”).
drawn instruction that the Court must avoid entanglement in political matters, to earn sustained public support, appears not just to lack empirical support, but seems unrealistic and naive. His warning is not useful counsel. It’s simply not the case that the public expects or requires the Court to act in ways Frankfurter believed it must in order to preserve public confidence. The same public that supports the Supreme Court readily, easily, even typically makes political calculations about its members and about the actions the Court takes. “[S]ustained public confidence” in the Court thrives in the very bright light of expressly political evaluations of the Court.

IV. Preserving Public Confidence in Judging

Frankfurter’s fear of political entanglement—his belief that “[i]t is hostile to a democratic system to involve the judiciary in the politics of the people”\(^\text{152}\)—is unfounded from this important perspective: The public does believe the judiciary is involved in the people’s politics. One piece still to be fitted into the puzzle depicting public support for the Court is an explanation why, despite this fact, the Court receives the esteem Frankfurter wished for it—higher ratings than are given the other players in the political process.

A. It’s not just the Court that relies on perceptions of “moral sanction”

In his *Baker v. Carr* dissent, Frankfurter contrasted the Court’s authority, dependent on “public confidence in its moral sanction,” with the tangible tools the Constitution distributes to the other branches—the purse and the sword.\(^\text{153}\) That comparison, where it explains why the Court must sustain public views of its “moral sanction,” fails doubly.

\(^{152}\) Colegrove v. Green, 328 U.S. 549, 553-54.

\(^{153}\) “The Court’s authority—possessed of neither purse nor sword—ultimately rests on sustained public confidence in its moral sanction.” Baker v. Carr, 369 U.S. 186, 267 (J. Frankfurter, dissenting.)
One, express grants of power do not alone and entirely sustain the other two branches in their authority. The Congress and the President seek and depend on public approval to exercise their authority. In fact, because they are less insulated from the public than is the judiciary, the need to sustain public faith in their authority is greater for the Congress and President in this simple way: It’s how members of these branches keep their jobs.

Two, it is plain wrong that only the Court relies on confidence in its “moral sanction,” or, stating the converse, that neither “political” branch ever appeals for public confidence by claiming it exercises its powers for a purpose higher than mere politics. They both do, often. Those claims are part and parcel of policy discourse, common political patter, effective posturing.

Frankfurter distinguished the Court’s moral sanction from political powers the Congress and the President possess, and he prescribed only for the Court the need to stay above politics to hold onto public support. Before the Senate Judiciary Committee charged with vetting his candidacy to become Chief Justice, then Judge Roberts made much the same claim. He would be an umpire and never bat or pitch. But in the public mind, the categorical distinction these two jurists drew dissolves—the public readily evaluates the Court along a political dimension. And in the day-to-day political fray, members of Congress and the President also try to rise above politics to garner public support.

It’s a degree of difference, not a distinction of category, that separates the Court from the other two branches when it comes to public attributions of how “political” each is. Perhaps the Court’s higher ratings are not painfully earned by its resolve to never act
politically. Rather, they may result from a natural advantage it enjoys, the degree to which it appears less political than the other two branches.

B. The public’s love-hate relationship with this political system

In their study of public attitudes toward political institutions, John R. Hibbing and Elizabeth Theiss-Morse tried to explain why support for Congress lagged behind support for the Supreme Court,\(^{154}\) and why support for Congress the institution and support for members of Congress in general were both so low when the same public feels much more positive toward their individual Congressperson.\(^{155}\) They hypothesized that the public maintains a “love/hate relationship” with American democracy.\(^{156}\)

“The American people,” Hibbing and Theiss-Moore write, “want democratic procedures, but they do not want to see them in action.”\(^{157}\) The public dislikes the give and take of normal politics, the haggling and bickering that characterizes an open democracy.\(^{158}\) Congress suffers specially, argue the authors, because “[a]s the most public institution, it acquires the inside track for being the least liked institution.”\(^{159}\)

A telling example was supplied by comments made in focus groups that Hibbing and Theiss-Moore organized. Participants\(^{160}\) reacted very negatively to the Clarence Thomas-Anita Hill controversy that exploded during the 1991 Senate confirmation

\(^{154}\) See HIBBING & THEISS-MOORE, supra note 82, at 31-32.

\(^{155}\) Id. at 43-45.

\(^{156}\) See id. at 17.

\(^{157}\) Id. at 19

\(^{158}\) Id. See also id. at 60-61.

\(^{159}\) Id. at 149 ("The American public has little stomach for uncertainty and equivocation, for bargaining and politically expedient compromise, for extended talking and partisan bickering, and this is exactly what Congress is about.").

\(^{160}\) It’s not clear how many focus group respondents discussed this event, and how many discussed it in the way the authors portray. See id. at 70 (“In the eyes of many, the all-male Senate Judiciary Committee was out of its element in understanding the charges and the proper manner to investigate them.”). But it seems certain that references by any focus group participant(s) to the Thomas hearings arose spontaneously from the participants, that is, were not specifically prompted by the moderator. See id. at 172-73 (listing the focus group questions).
hearings for (then) Judge Thomas. The intense, negative focus group reaction “was not driven by the final product, the confirmation of Judge Thomas, but was instead traceable to public perceptions of how the process unfolded . . . .” In addition, some evidence existed for generalizing the finding, that negativity toward Congress developed during the Thomas hearings, from focus group participants to the public at large.

Assume that Hibbing and Theiss-Moore are onto something here: The more open and partisan its way of conducting its affairs, the less support the public expresses for a particular institution. Perhaps this explains the higher marks the public tends to give the Supreme Court. As these authors point out, the Supreme Court, compared to Congress, operates in relative secrecy. Court members are typically seen only in formal and dignified settings. Most on point, the public does not observe the Court’s internal debates. The difference in how the public perceives the work of the Court as compared to the work of Congress is an advantage the least democratic branch holds over the Congress in competition for public support.

C. Does the Court deliberately construct the view that judging is not political?

Of course, the Court does not escape public perusal. Widespread speculation precedes any high court nomination, and confirmation hearings draw heavy attention and comment. Results of some cases are widely and vigorously discussed in the media. The

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161 Id. at 70.
162 Id. at 145-46. But see supra note 160 (caveat about how common were these responses in the focus groups in which they were expressed).
163 Hibbing & Theiss-Moore, supra note 82, at 70. “[M]ore than 60 percent [of survey respondents] said this event contributed a great deal to their negative perceptions of Congress.” This response indicates respondents’ attention to the process, rather than the outcome, of the Thomas hearings. The 60 percent figure came from a national telephone survey conducted from July to October, 1992. See id. at 163-71.
164 That the public gives higher marks to the Court was the conclusion consistently supported by findings described and analyzed above. See supra Part II.
165 Hibbing & Theiss-Moore, see supra note 82, at 148.
166 Id.
167 Id. at 149.
opinions announcing all decisions are public records. In that created archive, there’s evidence that the Court takes care to fashion a particular reputation for itself. Recall the discussion above of Gregory v. Ashcroft.168

The three opinions in Gregory spelled out different answers on the issue whether the ADEA or the equal protection clause precludes Missouri from capping the age at which a state judge may remain in office. But when read to answer the question, whether judges are policymakers, they sang as a chorus. In concert they defined a particular view of judges and judging.169

Alan Trachtenberg, in his study of American photographs, writes that the works photographers produce “are not simple depictions but constructions, that the history they show is inseparable from the history they enact: a history of photographers employing their medium to make sense of their society.”170 Substitute for photographers, Supreme Court justices; and for photographs, their opinions: In Gregory, the justices used their medium to distinguish judges from policymakers. Embedded in the history the case enacts is a picture of judging. In it the justices make sense of this polity—here, judges are not policymakers, not in the least.171 American photographs, Trachtenberg continues, compile “a history of photographers seeking to define themselves, to create a role for photography as an American art.”172 The record the justices constructed in Gregory defined their own position in exactly the way they wish it to be seen. The opinions, read collectively, make a clear statement about the posture of judging. Judges are not political actors. That picture falls perfectly in line with Frankfurter’s prescription. In Gregory,

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168 See supra notes 36-56 and accompanying text.
169 See supra notes 50-56 and accompanying text.
171 See supra notes 38-44 and accompanying text.
172 TRACHTENBERG, see supra note 170, at xvi.
the conviction that judges never make policy was composed, developed, and given permanence even as the majority reasoned to permit the decision to reach and extol particular political values.\textsuperscript{173}

**Conclusions: Public Perceptions of Political Judging**

“The Court’s authority—possessed of neither purse nor sword—ultimately rests on sustained public confidence in its moral sanction.”\textsuperscript{174} Findings displayed throughout this paper line up sometimes for Frankfurter’s proposition, but often against it. On balance, did Frankfurter get it right or wrong?

*Sustained public confidence in the Court is an empirical fact.* Frankfurter’s proposition assumes public support for the Court. Polls and surveys deliver the news that it’s so. Public support is strong and stable. It exists across time. It is true in absolute terms. A high level of support also exists in relative terms, where the Court’s ratings, compared to those attached to the other two branches, are more positive.

*The public pays attention to the Court.* This fact cuts both ways for Frankfurter’s proposition. On one hand, what authority would exist for the Court if no one knew what it did? A public keeping track of the Court inspires the justices to act so as not to lose public confidence. An intelligent Supreme Court heeds Justice Frankfurter’s warning to attend to how its actions are viewed. On the other hand…

*The public knows the Court is political.* Empirical evidence shows clearly that the public paying attention to the Court, the public that supports the Court, is well aware of the political nature of the Court, in its make-up (who is selected to sit on it) and in the actions it takes (how policy is affected by judicial decisions). This observation, for which

\textsuperscript{173} See *supra* notes 38-44 and accompanying text.

\textsuperscript{174} Baker v. Carr, 369 U.S. 186, 267 (J. Frankfurter, dissenting).
there is plenty of factual support, drives cracks into Frankfurter’s formulation. Another challenge follows.

*It’s not the Court alone that acts to inspire public confidence in its authority.* Frankfurter’s proposition miscasts the Court as categorically different than the coordinate departments of government when it comes to how the public views its authority. Congress and the President seek and depend upon public approval to wield, respectively, the purse and the sword. Both branches commonly claim they exercise their powers for a purpose higher than politics. Frankfurter’s counsel to the Court, to act in a way that inspires the public to believe something higher than politics is its motivating force, applies not just to the Court. It’s useful advice to each of the branches.

*Perhaps the need to sustain public confidence places a boundary on what the public will accept as acceptable political action by the Court.* If there is such a boundary, exactly where it lies, precisely what degree or amount of political action by the Court the public will not brook, is unclear. Is this because the line is never crossed? A prudent Court, acting politically up to a point, honors Frankfurter by never going further, by refusing to ever ultimately test the limits of public confidence. On this view, his formulation provides a warning, even where it cannot possibly serve as a clear-cut directive upon which the Court must always rely. Frankfurter’s formulation sets an outer bound on permissible political action by the judiciary. This is not a useless idea, and no outright rejection of Frankfurter’s formulation. But it reduces the proposition, which he stated so strongly and cleanly and starkly, to “Frankfurter Lite.” That’s not a very satisfying conclusion. It waffles.

There’s another way to put all these pieces together: The public is far more
attuned to the political nature and consequences of the Court’s actions than Frankfurter’s formulation imagines. Why has that fact not injured public confidence in the Court, as Frankfurter surely felt it would? 175

Perhaps the Court enjoys a higher level of positive support because it appears to the public to be the least political of the three branches. This statement is not proven. It is based on reasoning backwards from well-demonstrated support for the Court in light of the observation that politics—the haggling and bickering that characterizes an open democracy—turns people off. 176 If politics turns people off, then greater public support for the Court may be explained by the public’s perception that the Court is comparatively less political than the Congress and the President. How might these perceptions develop?

The justices are skilled at avoiding the impression that they act overtly to pursue political ends. Expand the frame on the particular picture the justices expressly composed in Gregory to what they implicitly manage to accomplish in all their cases. The Court’s language and vocabulary actively create and impart the view that the Court operates along different lines, according to different standards, than do the political branches. 177 Formalities and traditions the Court follows buttress perceptions that it is

175 Colegrove v. Green, 328 U.S. 549, 554 (“It is hostile to a democratic system to involve the judiciary in the politics of the people.”).
176 HIBBING & THEISS-MOORE, see supra note 82, at 19.
177 It’s not a new idea that the Court’s language creates impressions of what it has done in a case. For a much more profound and far-reaching statement of this notion, see Felix S. Cohen, Transcendental nonsense and the functional approach, 33 THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 37 (Lucy Kramer Cohen, ed., 1960) (1935) (“When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.”). Transcendental nonsense and the functional approach was first published in 1935 (35 COLUM. L. REV. 809, 1935). Justice Frankfurter authored the Foreward to the 1960 collection of Cohen’s collected short works. There Frankfurter wrote that the reader of Felix Cohen’s papers, when they originally appeared, “could not fail to be struck with the freshness and trenchancy of their author’s mind.” (xiii THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN xiii (Lucy Kramer Cohen, ed., 1960)).
less political\textsuperscript{178}—not apolitical, but less political—when compared to Congress and the President. The ways it conducts business can only work in the Court’s favor, in this system where, apparently, the more political an institution appears, the greater degree of public disfavor it inspires.

\textit{Did Frankfurter get the relationship backwards?} Sustained public confidence in the Court thrives alongside the public’s understanding that the Court acts politically. The public does not measure the Court against a standard of “moral sanction.” There’s no expectation, on the public’s part, that the Court remain aloof from politics. At the same time, the Court’s position and posture in this polity, less exposed and more formal than are the coordinate departments, may well contribute to public perceptions that it is not as political as are Congress and the President.

It’s reasonable to argue these institutional advantages translate into higher levels of public support for the Court. It makes sense that these positive views shield or cushion or even propel the Court when, in the eyes of the public, it, like the other branches, involves itself “in the politics of the people.”\textsuperscript{179} On this view, sustained public confidence in the Court, which does not require a belief in its moral sanction, runs alongside, and even supports, the political authority the public believes the Court exercises.

\textsuperscript{178} See, e.g., Hibbing & Theiss-Moore, supra note 82, at 148-49. This idea, too, traces back to prior, early, strongly-stated roots. See Max Lerner, Constitution and court as symbols, 46 Yale L. J. 1290, 1291 (1937) (“Talk to the men on the street . . . and you will in the main find that Constitution and Supreme Court are symbols of an ancient sureness and a comforting stability. If you watch the black-robed justices as they come filing in, if you listen to them read their opinions, you will be strong not to succumb to a sense of the Court’s timelessness.”).

\textsuperscript{179} Colegrove v. Green, 328 U.S. at 553.