DISPARAGING THE SUPREME COURT, PART II: QUESTIONING INSTITUTIONAL LEGITIMACY

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INTRODUCTION

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

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1. *See* Brian Bakst, *Scalia: 'Wouldn't Surprise Me' if Death Penalty Struck Down*, SEATTLE TIMES (Oct. 20, 2015), http://www.seattletimes.com/nation-world/scalia-wouldnt-surprise-me-if-death-penalty-struck-down/; *Speeches*, SUP. CT. U.S., http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx (last visited Mar. 14, 2016). Although, speeches are only released on the website "at the discretion of each Justice." *Frequently Asked Questions*, SUP. CT. U.S., http://www.supremecourt.gov/faq_documents.aspx (last visited Feb. 29, 2016).

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

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

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

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

The Supreme Court currently lumbers towards another politically charged term, with rulings issued or due on abortion clinics,[10] affirmative action,[11] the death penalty,[12] life sentencing for juveniles,[13] an incursion into the meaning of "one person one vote,"[14] and most recently, the acceptance of a case analyzing President Obama's

5. *See* Adrienne LaFrance, *Robots Could Make the Supreme Court More Transparent*, ATLANTIC (Jan. 20, 2016), http://www.theatlantic.com/technology/archive/2016/01/one-step-closer-to-a-robot-supreme-court/424800/.

6. *See* Molly McDonough, *What Is the State of the Legal Blogosphere?*, ABA J. (Dec. 1, 2015), http://www.abajournal.com/magazine/article/the_state_of_the_legal_blogosphere.

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

8. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957).

9. *See* Brian Christopher Jones, *Disparaging the Supreme Court: Is SCOTUS in Serious Trouble?*, 2015 WIS. L. REV. FORWARD 53, http://wisconsinlawreview.org/disparaging-the-supreme-court-is-scotus-in-serious-trouble/.

10. *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *cert. granted sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 499 (2015).

11. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

12. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

13. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

14. *See Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014), *prob. juris. noted sub nom. Evenwel v. Abbott*, 153 S. Ct. 2349 (2015); Adam Liptak, *Supreme Court Agrees to Settle Meaning of 'One Person One Vote,'* N.Y. TIMES (May 26, 2015), http://nyti.ms/1BnxZD9; *see also* Jacob Shamsian, *The 5 Most Controversial Supreme Court Fights Coming Up*, BUS. INSIDER (Sept. 4, 2015), http://www.businessinsider.com/5-controversial-supreme-court-fights-this-fall-2015-9.

executive action on immigration.[15] The controversy surrounding the cases makes this year little different than any other, however this unabashedly political docket comes on the heels of one of the most controversial terms in recent memory. And, while the Court is certainly no stranger to controversy, at this point in the Roberts Era, something is different. The difference appears not through the divisiveness of the Court's docket but in the way the American public, including journalists and others, now thinks and speaks about the institution.

Key to this new assessment is a widespread, increasing criticism; the institution and its members are being disparaged by a larger and more sophisticated audience than ever before.[16] As Richard Davis notes, "[T]he press has undergone an evolution in its approach to the Court. Reporters have become less willing to view the justices as above political scrutiny, personalize Court coverage, and cover the Court with less formality than in the past."[17] Additionally, Vincent James Strickler has found that the volume and content of Court coverage has changed over the past two decades.[18] Tracking television and newspaper coverage of two major cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[19] and *National Federation of Independent Business v. Sebelius*,[20] he found that coverage of the Court has increased since 1992—at least in regard to these two major cases—and also that quotations from the arguments or opinions in stories had decreased, giving way to reactionary quotes by politicians and others.[21]

15. *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 84 U.S.L.W. 965 (Jan. 19, 2016) (No. 15-674); *see also* Adam Liptak & Michael D. Shear, *Supreme Court to Hear Challenge to Obama Immigration Actions*, N.Y. TIMES (Jan. 19, 2016), http://www.nytimes.com/2016/01/20/us/politics/supreme-court-to-hear-challenge-to-obama-immigration-actions.html.

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

17. Davis, *supra* note 7, at 4–5; *see also* David G. Savage, *How Traditional Journalists Cover the Court in the Age of New Media*, *in* COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE, *supra* note 7, at 173, 175 ("Compared to the mid-1980s, when I began covering the Court, the news coverage these days is richer, deeper, more varied, but most of all, faster.").

18. Vincent James Strickler, *The Supreme Court and New Media Technologies*, *in* COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE, *supra* note 7, at 63–65.

19. 505 U.S. 833 (1992).

20. 132 S. Ct. 2566 (2012).

21. Strickler, *supra* note 18, at 64–65.

But change has not just arisen in the press. Indeed, frustration with the Court among the citizenry may now have reached a boiling point.[22] Conservatives remain angry with the Court because of the health care[23] and gay marriage[24] decisions, and suffice it to say that liberals are also unhappy with its work.[25] Such sentiments could be shrugged off as the whims of a partisan electorate, if not for the increased sophistication of the Court's critics. Recent disparagement has rivaled what other branches have dealt with throughout the years, especially Congress. Yet, Congress need not worry about its primary roles: most of them (and the most important of all—legislating) are explicitly enshrined in the Constitution's text,[26] and any contestation of these powers in the near future appears highly unlikely. In fact, in the face of relentless adversity, Congress has been a resilient institution.[27]

However, the Court's troubles go beyond legitimacy issues: since its powers of constitutional review are judicially rather than constitutionally constructed,[28] if the Court loses enough legitimacy such powers could be modified, perhaps significantly. As has been widely acknowledged, the power of the Court's judgments "depend on the acceptance by other political players—the executive, Congress, and the public."[29] In fact, no formal amendment to the Constitution is required in order to change the nature of Supreme Court constitutional review. While some may believe that judicial supremacy of constitutional

22. October 2015 figures from Gallup reveal that a new high of 50% of respondents now disapprove of the way the Court is handing its job. Justin McCarthy, *Disapproval of Supreme Court Edges to New High*, GALLUP (Oct. 2, 2015), http://www.gallup.com/poll/185972/disapproval-supreme-court-edges-new-high.aspx. This is coming on the heels of July 2015 figures that showed Republicans' view of the Court plummeted to a fifteen-year low, standing at 18%. Jeffrey M. Jones, *Republicans' Approval of Supreme Court Sinks to 18%*, GALLUP (July 16, 2015), http://www.gallup.com/poll/184160/republicans-approval-supreme-court-sinks.aspx. Conversely, Democratic views of the institution surged to 76%. *Id.* However, it is worth noting that the wide party approval gap eased a bit in the October figures (Republicans: 26%, Democrats: 67%). McCarthy, *supra*.

23. *King v. Burwell*, 135 S. Ct. 2480 (2015).

24. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

25. Josh Gerstein, *Supreme Court's Liberal Admirers Get Reality Check: Reports of the Supreme Court's Leftward Turn Have Been Greatly Exaggerated*, POLITICO (June 29, 2015, 7:28 PM), http://www.politico.com/story/2015/06/supreme-courts-liberal-admirers-get-reality-check-119567; Linda Greenhouse, *The Illusion of a Liberal Supreme Court*, N.Y. TIMES (July 9, 2015), http://www.nytimes.com/2015/07/09/opinion/the-illusion-of-a-liberal-supreme-court.html.

26. U.S. CONST. art. I, § 1.

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

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

29. Davis, *supra* note 7, at 5.

interpretative authority has been the long-established norm throughout American history, this view is manifestly incorrect; such "authority is not fixed" and "has shifted over time."[30] Indeed, "[j]udicial authority can be successfully challenged,"[31] and this is especially true from a presidential perspective.[32] Given the animosity citizens of all political stripes have had towards the institution in recent years, an increase in popular constitutionalism or an enhanced form of departmentalism—including direct challenges from the President or Congress—could thus significantly reduce the Court's role in American democracy.[33] Alternatively, lower federal courts or state courts may become more hostile to Supreme Court precedent, carving out their own constitutional paths that run contrary to Court interpretation.[34] In fact, as covered below, this may already be happening in relation to the Court's same-sex marriage decisions.

The lack of explicitly provided constitutional review is no small matter. In other countries, powers of constitutional review for high courts or constitutional courts are clearly expressed.[35] The U.S.

30. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 290, 292 (2007) ("The judicial authority to interpret the Constitution has been dynamic over the course of American constitutional history. The supremacy and leadership of the judiciary in setting the meaning of the Constitution was neither fixed at any particular moment in time nor strictly a function of the Court's own interpretation of its powers under the Constitution.").

31. *Id.* at 286.

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

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

34. *See, e.g.*, Steven Ferrey, *Can the Ninth Circuit Overrule the Supreme Court on the Constitution?*, 93 NEB. L. REV. 807, 810 (2015) ("The Ninth Circuit decision reconfigured the past half-century of Supreme Court interpretation of the dormant Commerce Clause.").

35. *See, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 93 (Ger.); MINGUO XIANFA art. 78 (2005) (Taiwan) ("The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders."); *id.* at art. 171 ("Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation

Constitution fails in this regard;[36] hence the need for the judiciary to establish this power in *Marbury v. Madison*.[37] Nevertheless, if the Court continues to inject itself into the political process (adjudicating the most contentious political issues), fail to protect minorities, and expand both unchecked governmental power and corporate speech rights,[38] hostility towards the institution will only increase. Without question, the Court should indeed worry about its constitutional future.

I. OFF THE HOOK?

While disparagement of the Court is more widespread, the institution has often received unequal and less severe treatment than the other branches, notably Congress, regarding similar issues. This phenomenon has been noted in previous works about the Court[39] and in more recent ones, as well.[40] The Court, in large part because of its own institutional considerations and in large part because of hesitation by journalists and others, has failed to receive the same scrutiny as the other branches.[41]

An interesting example can be found in reactions to the productivity of two branches: Congress and the Court. Just as it is Congress's job to pass laws, it is the Court's job to maintain the uniformity of federal law, which it does by issuing decisions. But the difference in public reaction to the decreasing productivity of the two branches is striking. For instance, near the end of the conspicuously unproductive 112th Congress, *The Week* put together a list of the most insulting media labels for the governing body, which included "the most worthless, incompetent, do-nothing gathering of lawmakers in the nation's history" (*LA Times*);[42] "took incompetence to a higher level"

thereon shall be made by the Judicial Yuan."); *id.* at art. 173 ("The Constitution shall be interpreted by the Judicial Yuan.").

36. *See* U.S. CONST. art. III.

37. 5 U.S. (1 Cranch) 137, 177–78 (1803).

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

39. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

40. *See, e.g.*, JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007); Davis, *supra* note 7.

41. Tyler Johnson, *How and Why the Supreme Court Remains Undercovered*, *in* COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE, *supra* note 7, at 23, 23–35.

42. Harold Maass, *10 Insulting Labels for the Outgoing 112th Congress*, WEEK (Jan. 3, 2013), http://theweek.com/articles/469058/10-insulting-labels-outgoing-112th-congress (quoting David Horsey, *Derelict 112th Congress Sets New Record for*

(*Daily Beast*);[43] "clowns" (*Washington Times*);[44] and "least effective and most disliked" (*Business Insider*).[45] Unsurprisingly, the 113th Congress received similar condemnation, receiving labels such as "worst Congress ever" (*The Week* and *Politico*);[46] "[t]errible" (*Huffington Post*);[47] and "set[] a standard for inertia" (*U.S. News & World Report*).[48] While depictions such as these are relatively common for the lawmaking body, the Court is not—or at least was not—attuned to such disparagement.

Beginning in the late 1980s, the Court saw a decline in the cases on the plenary docket and in the merits opinions it delivered, a trend which continued into recent years.[49] Yet little hateful or extreme language about the institution emerged. And for those who did criticize the Court, the language was more genteel, as opposed to intolerable of the institution. A 2009 *New York Times* article used the phrases "not operating at peak capacity" and "not an active enough participant in a dialogue with the lower courts."[50] A 2013 *Washington Post* piece even described the Court as "busy looking for cases—but finding fewer than usual."[51] Those phrases are a far cry from the demonstrative "Congress

Low Achievement, L.A. TIMES (Jan. 3, 2013, 5:00 AM), http://www.latimes.com/opinion/topoftheticket/la-na-tt-derelict-congress-20130102-story.html).

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

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

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

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

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

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

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

50. Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), http://www.nytimes.com/2009/09/29/us/29bar.html.

51. Robert Barnes, *Supreme Court Busy Looking for Cases — but Finding Fewer than Usual*, WASH. POST (Dec. 1, 2013), https://www.washingtonpost.com/politics/supreme-court-busy-looking-for-cases--but-finding-fewer-than-usual/2013/12/01/d6fd1194-5aa0-11e3-a66d-156b463c78aa_story.html.

is useless" rhetoric seen above, most of which came from reputable news sources.

Even the law review audience, at times the institution's harshest critic, has not condemned the Court too severely for its depleted docket. Kenneth Starr provided the bitterest words for the Court in 2006, remarking that they do "not even pretend to maintain the uniformity of federal law"[52] and that "the facts show beyond the slightest doubt that the Court is willing to allow conflicts in federal law to exist—and, even worse, to persist."[53] Ultimately, he calls the Court's docket "a scarce, indeed precious national resource"[54] and suggests that it may be time for the U.S. Supreme Court (SCOTUS) "to put its shoulder to the wheel and work harder."[55] Recognizing Starr's point about a lack of uniformity, in 2012, Ryan Owens and David Simon wrote that "legal ambiguity may be rampant."[56] They further note that a depleted docket could leave the institution "[o]ut of [t]ouch"[57] or perhaps even "[d]iminish the Court's [l]egitimacy,"[58] remarking, "Failure by the Court to send clearer signals could have damaging long-term consequences for the Supreme Court as an institution."[59] Yet again, while these words are indeed critical, they are not altogether severe or extreme; if anything, such phrases sound thoughtful and inquisitive.

However, all that may be changing.

II. EXTERNAL DISPARAGEMENT: CHANGING TIMES

While the Court has received favorable treatment compared to the other branches, books such as *The Brethren* ushered in new techniques regarding how journalists understood and covered the institution.[60] This

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

53. *Id.* at 1366.

54. *Id.* at 1385.

55. *Id.*

56. Owens & Simon, *supra* note 49, at 1223–24.

57. *Id.* at 1254–56 ("[T]he smaller the docket, the more likely that the Court will fail to decide an important case and, when it does decide a case, it could decide the wrong issue.").

58. *Id.* at 1260–63 ("Because decisions influence whether the public perceives the Court as legitimate, a smaller docket has the potential to catalyze the erosion of the Court's legitimacy. That is important because people are more likely to follow a legitimate Court.").

59. *Id.* at 1285.

60. Davis, *supra* note 7, at 10 ("Following Woodward's lead, some other reporters began to view the Court as an institution full of individuals with political goals.").

newfound approach evolved over the next few decades—merging with the Internet era—to produce a level of sophisticated (and unsophisticated) coverage the Court had never witnessed. Not only does it have to contend with traditional press coverage, as the press area inside the courtroom has been enlarged to accommodate more journalists,[61] but it is now subject to widespread analysis and criticism through social media and blogs.[62] Blogs have probably made the most significant contribution to covering the Court in recent years. While some have lamented the death of the legal blogosphere, it indeed remains strong (and some say, growing).[63] In December 2015, the ABA reported that, although some of the major blogs they enjoyed had gone on hiatus or shut down, "law blogging appears to be flourishing."[64] They note that sites such as SCOTUSblog and Above the Law have never been as popular and that almost 26% of law firms are actively engaged in blogging.[65] Traditional journalists have also readily admitted that they follow legal blogs and consider them good sources of information.[66] The proliferation of blogs and social media related to the Court has occurred in conjunction with a wider availability of academic literature on the Internet through open-access websites like SSRN and Bepress. The widespread availability of social media, legal blogs, and access to academic commentary has led to a reformulation of where people get information about the Court. Ultimately, it is quite evident that although the Justices have gone out of their way to avoid new media,[67] new media is certainly not avoiding them.

After the 2014 session ended, many people (including celebrities, politicians, and journalists) used unabashedly strong language towards the Court. Seth Rogen publicly called them "a**holes,"[68] Elizabeth Warren said they were heading in "a very scary direction,"[69] and a sitting federal judge proclaimed it is time for the Court to "stfu" (shut

61. *Id.* at 13.

62. Strickler, *supra* note 18, at 78.

63. McDonough, *supra* note 6.

64. *Id.*

65. *Id.*

66. David G. Savage, *How Traditional Journalists Cover the Court in the New Media Age*, *in* COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE, *supra* note 7, at 176.

67. Strickler, *supra* note 18, at 70.

68. Alex Lazar, *Seth Rogen Calls Hobby Lobby and Supreme Court Justices 'A**holes,'* HUFFINGTON POST (July 1, 2014, 2:29 PM), http://www.huffingtonpost.com/2014/07/01/seth-rogen-hobby-lobby_n_5548421.html.

69. Elizabeth Warren (@elizabethforma), TWITTER (June 30, 2014, 8:49 AM), https://twitter.com/elizabethforma/status/483638535296409601 ("The current Supreme Court has headed in a very scary direction. #scotus #hobbylobby").

the f**k up).[70] Given the lack of televised proceedings, some late night comedy news shows found innovative ways to cover the Court. John Oliver used dogs to represent different Justices,[71] while Rachel Maddow employed hand puppets.[72] Justice Breyer even concernedly mused at the American Law Institute that the Justices were being referred to as "junior varsity politicians,"[73] and prominent *New York Times* columnist Linda Greenhouse insightfully remarked "that instead of blaming our politics for giving us the court we have, we should place on the court at least some of the blame for our politics."[74] She's right. But this chorus of discontent predominantly came from the left.

Given the monumental health care and same-sex marriage decisions, the end of the 2015 session was as replete with rebukes, this time from the right. Republican politicians thoroughly trashed the Court. Bobby Jindal mused about getting rid of the Court,[75] while Mike Huckabee declared that the Court "unwr[o]te the laws of nature."[76] Governor Scott Walker suggested passing a constitutional amendment to let states decide the definition of marriage,[77] and, not to be outdone, Senator Ted Cruz proposed an amendment for SCOTUS retention elections.[78] Although much of this political theatre was anticipated (at least in regard to the same-sex marriage decision), should one of these presidential contenders be voted into the White House, SCOTUS's

70. Richard G. Kopf, *Remembering Alexander Bickel's Passive Virtues and the Hobby Lobby Cases*, HERCULES & UMPIRE (July 5, 2014), http://herculesandtheumpire.com/2014/07/05/remembering-alexander-bickels-passive-virtues-and-the-hobby-lobby-cases/.

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

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

73. Linda Greenhouse, *Polar Vision*, N.Y. TIMES (May 28, 2014), http://www.nytimes.com/2014/05/29/opinion/greenhouse-polar-vision.html.

74. *Id.*

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

76. Kristen Wyatt, *GOP WH Hopefuls Deride Gay Marriage Ruling*, ASSOCIATED PRESS (June 28, 2015, 12:02 AM), http://bigstory.ap.org/article/ee965dabb4b64c4fa44441db3f1f6c0c/court-decisions-highlight-political-challenges-facing-gop.

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

78. Katie Zezima, *Ted Cruz Calls for Judicial Retention Elections for Supreme Court Justices*, WASH. POST (June 27, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/27/ted-cruz-calls-for-judicial-retention-elections-for-supreme-court-justices/.

constitutional interpretative authority could certainly be challenged, as it was by Reagan in the 1980s.[79]

What was unforeseen was the wider and deeper investigation—which seems to have only just begun—focusing on the Court's proper role in American democracy. The *New York Times* held a forum asking "Is the Supreme Court Too Powerful?"[80] Some of the writers answered affirmatively to that question.[81] SCOTUSblog held a similar forum,[82] and a couple of writers made strong cases against the processes of change brought about by the *Obergefell v. Hodges*[83] ruling.[84] Even prominent academic blogs like I-CONnect (the *International Journal of Constitutional Law*'s blog) have published material that questions whether the ruling was "unconstitutional" change.[85]

High-court judges within the American judiciary have also criticized the *Obergefell* decision. A Louisiana Supreme Court justice called it "horrific,"[86] labelling it "a super-legislative imposition,"[87] and a fellow Louisiana Supreme Court justice noted that the "definition [of

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

80. *Is the Supreme Court Too Powerful?*, N.Y. TIMES (July 6, 2015), http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful.

81. Larry Kramer, *The Supreme Court's Power Has Become Excessive*, N.Y. TIMES (July 6, 2015, 5:05 PM), http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-courts-power-has-become-excessive; Richard Thompson Ford, *On Rights, the Supreme Court Has Done More Harm than Good*, N.Y. TIMES (July 6, 2015), http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/on-rights-the-supreme-court-has-done-more-harm-than-good.

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

83. 135 S. Ct. 2584 (2015).

84. Ryan Anderson, *Symposium: Judicial Activism on Marriage Causes Harm: What Does the Future Hold*, SCOTUSBLOG (June 26, 2015, 4:28 PM), http://www.scotusblog.com/2015/06/symposium-ryan-anderson/; David Upham, *Symposium: A Tremendous Defeat for "We the People" and Our Posterity*, SCOTUSBLOG (June 26, 2015, 4:26 PM), http://www.scotusblog.com/2015/06/symposium-a-tremendous-defeat-for-we-the-people-and-our-posterity/.

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

86. *Costanza v. Caldwell*, 167 So. 3d 619, 622 (La. 2015) (Knoll, J., concurring), *quoted in* Mark Joseph Stern, *Louisiana Supreme Court Justices Blast "Horrific" Marriage Equality Decision*, SLATE (July 8, 2015, 1:28 PM), http://www.slate.com/blogs/outward/2015/07/08/louisiana_supreme_court_justices_blast_horrific_marriage_equality_ruling.html.

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

marriage] cannot be changed by legalisms."[88] This all happened after the end of the most recent term. Yet, a few months before the *Obergefell* decision, in a bold and at times meandering 148-page decision, the Alabama Supreme Court publicly questioned whether the doctrine of federal supremacy should remain part of the American Constitution.[89] Just recently, the Chief Justice of the Alabama Supreme Court, Roy S. Moore, issued an Administrative Order to halt same-sex marriages from being administered in his state, therefore directly and forcefully challenging the Court.[90] Thus, merely over the past few years a range of citizens have been thinking and speaking about the Court—and its place within American society—in remarkably different terms than previously.

III. INTERNAL DISPARAGEMENT: THE COURT'S OWN DENUNCIATIONS

But perhaps some of the harshest rhetoric—and analysis regarding the institution's proper role in American democracy—has come from the Justices themselves. This was abundantly evident in the previous term. The late Justice Scalia begins his *King v. Burwell*[91] dissent by calling the majority's opinion "absurd"[92] and "indefensible."[93] He goes on to dramatically proclaim, "Words no longer have meaning,"[94] and classifies the majority's decision as "unheard of,"[95] "jiggery-pokery,"[96] "pure applesauce,"[97] and "self-defeating."[98] Justice Scalia ends his dissent with noticeably ominous language, remarking that the two Affordable Care Act cases, *King v. Burwell* and *National Federation of*

88. *Id.* at 624 (Hughes, J., dissenting).

89. *State ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752 (Ala. Mar. 3, 2015), *discussed in* Mark Joseph Stern, *Alabama Supreme Court Throws Tantrum, Defies Federal Judge, Halts Gay Marriages*, SLATE (Mar. 4, 2015, 8:57 AM), http://www.slate.com/blogs/outward/2015/03/04/alabama_supreme_court_defies_federal_judge_on_gay_marriage.html.

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

91. 135 S. Ct. 2480 (2015).

92. *Id.* at 2486 (Scalia, J., dissenting) ("The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.' That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.").

93. *Id.* at 2502 (Scalia, J., dissenting).

94. *Id.* at 2497 (Scalia, J., dissenting). "But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved." *Id.* (Scalia, J., dissenting).

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

96. *Id.* at 2500 (Scalia, J., dissenting).

97. *Id.* at 2501 (Scalia, J., dissenting).

98. *Id.* at 2504 (Scalia, J., dissenting).

Independent Business v. Sebelius, "will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."[99] While these decisions did not necessarily do this, the formal acknowledgement in Justice Scalia's dissent certainly does so. And although this line did not get as much play in the media as the Justice's other decadent language, it casts a gloomy shadow over the Court, acknowledging it as an overtly political institution.

The *Obergefell* decision brought forth more disparaging rhetoric amongst the Justices. In his dissent, Chief Justice Roberts prominently notes that the decision was "an act of will, not legal judgment,"[100] and boldly asks of his colleagues, "[j]ust who do we think we are?"[101] In relation to one section of the majority's decision, Chief Justice Roberts notes, "At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach."[102] In a separate dissent, Justice Scalia calls the opinion a "threat to American democracy"[103] and a "naked judicial claim to legislative—indeed, *super*-legislative—power."[104] Justice Thomas is none softer, stating that the decision is a "distortion of our Constitution"[105] and at odds "with the principles upon which our Nation was built."[106] Finally, Justice Alito writes that the decision "is far beyond the outer reaches of this Court's authority,"[107] claiming that it "usurps the constitutional right of the people"[108] and will "have a fundamental effect on this Court and its ability to uphold the rule of law."[109] All of these accusations are undeniably serious and constitutionally significant, especially as regards the proper role of the

99. *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting).

100. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

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

102. *Id.* at 2621 (Roberts, C.J., dissenting).

103. *Id.* at 2626 (Scalia, J., dissenting).

104. *Id*. at 2629 (Scalia, J., dissenting) ("A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."). And let us not forget perhaps his most whimsical line of the dissent: "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie." *Id.* at 2630 n.22 (Scalia, J., dissenting).

105. *Id.* at 2631 (Thomas, J., dissenting). "Distort" or "distortion" is used at many points in Thomas's dissent. *Id.* at 2631, 2640 (Thomas, J., dissenting).

106. *Id.* at 2631 (Thomas, J., dissenting).

107. *Id.* at 2642 (Alito, J., dissenting).

108. *Id.* at 2643 (Alito, J., dissenting).

109. *Id.* (Alito, J., dissenting).

judiciary in constitutional review and, ultimately, in American democracy.

Well known for being the most sarcastic Justice,[110] such bold vitriol was expected from Justice Scalia.[111] But, such sweeping and divisive rhetoric is not accustomed to the other Justices. Given the increasing disparagement of the institution, these attacks will receive more attention than ever. This compromises the Court on two levels. First, the flamboyant attacks Justice Scalia employed in his *King* dissent, in addition to the many he has applied throughout the years, often made the Court's work look insignificant or trivial.[112] Moreover, the harshness of the language used in the *Obergefell* dissents taints the Court's authentic constitutional discourse, making it appear abundantly and overtly political. While Justice Scalia's passing may end up changing the composition of the Court in some respects, the other Justices have demonstrated that in major constitutional cases they are certainly not immune from indulging in provocative and inflammatory rhetoric. This type of internal disparagement will only deepen external ridicule of the institution.

IV. QUESTIONING INSTITUTIONAL LEGITIMACY

During the early years of the Supreme Court, many Chief Justices were hesitant to allow dissenting opinions, as they thought these would take away from the legitimacy and certainty of the law.[113] While contemporary democracies recognize the importance of such valuable constitutional dialogue, the practicalities of these early notions remain an altogether valid concern: most opinions are not unanimous, and many significant decisions land 5-4. Yet it is difficult to imagine that the Founders could have foreseen the era of "body slam" dissents some members of the Court now routinely engage in.[114] One of the most striking aspects of the external and internal disparagement material above is that such criticism does not merely relate to specific cases,

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

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

112. *See, e.g.*, Katy Steinmetz, *This Is What 'Jiggery-Pokery' Means*, TIME (25 June 2015), http://time.com/3936188/scalia-jiggery-pokery/; *The Human Dissentipede*, DAILY SHOW WITH JON STEWART (June 29, 2015), http://on.cc.com/1KseZuM.

113. MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 9–12 (2015).

114. Dahlia Lithwick, *'Dissent and the Supreme Court,' by Melvin I. Urofsky*, N.Y. TIMES (Oct. 21, 2015) (book review), http://www.nytimes.com/2015/10/25/books/review/dissent-and-the-supreme-court-by-melvin-i-urofsky.html.

interpretative methods, or particular reasoning, but to the *legitimacy of Supreme Court constitutional review on the whole*: the Justices, journalists, academics, and others are openly questioning the Court's role within American democracy and its right to intervene in the democratic process. Unsurprisingly, this inquiry has been passed down to the American public, including journalists, academics, and candidates for public office.[115]

The most confrontational comments regarding the legitimacy of the Court have come from current and former Republican presidential candidates, who see the Court—or aspects of it—high on their list of problems. Much of this talk came to a head in the September 2015 CNN Republican debate, which posed an interesting question: whether George W. Bush made a mistake appointing John Roberts as Chief Justice. Although it was asked to Jeb Bush, the harshest response came from Senator Ted Cruz, who said Chief Justice Roberts was "a good enough lawyer that he knows in these Obamacare cases he changed the statute, he changed the law in order to force that failed law on millions of Americans for a political outcome."[116] He further noted that if two different people were nominated, then Obamacare would not be on the books, and same-sex marriage would still be illegal.[117] This response, and others like them, are especially hazardous for the Court in terms of its institutional legitimacy; something that, ironically, Chief Justice Roberts was attempting to protect by switching his vote in favor of the law.[118] To have (Harvard Law–educated) presidential candidates attesting that different nominees would have produced different results certainly does little to mask the Court's political nature. Furthermore, such comments rebrand the Court and its members from independent judges with interpretive differences into glorified party politicians.

But that was not the end of the matter. Governor Bobby Jindal added, "Justice Roberts twice rewrote the law to save Obamacare, the biggest expansion of government, creating a new entitlement when we

115. *See, e.g.*, Ramesh Ponnuru, *Supreme Court & Gay Marriage: Judicial Supremacy Isn't Constitutional Supremacy*, NAT'L REV. (Sept. 10, 2015); Sarah Smith, *Huckabee Slams 'Judicial Supremacy,'* POLITICO (June 19, 2014, 5:02 PM), http://www.politico.com/story/2014/06/mike-huckabee-march-for-marriage-gay-marriage-supreme-court-108085.

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

117. *Id.*

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

can't afford the government we've got today . . . ."[119] Cruz struck again here, noting, "We have an out-of-control Court, . . . if I'm elected president, every single Supreme Court justice will faithfully follow the law and will not act like philosopher kings."[120] Indeed, this has not been the only prominent occasion where the Chief Justice has drawn the scorn of Republican presidential candidates.[121] Mike Huckabee has routinely gone even further, accentuating the fight against judicial supremacy as one of his main campaign talking points. He frequently discusses the Court's errors and its power within the American judicial system. He has stated, "Throughout our nation's history, the court has abused its power and delivered morally unconscionable rulings. . . . Too much power concentrated in the courts is a threat to our republic."[122] Such statements, even after the election, will not be easily forgotten.

Exploration into the institution's legitimacy has not been limited to political candidates and has been even broader throughout the academy. Stephen Gottlieb has written, "In each area that political scientists, historians, jurists, and legal scholars, both in the United States and abroad, have identified as crucial to the survival of democracy, the Roberts Court has been leading in the opposite direction."[123] He further states that other top national courts take the "perfection and survival" of democracy seriously and argues that if the Court's interpretative methods are not based on such reasoning, this will "generate law without logic, mind, or soul and reveal the partisanship of the Court."[124] Indeed, the politics of the Court remains a primary concern for academics. James Gibson has been investigating Supreme Court legitimacy for over three decades and has some words of caution for the institution. He notes that if judges are seen as ordinary politicians, the American public tends to support the judiciary less; in fact, some decrease in support for the Court may be due to "intemperate and

119. *Full Transcript: Undercard GOP Debate*, WASH. POST (Sept. 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/09/16/running-transcript-undercard-gop-debate/.

120. Beckwith, *supra* note 116.

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

122. Mike Huckabee, *Mike Huckabee: Fight Gay Marriage Judicial Tyranny*, USA TODAY (June 26, 2015), http://www.usatoday.com/story/opinion/2015/06/25/supreme-court-obamacare-religious-freedom-huckabee-column/29175727/.

123. GOTTLIEB, *supra* note 16, at 233.

124. *Id.* at 238, 261.

politicized dissents by some justices."[125] Gibson reasons that the Court "should worry less about angering the public with its policy decisions, and focus more on the public's satisfaction with its processes, procedures, and politics, if it is to maintain its popular legitimacy."[126] Indeed, in relation to those processes, procedures, and politics, the Court could learn much from its peers.

V. THE COURT IN COMPARATIVE PERSPECTIVE[127]

An examination of the Court's practices in relation to other constitutional courts may help to understand why the Court is under such intense disparagement. This section focuses on some issues that Chemerinsky covered[128] and that I focused on in my book review.[129] Yet its main purpose is to expand on these criticisms, providing a relevant point of comparative analysis. In doing so, it compares the SCOTUS and the relatively new UK Supreme Court (UKSC)—established in 2009—and attempts to articulate some areas in which SCOTUS may want to change its current practices. This section also takes a practical view of institutional change, noting that any type of constitutional changes to the Court, such as setting term limits for justices or altering the way justices are selected, although highly desirable,[130] remains unlikely at this time.[131] Nevertheless, many practical changes inside the institution can be made by SCOTUS itself, and these changes may very well aid it in retaining legitimacy and carrying out its constitutional duties.

While newly implemented courts are more likely to take into consideration modern democratic expectations and problems—including technological innovations—than long-established courts, comparing the

125. James L. Gibson & Michael J. Nelson, Too Liberal, Too Conservative, or About Right? The Implications of Ideological Dissatisfaction for Supreme Court Legitimacy 36 (2015) (unpublished manuscript) (on file with author).

126. *Id.*

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

128. CHEMERINSKY, *supra* note 16.

129. Jones, *supra* note 16.

130. I also argued that the judicial selection process was one of the major contributors to a less legitimate court. Jones, *supra* note 127.

131. ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 2 (2007) ("The fact is that in most democratic polities, the basic constitutional arrangements are no longer up for grabs. . . . [S]mall-scale institutional design is all that is on offer.").

two demonstrates how far SCOTUS is from its newly established, trans-Atlantic peer.[132] Additionally, although the courts may differ in terms of their comprehensive democratic functions,[133] there is no reason as to why long-established high courts cannot innovate to keep up with the times.

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

132. However, the UKSC is not immune from communication problems. *See, e.g.*, Richard Cornes, *A Constitutional Disaster in the Making? The Communications Challenge Facing the United Kingdom's Supreme Court*, 2013 PUB. L. 266.

133. The major difference between the two is the extent of their judicial review powers. Much simplified, SCOTUS has wide jurisdiction in terms of what it can review; the most significant power being that it can strike down federal and state statutes (primary legislation). The UKSC, operating in a system based on parliamentary sovereignty, cannot strike down primary legislation (Acts of Parliament), but under the Human Rights Act 1998, can now offer "statements of incompatibility" with HRA rights. *See* THE SUPREME COURT OF THE UNITED STATES OF AMERICA (SCOTUS) AND THE SUPREME COURT OF THE UNITED KINGDOM (UKSC): A COMPARATIVE LEARNING TOOL 5 [hereinafter COMPARATIVE LEARNING TOOL], https://www.supremecourt.uk/docs/scotus-and-uksc-comparative-learning-tool.pdf (last visited Mar. 14, 2016).

134. Regarding government, see CONGRESS.GOV, http://www.congress.gov (last visited Feb. 11, 2016).

135. Brian Stelter, *CNN and Fox Trip Up in Rush to Get the News on the Air*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/2012/06/29/us/cnn-and-foxs-supreme-court-mistake.html.

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

case,[137] a brief background on the appeals, the judgment, and the main reasons for the judgment.[138] The "reasons for the judgment" section always cites specific paragraphs in the decision to make it easier for the reader to follow. The UKSC is also on Twitter[139] and has its own YouTube and Flickr channels as well,[140] demonstrating a significant effort on their part for openness and increased public interaction. Suffice it to say SCOTUS has none of these.[141]

The second issue addressed here is that of cameras in the courtroom. While other constitutional courts, such as Germany's, have banned cameras inside their court,[142] the UKSC has recently embraced them. In fact, this May, the UKSC even launched a "video on demand" service that includes recordings of both current and decided cases and also includes videos of both the hearings and the judgment announcements.[143] However, UK news reports are not littered with journalists taking Supreme Court decisions out of context. This is because the website authorizes the use of a person to watch the material but does not give them license to use the material outside of the UKSC website.[144] Yet many SCOTUS Justices have come out against cameras

137. The court has twelve "active" justices, who do not have term limits, but do have mandatory retirement ages (seventy or seventy-five, depending on when they were appointed). *See* COMPARATIVE LEARNING TOOL, *supra* note 133, at 2.

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

139. UK Supreme Court (@UKSupremeCourt), TWITTER, https://twitter.com/uksupremecourt (last visited Feb. 11, 2016).

140. *UKSupremeCourt*, YOUTUBE, https://www.youtube.com/user/UKSupremeCourt (last visited Feb. 11, 2016); *UK Supreme Court*, FLICKR, https://www.flickr.com/photos/uksupremecourt (last visited Feb. 11, 2016).

141. The "@Scotus" twitter handle is admittedly "a private group." Scotus (@Scotus), TWITTER, https://twitter.com/Scotus (last visited Mar. 2, 2016).

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

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

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

> This footage is made available for the sole purpose of the fair and accurate reporting of the judicial proceedings of the UK Supreme Court.
>
> Although you are welcome to view these proceedings, the re-use, capture, re-editing or redistribution of this footage in any form is not permitted.

in the courtroom.[145] Some have cited Orwellian reasons for not doing so, such as that having them would "misinform the public rather than inform the public."[146] This appears to imply that the press and others would distort their work. The Justices correctly point out that video clips could potentially be used by the press and others (if allowed to do so)[147] and that they themselves would be more widely recognised, but . . . welcome to democracy. If the complete recording can be found on SCOTUS's website, then a full context of any comment could be obtained. Other reasons for not doing so, such as that it would create an "insidious dynamic" in the courtroom,[148] make it seem as if the Justices themselves could not handle such a change. And maybe they are right. How some of the Justices behave at both hearings and decisions (being overly and unapologetically sarcastic[149] or going years without ever questioning counsel)[150] does not exactly align with the behaviour of judges from other constitutional courts. Nevertheless, years from now when cameras are allowed inside the Court, it will be near impossible (and potentially laughable) to think of the time when citizens were unable to watch their highest court in operation.

Finally, one of the major—if not entirely symbolic—differences between the U.S. and UK Supreme Courts is their wardrobes. As can be seen on the UKSC video feed, the justices have abandoned gowns and wigs in favor of formal attire. This change has caused little, if any, response from the media or general public.[151] The U.S. Supreme Court, meanwhile, has attested that the black gowns "bring dignity and

> You should be aware that any such use could attract liability for breach of copyright or defamation and, in some circumstances, could constitute a contempt of court.
>
> Please click 'Accept' to confirm you understand these restrictions.

E.g., *Watch Hearing: In the Matter of B (A Child)*, SUP. CT. (Dec. 8, 2015), https://www.supremecourt.uk/watch/uksc-2015-0214/081215-am.html.

145. Jonathan Sherman, *End the Supreme Court's Ban on Cameras*, N.Y. TIMES (Apr. 24, 2015), http://www.nytimes.com/2015/04/24/opinion/open-the-supreme-court-to-cameras.html.

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

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

148. Sherman, *supra* note 145.

149. Hasen, *supra* note 111.

150. Mark Walsh, *Experts Sound Off Once Again on Justice Thomas' Silence*, ABA J. (May 1, 2014), http://www.abajournal.com/magazine/article/experts_sound_off_once_again_on_justice_thomas_silence.

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

solemnity to judicial proceedings,"[152] while others have noted that such "attire downplays subjective tastes and identities."[153] Yet beyond this, the black gowns are used much more symbolically. Justices have expressed the belief that they highlight the neutrality of the law. The black gowns purportedly demonstrate that the Justices are able to make independent assessments based on the notion of "equality before the law," the inscription that dons the front of their building. Former Justice O'Connor has stated that the black robe "shows that all of us judges are engaged in upholding the Constitution and the rule of law. We have a common responsibility."[154] Even news outlets have bought into this. In PBS's series on "The Court and Democracy," they note, "Today, some justices see the simple black robe as a symbol of the Court's impartiality. The idea that the justices all wear the same unadorned attire downplays subjective tastes and identities, giving the Court the appearance of being one neutral and unified body."[155] Such rationales are highly questionable. As Griffith eloquently states, "It is when the claim to neutrality is seen, as it must be, as a sham that damage is done to the judicial system."[156] Judicial independence does not form because of one's attire, and judicial legitimacy is not contingent on seeing or not seeing the color of a person's shirt. Moreover, judicial robes—as pointed out by PBS—are a symbol of authority, a prop hardly needed at America's highest court. If the Justices truly want to engage in constitutional dialogue inclusive of not only the judiciary but the other branches and the wider American public, then they would rid themselves of the robes that distance themselves from the community in which they serve.

This section (intentionally) does not discuss some of the other changes SCOTUS could make to decrease widespread criticism. For example, not altering the text of official decisions after they have been publicly rendered without notifying the press or anyone else[157] and granting press passes to journalists who should easily qualify for their

152. *Frequently Asked Questions*, SUP. CT. U.S., http://www.supremecourt.gov/faq_justices.aspx (last updated Mar. 30, 2016).

153. *The Look of Authority: The Judicial Robe*, PBS (Dec. 2006), http://www.pbs.org/wnet/supremecourt/democracy/authority4.html (scroll over highlight #1).

154. Sandra Day O'Connor, *Justice Sandra Day O'Connor on Why Judges Wear Black Robes*, SMITHSONIAN MAG. (Nov. 2013), http://www.smithsonianmag.com/history/justice-sandra-day-oconnor-on-why-judges-wear-black-robes-4370574/.

155. *The Look of Authority: The Judicial Robe*, *supra* note 153.

156. J. A. G. GRIFFITH, THE POLITICS OF THE JUDICIARY 57 (5th ed. 1997).

157. Lazarus, *supra* note 3, at 563–72.

press credentials[158] certainly are aspects the institution could improve upon. Nevertheless, this section demonstrates that there are many aspects of SCOTUS's day-to-day processes and procedures that could easily change, hopefully increasing the institution's legitimacy while decreasing its chances of disparagement; and above all, these could happen without having to make wholesale constitutional amendments.

CONCLUSION

In late October 2012, Chemerinsky wrote that the Supreme Court was "the forgotten issue in this year's presidential election."[159] That certainly does not appear to be the case this year, given the Court's recent divisive and impending dockets in addition to the provocative comments from Republican presidential candidates. But the larger question is whether the Court will maintain its institutional legitimacy in an era of increased and unrelenting disparagement. Of course, the Court has been criticized and put under significant pressure during earlier periods of its existence. The Reconstruction Era,[160] FDR's New Deal Era (including his infamous "court packing" plan),[161] and the endless condemnation of the Warren Court during the Civil Rights Movement[162] are three such examples. The institution survived these episodes, however, and it could be argued that the power of the Court has only increased since these tumultuous periods.[163] Nevertheless, by intervening into the political process in such a distinct and resolute manner during recent years, the Court has unquestionably brought this increased disparagement upon itself. After all, the amplified vilification

158. Adam Liptak, *No Easy Way to Be Fair on Media Credentials*, N.Y. TIMES (June 2, 2014), http://www.nytimes.com/2014/06/03/us/press-credentials-seem-to-hinge-on-the-governments-whims.html.

159. Erwin Chemerinsky, *What Nov. 6 Means for the Supreme Court*, L.A. TIMES (Oct. 30, 2012), http://articles.latimes.com/2012/oct/30/opinion/la-oe-chemerinsky-scotus-future-20121030.

160. *See, e.g.*, Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39; Eugene Gressman, *The Unhappy History of Civil Rights Litigation*, 50 MICH. L. REV. 1323, 1323–43 (1952).

161. DREW PEARSON & ROBERT ALLEN, THE NINE OLD MEN 16–44 (1936); Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987); William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

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

163. WHITTINGTON, *supra* note 30, at 293 ("The reconstructive challenge to judicial authority plants the seeds for the future resurgence of the courts, however. Far from subverting the foundations of American constitutionalism, these episodes of reconstructive politics have served to strengthen and renew them.").

and questioning of the institution's reasoning and proper democratic role comes not only from the media and the other sources listed above but through the Court's own decisions. Furthermore, new media technologies, in conjunction with traditional media, have created a different domain by which the institution is discussed and critically analyzed. The challenge for the Court—and it is a difficult, if not impossible, one—is convincing the American public that law remains separate from politics.