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The Forgotten Third Branch: The Supreme Court, Public Opinion, and the Media

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THE FORGOTTEN THIRD BRANCH:
THE SUPREME COURT,
PUBLIC OPINION,
AND
THE MEDIA

by

ADRIEN JESS PITCHMAN

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
in the College of Health and Public Affairs
and in the Burnett Honors College
at the University of Central Florida
Orlando, Florida

Spring Term 2015

Thesis Chair: Cynthia Schmidt, J.D.

ABSTRACT

The three branches of government rely on public engagement for the prosperity of the nation. Moreover, informed public opinion is a fundamental tenant of democracy. With that in mind, this paper aims to explore the relationship between the Judicial Branch and the public. Specifically, this paper examines and questions the Supreme Court's efficacy communicating with the public. American constituents are inundated on a daily basis by the clamor of D.C. politics. The twenty four hour news cycle has given way to politicized headlines and exaggerated pundit commentary on contentious national issues. In a technological age where information is instant and the public has become accustomed to soundbites for education, the Supreme Court is left out of place. Both the Executive Branch and Legislative Branch converse directly with the public when necessary. Politicians frequently address their constituents or discuss complicated issues with voters first hand. However, the Supreme Court has rejected this strategy and instead relies almost exclusively on the press to relay their decisions. The judicial branch is the only third of our government without constant communication to the American people. As a result, the judiciary is relatively ignored by its citizens. By discussing a number of landmark cases since the turn of the century, this paper aims to analyze how those decisions were both announced to the public by the media and how the public received them. The Court has certainly adopted the press as an agent of communication. But is the media truly the proper outlet for the Court's rulings?

DEDICATION

For my parents Jonina and Rick,
I owe my success to your love and support.
Without you none of my accomplishments would be possible.

ACKNOWLEDGEMENTS

Principally, I would like to thank Dr. Cynthia Schmidt for going above and beyond the call of thesis committee chair. Your guidance, assistance, understanding, inspiration, and friendship have filled my final year at UCF with joy. To my entire thesis committee, Dr. Dupuis, Dr. Consalo, and Dr. Schmidt, thank you for all of your help and guidance throughout this process.

Without your advice and criticism, this paper would be a hollow shell. I would also like to express gratitude to Gary He, Herbert Kritzer, and Pew Research for allowing me to use their figures within this paper.

A special thank you to my entire family, my friends, and my loving girlfriend,
this paper belongs to you as much as it belongs to me.

Thank you for sticking by me no matter how crazy I drive you.

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Introduction

The force of judicial decisions . . . depends on a fragile constitutional chemistry and it flows directly from popular knowledge and acceptance of their decisions. Courts cannot publicize; they cannot broadcast. They must set forth their reasoning in accessible language and logic and then look to the press to spread the word.

-Irving Kaufman, Former Chief Judge of the United States Court of Appeals for the Second Circuit¹

The bedrock of secondary school civics classes in the United States is the three branches of government. It is imparted to Americans at a very young age that the checks and balances afforded by the founders are the linchpin of national stability and longevity. No single division of government is able to flourish without the other two; nor is it able to seize unbearable power not purposefully ceded by the constituents. Yet, these branches are not viewed equally by the American people. While no less indispensable to the United States system than the executive or the legislative, the judiciary is often overlooked by its citizens. In the seventy-eighth entry to the Federalist Papers, Alexander Hamilton discussed the significance of the judiciary,

The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the

¹ Slotnick, Elliot E., and Jennifer A. Segal. *Television News and the Supreme Court: All the News That's Fit to Air?* Cambridge UP, 1998. Quote on page 9.

representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.²

The founding fathers recognized the necessity of the judiciary to have ‘good behavior’ or public confidence, so that they may keep their post as a steward of the constitution and limit the power of the other two branches. It would be troublesome then, if the public lost its trust in the operations of the courts.

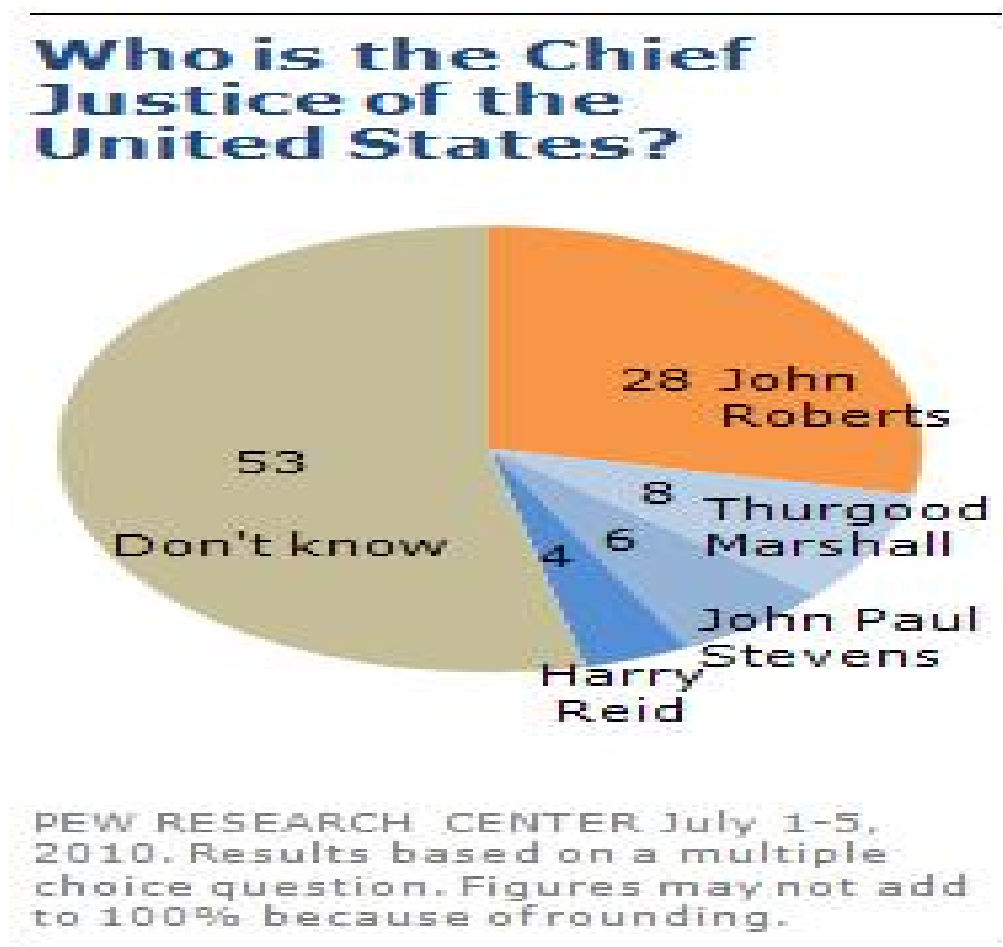


Figure 1: 2010 Pew Poll.

² Hamilton, Alexander. "The Federalist No. 78: The Judiciary Department." *Independent Journal* (1788). *The Constitution Society*.

A 2010 Pew Research Center poll indicates that less than 30 percent of the United States population is able to correctly identify the sitting Chief Justice of the Supreme Court. In perhaps the most generous method of quizzing the populace possible, Pew presented those polled with five multiple-choice options for Chief Justice. Figure 1 (previous page) illustrates the percentage of individuals that selected each possible response. Only twenty-eight percent of those polled responded correctly that John Roberts was Chief Justice, while fifty-three percent admitted to not knowing, eight percent chose a justice who has been dead for twenty-two years, six percent chose a justice who had stepped down from the bench days prior, and four percent chose the senate majority leader.³ The reality that nearly three-quarters of Americans lack even the most basic knowledge about the third branch is alarming.

Potential causes of such widespread unfamiliarity with the court abound: non-elected officials, unapproachable subject matter, customs that preclude the justices from seeking publicity and closed courtrooms to the media, to name a few. The root of ignorance notwithstanding, the fact remains that one of the central institutions of United States government is virtually unknown by the public. In the opening speech of his confirmation, Chief Justice John Roberts offers a more modern explanation than Hamilton's of the judiciary's fundamental role:

It is that rule of law that protects the rights and liberties of all Americans. It is the envy of the world; because without the rule of law, any rights are meaningless. President Ronald Reagan used to speak of the Soviet constitution, and he noted that it purported to grant wonderful rights of all sorts to people. But those rights were empty promises, because that system did not have an independent judiciary to uphold the rule of law and enforce

³ "The Invisible Court." Pew Research Center. 3 Aug. 2010.

those rights. We do, because of the wisdom of our founders and the sacrifices of our heroes over the generations to make their vision a reality.⁴

But, what perceptible impact does public engagement of the Supreme Court actually have on the Court's ability to function? The answer lies in the crucial democratic principle of popular control. According to Fredrick A. Cleveland, an early 20th century professor at the University of Pennsylvania, New York University, and Boston University, popular control "make[s] the organization and leadership consistent with the conscious ideals and purposes of those who are served".⁵ It is crucial that the American populace remains cognizant and confident in the actions of the judiciary in order to maintain its position of power in the governmental scheme.

Unlike the president and Congress, the nine justices that interpret the United States Constitution are not elected by the people.⁶ Rather than tangible reelection, it is the constituents' trust in the court to be an unbiased paragon of justice which allows for it to remain the organ of 'the supreme Law of the Land'.⁷ As Justice Frankfurter explains in his dissenting opinion of *Baker v. Carr* (1962), it is the people that grant the Court judicial power. "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction".⁸ Even now, the notion of popular control weighs heavily on the justices' mandate to govern. Recently retired Justice John Paul Stevens said the following in his dissenting opinion to *Bush v. Gore*, "It is confidence in the men and women who administer the

⁴ CNN. "Roberts: 'My job is to call balls and strikes and not to pitch or bat.'" CNN Politics. Cable News Network, 12 Sept. 2005.

⁵ Cleveland, Fredrick A. "Popular Control of Government." *Political Science Quarterly* 34.2 (1919), page 237.

⁶ U.S. Const. art. II, § 2.

⁷ U.S. Const. art. VI, § 2.

⁸ 369 U.S. 186, page 267.

judicial system that is the true backbone of the rule of law”.⁹ The two previous statements are not hollow and unsubstantially founded; in fact the justices are drawing upon United States history to guide their philosophy.

In the two-hundred-and-twenty-six-years since the creation of the Supreme Court, there have been several poignant challenges to the Court’s effective mandate to govern. Realistically, outcry against Supreme Court ordinance could not begin until the early nineteenth century subsequent to the formation of judicial review in 1803. It was the years following 1803 until about 1832 that saw the most frequent and unabashed opposition to the Supreme Court. In a period so foundational to the composition of United States government the preponderance of judicial decisions aimed to answer questions of states’ rights and federalism. New York University Law School professor Barry Friedman explains:

In the states' rights environment in which the Court was operating, the states would regularly fail to show up when haled before the justices and would often defy orders the Court issued. Virginia's highest court refused to concede that the Supreme Court had the authority to review its decisions. Georgia actually hanged a man in the face of a Supreme Court order to the contrary. This period of defiance came to a gradual close only when the national leaders recognized they needed the Supreme Court to help keep the states in line.¹⁰

This period of nearly thirty years was riddled with public and state sanctioned defiance of the Supreme Court. In fact, it was not until 1832 when South Carolina decreed their ability to

⁹ 531 U.S. 98, page 128.

¹⁰ Friedman, Barry. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus and Giroux, 2009, Page 12.

completely ignore federal law and postured succession that the nation, and namely the executive branch, realized how important the Court was. Andrew Jackson responded to the states' bravado and "threatened to use force against South Carolina and placed the authority of his office squarely behind the Supreme Court as an arbiter of constitutional disputes".¹¹

It is the public confidence and approval of Court decisions that enables the Court to retain power in the face of adversity. When the Court involves itself in countrywide controversy there is usually a backlash of disapproval and challenges. The periodic reminder to the public that an arbiter of constitutionality will ultimately settle a popular battle sends tremors of disquiet through the nation. Valarie Hoekstra, professor of politics and global studies at Arizona State University helps elucidate the phenomenon surrounding a landmark decision. She highlights several hotly contested social issues and Supreme Court cases that ultimately settled those questions. For example, she explains the national atmosphere surrounding *Brown v. Board of Education* (1954), "Both before and after the Court announced its decision, people questioned whether the Court's decision would be implemented and whether the decision would promote advances in civil rights more generally. At the same time, the very divisiveness of the issue caused speculation about whether the Court's decision would affect support for the Court itself".¹² While these questions seem easily discountable as rhetoric, the reality is that they proved to be suitable to the reaction to the decision. In 1957 public respect for the Supreme Court's ability to declare segregation as unconstitutional was low enough that the state of Arkansas refused to desegregate.¹³ The national support for the decision and mandate of the

¹¹ Id. at 12.

¹² Hoekstra, Valerie J. *Public Reaction to Supreme Court Decisions*. New York: Cambridge University, 2003. *Library of Congress*, page 2.

¹³ Friedman, Barry. See footnote 10, page 247.

Court was pronounced enough to allow President Eisenhower to intervene in the state and force desegregation.

Fewer extreme examples of modern impertinence exist in the face of Supreme Court governance; however, that is due to the continuing support the Court's decisions have received from the populace and the executive. Friedman accounts for popular control's impact on the strength of the Supreme Court:

The Court has this power only because, over time, the American people have decided to cede it to the justices. The grant of power is conditional and could be with-drawn at any time. The tools of popular control have not dissipated; they simply have not been needed. The justices recognize the fragility of their position, occasionally they allude to it, and for the most part (though, of course, not entirely) their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution. It is hardly the case that every Supreme Court decision mirrors the popular will—and even less so that it should. Rather, over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people.¹⁴

Consequently, those decisions which are particularly jarring to the public's perception of American constitutionality create dissidence towards the Court. Given the historical and theoretical context, it stands to reason that public knowledge and engagement in Supreme Court activity is fundamental to the continued legitimacy of the Court. The public must have an active

¹⁴ Id. at 14.

role in understanding and evaluating the judiciary's decisions in order to properly attribute efficacy to the Courts. If not, popular will cannot shield the institution from crumbling.

Nearly ten-thousand petitions for writ of certiorari are issued to the Supreme Court each year, but on average only 80 of those appeals are heard.¹⁵ Once it is established that public scrutiny of the Supreme Court is essential to its very existence, it is important to consider how the public gains necessary information. Unlike Congress and the Executive, justices do not promulgate their decisions or reasoning to the masses. Rather, the Court historically and in practice prefers to remain veiled behind closed doors and allow for third parties to disseminate their rulings.¹⁶ Moreover, justices do not preserve the ability to correct misinformation or misinterpretation of their holdings. Linda Greenhouse, former Supreme Court reporter for the New York Times explains,

Political candidates who believe that their messages are not being conveyed accurately or fairly by the press have a range of options available for disseminating those messages. They can buy more advertising, speak directly to the public from a talk-show studio or a press-conference podium or line up endorsements from credible public figures. But judges, for the most part, speak only through their opinions, which are difficult for the ordinary citizen to obtain or to understand.¹⁷

It is exactly the complex nature of judicial reasoning that deters the layman from independently following Supreme Court decisions. The media then, has taken up the mantle of town crier and

¹⁵ <http://www.supremecourt.gov/faq.aspx>

¹⁶ Clawson, Rosalee A., Harry C. Strine IV, and Eric N. Waltenburg. "Framing Supreme Court Decisions: The Mainstream Versus the Black Press." *Journal of Black Studies* 33.6 (2003), page 784.

¹⁷ Slotnik, Elliot. See footnote 1, quote on page 9.

delivers directly to America the Court's actions. However, only a few cases a year, if any, tread upon contentious and politicized issues enough to garner media attention. As Professor Rosalee Clawson notes, the press's coverage on the Supreme Court is substantially different from its handling of the executive and legislative. She states that, "reporting on the Court tends to be much more selective and episodic".¹⁸ It is those landmark cases such as *Brown v. Board of Education* (1954), *Roe v. Wade* (1973), and *Bush v. Gore* (2000), which trigger media frenzy and thrust the Court into the arena of public opinion.¹⁹ The unexciting nature of the preponderance of cases insulates most decisions from the eyes of the public. Edward Purcell, Jr. noted legal historian and Distinguished Professor at New York Law School explicates this aspect of public opinion:

One can readily think of many decisions and lines of cases—such as those involving standing, preemption, the dormant Commerce Clause, the Seventh and Eleventh Amendments, due process limits on personal jurisdiction, congressional power under Section 5 of the Fourteenth Amendment, and the President's power to make sole executive agreements—that are of major practical importance but that have hardly caused a ripple in popular opinion. Beyond the relatively small number of truly towering issues in the nation's constitutional history, in truth, the great bulk of the Court's constitutional decisions have likely had—at most—only an indirect and squinting relationship to public opinion. Indeed, it seems likely that truly "popular opinion" hardly exists on many constitutional issues and that, to the extent it does exist, it is largely the processed product

¹⁸ Clawson, Rosalee A., Harry C. Strine IV, and Eric N. Waltenburg. See footnote 16, page 785.

¹⁹ Hoekstra, Valerie J. See footnote 12, page 2.

of elite debates, media propagation, interest group activism, and political party agitation.²⁰

It is virtually impossible in the 21st century to avoid the constant inundation of sensationalized headlines that news media has become. In theory, the inherently apolitical quality of the Supreme Court should render it difficult for media to create a partisan lens by which rulings would be viewed. Yet, divisive issues within the small percentage of reported cases allow media outlets to feed off of national schism. The media's position as information gatekeepers allow for a massive amount of discretion when reporting anything political. Each individual media outlet has the potential to frame the story it is reporting however it sees fit. Political scientist, Dr. Rosalee Clawson states that "framing is ubiquitous in the American political system. Frames are story lines that order developments germane to the issue. They inform the public about what the essence of the issue is, what the controversy is about—in short, they are constructions of the issue".²¹ Whether intentional or not, the media possesses the potential to and indeed in practice often perverts holdings into a palatable storyline for their consumer base.

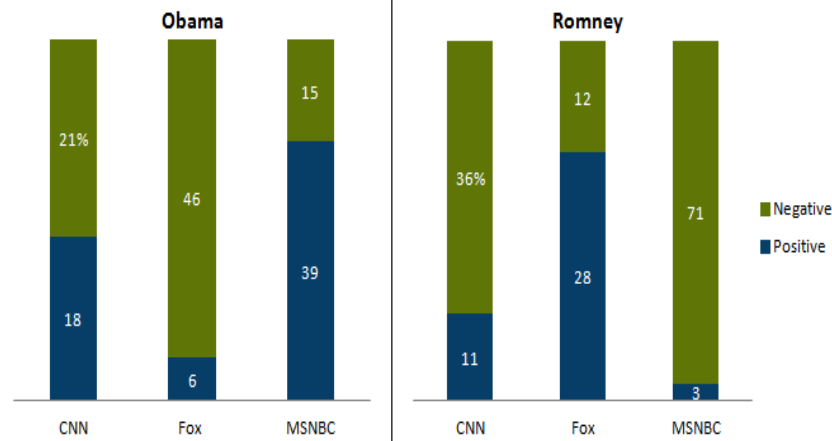
To illustrate the ubiquitous nature of framing bias and tone, consider reporting on the 2012 presidential hopefuls. Pew Research recorded the coverage of President Barack Obama and Mitt Romney on the three most major news networks CNN, Fox News, and MSNBC.

²⁰ Purcell, Edward A., Jr. "Barry Friedman's *The Will of the People*: Probing the Dynamics and Uncertainties of American Constitutionalism." *Michigan State Law Review* 663 (2010), page 668.

²¹ Clawson, Rosalee A., Harry C. Strine IV, and Eric N. Waltenburg. See footnote 16, page 785.

Tone of Coverage on Cable News

Percent of stories with tone



Note: Mixed tone numbers are not included
Date Range: August 27 - October 21, 2012

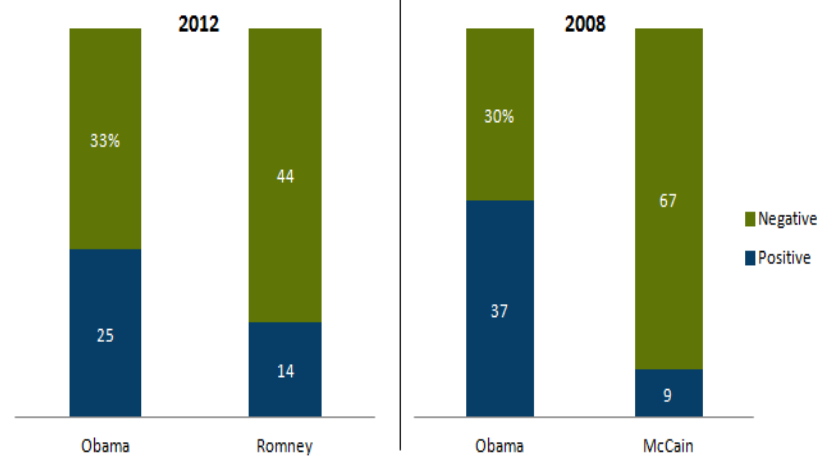
PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM

Figure 2: Pew Tone of Coverage TV 2012

Tracking the tone of the coverage regarding each candidate from August through October, Pew found that each network had overwhelming differences in their spin on stories (Figure 2 above). Framing is not limited to television reporting. In the same collection of data Pew also recorded

Tone of Coverage on News Websites 2012 vs. 2008

Percent of stories with tone



Note: Mixed tone numbers are not included
Date Range: August 27 - October 21, 2012 and September 8 - October 16, 2008

PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM

Figure 3: Pew Tone of Coverage Internet 2008/2012

the internet coverage of candidates in both the 2008 and 2012 race. Tracking stories from the ten most utilized news websites, it is similarly displayed that written coverage is also framed by its writer (Figure 3 previous page).²² Naturally, the very nature of a presidential race lends itself to partisan depiction of issues. Nevertheless, the galvanizing issues which garner media attention carry with them the same polarized stigma that provides the press with opportunity to frame the coverage. There is a serious lack of neutrality in the day-to-day reporting of the gatekeepers of information, and that bias carries with it a risk of impacting viewer opinion.

Take for example newspaper coverage of the 1954 decision of *Brown v. Board of Education*. If simply informing the public is what is necessary for Court salience, then the periodicals in figures 4 and 5 went beyond their call to duty. Even over sixty years ago, publications clearly showcase adulterated versions of the Court's holding. Rather than purely simplifying and providing understandable information, a media spin attempts to pander to the passions of the reader. Figure 4 (next page) places two incredibly opinionated framings of *Brown*, one from a progressive desegregated urban area and the other from a deep rooted southern capital.

It is not uncommon for media coverage of the Supreme Court to be riddled with reporter predisposition. However, the appropriations by both the Chicago Defender and the Jackson Daily News stretch far beyond fact and legal conveyance.²³ Such fabrication dilutes the public's ability

²² Pew Research Center: Journalism & Media Staff. "Coverage of the Candidates by Media Sector and Cable Outlet." *Pew Research Center*. Pew Research Center, 1 Nov. 2012, both figures 2 & 3 in the same source.

²³ Street Law Inc. "Immediate Reaction to the Decision: Comparing Regional Media Coverage." *Street Law*. Supreme Court Historical Society, 2005. Figures 4 & 5 created by me from the newspaper quotes gathered by StreetLaw Inc.

<u>The Chicago Defender:</u> <u>"End of Dual Society."</u> <u>May 18, 1954</u>	<u>The Jackson(Mississippi) Daily News:</u> <u>"Bloodstains On White Marble Steps."</u> <u>May 18, 1954</u>
<p>Neither the atom bomb nor the hydrogen bomb will ever be as meaningful to our democracy as the unanimous decision of the Supreme Court of the United States that racial segregation violates the spirit and letter of our Constitution. This means the beginning of the end of the dual society in American life and the segregation which supported it.</p>	<p>Human blood may stain Southern soil in many places because of this decision but the dark red stains of that blood will be on the marble steps of the United States Supreme Court building. White and Negro children in the same schools will lead to miscegenation. Miscegenation leads to mixed marriages and mixed marriages lead to mongrelization of the human race.</p>

Figure 4: Chicago vs. Jackson following Brown

to pass pure judgments on the Court. Instead, reporter bias can be tapered to conform to the reasoning of the Court and the principles which govern its decision making. Figure 5 (next page) offers a perfect juxtaposition between sensationalized headlines and responsible reporting. The Boston Herald and the UVA Cavalier Daily offer contrasting frames of Brown, but do not stray far from the foundation of law which they are tasked to present.²⁴ Unlike Figure 4, these periodicals do much to offer opinionated commentary without altering reality.

²⁴ Id.

<u>The Boston Herald:</u> <u>"Equality Redefined."</u> <u>May 18, 1954</u>	<u>The University of Virginia Cavalier Daily:</u> <u>"Violates Way of Life."</u> <u>May 18, 1954</u>
<p>The Supreme Court's history-making decision against racial segregation in the public schools proves more than anything else that the Constitution is still a live and growing document. The segregation ruling is frankly expedient. It recognizes the growing national feeling that the separation of Negro (or other minority) children from the majority race at school age is an abuse of the democratic process and the democratic principle. But it is also the culmination of a series of judicial opinions which circumspectly prepared the way for change.</p>	<p>It is too early to tell what effect the Supreme Court decision to abolish segregated schools will have on the South... Although it is hard from a strict legal point of view to justify any action contrary to law, we feel that the people of the South are justified in their bitterness concerning this decision. To many people this decision is contrary to a way of life and violates the way in which they have thought since 1619.</p>

Figure 5: Boston vs. Virginia following Brown

The importance of judicial impartiality—or if nothing else, the appearance of it—is paramount in the Supreme Court's ability to continue operation. Likewise, public will can only be properly fueled if information is plentiful and accurate. Two prospective threats to Supreme

Court salience have then been presented: a lack of information relayed to the public regarding the predominance of the Court's cases and the potential for reporting to carry with it speculative bias which taints public knowledge. There is moreover, a third issue which could be even more harmful than the first two—understanding. Consider the fact that there are rules of law and particular court decisions which can take a seasoned attorney prolonged periods of time to properly interpret. For instance, ambiguous rationales such as, “I know it when I see it”²⁵ referencing obscene materials in Justice Stewart's concurrence to *Jacobellis v. Ohio* (1964) fall into this category. Years of schooling, a doctoral degree, and practical legal experience still do not guarantee that an individual can properly grapple with the complex language and the legal nomenclature utilized in most decisions. Additionally, even brilliant attorneys can take several days to try and fully understand a complex opinion. So how is it that a reporter who lacks most if not all of these qualifications can properly analyze and explicate Supreme Court rationale?

The emergence of the twenty-four hour news cycle, coupled with the immediacy of information published on the internet has led to a ‘rush to publish’ by the press.²⁶ Orlando Sentinel Court Reporter Jeff Weiner explains the ‘rush’ as more of a race between major news outlets to be the first to break a story.²⁷ News outlets are mostly for-profit entities which seek to compete with one another in order to maximize their consumer base. According to Weiner, news is now instantaneous and the ability of media outlets to report exclusive stories is all but extinct. Consequently, reporters clamor to be the first source to publish a story. The impetus to be the initial report for Supreme Court decisions specifically is so great that many news outlets write

²⁵ 378 U.S. 184, page 197.

²⁶ Epstein, Reid J., and Elizabeth Titus. "Director of National Intelligence James Clapper Condemns ‘Rush to Publish’." *Politico*. 8 June 2013.

²⁷ I interviewed Mr. Weiner in fall 2014. Topics of discussion include the state of news reporting as a whole, technologies impact on reporting, and how journalists typically grapple with court decisions.

multiple articles anticipating the several directions in which the Court could lean.²⁸ The major issue with such a strategy is that it is near impossible to accurately anticipate the rationale behind a holding. Furthermore, in attempting to communicate accurate information, the struggle to report quickly stacks another disadvantage against the already underequipped reporter.

There is a serious potential for harm when arbiters of information do not take the time to ensure that their journalism is accurate. In their race to break the story first, a few of the most utilized and trusted news sources in the country published completely false information following the Boston Bombing of April 13, 2013. For example, “The New York Post mistakenly identified a high school student, Salah Barhoun, as a bombing suspect”.²⁹ The young man must have been terrified as he saw his name and picture all over the TV and social media. Moreover, “CNN, Fox News, and the AP mistakenly reported that the Boston police had made an arrest. Within hours, all three outlets had to walk back and retract their earlier reporting”.³⁰ Barhoun was able to clear his name at a local police station and The Post retracted the story. Nevertheless, the race to publish a story first leads to serious blunders. “Despite claims to [...] cross-check information, even reputable news organizations [...] get important facts wrong in the scramble to be first out the gate with news”.³¹

A question of whether or not individuals can truly rely on U.S. news outlets to correctly report on the Supreme Court exists. Linda Greenhouse explains that “in an era when the political system has ceded to the courts many of society’s most difficult questions, it is sobering to acknowledge the extent to which the courts and the country depend on the press for

²⁸ Id.

²⁹ Foust, Joshua. "Boston Bombing: Media Haste Makes Mistakes." *Christian Science Monitor*: Academic Search Premier.

³⁰ Id.

³¹ Id.

the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society”.³² If the Court relies so heavily on the press for not only public understanding, but its very legitimacy, then the press has a daunting civic duty. This paper analyzes three cases, *Bush v. Gore* (2000), *National Federation of Independent Businesses v. Sebelius* (2012), and *Burwell v. Hobby Lobby* (2014). Through examining three of the most important landmark decisions since the turn of the century, it will be possible to garner how the Court’s rulings, shaped and disseminated by the media, effect public opinion.

³² Slotnik, Elliot. See footnote 1, quote on page 9.

Bush v. Gore (2000)

Few cases that go before the Supreme Court enjoy the massive amount of media attention that *Bush v. Gore* garnered.³³ Even so, of the three cases explored in this paper, the electoral contest offers the least static narrative for media coverage. Instead, *Bush v. Gore* does something else entirely; it paints a beautiful background and opens the floor for discussion on the true impact of the media's perceived partisanship on public trust in the Court. It also allows for well-rounded discourse on the nature of the Court, reliance on media coverage, and the reciprocal interaction both have with public opinion.

The Case

The 2000 election for President between Vice President Al Gore and Texas Governor George W. Bush was one of the closest in American history. By the end of the final day of voting on November 7th, 2000, forty-nine of the fifty states had selected their candidate and allocated their electoral votes. At that point, Gore led Bush 266 electoral votes to 246 with 270 being required to win the election. Florida carried 25 electoral votes and would give a victory to the candidate who won the state. Florida, however, did not have a clear winner after Election Day. Florida statute §102.141(4) of the election code mandated that if the margin of victory was less than that of the statistical margin for error (0.5%), then a machine recount of all votes was to

³³ Nicholson, Stephen P. and Robert M. Howard. "Framing Support for the Supreme Court in the Aftermath of Bush V. Gore." *Journal of Politics* 65.3 (2003), page 677.

be held.³⁴ The difference between the two candidates was less than a hundredth of a percent, and accordingly recount was triggered.

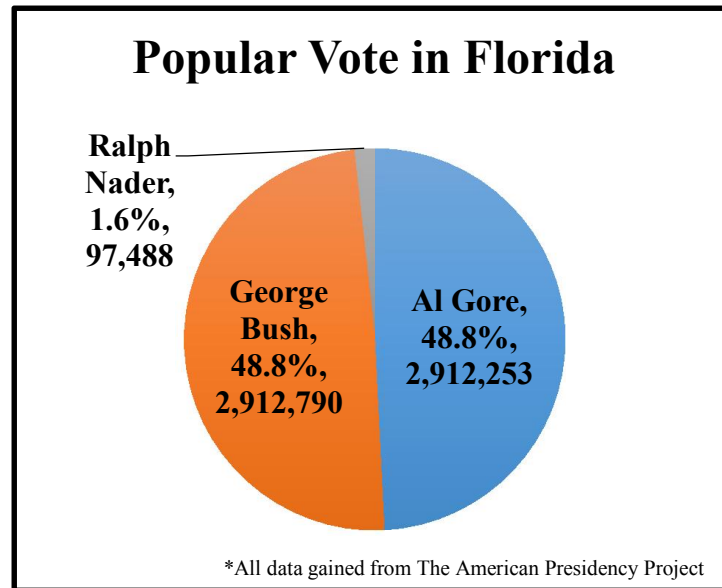


Figure 6: Popular Vote Outcome in Florida

After the machine recount George W. Bush led the state with less than 600 votes more than Al Gore. It was at this point that the Vice President pursued manual recounts of votes in several counties across Florida, primarily Palm Beach County and Miami-Dade County. The ballot in Palm Beach County was a particularly tricky subject due to its poor construction. The ‘butterfly ballot’ (shown on the next page), was fashioned in such a confusing way that thousands of voters submitted sworn affidavits testifying to their confusion with the ballot.³⁵ Upon retroactive analysis approximately 4,000 Palm Beach County voters accidentally voted for Pat Buchanan while intending to vote for Gore.³⁶ Dade County on the other hand, had 9,000 ballots that the machines failed to record a presidential vote for due to “hanging chads” (holes

³⁴ 531 U.S. 98, page 116.

³⁵ Wand, Jonathan N., et al. "The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida." *American Political Science Review* 95.4 (2001), page 793.

³⁶ Chemerinsky, Erwin. "How Should We Think about Bush V. Gore?" *Loyola University Chicago Law Journal* 34 (2002), page 10.

that hadn't been pushed completely through the ballot). In fact, the total number of ballots in Florida which the machines could not record a vote for was about 60,000.³⁷ Naturally, any number in the thousands would have given Gore the lead in Florida and thus the election. However, during the ensuing manual recount, prior to any of the results coming to light, and using the original recount result, Florida Secretary of State Katherine Harris (a Republican) certified the election to George W. Bush.

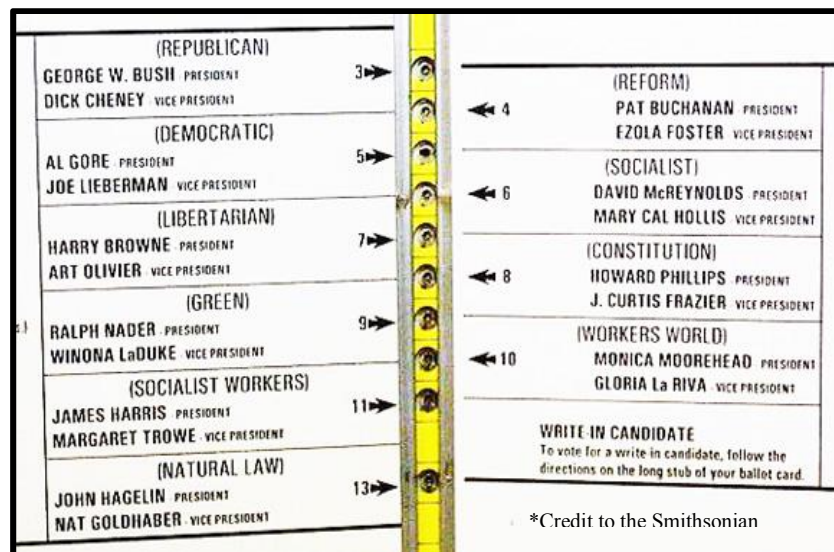


Figure 7: Palm Beach County Butterfly Ballot.

When both Al Gore and Palm Beach County brought suit against Bush and Harris, the Florida Supreme court agreed with the Vice President and ordered that the manual recount should continue. George W. Bush appealed to the U.S. Supreme Court, and after a few days of legal procedure, the court granted certiorari.³⁸ On December 12th 2000, the Court held 7 to 2 that the Florida Supreme Court's recount was unconstitutional due to its irregular dissemination. The more contentious ruling however, was the 5 to 4 per curiam decision rendered by the Court

³⁷ 531 U.S. 98, page 133.

³⁸ Id. at 98.

which held that no constitutional method for carrying out a state-wide recount was feasible in such a short period of time. Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor ruled that no alternative could be established; instead, the recount should be permanently halted and that the original machine recount be the final tabulation of votes.³⁹

Whether one liked it or not, the outcome of the 2000 presidential race had been decided by the Supreme Court. Moreover, the Republican candidate had emerged victorious after an unprecedented decision in which the Court majority was the five conservative justices. Unsurprisingly, the four liberal justices had dissented and as a result, the appearance of a partisan mini-election came to fruition.

Public Opinion, Fragility, and the Media

No modern case better exemplifies the masses crying foul at the apparent partiality of the Court than does *Bush v. Gore*. Indeed, there was a distinct period following the 2000 ruling where the Court's legitimacy was thrown into question. Sections of the public, it seemed, were outraged at a clearly partisan divide in the justice's decision in the case.⁴⁰ Political scientists Stephen Nicholson and Robert Howard recall the social narrative following the decision:

Not surprisingly, the Court received an extraordinary amount of media coverage—journalists, politicians, spin doctors, academics, and legal analysts had much to say about the Court's motives. All this discussion centered on a long-standing debate about judicial

³⁹ Id. at 111.

⁴⁰ Farganis, Dion. "Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy." *Political Research Quarterly* 65.1 (2012), page 213.

decision making: does the Supreme Court make decisions based on the Constitution and law, or does it make decisions on the basis of politics and policy preferences?⁴¹

The nine justices are lauded as unbiased paragons of law. Yet, the theory that they were ruling based on partisan predilections and ignoring the Constitution they swore to protect gained a full head of steam. That is not to say that the Court did not have supporters or those who agreed with the rule of law. “For many, the decision was ideological, partisan, and political, or it had severe consequences in that it ‘stole the election.’ For others, including the stated observations of at least three of the justices who formed the majority coalition, the Court premised the decision on the proper application of law and rules”.⁴² Media outlets, however, ran with the opportunity to paint the picture of five Republicans and four Democrats sitting in a closed courtroom filling out ballots of their own. For instance, three days after the decision the Los Angeles Times published a cartoon by Paul Conrad showing all nine Justices behind the bench, five holding ‘Bush for President’ signs and four holding ‘Gore for President’ signs.⁴³ The partisanship notion certainly was not unfounded; in fact the majority’s decision ran afoul of the very conservative ideals of state’s rights and judicial restraint that most of the five had spent years on the Court protecting. As Justice John Paul Stephens noted in his dissent, joined by Justices Breyer and Ginsberg:

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors.⁴⁴ When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of

⁴¹ Nicholson, Stephen P. and Robert M. Howard, see footnote 33, page 677.

⁴² Id. at 680.

⁴³ Chemerinsky, Erwin, see footnote 36, page 5.

⁴⁴ U.S. Const. Art. II, §1, cl. 2.

the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.⁴⁵

The alleged latent hypocrisy of the most conservative justices who could have, in the eyes of their critics, only have been motivated by the desire to see a Republican in the White House fanned a roaring flame. News outlets in many cases turned their coverage over to experts who could better explain the nature of the decision to the public. Legal scholars who had dedicated their lives to the court took the opportunity to cry out to the public through the Press. Akhil Reed Amar, professor of law at Yale Law School wrote an article for the LA Times in which he condemned the decision:

Ironies abound. Justices who claim to respect states savage state judges. Jurists who purport to condemn new rules make up rules of breathtaking novelty in application. A court that frowns on ad hoc decision-making gives us a case limited to its facts. A court that claims it is defending the prerogatives of the Florida Legislature unravels its statutory scheme vesting power in state judges and permitting geographic variations.⁴⁶

The question becomes not whether the critics of the Court are right in their claims of biased duplicity, but whether or not those feelings damage the Court. Justice John Paul Stephens, again in his dissenting opinion for *Bush v. Gore* clearly argued the potential ramifications of a partisan appearance. He stated, “it is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that

⁴⁵ 531 U.S. 98, page 123.

⁴⁶ Amar, Akhil Reed. "Should We Trust Judges?" *Los Angeles Times*. Los Angeles Times, 17 Dec. 2000.

confidence that will be inflicted by today's decision".⁴⁷ Justice Stephens, as well as many other prominent legal theorists, subscribes to the notion that public faith in the Court is the only fuel that rightly sustains it. He goes on to further lament the Majority's decision, "although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law".⁴⁸ But is Justice Stephens correct in his assessment that national confidence in the court was damaged by *Bush v. Gore*, consequently inhibiting the court's effective mandate to adjudicate?

Recall the commonly asserted theory that it is the constituent's trust in the Court to be an evenhanded exemplar which allows for it to remain the organ of 'the supreme Law of the Land'.⁴⁹ As Justice Frankfurter explains in his dissenting opinion of *Baker v. Carr* (1962), which is the genesis for this line of reasoning, it is the people that grant the Court judicial power: "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements".⁵⁰ Surely Justice Stephens, as well as others, rely on Frankfurter's opinion in the foundation of the Supreme Court as a fragile entity subject to the dismissal of its decisions and the loss of trust in its rule of law. Moreover, one could argue that the judicial institution crumbling is not the only qualifiable negative result of a partisan appearance.

⁴⁷ 531 U.S. 98, page 128.

⁴⁸ *Id.*

⁴⁹ U.S. Const. Art. VI, § 2.

⁵⁰ 369 U.S. 186, page 267.

Quite obviously, this discourse could not exist had the public been so outraged with the ruling in *Bush v. Gore* that all faith was lost in the court. Nevertheless, when the most astute legal professors feel forced by the bench to posit, “What will I tell my law students in the aftermath of Bush vs. Gore, in which five Republican judges handed the presidency to Republican George W. Bush? It will be my painful duty to say, ‘Put not your trust in judges’”,⁵¹ it is evident that a public opinion issue exists. Again, media outlets spared no opportunity to join in on the fun. An article in the New Republic on December 24th titled ‘Disgrace,’ communicated biting remarks to the public, “It will be impossible to look at O'Connor, Kennedy, Scalia, Rehnquist, and Thomas in the same light again, much as it was impossible to look at President Clinton in the same light after seeing him exposed in the Starr Report”.⁵² Understanding that *Bush v. Gore* left quite a bad taste left in the mouths of millions leads to the question of tangible impact.

Brass Tacks

It would stand to reason that the flame of the decision itself combined with the media’s deluge of gasoline would be enough to cause a plunge in public opinion. Yet, there did not seem to be a nationwide fall in confidence in the Court. Even in the short term, Gallup polls show that, “65% of Americans expressed confidence in the Court as an institution in September 2000 and 62% expressed confidence in June 2001”.⁵³ While a three percent drop-off is not wholly insignificant, one would expect the wake of one of the most controversial Supreme Court cases in United States history to carry with it a more staggering number. Why did the masses claiming

⁵¹ Amar, Akhil Reed, see footnote 46.

⁵² Rosen, Jeffrey. "Disgrace." *The New Republic*. New Republic, 24 Dec. 2000.

⁵³ Chemerinsky, Erwin, see footnote 36, page 3.

crooked adjudication and alleging partisanship not result in a drop in public confidence? Several plausible explanations exist, none inhibiting the others, so perhaps all of them carry some weight.

Chiefly amongst them is that the aggregate approval of the Court remained relatively unchanged, but the fluctuations within party lines were dramatic. Political scientist Herbert Kritzer explains the restructuring of public opinion following *Bush v. Gore*, “Republicans became more supportive [of the Supreme Court] and Democrats became less supportive, and this is directly related to whether they approved or disapproved of the Court’s decision, which in turn is a function of whom individuals voted for”.⁵⁴ It makes sense that the average American who has no express knowledge in the functions of law or the intricacies of its application would be more concerned with the outcome of the decision than the rationale of the court. That is to say, that those voters who favored George W. Bush would be less upset by the Court’s actions than those who voted for Gore. According to Gallup polls, approval of the Supreme Court amongst Republicans stood at 60% in August 2000 and increased to 70% after the decision in December, while approval among Democrats nosedived from 70% in August to 42% in December.⁵⁵ Again, Kritzer explains how this shuffling of constituent opinion left the court with no less overall support than it had prior to the decision:

Importantly, the net effect on the public’s evaluation of the Court was essentially nil; increases in negative evaluations were almost exactly offset by increases in positive evaluations. The more important impact was on the structuring of public evaluations of

⁵⁴ Kritzer, Herbert M. "The Impact of Bush V. Gore on Public Perceptions and Knowledge of the Supreme Court." *Judicature: University of Wisconsin–Madison Political Science*, page 15.

⁵⁵ Chemerinsky, Erwin, see footnote 36, page 3.

the Court. Where before the decision on December 12, partisanship was not related to evaluation of the Court, after the election it was, and this relationship was clearly mediated by the specific approval or disapproval of the Court's decision in *Bush v. Gore*.⁵⁶

The rhetorical question that is inseparably joined to a party affiliated support base for the Court is whether or not that court should be sustained by fluctuations of partisan support. Truly, if public confidence in the Court is predicated on rulings being aligned with constituents' contentious policy preferences, what separates the Judiciary from the other two branches? While the doomsday predictions of a public loss of faith may not have been completely accurate, the Court and the press created a dynamic that flies in the face of the United States democratic system.

Another explanation for the undisturbed aggregate support for the Supreme Court is simply that Justice Frankfurter's conjecture on the Court's fragility is overstated. It is quite possible that any resultant loss in confidence following *Bush v. Gore* was not in the institution of the Supreme Court, but in the justices themselves. The perception of partisanship would rightly be attributed to individuals rather than the position they hold. Nicholson and Howard explain, "Citizens' perceptions of partisan decision making on the Court do not diminish support for the Court as an establishment. Therefore, framing a judicial decision in this manner does not appear to produce a loss of diffuse support. Thus, broad claims of partisan decision making on the Court affect the standing of justices, but not the institution".⁵⁷ The idea of diffuse support or confidence

⁵⁶ Kritzer, Herbert M, see footnote 54, page 11.

⁵⁷ Nicholson, Stephen P. and Robert M. Howard, see footnote 33, page 692.

in the Court itself versus those who occupy its seats, certainly lends resilience to the Court on the back of controversy.

Thus, the delicacy of the Court should not be considered to be in the institution itself, but rather it lies in each line of judges. The Supreme Court's reliance on the public should not be understated, nor should it be assumed that the bench is unaccountable. Rather, it should be inferred that while the public may be dissatisfied with a ruling or skeptical of judicial motive, United States citizens place fortified trust in the rule of law. As political scientist Erwin Chemerinsky explains:

Bush v. Gore requires that we rethink what is even meant by the Court's legitimacy. Is it approval ratings in Gallup polls? Is it something deeper and less susceptible to measurement? However defined, *Bush v. Gore* indicates that the Supreme Court's legitimacy is robust, not fragile, and no single decision is likely to make much difference in the public's appraisal of the Court. The credibility of the Court is the product of over 200 years of American history; it is the result of confidence in the Court's methods and overall decisions. It reflects popular understanding of the desirability of resolving disputed questions in the courts and under the Constitution, even though it means that everyone knows that, at times, they will be on the losing side.⁵⁸

The 2000 case of *Bush v. Gore* did not, as some predicted, leave the court indefensible and absent of public support. Instead, it was a testament to the Court's enduring strength.

Nevertheless, the *Per Curiam* decision certainly had its ramifications. The media's proliferation

⁵⁸ Chemerinsky, Erwin, see footnote 36, page 4.

of the partisan bench coupled with memories of party affiliated support all endure to cast a shadow of doubt upon the independent judiciary.

A Lesson in Civics

Moving away from the nature of press coverage on *Bush v. Gore*, the national controversy surrounding the entire election may have served an objectively beneficial purpose. The public's obliviousness on the Supreme Court cannot be reaffirmed enough. According to pollster Richard Morin, in 1989 only 29% of the American public could name a single member of the Supreme Court, whereas 54% could name the only judge on 'The People's Court,' a popular television show.⁵⁹ These numbers seem consistent with the Pew data that was presented in the introduction to this paper. Recall that in the 2010 poll; only 28% of the public properly identified the Chief Justice of the Court to be John Roberts.⁶⁰ Regardless of one's political stance or opinion on the court, the prospect that extensive media coverage on *Bush v. Gore* or any case for that matter, could educate an otherwise ignorant public can only be viewed as positive.

When the national dynamic usually limits public exposure to the Court on practically a biannual basis, any extended coverage would likely do well to expose citizens to an otherwise unfamiliar topic. According to Professor of Political Science and Law, Herbert Kritzer, this is exactly what happened after *Bush v. Gore*. Using the University of Wisconsin Survey Center Professor Kritzer conducted a nationwide survey for month long periods both before and after December 12th 2000. The survey consisted of six general questions on the Court which anyone would learn in an introductory United States civics class. Participants were asked what the size

⁵⁹ Kritzer, Herbert M, see footnote 54, page 2.

⁶⁰ See footnote 3.

of the Court was, what the mandatory retirement age for justices was, who appoints justices, who the sitting Chief Justice was, whether or not the Court used juries, and whether or not the Court had to hear every case that was appealed to it.⁶¹ The results of the study can be seen in the table below:

KNOWLEDGE OF THE U.S. SUPREME COURT			
	Percent (or mean) correct		
	Total	Before	After
Size of Court***	31.3%	28.7%	39.0%
Mandatory Retirement Age*	47.9%	46.4%	52.6%
Who Appoints Justices	68.4%	67.9%	69.8%
Who Is Chief Justice***	19.8%	16.0%	31.0%
Supreme Court's Use of Juries*	74.6%	73.2%	79.0%
Control of Docket	71.9%	70.9%	74.9%
Mean Number Correct***	3.15	3.04	3.48

Figure 8: Kritzer's study on public knowledge before and after *Bush v. Gore*.

Every single question asked saw an increase in correct responses following the coverage of *Bush v. Gore*. Of those, knowledge of the size of the Court, as well as the identity of the Chief Justice saw dramatic growth. Whether these results are indicative of public awareness of the Court following any period of intensified coverage, or if they are specific to *Bush v. Gore* is not completely clear. Nevertheless, it is evident that the public utilized the media as an instructor in a wide-spread civics lesson that was clearly needed.

⁶¹ Kritzer, Herbert M, see footnote 54, pages 12-13.

National Federation of Independent Business v. Sebelius (2012)

Passed by the slimmest of margins in 2010, the Patient Protection and Affordable Care Act will be the cornerstone of President Barack Obama's legacy in American history. Obamacare, as it has been dubbed, is the first comprehensive universal health care law to be enacted in the United States. Naturally, legislation with an admitted degree of socialistic propensity has caused quite a stark debate throughout the country. The 1990 page bill, which is about 500 more pages than the King James Bible, constructs a huge amount of room for error leaving it susceptible to constitutional challenge.⁶² Following its ratification in 2010, a two year period of contentious debate, ugly legislative politics, and public intrigue all coalesced into one Thursday morning. On June 28th 2012, the Supreme Court issued its decision on *National Federation of Independent Business v. Sebelius*, leading the United States into one of the most confusing mornings in modern history. This ruling, hullabaloo notwithstanding, was possibly the most momentous federalism ruling since the New Deal and the most widely covered since *Bush v. Gore* in 2000.⁶³

The Case

As one could expect from such mammoth legislation, the Affordable Care Act affects a wide array of issues and as such gives room for multiple claims against it. The particular challenges to the ACA in *National Federation of Independent Business v. Sebelius* were to its individual mandate and Medicaid expansion. The individual mandate stipulates that all Americans must acquire a minimally acceptable health insurance plan or be subject to monetary penalty, and the Medicaid expansion threatened states with loss of federal funds for

⁶² This is still true today, see *King v. Burwell* (2015).

⁶³ Liptak, Adam. "Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama." *The New York Times*. New York Times Company, 28 June 2012.

noncompliance with federal Medicaid guidelines. Both provisions of the ACA, Petitioners reasoned, fell outside of Congress’s enumerated powers and as such were not constitutionally permissible.^{64, 65}

This towering 193 page decision can hardly be grappled with in its totality. Within the context of this discussion, the finer points will be briefly explained as to lay a conceptual background for the more pertinent discussion. Much of *Sebelius* is centered on the idea of Congress’s enumerated powers. Article I, section VIII of the United States Constitution affords Congress the powers over which it has ability to govern. In crafting its legislation, Congress is restricted to only making laws that fall within the scope of these enumerated powers. Among those powers are the three relevant to the instant case: the Taxing and Spending Clause, the Commerce Clause, and the Necessary and Proper Clause.

The Taxing and Spending Clause allows Congress to “To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States”.⁶⁶ This power is implicated over whether or not the ‘penalty’ exacted from those who do not comply with the individual mandate constitutes a tax. The Commerce Clause gives Congress that ability “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”.⁶⁷ Naturally, the secondary portion of this clause treats on the Federal Government’s ability to regulate interstate commerce; this relates to the prospect of the government forcing each state’s constituents to purchase a product. Finally, the Necessary and Proper Clause is the backbone of Congress’s powers and directly relates to the

⁶⁴ 567 U.S. ____ (2012), pages 8 and 10

⁶⁵ Note that both *Sebelius* and *Burwell* have not been given full citations yet. They may be accessed by searching for the citation provided nonetheless.

⁶⁶ U.S. Const. Art. I, § 8

⁶⁷ *Id.*

first two issues insofar as it broadens Congress's scope of control and ability to create the ACA. The clause grants Congress the capability "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".⁶⁸

The Court ruled in a five-to-four decision that the Affordable Care Act (as challenged) is constitutional in part and unconstitutional in part. Chief Justice John Roberts writing the majority opinion reasoned that the individual mandate could not be maintained as an application of Congress's power either under the Commerce Clause or the Necessary and Proper Clause. However, Roberts goes on to interpret the 'penalty' for failure to purchase a minimum level of insurance as a tax and in doing so finds the individual mandate permissible. He states, "In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax".⁶⁹ As such, the individual mandate of Obamacare which penalizes citizens who fail to buy insurance can now under rule of law be read to be levying a tax for noncompliance.

This leads the discussion to the portion of the ACA that the Court found to be unconstitutional, the Medicaid expansion. Within his opinion, Chief Justice Roberts takes the time to explain the history of Medicaid and the practical impact of the ACA on existing Medicaid provisions. "Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining

⁶⁸ Id.

⁶⁹ 567 U.S. ____ (2012), page 58.

medical care. See 42 U.S.C. §1396a(a)(10)”.⁷⁰ He goes on to explain that by 1982 every state in the country had chosen to participate in the federal program, receiving funds from the Federal Government based on their compliance with guidelines. Moreover, Roberts notes that Medicaid now constitutes over ten percent of most states’ total revenue.⁷¹ What the Affordable Care Act attempted to do was to expand the range of Medicaid’s coverage to include individuals previously not provided for; however, the additional funding provided for the expansion in coverage would not be enough to offset all of the new costs, so state would have to bear some financial burden. The ACA stipulated that any noncompliant states would not only be subject to loss of new Medicaid funding, but all of the original Medicaid funds as well.⁷² This, in essence, is exactly what a seven-to-two majority of the Court took issue with and found to be unconstitutional, the danger of states losing existing funds. But if the Medicaid provision is unconstitutional, does that also mean that the ACA is unconstitutional? No, the Court (as it is apt to do in recent trends) found that severability was easily applicable in this case and salvaged the remainder of the law. Roberts explains:

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or

⁷⁰ 567 U.S. ____ (2012), page 10.

⁷¹ Id.

⁷² 42 U.S.C. §1396c.

risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.⁷³

In beautiful fashion, the Chief Justice puts a bow on his expansive opinion which maintains a law that he probably personally does not agree with and attempts, in doing so, to preemptively pacify his critics: “The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people”.⁷⁴ The decision in *National Federation of Independent Business v. Sebelius* pronounces the Affordable Care Act not necessarily to be wise or sound policy, but to be constitutional—at least, for now.

⁷³ 567 U.S. ____ (2012), page 64.

⁷⁴ *Id.* at 65.

The Error of the Century

Try and think back to 11th grade US History class, the first and perhaps only time this infamous photo in (see below) is shown to students across the country:



Figure 9: Dewey Defeats Truman

On November 3rd 1948, President Harry S. Truman held up a newspaper printed by the Chicago Tribune, headlined “DEWEY DEFEATS TRUMAN.” Of course, Dewey did not defeat Truman, but the Tribune decided that the night before the election results were done being tallied that they would go to print regardless.⁷⁵ Relying on early Gallup polls which showed Dewey squarely in the lead, the Tribune did not do their civic duty as members of the “fourth branch of

⁷⁵ American Treasures of the Library of Congress. "Dewey Defeats Truman." *Library of Congress*. 27 July 2010.

government”.⁷⁶ By not doing their due diligence, a gatekeeper of information committed what is probably the largest publishing gaffe of the 20th century.

Immediately following the decision publication of *National Federation of Independent Business v. Sebelius*, history repeated itself. With over 60 years of time between the day Truman triumphantly made an example of foolish reporting, and *Sebelius*, the Cable News Network and FOX News overlooked the mistakes of generation past. Attorney and writer Bill Haltom recounts the morning of June 28th 2012:

Within seconds after the Supreme Court issued its Obama Care opinion, America’s finest journalists took to the airwaves. Fox News (“Fair and Balanced”) was first to share the breaking news with the American people. News Anchor Bill Hemmer, hardly containing his excitement, announced, “We have breaking news here on the Fox News Channel ... the individual mandate (of the act) has been ruled unconstitutional!” Within seconds, CNN (“the most trusted name in broadcast journalism”) shared the same news with millions of its viewers. CNN correspondent Kate Boulduan announced that the nation’s highest court had struck down the key component of President Obama’s health care law, finding it unconstitutional. “Wow, that’s a dramatic moment!” Wolf Blitzer said, and CNN then flashed on the screen, the announcement “BREAKING NEWS! SUPREME COURT KILLS INDIVIDUAL MANDATE”.⁷⁷

Needless to say, FOX News and CNN, the most trusted name in broadcast journalism, were completely incorrect. Not only did the two largest news outlets in the United States air the false

⁷⁶ Phrase used in conversation with Dr. Cynthia Schmidt, Center for Law and Policy Director at the University of Central Florida.

⁷⁷ Haltom, Bill. “Rush to Judgment, or How to Read a Judicial Opinion.” *Tennessee Bar Journal* 48.8 (2012), page 34.

information on television, they also placed large headlines on their websites. The now famous headline on CNN's website read "Mandate Struck Down." Of course, many news outlets took their time following the decisions publication, The Associated Press, the New York Times, Bloomberg News, and the blog SCOTUSblog.com all got it correct off the bat.⁷⁸ Realizing their mistake, CNN and FOX took down their misinformation and corrected themselves, but not before they smeared egg generously across their faces, and falsely informed millions of people. Thankfully, due to Photoshop and a shrewd photojournalist named Gary He, CNN in 2012 got to know exactly how the Chicago Tribune felt in 1948 (see photo below).



Figure 10: "Mandate Struck Down" by Gary He

⁷⁸ Timpane, John. "Some Media Jump to Conclusions on The High-Court Ruling." *Philadelphia Inquirer* [Philadelphia] 29 June 2012, NATIONAL; Inq World & Nation: A18.

Mr. He cast Barack Obama in the likeness of Harry Truman, except in this version the President holds up an iPad which presents CNN's front page, "Mandate Struck Down." According to John Timpane, a staff writer for the Philadelphia Inquirer, this image embodies much of what that Thursday morning felt like. He describes a "storm front of anticipation" building around a decision two years in the making; moreover, the anticipation was focused on every media outlet chomping at the bit to be the first to "know and tell".⁷⁹ For CNN, the looming black cloud of impatience coalesced into this image being tweeted and posted across the spans of the internet. It is worth noting, that in a quickly evolving technological arena, media could be considered to include any mass communication by any trusted and influential official. Many journalists and politicians communicate information to millions of people through Twitter or Facebook.

According to Victor Pickard, associate professor at the Annenberg School for Communication at the University of Pennsylvania, and Chris Harper, codirector of the Multimedia Urban Reporting Lab at Temple University, the United States has entered a time where media outlets are tasked with speed more than diligence. The instantaneous nature of headline reporting, twitter, social-media, and the 24-hour news cycle all pressure the press to be the first to report. Professor Pickard touches upon this, "The commercial pressure to be first, especially on dramatic stories like this, has lately led to some pretty vulnerable and visible errors. [...] You have no time to think, when you're going that fast, there's so much less vetting and editing".⁸⁰ Harper certainly mirrors this point, though he treats upon this case more specifically, "People, especially journalists, had been waiting so long for this decision [that they] couldn't

⁷⁹ Id.

⁸⁰ Id. quoting Victor Pickard.

help themselves. They were just jumping the gun”.⁸¹ Both of these scholars are explaining a phenomenon now, where the potential for misinformation does not only exist, but is overwhelming.

CNN and FOX’s desire to be the first to print obviously contributed to a disappointing blunder. Harper points out, with a high level of significance, that most of the media outlets which initially reported the *Sebelius* decision correctly, did so after taking a bit of time to understand the opinion.⁸² Frankly, it seems impossible that even those newsmen who got it right could understand the decision prior to reporting it. As previously noted, this decision is 193 pages long with Chief Justice Roberts’s Majority opinion accounting for 66 pages. In order to fully account for possible law, at the very least, one would have to read those 66 pages. It is not possible that any news outlet, even those which reported correctly could have read and reported the full opinion in under an hour. Admittedly, those reporting the ruling need not have awareness of the full decision, nor do media outlets tend to report more than a case’s most simple outcome. Nevertheless, when CNN and FOX decided to speed through a few pages or perhaps even paragraphs, rather than digesting 193 pages, they made a mockery of their institution. It is likely that they stumbled across Robert’s holding and read only the first part, without bothering to read past what appears to be a decisive statement, “The individual mandate cannot be upheld as an exercise of Congress’s power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it”.⁸³ Naturally, as was explained earlier, Roberts goes on after this point to uphold the individual mandate through the

⁸¹ Id. quoting Chris Harper.

⁸² Id.

⁸³ 567 U.S. ____ (2012), page 66.

Taxing and Spending Clause. John Timpane in a final assessment of the Obama Photoshop aptly quips, “It's both ironic and right that the Obama of the ‘Obama-Dewey’ image holds up the iPad, symbol of our networked, light-speed world - and, now, of the perils of moving in such fast company”.⁸⁴

Mistakes Happen

Yes, mistakes happen. Those who report the news, those who consume it, and even the Justices who make news, are human. *National Federation of Independent Business v. Sebelius* is among the most important cases since the turn of the century. That fact, coupled with the sheer amount of anticipation bubbling up throughout the country, shined a beaming spotlight onto CNN and FOX’s error. The public had been misinformed and somebody was to blame. The natural inclination is to blame CNN and FOX for shabby journalism. But, is it completely their fault? Erwin Chemerinsky, Professor of Law at University of California-Irvine, does well to highlight the issue, “Although these errors in reporting are not typical and the press certainly deserves a great deal of the blame for hasty and inaccurate reporting, they reflect a larger problem. The United States Supreme Court has a serious failure in communicating with the American public”.⁸⁵

It has been established multiple times throughout this paper that the Court does not talk directly to the public and that the press is almost always an intermediary. Currently, the only real way to sever the chain of information would be for members of the public to read judicial opinions themselves. As one would expect from a public who is often uninformed on even the

⁸⁴ Timpane, John. See footnote 78.

⁸⁵ Chemerinsky, Erwin. "A Failure to Communicate." *Brigham Young University Law Review* 2012.6 (2012), page 1705.

most basic functions of the Court,⁸⁶ few citizens do read decisions and even fewer still would read the 193-page behemoth that is *Sebelius*.⁸⁷ Thus, it is imperative that the media be able to fully understand a holding relatively quickly, otherwise the public will not know the law.

There needs to be a method established which renders judicial opinions accessible to the non-lawyers who read them (be they reporter or member of the public). The tricky language of legal nomenclature notwithstanding, the sheer volume and complexity that modern opinions embody do not make them easily read or understood. *Brown v. Board of Education* (347 U.S. 483), objectively one of the most important cases in United States history, is a total of 3,840 words. *National Federation of Independent Business v. Sebelius*, on the other hand, weighs in at a whopping 59,604 words, over fifteen times longer than *Brown*. This comparison, while anecdotal, serves to illustrate that in the current system it is possible for decisions to be massive, unapproachable tomes which can easily confuse the reader.

Currently, most cases do carry with them a syllabus which serves a summary of sorts for the total opinion. Those syllabi are written by the Supreme Court's Reporter of Decisions and not the justices themselves. Moreover, the syllabus is not geared towards the public, but rather towards lawyers. As can be seen by the debacle following *Sebelius*, syllabi do not do enough to completely alleviate misconception. So what is the solution? Instead of just a third party syllabus, each justice who writes a majority opinion should publish with it a short, one paragraph-long statement of the holding. The rational of the court matters, but it matters much less in the short term reporting of the law, than in the later discussion of it. It would have been

⁸⁶ See Pew poll on page 2.

⁸⁷ Chemerinsky, Erwin. See footnote 85, page 1707.

relatively easy for Chief Justice Roberts to frontload his 66-page opinion, which was full of valuable reasoning and dicta of course, with a simple statement of the law. For example: *In a 5-4 decision we have upheld the individual mandate within the Affordable Care Act. This court does not recognize Congress's creation of the law through the scope of its commerce power or necessary and proper clause authority, however the provision is supported through Congress's taxing power. In a 7-2 decision we have found that the Medicaid expansion within the Affordable Care Act is unconstitutional, but that it does not nullify any other portion of the Law.*⁸⁸ Had a paragraph such as this existed on page 1 of 193, CNN and FOX would have been spared humiliation. Furthermore, millions of people would not have been misinformed by the discordant system of SCOTUS reporting that exists today.

⁸⁸ Modeled from Id. at 1712.

Burwell v. Hobby Lobby Stores, Inc. (2014)

Fast forward two years, the Patient Protection and Affordable Care Act is once again at the forefront of judicial review. The legal challenge in *Burwell v. Hobby Lobby Inc.* (2014), unlike the one in *Sebelius*, does not implicate the constitutionality of the Affordable Care Act.⁸⁹ Instead, this case sees a statutory showdown; a conflict between a provision of the ACA and the Religious Freedom Restoration Act of 1993. The issue at hand is whether the Affordable Care Act's mandated employer based health care plan can force religious employers to cover certain contraceptive coverage. The utilization of *Burwell v. Hobby Lobby* in this treatise, legal question notwithstanding, is predicated on the spectacle of media framing that followed the decision. While the rationale and opinion of the Court are invaluable to the contentions offered herein, the embellished national narrative surrounding *Burwell* is what makes the case a poignant choice for analysis. Referred to by some as a "legal and political blockbuster",⁹⁰ the overstated implications of this case were enough to not only create politicized public debate, but to inspire retaliatory legislation across the country.⁹¹ Make no mistake; the following explanation of the case is exhaustive, but only serves to elucidate the folly in the media's coverage.

The Case

As previously stated in the discussion of *Sebelius*, the Patient Protection and Affordable Care Act is large enough to generate dozens (if not hundreds) of potential claims against it. The ACA necessitates that employers with more than forty-nine full-time employees provide group health

⁸⁹ Horwitz, Paul. "The Hobby Lobby Moment." *Harvard Law Review* 128.1 (2014), page 160.

⁹⁰ *Id.* at 157.

⁹¹ See Protect Women's Health From Corporate Interference Act of 2014, S. 2578, 113th Congress.

insurance coverage that meets federally established minimum essential standards.⁹² The particular provision that draws legal conflict in *Burwell* is 42 U.S.C. §300gg–13(a)(4), which mandates that one of the aforementioned “essential standards” is “preventative care and screenings” for women without “any cost sharing requirements”.⁹³ Delineated as part of the required preventative care by the Department of Human and Health Services (HHS), are *all* contraceptive methods which are Food and Drug Administration Approved.⁹⁴ Specifically at issue in this case were four of those contraception methods which were characterized by petitioner as abortifacients. Justice Alito states in *Burwell*, these methods “may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus”.⁹⁵ Examples of the contraceptives in question include the morning after pill and intrauterine devices.⁹⁶

Hobby Lobby, the for-profit arts and crafts store, is comprised of over 13,000 employees at 500 locations nation-wide, and as such would fall under ACA employer healthcare mandate.⁹⁷ Logically, that too means that they were subject to providing coverage for contraceptives under the HHS mandate (42 U.S.C. §300gg–13(a)(4)). The problem was that the owners of Hobby Lobby Stores, Inc., the Green Family, are devoutly religious Christians. In fact, as Justice Alito delineates in his majority opinion:

⁹² 26 U.S.C. §5000A(f)(2).

⁹³ 573 U.S. ____ (2014), page 8.

⁹⁴ 77 Fed. Reg. 8725.

⁹⁵ 573 U.S. ____ (2014), page 8.

⁹⁶ Dahline, Susan L. "Thou Shalt Provide Coverage For Contraceptives (Except For Religious Employers, Nonprofit Religious Organizations, And Closely Held For-Profit Entities Run By Religious People): Hobby Lobby, Wheaton, And Subsequent Agency Guidance Regarding "Eligible.." *Journal of Pension Benefits: Issues in Administration* 22.2 (2015), page 76.

⁹⁷ 573 U.S. ____ (2014), page 13.

Hobby Lobby’s statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.”

Each family member has signed a pledge to run the businesses in accordance with the family’s religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so.

The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to “know Jesus as Lord and Savior.”

(Internal citations omitted).⁹⁸

Due to the overwhelming nature of this existing evidence, the validity of the Green’s religious belief was accepted by the Court.⁹⁹

Prior to discussing the statutory conflict addressed by the Court in *Burwell*, the Religious Freedom Restoration Act of 1993 must be understood. Alito explains that the RFRA was designed and passed to “provide very broad protection for religious liberty.” He continues to say, “By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required”.¹⁰⁰ In effect, the RFRA raised religious freedom from government intervention to the highest level of scrutiny the Court can apply to a case: Strict scrutiny. As applied specifically to religious freedom,

⁹⁸ Id. at 14.

⁹⁹ Id. at 1.

¹⁰⁰ Id. at 17.

RFRA prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§2000bb–1(a), (b) (emphasis added).¹⁰¹

In layman’s terms, when a federal law implicates a person’s practice of religion, the government must show that their reason for doing so is compelling (meaning indisputably important). Moreover, the government must also show that there is no other less imposing means by which they could achieve their stated goal.

But the RFRA clearly says person, how does that apply to a business? As the majority opinion in *Burwell* explains, “A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another”.¹⁰² What this case’s opinion goes to great lengths to designate—both in the majority and in the concurrence—is that the nature of a corporation’s claim to religious freedom under RFRA is predicated on that business being closely held.¹⁰³ Closely held, as defined by the IRS is a corporation that “has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the

¹⁰¹ Id. at 16.

¹⁰² Id. at 18.

¹⁰³ Id. at 31; Id. at 2, Kennedy, J., concurring.

last half of the tax year”.¹⁰⁴ Moreover, to stifle suspicion that this application of RFRA to a corporation might be used by one which is not closely held or one which feigns piety, Alito denotes, “To qualify for RFRA’s protection, an asserted belief must be “sincere”; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail”.¹⁰⁵

In practical terms, a closely held company is one which is not publicly traded and that has a central body of ownership. Applied to Hobby Lobby Stores Inc., it is seen that the business is private, the Green Family owns over 50% of the stock, and that is not only owned by the Greens, but operated by them as well—David Green is the CEO of Hobby Lobby, and his three children are president, vice president, and vice CEO.¹⁰⁶ Justice Alito places these disjointed pieces together by stating that, “the companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs”.¹⁰⁷ Accordingly, using both the Court’s definition of person and Congress’s definition of person (*see* 1 U.S.C. §1), the majority concludes that RFRA applies in the instant case.¹⁰⁸

Next it must be established that the specific ACA contraceptive mandate was a substantial burden on Hobby Lobby’s free exercise of religion. A HHS brief¹⁰⁹ delineates that the four particular contraceptives may have the effect of destroying an already fertilized egg prior to implantation in the uterus. Due to the Green family’s firmly rooted belief that life begins at the

¹⁰⁴ IRS, “Question: Can you give me plain English definitions for the following: (1) a closely held corporation, (2) a personal holding corporation, and (3) a personal service corporation?” *Internal Revenue Service*. 1 Jan. 2015.

¹⁰⁵ 573 U.S. ____ (2014), page 29, n. 28.

¹⁰⁶ *Id.* at 14.

¹⁰⁷ *Id.* at 29.

¹⁰⁸ *Id.* at 31.

¹⁰⁹ No. 13–354, at 9, n. 4.

moment of conception, they believe such destruction akin to abortion.¹¹⁰ Moreover, the government necessitating that the Green's business pay for these contraceptives would in effect force the family to "seriously violate their religious beliefs".¹¹¹ Theoretically, noncompliance with the provision could be an option; however, the economic consequences imposed by the ACA for not meeting the minimum standards of health coverage would be astronomical. Hobby Lobby would be taxed \$100 a day per individual not satisfactorily covered.¹¹² While that does not seem like a lot, remember that Hobby Lobby Stores has 13,000 employees, which as Justice Alito notes would amount to total fines around "\$1.3 million per day or about \$475 million per year".¹¹³ Thus, Hobby Lobby is left with no choice that is not substantially burdened by the state; either they shoulder a grievous moral burden contrary to their faith or shoulder an unconscionable monetary burden for compliance with their faith.

Now that the existence of substantial burden has been established, the last step is application of the two-part test for strict scrutiny. In order for the contraceptive mandate to remain legal in this case, the government must exhibit that (1) the burden placed on Hobby Lobby is done so for a compelling government interest, and (2) that there is no less restrictive means to serve that interest.¹¹⁴ Surprisingly, this step was rather easy for the Court. The majority proceeds to assume that the stated interest of assuring cost-free contraceptive coverage to all women is a compelling governmental interest; instead, it tackles the parameter of least restrictive means. "We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to

¹¹⁰ 573 U.S. ____ (2014), page 32.

¹¹¹ *Id.*

¹¹² 26 U.S.C. §4980D.

¹¹³ 573 U.S. ____ (2014), page 32.

¹¹⁴ 42 U.S.C. §§2000bb-1(a), (b).

consider the final prong of the RFRA test, i.e., whether HHS has shown that the contraceptive mandate is ‘the least restrictive means of furthering that compelling governmental interest’ (§2000bb–1(b) (2))’.¹¹⁵ Rather quickly, the majority comes up with an ironclad reason that this compelling governmental interest is not being fulfilled through the least restrictive means: The department of Human and Health Services already has in place exemptions from the contraceptive provision for religious non-profits in which the insurance company or government covers those contraceptives.¹¹⁶ HHS has taken into account that organizations, be they non-or-for-profit, may have religious objections to providing potentially abortifacient contraceptives. Furthermore, they have created an avenue for exemption that is clearly less burdensome than the existing provision. Accordingly, the Court held in *Burwell* that the contraceptive mandate was unlawful and violated the RFRA by not being the least restrictive means of ensuring contraceptive coverage.¹¹⁷

Applying the recommendation made in the previous section, a brief synopsis of the rule of law from *Burwell* will now be presented: *In a five to four ruling, the Supreme Court held that closely-held religious businesses must be afforded the same religious protections as non-profits and individuals. The RFRA stipulates that government must serve its interest in cost-free contraceptives by the least restrictive means possible. Accordingly, the Department of Human and Health Services must offer religious companies the same coverage exemptions for*

¹¹⁵ 573 U.S. ____ (2014), page 40.

¹¹⁶ 45 CFR §147.131(c)(2).

¹¹⁷ 573 U.S. ____ (2014), page 49.

*potentially abortifacient contraceptives as it does to religious non-profits.*¹¹⁸ This simple summary informs the public of the case’s major holding.

Women’s Rights v. Religion

This paper returns to the discussion of framing to analyze the unsubstantiated and politicized media coverage of *Burwell v. Hobby Lobby Stores Inc.* Recall the introduction’s discussion of media coverage following *Brown v. Board of Education* (1954),¹¹⁹ and the pervasive effect that framing has on public narrative. Although repetitive, it bears repeating that “framing is ubiquitous in the American political system. Frames are story lines that order developments germane to the issue. They inform the public about what the essence of the issue is, what the controversy is about—in short, they are constructions of the issue”.¹²⁰ The frame surrounding the decision in *Burwell* placed very little emphasis on the merits of the case or the specified rationale delineating the very narrow scope of the case. Instead, most news correspondents and politicians took to Twitter or television to promulgate a politicized duel between women’s rights and religion. Professor of Law, Paul Horwitz, recalls the conversation immediately surrounding the decision:

Unsurprisingly, given the polarized nature of the larger debate over religious accommodation, most discussions of Hobby Lobby and the contraception mandate have been equally polarized. On one side of the divide, some saw the contraception mandate as

¹¹⁸ Modeled from Dahline, Susan L. See footnote 96, page 76.

¹¹⁹ See pages 6, 13, and 14.

¹²⁰ Clawson, Rosalee A., Harry C. Strine IV, and Eric N. Waltenburg. See footnote 16, page 785.

‘trampling’ or ‘assaulting’ religious liberty. On the other side were those who warned that a win for Hobby Lobby threatened our local and national civil rights laws.¹²¹

Granted, the majority of this discussion is anecdotal in nature due to the fact that *Burwell* was released less than a year ago, however there are more than enough examples to substantiate the point.

As will be shown, it is likely that the nature of public discourse regarding *Burwell* was entirely altered by the decision’s timing. Released on June 30th 2014, *Burwell* was issued less than four months before a contentious midterm election. No doubt, politicians from both sides of the aisle seized the opportunity to galvanize their voter base by touting the unsubstantiated narrative of their respective philosophy. For example, immediately after the decision was announced, Louisiana Governor Bobby Jindal tweeted, “America was founded on the principle of religious freedom, and there is nothing more fundamental than the First Amendment. #HobbyLobby”.¹²² Claiming a win for religion under the First Amendment is a sure fire way to garner support. After all, everyone loves the First Amendment. The only issue with Governor Jindal’s message to the 179,000 people who follow him on Twitter is that this case was not decided on First Amendment merits. In fact, it is expressly stated several times that the Court is not considering a “free exercise” challenge under the First Amendment, but instead a RFRA challenge.¹²³ Even worse, is that an uncontested statement in Justice Ruth Bader Ginsberg’s dissent expressly rejects that this decision could have survived on the merits of the First Amendment alone, “The Court does not pretend that the First Amendment’s Free Exercise

¹²¹ Horwitz, Paul. See footnote, 89, page 155.

¹²² Greve, Joan E. “#ReligiousFreedom v. #NotMyBossBusiness: SCOTUS Contraception Ruling Ignites Hashtag War.” *Time* 2 July 2014: *Business Source Premier*.

¹²³ 573 U.S. ____ (2014), Kennedy J., Concurring, page 2.

Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score”.¹²⁴ Nevertheless, nearly 180,000 people were fed a false narrative by a public official.

To be sure, the narrative by politicians of the liberal cloth was no more grounded in reality. The persistent outcry that *Burwell* was a slap in the face to women’s rights was so overwhelming, that it spurred legislation both on the federal and state level.¹²⁵ Following the decision, California Senator Barbara Boxer tweeted out, “SCOTUS took an outrageous step against women's rights, setting a dangerous precedent that permits corporations to choose which laws to obey,” she was joined in her position by House Minority Leader, Nancy Pelosi, “[retweet] if you want more women in office to defend you against a SCOTUS that is hostile to reproductive health #HobbyLobby”.¹²⁶ Once again, it is seen that a compelling tagline is more important than accurate information. The entire premise of the Court’s opinion is founded upon the notion that the Government or insurance provider would cover the expense for the exempted contraceptive. In essence, the Court’s decision would have very little effect on women and more of an effect on their employer. Justice Alito explains, “Under the accommodation, the plaintiffs’ female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to ‘face minimal logistical and administrative obstacles,’ because their employers’ insurers would be responsible for providing information and coverage”.¹²⁷ Together, Boxer and Pelosi reach over 600,000 people.¹²⁸

Unsurprisingly, it was not just politicians that took to social media to voice their abhorrence with the he-man-woman-hating Supreme Court, media correspondents did as well.

¹²⁴ Id. Ginsberg J., dissenting, page 2.

¹²⁵ See Protect Women's Health From Corporate Interference Act of 2014, S. 2578, 113th Congress.

¹²⁶ Greve, Joan E. See footnote 122.

¹²⁷ 573 U.S. ____ (2014), page 44.

¹²⁸ Number in flux: www.twitter.com.

Reporters for MSNBC and CNN Jimmy Williams, John Fugelsang, and Donna Brazile (amongst others) all tweeted out their concerns. Williams said, “Scotus Hobby Lobby decision most sweeping assault on privacy/equal [rights] since Plessy. [Business] reigns over humans now, law of the land”.¹²⁹ Of course, the issue with Mr. Williams’ analysis is that *Burwell* had quite literally no mention of the Fourth Amendment whatsoever. John Fugelsang had perhaps the most unabashed comment of a reporter, “the Supreme Court #HobbyLobby ruling proves once again that Scalia Law is a lot like Sharia Law”.¹³⁰ Justice Scalia did not write the opinion, nor did he write a concurrence. Finally, Donna Brazile tweeted out a warning which has no relation to the Court’s judgement whatsoever, “#SCOTUS ruling on #HobbyLobby is wrong! Your Boss will now get in your personal business. I’ve lost faith in the Supreme Court”.¹³¹ Together, they reach 550,000 people.¹³² When the gatekeepers of information—the faces of the modern day press—feed false claims about the legal ramifications of a case to hundreds of thousands of people, the law and the truth fall by the wayside.

Of course, these are handpicked examples of political and partisan framing by politicians and the press. Honest discourse on the doctrinal merits of the case is sure to have existed. Nevertheless, even if these few examples were the only cases of irresponsible communication by trusted figures in the political realm, over a million people would have been misinformed. Professors of political science Stephen Nicholson and Robert Howard clarify how damning this false frame may be, “Results suggest that framing matters across a broad spectrum of politics. [...] Framing not only shapes citizens’ attitudes about public policy, but also about political

¹²⁹ Nguyen, Tina. “I Feel Sick”: Liberal Pundits React to SCOTUS Hobby Lobby Ruling.” MediaITE. 30 June 2014.

¹³⁰ Id.

¹³¹ Id.

¹³² Number in flux: www.twitter.com.

actors and institutions”.¹³³ Indeed, the false frame following *Burwell v. Hobby Lobby Stores, Inc.*, could have not only effected public opinion and public discourse, but it could have tangibly made an impact on the November 2014 midterm election.

¹³³ Nicholson, Stephen P. and Robert M. Howard. See footnote 33, page 693.

Times Are Changing

The force of judicial decisions . . . depends on a fragile constitutional chemistry and it flows directly from popular knowledge and acceptance of their decisions. Courts cannot publicize; they cannot broadcast. They must set forth their reasoning in accessible language and logic and then look to the press to spread the word.

-Judge Irving Kaufman

Currently, the media bears all responsibility for the dissemination of judicial knowledge. Such a system, as it exists, does not work to strengthen American democracy. Media outlets are businesses and as such, do not exist to provide information to the public. They exist to sell advertisement space and derive a profit from amassing viewers. Accordingly, the media has fallen short on quantity, quality, and accuracy of coverage on the Supreme Court. Political polarization within the media has risen to an extreme that now implicates the symbol of impartiality. It is not entirely the media's fault. Times have changed, and with it technology has evolved. Now more than ever, information is broken down into small, bite-size pieces, and communicated instantly and directly by those who have a message (whether it be on social media, television, the internet, etc.). Rather than be wed to tradition, the Court too must evolve to assist in the reclamation of civic engagement. A cross roads of increased political polarization and decreased knowledge lies before the country. *Bush v. Gore*, *National Federation of Independent Business v. Sebelius*, and *Burwell v. Hobby Lobby Stores Inc.* highlight what has now become a failing relationship. Only together can the press and the Supreme Court mend a system that does not serve to properly disseminate law. Understanding fuels education; education drives engagement. Judge Kaufman may or may not have been correct about the necessity for

public knowledge and acceptance of Supreme Court decisions. Yet, while it is possible that a judicially informed citizenry is not necessary for the survival of the Supreme Court (*see Baker v. Carr; Bush v. Gore*), it is undeniable that an educated and civically responsible public is a foundational tenant of American Democracy.

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