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A Court Under Strain: The U.S. Supreme Court's Democratic Deficit

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A COURT UNDER STRAIN: THE U.S. SUPREME COURT'S DEMOCRATIC DEFICIT

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TABLE OF CONTENTS

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ABSTRACT

The legitimacy of the United States Supreme Court has been consistently attacked and undermined by the public and political elites since the nation's founding. Claims of Court illegitimacy stem from the Court's countermajoritarian dilemma, which emerges when unelected justices use judicial review to invalidate legislation enacted or action taken by an electorally accountable Congress or executive, respectively. While scholars have examined the extent of the legitimacy conferred on the Court by the public and executive and legislative branches, they have not analyzed how claims of judicial illegitimacy have or have not resonated with the Supreme Court justices themselves. To what extent are justices preoccupied with the Court's legitimacy? Do they perceive their institution's position as precarious? If so, are there any ramifications on perceived judicial authority? This project analyzes these questions by examining whether and, if so, how attacks undermining Court legitimacy have been internalized by Supreme Court justices. Specifically, the following are analyzed: (1) the emergence of distinct constitutional interpretive approaches over time, which are understood as responses to the Court's legitimacy crisis, (2) evidence of concern with the Court's legitimacy in justices' internal correspondence during decision-making, (3) the use of rhetoric in abortion jurisprudence that speaks to the Court's institutional legitimacy, and (4) the Chief Justices' articulation of legitimacy concerns within their annual year-end reports on the federal judiciary. Ultimately, this project demonstrates that Supreme Court justices are concerned with the Court's legitimacy.

INTRODUCTION: A COURT UNDER STRAIN

The legitimacy of the United States Supreme Court has been a topic of concern since the establishment of an independent judicial branch during the nation's founding. After laying-out the foundations of legislative and executive power in Articles One and Two of the Constitution, the Founders described an independent judiciary in Article Three. However, in establishing the judicial branch, the Founders did not explicitly enumerate the Supreme Court with the power of judicial review. Instead, they paid attention to establishing the types of cases over which the Court would have jurisdiction.[1] If the Framers of the Constitution had explicitly referenced judicial review, then perhaps much of the controversy over the extent of the judiciary's power would have been avoided. There would be no legitimate countermajoritarian concern because it would have been understood that in providing for judicial review, the Framers were acceding the necessity of some countermajoritarian judicial checks. Instead, judicial review was not explicitly articulated in Article Three and there has been consistent criticism of judicial review, expansive Court powers, and the Court's legitimacy since the Founding.

That the legitimacy of the Supreme Court was questioned during its early history is evident in Alexander Hamilton's rebuttal of Anti-Federalist concerns regarding the extent of judicial authority. Specifically, Anti-Federalist "Brutus" published two essays in March and April 1788 on the power of the judiciary that raised concerns about the Court's seeming preeminence in constitutional interpretation.[2] "Brutus" feared that the Constitution created an unaccountable Court "exalted above all other power in the government, and subject to no control."[3] Alexander Hamilton responded in *Federalist* No. 78 by maintaining that the judiciary is the weakest branch because it holds neither the "sword" (as does the executive) nor the "purse" (as does the legislature).[4] Hamilton protected the Court's legitimacy in *Federalist* No. 78 when opposition to the judicial branch during state ratification of the Constitution

[1] U.S. Constitution, art. 1-3.
[2] Brutus XV, 20 March 1788, http://www.constitution.org/afp/brutus15.htm; Brutus XVI, 10 April 1788, http://www.constitution.org/afp/brutus16.htm.
[3] Brutus XV.
[4] Alexander Hamilton, *Federalist* No. 78, in *The Federalist Papers*.

threatened to undermine judicial authority. Similarly, Chief Justice John Marshall's articulation of judicial review in *Marbury v. Madison* (1803) and the Court's subsequent refusal to oppose the executive and legislature in *Stuart v. Laird* (1803) highlights both an articulation of the Court's legitimacy and authority and concern with maintaining legitimacy when faced with presidential and congressional opposition, respectively.[5]

The concerns regarding the Court's legitimacy that have been evident since the nation's founding have not dissipated. Instead, various factors cause extensive criticisms of judicial legitimacy to come to the forefront of American politics. Election years, highly salient and controversial cases, and Supreme Court vacancies all may increase public awareness of the Supreme Court and lead to the reemergence of criticisms that undermine judicial legitimacy. Indeed, election years tend to correlate with increases in direct attacks against the Court. Donald Stephenson suggests that the Supreme Court was an important topic during nearly one fifth of the presidential elections through the election of 1992.[6] Stephenson emphasizes that the Court is a major focus of presidential elections when there are "realigning elections" where political parties are transformed or new parties emerge.[7] Additionally, controversial cases receive extensive media coverage as they typically address contemporary social issues that have generated political mobilization.[8] These cases receive significant publicity throughout the entire adjudication process, from when they are added to the Court's docket through the point when final decisions are handed down. If the decision generates backlash, as generally occurs when there is a losing coalition in a controversial case, media attention surrounding the Court continues past the point when a decision has been released.[9] For example, since the turn of the twenty-first century, *Bush v. Gore* (2000), *Lawrence v.*

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[5] *Marbury v. Madison*, 5 U.S. 137 (1803); *Stuart v. Laird*, 5 U.S. 299 (1803); see generally Bruce Ackerman, *Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Massachusetts: Harvard University Press, 2009), especially Chapter Eight: *Marbury* v. *Stuart*, 163-98.
[6] Donald Grier Stephenson, Jr., *Campaigns & the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), 3.
[7] Ibid, 218-9.
[8] Valerie J. Hoekstra, "The Supreme Court and Local Public Opinion," *The American Political Science Review* 94 (March 2000).
[9] On Backlash Theory, see Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004) and Thomas M. Keck, "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights," *Law & Society Review* 43 (2009).

Texas (2003), *Citizen's United v. Federal Election Commission* (2010), and *Obergefell v. Hodges* (2015) exemplify some of the century's most salient cases. Supreme Court vacancies also lead to increased public awareness of the Court as the nomination and confirmation process of Supreme Court justices can be highly politicized. For example, Charles Geyh notes that "From its inception, the [Supreme Court judicial appointment] process has been exploited by Senate factions to gain partisan political advantage."[10] Similarly, Stephen Engel suggests that judicial nominations "have the potential to achieve policy aims through judicial rulings."[11] Given the often contentious appointment process that is exacerbated when the executive and legislature are dominated by different parties, media coverage of the process can signal to the public that the Supreme Court is hardly apolitical and generate criticisms that undermine the Court's legitimacy.

The current Supreme Court is likely to be particularly vulnerable to criticism that calls its legitimacy into question as public polling data suggests the Supreme Court may be facing a crisis of confidence. Additionally, the Court is operating during a time when *all three* of the above factors have come to a head. First, public polling data suggests that disapproval regarding the way in which the Supreme Court handles its job has doubled since June 2001 from twenty-five percent disproval to fifty percent disapproval in September 2015.[12] Since the turn of the century, 2015 marks the first time that public disapproval of the Court has been equal to or above fifty percent.[13] The general trend of decreasing public support for the Court suggests that judicial authority may not be as insulated as is generally alleged in scholarly literature. Second, given the imminent 2016 presidential election and evidence of ideological turmoil in both major political parties, accusations against the Court are likely to increase.

The Court has further lined-up a string of highly salient and controversial cases to hear and decide over the course of 2016, including the first abortion case, *Whole Woman's Health v. Hellerstedt*, since *Gonzales v. Carhart* (2007). This case poses the most significant threat to a woman's right to have an

[10] Charles G. Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Michigan: University of Michigan Press, 2008), 186.
[11] Stephen M. Engel, *American Politicians Confront the Court* (New York: Cambridge University Press, 2011), 68.
[12] Gallup, (2015) *Supreme Court* [Data set], retrieved from http://www.gallup.com/poll/4732/supreme-court.aspx.
[13] Ibid.

abortion since 2007 and, after the March 2, 2016 oral arguments, it appears as if a fragmented final decision is likely.[14] The likelihood that the decision will rest on Justice Anthony Kennedy's swing vote and the implications of a fragmented decision on an issue as salient as abortion rights is likely to generate extensive media coverage in the months leading up to a final decision and to revive criticism of fragmented Court decisions. Chief Justice John Roberts himself has not only expressed his aversion to fragmented Court decisions as they undermine judicial legitimacy, but he has also lamented the media's preoccupation with such decisions.[15] Specifically, in a 2006 interview, Justice Roberts asserted "'We had more unanimous opinions announced in a row [during his first term as Chief Justice] than ever before…in the modern era…but in the first 5-4 decision, people are writing, 'So much for unanimity.'"'[16] Given the media's proclivity for highlighting fragmented decisions, *Hellerstedt* and the Court's other equally controversial and salient cases will likely invoke charges of judicial illegitimacy and further strain the Court.

Additionally, since Justice Antonin Scalia's unexpected passing on February 13, 2016, the Supreme Court vacancy has not only thrown the Court into the unexpected position of potentially deciding controversial cases with an eight-member Court, but has also thrust the Court into the midst of the increasingly politicized confirmation process. Ironically, speaking ten days before Scalia's death, Justice Roberts asserted that the judicial confirmation "'process is not functioning very well'" and warned about its negative impact on the legitimacy of the Court.[17] Roberts claimed "'When you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it will be viewed in those terms'" and it becomes "'natural for some members of the public to think, well, you must be

[14] Adam Liptak, "Supreme Court Appears Sharply Divided as it Hears Texas Abortion Case," *The New York Times*, 2 March 2016, http://www.nytimes.com/2016/03/03/us/politics/supreme-court-abortion-texas.html?.
[15] Jeffrey Rosen, "Roberts's Rules," *The Atlantic*, January/February 2007, http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/.
[16] John G. Roberts quoted in Jeffrey Rosen, "Roberts's Rules."
[17] John G. Roberts quoted in Adam Liptak, "John Roberts Criticized Supreme Court Confirmation Process, Before There Was A Vacancy," *The New York Times*, 21 March 2016, http://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html.

identified in a particular way as a result of that process.'"[18] However, reasserting the Court's apolitical mandate, Roberts stated that justices "'don't work as Democrats or Republicans.'"[19] Roberts' negative characterization of the confirmation process spells even more trouble for the Supreme Court as his characterization foreshadows what is to come in President Barack Obama's attempt to fill Scalia's vacant seat. The Senate's refusal to consider President Obama's nomination of Merrick Garland on March 16, 2016 already signals that the Supreme Court will be subject to the broken confirmation process that Roberts denounced a few days before Scalia's passing.[20] Given the election year, the judicial appointment process between a Democratic President and Republican-led Senate will likely complicate the nomination process, significantly extend the confirmation of a new justice, and become even more politically divisive than in a non-election year. Ultimately, in light of wavering public opinion, the 2016 presidential election, the Court's highly salient docket, and the diminished, eight-membered Court, the Supreme Court is truly a Court under strain. These factors make the analysis undertaken in this project, namely how Supreme Court justices respond to the Court's so-called legitimacy crisis, particularly timely. The remainder of this introduction will introduce the project's central question and provide an outline of what is to follow.

I. Supreme Court Justices and the Court's Legitimacy Crisis

This project asks if Supreme Court justices have internalized the accusations of the Court's democratic deficit and, if so, whether and how that position compels reconsideration of scholarly understanding of the so-called norm of judicial supremacy and security of judicial authority. The Court's democratic deficit has been characterized as the Court's countermajoritarian difficulty, and contributes to claims that the Court suffers from a legitimacy crisis insofar as the Court sometimes deems enactments of the more democratic federal executive and legislative branches unconstitutional. Therefore, in alluding to the Court's democratic deficit, this project addresses the legitimacy implications of the

[18] Ibid.
[19] Ibid.
[20] Nina Totenberg, "Why President Obama Picked 'The Only White Guy' on His Shortlist," *NPR* 20 March 2016, http://www.npr.org/2016/03/18/470918125/obama-refusal-to-consider-nominee-damages-publics-faith-in-the-judiciary.

countermajoritarian dilemma, specifically as they resonate with the Supreme Court justices themselves. Furthermore, by implicating the norm of judicial supremacy, this project refers to scholarly literature that suggests the contemporary post-*Brown* Court benefits from extra-judicial acceptance that the Court is the final interpreter of the Constitution.[21] However, this project does not take the norm of judicial supremacy as fact; hence it is only referred to as a "so-called" norm and this project begins from a position that questions the norm's validity in light of more recent scholarship that suggests such a norm cannot be reconciled with the current state of American politics.[22] If it is evidenced within this project that justices express a persistent preoccupation with Court legitimacy, such findings would suggest that justices, at least, have not sensed the apparent security of judicial authority that a norm of judicial supremacy confers.

There is an extensive body of scholarly research on the Supreme Court that focuses on its legitimacy. Scholars have sought to explain how the public, elites, and the executive and legislative branches interact with the Court and perceive its legitimacy. They have further addressed how these interactions and perceptions have changed over time. Scholarly literature on the Court can be partitioned into two broad categories: literature that addresses how the public views the legitimacy of the Court and literature that addresses the way in which the executive or legislature interact with the Court.[23] Paired

[21] On the establishment of a norm of judicial supremacy, see Larry D. Kramer, "Judicial Supremacy and the End of Judicial Restraint," *California Law Review* 100 (2012) and the complete five-part law review series by Barry Friedman: Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *New York University Law Review* 73 (May 1998); Barry Friedman, "The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court," *Georgetown Law Journal* 91 (November 2002); Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*," *New York University Law* 76 (November 2001); Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Four: Law's Politics," *University of Pennsylvania Law Review* 148 (April 2000); Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five," *The Yale Law Journal* 112 (November 2002).

[22] On recent challenges to the validity of a norm of judicial supremacy, see Stephen M. Engel, *American Politicians Confront the Court* (New York: Cambridge University Press, 2011).

[23] For an introduction to public opinion literature, see Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science* 36 (August 1992), James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "Measuring Attitudes toward the United States Supreme Court," *American Journal of Political Science* 47 (April 2003), Stephen P. Nicholson and Robert M. Howard, "Framing Support for the Supreme Court in the Aftermath of *Bush v. Gore*," *The Journal of Politics* 65 (August 2003), and James L. Gibson and Michael J. Nelson, "Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?," *American Journal of Political Science* 59 (January 2015). On the institutional

with scholarship that contends the Court benefits from an apparent norm of judicial supremacy, literature that addresses Court legitimacy is inherently contradictory; an illegitimate Court cannot concurrently operate under a norm of judicial supremacy that suggests the public and other federal branches recognize its legitimacy.

There is also a large gap in research that addresses the Court's legitimacy as this literature focuses on the actors – the public, the executive branch, or the legislative branch – that call the Court's legitimacy into question, i.e. scholars discuss the Court's "attackers." In solely focusing on the "attackers," judicial politics scholarship generally fails to consider the justices' response to attacks that call the Court's legitimacy into question, i.e. the "attacked" are not addressed. In other words by focusing on the "attackers," scholars have failed to analyze how claims of judicial illegitimacy have or have not resonated with the Supreme Court justices themselves. Accordingly, there is a significant gap in the literature regarding how accusations of the Court's democratic deficit affect justices and warrants the question, do the justices recognize their own position as precarious, given attacks that undermine the Court's legitimacy? The general absence of scholarly focus on the justices in literature that addresses the Court's legitimacy is marginally remedied by multimember panel literature and judicial biographies that address the justices. However, these bodies of literature do not address Court legitimacy, at least not in terms of the Court as a whole. While biographies do address individual justices' concerns with Court legitimacy, multimember-panel literature focuses on the strategy of judicial decision-making.[24] Hence, there remains a gap in the literature regarding how justices have internalized the Court's presumed democratic deficit,

relationship between the Court and the executive branch, see Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (New Jersey: Princeton University Press, 2009) and Engel. On the dynamics between the Court and the legislative branch see Charles G. Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Michigan: University of Michigan Press, 2008) and Engel.

[24] For literature addressing multimember panel decision-making, see Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), Chris W. Bonneau, Thomas H. Hammond, Forest Maltzman, and Paul J. Wahlbeck, "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court," *American Journal of Political Science* 51 (October 2007), Geyh, 7-14, Cliff Carrubba, Barry Friedman, Andrew D. Martin, and Georg Vanberg, "Who Controls the Content of the Supreme Court," *American Journal of Political Science* 56 (April 2012), and Benjamin E. Lauderdale and Tom S. Clark, "The Supreme Court's Many Median Justices," *American Political Science* Review 106 (November 2012).

i.e. the legitimacy crisis that emerges from the countermajoritarian dilemma, which this project aims to address.

II. Chapters to Come

Chapter One reviews the relevant scholarly literature concerning the Court's legitimacy crisis. The chapter identifies the countermajoritarian difficulty as the source of the Court's democratic deficit. The countermajoritarian difficulty ultimately arises from the perceived illegitimacy of an unelected, unaccountable judiciary having the power to overturn executive and legislative action; the executive and legislature are suggested to be inherently more representative of popular will given the President's and Congress' electoral accountability. The chapter further outlines some of the mechanisms justices use to insulate the Court's legitimacy, e.g. by following the "passive virtues," utilizing the *Ashwander* principle, and relying on the four main schools of judicial thought (which are extensively discussed in Chapter Two) to convey that the judiciary is not characterized by expansive, unchecked power. Literature that addresses the Court's legitimacy – public support and interbranch relations literature – is then fleshed-out. Despite persistent claims of Court illegitimacy, some of these scholars have suggested that the contemporary, post-*Brown* Court operates under a norm of judicial supremacy. Such a norm would suggest that the justices have no cause to be concerned with the Court's legitimacy, though prior research has not addressed if the justices actually recognize the appearance of this norm. A major gap in the scholarly literature regarding Court legitimacy is scholars' near exclusive focus on the actors who call the legitimacy of the Supreme Court into question. This project aims to remedy the lack of focus on the justices, who are ultimately the most likely to be influenced by such criticisms of the Court. Finally, the chapter concludes by introducing the topics typically addressed by multimember panel literature and judicial biographies, and highlights how these areas of literature fail to address this projects motivating question.

Chapter Two further discusses the four main schools of judicial thought that are briefly introduced in Chapter One, and it conceptualizes these schools as strategic responses to specific concerns

with the Court's legitimacy. These schools of thought include Formalism, Originalism, Common Law Constitutionalism, and Legal Realism, and they are largely used by the justices to guide decision-making and constitutional interpretation. The Chapter focuses on introducing the emergence of (1) Formalism as a response to concerns with the Court's perceived power at the nation's Founding, (2) Legal Realism as a response to the Populist and Progressive Eras' criticism of the Court's inability to recognize changing societal norms given the justices' strict reliance on textual interpretation, (3) Originalism as a response to attacks of the seemingly arbitrary and ideologically motivated Legal Realist interpretation, and (4) Common Law Constitutionalism as a response to extrajudicial dissatisfaction with both Legal Realist and Originalist interpretation. Ultimately, the chapter aims to illustrate how judicial reliance on the schools of thought to guide decision-making developed in response to the emergence of crises that questioned and undermined the Court's legitimacy. Its purpose is not to connect justices to specific interpretive approaches, but, rather, to show the development of distinct interpretive frameworks overtime as responses to attacks that undermined the Court's legitimacy. The Chapter also discusses why Thomas Grey's interpretive approach was not embraced by the justices as a way to guide decision-making and evaluates why certain legitimacy crises, i.e. the crisis after *Dred Scott v. Sandford* (1857), are insufficient to generate new interpretive approaches.[25] Given the sequential emergence of the schools of thought, the chapter is grounded in Frank Baumgartner and Bryan Jones' approach to punctuated equilibrium.[26]

Chapter Three begins a two-chapter case study analysis of the Court's abortion jurisprudence. Selection of an area of jurisprudence for the case study had to meet two metrics, one that is addressed in Chapter Three and the other in Chapter Four. Chapter Three's analysis required the cases to address a salient social issue that has polarized the public. Chapter Four's analysis required a jurisprudential tradition that emerged after the so-called norm of judicial supremacy was established and included a number of cases. As the Court's abortion jurisprudence meets both requirements, it was chosen for analysis. Chapter Three analyzes justices' internal correspondence and communications regarding

[25] Thomas Grey, "Do We Have an Unwritten Constitution?," *Stanford Law Review* 27 (February 1975).
[26] Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Illinois: The University of Chicago Press, 1993).

decision-making of the Court's first two abortion decisions: *Roe v. Wade* (1973) and *Doe v. Bolton* (1973). Internal deliberations of *Roe* and *Bolton* are analyzed to foreshadow the analysis of all the Court's abortion cases that occurs in Chapter Four. The analysis in Chapter Three aims to highlight whether evidence of judicial concern or preoccupation with the Court's legitimacy emerge when justices are deciding cases. The chapter follows Michael Klarman's analysis of *Brown v. Board of Education* (1954) in his book, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*.[27] Rather than focus on each of the justices' position on the issue, as does Klarman, the chapter focuses on the specific legitimacy concerns that emerged over the course of the *Roe* and *Bolton* decision-making process. During deliberation of the abortion cases, legitimacy concerns arose regarding fragmented Court decisions, reargument, assignment of the majority opinion author, and salience of the abortion issue.

Chapter Four continues with Chapter Three's analysis of *Roe* and *Bolton* by conducting a content analysis of the justices' use of legitimacy rhetoric in the Supreme Court's abortion rulings. The analyzed abortion decisions are limited to those that substantively address a woman's fundamental right to have an abortion. Doing so creates a database of twenty-one cases. The chapter identifies various keywords and claims that are articulated in the abortion decisions and suggest a concern with the Court's institutional legitimacy. These keywords and claims are largely informed by the project's preceding three chapters. For example, Chapter Two not only argues that the emergence of the four schools of judicial interpretation are responses to concerns with the Court's democratic deficit, but also illustrates the type of rhetoric that may be used in cases to reinforce Court legitimacy. Similarly, Chapter Three directly transitions into Chapter Four as it discusses the initial legitimacy concerns that emerged when the justices were first deciding that there was a right to abortion.

Chapter Five addresses the extent that Chief Justices emphasize Court legitimacy in their annual *Year-End Report on the Federal Judiciary*. The chapter views the project's question from the perspective of the Chief Justice, i.e. the institutional steward of the Court, and seeks to understand the extent of his

[27] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 290-342.

concern with the Court's legitimacy. The chapter not only provides another perspective through which to analyze the extent of the justices' preoccupation with legitimacy, but further identifies another source within which legitimacy concerns are articulated. As this chapter evidences, justices do not only address legitimacy concerns in internal deliberations or final decisions, but also in the year-end reports. Many of the legitimacy concerns articulated in the year-end reports parallel the legitimacy claims that are discussed in Chapter Four.

In the Conclusion, the project's substantive chapters are briefly summarized and its four main "takeaways" are discussed. The Conclusion aims to synthesize the arguments of the preceding chapters and highlight how they reinforce one another in answering this project's central question. The ultimate conclusions are that (1) justices are concerned with the Court's democratic deficit, (2) justices do not perceive the norm of judicial supremacy, (3) justices seem to recognize a link between the public's specific and diffuse support, and (4) neoinstitutionalism is a more accurate model of judicial decision-making than is attitudinalism. Given the first "takeaway," one final implication is considered. This implication suggests that scholarly work on the Court's legitimacy crisis provides an incomplete assessment of the Court's democratic deficit due to scholars' preoccupation with the "attackers" of the Court's legitimacy.

Each of the chapters ultimately aim to address the project's central question from a different perspective. The goal is to provide a comprehensive analysis of whether and how justices have internalized the Court's democratic deficit. The chapters demonstrate that Supreme Court justices are in fact consistently and deeply concerned with judicial legitimacy. Ultimately, this finding would seem to call into doubt some aspects of a supposed norm of judicial supremacy. While it is unclear how the justices will navigate the Court's current state of strain, it would be expected, at the very least, that the justices will exhibit signs of a deep concern regarding the state of the Court's legitimacy.

1

THE DEMOCRATIC DEFICIT OF THE UNITED STATES SUPREME COURT

Attacks on the legitimacy of the U.S. Supreme Court often take their starting point from the institution's alleged democratic deficit, which has been otherwise characterized as the Court's countermajoritarian difficulty. The form of these attacks and their effect on public and political elite perceptions of the Court's legitimacy has generated significant scholarship. As these attacks challenge the Supreme Court's institutional legitimacy, the Supreme Court justices are also likely influenced by attacks suggesting the Court is inherently illegitimate. This project therefore focuses on the Supreme Court justices and specifically addresses if the justices have internalized accusations of Court illegitimacy and, if they have, what the implications are on the supposed norm of judicial supremacy and the Court's institutional constraints.

Before addressing the justices in future chapters, this chapter reviews the relevant scholarship regarding the legitimacy of the Supreme Court. The chapter begins by introducing the countermajoritarian dilemma as the source of many of the attacks directed at the Court. Once that concept is defined, the chapter turns to a discussion of two perspectives that scholars have used to frame the Court's legitimacy crisis: public support and institutional support. While public support literature attempts to distinguish between diffuse and specific support, literature analyzing institutional support addresses executive- or legislative-judicial inter-branch relations. In recent years, both public perception and inter-branch relations scholars have generally concluded that judicial legitimacy is secure. This finding warrants the question, if the legitimacy of the Court is in fact secure, do Supreme Court justices continue to be preoccupied with asserting that the Court is a legitimate institution? If so, why? The pervasive finding that the Court generally enjoys widespread popular support has led to claims that the modern Court operates under a norm of judicial supremacy, which is the fourth focus of this chapter. Lastly, the chapter acknowledges the two bodies of scholarship (multimember panel literature and judicial biographies) that

have addressed the factors that influence justices' decision-making, but have nonetheless failed to address this project's motivating question.

I. The Countermajoritarian Difficulty

The countermajoritarian difficulty, as coined by Alexander Bickel, refers to an alleged inherent legitimacy crisis that arises when the Supreme Court invokes judicial review.[1] Specifically, judicial review is the doctrine that established the Court's authority to deem executive action or congressional legislation invalid after a constitutional analysis. Bickel argues that overturning legislation that has been duly passed by Congress and executed by the President is problematic because, in doing so, the Supreme Court directly opposes the democratically elected federal branches that are more receptive to and influenced by the populace.[2] Essentially, overturning legislation is countermajoritarian because the majority elected the lawmaking representatives and therefore legislation that is passed by Congress is presumed to be representative of the populace. Majority rule is directly threatened when an unelected branch has the power to invalidate legislation enacted by an electorally accountable body.

Legal scholar Or Bassok suggests that Bickel's definition of the countermajoritarian difficulty is incomplete because it only addresses the Court's lack of electoral accountability.[3] Bassok argues that an additional facet of the countermajoritarian difficulty – the "literal" definition – arises when the Court deems legislation that is supported by the public unconstitutional.[4] This "literal" component of the definition differs from Bickel's definition because Bickel conflates instances in which the Court opposes electorally accountable representatives (and by association the public majority) with instances in which the Court actually opposes public opinion. With the advent of public opinion polling, the Court's agreement or disagreement with the public majority is purportedly even more readily apparent. As such,

[1] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: The Bobbs-Merrill Company, Inc., 1962), 18.
[2] Ibid, 33.
[3] Or Bassok, "The Two Countermajoritarian Difficulties," *Saint Louis University Public Law Review* 31 (January 2012): 335.
[4] Ibid, 340.

advances in polling may exacerbate the Court's alleged institutional legitimacy crisis. Bassok's expanded countermajoritarian difficulty ultimately relies on the accuracy (and representativeness) of public polling data and, as he suggests, is only relevant in highly salient cases.[5]

Although Bickel coined the countermajoritarian difficulty in the mid-twentieth century and Bassok recently clarified two components of this difficulty, the negative legitimacy implications of judicial review have been evident since the Court's early history.[6] For example, in tracing the development of judicial review, Barry Friedman suggests that the inception of the countermajoritarian difficulty was likely a response to Federalist and Jeffersonian disagreement regarding judicial independence, as well as the latter's concern with the Court's invalidation of legislation supported by the public.[7] Friedman maintains that countermajoritarian criticism initially emerged in response to Federalist court-packing and the justices' seemingly partisan decision-making after Thomas Jefferson's victory in the election of 1800. Specifically, debates surrounding the repeal of the Circuit Judges Act, proceedings of the Chase impeachment, and the Burr conspiracy trials all led countermajoritarian concerns to be raised against the judiciary.[8] The extent of countermajoritarian criticism at this time ultimately led Friedman to suggest that the Jeffersonian era exhibited the second-highest number of countermajoritarian claims in the Court's entire history.[9] Hence, although the countermajoritarian difficulty was only coined in the mid-twentieth century, countermajoritarian claims have arisen against the Court since its early history.

While the countermajoritarian difficulty continues to be cited as the major threat to judicial legitimacy, scholars have questioned the validity of this claim.[10] For example, Matthew Hall has proposed that the Supreme Court is predominantly a majoritarian institution, which only acts in a

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[5] Ibid, 367.
[6] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *New York University Law Review* 73 (May 1998): 340 (refuting that countermajoritarian claims have only been leveled against the modern Court).
[7] Ibid, 357-81.
[8] Ibid, 359-71.
[9] Ibid, 358.
[10] Some scholars who have questioned this claim include Stephen M. Engel, *American Politicians Confront the Court* (New York: Cambridge University Press, 2011), 19-42, Matthew E. K. Hall, "Rethinking Regime Politics," *Law and Social Inquiry*, 37 (March 2012), and Matthew E. K. Hall, "The (Counter-)Majoritarian Paradox and the Acquittal Theory of Judicial Legitimacy," (essay for the Workshop on the Normative Implications of Empirical Research on Law and Courts, Washington, D.C., May 2013).

countermajoritarian fashion when public opinion will not affect a decision's enforcement.[11] Additionally, some contend that even if the courts exhibit some countermajoritarian impulse, the judiciary is nevertheless an important check on majority rule.[12] The justices themselves seem to have embraced this justification of countermajoritarianism in the fourth footnote of *United States v. Carolene Products Co.* (1938) where they recognize that the rights of "discrete and insular minorities" may require countermajoritarian protection.[13] Although Robert Dahl has questioned the evidence that judicial authority actually functions to protect minority rights, it seems to be generally understood that there are certain constitutionally protected rights that cannot be abridged, even if infringement of the rights is desired and supported by the majority and their elected representatives.[14] As Dennis Goldford maintains, "There are some things a majority should not do to us no matter how democratically it decides to do them."[15] Furthermore, Friedman also highlights how the Supreme Court is not necessarily opposing majoritarian will when it overturns legislation, as is suggested by Bickel's definition of the countermajoritarian dilemma; rather, it may be the case that a majority of the people may in fact agree with a Court decision that overturns legislation enacted by the electorally accountable legislature.[16] The "literal" definition of the countermajoritarian difficulty can also be challenged because polling data may not be an accurate representation of the populace. As the "literal" definition of the countermajoritarian difficulty relies on public opinion data and polling data inherently have sampling artifacts, the certainty with which a Court ruling opposes the majority is somewhat inconclusive. Therefore, although cited as the most concrete threat to judicial legitimacy, both facets of the countermajoritarian difficulty can be challenged.

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[11] Hall, "The (Counter-)Majoritarian Paradox and the Acquittal Theory of Judicial Legitimacy," 1-19.
[12] Bassok, 350 (suggesting that "arguably the most common justification for the Court's [countermajoritarian] authority" was "protection of minorities against tyranny by majorities").
[13] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
[14] On refuting the justification of the countermajoritarian difficulty, see Robert A. Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957), reprinted in the *Emory Law Journal* 50 (Spring 2001).
[15] Dennis J. Goldford, *The American Constitution and the Debate over Originalism* (New York: Cambridge University Press, 2005), 126.
[16] Friedman, "The History of the Countermajoritarian Difficulty, Part One," 349.

The perpetuation of judicial review as an important tenant of Court doctrine would suggest that, despite the countermajoritarian difficulty, the Court's ability to subject executive action and congressional legislation to a constitutional review has ultimately been accepted as within the scope of judicial power. However, that is not to say that concerns about Court illegitimacy due to the countermajoritarian dilemma have not resonated with Court justices. Instead, Bickel's "passive virtues," the development of the *Ashwander* principle, and the development of particular judicial schools of thought would suggest that the Court's democratic deficit (due to its lack of electoral accountability) has influenced the institutional framework under which decisions are made. In particular, the judicial schools of thought emerged in response to periods of sustained criticism of the Court that specifically attacked its institutional legitimacy. The following two subsections will introduce these possible implications for judicial behavior given the prevalence of the Court's countermajoritarian difficulty.

I.a. *Bickel's "Passive Virtues" and the Ashwander Principle: Avoiding the Constitutional Question*

Avoiding a case's constitutional question is one response justices employ to avoid highlighting the Court's democratic deficit. Adherence to Bickel's "passive virtues" and the *Ashwander* principle – which is one doctrine used to avoid the constitutional question when possible – captures the justices' attempts to avoid controversy that might inflame opposition to their position as unelected reviewers of the law. The "passive virtues" capture Bickel's notion that the justices should "imaginatively utilize" the jurisdiction constraints that the Court has developed to avoid deciding cases that ask political questions or jeopardize the Court's legitimacy.[17] These constraints are manifested in the Court's justiciability doctrines, which include an analysis of mootness (if the substantive issue is live), ripeness (if an injury has occurred), standing (if the involved parties have suffered injury), the motivating question (if the question is political and outside the Court's jurisdiction), and if an advisory opinion would be required (if the statute in question is pending). According to Bickel, when Supreme Court justices deem a case

[17] Alexander M. Bickel, "Foreword: The Passive Virtues" *Harvard Law Review* 75 (1961-1962): 41.

nonjusticiable based on the justiciability doctrines, they are still advancing a decision, but they avoid the illegitimacy claims that may accompany the exercise of judicial review.

Similar to Bickel's "passive virtues," the *Ashwander* principle was birthed as a doctrine of judicial restraint. The *Ashwander* principle was articulated by Justice Louis Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936) and states that the Court should avoid invoking judicial review to decide cases on the constitutional merits when they can be decided on other grounds.[18] While judicial review asserts the authority of the Court, doctrines that embrace judicial restraint reign in Court power. Although Frederick Schauer makes the contradictory claim that the *Ashwander* principle is actually a form of "judicial aggressiveness," it was clearly intended to be a response to the legitimacy crisis associated with the countermajoritarian difficulty.[19] Schauer maintains that the principle is akin to judicial review because it requires the Court to reinterpret legislation and, in doing so, extends judicial authority as does judicial review.[20] While this point may be conceded, the intent behind Justice Brandeis' articulation of the *Ashwander* principle – to reduce the legitimacy crisis associated with judicial review – is important because it highlights what can only be interpreted as a response to the countermajoritarian dilemma. The Court's use of the justiciability doctrines and *Ashwander* principle suggests that the justices are aware of the legitimacy concerns regarding the countermajoritarian difficulty, despite widespread alleged acceptance of judicial review.

I.b. *Judicial Schools of Thought: Framing the Constitutional Question*

Once the decision to hear a case based on its constitutional merits has been made, the justices utilize different schools of thought to frame the ruling. The reliance on the schools of thought to guide constitutional decision-making can be interpreted as a response to attacks that undermine the Court's institutional legitimacy. This project argues that judicial adherence to the schools of thought throughout the course of the Court's history indicates some attempt to reinforce Court legitimacy when it is

[18] *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936).
[19] Frederick Schauer, "Ashwander Revisited," *The Supreme Court Review* 1995 (1995): 80-1.
[20] Ibid, 80.

threatened. The schools of thought specifically include Formalism (also known as Textualism), Originalism, Common Law Constitutionalism, and Legal Realism (also known as Living Constitutionalism). While Formalism and Originalism constitute the conservative approaches to judicial interpretation, Common Law Constitutionalism and Legal Realism are more liberal insofar as they accept that the meaning of the Constitution may change over time. Specifically, Formalism is identified by adherence to the Constitution's written text; Originalism relies on interpreting the intentions of the Founding Fathers when the Constitution was drafted; Common Law Constitutionalism is marked by a strong observance of precedent; and Legal Realism attempts to reflect changing societal norms.[21] In early Court history, Formalism was the only school of judicial thought. It was not until the Populist/Progressive Eras (1880s-1920s) and the Reagan Administration of the 1980s that Legal Realism and Originalism emerged as schools of interpretation, respectively.[22] Lastly, Common Law Constitutionalism emerged in response to dissatisfaction with the interpretive outcomes of Originalism and Legal Realism.[23]

Although all four schools address the role of the Constitution in judicial interpretation, they can lead to substantively different outcomes. While Formalists adhere more religiously to the written Constitution, Legal Realists look beyond the Constitution to the changes occurring in society. Therefore the tension that ultimately arises in looking backwards versus looking forward for Formalists and Legal Realists, respectively, inherently alters the Court's role in policy-making and reading provisions into the Constitution. Internal deliberation during decision-making between the justices also contributes to a ruling's substantive outcome; justices put-forth opposing opinions on a case's merits based on their preference for Formalism, Originalism, Common Law Constitutionalism, or Legal Realism. As a decision requires at least a simple majority, a final ruling often reflects strategic negotiation between the four

[21] Morgan Marietta, *A Citizen's Guide to the Constitution and the Supreme Court: Constitutional Conflict in American Politics* (New York: Routledge, 2014).
[22] Ibid, 119 (on the emergence of Living Constitutionalism (Legal Realism)); Engel, 338 and Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Maryland: The John Hopkins University Press, 2005), 1 (both on the emergence of Originalism).
[23] Andrew C. Spiropoulos, "Just Not Who We Are: A Critique of Common Law Constitutionalism," *Villanova University Law Review* 54 (2009): 184.

schools of judicial thought based on the side of the issue that each of the justices fall.[24] However, the reliance on the schools of interpretation is not only an indication of the justices' substantive preferences, but, as argued in Chapter Two, adherence to these schools also reflects the justices' internalization of the Court's democratic deficit and their need to maintain Court legitimacy in the face of attacks on the Court.

II. Public Perception and Supreme Court Legitimacy: Diffuse and Specific Support

One way in which perceptions of the Court's democratic deficit – due to the countermajoritarian dilemma – have been measured and analyzed by judicial politics scholars is by evaluating public opinion about both the institution as a whole and specific rulings. Public perception literature generally distinguishes between diffuse support and specific support. Diffuse support refers to continued public support for the judicial branch regardless of the Supreme Court's decision output, while specific support refers to public support for individual justices or Court decisions. The Court benefits from widespread diffuse support, though there are instances in Court history where specific support has been depleted.

In general, the Supreme Court seems to possess a "reservoir of goodwill" that insulates it from unpopular decisions.[25] For example, James Gibson, Gregory Caldeira, and Lester Spence conducted a national survey in 2001 and found that 82.7% of respondents disagreed with eliminating the Supreme Court, even in response to a string of unpopular Court decisions.[26] Similarly, Gibson argues that public perceptions of the Court's institutional legitimacy remained consistent from 1987 to 2005 and did not decline despite strong partisan politics and ideological divisions in the later analysis years.[27] Given that the majority of the public finds the judiciary to be a legitimate institution, Supreme Court justices benefit

[24] Marietta, 26.
[25] Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science* 36 (August 1992): 658, James L. Gibson and Michael J. Nelson, "The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto," *Annual Review of Law and Social Science* 10 (November 2014): 205, and James L. Gibson and Michael J. Nelson, "Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?," *American Journal of Political Science* 59 (January 2015): 171 (all concluding the Supreme Court enjoys a "reservoir of goodwill" that reinforces diffuse support).
[26] James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "Measuring Attitudes toward the United States Supreme Court," *American Journal of Political Science* 47 (April 2003): 358.
[27] James L. Gibson, "The Legitimacy of the U.S. Supreme Court in a Polarized Polity," *Journal of Empirical Legal Studies* 4 (September 2007): 515.

from consistent diffuse support and should be subsequently less preoccupied with asserting the Court's legitimacy in individual rulings.

Although the Court seems to benefit from significant diffuse support, this support is not unconditional. Instead, both specific support for particular rulings and perceptions that the Court is impartial and fair contribute to replenishing the judiciary's diffuse support. In regards to the former, it is only after the public experiences sustained dissatisfaction with a specific Court decision or multiple such rulings that diffuse support for the institution may be undermined. However, scholars largely speculate, without presenting direct evidence, that a substantial, unparalleled drop in specific support is required to alter levels of diffuse support. Thomas Clark, for example, only suggests that repeated declines in specific support may reduce diffuse support.[28] The scholarly concern that long-term diminished specific support for rulings will affect levels of diffuse support for the institution is just that, only a concern. Instead of showing the connection between specific support and diffuse support, it has repeatedly been shown that specific support has virtually no effect on diffuse support. For example, the drop in specific support of some groups after the controversial *Bush v. Gore* (2000) decision was not manifested in a similar reduction of diffuse support.[29] Christopher Johnston, Sunshine Hillygus, and Brandon Bartels come closest to suggesting that diffuse support declined after the Court's controversial *National Federation of Independent Business v. Sebelius* (2011) ruling, but Gallup polling data suggests that support for the judicial branch was fifty-one percent prior to the October ruling and actually increased to fifty-three percent the following year; hence, the effect of the *Sebelius* ruling was not manifested in a loss of diffuse support.[30] Although Gallup polling suggests public approval of the Supreme Court has precipitously

[28] Thomas S. Clark, "The Separation of Powers, Court-Curbing, and Judicial Legitimacy," *American Journal of Political Science* 53 (October 2009): 973.
[29] Stephen P. Nicholson and Robert M. Howard, "Framing Support for the Supreme Court in the Aftermath of *Bush v. Gore*," *The Journal of Politics* 65 (August 2003): 692.
[30] Christopher D. Johnston, Sunshine D. Hillygus, and Brandon L. Bartels, "Ideology, the Affordable Care Act Ruling, and Supreme Court Legitimacy," *Public Opinion Quarterly* (October 2014): 9-10; Gallup, (2015) *Supreme Court* [Data set], retrieved from http://www.gallup.com/poll/4732/supreme-court.aspx.

declined (thirty-seven percent decline) from August 2009 to September 2015, there is insufficient evidence to suggest that the decline is due to reduced specific support.[31]

While the link between diffuse and specific support is unclear at best, loss of specific support does have ramifications on the Court. Specifically, instances in which specific support is depleted correspond to times that Michael Klarman and Gerald Rosenberg suggest the Court can expect public backlash.[32] Backlash Theory contends that unpopular Court decisions lead to losses in specific support and political countermobilization by the losing coalition. Such backlash is said to ultimately hinder social reform.[33] For example, after analyzing judicial involvement in the civil rights movement, Klarman concludes that *Brown v. Board of Education* (1954) generated significant backlash among southern whites and that "Litigation is unlikely to help those most desperately in need" because "many landmark Court rulings seem to have generated backlash rather than support."[34] However, Tom Keck has critiqued Backlash Theory, finding instead that all "victories by LGBT rights advocates have sparked legal and political countermobilization, regardless of whether the victories occurred through legislative, executive, or judicial channels."[35] He therefore suggests that "all political strategies employed by or on behalf of the relatively disadvantaged are likely to be met with powerful political resistance…"[36] Though Keck's assertion may be conceded, Klarman claims that the Court is more likely to face backlash than the other branches because the judiciary is more likely to "Take action that is sufficiently deviant from public opinion" as they are less in-tune to the public.[37] Ultimately, the manifestation of reduced specific support in public backlash is possibly implicated in the link between specific and diffuse support and can potentially resonate with Court justices.

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[31] Gallup.
[32] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Illinois: University of Chicago Press, 2008).
[33] As summarized by Thomas M. Keck, "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights," *Law & Society Review* 43 (2009): 152, 160.
[34] Klarman, *From Jim Crow to Civil Rights*, 454 (regarding the public effects of *Brown*) and 463-4 (regarding backlash).
[35] Keck, 180.
[36] Ibid, 182.
[37] Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2013), 169.

Perceptions of judicial legitimacy are also associated with the notion that justices do not make arbitrary decisions. While the general public and legal scholars recognize that justices' ideological preferences play a role in decision-making, the public still expects the Court to apply the law in a fair manner.[38] In light of claims that the Court's engagement in partisan politics and media sensationalization of Court decisions as political reduce Court legitimacy, the recognition that justices have ideological predispositions seems to suggest that Court legitimacy is not significantly affected by these claims. In fact, Stephen Nicholson and Robert Howard found that framing a decision in regards to partisan decision-making only affects specific, and not diffuse, support.[39] Ultimately, the constant fear that justices undermine the Court's institutional legitimacy in deciding salient cases appears largely unfounded; the judiciary is deemed legitimate by the public. Theoretical concern about the Court's democratic deficit is not made manifest in empirical analysis of public opinion concerning the Court's broad-based or diffuse support. Nevertheless, the extent to which this perception of legitimacy has resonated with justices is an entirely different question, and it is one that this project ultimately aims to address.

III. Institutional Support: Reconstructive Presidents and Congressional Court-Curbing

Court legitimacy is not only measured by public support for either a ruling (specific support) or the institution (diffuse support); it is also measured as institutional support. Such institutional support refers to the executive and legislative branches' recognition of or agreement with Court rulings and jurisprudence. Scholarly literature addressing this type of institutional support focuses on either the relationship between the executive and the Supreme Court or the legislature and the Supreme Court. Although the Court's legitimacy is undermined when the executive or Congress "attack" the judiciary,

[38] Gibson and Nelson, 211 (on the public's recognition that justices are ideological); Brandon L. Bartels, Christopher D. Johnston, and Alyx Mark, "Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a "Political" Institution?," *Law & Society Review* 49 (July 2015): 774 (on legal elites' recognition that justices are ideological); James L. Gibson and Gregory A. Caldeira, "Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination," *American Journal of Political Science* 53 (January 2009): 147 (regarding the general public's expectations of an impartial Court).
[39] Nicholson and Howard, 690.

their attempt to "harness" the judiciary's power and influence its jurisprudence implies an implicit recognition of the Court's legitimacy.[40]

In focusing on the executive-judiciary inter-branch relationship, Keith Whittington claims that instances in which diffuse support has weakened parallel instances when the Court faces backlash from "reconstructive" presidents. Rather than accept the Court's authority as the sole interpreter of the Constitution, "reconstructive" presidents – including Presidents Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt – engage in their own constitutional interpretation.[41] A classic example of a "reconstructive" president directly challenging the Court is FDR with his "Court-packing" plan. The "Court-packing" plan threatened the legitimacy and independence of the judicial branch and ultimately led to a questionable judicial switch in *West Coast Hotel Co. v. Parrish* (1937).[42] However, it has also been suggested that "reconstructive" presidents only challenge judicial interpretation for a specific purpose and are an anomaly rather than the norm.[43]

Additional scholarship on inter-branch relations has addressed the Court's democratic deficit from the perspective of congressional Court-curbing. While congressional attacks on the judiciary occurred during specific times in history, Charles Geyh suggests that congressional Court-curbing has reigned in the Court, without completely undermining judicial independence.[44] Court-curbing by the legislature has somewhat paralleled Whittington's "reconstructive" presidential terms, occurring during Thomas Jefferson's and Andrew Jackson's presidencies, before, during, and after the Civil War and Reconstruction, in response to New Deal frustrations, and during the Warren Court's expansive, liberal rulings.[45] Geyh identifies these periods where Court-curbing was commonplace and subsequently suggests that certain types of legislative Court-curbing have become unacceptable as the independence of

[40] Engel, 36.
[41] Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (New Jersey: Princeton University Press, 2009), 53.
[42] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[43] Whittington, 78 (regarding "reconstructive" presidents challenging the judiciary for a specific purpose).
[44] Charles G. Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Michigan: University of Michigan Press, 2008), 259.
[45] Ibid, 51-2; for more on Court-curbing during the Reconstructive Era, see Barry Friedman, "The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court," *Georgetown Law Journal* 91 (November 2002).

the judicial branch has solidified (e.g. impeachment based on decision-making is no longer a convincing threat).[46] Engel expands on this literature by analyzing the "mode" of congressional Court-curbing and demonstrating that the legislature's Court-curbing tactics have shifted from undermining Court legitimacy to utilizing judicial authority in order to achieve favorable policy outcomes.[47] The changing acceptability and mode of congressional Court-curbing ultimately imply that the legislature has come to recognize the Court as more legitimate and independent than was believed at the nation's inception. This implication thus contributes to this project's motivating question: whether and how the justices have internalized the Supreme Court's legitimacy crisis. If the Court generally possesses institutional support, justices' continued preoccupation with legitimacy would indicate that they have not recognized the Court's established and largely legitimate position in the federal government.

IV. The Norm of Judicial Supremacy

While the role of the Supreme Court in the federal government was unclear at the Founding, somewhat articulated with Chief Justice John Marshall's assertion of judicial review in *Marbury v. Madison* (1803), and challenged by "reconstructive" presidents and congressional Court-curbing to various degrees during its history, it is now widely suggested that the modern, post-*Brown* Court operates under a so-called norm of judicial supremacy. Judicial supremacy goes one step further than judicial review in suggesting that the Supreme Court has the final say on constitutional matters, such that the public, executive, and legislature all view Court decisions as binding regardless of their agreement with the ruling. Although it is difficult to explicitly point to the year the norm of judicial supremacy was widely accepted, scholars (who claim that this norm operates) suggest it emerged by the mid-twentieth century.[48] Barry Friedman maintains that judicial supremacy was a norm by the 1950s and cites President

[46] Geyh, 52 (on the independent judicial branch), 170 (on the threat of impeachment).
[47] Engel, 68.
[48] For a comprehensive analysis of the establishment of the judicial supremacy norm, see the complete law review series by Barry Friedman: Friedman, "The History of the Countermajoritarian Difficulty, Part One"; Friedman, "The History of the Countermajoritarian Difficulty, Part II"; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*," *New York University Law* 76 (November 2001); Barry Friedman,

Dwight D. Eisenhower's enforcement of *Brown* in Little Rock, Arkansas as evidence of the acceptance that the Supreme Court was the final arbitrator on constitutional matters.[49] Larry Kramer similarly recognizes *Brown* as an important step toward the recognition of judicial supremacy and suggests that the norm's emergence was largely facilitated by the Warren Court.[50]

The advent of a norm of judicial supremacy would suggest that justices' concerns with Court legitimacy, insofar as they exist and can be observed in Court rulings and justices' personal correspondence to one another, are unfounded because the norm legitimizes the Supreme Court's constitutional interpretation. However, the validity of this norm has been subject to some scholarly debate. For example, Engel questions the establishment of the norm as Court-curbing legislation still passed after the norm's supposed advent; regardless of the shift in the "mode" of Court-curbing legislation, the mere fact that such legislation did pass undermines the norm.[51] If the Supreme Court was fully recognized as the supreme interpreter of the Constitution and if it was recognized that decisions are binding, any type of jurisdiction-stripping would cease. In addition, if a norm of supremacy was accepted among the broader public, why then would rhetorical attacks on so-called judicial activism appear to be such a potent tactic during election years as Donald Stephenson suggests?[52] And, if justices have continued to be concerned with the Court's legitimacy after the norm's advent, the presence of a norm of judicial supremacy would appear unfounded. At least, such evidence would suggest that the justices have not perceived the emergence of the norm.

V. Focusing on the Attacked: Multimember Panel Scholarship and Judicial Biography

Researchers studying the Court's legitimacy crisis largely focus on either public perceptions of

"The History of the Countermajoritarian Difficulty, Part Four: Law's Politics," *University of Pennsylvania Law Review* 148 (April 2000); Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five," *The Yale Law Journal* 112 (November 2002).

[49] Friedman, "The Birth of an Academic Obsession," 170-1.

[50] Larry D. Kramer, "Judicial Supremacy and the End of Judicial Restraint," *California Law Review* 100 (2012): 630.

[51] Engel, 335.

[52] Donald Grier Stephenson, Jr., *Campaigns & the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999).

the Supreme Court's legitimacy or the executive's and legislature's interactions with the Court; they ultimately focus on the "attackers" that actively reference the Court's lack of legitimacy or act to undermine the Court's legitimacy. However this project aims to address Court legitimacy from the perspective of the "attacked," a perspective that has thus far been primarily addressed in the context of multimember panel game-theory or individual justices' biographies.

Within multimember panel literature, scholars discuss judicial decision-making via two main frameworks: the attitudinal and neoinstitutional models. Attitudinalists maintain that justices make decisions only based on ideological preferences and minimize the role of institutional pressures.[53] Neoinstitutionalists conversely recognize that justices consult their ideological predispositions during decision-making, but argue that decision-making is constrained by institutional pressures, including the political preferences of the executive and legislative branches, norms of constitutional decision-making and law, theories of constitutional interpretation, and social constraints.[54] Within this literature on judicial decision-making, studies about the "median justice" have also emerged to analyze the influence that individual justices have on a final Court ruling. "Median justice" literature does not examine what influences a justice to side with the majority or minority coalition, but rather the asymmetric extent that individual justices influence the Court's decision. Ultimately, many scholars argue that the "median justice" has a disproportionate influence on the final ruling because the justice tasked with writing the opinion must maintain a majority and the "median justice" is most likely to defect if they are dissatisfied with a draft of an opinion.[55]

Benjamin Lauderdale and Tom Clark also importantly recognized that there is not only one "median justice" that fluctuates as the Court's composition changes, e.g. a Justice Sandra Day O'Connor or a Justice Clarence Thomas on the contemporary Roberts Court. Instead, they suggest that the "median

[53] On the attitudinal model, see Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).
[54] For a clear review and comparison of the attitudinal and neoinstitutional models, see Geyh, 14-7.
[55] Cliff Carrubba, Barry Friedman, Andrew D. Martin, and Georg Vanberg, "Who Controls the Content of the Supreme Court," *American Journal of Political Science* 56 (April 2012); Chris W. Bonneau, Thomas H. Hammond, Forest Maltzman, and Paul J. Wahlbeck, "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court," *American Journal of Political Science* 51 (October 2007).

justice" varies based on the substantive issue facing the Court. Based on an analysis of the Court's non-unanimous jurisprudence from 1953 to 2006, every justice was identified by Lauderdale and Clark as the "median justice" at one point; Lauderdale and Clark thus suggest that justices' preferences diverge from the expected conservative/liberal framework based on the substantive issue and disproportionately influence the rulings when they are the "median justice."[56] These findings differ from other "median justice" literature that suggests one "median justice" has a disproportionate influence on Court jurisprudence for the entire duration that the Court's composition is constant. However, while these studies discuss the dynamics of how justices interact and are constrained (or not according to Attitudinalists), they do not address any ways that the Court's democratic deficit may have been internalized by justices, influence decision-making, or affect the rhetoric employed in final opinions.

Biographies are an additional source of literature that address judicial decision-making. While they discuss a specific justice's mode of interpretation, e.g. Formalism, Originalism, Common Law Constitutionalism, and Legal Realism, they do not present a comprehensive analysis of how Supreme Court justices have internalized the judiciary's democratic deficit. Furthermore, by solely focusing on one justice, biographies do not present an analysis of the Court. By contrast, this project focuses on the Court as a single unit in specific chapters (Chapter Two) because justices are strategic decision-makers that operate under institutional constraints and, more importantly, because the public largely views the Court as a single decision-making body. In other words, while justices certainly have personal ideological and interpretive predispositions that are often highlighted in biographies, they are constrained by the multi-member panels on which they serve and they are not independent actors. For example, Forrest Maltzman, James Spriggs, and Paul Wahlbeck conducted a comprehensive analysis of deliberation and decision-making during the Burger Court and ultimately found that justices tasked with writing a decision are

[56] Benjamin E. Lauderdale and Tom S. Clark, "The Supreme Court's Many Median Justices," *American Political Science* Review 106 (November 2012): 850 (on data collection), 855 (on results), 860 (on the claim that the "median justice" fluctuates).

constrained by the Supreme Court's institutional framework.[57] Although a justice writing an opinion for the Court has his own substantive preference (often motivated by an interpretive school), the need to maintain a majority will ultimately color a final decision.

Furthermore, this project's approach to the Court as a unit follows from how the general public identifies the Supreme Court as a unit, rather than focusing on the individual justices. A 2012 survey that polled 1,000 demographically representative respondents found that the vast majority of respondents were unable to identify any of the justices.[58] While Chief Justice John Roberts was most identifiable, he was still only identified by twenty percent of respondents, and the remaining justices were not identified by any more than sixteen percent of respondents, with Justice Stephen Breyer identified by only three percent of respondents.[59] This data ultimately highlights that the justices are not very visible. Therefore, the majority of public opinion about the Supreme Court must largely be influenced by conceptions of the Supreme Court as a unitary actor given the public's lack of awareness regarding presiding justices. While this project will analyze individual justices in some of the following chapters to identify justices' institutional concerns (Chapters Three, Four, and Five), the analysis speaks to the broader issue of the Court's institutional legitimacy and whether the alleged crisis has been internalized.

VI. Conclusion

The Supreme Court's legitimacy crisis stems from the Court's countermajoritarian dilemma, such that criticism of the Court arises when the justices utilize judicial review to deem executive or legislative action unconstitutional. Extensive scholarly focus on the Court's legitimacy crisis either addresses the Court's public support or institutional support. In measuring extrajudicial perceptions of the Court's legitimacy, many scholars have concluded that the contemporary, post-*Brown* Court operates under a so-

[57] Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000).
[58] FindLaw, (2012) *Two-Thirds of Americans Can't Name Any U.S. Supreme Court Justices, Says New FindLaw.com Survey* [Data set], retrieved from http://company.findlaw.com/press-center/2012/two-thirds-of-americans-can-t-name-any-u-s-supreme-court-justice.html.
[59] Ibid.

called norm of judicial supremacy. However, it is not clear that the justices have recognized the security of judicial constitutional interpretation that this norm confers. In fact, scholarly literature has yet to address how justices perceive the Court's legitimacy. The two bodies of literature that do focus on how the *justices* operate within the Court's institutional constrains – multimember panel literature and judicial biographies – have failed to provide a comprehensive understanding regarding if and how the justices have responded to the Court's democratic deficit.

Given that literature regarding Court legitimacy focuses on the "attackers" of the judiciary and multimember panel literature largely ignores justices' responses to the democratic deficit, this project seeks to analyze whether and how justices may have internalized the democratic deficit. If they have, what are the implications of such internalization for both how judicial authority is expressed and whether a norm of judicial supremacy is actually operative? While the public and executive and legislative branches certainly influence perceptions of the Court's legitimacy, justices' own interpretation of their legitimacy likely influences decision-making and institutional constraints.

In beginning to answer these questions, Chapter Two conceptualizes the four schools of judicial interpretation not only as methods to render constitutional and statutory meaning, but also as specific strategic responses to the Court's reemerging legitimacy crisis, precisely because these schools are explicit attempts to ground decision-making in something other than the justices' own values. The chapter is grounded in the principles of each of the four main schools of jurisprudential interpretation to show that each school developed and was adopted in response to attacks directed against the Court; its goal is not to link individual justices to the schools of jurisprudential thought. Heavy reliance on the schools, which were established to manage the Court's legitimacy crisis, ultimately suggests that justices recognize that the Court operates from a democratic deficit.

2

JUDICIAL SCHOOLS OF THOUGHT

Over the course of the Supreme Court's jurisprudential history, justices have developed and embraced different interpretive theories to guide decision-making. These interpretive theories – often referred to as judicial schools of thought – include Formalism (also known as Textualism), Originalism, Common Law Constitutionalism, and Legal Realism (also known as Living Constitutionalism). Briefly, Formalists remain most committed to analyzing the Constitution's text; Originalists interpret the intentions of the text's framers; Common Law Constitutionalists refer to the Court's jurisprudential history; and Legal Realists interpret constitutionality based on constantly changing societal norms.[1] While the four interpretive approaches all provide justices with guidelines regarding the appropriate sources to consult during decision-making, they can lead to different substantive outcomes. As individual justices serving during the same term may subscribe to different judicial schools of thought, there is currently little consensus regarding the proper framework under which justices should justify rulings. Although justices generally begin to interpret constitutionality by referencing the Constitution's text, interpretation becomes infinitely more challenging when the text is not clear.[2] It is during these instances when the Constitution is inconclusive, that justices rely on one or more of the judicial schools of thought to guide decision-making.

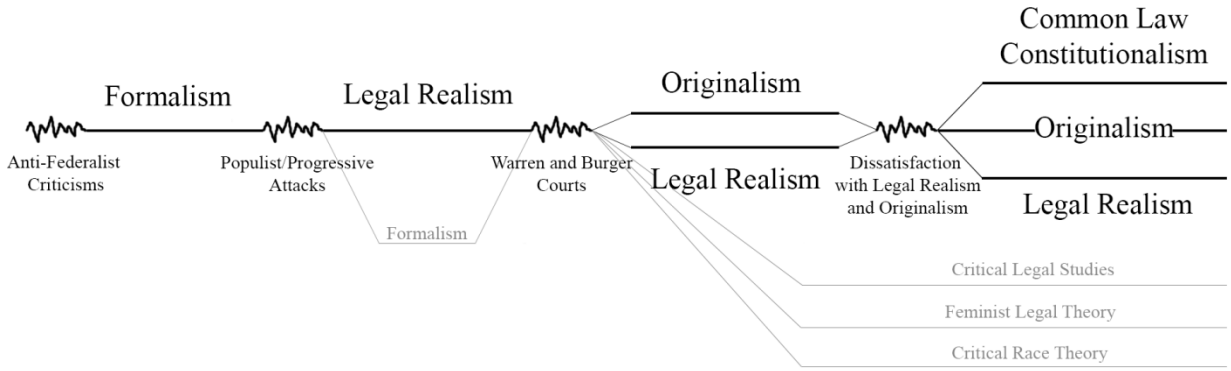
All four schools of judicial thought have not been present since the Court's establishment. Instead, other than Formalism, the theories of judicial interpretation largely emerged after the end of the nineteenth century. As Stephen Griffin notes, constitutional theory only became an area of scholarly focus in the mid-twentieth century and was largely a response to controversial Supreme Court decisions that

[1] Morgan Marietta, *A Citizen's Guide to the Constitution and the Supreme Court: Constitutional Conflict in American Politics* (New York: Routledge, 2014).
[2] Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* (New Jersey: LexisNexis, 2007), 175.

were based on non-traditional rationales, considered to reach beyond the Constitution's text.[3] Though the justices themselves did not define the interpretive approaches, individual justices have certainly embraced specific theories and the framework of judicial interpretation has changed from one Chief Justice's tenure to another's. This chapter contends not only that different schools of thought emerged overtime, but more importantly, that these schools developed as specific strategic responses to distinct crises that challenged the Court's legitimacy. Ultimately, the four interpretive approaches have been embraced by justices due to public dissatisfaction with the Court, political realities, and inter-branch pressures directed at the Court. In short, each school of thought is a strategic response and attempts to overcome a legitimacy crisis.

This chapter traces the emergence of each of the judicial schools of thought to highlight that the judicial interpretive approaches are responses to the Court's re-occurring legitimacy crisis (Fig. 2.1).

Figure 2.1 The sequential emergence of the four main schools of judicial thought.



The interpretive approaches emerged in response to periods of opposition against the Supreme Court that called the Court's legitimacy into question. While Legal Realism replaced Formalism as the main school of thought after the Populist/Progressive Eras, after criticism of the Warren and Burger Courts, Legal Realism, Originalism, and ultimately Common Law Constitutionalism proliferated as the major interpretive approaches. Accordingly, there is currently no judicial consensus regarding the proper approach to constitutional interpretation. While nineteenth century Formalism has largely disappeared as a distinct school of thought, the tenets of Formalism have been reintroduced and expanded within Originalism.[4] (Critical Legal Studies, Feminist Legal Theory, and Critical Race Theory are offshoots of Legal Realism that are not discussed in this chapter, but further complicate judicial interpretation and destabilize interpretive equilibrium.)

[3] Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (New Jersey: Princeton University Press, 1997), 3 (on the emergence of scholarly concern with constitutional theory after the Warren and Burger Courts), 140 (on the emergence of modern constitutional theory after the *Lochner* era), 142 (on constitutional responding to controversial Supreme Court decisions).

[4] Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Maryland: The John Hopkins University Press, 2005) (suggesting that modern Originalism has strong ties to pre-Legal Realist constitutional interpretation).

While all four interpretive approaches will be more thoroughly defined over the course of the chapter, the goal of this chapter is not to provide a comprehensive literature review of scholarly work regarding the interpretive approaches. The chapter also does not aim to show a direct one to one correlation between a justice serving on the Court and an interpretive approach. While there are iconic justices who represent one interpretive approach (e.g. Chief Justices Earl Warren and Warren Burger were Legal Realists, Justice Antonin Scalia was and Justice Clarence Thomas is a self-identified Originalists, and Justice Sandra Day O'Connor was a Common Law Constitutionalist), there are many Supreme Court justices who do not fall neatly into a school of thought. Instead, this chapter describes the principles of the interpretive approaches and contends that these theories emerged and were adopted during decision-making in the face of clear public and elected branch dissatisfaction with the Court.

As the sequential development of the judicial schools of thought in response to attacks on the Court parallels Frank Baumgartner and Bryan Jones' Punctuated Equilibrium Theory of political agenda-setting, this chapter applies their theory to understand the contexts under which the judicial interpretive approaches emerged.[5] Accordingly, the chapter begins by defining Punctuated Equilibrium Theory to identify the theory's main assertions and suggest how it is a relevant model for understanding justices' use of the schools of thought in decision-making. The chapter then discusses Formalism, which was the predominant judicial school of thought from the Supreme Court's establishment through the end of the nineteenth century. It subsequently discusses Legal Realism as a response to Populist and Progressive attacks in the late-nineteenth and early-twentieth centuries. Thomas Grey's mid-twentieth century call for flexibility in judicial decision-making is then discussed to reemphasize that justices view the schools of interpretation as important tools to maintain Court legitimacy and respond to claims that decision-making is rule-less and arbitrary. However, Grey's thesis was ultimately not embraced by Supreme Court justices, and the chapter then moves to discussing Originalism as a direct response to the criticisms of Legal Realism. Common Law Constitutionalism is then addressed; though adherence to precedent was common

[5] Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Illinois: The University of Chicago Press, 1993).

throughout most of the Court's jurisprudential history, Common Law Constitutionalism largely emerged as an articulated interpretive theory in response to the legitimacy crises caused by adherence to Legal Realism and Originalism. The penultimate section addresses a legitimacy crisis – generated from the Court's *Dred Scott v. Sandford* (1857) decision – that did not lead to the development of a new interpretive approach in order to identify the factors that are required for a new school of thought to emerge. Finally, the chapter ends with a discussion of the implications regarding (1) the norm of judicial supremacy, (2) the lack of a contemporary interpretive monopoly, and (3) diffuse and specific support. Ultimately, this chapter illustrates how the schools of thought are one source of evidence that Supreme Court justices are aware of, concerned with, and continue to respond to the Court's democratic deficit. Additionally, the lack of an interpretive monopoly in the twenty-first century may serve to increase judicial concern with Court legitimacy, despite external assertions of judicial supremacy.

I. Frank Baumgartner and Bryan Jones' Punctuated Equilibrium Theory: A Model for Understanding the Emergence of the Four Main Schools of Thought

In their book, *Agendas and Instability in American Politics*, Frank Baumgartner and Bryan Jones propose a punctuated equilibrium theory to explain the establishment and then dissolution of agendas in American politics.[6] Specifically, their theory is "based on the emergence and the recession of policy issues from the public agenda. During periods when issues emerge, new institutional structures are often created that remain in place for decades, structuring participation and creating the illusion of equilibrium. Later agenda access can destroy these institutions, however, replacing them with others."[7] Baumgartner and Jones emphasize that new agendas often emerge as a direct response to changing and often unpredictable public and media discourse that either increase attention to current policy or draw attention to new areas of public concern.[8] As heightened public scrutiny becomes evident and/or new issues are raised, the displacement of the period's existing agenda with a new institutionalized agenda becomes

[6] Ibid.
[7] Ibid, 1.
[8] Ibid, 8, 10, 20.

increasingly likely.[9] As Baumgartner and Jones maintain, "institutions are often the children of agenda access…"[10] Further, the institutionalization of a new agenda is ultimately dependent upon the agenda-setters' ability to establish a policymaking monopoly. Such a monopoly is characterized by (1) "a definable institutional structure [that is] responsible for policymaking" and "limits access to the policy process" and (2) "a powerful supporting idea [that] is associated with the institution."[11] Baumgartner and Jones use William Riker's definition of an institution and claim that institutions are simply rules; accordingly, the development of new rules changes an institution and its outcomes.[12] Subsequently, the emergence of an agenda monopoly can lead to a period of equilibrium, until public discourse, the media, heightened participation in politics, etc. introduce new issues that can lead to the emergence of a new institutionalized agenda monopoly. Periods of equilibrium are characterized by (1) an essentially unchanging agenda and (2) movement back to the agenda "should a force push the system away from" the agenda monopoly.[13]

Before suggesting that the theory can be applied to the development of the modes of judicial interpretation, a brief summary of Baumgartner and Jones' application of their theory to the civilian nuclear power policy monopoly illustrates how the theory is applied in its intended context. During the 1940s and 1950s the issue of civilian use of nuclear power was introduced in public discourse for the first time.[14] At this time, rhetoric and discussion regarding nuclear power focused on the "tremendous potential of the new source of energy to solve a variety of human problems" and was positively viewed by the public.[15] Accordingly, an agenda monopoly was institutionalized that supported the use of nuclear power.[16] However this monopoly was only maintained for a few decades as it was disrupted amidst re-emerging heightened public concern with nuclear power and a "not in my backyard" mentality in the late

[9] Ibid, 20.
[10] Ibid, 84.
[11] Ibid, 7.
[12] Ibid, 14.
[13] Ibid, 13.
[14] Ibid, 60.
[15] Ibid, 64.
[16] Ibid, 59.

1960s through the 1970s. This re-emergence allowed a new agenda that was unsupportive of the civilian use of nuclear power to monopolize policy.[17] As highlighted by this example, a period of equilibrium was maintained where agenda-setting responded to support for the use of nuclear power, but was then punctuated by the emergence of new concerns about nuclear power in the context of crisis. The previous agenda monopoly, destabilized by crisis, was ultimately replaced with a new agenda monopoly.

While Punctuated Equilibrium Theory was developed to explain agenda-setting in American politics, it can also provide important insight regarding when judicial schools of thought emerge, and particularly how these schools of judicial thought might be considered as responses to crises. That is to say, the distinct schools of judicial thought may be displaced and replaced by others as a response to pointed attacks on the Court's legitimacy and decision-making. While there is currently no consensus regarding the "correct" interpretive theory and, therefore, the Court would not be considered to be in a period of interpretive equilibrium, there are identifiable periods in the Court's history where one legal theory was widely accepted and determined the rules of interpretation. For example, both Formalist and Legal Realist thought exhibited a monopoly over judicial interpretation for portions of Court history, even as Originalist and Common Law Constitutionalist interpretations have never fully monopolized judicial decision-making. In considering that justices' acceptance of the various schools of judicial thought were responses to changing public discourse, political pressures, and legitimacy concerns that disrupted earlier interpretive monopolies, the development of judicial interpretation follows a punctuated equilibrium model. As a result, this chapter's substantive discussion of the schools of judicial interpretation is grounded in Baumgartner and Jones' Punctuated Equilibrium Theory.

In developing their theory and applying the model to agenda-setting in American politics, Baumgartner and Jones largely employ a post-hoc analysis; they identify a new agenda monopoly and then look for the shift in public concerns that can explain its emergence. As a result, they do not present specific examples in which public concerns shifted or attention to a policy agenda increased, but the institutionalization of a new agenda monopoly did not emerge. To avoid a similar problem in this

[17] Ibid, 59-82 (Chapter Four: The Construction and Collapse of a Policy Monopoly).

project's analysis of retrospectively selecting instances in which a school of judicial thought emerged and then identifying the associated legitimacy attacks that led to its development, the chapter ends by discussing an instance in which a legitimacy crisis was apparent, but a new interpretive approach did not emerge. Specifically, the legitimacy crisis surrounding the Court's *Dred Scott* decision is discussed to distinguish when a legitimacy crisis will or will not lead to the emergence of a new school of judicial thought.

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II. Formalism: From the Founding to the Late-Nineteenth Century

As already mentioned, Formalism (also known as Textualism) is characterized by adherence to the Constitution's written text. Formalists maintain that the drafters of the Constitution took great care in writing the Constitution such that word choice, structure, and the level of ambiguity in a given section all provide important clues about the text's meaning. Morgan Marietta explains that Formalists believe in the "completeness" of the Constitution's text.[18] An understanding of the text as complete suggests that the intentions of the text's framers and any necessary compromises were written into the Constitution as desired. Although Elliott Davis analyzes Formalism in determining statutory meaning, his claim that the completeness of written statutes preclude Formalists from reading past the text also underlies the application of Formalism to constitutional interpretation.[19] Similarly, John Manning's claim that Formalists refrain from looking past statutory text because doing so illegitimately expands judicial discretion is equally applicable to a Formalist's approach to constitutional interpretation.[20] Ultimately, Formalists refer to the actual words written in the Constitution to determine its meaning.

Formalism monopolized constitutional interpretation from the Court's establishment through the end of the nineteenth century; up until the twentieth century, constitutional interpretation was "understood as the ascertainment and application of the fixed, unchanging meaning of the written Constitution" (i.e.

[18] Marietta, 99.
[19] Elliott M. Davis, "The Newer Textualism," *Harvard Journal of Law & Public Policy* 30 (June 2007): 988.
[20] John F. Manning, "Second-Generation Textualism," *California Law Review* 98 (2010): 1292.

Formalism).[21] For example, Johnathan O'Neill maintains that Chief Justice John Marshall was an important supporter of Formalism who believed that constitutional interpretation was rooted in textual analysis.[22] Lackland Bloom similarly maintains that Court jurisprudence during Chief Justice Marshall's tenure evidences the Court's greatest use of Formalism in justifying decisions.[23] The rationale presented in *Marbury v. Madison* (1803) is often cited as a model of Formalist constitutional interpretation given Marshall's emphasis on analyzing both the written text of the Judiciary Act of 1789 and Article III of the Constitution.[24] However, *Marbury* is certainly not the only case to heavily rely on textual analysis. The rationale put forward in *McCullough v. Maryland* (1819) in legitimizing a national bank also heavily relied on Formalism in its focus on establishing an understanding of the Necessary and Proper Clause located in Article I, Section 8 of the Constitution.[25]

While the Marshall Court adhered to Formalism, Marshall neither created Formalism nor did Formalism lose favor after his tenure.[26] Bloom maintains that the Court's application of Formalism, especially during the Marshall Court, was due to a lack of precedent, doctrine, and jurisprudential practice upon which to justify Court rulings.[27] Essentially, justices were Formalists because the Constitution's text was the only source of justification available during decision-making. However, adherence to Formalism through the nineteenth century was also likely a response to early concerns about the extent of Court legitimacy. Bloom fails to suggest that justices could have decided to justify rulings on their political and moral predispositions at the Court's establishment. That justices chose to approach constitutional interpretation through textual analysis in the early-nineteenth century suggests there was some inherent concern with politicizing the judicial branch. Accordingly, it is particularly telling that justices did not explicitly base their decisions on political and moral predilections and instead embraced Formalism.

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[21] O'Neill, 12.
[22] Ibid, 20.
[23] Lackland H. Bloom, Jr., *Methods of Interpretation: How the Supreme Court Reads the Constitution* (New York: Oxford University Press, 2009), 5.
[24] Ibid, 3 (regarding the use of Textualism (Formalism) in *Marbury*); *Marbury v. Madison*, 5 U.S. 137 (1803).
[25] *McCullough v. Maryland*, 17 U.S. 316 (1819).
[26] Bloom, 4 (on the use of Textualism (Formalism) since the Court's establishment).
[27] Ibid, 5.

In establishing the federal government, the drafters of the Constitution created a system of checks and balances to prevent tyranny by any of the three branches. However, the power of the judicial branch was a source of great contention during the Constitution's ratification debates. On January 31, 1788, March 20, 1788, and April 10, 1788, Anti-Federalist "Brutus" published three essays on the power of the federal judiciary that expressed concern with the Supreme Court's seemingly absolute power, lack of accountability and legitimacy, and apparent discretion in decision-making.[28] "Brutus" worried that Supreme Court justices "will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the [C]onstitution."[29] While Alexander Hamilton responded to "Brutus'" concern with the expansive power of the judiciary in *Federalist* No. 78, it can be argued that the justices also responded to the concerns of the Court's legitimacy and power after ratification.[30] They did so by self-establishing and adhering to what became the Formalist theory of judicial interpretation. Although the Constitution did not express how the Supreme Court was expected to determine constitutionality (only establishing the type of cases that would be under the Court's jurisdiction), the justices saw the need to reduce the appearance that decisions were arbitrary and based on their own discretion and political whims. In discussing judicial decision-making in the late-twentieth century, Manning suggested "When the Court, in effect, tells a coordinate branch that it must do its business a different way (placing policy details in the text rather than the legislative history), it is imperative to anchor that instruction firmly in the source of higher law. Otherwise, it is not clear why the Court has any warrant to reform the legislative process."[31] Similarly, justices at the nation's Founding were in the same predicament of needing to ensure decisions were linked to the Constitution's text to prove that the judiciary did not have unaccountable, expansive powers. Hence, judicial decision-making

[28] Brutus XI, 31 January 1788, http://www.constitution.org/afp/brutus11.htm; Brutus XV, 20 March 1788, http://www.constitution.org/afp/brutus15.htm; Brutus XVI, 10 April 1788, http://www.constitution.org/afp/brutus16.htm.
[29] Brutus XI.
[30] Alexander Hamilton, *Federalist* No. 78, in *The Federalist Papers*.
[31] Manning, 1306.

based on textual analysis (Formalism) can be seen as a direct response to Anti-Federalist concerns with the Court's legitimacy and power.

By defining the Court's interpretive rules, Formalism largely established the institutional power of the Supreme Court during its early history and monopolized judicial interpretation. Drawing from Baumgartner and Jones' requirements for agenda institutionalization (the appearance of defined rules that dictate policymaking) and monopolization (a stable, persistent, and unchanging agenda), Formalism was successfully institutionalized as an interpretive approach early in the Court's history and monopolized interpretation.[32] It was institutionalized as it became responsible for informing constitutional interpretation and reflected the importance of grounding interpretation in the text given the Court's lack of electoral accountability and the need to justify Court power. The early discourse surrounding Court power (highlighted by Antifederalist and Federalist exchanges) ultimately influenced the institutionalization of this interpretive approach. Furthermore, the monopolization of Formalism was evidenced by its persistent, uncontested use in decision-making through the late-nineteenth century. As is possible when agendas are institutionalized and monopolized, the institutionalization and monopolization of Formalism led to a period of equilibrium in Supreme Court interpretation. This period of equilibrium was largely important in Supreme Court history because it initially established and maintained the Court's legitimacy.

However, while justices applied Formalism in decision-making from the nation's founding through the late-nineteenth century, adherence to Formalist judicial interpretation became a source of contention by the turn of the twentieth century. Critics of Formalism opposed the conservative rigidity of textual analysis and bemoaned its resistance to constitutional change and invalidation of desired reform. Marietta suggests that adherence to Formalism is most illegitimate when the Constitution's text is unclear or vague.[33] When the text is inconclusive or unclear, interpretation based on the text becomes increasingly arbitrary and dependent upon the justices on the Court. With the emergence of these criticisms, the

[32] Baumgartner and Jones, 7 (on agenda institutionalization), 13 (on agenda monopolization).
[33] Marietta, 101.

equilibrium evident between Formalist constitutional interpretation and public and institutional responses was disrupted (i.e. punctuated) and the stage was set for a new interpretive approach to monopolize judicial interpretation. As Formalism was no longer able to adequately curtail critics of the Court in the twentieth century, Supreme Court justices responded to the re-emphasis on the Court's democratic deficit by embracing Legal Realism. The following section introduces Legal Realism and traces the criticisms of the Court that emerged during the late-nineteenth century and the subsequent judicial response in monopolizing a new theory of judicial interpretation (i.e. Legal Realism).

III. Legal Realism: A Response to Late-Nineteenth, Early-Twentieth Century Criticisms of the Court

The Populist/Progressive Eras of the 1890s through the 1930s was characterized by pointed attacks directed against the Supreme Court that disrupted the prior judicial interpretive monopoly. From 1890 through 1937, Populists, Progressives, and labor unions asserted that the Court was resisting the will of the people by frustrating many reforms that were supported by these coalitions.[34] As the Populist and Progressive movements advocated for "responsiveness to popular preferences," the Court's failure to rule in favor of these preferences became actively criticized.[35] Specifically, William Ross maintains that Populist/Progressive dissatisfaction with the Court began with its overturning of redistributive economic legislation in the 1890s and intensified after *Lochner v. New York* (1905) when the Fourteenth Amendment's due process clause was used to frustrate reform.[36] Progressives' attacks on the Court specifically called judicial review into disrepute, advocated for judicial restraint, and asserted that law should coincide with changing societal needs and norms.[37] However, while Progressives threatened the Court with "all the Court-curbing measures that the Constitution affords" in calling for different

[34] William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (New Jersey: Princeton University Press, 2014), 1, 16; Stephen M. Engel, *American Politicians Confront the Court* (New York: Cambridge University Press, 2011), 225-84.
[35] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Four: Law's Politics," *University of Pennsylvania Law Review* 148 (April 2000): 1002.
[36] Ross, 20; *Lochner v. New York*, 198 U.S. 45 (1905).
[37] Ross, 48 (on questioning judicial review and advocating for judicial restraint), 88 (on the Progressive philosophy that law should "fit the changing needs of society").

substantive outcomes, Progressives nevertheless refrained from directly advocating that the judiciary should be powerless.[38] Ross referred to this dichotomy as the attackers' oxymoronic "muted fury"; although Populists and Progressives were dissatisfied with Court rulings, they called for the Court to recognize societal change during decision-making and not for the alteration of the Court's function.[39]

The Populist/Progressive Eras' call for judicial restraint was largely a response to dissatisfaction with the Court's substantive rulings and not a concern with expansive Court power. Had the Court ruled in favor of Populist and Progressive reforms during the early twentieth century, the Populists and Progressives would have both been staunch advocates of the Supreme Court. Nothing in Populist/Progressive attacks against the Court pointed to institutional concerns. However, although the Populists and Progressives were not opposed to judicial power, the legitimacy of judicial review was brought into question because the Populists/Progressives did not support its outcomes. Given Populists'/Progressives' critique of judicial review, it is clear that the legitimacy of the Supreme Court was called into question during this time; Populists and Progressives pressured the Court and disrupted the equilibrium and legitimacy of Formalist decision-making. The reliance on Formalism that had successfully mitigated concerns with judicial legitimacy through the late-nineteenth century was no longer an adequate response to Populist/Progressive attacks because the critics argued that the Court needed to look past the Constitution's text during decision-making. In fact, Formalism, by relying on the Constitution's text, was antithetical to the expansive constitutional interpretation that critics of the Court called for.

In the face of concerns with Court legitimacy and dissatisfaction with both Court rulings and (by association) the Court's Formalist interpretive method, justices began to ascribe to the tenets of Legal Realism (Living Constitutionalism). The emergence of Legal Realism follows the expectations of Punctuated Equilibrium Theory as the criticisms of Formalism reopened the dialogue regarding

[38] Ibid, 10 (on Court-curbing), 63 (on judicial restraint in decision-making), 103 (claiming that justices should be "more aware of the exigencies of a rapidly changing society").
[39] Ross.

acceptable modes of constitutional interpretation.[40] Legal Realism is a theory of judicial interpretation that is, in many ways, the polar opposite of Formalism in its reliance upon public will, changing societal values, and electoral politics as legitimate sources of evidence for the justification of judicial decisions.[41] Legal Realists believe that interpretation of the Constitution must change over time to more accurately reflect the historical time period, such that each generation responds to what is or is not deemed constitutionally legitimate.[42] Although Legal Realism began to emerge in the early-twentieth century, it only became the consistently dominant judicial interpretive theory in the 1960s.[43] Early signs of the justices' use of Legal Realism in decision-making are evident in the *Lochner* ruling; however, *Brown v. Board of Education* (1954) is a clearer example of Supreme Court justices' invocation of Legal Realist judicial interpretation.[44]

In regards to *Lochner*, while the Court's majority opinion was challenged by Populist and Progressive critics, the Court did, in fact, embrace one of the early-twentieth century's prevalent economic theories (i.e. laissez-faire). This focus on laisse-faire suggests that the majority was attempting to interpret the public's stance on economic issues. In dissenting, Justice Oliver Wendell Holmes maintained that the majority decided *Lochner* on "an economic theory which a large part of the country does not entertain."[45] Although the public majority apparently did not support laissez-faire, that the decision was in fact based on an economic theory, as is suggested by Justice Holmes, indicates that the Court's interpretive theory was shifting in the early-twentieth century. Furthermore, in *Brown*'s unanimous majority opinion, the justices obviously rejected Formalism and accepted Legal Realism in

[40] Baumgartner and Jones.
[41] Marietta (suggesting that Textualism (Formalism) is on the opposite side of the spectrum of judicial interpretation as Living Constitutionalism (Legal Realism)); Jack M. Balkin, "Framework Originalism and the Living Constitution," *Northwestern University Law Review* 103 (2009): 597 (claiming Living Constitutionalism (Legal Realism) responds to popular culture, societal movements, and electoral politics).
[42] Marietta, 19; Ethan J. Leib, "The Perpetual Anxiety of Living Constitutionalism," *Constitutional Commentary* 24 (May 2007): 370.
[43] Marietta, 119.
[44] *Lochner v. New York* (in dissenting, Justice Holmes argued that the majority's decision was not based on a constitutional analysis, but on an economic principle); O'Neill, 55 (claiming *Brown* "signaled a renaissance in judicial activism").
[45] *Lochner v. New York*.

claiming that the Fourteenth Amendment was "inconclusive" in guiding the school segregation issue.[46] Ultimately, Legal Realism emerged as the primary mode of judicial interpretation during the mid-twentieth century and was largely facilitated by the liberal Warren and Burger Courts.

This shift from late-nineteenth century Formalism to monopolization of Legal Realism in the mid-twentieth century was a direct response to the Populist and Progressive criticisms of the Court that heightened scrutiny of judicial legitimacy. Not only did the failure of Formalism to appease critics suggest the Court needed to find a new justification for their rulings, but Legal Realism embraced the type of judicial interpretation advocated for by the Populists and Progressives. As noted by O'Neill, Legal Realists opposed the rigidity of Formalism and moved away from justifying decisions on the Constitution's text.[47] In moving away from textual analysis, justices embraced Populist and Progressive calls for judicial interpretation to be based on changing societal norms. Various scholars have explicitly claimed that justices' acceptance of Legal Realism was a response to the Populist/Progressive Eras' concerns. For example, Justin Zaremby maintains that Legal Realism emerged from a "fundamentally progressive mood," and William Ross similarly states that justices' acceptance of Legal Realism was "attributable in no small measure to the persistent criticism of the courts during the half century before 1937."[48] As Populists and Progressives called for the Court to recognize a living constitution, the Warren and Burger Courts embraced Legal Realism to expand judicial interpretation in the ways called for by early-twentieth century critics. Although Ross laments that the significance of the Populist/Progressive Eras' criticisms of the Court is difficult to identify because Court-curbing was actually not actively considered by Congress, the effects of the criticism on the justices is more apparent.[49] The Supreme Court justices clearly heard the criticisms and references to Court illegitimacy and responded by institutionalizing Legal Realism. The shift from justices' use of Formalism to Legal Realism marks the fall (though not complete disappearance) of one interpretive approach and the monopolization of another.

[46] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[47] O'Neill, 29.
[48] Justin Zaremby, *Legal Realism and American Law* (New York: Bloomsbury, 2014), 1; Ross, 324.
[49] Ross, 313.

Legal Realism temporarily re-stabilized the "partial equilibria" of judicial interpretation after Populists' and Progressives' destabilizing attacks and, in institutionalizing a more popular interpretive approach, mitigated concerns with Court legitimacy.[50] However, Legal Realism only remained an unchallenged mode of judicial interpretation for two decades. Just as justices' adherence to Formalism was challenged, their application of Legal Realism became actively criticized during the 1980s. Critics of Legal Realism maintained that it was "standardless" and President Ronald Reagan's Attorney General, Edwin Meese III, challenged Legal Realism on the grounds that "it is not constitutional law in any meaningful sense at all."[51] While the Court's outcomes were challenged under Formalism, the Court's outcomes under Legal Realism were heralded; instead, the actual Legal Realist interpretive framework was criticized because it was deemed illegitimate and foundationless. These criticisms allowed new interpretive approaches to enter public and elite discourse and largely called for an Originalist interpretation of the Constitution. While justices institutionalized and monopolized Formalism and, subsequently, Legal Realism in the face of clear discontent with the Court, the emergence of Originalism did not re-establish equilibrium.

Before Originalism is discussed as a response to concerns with Legal Realism, Thomas Grey's proposed judicial interpretive approach is addressed in the following section. The analysis of the development of jurisprudential interpretation over the Court's history is briefly interrupted with a discussion of Grey's "interpretivism" and "non-interpretivism" because he maintained that justices should have the flexibility to utilize various interpretive approaches in decision-making, relying on Formalism in answering some questions and embracing tenets of Legal Realism to answer others. The rejection of his proposal highlights the important role that the judicial schools of thought play in justifying and legitimizing Supreme Court decision-making in both the eyes of the public and the justices. The justices'

[50] Baumgartner and Jones, 21 (referring to the equilibrium established by a new policy monopoly as reinstating a "partial equilibria" in policymaking).
[51] Marietta, 126 (claiming the major criticism of Living Constitutionalism (Legal Realism) was its arbitrariness); Edwin Meese III, "Speech Before the D.C. Chapter of the Federalist Society Lawyers Division," delivered on 15 November 1985, reprinted in *Originalism: A Quarter-Century of Debate*, Steven G. Calabresi, ed. (Washington, D.C.: Regnery, 2007), 77.

rejection of Grey's notably flexible interpretive approach suggests that they deemed a consistent interpretive approach as highly important in insulating their tenuous positions. It further suggests that Grey's interpretive approach did not receive enough public or inter-branch support to incentivize the Supreme Court justices to monopolize "interpretivism" and "non-interpretivism," partially because it did not emerge at a time when there was sufficient criticism of Legal Realism.

IV. Thomas Grey's Theory of Constitutional Interpretation

In February 1975, Thomas Grey published the article, "Do We Have an Unwritten Constitution?," in the *Stanford Law Review*. Grey suggested that Supreme Court justices are both responsible for interpreting the Constitution's written text and asserting the constitutionality of textually unarticulated natural rights. For example, in regards to the latter, Grey maintained that the Constitution's Ninth Amendment was the drafters' way of suggesting that there were "binding principles of higher law" that were not explicitly included in the Constitution.[52] Similarly, in referring to written and unwritten rights, Grey further maintained that "As it came to be accepted that the judiciary had the power to enforce the commands of the written Constitution when these conflicted with ordinary law, it was also widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well."[53] Essentially, Grey argued that Supreme Court justices should employ both interpretivism (basically Formalism) and non-interpretivism (basically Legal Realism) during constitutional interpretation. He arrived at this conclusion not only because it was largely expected that justices enforce un-enumerated natural rights throughout the Court's history, but also because complete adherence to Formalism would delegitimize important Court doctrine. For example, Fifth and Fourteenth Amendment substantive due process and strict scrutiny jurisprudence would be delegitimized.[54] Ultimately, Grey maintained that he

[52] Thomas Grey, "Do We Have an Unwritten Constitution?," *Stanford Law Review* 27 (February 1975): 716.
[53] Ibid.
[54] Ibid, 711-2.

did not believe "interpretivism" alone was "sufficiently broad to capture the full scope of legitimate judicial review."[55]

As suggested by Stephen Engel, Grey recognized the importance of approaching constitutional interpretation from multiple perspectives (and applying numerous schools of judicial thought) to ensure that the Court successfully protects all rights.[56] However, Supreme Court justices ultimately did not embrace the pragmatic and flexible constitutional interpretive theory that Grey proposed. Instead, individual justices continued (and still continue) to support one of the schools of constitutional interpretation. The justices' ultimate refusal of Grey's thesis highlights the importance they ascribe to the schools of judicial thought, not only as consistent grounding for their own decision-making, but the need for consistency as a way to challenge accusations against judicial activism or illegitimacy. Justices largely rely on the theories as a way to guide decision-making and convey that rulings are grounded in established and accepted principles rather than their own values. Accepting that interpretation need not be bound by a theory would have eliminated the justices' one available response to combat attacks on the Court's legitimacy. Although the complete history of the justices' acceptance of the schools of judicial thought has not yet been fully articulated in this chapter, the previous discussions of Formalism and Legal Realism clearly highlight that justices used the schools of interpretation to respond to the attackers of Court legitimacy. Hence, the lack of support for Grey's interpretive theory, i.e. the simultaneous use of "interpretivism" and "non-interpretivism" depending on the question at hand, suggests that justices were and continue to be significantly concerned with the Court's democratic deficit, such that the interpretive theories are deemed highly important in guiding Court decision-making.

Similarly, Punctuated Equilibrium Theory suggests that Grey's "interpretivism" and "non-interpretivism" were not embraced by the justices because there was insufficient criticism of Legal Realism in the 1970s when Grey published his work. Public and inter-branch discontent of judicial Legal Realist constitutional interpretation did not gain significant attention until the Reagan Administration's

[55] Ibid, 705.
[56] Engel, 344.

identification of Originalism as the most legitimate mode of judicial interpretation in the early 1980s (discussed in the following section).[57] As Baumgartner and Jones suggest that new agenda monopolies "are often the children of agenda access," there needs to be sufficient "access" to judicial interpretation in order for a new interpretive approach to successfully emerge.[58] Access to interpretation is generated by intense Court criticism and heightened scrutiny of the Court's democratic deficit. Therefore, as the schools of thought are responses to criticisms of the Court's legitimacy and as criticism increases access to interpretation, there needs to be sufficient criticism in order to stimulate the re-evaluation of the mode of judicial interpretation and destabilize a particular interpretive school. It does not follow that simply because Grey proposed a new mode of judicial interpretation that the new approach disrupted equilibrium – even if Grey's approach would seem to ensure the Constitution was applied to contemporary society without replacing the values and principles originally written into the Constitution (combining both Formalism and Legal Realism).

Instead of responding to the liberalism of the Warren and Burger Courts by advocating for Grey's "interpretivism" and "non-interpretivism," critics of Legal Realism called for an Originalist interpretation of the Constitution in the 1980s. The following section thus resumes the historical analysis of the judicial schools of thought by discussing Originalism. Originalism was a direct response to criticisms of the Legal Realist mode of interpretation and articulated the necessity of interpreting Constitutional text in the context of the framers' intentions.

V. Originalism: Responding to the Illegitimacy of Legal Realism

The application of Legal Realism by the Warren and Burger Courts came under fire in the 1980s and criticisms thus disrupted the equilibrium established by Legal Realism. During this time, the Court was increasingly seen as expanding and overstepping the bounds of legitimate judicial power. The Court was increasingly acting in an activist fashion and, as John Ely concedes, the Warren Court's "reputation

[57] Dennis J. Goldford, *The American Constitution and the Debate over Originalism* (New York: Cambridge University Press, 2005), 1.
[58] Baumgartner and Jones, 84.

as 'activist' or interventionist [was] deserved."[59] In using Legal Realism to interpret the Constitution, the Warren and Burger Courts did not view the amendment process as the only means by which constitutional change occurs. Instead, the Court interpreted changing societal norms and read natural rights and principles into the Constitution. However, critics of Legal Realism quickly came to challenge the lack of actual constitutional analysis in Warren and Burger Court decisions. Essentially, critics of the Court claimed that decision-making during the 1960s and 1970s produced a consistent stream of poorly reasoned opinions that delegitimized the Court and morphed it into a "third legislative chamber."[60] At the same time that the Court's *Brown* ruling exemplifies the pinnacle of Legal Realist constitutional interpretation, it is also a prime example of the poorly reasoned opinions that were challenged and deemed illegitimate by Court critics. The majority's conclusion that the Fourteenth Amendment was "inconclusive" on the issue of segregation in education provided ample fodder for critics to claim that *Brown* was an intentional expansion of the Supreme Court's power.[61] Given the Court's countermajoritarian difficulty, expansive rulings that were not even remotely based on the Constitution were seen to delegitimize the Court's constitutional interpretation; as stated in a speech by President Reagan's Attorney General Meese, "A constitution that is viewed as only what the judges say it is no longer is a constitution in the true sense."[62]

While many of the critics of the Warren and Burger Courts supported the Court's substantive outcomes and only opposed the Legal Realist justifications, political conservatives and Republicans were also critical of the Court's liberal outcomes.[63] Specifically, conservatives/Republicans were critical of essentially all the Court's rulings on social issues, including the Court's abortion, school prayer, bussing,

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[59] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Massachusetts: Harvard University Press, 1980), 73.
[60] O'Neill, 56 (on unsatisfactory Court reasoning), 57 (claiming that the Court essentially became a legislative branch).
[61] Ibid, 56.
[62] Edwin Meese III, "Speech before the American Bar Association," delivered on 9 July 1985, reprinted in *Originalism: A Quarter-Century of Debate*, Steven G. Calabresi, ed. (Washington, D.C.: Regnery, 2007), 54.
[63] Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five," *The Yale Law Journal* 112 (November 2002): 237 (on support for the Warren and Burger Courts' substantive outcomes); O'Neill, 97 (on conservative and Republican criticisms of the Warren and Burger Courts).

affirmative action, pornography, and death penalty rulings.[64] Conservatives and Republicans attacked the Court on the grounds that it was frustrating majority will. These criticisms directly invoked the Court's countermajoritarian dilemma and, therefore, confounded with other criticisms to question the Court's legitimacy.[65] The additional attacks on the Court directed from those dissatisfied with the substantive outcomes certainly served to increase the overall amount of dissatisfaction with Court jurisprudence. However, the justices' response to their attackers was ultimately a response to claims that the Court was overstepping its boundaries rather than a response to claims that the Court's substantive rulings were too liberal.[66]

Given the widespread attacks on the Court that undermined Legal Realism's interpretive "monopoly," justices' concerns with the Court's legitimacy led some of them to embrace Originalism as a more legitimate guide to decision-making. Originalism reasserted the importance of grounding judicial justifications and constitutional interpretation in the Constitution's text, partially reviving the tenets of Formalism. O'Neill specifically suggests that Originalism was rooted in Formalism as constitutional interpretation was always understood as "the ascertainment and application of original intent," though, under Formalist interpretation, determinations of original intent were restricted to textual analysis of the Constitution.[67] For example, O'Neill maintains that Chief Justice Marshall "always understood constitutional interpretation as the effectuation of intent, purpose, and design, as revealed primarily through textual analysis."[68] Thus, twentieth century Originalism shares some similarities with nineteen century Formalism. Furthermore, Robert Bork was the "intellectual godfather" of Originalism and presented the theory as a way to restrain expansive judicial review and power.[69] Specifically, Originalists analyze the Constitution's text in the context of what the drafters of the text (either the drafters of the

[64] O'Neill, 118.
[65] Ibid, 97.
[66] Goldford, 31.
[67] O'Neill, 17.
[68] Ibid, 20.
[69] Steven G. Calabresi, "A Critical Introduction to the Originalism Debate" in *Originalism: A Quarter-Century of Debate*, Steven G. Calabresi, ed. (Washington, D.C.: Regnery, 2007), 14 (claiming Bork was the "intellectual godfather" of Originalism); O'Neill, 42, 175 (on Originalism's restriction of judicial power).

Constitution or the drafters of individual amendments) intended the text to mean.[70] While Bork introduced Originalism to scholarly circles, the Reagan Administration was particularly instrumental in attacking the Court's reliance on Legal Realism and catalyzing the use of Originalism in Supreme Court decision-making. For example, Attorney General Meese argued that Legal Realism led to a "jurisprudence of idiosyncrasy" that caused the Court to abandon constitutional interpretation for policymaking, and proposed that Originalism was a solution to the Court's growing illegitimacy.[71] The Reagan Administration actively campaigned for the Court to use Originalism over Legal Realism during constitutional interpretation in 1985 and 1986.[72]

Overall, Originalism was a direct response to the criticisms of Legal Realism because it reasserted the need to analyze the Constitution's text during constitutional interpretation. Originalism was not a direct response to criticism of the Court's liberal streak during the Warren and Burger years because Originalism could yield liberal or conservative outcomes; it was not articulated or framed as a substantively conservative response.[73] As Jack Balkin maintains, Originalism aimed to re-legitimize judicial review.[74] While Legal Realists employed little, if any, textual analysis in their rulings and instead interpreted public values, Originalists reverted back to the written Constitution, specifically as a way to respond to growing accusations from politicians and the public that the Court was hardly strictly reading the Constitution. For example, in the presidential campaign of 1968, Republican Richard Nixon claimed that the liberal, Legal Realist Warren Court undermined constitutional interpretation.[75] He pledged to reign in the Court through careful judicial appointments and called for justices' strict adherence to the Constitution's text during judicial interpretation.[76] As justices' adherence to Legal Realism was a response to the Court's perceived illegitimacy during the Populist and Progressive Eras, their shift toward Originalism was similarly a response to the illegitimacy claims that emerged after the expansive judicial

[70] O'Neill, 2.
[71] Edwin Meese III, quoted in O'Neill, 154.
[72] O'Neill, 154.
[73] Goldford, 53.
[74] Balkin, 603.
[75] O'Neill, 96-7.
[76] Engel, 303, 305.

powers of the Warren and Burger Courts. Had the Supreme Court justices been unconcerned with the state of the Court's legitimacy, the acceptance of Originalism as an interpretive theory would have been less likely.

Although Originalism was embraced by some justices as a response to the rising concerns about the Court's legitimacy, it did not fully displace the use of Legal Realism in guiding judicial decision-making. After Chief Justice Burger stepped down from the Court and Justice William Rehnquist was nominated to the Chief Justiceship, the Associate Justices of the Rehnquist Court ascribed to different interpretive theories. For example, Justice Scalia (nominated to the Court in 1986) was and Justice Thomas (nominated to the Court in 1991) is a self-identified Originalist, while Justice William Brennan remained a Legal Realists (from his time on the Burger Court) despite the widespread criticism of Legal Realism.[77] Constitutional interpretation was further complicated by the emergence of Common Law Constitutionalism as an actual interpretive theory in the late-twentieth century. As Legal Realism and Originalism emerged and were embraced in the face of attacks on the Court, Common Law Constitutionalism similarly originated from criticisms of Court legitimacy. Therefore, this chapter subsequently analyzes the development and acceptance of Common Law Constitutionalism as a final interpretive approach and suggests that the lack of one interpretive monopoly in contemporary constitutional analysis is problematic for Supreme Court justices who have largely responded to the Court's democratic deficit by monopolizing an interpretive approach for most of the Court's history.

VI. The Articulation of Common Law Constitutionalism as an Interpretive Theory

While Originalism was supposed to resolve the legitimacy problems associated with Legal Realism, it ultimately drew similar attacks as Legal Realism. Attackers of the Court argued that Originalism was no more constrained than was Legal Realism because Originalist judges manipulated or ignored historical facts to rationalize their own preferred outcome.[78] As Robert Post and Reva Siegel

[77] O'Neill, 210 (regarding Justices Scalia and Thomas).
[78] Ibid, 211.

argue, Originalism was (and still is) linked to conservative politics, such that Originalism does not lead to an objective analysis of the framers' intentions and is instead largely motivated by the conservative political agenda.[79] For example, Post and Siegel criticized Justice Thomas' and Justice Scalia's Originalism as "[reinterpreting] the integral thrust of American constitutional history so as to render it compatible with contemporary conservative beliefs" and "[simulating] political support for changing constitutional law to make it more consistent with his conservative vision," respectively.[80] Originalism ultimately became justices making their own expansive, value judgements during decision-making.[81] As a result, Originalism led to illegitimate judicial decision-making because of its reliance on the discretion of unelected justices. Once again, critics of the Court invoked the Court's legitimacy in their attacks by claiming that Originalism did not sufficiently constrain decision-making. Furthermore, as Legal Realism continued to be a popular interpretive theory among some of the justices, critics of the Court continued to attack the illegitimacy of Legal Realist interpretation.[82] The attacks on Legal Realism during this time persisted along the same vein as discussed in the previous section.

Common Law Constitutionalism was embraced by some justices in response to the criticisms of Originalist constitutional interpretation and the persistence of criticisms directed toward Legal Realism.[83] Common Law Constitutionalism calls for an analysis of the Court's jurisprudential history during decision-making; the Court's jurisprudential history is the main restraint on Common Law Constitutionalist judicial interpretation.[84] The Common Law Constitutionalist incrementally establishes principles by referencing previous Court decisions and actively uses analogies to past decisions in deciding new cases.[85] Accordingly, Common Law Constitutionalism is linked to the principle of *stare*

[79] Robert C. Post and Reva B. Siegel, "Originalism as a Political Practice: The Right's Living Constitutionalism," *Fordham Law Review* 75 (January 2006): 557, 559.
[80] Ibid, 563 (regarding Justice Thomas), 568 (regarding Justice Scalia).
[81] Andrew C. Spiropoulos, "Just Not Who We Are: A Critique of Common Law Constitutionalism," *Villanova University Law Review* 54 (2009): 184.
[82] Ibid.
[83] Ibid.
[84] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Massachusetts: Harvard University Press, 1999), 14.
[85] Spiropoulos, 181 (on the incremental establishment of principles); Ibid, 9 (on the use of analogy).

decisis, which advises against overturning jurisprudential precedent.[86] Similarly, Common Law Constitutionalism calls for minimalism during decision-making such that decisions are narrowly tailored and largely leave political debates to the other branches of government.[87] While the justices' invocation of precedent is obvious for a considerable part of the Court's history and David Strauss claims that it was the main interpretive approach through the nineteenth-century, adherence to precedent was not articulated into an actual school of judicial thought until the late-twentieth century.[88]

The interpretive Common Law Constitutionalist theory was only articulated in response to the illegitimate ramifications of Originalism and Legal Realism. Ultimately, Common Law Constitutionalism is a direct response to criticisms of Originalism and Legal Realism because it questions the legitimacy of relying on the preferences of unelected justices, which critics claim both Originalism and Legal Realism lead to, and instead advocates for predictability and reasoning based on the Court's long jurisprudential history.[89] Furthermore, Common Law Constitutionalism is also a response to criticism of the expansive decisions of Originalist and Legal Realist interpretation as it proposes a minimalist approach to judicial decision-making. The interpretive approach championed by Common Law Constitutionalists is argued to be less subjective than theories that only mask decision-making that is really based on justices' predilections. Common Law Constitutionalism further responds to the potential legitimacy crisis that emerges when the Court consistently overturns precedent. Maintaining precedent is important because it stabilizes judicial interpretation and Common Law Constitutionalism accordingly emphasizes the importance of stability in rulings generated by an unelected, countermajoritarian institution.[90]

However, Common Law Constitutionalism did not resolve the disrupted equilibrium of constitutional interpretation that Originalism had punctuated. Instead, it further complicated judicial

[86] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law," in *A Matter of Interpretation: Federal Courts and the Law*, Amy Gutmann, ed. (New Jersey: Princeton University Press, 1998), 7.
[87] Sunstein, 11 (on the narrowness of minimalist decisions), 53 (on "grant[ing] a certain latitude to other branches").
[88] David A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010), 36.
[89] Spiropoulos, 188.
[90] Marietta, 103 (suggesting that "consistency in our understanding of the Constitution is of the greatest importance. We must follow precedents and make only minor alterations as events demand because only in this way can citizens have a clear set of expectations about the law").

decision-making. Through the analysis of Legal Realism, Punctuated Equilibrium Theory was discussed in the context of monopoly disruption and then the eventual reestablishment of a new monopoly. Yet, Baumgartner and Jones briefly suggest there are instances in which monopolies fail to form; specifically, they maintain that agenda monopolies do not form "in large-scale policy problems where the political parties and major social groups disagree on potential solutions."[91] Given justices' persistent adherence to Legal Realism and Originalism, despite the emergence of Common Law Constitutionalism (and the presence of other minor interpretive theories as well, see Figure 2.1), an interpretive monopoly is unlikely to emerge. The Court appears to be in a situation where Punctuated Equilibrium Theory suggests monopolization is unlikely. Each of the interpretive approaches was a response to a specific legitimacy concern and each promotes its own rules of constitutional interpretation. However, there is no sight of a new interpretive approach that can take into account the comprehensive claims about illegitimate judicial interpretation that have been articulated over the Court's history. Without a remedy to the disagreement about legitimate Court interpretation, individual Supreme Court justices, the public, and elites are unlikely to mobilize behind a common solution.

VII. When Judicial Schools of Thought Fail to Emerge: The Case of *Dred Scott v. Sandford* (1857)

This chapter has traced the emergence and adoption of the four main schools of judicial thought as responses to attacks undermining Court legitimacy and judicial attempts to insulate the Court against legitimacy crises. However, there are instances throughout the Court's history where legitimacy crises were evident, but a new judicial school of thought did not emerge. Accordingly, this section discusses why certain legitimacy crises are insufficient to generate new interpretive frameworks in order to suggest the conditions that are necessary for the articulation and adoption of a new school of thought.

The long period during which Formalism monopolized decision-making was not absent of attacks on the Court's legitimacy. While the emergence of Populist/Progressive attacks of Formalism in the late nineteenth-century led to the eventual articulation of and judicial reliance on Legal Realism in the mid-

[91] Baumgartner and Jones, 4.

twentieth century, criticisms undermining Court legitimacy were also evident before the Populist/Progressive attacks. For example, during the mid-nineteenth century, the Court handed down *Dred Scott v. Sandford* (1857), its most abhorrent decision to-date. As Robert Burt summarizes, "No Supreme Court decision has been more consistently reviled than *Dred Scott v. Sandford*. Other decisions have been attacked, even virulently, by both contemporary and later critics; other decisions have been overruled by constitutional amendment or by subsequent Court majorities. But of all the repudiated decisions, *Dred Scott* carries the deepest stigma."[92] Keith Whittington and Cass Sunstein also agree that *Dred Scott* is generally held to be the Court's worst decision and a "terrible mistake."[93] However, *Dred Scott* has not been solely criticized by twentieth and twenty-first century scholars. The Court also received significant backlash and claims of Court illegitimacy at the time the final decision was released.[94]

In *Dred Scott*, Chief Justice Roger Taney not only concluded that Dred Scott lacked jurisdiction to bring a suit because he was not a citizen of Missouri, but the Chief Justice further expansively concluded that states' conferral of citizenship on free blacks was inconsistent with the Constitution and Framers' intentions. Chief Justice Taney suggested with "absolute certain[ty] that the African race were not included under the name of citizens of a State" and that states could not "introduce a new member into the political community created by the Constitution of the United States."[95] In reaching this conclusion, the Court was criticized by antislavery proponents and Justice Benjamin Curtis in his dissent for unnecessarily expanding the scope of the decision and reaching a question that was not actually facing the Court. Although Burt argues that Justice Curtis' criticism regarding the unnecessary broadness of Chief Justice Taney's opinion was technically incorrect, he concedes that Curtis' criticism "quickly attained acceptance as a truism" by critics of the Court's decision; accordingly, many of the attacks that were directed at the Court in response to *Dred Scott* focused on the perceived expansiveness of the

[92] Robert A. Burt, "What was Wrong with *Dred Scott*, What's Right about *Brown*," *Washington and Lee Law Review* 42 (Winter 1985): 1.
[93] Keith E. Whittington, "The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions," *The Journal of Politics* 63 (May 2001), 365-6; Sunstein, 36.
[94] Whittington, "The Road Not Taken," 378-80.
[95] *Dred Scott v. Sandford*, 60 U.S. 393 (1957).

majority opinion.[96] Engel, for example, analyzed Martin Van Buren's response to Taney's majority opinion and suggests that Van Buren similarly criticized the unnecessary expansiveness of the Court's assertion that states did not have the power to define citizenship; Van Buren opposed the Court's willingness to address a states' rights question – regarding citizenship – that was not actually facing the Court.[97] Ultimately, "One of the notable features of [*Dred Scott*] was that instead of deciding only those issues that were necessary for disposition, the Court decided every issue that it was possible to decide."[98] Furthermore, other criticisms, specifically those articulated by Republicans, challenged the political nature of the decision and the Court's lack of authority in addressing political questions.[99]

While the Court was actively attacked and ridiculed after *Dred Scott*, such that one could argue a legitimacy crisis was evident, the legitimacy crisis did not lead to the development of a new school of judicial thought. A new interpretive approach did not develop after the Court's *Dred Scott* legitimacy crisis because (1) the justices' interpretive approach was not criticized by opponents of the decision and (2) the crisis was largely remedied by extra-judicial action. In regards to the former, the attacks that emerged after *Dred Scott* did not criticize the justices' reliance on Formalism in guiding decision-making. Criticisms that suggest a decision is expansive or answers a political question – as the attacks after *Dred Scott* asserted – ultimately present an issue regarding the extent of the Court's jurisdiction. Accordingly, the crisis facing the Court after *Dred Scott* was not an attack of the Court's interpretive approach and did not require a response that altered the justices' reliance on Formalism; in fact, as Friedman asserts, there was a "relative attachment to legal formalism at the time of [*Dred Scott*]."[100] Since adopting a new interpretive approach was not an appropriate response to the *Dred Scott* legitimacy crisis, the justices continued to rely on Formalism until after the judicial school of thought was directly challenged during the Populist/Progressive Eras.

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[96] Burt, 12.
[97] Engel, 164.
[98] Sunstein, 36.
[99] Whittington, "The Road Not Taken," 380.
[100] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *New York University Law Review* 73 (May 1998).

Although a new interpretive approach was not embraced, the justices did in fact respond to the *Dred Scott* legitimacy crisis. They did so by becoming increasingly aware of the Court's jurisdictional limits. For example, the *Slaughter-House Cases* (1873) presented the justices with the possibility of handing down another expansive decision. However, after the widely criticized expansiveness of *Dred Scott*, Justice Samuel Miller was unwilling to expand the scope of the *Slaughter-House Cases* and expansively interpret the Thirteenth and Fourteenth Amendments in his majority opinion. This reluctance is evidenced by his assertion in *Slaughter-House* claiming "we now propose to announce the judgements which we have formed in the construction of those articles [the Thirteenth and Fourteenth Amendments], so far as we have found them necessary to the decision of the cases before us, and *beyond that we have neither the inclination nor the right to go* [emphasis added]."[101] Justice Noah Swayne even recognized the narrowness of the Court's *Slaughter-House* majority opinion in his dissent as he suggested that the majority opinion was "much too narrow."[102] The majority's explicit statement that the Court purposefully avoided a broad decision in *Slaughter-House* is a direct response to the criticism that the Court's *Dred Scott* decision was illegitimately expansive.

Additionally, not only was the adoption of a new interpretive approach an inappropriate remedy as the crisis did not implicate the Court's adherence to Formalism, but the *Dred Scott* crisis was over before it had really begun. The Thirteenth and Fourteenth Amendments were ratified and *Dred Scott* was invalidated only one decade after *Dred Scott* was decided. The passage of the Reconstruction Amendments largely corrected the crisis for the Court because they overturned the Court's decision. As the Court's *Dred Scott* crisis was solely due to its decision in that case, rather than a crisis generated from widespread interpretive problems in many of the Court's cases during that time, extra-judicial channels were able to remedy the crisis. A new interpretive theory to guide constitutional interpretation was unnecessary as the Constitution's meaning was textually altered and forced the justices to interpret the meaning of the Constitution after *Dred Scott* differently. In other words, a new interpretive theory was not

[101] *Slaughter-House Cases*, 83 U.S. 36 (1873).
[102] Ibid.

needed to understand the Constitution because the way in which the Constitution should be understood was textually altered. Therefore, the Court's crisis was also remedied via extra-judicial channels.

Ultimately, the attacks that emerged during the legitimacy crisis after *Dred Scott* differed significantly from the legitimacy crises that led to the emergence of each of the four main schools of judicial thought. While the *Dred Scott* legitimacy crisis did not arise from attacks directed at the Court's interpretive approach (as discussed above), the crises discussed throughout this chapter were dominated by criticisms of the applied interpretive approaches. For example, Populist/Progressive attacks challenged the rigidity of Formalism in failing to recognize that constitutional interpretation should reflect evolving societal norms and subsequent attacks of Legal Realism claimed that Legal Realists illegitimately read changing societal norms and personal moral preferences into the Constitution. As suggested by Post and Siegel, critics of Legal Realism claimed Originalism "was the *only* legitimate way of interpreting the Constitution, and they began to denounce all other approaches to constitutional interpretation as improper and unprincipled."[103] These examples highlight critics' focused attacks on the Court's interpretive framework.

Similarly, the crises that ultimately led to the justices' reliance on a new interpretive approach were not remedied via extra-judicial channels. In fact, extra-judicial channels, such as constitutional amendments, could not remedy the crises that led to the emergence of new interpretive approaches because those crises were not confined to one attacked, unpopular decision, as was the *Dred Scott* legitimacy crisis. Rather, the Court's interpretive approach was consistently challenged in cases that addressed a variety of substantive issues. For example, the Warren and Burger Courts' reliance on Legal Realism in abortion, school prayer, bussing, affirmative action, pornography, and death penalty cases was criticized.[104] Hence, the Court faced a vast legitimacy crisis due to justices' adherence to Legal Realism, rather than an isolated legitimacy concern stemming from one unpopular decision. The attacks that led to the development of the other schools of thought were similarly diffuse. Given the crises' diffuse nature,

[103] Post and Siegel, 547.
[104] O'Neill, 118.

extra-judicial acts that aimed to remedy them would have only been successful had they systematically overturned (via the constitutional amendment process) or ignored the Court's decisions. However, doing so would have deepened the Court's legitimacy crisis rather than remedied it as such persistent infringement on judicial power and Court-curbing directly undermine the Court's institutional legitimacy as a separate branch of the federal government.[105]

An analysis of the Court's *Dred Scott*, mid-nineteenth century legitimacy crisis suggests that the nature of the attacks that undermine Court legitimacy, as well as the possibility of remedy via an extra-judicial response, determine if a new interpretive approach will emerge. Specifically, the Court must face sustained, diffuse attacks that call into question an interpretive approach in order for a new school of thought to emerge. While this section focused on the Court's *Dred Scott* decision, other legitimacy crises have emerged over the Court's history that were also insufficient to generate a new school of thought because the attacks did not criticize the Court's interpretive method and were remedied by extra-judicial action (e.g. the legitimacy crisis the Court faced after *Worcester v. Georgia* (1832)).[106] Briefly, the legitimacy crisis after *Worchester* did not target the Court's interpretive approach because President Andrew Jackson's refusal to enforce the decision was based on his personal Formalistic interpretation of the Constitution. Jackson's reliance on Formalism to guide his refusal to reinforce the Court's *Worcester* decision suggests that the Court's answer, not its interpretive approach, was wrong. As Engel notes, Jackson believed that "Just as the Court must not abet what it considered an unconstitutional act thereby forcing it to commit a necessarily unconstitutional act, the president must not either."[107] Thus, the *Dred Scott* and *Worcester* crises both highlight that the emergence of a legitimacy crisis is not sufficient for the development of a new school of judicial thought. Instead, a legitimacy crisis that is generated from

[105] For an analysis of the effects of Court-curbing on Court legitimacy, see Charles G. Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Michigan: University of Michigan Press, 2008), Tom S. Clark, "The Separation of Powers, Court Curbing, and Judicial Legitimacy," *Journal of Political Science* 53 (October 2009), and Engel.
[106] For an analysis of the crisis facing the Court after its *Worcester* decision see Chapters Three (Judicial Resistance: *Worcester v. Georgia*) and Four (The Bank Veto and the Election of 1832) in Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (Kansas: University Press of Kansas, 2007).
[107] Engel, 147.

persistent and widespread attacks of the Court's interpretive framework contributes to the emergence of a new jurisprudential school.

VIII. Implications

The justices' ultimate reliance on the schools of thought and the conditions that lead to the emergence of new interpretive approaches point to three implications that are further discussed in the following subsections. First, the sequential emergence of the four main schools of judicial thought as responses to criticism of the Court suggests that justices are, in fact, concerned with the extent of the Court's legitimacy and have failed to recognize a norm of judicial supremacy. Second, the lack of an interpretive monopoly in the twenty-first century may exacerbate the justices' concerns with judicial legitimacy. Third, the emergence of new schools of thought can be discussed in terms of the extent of the Court's diffuse and specific support.

VIII.a. *The Schools of Judicial Thought and the Norm of Judicial Supremacy*

The justices' adherence to the interpretive theories to combat criticisms that specifically undermined and challenged the Court's legitimacy suggests that justices are concerned with maintaining institutional legitimacy. From the justices' application of the theories of judicial interpretation, it is clear that they have internalized the Court's legitimacy crisis and democratic deficit, and have responded by applying justifications that appease Court attackers. However, while the justices have certainly been attacked on the expansiveness of their application of judicial review throughout the Court's history and have a reason to be concerned with the Court's legitimacy, judicial politics scholars largely suggest that the Court benefits from widespread diffuse and institutional support.[108] Additionally, during the same

[108] Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science* 36 (August 1992): 658, James L. Gibson and Michael J. Nelson, "The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto," *Annual Review of Law and Social Science* 10 (November 2014): 205, and James L. Gibson and Michael J. Nelson, "Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?," *American Journal of Political Science* 59 (January 2015): 171 (all concluding the Supreme Court enjoys a "reservoir of goodwill" that reinforces diffuse

decades that three of the four interpretive theories were embraced (during the mid- to late-twentieth century), widespread support for the judiciary culminated in the so-called norm of judicial supremacy.[109] Yet, despite widespread public support and this norm, the justices' willingness to engage in the debate about constitutional interpretation would suggest that the norm of judicial supremacy is largely unrecognized by the justices. In other words, the norm of judicial supremacy seems to have failed to ameliorate the justices' apparent insecurity with the Court's institutional legitimacy. That the justices' continually seek to justify their decision-making by grounding it in a specific interpretive theory, rather than embracing the pragmatic conditional approach highlighted by Grey in the 1970s, would seem to evidence their internalization of the Court's democratic deficit, despite claims of a parallel public and elite acceptance of a norm of judicial supremacy.

VIII.b. ***Interpretive Disequilibrium on the Contemporary Court***

As discussed earlier in the chapter, after the emergence of Originalism and, ultimately, Common Law Constitutionalism, the justices have been unable to reestablish an interpretive monopoly to guide judicial decision-making. This lack of a current interpretative monopoly may suggest that justices are likely to be *even more concerned* with their institution's legitimacy because they have been unable to completely respond to the myriad criticism facing the Court after having forsaken Grey's approach. Given the proliferation of plausible schools of thought and constitutional interpretive techniques, the Court's legitimacy crisis deepens as the lack of a common standard of interpretation seems to suggest that justices are in fact largely making value judgments during interpretation. As the Court is a countermajoritarian entity, the schools of thought aim to ground judicial review in a clear mode of interpretation to show that

support); Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (New Jersey: Princeton University Press, 2009), 78 (claiming "reconstructive" presidents that challenge Court legitimacy are an anomaly, rather than the norm); Geyh, 25 (suggesting that congressional Court-curbing has largely refrained from undermining judicial independence).

[109] See Friedman's five-part law review series for a complete historical analysis of the establishment of judicial supremacy: Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One"; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court," *Georgetown Law Journal* 91 (November 2002); Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*," *New York University Law* 76 (November 2001); Friedman, "The History of the Countermajoritarian Difficulty, Part Four"; Friedman, "The Birth of an Academic Obsession."

the Court does not arbitrarily make decisions. For example, both Bork and Chief Justice Rehnquist have underscored the importance of guided constitutional interpretation. Bork maintained that "The functions assigned the Court impose a need for constitutional theory…" because "How is the Court to reason about the resolution of the disputes brought before it?"[110] Similarly, Rehnquist would seemingly agree with Bork since he claimed "those who have pondered the matter have always recognized that the ideal of judicial review has basically antidemocratic and antimajoritarian facets that require some justification in this Nation."[111] Although Engel suggests that Federalists and many Anti-Federalists and Jeffersonians believed judicial review was "constitutionally provided" and Grey asserted that "history has firmly decided in favor of judicial review," the lack of an interpretive equilibrium will likely exacerbate the justice's preoccupation with responding to the Court's democratic deficit.[112] For example, justices may exhibit greater preoccupation with legitimacy during deliberations (the focus of Chapter Three) or increase the use of legitimacy rhetoric in decisions (the focus of Chapter Four) when an interpretive monopoly does not exist. The justices are clearly concerned with the Court's legitimacy, highlighted by their implementation of the schools of thought; however, the current lack of an interpretive monopoly, after one had existed during much of the Court's history, may actually increase their concern with the Court's democratic deficit.

VIII.c. *The Emergence of New Interpretive Theories in the Context of Diffuse and Specific Support*

In highlighting the differences between the legitimacy crises that have and have not led to judicial reliance on a new interpretive theory, one clear difference that was suggested above is the breadth of the criticisms challenging the Court. The attacks that led to new schools of thought consistently targeted the Court's interpretive approach, regardless of the substantive outcome of the decision. Individual decisions were not targeted as the source of the Court's tenuous legitimacy and, likewise, individual decisions did

[110] Robert H. Bork, "The Original Understanding," in *Contemporary Perspectives on Constitutional Interpretation*, Susan J. Brison and Walter Sinnott, eds. (Colorado: Westview Press, 1993), 49.
[111] William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976), reprinted in *Harvard Journal of Law & Public Policy* 29 (2006): 404.
[112] Engel, 104; Grey, 707.

not receive all of the criticism. Conversely, not only does the *Dred Scott* case highlight that a new approach will not be embraced when the interpretive approach is not actually challenged, but the legitimacy crisis surrounding *Dred Scott* was also a specific attack of the Court's outcome in only one decision. The legitimacy crisis did not transcend to other Court decisions at this time, such that the scope of the crisis facing the Court was drastically different than the scope of the crises that did in fact lead to new schools of thought. Accordingly, as differences in the breadth of attacks on the Court lead to different outcomes regarding the emergence or lack of emergence of an interpretive approach, the crises' perceived effect on diffuse or specific support may be implicated in whether or not a new interpretive school is embraced by the justices.

Due to the scope of the attacks that led to the emergence of Legal Realism, Originalism, and Common Law Constitutionalism, the legitimacy crises could be associated with instances during which the justices feared that diffuse support was endangered. For example, not only was it likely that the justices perceived attacks on the Court's legitimacy when Legal Realism and Originalism were called into question as threatening the Court's diffuse support, but Gallup polling also reflects a drop in the Court's public approval in the early-1990s, as compared to the mid-1980s, that may have reinforced the justices' concerns and contributed to the emergence of Common Law Constitutionalism.[113] Conversely, with the *Dred Scott* and *Worcester* legitimacy crises, it can be argued that specific support, but not diffuse support, was threatened. The constrained nature of the attacks following both decisions suggests dissatisfaction with specific cases and not the Court as an institution. Hence, insofar as the justices perceive threats to the Court's diffuse support and not merely reductions in specific support, it is likely that they will look to reinforce institutional legitimacy and respond to criticisms of the Court by embracing a new interpretive approach.

IX. Conclusion

The sequential emergence of the four schools of judicial thought and their subsequent application

[113] Gallup, (2015) *Supreme Court* [Data set], retrieved from http://www.gallup.com/poll/4732/supreme-court.aspx.

in Supreme Court decision-making was a direct response to the pointed criticisms leveled against the Court. Formalism emerged in response to Anti-Federalist concerns with the expansive powers of an unelected and countermajoritarian judiciary. Legal Realism was then institutionalized to combat reemerging concerns with expansive judicial power during the Populist and Progressive Eras. Before Originalism was fully articulated, Thomas Grey suggested that the justices employ a flexible interpretive approach to better protect the principles and rights embedded in the Constitution. As this proposition was staunchly ignored, Originalism subsequently emerged in the late-twentieth century. Originalism redirected constitutional interpretation to the Constitution's written text after widespread criticism of the Court's expansion into judicial policymaking through Legal Realist justifications. Finally, Common Law Constitutionalism was articulated as an interpretive theory to remedy Originalism's apparent failure in reestablishing the Court's legitimacy. An analysis of the *Dred Scott* legitimacy crisis, which did not lead to the emergence of a new school of thought, suggests that legitimacy crises must target the Court's interpretive framework across diffuse substantive issues in order to generate judicial reliance on a new interpretive school.

The intention of this chapter was to show that justices look to the theories of interpretation to guide decision-making and justify rulings because of concerns with the Court's legitimacy. The theories themselves emerged due to attacks against the Court as a way for justices to respond and combat the claims of Court illegitimacy. The application of Punctuated Equilibrium Theory suggests that, while there were clear interpretive monopolies during the Court's history, an interpretive monopoly is unlikely to emerge to guide the contemporary Court's decision-making and may actually serve to exacerbate the justices' concern with Court legitimacy. Although this chapter only presented a broad overview of the major interpretive theories, ignoring the various sub-theories within the four discussed interpretive approaches and the Critical Race Theory, Feminist Legal Theory, and Critical Legal Studies interpretive doctrines that emerged from Legal Realism, the responsiveness of the four theories to the Court's legitimacy crises is evident. The following chapters will present more evidence of the justices' internalization and preoccupation with Court legitimacy, despite public and institutional support for the

judiciary. Specifically, Chapter Three seeks to identify if the justices express an awareness of potential legitimacy concerns in deciding Court cases. Are the justices aware of or concerned with instances in which the Court's legitimacy may be threatened before a decision is handed down and public or elite backlash emerge?

3

THE "*ABORTION CASES*": *ROE V. WADE* (1973) AND *DOE V. BOLTON* (1973)

On January 22, 1973, more than two full years after they had been initially argued, the U.S. Supreme Court handed down the first two decisions to address a woman's right to have an abortion. In one, *Roe v. Wade* (1973), the Court assessed the constitutionality of a Texas abortion statue and decided to expand the right to privacy found within the Fourteenth Amendment's Due Process Clause (as decided in *Griswold v. Connecticut* (1965)) to the abortion issue. However, the Court also maintained that the right to an abortion was constrained by states' potential interest in protecting fetal life. The *Roe* decision ultimately suggested that there was a fundamental right to have an abortion throughout the first trimester, but that the right was increasingly overshadowed by states' interests in protecting fetal life throughout the second- and third-trimesters provided the mother's life or health was not in jeopardy.[1] In the other case, *Doe v. Bolton* (1973), the justices essentially followed *Roe* in striking down most of Georgia's abortion statute as being unduly restrictive.[2] Both of these cases were initially heavily influenced by the Court's ruling in *U.S. v. Vuitch* (1971) that addressed the vagueness of Washington, D.C.'s abortion statute; in *Vuitch*, the Court found that D.C.'s statute denying abortions, except when "necessary for the preservation of the mother's life or health," was not unconstitutionally vague.[3] While both *Roe* and *Bolton* ultimately reached the "core issue" of their cases, i.e. the right to an abortion, *Vuitch* did not address this right and stopped at the vagueness issue.[4]

In deciding *Roe* and *Bolton*, the justices ultimately concluded that *Roe* would be the primary case and that they would in fact hand down a decision addressing the right to an abortion. However, this outcome was not pre-ordained. Instead, the justices' correspondence and personal notes in deciding the *Abortion Cases* (i.e. *Roe* and *Bolton*) suggests that Justice Harry Blackmun, the author of both majority

[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Doe v. Bolton*, 410 U.S. 179 (1973).
[3] *U.S. v. Vuitch*, 402 U.S. 62 (1971).
[4] William J. Brennan, Memo to Harry A. Blackman, 18 May 1972, from Library of Congress, *Thurgood Marshall Papers, 1949-1991*, Supreme Court File, 1967-1991, Case File, 1967-1991, Box 98, Folder 2.

opinions, actually intended *Bolton* to be the primary case. Furthermore, he had initially drafted an opinion of *Roe* that directly followed the vagueness argument of *Vuitch* and did not reach the issue regarding the actual right to an abortion. This approach was ultimately not well received by a majority of the Court. As Justice William Brennan suggested in a memo to Justice Blackmun on May 18, 1872, "This does not mean, however, that I disagree with your conclusion as to the vagueness of the Texas statute. I only feel that there is no point in delaying longer our confrontation with the core issue on which there appears to be a majority and which would make reaching the vagueness issue unnecessary."[5] Accordingly, Blackmun changed course, reached the abortion issue in *Roe,* and treated it as the primary case. While he still thought the Texas statute was vague, Blackmun recognized the need for a shift because his "vagueness approach…did not find favor. Byron [White] disagreed with it, and most of the others preferred to get to what they called the 'core issue.'"[6] Given Blackmun's initial intention to dispose of *Roe* on vagueness, David Garrow points out that "It is of course ironic that Harry Blackmun, who has gone down in history first and overwhelmingly foremost as the author of *Roe v. Wade*, privately opposed making the case's holing anywhere near as extensive as his final opinion actually came to be."[7]

As *Roe* ultimately became the primary case, it was initially and has continued to be extensively criticized by the public, media, political elites, and scholars. For example, in reviewing and describing the cases decided during 1972, as was his practice at the completion of every term, Justice Brennan remarked that "The public response to the decisions [*Roe* and *Bolton*] was predictable but the volume of mail was, to say the least, unprecedented. Within days of the decisions, letters and telegrams of protest by the hundreds began coming in. Within a week, the letters were coming in at the rate of 2000-3000 a day and continued to do so for at least a month."[8] Much of these letters from the public were likely influenced by personal disagreement with the Court's substantive outcome. However, criticisms of the decision did not

[5] Ibid.
[6] Harry A. Blackmun, Memo to William H. Rehnquist, 18 May 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4.
[7] David J. Garrow, "How *Roe v. Wade* was Written," *Washington and Lee Law Review* 71 (April 2014): 922.
[8] Willian J. Brennan, Opinions of William J. Brennan, Jr.: October Term, 1972, from Library of Congress, *William J. Brennan Papers, 1945-1998*, Part II: Case Histories, 1958-1989, Box II:6, Folder 6.

solely address its outcome. Instead, typical criticisms of *Roe*, beyond those simply concerning its result, included claims that the abortion issue did not belong in the courts and that *Roe* was unduly legislative in both form and content. In regards to the former, *Roe* has continued to be extensively criticized by scholars as a prime example of the judiciary's overreaching into the political arena. For example, Cass Sunstein suggests that "The Court should have allowed the democratic processes of the states more time to adapt and to deliberate, and to generate solutions that might be sensible but that might not occur to a set of judges" rather than decide to hear the abortion issue.[9] Steven Calabresi mirrors this sentiment in stating that the Supreme Court unduly removed the "hotly contested" abortion issue from "the democratic process of the fifty states where compromise was possible…"[10] Further, in regards to the latter criticism, the decisive first trimester cut-off established in *Roe* is often criticized as an unduly legislative action that subverted constitutionally mandated congressional power. In fact, Paul Brest et al. assert that "*Roe*'s trimester framework has been one of its most heavily criticized features, on the grounds that the trimester framework was essentially legislative in character and gave states too little discretion to design their own abortion regulations."[11] Similarly, as is clear to Calabresi, the Supreme Court has essentially attempted "to write a national abortion code" over the course of its abortion jurisprudential history, an attempt that undoubtedly began with *Roe*.[12] Both of these criticisms of *Roe* reference the Court's democratic deficit in challenging the legitimacy of the Court's decision to hear *Roe* and infringe on legislative power.

Given how *Roe* was initially received by the public and elites, continues to be discussed by scholars as a judicially problematic case, and has shaped the abortion issue, an analysis of how the 1973 *Abortion Cases* were understood by the Supreme Court justices during decision-making is warranted. Because *Roe* was not immediately chosen as the primary case and early drafts of the majority opinion did not always reach the right to abortion issue, a proper analysis of the deliberation surrounding *Roe* requires

[9] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Massachusetts: Harvard University Press, 1999), 54.
[10] Steven G. Calabresi, "A Critical Introduction to the Originalism Debate," in *Originalism: A Quarter-Century of Debate*, Steven G. Calabresi, ed. (Washington, D.C.: Regnery, 2007), 13.
[11] Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* (New York: Aspen Publishers, 2006), 1405.
[12] Ibid.

that *Bolton* also be analyzed. Accordingly, this chapter consults the justices' correspondence – including letters, memos, and memoranda – and personal notes regarding *Roe* and *Bolton* to specifically identify if the justices were aware of or were anxious about how the *Abortion Cases* would affect judicial legitimacy.[13] For example, did the justices believe that *Roe* would be controversial or that the first trimester cut-off point would be heavily criticized? Were they concerned with the Court's democratic deficit after deciding to reach the abortion issue for the first time? Ultimately, addressing these questions will inform Chapter Four's analysis of the legitimacy keywords and claims that were articulated in both *Roe* and *Bolton*, and the rest of the Court's abortion cases.

The chapter follows Michael Klarman's analysis of *Brown v. Board of Education* (1954) in Chapter Six of his book, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*.[14] While Klarman traces when each of the justices joined the majority opinion to explain how *Brown* became a 9-0 decision when it was clearly not unanimous at the start of the justices' deliberations, this chapter traces whether and how various legitimacy concerns arose in deliberating how to rule on the *Abortion Cases*. The chapter focuses on specific correspondence that speaks to the major legitimacy concerns that arose over the course of the Court's deliberations of *Roe* and *Bolton*. The chapter first provides a brief explanation of why *Roe* and *Bolton*, rather than any other Supreme Court cases, are analyzed in this chapter. It then provides a general timeline of the *Roe* and *Bolton* deliberation process to contextualize when specific memos/memoranda emerged in relation to the cases' first oral arguments, rearguments, case Conferences, and final decisions. Next, the correspondence is extensively discussed and quoted to establish the legitimacy concerns that arose between initial arguments in 1971 and the final 1973 decisions. This section is organized based on the different legitimacy concerns that emerged during justices' deliberation of *Roe* and *Bolton*. While *Roe*'s trimester approach became heavily contested and criticized as unduly legislative, the justices were not particularly invested in the first trimester cut-off

[13] Files from the Library of Congress' William O. Douglas Papers, 1801-1980, Harry A. Blackmun Papers, 1913-2001, William J. Brennan Papers, 1945-1998, Thurgood Marshall Papers, 1949-1991, and Byron R. White Papers, 1961-1992 are consulted throughout this chapter.
[14] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 290-342.

point. However, that is not to say that the justices were unaware of the importance of their decisions or possible ramifications on Court legitimacy. Decisive legitimacy concerns did in fact arise regarding (1) the desire to have a near unanimous, if not a 9-0 opinion, (2) the debate surrounding the decision to reargue both cases, (3) Chief Justice Warren Burger's assignment of the majority opinion author, and (4) the recognized political and public importance of the abortion issue. Given the ultimate importance of the trimester framework in influencing the Court's abortion jurisprudence, the chapter subsequently discusses why the first trimester cut-off became the standard instead of viability, in light of the general legitimacy concerns that were articulated over the course of the deliberations. Finally, the chapter ends by discussing how the legitimacy concerns that emerged during internal deliberations of *Roe* and *Bolton* indicate how the justices have internalized the Court's democratic deficit, regardless of the so-called norm of judicial supremacy.

I. Using the Court's Abortion Jurisprudence as a Case Study

This chapter begins a two-chapter case study analysis of the Court's abortion jurisprudence. The jurisprudential area selected for analysis needed to meet two conditions, one to allow analysis in this chapter and the other to allow analysis in Chapter Four. This chapter needed cases that addressed a highly salient and controversial social issue. Chapter Four needed a long jurisprudential tradition that encompassed a number of cases and that emerged after the norm of judicial supremacy was established. The Court's abortion jurisprudence was chosen for analysis as it met the conditions required for both chapters; as both chapters address the same jurisprudential area, this chapter can directly inform the analysis in Chapter Four. A brief discussion of how the abortion issue satisfies the salience condition is provided in the remainder of this section; the other condition is further discussed within Chapter Four.

The abortion issue is undoubtedly a controversial and salient issue that has generated public and elite criticism of the Court. The controversy surrounding a woman's right to have an abortion is highlighted by politicization of the question. Linda Greenhouse and Reva Siegel suggest that *Roe* was not the cause of the contemporary polarization of the abortion issue as some controversy surrounding the

issue began before *Roe*.[15] However, *Roe* is still often cited as the cause of the deep political partisanship surrounding a woman's right to have an abortion; Donald Stephenson suggests that "no single judicial decision since *Dred Scott* [*v. Sandford*] in 1857 electrified the political system to a greater extent than *Roe v. Wade*."[16] Though they ultimately argue that *Roe* was not responsible for the contemporary polarization of the abortion issue that emerged in the mid- to late-1980s, Greenhouse and Siegel present many possible explanations for why the "Court's decision in *Roe* has come to matter as it has."[17] For example, two of their explanations are that partisanship regarding abortion could have increased because (1) the Court attempted to prematurely settle a political issue or (2) because the Court's decision motivated "pro-life" supporters to mobilize against the decision.[18] Given abortion's political relevance, even during the early-1970s, intra-judicial concerns regarding the Court's democratic deficit could be activated within the Court's first two abortion decisions; little valuable information would be garnered from an analysis of routine Court decisions that do not traditionally generate extrajudicial claims of Court illegitimacy and that were also found to be absent of legitimacy rhetoric.

Given that abortion is a salient and controversial issue, this chapter analyzes the justices' internal correspondence regarding *Roe* and *Bolton* in order to foreshadow the analysis of the Court's complete abortion jurisprudence that occurs in Chapter Four. It aims to identify the type of legitimacy concerns articulated by the justices in deciding the Court's first abortion cases. The legitimacy concerns that emerged when the justices were deliberating *Roe* and *Bolton* could have influenced the type of legitimacy keywords and claims that were articulated in the abortion cases that followed.

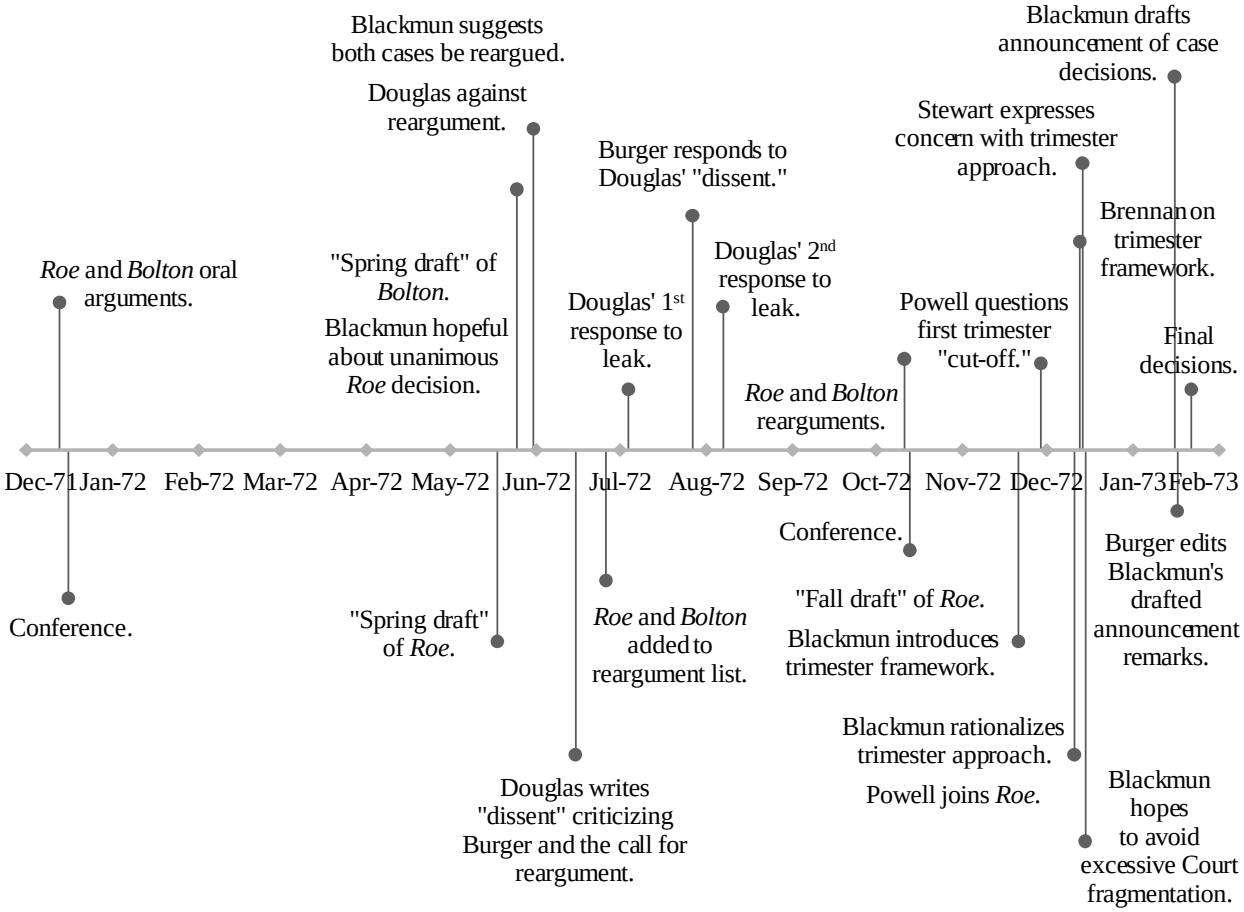
II. General Timeline of the *Roe* and *Bolton* Deliberation Process

This section lays out the general timeline of the justices' *Roe* and *Bolton* decision-making

[15] Linda Greenhouse and Reva B. Siegel, "Before (and After) *Roe v. Wade*: New Questions about Backlash," *The Yale Law Journal* 120 (2011).
[16] Donald Grier Stephenson, Jr., *Campaigns & the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), 190.
[17] Greenhouse and Siegel, 2085.
[18] Ibid.

process. It highlights the administrative progression of the cases and identifies when various issues and legitimacy concerns were articulated in the justices' correspondence and notes over the two year period between when the cases were first argued and when their decisions were handed down. The goal of this section is to contextualize the *Roe* and *Bolton* deliberations; a close analysis of the identified correspondence follows in the next sections. Figure 3.1 visually summarizes the emergence of legitimacy concerns during the deliberation process and parallels this section's broad description. The correspondence identified in this section will be extensively quoted and discussed in the remainder of the chapter.

Figure 3.1 Major developments during the *Roe* and *Bolton* decision-making process, 1971-1973.



Roe and *Bolton* were first argued on December 13, 1971 before a seven-man Court and, approximately five months later, Justice Blackmun circulated a first draft ("spring draft") of the two decisions to the other justices; a draft of *Roe* was circulated on May 18, 1972 and a draft of *Bolton* was circulated the following week on May 25, 1972.[19] In circulating *Bolton*, Blackmun first expressed his desire to have a unanimous decision in the *Abortion Cases*. Blackmun's concern with a fragmented Court continuously emerged during the decision-making process, specifically appearing in a memorandum he distributed on December 15, 1972 that addressed his extensive edits of both decisions.[20] Blackmun's concern with the legitimacy problems associated with fragmented decisions is further informed by his desire that both *Roe* and *Bolton* be reargued. While mention of reargument initially arose on December 20, 1971 and Blackmun tentatively hinted that he thought *Bolton* was an especially likely candidate for reargument in his early memos, it was not until May 31, 1972 when Blackmun decisively expressed that he favored reargument of both *Roe* and *Bolton*.[21] A letter Blackmun wrote to then Chief Justice William Rehnquist on July 20, 1987, years after the abortion cases were decided, provides important insight regarding Blackmun's rationale for strongly favoring reargument in 1972.[22] After Blackmun announced his desire that both abortion cases be reargued, debate regarding the merits of reargument ensued as the justices all expressed their support of or disagreement with reargument. Justice William Douglas, in particular, quickly expressed his disapproval of reargument, disagreeing with Blackmun's position.[23]

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[19] Harry A. Blackmun, Memorandum to the Conference, 18 May 1972, from the Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4 (announcing his draft of *Roe*: "Herewith is a first and tentative draft for this case"); Harry A. Blackmun, Memorandum to the Conference, 25 May 1972, from Library of Congress, *Byron R. White Papers, 1961-1992*, Part I: Case Files, 1961-1984, Box I: 237, Folder 7.

[20] Harry A. Blackmun, Memorandum to the Conference, 15 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 3.

[21] Warren E. Burger, Memo to William O. Douglas, 20 December 1971, from Library of Congress, *Byron R. White Papers, 1961-1992*, Part I: Case Files, 1961-1984, Box I: 238, Folder 3 (suggesting that *Roe* and *Bolton* were "quite probable candidates for reargument"); Harry A. Blackmun, Memorandum to the Conference, 31 May 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 3.

[22] Harry A. Blackmun, Letter to William H. Rehnquist, 20 July 1987, from the Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 3.

[23] William O. Douglas, Letter to Harry A. Blackmun, 31 May 1972, from Library of Congress, *Thurgood Marshall Papers, 1949-1991*, Supreme Court File, 1967-1991, Case File, 1967-1991, Box 99, Folder 2.

Various legitimacy concerns, including concern with fragmented decisions and the importance of the abortion issue, emerged during the reargument debate.

While discussions of the merits of reargument were occurring, Justice Douglas penned a scathing "dissent" attacking Chief Justice Warren Burger's assignment of the majority opinion.[24] As the "dissent" inexplicably reached the press and was quoted in a *Washington Post* article, Burger eventually responded to Douglas to refute many of his charges.[25] This exchange between Burger and Douglas evidences the most explicit and detailed discussion of the Court's institutional legitimacy. Once the issue surrounding assignment of an author for the Court's majority opinion passed and *Roe* and *Bolton* were reargued, the justices increasingly articulated concern with the public's reaction to what they knew was a politically and publicly charged issue. Recognition that the *Abortion Cases* would likely lead to criticism first appeared in Blackmun's November 21, 1972 memorandum to the Conference that accompanied a draft of his edited *Roe* decision ("fall draft").[26] Blackmun again articulated concerns with public backlash on January 16, 1973 when he circulated a draft of the remarks he intended to deliver when handing down the final opinions.[27] In editing Blackmun's announcement, Burger similarly highlighted the expected criticism that the Court would likely face, though he was against overtly informing the public of the Courts' concerns as Blackmun proposed.[28]

The trimester framework and first semester cut-off point that were ultimately articulated in *Roe* also entered discussions after Blackmun circulated his "fall draft" in late November of 1972.[29] Though the first trimester cut-off became a point of great contention with the general public and continuously re-emerged in future abortion cases, the justices' discussion of this point was notably less contentious than

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[24] William O. Douglas, Memorandum, n.d., from the Library of Congress, *William O. Douglas Papers, 1801-1980*, Part II: Supreme Court File, 1952-1980, Box 1589, Case File 2.
[25] Brennan, Opinions: October Term, 1972, *William J. Brennan Papers*; Warren E. Burger, Memo to William O. Douglas, 27 July 1972, from the Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 8.
[26] Harry A. Blackmun, Memorandum to the Conference, 21 November 1972, from the Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 6.
[27] Harry A. Blackmun, Memorandum to the Conference, 16 January 1973, from Library of Congress, *Byron R. White Papers, 1961-1992,* Part I: Case Files, 1961-1984, Box I: 238, Folder 1.
[28] Warren E. Burger, Memorandum to Harry A. Blackmun, n.d., from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 3.
[29] Blackmun, Memorandum to the Conference, 21 November 1972, *Harry A. Blackmun Papers*.

would be expected. Though Justice Lewis Powell wrote a memo to Blackmun inquiring about his chosen first trimester cut-off point on November 29, 1972 and Blackmun recognized the inquiry in a memo to all the justices, the cut-off point did not seem to significantly influence the justices' decisions to join the majority opinion or author separate opinions.[30] In fact, Powell had expressed that the trimester approach ceased to be a problem with him and joined Blackmun's opinion on December 11, 1972, presumably shortly before Blackmun sent a memo to all the justices rationalizing his approach and requesting that they consider their stance on the issue.[31] While Blackmun ultimately heard from nearly all of the justices, only Justices Brennan and Potter Stewart expressed a concern with how the cut-off point would affect the Court's legitimacy.[32] Overall, the trimester approach generated much less concern with the Court's legitimacy than did the reargument debates and the assignment of majority opinion author. After navigating the lack of unanimity, trials of reargument, assignment of majority opinion author, concerns with the public's likely reaction, and a notably passing discussion of the trimester approach, *Roe* and *Bolton* were finally handed down on January 22, 1973.

III. Emergence of Legitimacy Concerns during Deliberations of *Roe* and *Bolton*

The justices articulated specific legitimacy concerns throughout the *Roe* and *Bolton* decision-making process. Specifically, concerns with maintaining Court legitimacy emerged regarding (1) fragmented final decisions, (2) reargument, (3) assignment of a majority opinion author, and (4) salience of the abortion issue. In contrast to the legitimacy concerns that emerged surrounding these topics, *Roe*'s first trimester cut-off point generated minimal discussion of the Court's legitimacy. In the following sub-

[30] Lewis F. Powell, Letter to Harry A. Blackmun, 29 November 1972, from the Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 8; Harry A. Blackmun, Memorandum to the Conference, 11 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4.
[31] Lewis F. Powell, Memorandum to Harry A. Blackmun, 11 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 5; Blackmun, Memorandum to the Conference, 11 December 1972, *Harry A. Blackmun Papers*.
[32] William J. Brennan, Memo to Harry A. Blackmun, 13 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 8; Potter Stewart, Memo to Harry A. Blackmun, 14 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 8.

sections, both the types of legitimacy concerns that emerged during deliberations of *Roe* and *Bolton* and the general lack of articulated legitimacy concerns regarding the trimester approach are discussed.

III.a. *Fragmented Court Decisions*

Of all the justices, Justice Blackmun was most concerned with the legitimacy implications of fragmented Court decisions and explicitly referenced this preoccupation in memos that he distributed to the other justices. Blackmun first articulated his desire to garner a unanimous decision in the *Abortion Cases* in a memo accompanying his first "spring draft" of *Bolton* on May 25, 1972. In this memo, Blackmun admitted that his hope for a unanimous decision had influenced the route he pursued in drafting *Roe* (which he had distributed a few days prior to *Bolton*); he claimed: "It is because of Vuitch's vagueness emphasis and a hope, perhaps forlorn, that we might have a unanimous [C]ourt in the Texas case, that I took the vagueness route."[33] However, Blackmun's first *Roe* "spring draft" ultimately missed the mark, given the decision's narrowness in failing to "reach the central issue in the abortion area" and, needless to say, did not generate the unanimous majority opinion he was aiming for.[34] He subsequently altered course and substantially changed his *Roe* opinion to reach the abortion issue. After distributing and receiving comments on his new "fall draft," Blackmun again reasserted his desire to reduce the number of separate opinions that were authored. On December 15, 1972, Blackmun distributed a memorandum to the Conference that expressed appreciation for "the helpful suggestions that have come to me in response to my memorandum of December 11" and expressed that he "would like the opportunity to revise the proposed opinions in the light of these suggestions."[35] He likely hoped that revisions would further convince some justices to join his opinion as he reiterated that it was his "earnest hope, as you know, that on this sensitive issue we may avoid excessive fractionation of the Court…"[36]

[33] Blackmun, Memorandum to the Conference, 25 May 1972, *Byron R. White Papers*.
[34] Brennan, Opinions: October Term, 1971, *William J. Brennan Papers* (recounting the majority's disappointment regarding Blackmun's *Roe* "spring draft").
[35] Blackmun, Memorandum to the Conference, 15 December 1972, *Harry A. Blackmun Papers*.
[36] Ibid.

Though these two memos were the only instances when Blackmun wrote about his desire to avoid a fragmented decision (outside of the reargument issue), his aside that the justices were well aware of his hope to at least achieve a near unanimous decision suggests it was likely a stance he had quite regularly articulated in other forums. Blackmun's assertion that he was "still flexible, as to results" when initial drafts were circulated and his willingness to completely rework the argument in *Roe* and not discuss the vagueness issue that he continued to believe was correct suggests the lengths that he went to secure a 7-2 majority.[37] It is possible that Blackmun was simply interested in less fragmented decisions because he authored the majority opinions or, as he referenced, because of the sensitivity of the abortion issue. However, as the reargument debates further highlight, it is likely that Blackmun feared the negative repercussions on the Court's legitimacy after fragmented decisions are handed down.

III.b. *The Reargument Debate*

On January 18, 1972, when the justices were conferencing about potential cases that were candidates for reargument, Justice Blackmun first nominated both *Roe* and *Bolton* to the list.[38] However, the "suggestion was not enthusiastically received" and it was decided that Blackmun would draft the opinions and the Court would proceed from there.[39] At the end of May, when Blackmun received limited support for the way in which he intended to dispose of *Roe*, he reasserted "somewhat reluctantly, that reargument in <u>both</u> cases at an early date in the next term, would perhaps be advisable."[40] Blackmun ultimately came to the conclusion that reargument was necessary because he "believe[d], on an issue so sensitive and so emotional as this one, the country deserve[d] the conclusion of a nine-man, not a seven-man [C]ourt, whatever the ultimate decision may be."[41] He was further in favor of reargument as he was

[37] Blackmun, Memorandum to the Conference, 18 May 1972, *Harry A. Blackmun Papers*; Brennan, Memo to Blackmun, 18 May 1972, *Thurgood Marshall Papers*.
[38] Brennan, Opinions: October Term, 1972, *William J. Brennan Papers*.
[39] Blackmun, Memorandum to the Conference, 31 May 1972, *Harry A. Blackmun Papers.*
[40] Ibid.
[41] Ibid.

"not yet certain about all the details," including uncertainty regarding if *Roe* or *Bolton* should be the primary opinion.[42]

A personal letter from 1987 that Blackmun wrote to Rehnquist years after *Roe* and *Bolton* were decided highlights the strong concern Justice Blackmun had regarding deciding cases without a full Court, especially ones that would likely be controversial. Within this letter, Blackmun discussed the nearing October 1987 term and agreed with Rehnquist that the Court would likely "begin the Term with a bobtailed Court," which was an undesirable position because, as Blackmun explained, "it was somewhat awkward when less than nine are participating for an entire session or two, or, for that matter, even for a single case."[43] Blackmun then transitioned to discussing past terms during which the Court had operated with fewer than nine justices and recounted his concern regarding the seven-membered Court of 1971 that initially heard *Roe* and *Bolton* (as the cases were reargued before the full-Court, nine justices did participate in both final decisions). In his letter, Blackmun recounted how Chief Justice Burger had tasked a committee, of which Blackmun was a part, "to decide those cases that could (it was assumed) be adequately heard by a Court of seven."[44] In deciding the cases that would be heard, Blackmun lamented that the committee "did not do a good job," in part because *Roe* and *Bolton* were chosen to be heard by the "bobtailed" Court under the "misapprehension that they involved nothing more than an application of Younger v. Harris [1971]."[45] However, instead of being cases that would command an overwhelming majority of the Court, early Conference votes suggested that the justices were not in agreement regarding the two cases. At this point in the letter, Blackmun expressed his displeasure with 4-3 decisions, stating that he "was disturbed…about 4-3 decisions," because "the four-membered majority was less than a majority of a full court."[46] However, despite his concerns, Blackmun stated that "no one raised a fuss" about the 4-3 decisions that were handed down in 1971 and the Court "seems to have survived."[47] In

[42] Ibid.
[43] Blackmun, Letter to Rehnquist, 20 July 1987, *Harry A. Blackmun Papers*.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.

hindsight Blackmun could say that the Court survived, but it was clear that he was not certain, and almost surprised, that this was the case. Hence, Justices Blackmun's unwillingness to decide the *Abortion Cases* without a nine-man Court and his push for reargument was directly linked to his concern that deciding cases with only seven participating justices would undermine the Courts legitimacy, especially if the majority opinion did not command a near unanimous "bobtailed" Court.

Although Blackmun largely justified his proposal that *Roe* and *Bolton* be reargued because the abortion issue was too important to be decided by a fragmented, diminished Court, not all the justices were in agreement regarding the necessity of reargument. Given the lack of agreement, a debate ensued that was largely prompted by Justice Douglas' adamant opposition to reargument. Justices Powell, Rehnquist, and Byron White and Chief Justice Burger supported reargument, while Justices Brennan, Douglas, Thurgood Marshall, and Stewart opposed reargument.[48] Though Brennan, Douglas, and Powell sent memos to the Conference regarding their stance on the reargument issue, Douglas expressed the strongest opinion.[49] Specifically, on May 31, 1972, Douglas asserted that he felt "quite strongly that they should not be reargued" because (1) *Roe* and *Bolton* were "as thoroughly worked over and considered as any cases ever before the Court in [his] time" and (2) while he conceded that "where the Court is split 4-4 or 4-2-1 or even in an important constitutional case 4-3, reargument may be desirable," Douglas maintained "you have a firm 5 and the firm 5 will be behind you in these two opinions until they come down."[50] From his second rationale, it is clear that Justice Douglas did not so much disagree with Blackmun's concern with fragmented Court decisions or handing down salient cases without the participation of the full Court. Instead, Douglas thought that the five-justice majority in *Roe* and *Bolton*

[48] Thurgood Marshall, Spreadsheet, from the Library of Congress, *Thurgood Marshall Papers, 1949-1991*, Supreme Court File, 1967-1991, Case File, 1967-1991, Box 98, Folder 11; Thurgood Marshall, Spreadsheet, from the Library of Congress, *Thurgood Marshall Papers, 1949-1991*, Supreme Court File, 1967-1991, Case File, 1967-1991, Box 99, Folder 2; Willian J. Brennan, Opinions of William J. Brennan, Jr.: October Term, 1971, from Library of Congress, *William J. Brennan Papers, 1945-1998*, Part II: Case Histories, 1958-1989, Box II:6, Folder 14 (suggesting there were only five votes for reargument, which indicates that Justice Stewart must have been opposed to reargument).

[49] For individual memos indicating support or opposition to reargument of *Roe* and *Bolton*, see William J. Brennan, Memo, 31 May 1972, from Library of Congress, *Byron R. White Papers, 1961-1992*, Part I: Case Files, 1961-1984, Box I: 237, Folder 7; Lewis F. Powell, Memorandum to the Conference, 1 July 1972, from the Library of Congress, *Thurgood Marshall Papers, 1949-1991*, Supreme Court File, 1967-1991, Case File, 1967-1991, Box 99, Folder 2.

[50] Douglas, Letter to Blackmun, 31 May 1972, *Thurgood Marshall Papers*.

indicated that there was "solid agreement of the majority" and that "it [was] important to announce the case, and let the results be known…"[51] Ultimately, Douglas' assertion that certain fragmented cases may be problematic when there are vacancies on the Court indicates recognition that judicial legitimacy needs to be considered when handing down such decisions. Blackmun's and Douglas' open discussion of these concerns indicate that Supreme Court justices do in fact consider the effect that certain decisions will have on the Court's legitimacy. However, Douglas' strong opposition to reargument foreshadowed his exasperation with the Court's decision-making process that emerged in the scathing "dissent" he authored sometime in June 1972 (discussed in the following section).

During the reargument debates, the justices who favored reargument were additionally influenced by the concern that the Court would be handing down too many controversial decisions in one term. In summarizing one of the conferences that addressed the reargument issue, Brennan suggested that "In Conference the five votes for reargument became firm when Justice Blackmun urged that it would be politically unwise for the Court to strike down both the death penalty (which he assumed it would) and the abortion laws at the same time."[52] This blatant concern with how the public would react to the Court's use of judicial review in two different controversial and highly salient social issues further underscores that at least some of the justices were concerned with protecting the Court's legitimacy when deciding *Roe* and *Bolton* by not drawing too much negative attention to the Court. In other words, some of the justices were mindful of the Court's specific support and were possibly concerned with undermining it to the extent that the Court's legitimacy might be threatened, i.e. to the point that diffuse support would be undermined. As specific support refers to the public's support for individual Court decisions (or justices), the justices seemed to express concern that the expected controversies surrounding both the *Abortion Cases* and the death penalty cases would be reflected in a loss of specific support. Additionally, given that the justices did not express an unwillingness to hand down the unpopular decisions per say, just an unwillingness to do so simultaneously, suggests that they were likely further concerned with upholding

[51] Ibid.
[52] Brennan, Opinions: October Term, 1971, *William J. Brennan Papers*.

the Court's diffuse support. Although scholarly evidence regarding the link between specific and diffuse support is largely lacking in terms of how the public views the Court's legitimacy (as is suggested in Chapter One), the Supreme Court justices actually seemed to fear that dissatisfaction with individual decisions (specific support) does influence perceptions about the Court's institutional legitimacy (diffuse support).

III.c. *Chief Justice Warren Burger's Assignment of Majority Opinion Author*

Chief Justice Burger assigned the Court's *Roe* and *Bolton* majority opinions to be authored by Justice Blackmun on December 17, 1971.[53] Shortly thereafter, Douglas presumably wrote to Burger and indicated that his "notes show[ed] there were four votes to hold parts of the Georgia Act unconstitutional and to remand for further findings, e.g. on equal protection. Those four were Bill Brennan, Potter [Stewart], Thurgood Marshall, and me" and that "There were three to sustain the law as written – you, White, and Harry Blackmun."[54] Based on both Burger's and Blackmun's position in the minority, Douglas opined "I would think, therefore, that to save future time and trouble, one of the four, rather than one of the three should write the opinion."[55] While Burger had the power as Chief Justice to assign the majority opinion author, the power to do so is constrained by the need of the Chief Justice to be aligned with the majority opinion; only when the Chief Justice is in the majority does he possess the power to assign an author to draft the Court's opinion.[56] When the Chief Justice is not within the majority, as Douglas suggested was the case after the initial *Roe* and *Bolton* conferences, the responsibility conventionally falls upon the most senior justice in the majority. However, Burger responded to Douglas on December 20, 1971 suggesting there was no majority opinion; he "marked down no votes" in Conference as "there were, literally, not enough columns to mark up an accurate reflection of the voting

[53] Ibid.
[54] William O. Douglas, Memo to Warren E. Burger, n.d., from the Library of Congress, *Byron R. White Papers, 1961-1992,* Part I: Case Files, 1961-1984, Box I: 238, Folder 3.
[55] Ibid.
[56] For a discussion of the Chief Justice's agenda setting power, see Paul J. Wahlbeck, "Strategy and Constraints on Supreme Court Opinion Assignment," *University of Pennsylvania Law Review* 154 (2006).

in either the Georgia or the Texas case."[57] Though Burger ultimately stood by his decision and authority to assign the majority opinion at the end of December 1971, the issue of Burger's decision to select the majority author was far from settled.

Sometime during the reargument debates (between the end of May 1972 and June 26, 1972, when the decision was officially made to have the cases reargued), Justice Douglas authored a scathing "dissent" that articulated his frustrations with the *Abortion Cases*' decision-making process and Burger's assignment of the majority opinion author. Within this "dissent," Douglas first reminded everyone that it is typically the majority's decision "who their spokesman should be."[58] When the majority is not allowed to assign the author, as Douglas thought occurred in the *Abortion Cases*, "there is a destructive force at work in the Court. When a Chief Justice tries to bend the Court to his will by manipulating assignments, the integrity of the institution is imperiled."[59] In light of the correspondence between Douglas and Burger from the previous December regarding the Chief Justice's assignment of opinion author, it is clear that Douglas was accusing Burger of imperiling the legitimacy of the Supreme Court. He directly implicated Burger by suggesting that although "Up until now, a majority view, no matter how unacceptable to the minority, has been honored as such," with *Roe* and *Bolton*, "The purpose of the Chief Justice, a member of the minority in the Abortion Cases, in assigning the opinions was to try to keep control of the merits."[60] Douglas' explicit discussion of the Court's "integrity" emphasizes his awareness that the Court's legitimacy was not limitless and that the decision-making process needed to remain above unjustified manipulation by the Chief Justice.

Additionally, after sufficiently attacking Burger and arguing that his actions imperiled the Court's legitimacy, Douglas then shifted to criticizing the call that *Roe* and *Bolton* be reargued as "merely strategy by a minority somehow to suppress the majority view with the hope that exigencies of time will

[57] Burger, Memo to Douglas, 20 December 1971, *Byron R. White Papers*.
[58] Douglas, Memorandum, n.d., *William O. Douglas Papers*.
[59] Ibid.
[60] Ibid.

change the result."[61] He charged that such a "strategy dilutes the integrity of the Court and makes the decisions here depend on the manipulative skills of a Chief Justice." Douglas suggested that some justices favored reargument because "The Abortion Cases are symptomatic."[62] The end of the October 1971 term paralleled the 1972 congressional elections and "both parties [had] made abortion an issue."[63] Douglas reminded everyone that "What the parties say or do is none of our business" as the Court should "decide questions only on their constitutional merits."[64] Ultimately, Justice Douglas concluded his memo stating "I dissent with the deepest regret that" the Court was "allowing the institution to be manipulated for political objective."[65] Douglas' reminder that the Court was required to remain apolitical implies his awareness that the Court has neither a constitutional mandate nor unwavering public support to grossly extent its power into the political arena. It further emphasizes that Douglas was against the apparent encroachment of the judicial branch and blurring of the separation of powers by the politics of the election year.

Although Douglas withdrew his "dissent" and it was not published with the final decision, a copy of it leaked to the press and was quoted in an article published in the *Washington Post* during the summer of 1972.[66] Once news of the leak reached Douglas, he wrote a handwritten letter to Burger on July 4, 1972 within which he stated "I am upset and appalled. I have never breathed a word concerning the cases, or my memo, to anyone outside the Court. I have no idea where the writer got the story."[67] He continued "We have our differences; but so far as I am concerned they are wholly internal; and if revealed, they are mirrored in opinions filed, never in 'leaks' to the press."[68] He again denied any involvement in the leak after Burger responded to the charges evident in his "dissent" and claimed "I wrote the memo for internal consumption only. I showed it to no one not on our staff. I did not 'leak' it to the press. I believe in full

[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Brennan, Opinions: October Term, 1972, *William J. Brennan Papers*.
[67] William O. Douglas, Personal Letter to the Chief Justice, 4 July 1972, from the Library of Congress, *William O. Douglas Papers, 1801-1980*, Part II: Supreme Court File, 1952-1980, Box 1589, Case File 2.
[68] Ibid.

candor on [*sic*] our internal procedures…I did not write the memo for posterity."[69] Given Douglas' seemingly genuine shock regarding the breach in the Court's veil of secrecy, it does not appear that Douglas intended to incite a legitimacy crisis to impress upon the Court the extent that its *Roe* and *Bolton* deliberation process was illegitimately manipulating decision-making. However, that a document reached the press during the deliberations of such a controversial case is nevertheless surprising as leaks from the Supreme Court are exceedingly rare.

After the leak, Chief Justice Burger ultimately decided to write an internal response to Douglas on July 27, 1972 to "keep the record straight" and "allow any future scholar who may peruse the current press accounts or papers of Justices to have the 'due process' benefit of all the facts in context…"[70] In his memo, Burger reiterated his position of late December 1971 that a clear majority did not emerge from the *Roe* and *Bolton* conference and recognized that "It is not unusual for an assignment to go awry – a case may be assigned to a Justice and it develops he cannot write a Court opinion."[71] Further, regarding the reargument charges, Burger asserted that "Crucial constitutional issues should not be resolved by four of a 7-man Court when there are nine justices at the time the case comes down."[72] Thus, Burger emphasized his own concern with maintaining the Courts legitimacy in justifying his majority opinion author selection and having a full Court participate in controversial and publicly salient cases. Therefore, the exchange between Douglas and Burger underscores that both were not only aware of the limits to the Court's legitimacy, but that they both aimed to maintain the Court's institutional legitimacy during the *Roe* and *Bolton* decision-making process, though their specific legitimacy concerns differed.

III.d. *Public Salience of the Abortion Issue*

The salience of the abortion issue also became a point of concern once the justices passed reargument and neared the inevitable need to hand down the decisions. While the justices referenced the

[69] William O. Douglas, Memorandum to the Chief Justice, 7 August 1972, from the Library of Congress, *William O. Douglas Papers, 1801-1980*, Part II: Supreme Court File, 1952-1980, Box 1589, Case File 2.
[70] Burger, Memo to Douglas, 27 July 1972, *Harry A. Blackmun Papers*.
[71] Ibid.
[72] Ibid.

salience of the *Abortion Cases* at various points throughout the decision-making process, explicit concerns with the way in which the public would react to the decisions emerged in late-1972. For example, in a memo accompanying the "fall draft" of *Roe*, Blackmun reiterated that "the decision, however made, will probably result in the Court's [*sic*] being severely criticized."[73] Blackmun again articulated a similar concern in a memorandum to the Conference that accompanied a draft of what he planned to say in announcing the *Roe* and *Bolton* decisions. The very first sentence of his cover memo stated "I anticipate the headlines that will be produced over the country when the abortion decisions are announced."[74] He further made the unprecedented suggestion that copies of his remarks announcing *Roe* and *Bolton* be given to the press to give "at least some reason for the press not going all the way off the deep end."[75] Although this suggestion was unanimously opposed for fear that it would be mistaken and "relied upon as the opinion or as interpreting the filed opinion," Blackmun's proposal underscored his awareness and concern that the decisions would be widely controversial.[76]

The actual draft of his announcement further clearly attempted to mitigate public backlash. For example, Blackmun proposed to admit that the Court recognized "The abortion issue, of course, is a most sensitive, emotional and controversial one, perhaps one of the most emotional that has reached the Court for some time. The issue is a matter of great public interest and is not confined to lawyers and their law suits. Attitudes are firmly rooted and firmly held. At the same time, attitudes by no means are uniform." [77] He suggested that the justices were "aware of this" and that the justices "are fully aware that, however the Court decides these cases, the controversy will continue."[78] He also wanted to explicitly suggest that he "fears what the headlines may be…" should the public erroneously conclude that the Court found the Constitution to "compel abortion on demand."[79] That Blackmun wanted to impress upon the public the

[73] Blackmun, Memorandum to the Conference, 21 November 1972, *Harry A. Blackmun Papers*.
[74] Blackmun, Memorandum to the Conference, 16 January 1973, *Byron R. White Papers.*
[75] Ibid.
[76] William J. Brennan, Memo to Blackmun, 17 January 1973, *Byron R. White Papers, 1961-1992*, Part I: Case Files, 1961-1984, Box I: 238, Folder 1.
[77] Blackmun, Memorandum to the Conference, 16 January 1973, *Byron R. White Papers.*
[78] Ibid.
[79] Ibid.

care with which the *Abortion Cases* were decided is clear; he intended to indicate that the Court was not completely disconnected from public opinion and was aware of the controversy surrounding the issue.

Though Blackmun favored an open approach regarding his concerns with how the decisions would be received, Chief Justice Burger expressed reservations about Blackmun's honesty. In editing Blackmun's announcement, Burger took issue with many of the assertions quoted in the preceding paragraph. Specifically, he suggested that Blackmun remove the sentence that suggested the Court recognized the abortion controversy would continue regardless of the Court's decision.[80] He also recommended that Blackmun not admit to fearing the "headlines" after the decisions were released because he found the assertion "hazardous"; instead, Burger advocated for the removal of this reference and suggested Blackmun simply say "In closing, I emphasize what the Court does not do by these decisions."[81] Though one can only speculate why Burger suggested Blackmun be less open about the expected reaction to the decisions, it is likely that Burger neither wanted to draw more attention to the controversy of the issue or undermine the Court's authority by suggesting that the decisions would not be deemed final on the abortion issue. However, both Blackmun's and Burger's intentions were to insulate the Court's legitimacy. Blackmun likely wanted to avoid claims that the Court was undemocratic and countermajoritarian by potentially going against a large portion of public opinion without recognizing an awareness of the vast controversy surrounding the issue. Similarly, Burger was likely averse to undermining the finality of the Court's constitutional interpretation, though he also recognized Blackmun's warranted concern with the public's reaction to the decisions.

III.e. *The First Trimester Cut-Off Point*

In light of the legitimacy concerns that were articulated regarding the fragmented decisions, the reargument debates, claims of illegitimate minority manipulation of the Court's opinion, and recognition of likely public disapproval of the decisions, the factor that ended up causing the greatest public

[80] Burger, Memorandum to Blackmun, n.d., *Harry A. Blackmun Papers*.
[81] Ibid.

controversy, i.e. the first trimester cut-off point, was, perhaps ironically, a point of limited controversy for the justices. After *Doe* and *Bolton* were reargued in October 1972, Blackmun distributed a draft of his substantially altered majority opinion that, for the first time, introduced the trimester framework to distinguish when a woman's unhindered right to an abortion ended and states' constrained interests in preserving fetal life began. In a memo accompanying his November draft, Blackmun explained to the other justices "I have concluded that the end of the first trimester is critical."[82] However, he further asserted that "this is arbitrary, but perhaps any other selected point, such as quickening or vitality, is equally arbitrary."[83] Interestingly, a cut-off point that Blackmun asserted was vital to the decision and that was also identified by the public as a decisive part of the opinion, was initially chosen with limited justification. While the justices' memoranda indicate there was minimal heated controversy surrounding the cut-off point, that is to not to say that there was no discussion about the chosen cut-off. Justice Powell was the first to inquire about Blackmun's decision to ascribe the cut-off point at the end of the first trimester. He asked Blackmun if he viewed his "choice of 'the first trimester' as essential to [his] decision" because Powell "wondered whether drawing the line at 'viability' – if we conclude to designate a particular point of time – would not be more defensible in logic and biologically than perhaps any other single time."[84] Although Powell was the first to question Blackmun's trimester approach, he ultimately decided that the issue was not a significant point of contention and joined Blackmun's draft of *Roe* on December 11, 1972 before Blackmun made any conclusive decisions about the cut-off point. Specifically Powell asserted "I will join your present opinion and so I leave entirely to you whether to address the 'viability' issue. It does seem to me that <u>viability</u> is a logical and supportable [?], but this is not a controversial issue with me."[85] While Powell did suggest to Blackmun that he thought viability was a more justifiable cut-off point, he clearly did not fear that the trimester approach would become synonymous with claims of Court illegitimacy after the decisions were handed down.

[82] Blackmun, Memorandum to the Conference, 21 November 1972, *Harry A. Blackmun Papers*.
[83] Ibid.
[84] Powell, Letter to Blackmun, 29 November 1972, *Harry A. Blackmun Papers*.
[85] Powell, Memorandum to Blackmun, 11 December 1972, *Harry A. Blackmun Papers.*

Despite Powell's ultimate expression of support for Blackmun's *Roe* opinion, Blackmun decided to invite the other justices to weigh-in on the trimester approach. After receiving Powell's December 11th memo, Blackmun sent a memorandum to the other justices on the same day that stated "One of the members of the Conference has asked whether my choice of the end of the first trimester, as the point beyond which a state may appropriately regulate abortion practices, is critical" and conceded that "The inquiry is a valuable one and deserves serious consideration."[86] Blackmun claimed "I selected the earlier point because I felt that it would be more easily accepted (by us as well as others) and because most medical statistics and statistical studies appear to me to be centered there."[87] However, he also acknowledged that viability "has its own strong points. It has logical and biological justifications. There is a practical aspect, too…"[88] After Blackmun asked all the justices to consider their preferences regarding the cut-off, it was clear that everyone was not in agreement. For example, Justices Powell and Marshall favored viability, Justice Douglas favored the first trimester, and Justice Brennan favored moving the cut-off closer to viability without expressly stating the point was viability.[89] Despite this lack of consensus, the memos do not suggest a heated debate ensued. The justices certainly indicated their preferences and, in most cases, rationalized why they favored either the end of the first trimester or viability, but none of the justices indicated that the cut-off point would significantly sway their decision to join the majority opinion or author a separate opinion in their correspondence. For example, one specific concern regarding Blackmun's first trimester cut-off point was that it would cause "states to prohibit abortions completely at any later date" and unduly infringe on a woman's right to receive an abortion, not that it would lead to extensive criticism of the Court.[90]

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[86] Harry A. Blackmun, Memorandum to the Conference, 11 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4.
[87] Ibid.
[88] Ibid.
[89] Powell, Letter to Blackmun, 29 November 1972, *Harry A. Blackmun Papers*; Thurgood Marshall, Memo to Harry A. Blackmun, 12 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4; William O. Douglas, Memo to Harry A. Blackmun, 11 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 3; Brennan, Memo to Blackmun, 13 December 1972, *Harry A. Blackmun Papers*.
[90] Marshall, Memo to Blackmun, December 12, 1972, *Harry A. Blackmun Papers.*

Additionally, there was a notable absence of legitimacy concerns articulated around either the first trimester or viability approaches. Brennan and Stewart were the only justices to express even the slightest concern with establishing a cut-off point and to foreshadow the claims of Court illegitimacy that emerged when *Roe* was handed down. In articulating his thoughts on the trimester approach, Brennan suggested that the Court should imprecisely establish that a cut-off point existed "somewhere between 16 and 24 weeks (or whatever the case may be)" and simply maintain that "the exact 'cut-off' point and the specifics of the narrow regulation itself are determinations that must be made by a *medically informed state legislature* [emphasis added]."[91] With his assertion that the states should be responsible for determining the specific point at which they could regulate abortions (within a Court defined timeframe), Brennan seemed to suggest that the states were better able to make an informed decision as to the cut-off because state legislatures are democratically elected and accountable to the public (while the Supreme Court is not). Yet, despite this recognition, Brennan did not explicitly suggest that establishing a decisive cut-off point would be illegitimate or lead to attacks on the Court. Justice Stewart was much more forthright in expressing his concern with the trimester approach in suggesting that it was not the Court's role to legislate. Specifically, in a short note to Blackmun, Stewart claimed "I wonder about the desirability of the dicta being quite so inflexibly 'legislative'" in establishing the first trimester cut-off.[92] He asserted "my present inclination would be to allow the States more latitude to make policy judgments between the alternatives mentioned in your memorandum [i.e. viability or quickening], and perhaps others."[93] Stewart was justifiably concerned with the Court's apparent decision to expand judicial power and illegitimately legislate from the bench. Both Brennan and Stewart were ultimately right to worry about establishing such a cut-off point, as the trimester approach in *Roe* generated the greatest public backlash for the very reason Stewart explicitly articulated.[94] However, there is no evidence that Brennan or Stewart actively pushed their concerns past their memos, and their assertions stand in sharp contrast to

[91] Brennan, Memo to Blackmun, 13 December 1972, *Harry A. Blackmun Papers*.
[92] Stewart, Memo to Blackmun, 14 December 1972, *Harry A. Blackmun Papers*.
[93] Ibid.
[94] Brest et al., 1405.

the general lack of a similar concern shared by the other justices. Instead the other developments discussed earlier in this chapter that emerged when *Roe* and *Bolton* were being decided generated legitimacy concerns that seemed to cause significantly more debate between the justices.

IV. *Roe v. Wade*'s Trimester Framework

Despite the general absence of articulated legitimacy concerns regarding the establishment of a decisive cut-off point to separate a woman's interest from the states' interests, there was still a lack of consensus regarding if *Roe* should rely on the trimester framework or the viability framework. From the internal correspondence discussed in the preceding section, it is not readily apparent why Blackmun ultimately stuck to his initial proposed, "arbitrary" framework.[95] However, given that the chosen framework did in fact become a major point of contention, it is valuable to further analyze how the Court ultimately came to this conclusion. Accordingly, this section considers the factors that may have contributed to Blackmun's decisions to immortalize the first-trimester cut-off in *Roe* and discusses how legitimacy concerns articulated in response to the public salience of the abortion issue may have influenced the final framework.

When Justice Blackmun initially decided to have all the justices weigh-in on the cut-off point, he asserted that he was not particularly wedded to the trimester approach. However, he also did not want to alienate any of the justices who had already expressed support for his opinion draft. Specifically, Blackmun asserted "I would be willing to recast the opinions at the later date [viability], but I do not wish to do so if it would alienate any Justice who has expressed to me, either by writing or orally, that he is in general agreement, on the merits, with the circulated memorandum."[96] The internal memos suggest that, of the four justices who wrote to Blackmun about their opinions regarding the cut-off, only Douglas had expressed written support for the first trimester point.[97] Douglas had also joined Blackmun's *Roe* and *Bolton* opinions on November 24, 1972 (prior to the December 11th memo that raised the cut-off issue),

[95] Blackmun, Memorandum to the Conference, 21 November 1972, *Harry A. Blackmun Papers.*
[96] Blackmun, Memorandum to the Conference, 11 December 1972, *Harry A. Blackmun Papers.*
[97] Douglas, Memo to Blackmun, 11 December 1972, from Library of Congress, *Harry A. Blackmun Papers.*

though he indicated he would likely file a limited concurrence that would be "a mere fly speck in the total case."[98] As was initially expressed in his memo of December 11th, Blackmun may have been unwilling to move the cut-off point for fear of alienating Douglas.[99] Additionally, there is no evidence in the internal correspondence regarding Rehnquist's or Burger's preferences for the trimester approach or the viability framework. Rehnquist dissented from both *Roe* and *Bolton*, and expressed his intentions to do so before the cut-off point was articulated such that his opinion regarding the cut-off likely did not influence Blackmun's final decision regarding the articulated framework.[100] However, Burger may have influenced Blackmun's final position as he ultimately joined the majority, but had not expressed his agreement with the *Roe* opinion draft prior to Blackmun's December 11th memo. Given the limited correspondence between Douglas and Blackmun and the absence of correspondence from Rehnquist and Burger regarding the trimester and viability frameworks, one can only speculate the extent that these justices influenced Blackmun's decision to forgo the latter approach.

Given the lack of evidence suggesting that the justices in the majority opinion heavily influenced Blackmun's decision regarding the trimester framework, additional factors could have contributed to his ultimate decision; his decision to set the cut-off at the first trimester was likely influenced by a desire to draft an opinion that could be read and easily understood by the public, as had similarly been the case when the Court was deciding *Brown*. Accordingly, *Brown* can be used as an analogy to understand how legitimacy concerns generated from an issue's salience can influence the way in which a final opinion is written, and partially explain Blackmun's chosen first-trimester cut-off point. In discussing how the Court's *Brown* decision went from a 4-3-2 decision (four for, three undecided, and two against) to a unanimous 9-0 ruling, Klarman suggests that at least some of the justices were "Worried about the

[98] William O. Douglas, Memo to Harry A. Blackmun, 24 November 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4.
[99] Ibid.
[100] William H. Rehnquist, Memo to Harry A. Blackmun, 24 November 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4. (suggesting he would probably "file a dissent").

catastrophic impact of a divided decision," as they supposed that their decision would be highly salient.[101] Brest et al. similarly suggest that, in deciding the desegregation issue, Chief Justice Earl Warren "strongly desired that the Court speak with one voice on this controversial question…"[102] Given the understood salience of the case and the justices' concern with how it would be receive, the justices ultimately decided to write *Brown* for the general public.[103] Based on this intended audience, Chief Justice Warren's final unanimous opinion was also notably absent of legal and constitutional jargon that is not readily understood by the average reader. Similarly, as discussed earlier in the chapter, Blackmun was clearly concerned with how the public would receive the *Abortion Cases* and was aware of the abortion issue's salience, such that he may have wanted *Roe* to be readily understood by the non-elite public.

The most obvious piece of evidence that Blackmun wanted his opinion to be accessible to the public was his desire to disseminate his announcement in handing down the cases, which essentially summarized the Court's position, to the press.[104] Providing the press with such a memo would have subsequently provided the public with an accurate interpretation of the Court's decision and diminished the public's barrier to understanding legal text. Additionally, correspondence between Blackmun and his clerks suggests that they were aware of the public's interest in the decision and actively attempted to write the decision so that it could be read by the general public. For example, in a memo to Blackmun, George I. Frampton – one of Blackmun's clerks – asserted "I have consciously aimed for the average (non-lawyer) reader here and throughout" presumably because "there is no doubt that these opinions [*Roe* and *Bolton*] are going to be read by lots of non-lawyers."[105] Frampton further explained "I realize in rereading [part of the draft] that, especially with regard to the state's interest, I have been repetitive. That was in part intentional, since I had in mind the non-lawyer and the person who would be reading it through one

[101] Klarman, 301.
[102] Brest et al., 924.
[103] Ibid, 923.
[104] Blackmun, Memorandum to the Conference, 16 January 1973, *Byron R. White Papers*.
[105] GIF [George I. Frampton], Letter to Harry A. Blackmun, 11 August 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 152, Folder 5.

time and trying to grasp the nub of it."[106] Similarly, another one of Blackmun's clerks – John T. Rich – wrote to Blackmun regarding the "spring draft" of *Roe* and identified a concern with the "general reader."[107] Accordingly, Blackmun (and his clerks) wrote *Roe* with an understanding and expectation that the decision would be understood by the "average reader."[108]

As Blackmun wanted to write an opinion that was readily understandable, his articulation of the trimester approach was likely influenced by this goal. For example, one of the reasons Blackmun initially used to justify the trimester framework was based on the medical profession's use of trimesters; he maintained that trimesters were more in-line with the medical community.[109] As the medical profession used trimesters and pregnancy is largely discussed amongst the public in terms of the three trimesters, Blackmun perhaps wanted to invoke the language of trimesters to better connect with how the public conceptualizes pregnancy. The trimesters are more recognizable periods during the pregnancy process than is the somewhat flexible and ambiguous point of viability. Hence, Blackmun's desire to draft an opinion that was for the public, a desire that was largely influenced by his perceived legitimacy concerns given the salience of the abortion issue, could have, at least partially, influenced his decision to articulate a trimester framework in *Roe*.

V. Judicial Internalization of the Court's Democratic Deficit and Challenging the Presumed Norm of Judicial Supremacy

The emergence of specific legitimacy concerns over the course of the justices' *Roe* and *Bolton* decision-making process suggests that the justices are aware of the Court's democratic deficit. The way in which the legitimacy concerns were used to rationalize justices' decisions or positions throughout the deliberation process suggest that justices are also influenced by the need to insulate judicial legitimacy. For example, as discussed above, some of the justices rationalized the need to reargue the *Abortion Cases*

[106] Ibid.
[107] JTR [John T. Rich], "More Notes on *Roe v. Wade*," 17 May 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 9.
[108] GIF [George I. Frampton], Letter to Blackmun, 11 August 1972, *Harry A. Blackmun Papers* (referencing the "average reader").
[109] Blackmun, Memorandum to the Conference, 11 December 1972, *Harry A. Blackmun Papers*.

on the grounds that a fragmented, salient decision would undermine legitimacy.[110] As such, their decision to vote for reargument was directly influenced by their preoccupation with maintaining judicial legitimacy. Furthermore, despite operating under a supposed norm of judicial supremacy when *Roe* and *Bolton* were argued and handed down, the justices did not exhibit any indication that such a norm existed and that they did not need to be concerned with the Court's legitimacy. In fact, Justice Blackmun explicitly undermined the norm's validity in asserting that regardless of the Court's decision, the abortion issue would continue to be a source of great public controversy.[111] The implication of Blackmun's statement, i.e. that he did not think the Court's ruling on the constitutional issue would be sufficient to resolve the abortion dispute, cannot be reconciled with any notion of judicial supremacy. Similarly, when Blackmun was reflecting on how previous "bobtailed" Courts did not damage the Courts legitimacy as he feared they would, his recognition that the Court survived provided a perfect avenue for Blackmun to theorize that the Court might in fact benefit from some form of judicial supremacy.[112] However, rather than consider that the Supreme Court's positon might not be as tenuous as he or many of the other justices believed, Blackmun seemed to have little explanation for why the Court's legitimacy was not irrevocably damaged.[113] Hence, it is clear that the justices who decided *Roe* and *Bolton* did not acknowledge a norm of judicial supremacy and were instead concerned with the Court's democratic deficit.

VI. Conclusion

This chapter analyzed the justices' correspondence regarding deliberations of *Roe* and *Bolton* to lift the typical veil of secrecy that surrounds judicial decision-making and better inform the content analysis of the abortion cases that follows in Chapter Four. During decision-making, the justices were clearly concerned with legitimacy in very specific contexts. Some of the justices expressed concerns with the implications of fragmented decisions, especially in deciding controversial cases. Additionally,

[110] Blackmun, Memorandum to the Conference, 31 May 1972, *Harry A. Blackmun Papers;* Brennan, Opinions: October Term, 1971, *William J. Brennan Papers*.
[111] Blackmun, Memorandum to the Conference, 16 January 1973, *Byron R. White Paper.*
[112] Blackmun, Letter to Rehnquist, 20 July 20 1987, *Harry A. Blackmun Papers*.
[113] Ibid.

extensive debate surrounded both the call for reargument of the cases and Chief Justice Burger's assignment of majority opinion author. Within these debates, it was articulated that deciding cases without a full Court of nine-justices could undermine the perception that the Court's decisions were dependent on the composition of the Court and suggest that the Court was illegitimately becoming involved in political issues. The justices' awareness of the controversy surrounding the abortion issue and the public salience of the cases also led them to consider the way in which the decisions would be written and announced. Furthermore, perhaps most notably, not only did the justices consider forgoing the trimester approach that *Roe* is so renowned for and embracing the viability framework that ultimately emerged in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), but nearly all of the justices were unconcerned with the potential ramifications of establishing a seemingly legislative cut-off point on the Court's legitimacy. However, in other instances, the justices were clearly concerned with maintaining the Court's legitimacy throughout the process of coming to a decisive decision in *Roe* and *Bolton*. How these concerns transcended the justices' personal correspondence and informed the rhetoric used in both the Court's first two abortion cases and future abortion decisions remains to be discussed in the following chapter.

Just as this chapter discussed the type of legitimacy concerns that emerged in the justices' internal correspondence and personal notes, Chapters Four and Five proceed to identify the type of legitimacy rhetoric that emerged in abortion decisions and the Chief Justices' annual *Year-End Report on the Federal Judiciary*, respectively. While the integrity of the judiciary and public opinion/confidence are discussed in all three contexts, some of the articulated legitimacy concerns and claims differed depending on the context under which they emerged and within which they were discussed.

4

LEGITIMACY RHETORIC IN THE U.S. SUPREME COURT'S ABORTION DECISIONS

The collaborative process of constitutional decision-making and opinion writing was coined the "collegial game" by Forrest Maltzman, James Spriggs, and Paul Wahlbeck to underscore the strategic interplay that occurs between a justice tasked with authoring a majority opinion, the justices who comprise the majority coalition, and the justices who refuse to join the majority.[1] This strategic interplay among Supreme Court justices leads to an opinion that reflects the compromises necessary to maintain a majority coalition and concurrences and dissents that highlight the perceived shortcomings of the majority opinion; essentially, the strategic interplay ensures that the final majority opinion is constrained.[2] For example, Maltzman et al. found that majority opinion writers are regularly forced to respond to concerns or disagreements with a draft of an opinion.[3] This finding was aptly demonstrated in Chapter Three. These concerns and disagreements can be articulated in response to the apparent expansiveness of a draft, "vulnerable assertions" that are made in a draft, the application of a controversial or new standard, the authoring justices' choice of language, and/or particular paragraphs with which justices takes issue.[4] For example, Maltzman et al. highlight an instance in which Chief Justice Warren Burger claimed he would only join Justice Thurgood Marshall's *Ake v. Oklahoma* (1985) majority opinion if he inserted the four words "'in a capital case'" into a specific paragraph of his draft opinion, and another instance when Justice Potter Stewart took issue with two "'unnecessary'" paragraphs of Chief Justice Burger's *Griggs v. Duke Power Co.* (1971) opinion draft.[5] Given the "collegial game" and justices' specific articulation of

[1] Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000).
[2] Ibid; Chris W. Bonneau, Thomas H. Hammond, Forest Maltzman, and Paul J. Wahlbeck, "Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court," *American Journal of Political Science* 51 (October 2007): 891 (recognizing the constrained nature of Supreme Court majority opinion writing).
[3] Maltzman, Spriggs, and Wahlbeck, 81.
[4] Ibid, 107 (quoting Justice Antonin Scalia's comments regarding the implications that a dissent draft has on a majority opinion draft).
[5] Ibid, 95 (regarding the exchange between Chief Justice Burger and Justice Marshall), 106 (regarding the exchange between Justice Stewart and Chief Justice Burger).

concerns with an opinion draft, the Court's final opinion, including concurrences and dissents, likely reflects precise rhetoric that was purposefully included in the decision. Therefore, justices' use of rhetoric in Court decisions can provide an important glimpse into the factors that influence a final opinion.

This chapter analyzes the justices' use of legitimacy rhetoric in their final opinions to signal concerns that a decision may exacerbate the Court's democratic deficit. Specifically, the use of rhetoric that (1) expresses concern with the Court's institutional legitimacy, (2) suggests that the Court must proceed cautiously to avoid invoking legitimacy concerns, or (3) attacks a majority opinion, concurrence, or dissent as threatening the Court's institutional legitimacy indicates that justices are at least aware of, if not preoccupied with, the Court's democratic deficit. As this project aims to identify whether and how Supreme Court justices have internalized attacks on the Supreme Court's legitimacy, an analysis of their decision rhetoric that speaks directly to the institution's legitimacy provides another metric (following Chapter Three) for identifying the extent of the justices' direct concern with the Court's democratic deficit. The chapter analyzes this question from the justices' perspectives and draws from key concepts discussed in Chapters One and Two to identify rhetoric that signals legitimacy concerns. Additionally, the chapter is informed by the legitimacy concerns that emerged when the justices were deciding *Roe v. Wade* (1973) and *Doe v. Bolton* (1973), which were discussed in Chapter Three. While James Gibson and Michael Nelson assert that "The justices of the Court are keenly aware of the importance of legitimacy to their institution, often discussing the concept in their rulings," this chapter aims to verify and to quantify the extent that justices are preoccupied or concerned with institutional legitimacy in their decisions.[6] Furthermore, the justices' preoccupation with the Court's democratic deficit has important implications regarding the so-called norm of judicial supremacy. If justices consistently reference the Court's legitimacy in final decisions, even after the norm of judicial supremacy was supposedly established, a clear contradiction exists. Justices cannot recognize the norm of judicial supremacy that essentially

[6] James L. Gibson and Michael J. Nelson, "The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto," *Annual Review of Law and Social Science* 10 (November 2014): 203.

assures the Court's legitimacy, while simultaneously remaining concerned with the extent of the Court's democratic deficit.

This chapter specifically analyzes Supreme Court justices' use of legitimacy rhetoric within the Court's abortion jurisprudence. First, the cases to be analyzed are identified and their selection is justified. Second, the parameters of analysis are discussed, i.e. how legitimacy rhetoric was identified and quantified. The abortion cases were ultimately read for evidence of keywords and claims that indicate judicial concerns with institutional legitimacy. These keywords and claims were largely informed by the factors that contribute to the Court's democratic deficit (discussed in Chapter One), the attacks of the Court's judicial schools of thought (discussed in Chapter Two), and the legitimacy concerns that emerged when the justices were deciding the abortion issue for the first time (discussed in Chapter Three). Third, each of the keywords and claims are discussed to indicate why they signal a legitimacy concern and examples of their appearance in decisions are provided. The broader findings and their implications are then presented and discussed; the content analysis suggests that (1) justices use keywords and claims to signal both explicit, direct concerns with Court legitimacy and less overt, nuanced concerns with legitimacy, (2) more legitimacy concerns appear in dissents than in majority opinions and concurrences, (3) 1983 is a turning-point that signals increasing judicial concern with Court legitimacy, and (4) *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) are important outliers where justices' use of legitimacy rhetoric spiked. Lastly, the potential implications of the content analysis are that (1) Supreme Court justices do not recognize a norm of judicial supremacy and (2) there are possible cumulative effects regarding justices' articulation of legitimacy concerns in final opinions.

I. The Supreme Court's Abortion Jurisprudence

This chapter analyzes the Supreme Court's abortion jurisprudence for evidence of justices' use of rhetoric that expresses concern with the Court's institutional legitimacy. Specifically, the analysis focuses on Supreme Court decisions that pertain to a woman's fundamental right to have an abortion. These cases

have generated attacks of the Court for two reasons. First, the Court's first abortion case, *Roe*, is often argued to be an expansive decision that violated separation of powers by infringing on Congress' constitutionally guaranteed legislative right; the claim that the abortion issue does not belong in the Courts has been a common attack throughout the history of the Court's abortion jurisprudence.[7] Second, the Court has been attacked for unjustifiably and illegitimately expanding the right to privacy mandated in *Griswold v. Connecticut* (1965) to the abortion issue.[8] Accordingly, cases whose substantive claims do not concern the Court's establishment and articulation of this fundamental right are not analyzed. For example, abortion cases that primarily address pro-life protestors' First Amendment right to free speech (e.g. *Bigelow v. Virginia* (1975), *Bray v. Alexandria*'s *Woman*'s *Health Clinic* (1993), *National Organization for Women v. Scheidler* (1994), *Madsen v. Women*'s *Health Center* (1994), *Schenck v. Pro-Choice Networks of Western N.Y.* (1997), *Hill v. Colorado* (2000), and *Scheidler v. National Organization for Women* (2006)) or that address a woman's material access to abortion (e.g. *William v. Zbaraz* (1980), *Rust v. Sullivan* (1991), and *Dalton v. Little Rock Family Planning Services* (1996)) are not included in the dataset. The twenty-one abortion cases analyzed in this chapter were identified by Ian Shapiro as concerning a woman's fundamental right to have an abortion.[9] They include:

- *Roe v. Wade* (1973),
- *Doe v. Bolton* (1973),
- *Planned Parenthood of Central Missouri v. Danforth* (1976),
- *Singleton v. Wulff* (1976),
- *Beal v. Doe* (1977),
- *Maher v. Roe* (1977),
- *Poelker v. Doe* (1977),
- *Colautti v. Franklin* (1979),
- *Bellotti v. Baird* (1979),
- *Harris v. McRae* (1980),
- *H. L. v. Matheson* (1981),
- *City of Akron v. Akron Center for Reproductive Health* (1983),
- *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft* (1983),
- *Simopoulos v. Virginia* (1983),
- *Thornburgh v. American College of Obstetricians and Gynecologists* (1986),

[7] Ian Shapiro, *Abortion: The Supreme Court Decisions 1965-2000*, Ian Shapiro, ed. (Indiana: Hackett Publishing Company, Inc., 2001), xxiii.
[8] Ibid.
[9] *Abortion: The Supreme Court Decisions 1965-2007*, Ian Shapiro, ed. (Indiana: Hackett Publishing Company, Inc., 2007).

- *Webster v. Reproductive Health Services* (1989),
- *Ohio v. Akron Center for Reproductive Health* (1990),
- *Hodgson v. Minnesota* (1990),
- *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992),
- *Stenberg v. Carhart* (2000), and
- *Gonzales v. Carhart* (2007).

As briefly mentioned in Chapter Three, the Court's abortion jurisprudence includes enough cases for analysis and emerged after the so-called norm of judicial supremacy was established. First, analyzing the cases in one substantive area of jurisprudence avoids the concern of selecting on the dependent variable, i.e. highly salient cases that are likely to invoke judicial concerns with legitimacy and lead to the use of legitimacy rhetoric in Court opinions. The Court's abortion decisions are analyzed because there are enough cases to allow meaningful analysis. Additionally, focusing on all of the cases within this substantive issue permits an analysis of how judicial concerns with the Court's legitimacy may have changed over time. The analysis will indicate if justices' use of legitimacy rhetoric was affected as the number of cases in the jurisprudential history increased and the political climate changed.

Second, the Court's abortion jurisprudence was selected because all of the cases were decided after scholars maintain the norm of judicial supremacy was established. As discussed in Chapter One, the emergence of a norm of judicial supremacy was largely facilitated by the Warren Court.[10] Additionally, President Dwight D. Eisenhower's reaffirmation of the Court's *Brown v. Board of Education* (1954) ruling in enforcing desegregation in Little Rock, Arkansas has been cited as evidence of the norm's existence in the 1950s.[11] As *Roe* was decided in 1973, the Court was operating under a supposed norm of judicial supremacy for the duration of its abortion jurisprudential history. Therefore, any use of legitimacy rhetoric in the analyzed abortion decisions would undermine the claim that a norm of judicial supremacy exists. At the very least, the use of legitimacy rhetoric in the Court's decisions would suggest that the justices have not recognized the emergence of this norm.

[10] Larry D. Kramer, "Judicial Supremacy and the End of Judicial Restraint," *California Law Review* 100 (2012): 630.
[11] Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five," *The Yale Law Journal* 112 (November 2002): 170-1; Kramer, 630.

II. Parameters of Analysis

Each of the afore mentioned Supreme Court abortion decisions were evaluated for instances in which keywords were used or claims were made that signal a legitimacy concern. The appearance of legitimacy rhetoric in the majority opinions, concurrences, partial concurrences/dissents, and dissents was noted. Keywords and claims that appeared in footnotes were included as footnotes are important components of the Court's rulings. For example, a classic example that highlights their importance in Supreme Court rulings is "Footnote Four" of *United States v. Carolene Products Co.* (1938). This footnote identified certain instances when "more exacting judicial scrutiny" of congressional legislation would be necessary, e.g. when "discrete and insular minorities" were implicated, and became the foundation for the Court's development of the tiers of scrutiny doctrine.[12]

A running tally of the keywords that suggest a legitimacy concern is reported, such that the total number of times a keyword appeared in each section of a decision (i.e. majority opinion, concurrence(s), partial concurrence(s)/dissent(s), or dissent(s)) was identified. Legitimacy claims were similarly tallied based on the number of sentences that expressed a concern with legitimacy. Sentences that subsequently referenced the concern once it was identified were additionally included in the tally to represent the depth of the judicial concern with the Court's democratic deficit. Instances in which only one sentence is constructed to signal a concern does not suggest the same preoccupation with legitimacy as does a concern articulated and explained over the course of a few sentences. Similarly, a concern that is articulated only once in a decision does not suggest the same depth of concern as does a concern that repeatedly appears in a decision.

An analysis of the Court's legitimacy rhetoric is admittedly not clear-cut and presents a slippery-slope between concerns of decisional legitimacy and concerns of the Court's institutional legitimacy. Claims that merely attack a decision's legitimacy or suggest that the interpretation of the constitutional question is erroneous do not invoke the same institutional concerns with legitimacy as do claims that, for example, suggest the Court expanded judicial review or violated separation of powers. The former are

[12] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

present in nearly every non-unanimous Supreme Court decision as dissenting justices identify the ways in which the majority coalition erred in deciding the case. Conversely, instances in which the latter emerge are more exact indications of judicial concerns with the Court's democratic deficit. Accordingly, this chapter identifies and analyzes the use of keywords and claims that indicate concerns with the Court's *institutional* legitimacy.

III. Keywords that Signal Justices' Concern with the Court's Institutional Legitimacy

Keyword searches of the Supreme Court's abortion jurisprudence suggest that judicial concern with Court legitimacy was not immediate; in other words, the concern was not fully articulated in many of the earliest cases including and following *Roe*. Instead, the keyword analysis reveals that although judicial concerns with legitimacy emerged slowly, there was a clear persistent concern with the Court's legitimacy in later abortion decisions. In fact, 1983 appears to be an important turning-point in the number of times keywords signaling legitimacy concerns appeared in Court decisions.

The keywords that were identified as signaling a concern with institutional legitimacy included (1) "illegitimacy" or "illegitimate," (2) "legitimacy" or, its synonym, "integrity," and (3) "*stare decisis*."[13] The number of times these keywords appeared in the twenty-one abortion decisions is summarized in Table 4.1. For all twenty-one abortion cases, the number of times a keyword appears in each part of an opinion is identified. Additionally, the total number of keywords signaling legitimacy concerns per decision is provided. Of the twenty-one analyzed cases, eight cases (38.1%) contained at least one of the identified keywords. However, these eight cases were not evenly distributed over the course of the thirty-four year period between *Roe* and *Gonzales*. Instead, justices began to consistently implicate the Court's

[13] "Illegitimacy" or "illegitimate" were only included in the analysis when they were used to indicate a concern with the Court's institutional legitimacy. Instances in which decisions or premises were called illegitimate were not included in the tally. For example, Justices Byron White and William Rehnquist's charge regarding the "illegitimacy of the Court's decision in *Roe v. Wade*" in their *Thornburgh* dissent was not included in the tally. Additionally, the use of "legitimacy" or "integrity" in a decision was only identified as signaling a concern with the Court's democratic deficit when it was used in the context of discussing the extent of the Court's institutional legitimacy/integrity; instances in which justices discussed the legitimacy or integrity of the marital relationship, body, medical profession, or legitimate state powers as connected to the tiers of scrutiny approach were omitted. The keyword search additionally included the terms "activist" and "judicial activism," although neither appeared in any of the twenty-one abortion cases.

legitimacy in decisions beginning in 1983. Specifically, of the ten abortion cases decided since the beginning of 1983, seventy percent have included at least one the above keywords; only one case decided before 1983 had any instance in which a keyword appeared, and the keyword only appeared once.

Table 4.1 Keywords signaling a concern with the Supreme Court's institutional legitimacy in abortion decisions by case and type of opinion, 1973-2007.

Case		Illegitimacy/ Illegitimate	Legitimacy/ Integrity	*Stare Decisis*	Total
***Roe* (1973)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Dissents	0	0	0	
***Bolton* (1973)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Dissents	0	0	0	
***Singleton* (1976)**	Majority Opinion	0	0	1	
	Concurrences	0	0	0	1
	Partial Concurrences/Dissents	0	0	0	
***Danforth* (1976)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Partial Concurrences/Dissents	0	0	0	
***Beal* (1977)**	Majority Opinion	0	0	0	
	Dissents	0	0	0	0
***Poelker* (1977)**	Majority Opinion	0	0	0	
	Dissents	0	0	0	0
***Maher* (1977)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Dissents	0	0	0	
***Colautti* (1979)**	Majority Opinion	0	0	0	
	Dissent	0	0	0	0
***Bellotti* (1979)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Dissents	0	0	0	
***Harris* (1980)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Dissents	0	0	0	
***Matheson* (1981)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Dissents	0	0	0	
***City of Akron* (1983)**	Majority Opinion	0	0	2	
	Dissents	0	0	4	6
***Ashcroft* (1983)**	Majority Opinion	0	0	0	
	Partial Concurrences/Dissents	0	0	0	0
***Simopoulos* (1983)**	Majority Opinion	0	0	0	
	Partial Concurrences/Dissents	0	0	0	0

Case		Illegitimacy/ Illegitimate	Legitimacy/ Integrity	*Stare Decisis*	Total
	Dissents	0	0	0	
***Thornburgh* (1986)**	Majority Opinion	0	0	0	
	Concurrences	0	0	2	9
	Dissents	0	1	6	
***Webster* (1989)**	Majority Opinion	1	0	1	
	Concurrences	0	0	0	10
	Partial Concurrences/Dissents	1	2	5	
***Hodgson* (1990)**	Majority Opinion	0	0	2	
	Concurrences	0	0	0	2
	Partial Concurrences/Dissents	0	0	0	
***Ohio* (1990)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	0
	Dissents	0	0	0	
***Casey* (1992)**	Majority Opinion	0	12	8*	79
	Partial Concurrences/Dissents	1	20	38	
***Stenberg* (2000)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	3
	Dissents	2	0	1	
***Gonzales* (2007)**	Majority Opinion	0	0	0	
	Concurrences	0	0	0	3
	Dissents	0	1	2	

*One reference to *stare decisis* was not included in the tally as it appeared in a referenced journal article title.

III.a. *Justices' Explicit Use of "Illegitimacy" and "Legitimacy"*

Justices' use of "illegitimacy" and "legitimacy"/"integrity" in decisions presents the most obvious concern with the Court's democratic deficit. Aside for *Webster* and *Casey*, these keywords predominantly appeared in separate opinions that expressed concern with a majority opinion's effect on institutional legitimacy. The first explicit concern that the Court was acting illegitimately emerged in Justice Sandra Day O'Connor's *Thornburgh* dissent where she criticized "not only the wisdom but also the legitimacy of the Court's attempt to discredit and pre-empt state abortion regulation…"[14] This concern was followed by the fear that the Court would be attacked with claims of illegitimacy in *Webster*. Specifically, Justice Harry Blackmun explicitly indicated that he "fear[ed] for the integrity of, and public esteem for, [the] Court" and further criticized the majority for "invit[ing] charges of cowardice and illegitimacy to [the

[14] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Court's] door" after the majority failed to satisfactorily justify their decision and abide by precedent.[15] While *Thornburgh* and *Webster* seem to preview some justices' concerns with Court legitimacy, by *Casey*, the depth of the concern for the Court's legitimacy reached an entirely new level. Both the majority opinion and three of the four partial dissents engaged in a discussion regarding the extent of the Court's legitimacy. For example, in delivering the opinion of the Court, Justices O'Connor, Anthony Kennedy, and David Souter reserved the third section (Section III) of their decision to discuss the Court's legitimacy. This section included statements suggesting that "The Court's power lies…in its legitimacy…," that the "Court's legitimacy depends on making legally principled decisions…," and that "the legitimacy of the Court would fade with the frequency of its vacillation."[16] By the end of this section, O'Connor, Kennedy, and Souter essentially confirmed their deep concern with the Court's legitimacy by admitting to the concern and explaining that "The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible."[17] Chief Justice Rehnquist similarly expressed concern with the Court's legitimacy in *Casey* when he suggested that the *Casey* majority created "an entirely new method of analysis, without any roots in constitutional law..." and that "neither *stare decisis* nor 'legitimacy' are truly served by such an effort."[18] Though the justices' explicit use of "illegitimacy" and "legitimacy"/"integrity" were cursory in a few of the Court's abortion decisions, the most overt use of these keywords appeared in *Casey*, which had been the Court's most salient abortion case since *Roe.*

III.b. *The Two Faces of Stare Decisis in Abortion Decisions*

Stare decisis, meaning "to stand by decided matters," has influenced judicial decision-making for a large part of the Court's jurisprudential history. While Chapter Two discussed the emergence of Common Law Constitutionalism as the first articulation of an interpretive approach that actively

[15] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
[16] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[17] Ibid.
[18] Ibid.

championed adherence to *stare decisis*, justices have generally followed the Court's precedents and expressed reservations about overturning decisions over the course of the entire Court's history. Instances in which justices overturn a decision are generally accompanied by recognition that frequently overturning decisions is not conducive to maintaining the Court's institutional legitimacy and an assertion that extenuating circumstances mandate divergence from precedent. Although *stare decisis* was not first articulated with the emergence of Common Law Constitutionalism, the interpretive approach does serve to clearly identify and articulate the concerns that arise when *stare decisis* is not a significant principle guiding Supreme Court decision-making. Specifically, the overarching claim of Common Law Constitutionalism is that overturning precedent destabilizes constitutional interpretation.[19] Maintaining precedent conveys that Court decisions are not arbitrary, reduces the impression that decisions are dependent on the composition of the Court, and, as Dion Farganis observes, helps the Court preserve legitimacy. [20] Accordingly, the principle of *stare decisis* is directly tied to legitimacy. Not only does the principle serve to foreclose major problems with the Court's legitimacy, but *stare decisis* was also articulated via Common Law Constitutionalism as a response to the attacks of Court legitimacy under Legal Realist and Originalist judicial interpretation.

Discussions of *stare decisis* in Court decisions inherently suggest a concern with legitimacy; references to *stare decisis* imply a certain level of judicial apprehension with undermining the Court's precedents and invoke the legitimacy concerns that accompany inconsistent and standardless constitutional interpretation. Ultimately, there are two instances in which *stare decisis* emerged in the Court's final abortion decisions. First, references to *stare decisis* were often made to justify why the Court should not overturn a prior abortion decision or to reiterate the importance of following precedent. Essentially, "the arguments for stare decisis matter most in cases that the Court thinks were wrongly

[19] Morgan Marietta, *A Citizen's Guide to the Constitution and the Supreme Court: Constitutional Conflict in American Politics* (New York: Routledge, 2014).
[20] Dion Farganis, "Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy," *Political Research Quarterly* 65 (March 2012): 206.

decided originally but that should nevertheless not be overruled for a variety of prudential reasons."[21] Following this logic, Justice Lewis Powell justified the majority's reaffirmation of *Roe* in the *City of Akron* majority opinion by claiming that "the doctrine of *stare decisis,* while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."[22] Similar sentiments were expressed by the *Casey* majority, and again reiterated by Justice Ruth Bader Ginsburg in *Gonzales*. It was claimed that "overruling *Roe*'s central holing would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[23] These references to *stare decisis* reflect justices' concerns with undermining the Court's jurisprudential history and their acknowledgement that doing so damages the Court's institutional legitimacy.

Second, justices discuss *stare decisis* in abortion decisions to justify why specific precedents – generally *Roe* – should be overturned, despite the simultaneously acknowledged importance of following precedent under normal circumstances. For example, Justice Byron White recognized in *Thornburgh* that "The rule of *stare decisis* is essential if case-by-case judicial decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results."[24] However, despite this recognition of the importance of following precedent, White proceeded to describe past situations in which overturning erroneous precedents was more important than continuing to follow bad or poorly reasoned prior decisions; he specifically cited *West Coast Hotel Co. v. Parrish* (1937), *United States v. Darby* (1941), and *Brown* as examples of cases that justifiably overturned precedent.[25] He suggested that in these instances, "history has been far kinder to those who departed from precedent than

[21] Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* (New York: Aspen Publishers, 2006), 1456.
[22] *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).
[23] *Planned Parenthood of Southeastern Pennsylvania v. Casey*; *Gonzales v. Carhart*, 127 U.S. 1610 (2007).
[24] *Thornburgh v. American College of Obstetricians and Gynecologists*.
[25] Ibid.

to those who would have blindly followed the rule of *stare decisis*."[26] Justice White is ultimately among the group of Supreme Court justices who believe that following *stare decisis* is not always the most legitimate course.[27] During instances when justices believe precedent should be overturned, the discussions of *stare decisis* that often accompany these claims suggest that justices recognize the legitimacy concerns associated with sharply diverging from precedent. Regardless of which of the above situations inform a justices' reference to *stare decisis*, the principle is discussed in order to insulate the Court from claims of illegitimacy.

IV. Claims that Signal Justices' Concern with the Court's Institutional Legitimacy

The following claims suggest judicial concern with Court legitimacy: (1) the Court violated separation of powers, (2) the Court violated the principle of federalism, (3) the Court expanded or misapplied judicial review, (4) the Court was inventing, rather than interpreting, a Constitution, (5) constitutional interpretation was excessively rigid, (6) justices were unduly influenced by public pressure, (7) justices were relying on value judgements to guide decision-making, and (8) interpretation relied on the selective use of history or facts. The number of times these claims appeared in the Court's twenty-one abortion decisions is summarized in Table 4.2. For all twenty-one analyzed abortion cases, the number of times a claim appeared in each part of an opinion is identified, and the total number of claims articulated per decision is provided. Claims expressing judicial concern with the Court's legitimacy appeared in a majority, seventy-one percent, of the Court's abortion cases. However, the average number of claims per decision increased significantly after the beginning of 1983. There were fourteen instances in which justices expressed concern with the Court's legitimacy in the eleven cases from *Roe* through *Matheson*, which corresponds to an average of one claim per decision (1.3 claims per decision). Conversely, the number of claims suggesting legitimacy concerns drastically increased in the ten cases after *Matheson*. After *Matheson*, there were sixty-two instances where these claims were articulated, which is an average

[26] Ibid.
[27] Marietta, 82 (suggesting that "The attitude toward precedent is a clear division among the Justices. Some believe that precedents should be followed…others believe that following past mistakes is an affront to the system…").

of six (6.2) claims per decision. The number of times claims signaling a concern with legitimacy appeared in the Court's final decisions exhibited nearly a five-fold (4.8-fold) increase after the start of 1983.

Table 4.2 Claims signaling a concern with the Supreme Court's institutional legitimacy in abortion decisions by case and type of opinion, 1973-2007.

		Claims*								Total
		1	2	3	4	5	6	7	8	
***Roe* (1973)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	3
	Dissents	2	0	0	0	0	0	0	1	
***Bolton* (1973)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	4
	Dissents	1	0	1	1	0	0	1	0	
***Singleton* (1976)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	0
	Partial Concurrences/Dissents	0	0	0	0	0	0	0	0	
***Danforth* (1976)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	1
	Partial Concurrences/Dissents	0	1	0	0	0	0	0	0	
***Beal* (1977)**	Majority Opinion	1	0	0	0	0	0	0	0	2
	Dissents	0	0	0	0	0	0	0	1	
***Poelker* (1977)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	0
	Dissents	0	0	0	0	0	0	0	0	
***Maher* (1977)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	0
	Dissents	0	0	0	0	0	0	0	0	
***Colautti* (1979)**	Majority Opinion	0	0	0	0	0	0	0	0	1
	Dissents	0	1	0	0	0	0	0	0	
***Bellotti* (1979)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	1	0	1
	Dissents	0	0	0	0	0	0	0	0	
***Harris* (1980)**	Majority Opinion	1	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	2
	Dissents	0	0	0	0	1	0	0	0	
***Matheson* (1981)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	0
	Dissents	0	0	0	0	0	0	0	0	
***City of Akron* (1983)**	Majority Opinion	0	0	0	0	0	0	0	0	0
	Dissents	0	0	0	0	0	0	0	0	
***Ashcroft* (1983)**	Majority Opinion	0	0	0	0	0	0	0	0	1
	Partial Concurrences/Dissents	0	0	0	0	0	0	1	0	
***Simopoulos* (1983)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Partial Concurrences/Dissents	0	0	0	0	0	0	0	0	0
	Dissents	0	0	0	0	0	0	0	0	

		Claims*								Total
		1	2	3	4	5	6	7	8	
***Thornburgh* (1986)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	2	0	18
	Dissents	6	0	1	0	0	0	9	0	
***Webster* (1989)**	Majority Opinion	2	0	0	0	0	0	0	0	
	Concurrences	2	0	0	0	0	0	0	0	4
	Partial Concurrences/Dissents	0	0	0	0	0	0	0	0	
***Hodgson* (1990)**	Majority Opinion	0	0	0	0	0	0	0	0	5
	Partial Concurrences/Dissents	2	0	1	0	0	0	2	0	
***Ohio* (1990)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	3	0	0	0	0	0	0	0	3
	Dissents	0	0	0	0	0	0	0	0	
***Casey* (1992)**	Majority Opinion	0	0	0	0	0	3	0	0	23
	Partial Concurrences/Dissents	3	0	0	2	0	7	7	1	
***Stenberg* (2000)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	7
	Dissents	4	0	0	0	0	0	3	0	
***Gonzales* (2007)**	Majority Opinion	0	0	0	0	0	0	0	0	
	Concurrences	0	0	0	0	0	0	0	0	1
	Dissents	0	0	0	0	0	0	1	0	

*Numbers correspond to the claims listed above.

IV.a. *Judicial Separation of Powers and Federalism Violations*

Two of the most important principles to emerge from the Constitution were the Founders' dedication to separation of powers between the three branches of the federal government and federalism. The Founders imbedded a principle of separation of powers in the Constitution to prevent tyranny of one federal body and, accordingly, invested the executive, legislative, and judicial branches with distinct powers. Federalism was articulated as a system of shared power between the federal government and state governments to prevent a system of absolute federal power. Given these principles that carve-up government authority, the judiciary's legitimate powers are vested in or can be traced back to the Constitution. If the Supreme Court violates separation of powers or federalism and takes on the powers invested in the executive and legislative branches or the states, respectively, it undoubtedly undermines its institutional legitimacy. In fact, *ex post facto* public and elite attacks of Court rulings have criticized the Court's violation of separation of powers and federalism in deciding certain cases; for example, the

Brown and *Griswold* Courts were attacked as partaking in illegitimate lawmaking.[28] Additionally, the justices themselves have also identified instances in which the Court threatens institutional legitimacy by violating these clearly articulate constitutional principles. While justices have recognized the legitimacy concerns associated with violating both separation of powers (claim one) and federalism (claim two), concerns with the former were more regularly articulated than were federalism violations. For example, Justice White's assertion that the majority's *Colautti* opinion "[was] a further constitutionally unwarranted intrusion upon the police powers of the state" marks one of the two instances in which the illegitimacy of infringing on federalism was articulated in the Court's abortion decisions.[29] Conversely, justices' claims that the Court violated separation of powers were manifested in two different ways in the abortion decisions.

First, justices invoke a legitimacy concern associated with a separation of powers violation when they claim that the Court illegitimately legislates from the bench. This specific claim was evident in Chief Justice Rehnquist's *Roe* dissent when he stated that the majority's decision "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."[30] A position that Justices William Brennan and Stewart had insinuated during the internal deliberations regarding *Roe*'s trimester approach.[31] The claim is also evident in Justice Antonin Scalia's *Stenberg* dissent when he suggests the dissenters "disagree with the majority on their policy-judgement-couched-as-law."[32] Second, separation of powers violations are manifested in claims that the abortion issue should be decided by the people through the democratic political process. While these specific claims initially emerged in earlier abortion decisions as mild assertions, they reemerged in later decisions as more forceful condemnations of the Court's continued willingness to undermine its legitimacy in addressing the

[28] Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Maryland: The John Hopkins University Press, 2005), 57 (regarding *Brown*); Shapiro, *Abortion: The Supreme Court Decisions 1965-2000*, xxiii.
[29] *Colautti v. Franklin*, 439 U.S. 379 (1979).
[30] *Roe v. Wade*, 410 U.S. 113 (1973).
[31] William J. Brennan, Memo to Harry A. Blackmun, 13 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 8; Potter Stewart, Memo to Harry A. Blackmun, 14 December 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 8.
[32] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

highly controversial abortion issue. In *Bolton*, Justice White briefly asserted that the decision to prioritize a woman's right to choose an abortion over the state's interest in preserving human life "for the most part, should be left with the people and to the political processes the people have devised to govern their affairs."[33] However, by *Thornburgh* and *Webster*, the charges that the Court should return the abortion issue to the populace and legislature are more concretely linked to explicit concerns with Court legitimacy. For example, in his *Webster* concurrence, Justice Scalia emphatically asserted that "this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical – a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive."[34] By the Court's later abortion cases, a clear shift was evident as significantly more justices seemed to believe that the abortion issue did not belong in the Supreme Court's docket.

IV.b. *Concerns with Undermining the Purpose of Judicial Constitutional Interpretation: Misapplying Judicial Review and Inventing a Constitution*

The Supreme Court's role in the federal government is to engage in constitutional interpretation. Over the course of the Court's jurisprudential history, this purpose is often manifested in judicial review. Although judicial review has contributed to the Court's democratic deficit and is regularly targeted by critics of the Court's legitimacy because it is not explicitly articulated in the Constitution, as Michael Gerhardt, Stephen Griffin, and Thomas Rowe suggest, "For all purposes of the study of constitutional theory, judicial review is, for all practical purposes, a given in the structure of American government" such that judicial review largely enables the Court to do its job.[35] As most of the Court's constitutional interpretation requires judicial review, when justices misapply or illegitimately expand judicial review they ultimately fail to properly do the Court's job. Justices' articulation of claims criticizing the

[33] *Doe v. Bolton*, 410 U.S. 179 (1973).
[34] *Webster v. Reproductive Health Services*.
[35] Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* (New Jersey: LexisNexis, 2007), 5.

misapplication and/or expansion of judicial review (claim three) in the Court's abortion cases therefore suggests concern with undermining the Supreme Court's legitimacy. For example, Justice Kennedy suggests that the *Hodgson*'s majority misapplied judicial review in invalidating Minnesota's state law requiring minors to notify their parents about their intentions to have an abortion, i.e. the invalidation was "incompatible with [the Court's] constitutional tradition and any acceptable notion of judicial review of legislative enactments."[36] The claim that application of judicial review was unacceptable suggests that the Court illegitimately undermined the purpose of judicial review.

Additionally, constitutional interpretation is expected to have some connection to the Constitution, whether the connection be to its text (as argued by Formalists), its general principles (as embraced by Legal Realists), its drafters' intentions (as proposed by Originalists), or its previous interpretations (as maintained by Common Law Constitutionalists). The Court's role in the federal government is solely to interpret the Constitution; it is decidedly not to amend the Constitution as Article Five vests Congress and the people with the authority to propose and ratify constitutional amendments.[37] When the Court deviates from this role, its legitimacy is directly threatened because it foregoes its institutional mandate. Accordingly, claims expressing concerns with the Court's legitimacy are evident in decisions when it is suggested that the Court was engaging in constitutional amending (claim four). Specifically, one example emerges when Chief Justice Rehnquist stated in *Casey* that "It is difficult to maintain the illusion that [the Court is] interpreting a Constitution rather than inventing one, when [the Court] amend[s] its provisions so breezily."[38]

IV.c. *Judicial Concerns with Institutional Legitimacy that Stem from Extrajudicial Attacks of the Schools of Judicial Thought*

Chapter Two extensively discussed the emergence of the four main schools of judicial thought as responses to attacks that challenge the Court's legitimacy. The chapter suggested that justices adopt the

[36] *Hodgson v. Minnesota*, 497 U.S. 417 (1990).
[37] U.S. Constitution, art. 5.
[38] *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

schools of judicial thought to guide decision-making and to respond to claims that judicial constitutional interpretation is illegitimate. The lack of judicial adoption of Thomas Grey's less stringent interpretive framework during the 1970s – when the Court was not facing a legitimacy crisis – was presented in Chapter Two as one piece of evidence that justices deem the mode of interpretation to be highly important in responding to claims of Court illegitimacy.[39] That attacks of the justices' interpretive approach are seen to destabilize Court legitimacy is evident in the adoption of new interpretive frameworks that specifically respond to the perceived illegitimacy of the prior framework. Similarly, justices' articulation of concerns with an interpretive framework, mirroring the criticisms extensively discussed in Chapter Two, ultimately signals that justices are concerned that the Court's institutional legitimacy is threatened by erroneous constitutional interpretation. Justices' concerns paralleling the extrajudicial criticisms of the four main schools of jurisprudential thought are evident in the Court's abortion decisions. Given that the abortion cases began in the early 1970s, the predominance of articulated concerns that stem from Legal Realism and Originalism corresponds to the emergence of attacks in the 1980s that challenged the Legal Realist monopoly and the subsequent attacks suggesting Originalism was merely Legal Realism for conservatives.[40] There were significantly less judicial concerns arising from Formalism, as Formalism had lost favor at the turn of the twentieth-century and was largely incorporated into Originalism.

The one claim that signaled a concern with Formalist interpretation (claim five) appeared in Justice Marshall's *Harris* dissent when he asserted that "the Court resolves the equal protection issue in this case through a relentlessly formalistic catechism."[41] This claim ultimately stems from the late-nineteenth century Populist and Progressive attacks of Court legitimacy that identified rigid constitutional interpretation as a hindrance to necessary constitutional change.[42] However, the general lack of articulated

[39] For Grey's article on "interpretivism" and "non-interpretivism," see Thomas Grey, "Do We Have an Unwritten Constitution?," *Stanford Law Review* 27 (February 1975).
[40] See Robert C. Post and Reva B. Siegel, "Originalism as a Political Practice: The Right's Living Constitutionalism," *Fordham Law Review* 75 (January 2006) for a critique of Originalism that suggests it is merely the conservative version of Legal Realism.
[41] *Harris v. McRae*, 448 U.S. 297 (1980).
[42] William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (New Jersey: Princeton University Press, 2014).

judicial concern with Formalist interpretation in abortion decisions follows from the lack of justices' use of Formalism to substantially guide decision-making of abortion cases. Instead, as *Roe* was decided during the Legal Realist interpretive monopoly, justices predominantly relied on Legal Realism to guide constitutional interpretation. This reliance on the Legal Realist school of thought is partially evidenced by the general lack of judicial concerns arising from this mode of constitutional interpretation in early abortion decisions, a period during which extrajudicial attacks of interpretation were similarly largely absent. For example, before the emergence of the legitimacy crisis of the 1980s that challenged the legitimacy of Legal Realism, justices only criticized the majority's mode of interpretation (via claims five through eight) four times, as compared to the thirty-seven times justices made such claims beginning in 1980. It was when attacks of the Court's interpretive framework emerged when justices' explicit articulation of virtually the same concerns with the mode of interpretation became obvious in abortion decisions.

The claim that interpretation is unduly influenced by public pressure (claim six) directly expresses concern with Legal Realism, as Legal Realists seek to interpret the Constitution in light of changing societal norms, and stems from attacks of the Warren and Burger Courts that suggested Legal Realist interpretation was foundationless and arbitrary.[43] Legal Realist interpretation is less reliant on the Constitution's text and more interested in interpreting changing societal norms such that concern with the extent of public influence on final decisions arises from Legal Realist interpretation. Articulation of this concern was evident in *Casey* when resistance to overturning *Roe* was predicated on the concern that doing so would signal undue public influence on the final opinion. Specifically, Justices O'Connor, Kennedy, and Souter suggested that "only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first [i.e. *Roe*] was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to

[43] Marietta, 126.

reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[44] Chief Justice Rehnquist similarly mirrored the majority opinion in reiterating that "The judicial branch derives its legitimacy not from following public opinion, but from deciding by the best lights whether legislative enactments of the popular branches of government comport with the Constitution."[45] These explicit reminders that institutional legitimacy in part relies on remaining outside of public pressure suggests the justices were concerned with mitigating the emergence of attacks that had previously disrupted the Legal Realist interpretive monopoly.

Additionally, both Legal Realist and Originalist constitutional interpretation has been challenged as ultimately dependent on justices' moral predilections (claim seven). These claims clearly emerged in abortion decisions. Specifically most of the claims that interpretation was based on value judgements were directed at the use of Legal Realist interpretation, as many of the claims were articulated by Originalist justices. For example, in many of their opinions, Originalists Scalia and Rehnquist mirrored the attacks of Legal Realism that were introduced in the 1980s. For example, Scalia and Rehnquist maintained that abortion decisions have been a "random and unpredictable result of [the Court's] consequently unchanneled individual view" and significantly influenced by "personal predilection" in *Hodgson* and *Casey*, respectively.[46] Other justices also expressed similar concerns, e.g. Justice White had previously articulated a concern regarding the influence of justices' values during abortion decision-making in *Thornburgh*; he suggested that "in so determining that liberty [i.e. the liberty to choose an abortion], the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own value preferences."[47] White further elaborated in the associated footnote that he could not "conceive of a definition of the purchase of 'imposing value preferences' that [did] not encompass the Court's action" in declaring a woman's right to have an abortion fundamental.[48]

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[44] *Planned Parenthood of Southeastern Pennsylvania v. Casey*.
[45] Ibid.
[46] *Hodgson v. Minnesota*; *Planned Parenthood of Southeastern Pennsylvania v. Casey.*
[47] *Thornburgh v. American College of Obstetricians and Gynecologists.*
[48] Ibid.

Though the moral judgements claim was predominantly articulated in response to a concern with Legal Realist interpretation, judicial claims also criticized the selective use of history and facts (claim eight) that is the mechanism by which justices' values are argued to influence decision-making under Originalism. As discussed in Chapter Two, Originalists were attacked for manipulating and ignoring history to achieve desired conservative outcomes.[49] Some justices took-up a similar criticism in abortion decisions. For example, they claimed that the *Roe* majority "eschews the history of the Fourteenth Amendment in its reliance on the 'compelling state interest' test" and that in the *Beal* majority opinion "'relevant factors [are] misapplied or ignored' [brackets in original]."[50] Ultimately, claims that a decision is based on something other than the Constitution suggest a concern with the Court's legitimacy given the judicial branches' responsibility to interpret the Constitution during decision-making and to do so in a fair, consistent, objective, and guided manner.

V. Findings

A content analysis of the justices' use of rhetoric in abortion cases suggests that the justices do, in fact, discuss the Court's legitimacy in decisions, especially in partial or full dissents. Additionally, the trend in the use of legitimacy rhetoric in the earlier abortion cases, as compared to later cases, suggests that 1983 was a turning-point in the Court's abortion jurisprudential history. The sharp increase in the number of legitimacy keywords and claims that appeared in *Thornburgh* and *Casey* further signals that the justices were particularly concerned with the Court's legitimacy in these cases. Each of these findings is discussed in more detail in the following subsections.

V.a. *Evidence of Clear Judicial Concern with the Court's Institutional Legitimacy*

The above data suggest that Supreme Court justices have expressed clear concern with the Court's institutional legitimacy in their abortion decisions. The included quotes highlight the type of

[49] O'Neill, 211.
[50] *Roe v. Wade*; *Beal v. Doe*, 432 U.S. 438 (1977).

legitimacy rhetoric that regularly appeared in the Court's abortion decisions. The appearance of keywords and claims in final decisions shows that concern with Court legitimacy was both explicitly discussed and also articulated in a less overt, more nuanced fashion. The claims specifically highlight the breadth of factors that justices recognize as subverting judicial legitimacy. The articulation of very pointed concerns with an interpretive approach or an expansion of power (e.g. a concern with a violation of separation of powers, federalism, or judicial review) and their explicit link or implied suggestion of a legitimacy concern paralleled the attacks that were generated outside the judiciary. Accordingly, justices are hyperaware of and directly responsive to external attacks of the Court's legitimacy. Furthermore, most of the legitimacy rhetoric that appeared in the decisions is notably different than the legitimacy concerns that had been articulated during deliberations of *Roe* and *Bolton* (Chapter Three). While Justice Brennan's and Justice Stewart's concerns with the illegitimate, seemingly legislative *Roe* trimester framework did emerge in Rehnquist's *Roe* dissent and charges that the justices must remain objective (i.e. apolitical and not influenced by personal preferences) parallels Justice William Douglas' unpublished, leaked *Roe* "dissent," these exemplify the only instances in which the concerns are similar.[51] The general lack of similarity between the justices' initial concerns in deciding the abortion issue for the first time and the concerns that were articulated over the course of the Court's abortion jurisprudential history suggests that the justices' legitimacy concerns both evolved and were exacerbated over time.

Nineteen justices served on the Court from the October 1973 term that decided *Roe* through the October 2007 term that decided *Gonzales*. Fifteen of these justices either authored at least one majority/separate opinion that articulated concern with the Court's legitimacy or joined an opinion that expressed such concern.[52] Justices Douglas, Stephen Breyer, Samuel Alito, and Chief Justice John

[51] Brennan, Memo to Blackmun, 13 December 1972, from Library of Congress, *Harry A. Blackmun Papers*; Stewart, Memo to Blackmun, 14 December 1972, *Harry A. Blackmun Papers*; William O. Douglas, Memorandum, n.d., from the Library of Congress, *William O. Douglas Papers, 1801-1980*, Part II: Supreme Court File, 1952-1980, Box 1589, Case File 2; *Roe v. Wade*.

[52] These fifteen justices included Justices William J. Brennan, Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, Lewis Powell, Jr., John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, and Ruth Bader Ginsburg, and Chief Justices Warren E. Burger and William H. Rehnquist.

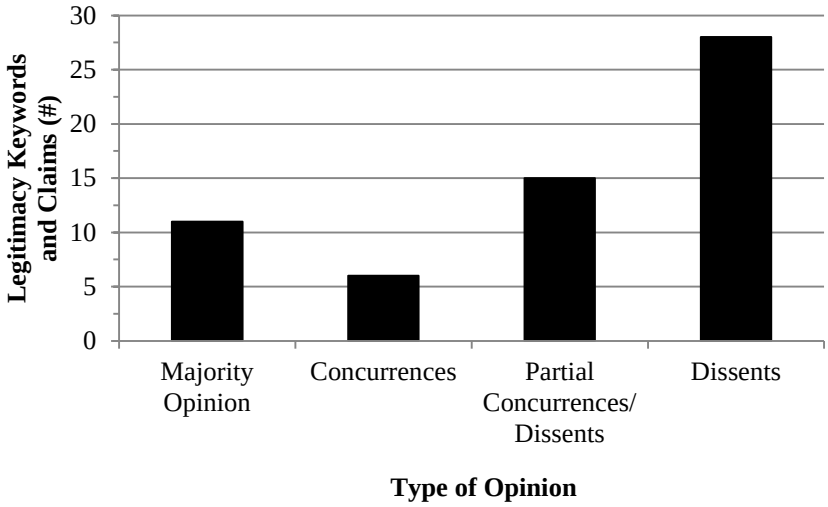
Roberts, were the only justices who did not express any legitimacy concerns in the Court's abortion decisions. However, Justice Douglas resigned in 1975 and was therefore only presiding on the bench during the Court's first two abortion decisions. Similarly Justice Breyer was nominated to the bench in 1994 and only participated in the Court's final two decisions, and Chief Justice Roberts and Justice Alito were nominated in 2005 and 2006, respectively and thus only heard *Gonzales*. Overall, a majority of justices presiding over abortion cases have expressed various concerns with the extent of judicial legitimacy and fears that the Court's institutional legitimacy would be undermined. That a vast majority of justices have voiced concerns with the Court's institutional legitimacy in deciding abortion cases suggests that the Court recognizes its democratic deficit.

V.b. *Legitimacy Concerns in Dissenting Opinions*

Although there were instances in which justices articulated legitimacy concerns in majority opinions and concurrences, legitimacy rhetoric was mostly evident in dissenting opinions. Specifically, Figure 4.1 shows the total number of times that legitimacy keywords and claims appeared in the Court's abortion majority opinions, concurrences, partial concurrences/dissents, and full dissents. More keywords and claims were articulated in the Court's dissenting opinions than in other parts of a decision. Specifically, there were approximately 2.5, 4.5, and 2 times more legitimacy concerns in dissents than in majority opinions, concurrences, and partial concurrences/dissents, respectively (Fig. 4.1). While the most legitimacy concerns are clearly articulated in abortion decision dissents, the legitimacy concerns articulated in both *Thornburgh* and *Casey* are not included in Figure 4.1. The data associated with these cases are not included in Figure 4.1 as both are identified and discussed as outliers later in this chapter. However, when *Thornburgh* and *Casey* legitimacy concerns are included, the concerns still predominantly appear in decisions that are associated with the dissent, i.e. in partial concurrences/dissents and full dissents (Fig. 4.2). While the most legitimacy rhetoric was clearly articulated in partial concurrences/dissents when *Thornburgh* and *Casey* are included, these opinions are still partially associated with the dissent. Additionally, the second greatest amount of legitimacy concerns appeared in

fully dissenting opinions when all twenty-one cases are considered. Legitimacy rhetoric was still used by dissenting justices 1.5 and approximately 5 times as often as in majority opinions and concurrences, respectively (Fig. 4.2). Ultimately, the predominance of legitimacy rhetoric in both partial and full dissenting opinions suggests that the dissent often identifies institutional concerns that majority and concurring opinions fail to recognize and identify. Furthermore, the dissent not only identifies ways in which the Court's democratic deficit is exacerbated, but the dissent also regularly suggests that the majority decision implicates the Court's institutional legitimacy. For example, Justice White suggested the majority undermined the Court's legitimacy in *Bolton* as "The Court simply fashion[ed] and announce[d] a new constitutional right…"[53] As this statement invokes a concern with the Court's enumeration of new Constitutional rights (claim 4), the Court's legitimacy is undermined. Dissenters often identify the ways in which the majority's decision implicates the Court's institutional legitimacy.

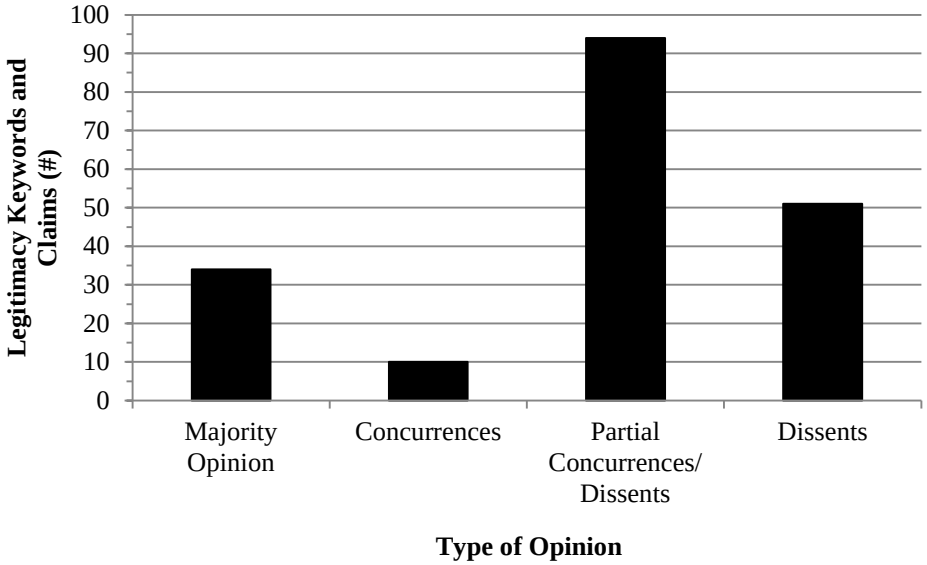
Figure 4.1 Legitimacy keywords and claims in the Court's abortion decisions based on type of opinion, 1973-2007.



Legitimacy rhetoric evident in *Thornburgh* and *Casey* are not included as they are outliers discussed later in the chapter.

[53] *Doe v. Bolton.*

Figure 4.2 Total legitimacy keywords and claims in the Court's abortion decisions based on type of opinion, 1973-2007.



V.c. *The Turning-Point of 1983*

As suggested above, justices' use of keywords and claims that signal legitimacy concerns in the Court's abortion decisions were not consistent over the Court's entire abortion jurisprudential history. Instead, both the number of keywords and the number of claims that signaled legitimacy concerns in decisions were significantly fewer before 1983 than after. Despite the sharp spike in the use of legitimacy keywords in 1992 that is associated with *Casey*, the number of keywords that appeared in abortion decisions clearly steadily increased between 1983 and 1989 (Fig. 4.3). Similarly, an increasing number of legitimacy claims were articulated in abortion cases beginning in 1986. Although legitimacy claims spiked in both *Thornburgh* and *Casey*, the number of articulated legitimacy claims were also above the levels of the previous decade in 1989, 1990, and 2000 (Fig. 4.4). The trend in the total legitimacy keywords and claims that appeared in Court abortion decisions provides a more comprehensive picture of how judicial concerns with legitimacy shifted over the thirty-four year period (Fig. 4.5). When justices' use of legitimacy rhetoric is considered, 1983 appears to be a turning-point in the justices' concern with the Court's institutional legitimacy. Although there are likely numerous factors that contribute to justices'

increased concern with legitimacy beginning in 1983, two possible reasons for the increase are that (1) political party transformation around the abortion issue was not complete until the mid- to late-1980s or (2) the justices were mimicking the concerns of the legitimacy crisis facing the Court in the 1980s. The following paragraphs further expand on these possible explanations.

Figure 4.3 Total legitimacy *keywords* within the Court's abortion decisions, 1973-2007.

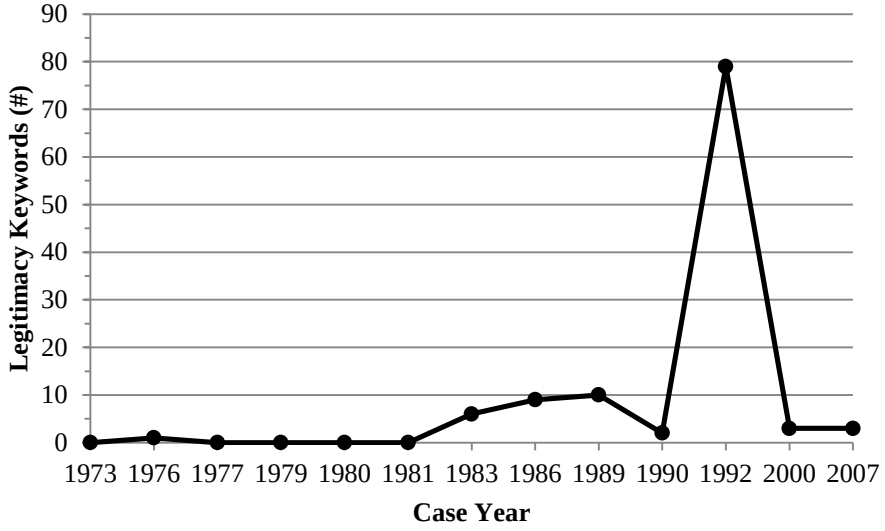


Figure 4.4 Total legitimacy *claims* within the Court's abortion decisions, 1973-2007.

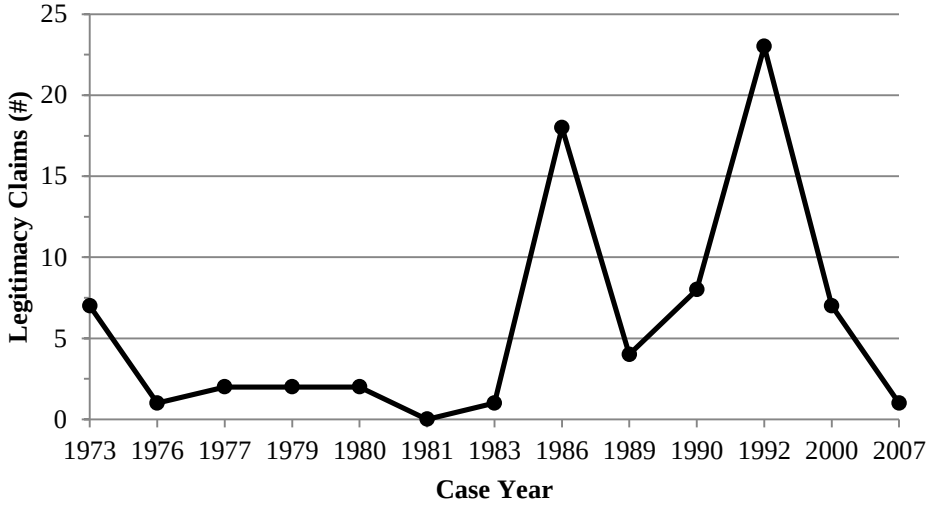
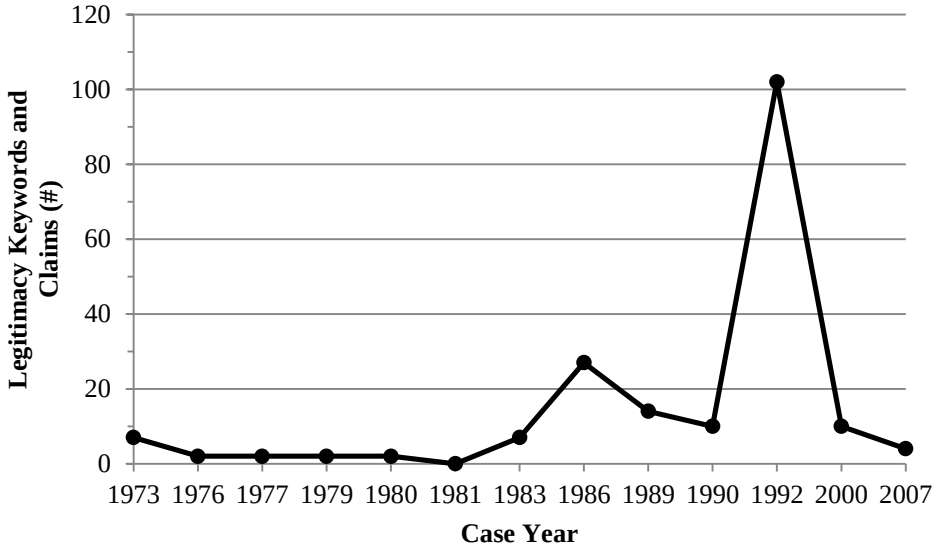


Figure 4.5 Total legitimacy *keywords and claims* within the Court's abortion decisions, 1973-2007.



In regards to the first explanation, Linda Greenhouse and Reva Siegel show that the common assumption that *Roe* began the contemporary controversy and deep political divide over abortion is misguided. Greenhouse and Siegel cite Gallup polling data that suggests the majority of the American populace (sixty-four percent) agreed that the abortion decision should be between a woman and her physician, regardless of political ideology just before *Roe* was decided.[54] Even more counterintuitive, in light of the current abortion debate, is that sixty-eight percent of Republicans, as compared to fifty-eight percent of Democrats, agreed with the previous sentiment.[55] Based on this polling data, the Court's *Roe* decision was clearly in-sync with public opinion in the early-seventies. Further, Greenhouse and Siegel suggest that polling data after *Roe* also indicate that public support for abortion did not change after the Court's decision.[56] Although *Roe* and *Bolton* had seven combined instances in which legitimacy rhetoric was used, following 1973, there was minimal expressed concern with legitimacy in abortion decisions until 1983. The lack of judicial concern with legitimacy in the nine cases during this period (after 1973

[54] Linda Greenhouse and Reva B. Siegel, "Before (and After) *Roe v. Wade*: New Questions about Backlash," *The Yale Law Journal* 120 (2011): 2067-8.
[55] Ibid.
[56] Ibid, 2081.

through 1982) parallels Greenhouse and Siegel's evidence that a woman's right to abortion was widely supported during the seventies and just beginning to be highly politically contentious in the early-1980s. While justices did express concerns with institutional legitimacy in 1973, this may be because 1973 marked the Court's first foray into deciding the abortion issue and justices may have been uncertain about how *Roe* and *Bolton* would be received by the public and political elites. Chapter Three seems to support this claim as it clearly evidenced how the justices were concerned with the salience and controversy of the abortion issue, as it existed in the early-1970s. However, David Garrow quotes a statement made by Justice Blackmun in 1987 that suggests the justices' and public's concern with abortion in 1973 was markedly different when *Roe* and *Bolton* were handed down than when the abortion issue became fully politicized in the mid- to late-1980s. Specifically, David Garrow quotes Justice Blackmun conceding in hindsight that "'Roe against Wade was not such a revolutionary opinion at the time' that it was handed down in January 1972…"[57] Thus, the justices' perception of the controversy surrounding abortion when *Roe* and *Bolton* were decided was likely worsened as the controversy regarding abortion escalated during the 1980s.

Greenhouse and Siegel argue that *Roe* was not the cause of the deep political division regarding a woman's right to have an abortion, as abortion actually began to be implicated in party politics with the Nixon campaign before the Court's decision.[58] They suggest that reorganization of the major parties – the Republicans and Democrats – around abortion before *Roe*, continued after the Court's decision and ultimately "played an important part in polarization around abortion…"[59] This party realignment was not complete until the mid- to late-1980s and it was only "years after *Roe* was handed down" that "conflict over abortion assumed its now-familiar shape."[60] Mary Ziegler similarly suggests that "The radicalization

[57] David J. Garrow quoting Harry A. Blackmun in "How *Roe v. Wade* was Written," *Washington and Lee Law Review* 71 (April 2014): 893.
[58] Greenhouse and Reva B. Siegel, 2030, 2046.
[59] Ibid, 2068.
[60] Ibid, 2068 (claiming "by several measures the partisan polarization on abortion that prevails today developed years after *Roe* was handed down"), 2034 (suggesting "it was not until the late 1980s that partisan conflict over abortion assumed is now-familiar shape, with more Republicans than Democrats opposing abortion").

we blame solely on *Roe* occurred gradually."[61] Rather than blame *Roe* for wholly contributing to the contemporary abortion controversy, Ziegler maintains that abortion politicization predominantly emerged due to factors outside the Court; "For reasons having little to do with the Court, movement members, politicians, and political operatives deliberately and consistently made decisions that intensified abortion conflict."[62] Accordingly, as the modern-day, highly politicized and partisan conflict over abortion was not evident on the political agenda until the mid- to late-1980s, justices did not necessarily have a cause to be overly concerned with the Court's legitimacy in early abortion cases; lack of a cause for concern follows Greenhouse and Sigel's evidence that the Court's decisions were largely in-sync with popular opinion before the mid-1980s. Significant judicial concerns with legitimacy began to emerge in abortion decisions in 1983 and were even more obvious when the abortion issue emerged in the mid- to late-1980s as a fully politicized and polarized source of contention between the Republican and Democratic parties. Ultimately, not only do Greenhouse and Siegel present evidence to explain the general lack of legitimacy rhetoric in the Court's abortion decisions prior to 1983, but the data presented in this chapter also provides another source of evidence for their claim. If Supreme Court justices are responsive to attacks of Court legitimacy, as Chapter Two suggests, attacks of the Court's abortion jurisprudence during the decade after *Roe* would likely have been recognized by justices and subsequently have been articulated as legitimacy rhetoric in the Court's early abortion decisions. The lack of legitimacy rhetoric in 1970 and early-1980 abortion cases suggests that extrajudicial attacks on the Courts legitimacy were not significant, with the exception of *Roe* and *Bolton* as they were the Court's first attempt at addressing the abortion issue.

The trend in justices' use of legitimacy rhetoric in the Court's abortion decisions may also be explained by the disruption of the Legal Realist interpretive monopoly in the 1980s. As extensively discussed in Chapter Two, the Court faced a legitimacy crisis in the 1980s that originated from attacks challenging the legitimacy of Legal Realist constitutional interpretation. This crisis directly led to the

[61] Mary Ziegler, "Beyond Backlash: Legal History, Polarization, and *Roe v. Wade*," *Washington and Lee Law Review* 71 (April 2014): 998.
[62] Ibid, 1005.

emergence and adoption of Originalism by some justices. However, a new interpretive monopoly was not established after the equilibrium of Legal Realist interpretation was disrupted. Constitutional interpretation was instead further complicated by the later emergence of Common Law Constitutionalism as a response to continued dissatisfaction with Legal Realism and the articulation of attacks undermining the legitimacy of Originalism. The lack of an interpretive monopoly beginning in the 1980s could explain justices' increased concern with the Court's institutional legitimacy and the reflection of this concern in the Court's abortion decisions. Disruption of interpretive equilibrium forced the Court into a crisis – which has not yet been fully resolved in favor of one interpretive approach – that intensified the public and elite spotlight on the Court's democratic deficit. As a result of the Court's increased scrutiny, justices could have also become increasingly aware of the Court's legitimacy, especially in cases that address an issue that had become highly controversial and politicized by the mid- to late-1980s. Ultimately, it is likely that both circumstances explain the trend in the justices' use of legitimacy rhetoric as their simultaneous occurrence in the 1980s could have led justices to be in the precarious position of being attacked on two fronts, i.e. the Court could have been attacked because of unsatisfactory substantive outcomes and/or its mode of constitutional interpretation. As the abortion issue is still highly politicized in current American politics and judicial interpretation is still in a period of disequilibrium, justices' continued expression of concerns with the Court's institutional legitimacy in abortion decisions is unsurprising.

V.d. *The Two Outliers: Thornburgh v. American College of Obstetricians and Gynecologists (1986) and Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)*

The trends in Figures 4.2 and 4.3 clearly suggest that *Thornburgh* (1986) and, to a much greater extent, *Casey* (1992) are outliers in terms of the amount of legitimacy rhetoric that appeared in both decisions. Accordingly, the spikes in the justices' use of legitimacy rhetoric in these decisions warrant additional discussion. The history of the abortion issue leading up to both *Thornburgh* and *Casey* are discussed below, and additional examples of the legitimacy rhetoric used in both cases are also presented.

Ultimately, the aim of this section is to contextualize the justices' concerns with the Court's institutional legitimacy in these opinions in order to offer suggestions regarding the justices' increased concern with legitimacy that are obvious in the decisions.

First, beginning with the earlier case, *Thornburgh* was decided after a three year "dry spell" in which the Court did not hear any fundamental right to abortion cases; *Ashcroft* and *Simopoulos*, decided on the same day in 1983, were the last cases to be decided before *Thornburgh*.[63] Dan Drucker suggests that this three year period during which the Court did not hear any fundamental right to abortion cases was a period during which "frustrations and pressures [regarding the abortion issue] grew to an explosive level" and culminated in a *Thornburgh* decision within which justices attacked one another and the Court.[64] While there were similar lulls in the abortion cases heard by the Court prior to 1983 – e.g. there was a three year period between the Court's *Roe* and *Bolton* 1973 decisions and *Danforth* and *Singleton* – Greenhouse and Siegel provide evidence that the period after 1983 was decisive in politicizing the abortion issue such that this politicization likely contributed to the pressures Drucker alludes to.[65] Drucker additionally suggests that the composition of the Court slowly changed over this period.[66] However, the only justice to be nominated to the Court in the early- to mid-1980s was Justice Sandra Day O'Connor in 1981; Justice Rehnquist was not elevated to the Chief Justiceship and Justice Scalia did not join the Court until after *Thornburgh* was decided. *Thornburgh* was not decided after a lull during which a shift in the Court's composition had occurred and, therefore, such a shift does not explain *Thornburgh*'s increased legitimacy rhetoric.

However, in addition to the politicization of the abortion issue in the years prior to *Thornburgh*, the Court was faced with direct attacks from the executive branch after the decision to hear the case was announced. The spike in the use of legitimacy rhetoric in *Thornburgh* emerged in the wake of the Reagan Administration's filing of an *amicus curie* brief that called for the overturning of *Roe*, a position that had

[63] Dan Drucker, *Abortion Decisions of the Supreme Court,1973 through 1989: A Comprehensive Review with Historical Commentary* (North Carolina: McFarland & Company, Inc., 1990), 123.
[64] Ibid, 145.
[65] Greenhouse and Siegel.
[66] Drucker, 123.

not been previously explicitly articulated by the Administration. Specifically, when the Court heard *Ashcroft* three years prior, President Ronald Reagan's then Solicitor General, Rex Lee, filed a reserved *amicus* brief that only advocated for reconsideration, but not a decisive overturning, of *Roe*.[67] However, by *Thornburgh*, Reagan's soon to be Solicitor General, Charles Fried, filed an *amicus* brief that explicitly called for the Court's overturning of *Roe* in *Thornburgh.* Fried asserted that the Court needed to "'reconsider [*Roe*] and on reconsideration abandon it [brackets in original]'" in *Thornburgh* because *Roe* was a source of "'instability,'" and, drawing on Originalism, was inconsistent with the Framers of the Constitution.[68] That Fried's *amicus* brief was essentially an attack on the Court's legitimacy is evidenced with former Solicitor General Lee's criticism that Fried should not "'take it upon himself to tell the Supreme Court what he may well believe are its errors of constitutional doctrine.'"[69] The Court therefore decided *Thornburgh* facing a clear charge from the executive branch claiming that continuing to follow *Roe* would undermine the Court's legitimacy.

Justice Stevens (in his concurrence) and the dissenting justices explicitly discussed the challenge made by the executive regarding the Court's legitimacy. For example, Stevens opposed overturning *Roe* because, contrary to Fried's assertion that *Roe* undermined Court stability, overturning precedent actually undermines stability; Stevens maintained "nor does the fact that the doctrine of *stare decisis* is not an absolute bar to the reexamination of past interpretations of the Constitution mean that the values underlying that doctrine may be summarily put to one side. There is a strong public interesting in stability, and in the orderly conduct of [the Court's] affairs, that is served by a consistent course of constitutional adjudication."[70] Conversely, conceding to Fried's assertion, Chief Justice Burger dissented after "thirteen years of fence-sitting" and supporting *Roe*, suggesting that "In discovering constitutional infirmities in the state regulations of abortion that are in accord with our history and tradition, [the Court] may have lured judges into 'roaming at large in the constitutional field.' The soundness of [the Court's]

[67] Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (North Carolina: The University of North Carolina Press, 1992), 253.
[68] Ibid, 254 (quoting former Solicitor General Fried's *Thornburgh amicus curie* brief).
[69] Ibid (quoting former Solicitor General Rex Lee's July 1985 speech).
[70] *Thornburgh v. American College of Obstetricians and Gynecologists*.

holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe* [internal citations omitted]."[71] Justice White similarly argued that *Roe* should be overturned. After laying out the principles that guide *stare decisis* in the three paragraphs beginning Section I of his dissent, he ultimately justified the necessity of overturning *Roe* on the grounds that the Court read a fundamental right to abortion into the Constitution based on judicial value judgements.[72] In general, the extensive discussion of *Roe* by both concurring and dissenting justices in *Thornburgh* was likely due, in part, to the executive's most direct and deliberate assertion (at the time) that *Roe* needed to be overturned and likely also contributed to a spike in the justices' use of legitimacy rhetoric in *Thornburgh*.

While the use of legitimacy rhetoric in *Thornburgh* spiked in comparison to the Court's first decade of abortion decisions, justices' use of legitimacy rhetoric in *Casey* superseded its use in any other decision. Not only was *Casey* the most salient abortion case since *Roe*, but internal changes on the Court had an important influence on the use of legitimacy rhetoric in the decision. After *Thornburgh*, the composition of the Court shifted such that *Roe* supporters only held a slim 5-4 majority on the Court by 1987.[73] Justices Blackmun, Brennan, Marshall, Powell, and Stevens were the Court's moderates and Chief Justice Rehnquist and Justices O'Connor, Scalia, and White were the Court's conservatives. With the resignation of Justices Powell, Brennan, and Marshall in 1987, 1990, and 1991, respectively, and the nominations of Justices Kennedy, Souter, and Thomas, the Court had shifted to a conservative majority for the first time since *Roe* was decided.[74] By *Casey*, Justice Blackmun was the only justice who had been involved in deciding *Roe*. As a result, while public and elite dissatisfaction with *Roe* had manifested in some fashion well before 1992, many believed that *Casey* would lead to an overruling of *Roe*, given the Court's conservative majority.[75]

[71] Epstein and Kobylka, 259 (regarding the Chief Justices' "fence-sitting"); Ibid.
[72] Ibid.
[73] Brest et al., 1422.
[74] Ibid, 1424; Drucker, 147.
[75] Brest et al., 1424.

Casey was therefore decided by a Court that was (1) acutely aware of the public pressure stemming from both pro-life and the pro-choice fronts, (2) facing the expectation that justices nominated by Republican presidents would vote to overrule *Roe*, and (3) interested in finally addressing the legal legitimacy of *Roe*, i.e. deciding if *Roe* would stand once and for all.[76] All three of these factors likely influenced the legitimacy rhetoric used in the Court's decision. In many instances, the discussions of Court legitimacy in *Casey* seemed to preemptively indicate that the Court was aware of the extent of the controversy surrounding abortion and the desires of the pro-life public and executive that *Roe* be overturned. The first indication that the *Casey* decision was heavily influenced by concerns with legitimacy stemming from the salience of the case is the decision's three-author majority opinion. Justices O'Connor, Kennedy, and Souter co-authored the majority opinion, as if to lower the costs associated with defecting from the expected conservative overturning of *Roe*. As David O'Brien maintains, Justices O'Connor, Kennedy, and Souter were concerned both with following precedent and with signaling that Court decisions were not necessarily dependent on the composition of the Court.[77] The *Casey* majority opinion authors clearly explained the factors that contributed to their decision, i.e. "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude" that *Roe* must be upheld.[78] They maintained that "a respect for precedent, is by definition, indispensable" and proceeded to outline why *Roe* was reaffirmed.

Conversely, the justices that wrote partial dissents disagreed with the Court's interpretation of the doctrine of *stare decisis* and referenced concerns with the majority's capitulation to public opinion. The Chief Justice and Justice Scalia both penned long diatribes challenging the majority opinion, with Scalia ultimately suggesting "I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced – against

[76] David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: W. W. Norton & Company, 2011), 22.
[77] Ibid, 26-7.
[78] *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

overruling, no less – by the substantial and continuing public opposition the decision has generated."[79] Ultimately, O'Brien suggests that *Casey* "confronted the justices with the brute fact that the Court is a political institution whose legitimacy is nonetheless perceived to depend largely on the symbolism and reality of judicial independence, impersonal decision making, and the 'rule of law.'"[80] It is clear that the justices wrote *Casey* either determined to alleviate concerns with the Court's legitimacy (as with the majority opinion and Justice Blackmun's partial concurrence and dissent) or to demarcate where the Court's institutional legitimacy problems originated (as in Rehnquist's and Scalia's separate opinions).

VI. Implications

This chapter's findings suggest that the justices' use of legitimacy rhetoric in their decisions indicates that they have internalized the Court's democratic deficit and are unaware that the contemporary, post-*Brown* Court purportedly operates under a norm of judicial supremacy. Additionally, although institutional legitimacy was the focus of this chapter, the analyzed abortion cases also suggest that the justices express concern with individual cases such that they likely perceive their institutional legitimacy (diffuse support) to be linked to individual decisions (specific support). These two implications are elucidated below.

VI.a. *The Norm of Judicial Supremacy*

Over the course of this chapter, the extent of justices' use of legitimacy rhetoric in Supreme Court abortion decisions has been highlighted. Justices' continuous reference to Court legitimacy in abortion cases, whether through keywords or articulated claims, suggests that Supreme Court justices are concerned with the extent of the Court's institutional legitimacy, i.e. diffuse support. Justices' concern with legitimacy is evident despite popular elite opinion that the Court benefits from extensive diffuse

[79] Ibid.
[80] O'Brien, 27.

support and claims that the Court operates under a norm of judicial supremacy.[81] While it may be expected that justices be preoccupied with the Court's legitimacy when diffuse support is depleted, scholarly evidence has not suggested that the Court was operating under a period of precipitously low diffuse support from *Roe* through *Gonzales*. In fact, Gallup polling suggests that from May 1972 (before *Roe*) through September 2008 (after *Gonzales*), a majority of respondents expressed a great deal/fair amount of trust in the Supreme Court (yearly percentages were between sixty-three and eighty percent).[82] Accordingly, justices' concerns with institutional legitimacy would appear somewhat unfounded. Additionally, if justices did in fact recognize a norm of judicial supremacy, then they would be secure in the outcomes of their abortion decisions and be less inclined to highlight instances in which other justices threaten and undermine the Court's institutional legitimacy. As the norm is suggested to have emerged in the mid-twentieth century, after the Warren Court and President Eisenhower's response to *Brown* facilitated its emergence, all of the Court's abortion decisions were decided after the norm is argued to have been established.[83] Yet, the justices clearly do not perceive this so called norm of judicial supremacy as justices' institutional concerns only increased in later abortion decisions. Judicial articulation of legitimacy concerns in Court decisions may actually serve to decrease the Court's institutional legitimacy. Justices may remind the public and elites of the Court's democratic deficit as many of the articulated claims and keywords explicitly suggest the Court was forgoing its institutional mandate, ignoring the checks on its power, and operating from an illegitimate position.

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[81] For examples of studies analyzing the extent of the Court's diffuse support, see Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science* 36 (August 1992), Rick A. Swanson, "The Dynamics of Specific and Diffuse Support for the U.S. Supreme Court: A Panel Study," *The Social Science Journal* 44 (2007), and/or Dino P. Christenson and David M. Glick, "Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy," *American Journal of Political Science* 59 (2014); for claims of a norm of judicial supremacy, see Larry D. Kramer, "Judicial Supremacy and the End of Judicial Restraint," *California Law Review* 100 (2012) and Barry Friedman's five-part law series: Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *New York University Law Review* 73 (May 1998); Barry Friedman, "The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court," *Georgetown Law Journal* 91 (November 2002); Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*," *New York University Law* 76 (November 2001); Friedman, "The History of the Countermajoritarian Difficulty, Part Four"; Friedman, "The Birth of an Academic Obsession."

[82] Gallup, (2015) *Supreme Court* [Data set], retrieved from http://www.gallup.com/poll/4732/supreme-court.aspx.

[83] Friedman, "The Birth of an Academic Obsession," 170-1; Kramer, 630.

VI.b. ***When Specific Support Bleeds into Diffuse Support***

Although this chapter focused on the justices' perception of the Court's intuitional legitimacy, or the Court's diffuse support, nearly all the decisions also evidenced judicial concern with specific support, i.e. public support for individual decisions. As discussed in Chapter One, public opinion literature typically addresses the extent of the public's support for individual decisions or justices as compared to their support for the Supreme Court as an institution. The fragmented nature of the abortion decisions itself serves to undermine specific support as one aspect of the Court's legitimacy rests in its ability to speak as a unified body. Historically, unanimity among the justices was generally desired because unanimous and nearly unanimous decisions decrease the extent of uncertainty in the Court's jurisprudential history, and are more difficult to overturn than are non-unanimous decisions.[84] As Chief Justice Roberts – a strong critic of fragmented decisions – maintained in a 2006 interview, "'I do think the rule of law is threatened by a steady term after term after term focus on 5-4 decisions'" because such fragmented decisions diminish the Court's "'credibility and legitimacy as an institution.'"[85] However, as is highlighted in Tables 4.3 and 4.4, none of the twenty-one analyzed decisions were unanimous; Table 4.3 identifies the number of justices that ended up in each case's majority and minority opinions and Table 4.4 identifies the number of separate opinions that accompanied each abortion decision. Nearly fifty percent (42.9%) of the Court's abortion rulings were 5-4 decisions, and the vast majority of the abortion decisions included either three or four separate opinions. The importance of unanimous decisions or decisions with fewer individual opinions is highlighted by Justice John Marshall's desire for the Court to speak in a near unanimous voice during his tenure as Chief Justice.[86] Sunstein presents data highlighting that less than twenty percent of decisions from 1800 to 1940 had one or more concurring opinion and less

[84] Cass R. Sunstein, "Unanimity and Disagreement on the Supreme Court," *Cornell Law Review* 100 (April 2015): 770 (quoting Chief Justice John Roberts' opinion that unanimity on the bench is more desirable than closely divided decisions).
[85] John G. Roberts quoted in Jeffrey Rosen, "Are Liberals Trying to Intimidate John Roberts?," *New Republic*, 28 May 2012, http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/.
[86] Sunstein, 772 (suggesting that Chief Justice Marshall was an important actor in "establishing the original norm of consensus," i.e. the pre-1941 period where few justices authored separate decisions), 785-6.

than twenty-five percent of decisions within this period had one or more dissenting opinion.[87] Although Sunstein ultimately suggests that separate opinions are "unlikely to threaten the Court's legitimacy, certainly not in specific cases and probably not even across a wide range of cases," many of the Chief Justices before 1940 believed that separate opinions undermined the Court's final opinion.[88] Though Sunstein claims the Court has operated in an "era of independent law offices" since 1941, where non-unanimous decisions are the norm, Supreme Court justices expressed concerns with the Court's fragmented nature in their abortion decisions. For example, Justice Rehnquist bemoaned that "literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court" in *Bellotti*, Justice Kennedy reiterated the same sentiment in *Hodgson*, and Justice Scalia described the Court's *Webster* decision as "indecisive."[89]

Table 4.3 Fragmentation of the Supreme Court's abortion decisions, 1973-2007.

Decision	Cases
8-1	*Bellotti* (1979), *Simopoulos* (1983)
7-2	*Roe* (1973), *Bolton* (1973)
6-3	*Danforth* (1976), *Beal* (1977), *Maher* (1977), *Poelker** (1977), *Colautti* (1979), *Matheson* (1981), *City of Akron* (1983), *Ohio* (1990)
5-4	*Singleton* (1976), *Harris* (1980), *Ashcroft* (1983), *Thornburgh* (1986), *Webster* (1989), *Hodgson* (1990), *Casey* (1992), *Stenberg* (2000), *Gonzales* (2007)

**Poelker* was a 6-3 *per curium* opinion.

Table 4.4 Number of separate opinions (total concurrences, partial concurrences/dissents, and dissents) in the Court's abortion decisions, 1973-2007.

Separate Opinions	Cases
1	*Colautti* (1979), *City of Akron* (1983)
2	*Singleton* (1976), *Ashcroft* (1983), *Simopoulos* (1983), *Gonzales* (2007)
3	*Danforth* (1976), *Beal* (1977), *Poelker** (1977), *Bellotti* (1979), *Matheson* (1981), *Ohio* (1990)
4	*Bolton* (1973), *Maher** (1977), *Thornburgh* (1986), *Webster* (1989), *Hodgson* (1990), *Casey* (1992)
5	*Roe** (1973), *Harris* (1980)
7	*Stenberg* (2000)

*Separate concurrences or dissents were included in the total count, though the concurrence or dissent was referenced from another case that was concurrently handed down.

[87] Ibid, 773-4.
[88] Ibid, 815 (regarding Sunstein's final conclusion about the lack of consensus in final opinions), 788-9 (on former Chief Justices' opinions regarding the importance of unanimous decisions).
[89] *Bellotti v. Baird*, 443 U.S. 622 (1979); *Hodgson v. Minnesota*; *Webster v. Reproductive Health Services*.

Notwithstanding the fact that separate opinions in and of themselves could be interpreted as undermining the Court' legitimacy as they muddle the Court's precedential history, separate opinions, especially dissenting opinions, also (1) include more concerns with the Court's institutional legitimacy than does the majority opinion (or concurrences) and (2) introduce judicial criticisms of decisional legitimacy. As discussed above, far more concerns regarding the Court's institutional legitimacy in abortion decisions were articulated in partial or full dissents (Figs. 4.1 and 4.2). As separate opinions are filed, justices' concerns with institutional legitimacy are likely to manifest. In fact, many separate opinions are specifically written not only to suggest how the majority's ruling was erroneous, but to suggest that the majority's errors in decision-making threaten the Court's institutional legitimacy. Not only do separate opinions fragment the Court's final decision, but increasing references to institutional legitimacy that are evident in these opinions, at least in abortion cases, can further call judicial legitimacy into question.

Additionally, judicial concern with individual abortion decisions is also evidenced in separate opinions, including claims suggesting the Court unnecessarily expanded the scope of the constitutional question in specific decisions. One such instance occurred in *Roe* when Justice Rehnquist maintained "the Court uses [the Plaintiff's] complaint…as a fulcrum" for expanding the scope of the case and, "In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[90] Similarly, Justice Powell took issue with the Plaintiffs' standing in *Singleton* and admonished the Court by suggesting "It seems wholly inappropriate, as a matter of judicial self-governance, for a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services."[91] Ultimately, separate opinions are a forum for judicial expression of decisional illegitimacy. As more abortion cases were decided and individual justices began to be increasingly concerned with the Court's majority opinions in an increasing

[90] *Roe v. Wade*.
[91] *Singleton v. Wulff*, 428 U.S. 106 (1976).

number of abortion cases, justices' concern with Court legitimacy clearly transcended decisional legitimacy and implicated intuitional legitimacy (the latter being the focus of this chapter). Although Chapter One suggests that scholarly evidence has yet to identify how the public's specific support actually influences their diffuse support, the justices themselves seem to be worried about the relationship between specific and diffuse support. This implication is different than previous research that analyzes the link between specific and diffuse support as it is centered on *justices'* perceptions of the Court, rather than the *public's* concern with the Court. Thus, one implication of the justices' use of legitimacy rhetoric in abortion decisions is that judicial concern with specific support may bleed into diffuse support, though the extent and point at which this begins to occur is unclear and not a focus of this chapter.

VII. Conclusion

Supreme Court justices clearly expressed institutional legitimacy concerns in the Court's abortion decisions that stem from both public and elite attacks of the Court and specific attacks of the Court's interpretive approaches. The articulation of these concerns through the use of keywords that signal a legitimacy concern and the development of claims that express concern with the Court's institutional legitimacy suggest that justices are concerned with, if not preoccupied with, Court legitimacy. While the extent of the justices' reference to institutional legitimacy in pre-1983 decisions seems to evidence a general concern with legitimacy, the use of legitimacy rhetoric after the 1983 turning-point seems to provide more convincing evidence that justices' concerns with legitimacy near preoccupation.

This chapter has presented an overview of the type of keywords and claims that appear in abortion decisions and either explicitly or inferentially suggest justices are concerned with the Court's democratic deficit. The chapter's findings, in the context of the Court's abortion jurisprudential history, included that (1) justices actively use legitimacy rhetoric in Court decisions, (2) more legitimacy rhetoric is articulated in full or partial dissents than in the majority opinion or concurrences, (3) there was a turning-point in 1983, ten-years after *Roe* was decided, after which justices became increasingly preoccupied with the Court's institutional legitimacy, and (4) *Thornburgh* and *Casey* are outliers in terms

of the extent of the legitimacy rhetoric that was used in the decisions. These findings suggest that (1) justices have not embraced the norm of judicial supremacy and (2) there is a point at which justices' concern with specific, decisional support appears to affect the extent of their concern with diffuse, institutional support. The latter implication indicates that the justices are concerned with the way that specific support feeds into diffuse support, even though, as discussed in Chapter One, there is a lack of scholarly-evaluated empirical evidence regarding the relationship between specific and diffuse support.

Ultimately, this chapter offers another perspective by which to examine how public and elite discourse of the Court's intertwined democratic deficit, countermajoritarian dilemma, and perceived illegitimacy have resonated with the Supreme Court justices themselves. Subsequently, Chapter Five seeks to present another perspective through which to assess the level of justices' internalization of the Court's democratic deficit. Specifically, the extent that Chief Justices express concerns with the Court's legitimacy in their annual *Year-End Report on the Federal Judiciary* will address this project's motivating question from the perspective of the Chief Justice, i.e. the institutional steward of the Court.

5

THE CHIEF JUSTICE'S ANNUAL *YEAR-END REPORT ON THE FEDERAL JUDICIARY*

While the first Judiciary Act of 1789 established a Supreme Court of five Associate Justices and one Chief Justice, the number of justices serving on the Court has been since fixed at eight Associate Justices and one Chief Justice as per the Judiciary Act of 1869.[1] By and large, the Associate Justices and Chief Justice have the same power on the Supreme Court; the votes of all the Supreme Court justices hold the same weight in deciding cases and giving final verdicts regarding constitutionality. However, the Chief Justice does benefit from greater agenda-setting influence as compared to the Associate Justices.[2] After a case is argued and the justices cast their preliminary votes regarding their stance on the issue, the Chief Justice, should he be part of the early majority, assigns one of the justices in the majority (potentially himself) to write the Court's opinion. In wielding the power to assign majority opinion writers, the Chief Justice may be in the best position to pursue personal policy and ideological preferences. However, the decision of who authors an opinion is still constrained; the Chief Justice's assignment of an opinion is constrained by the political and institutional conditions, the relative workloads of the justices, and may be influenced by the justices' area of expertise.[3] Chief Justice John Roberts acknowledged as much in a 2007 interview when he suggested that "'A [C]hief [J]ustice's authority is really quite limited, and the dynamic among all the justices is going to affect whether he can accomplish much or not,'" such that "'the [C]hief's ability to get the Court to do something is really quite restrained.'"[4] Hence, although the Chief Justice has the conditional ability to decide who authors a majority opinion, he actually holds minimal additional power.

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[1] Judiciary Act of 1789: "An Act to Establish the Judicial Courts of the United States," 1st Cong., 1st sess., 1 Stat. 73; Judiciary Act of 1869: "An Act to Amend the Judicial System of the United States," 41st Cong., 1st sess., 16 Stat. 44.
[2] Paul J. Wahlbeck, "Strategy and Constraints on Supreme Court Opinion Assignment," *University of Pennsylvania Law Review* 154 (2006): 1730.
[3] Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000), 55-6; Ibid.
[4] John G. Roberts quoted in Jeffrey Rosen, "Roberts's Rules," *The Atlantic*, January/February 2007, http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/.

Despite the relative symmetry in the powers of the Supreme Court justices, the Chief Justice is still the institutional steward of the Supreme Court and is often the most publicly salient figure of the judicial branch. For example, although only thirty-four percent of respondents of a 2012 Pew Research Center study identified Roberts as the current Chief Justice, this data stands in sharp contrast to a similar 2012 survey that found only sixteen percent of respondents identified Justices Antonin Scalia and Clarence Thomas, thirteen percent identified Justices Ruth Bader Ginsburg and Sonia Sotomayor, and only ten, five, four, and three percent identified Justices Anthony Kennedy, Samuel Alito, Elena Kagan, and Stephen Breyer as serving on the Supreme Court, respectively.[5] Although not recognized by a majority of the public, the Chief Justice is still the most recognized of the Supreme Court justices.

Recent Chief Justices have taken their role as the institutional steward of the judiciary one step further by embracing a tradition of authoring an annual year-end report on the federal judiciary to convey the challenges that faced the judicial branch over the course of a given year. Chief Justice Warren Burger began the now forty-five year-old tradition of presenting a year-end report on the federal judiciary in 1970.[6] In outlining the goal of the first annual 1970 report, Chief Justice Burger stated that the report was to convey what he thought was "wrong with our judicial machinery and what can and must be done to correct it in order to make the system of justice fulfill its high purpose."[7] As articulated by Burger in his first report, the annual year-end reports began as and have continued to be a forum through which the Chief Justice can articulate concerns with the state of the judicial branch. Richard Vining and Teena Wilhelm further suggest that the year-end reports are similar to the judiciary's version of the President's State of the Union Address.[8] Therefore, as the year-end reports offer the Chief Justice an open opportunity to address the other branches, the legal field, and the public, the annual reports may evidence

[5] Pew Research Center, (2013) *Chief Justice John the Obscure* [Data set], retrieved from http://www.pewresearch.org/fact-tank/2013/05/30/chief-justice-john-the-obscure/; FindLaw, (2012) *Two-Thirds of Americans Can't Name Any U.S. Supreme Court Justices, Says New FindLaw.com Survey* [Data set], retrieved from http://company.findlaw.com/press-center/2012/two-thirds-of-americans-can-t-name-any-u-s-supreme-court-justice.html.
[6] Richard L. Vining, Jr. and Teena Wilhelm, "Examining the Year-End Report on the Federal Judiciary: Reviewing Roberts' Record as an Agent of Judicial Reform," *Judicature* 95 (May/June 2012): 269.
[7] Warren E. Burger, "The State of the Judiciary – 1970," *American Bar Association Journal* 56 (October 1970): 929.
[8] Vining and Wilhelm, 268.

instances in which the justices – through the voice of the Chief Justice – were concerned with the Court's legitimacy.

Specifically, this chapter evaluates whether post-1970 Chief Justices have used the annual *Year-End Report on the Federal Judiciary* to express concern with the Court's democratic deficit. The chapter directly builds on the analyses provided in the preceding chapters to offer another perspective on the ways that justices have internalized and been influenced by the Court's democratic deficit. While initial reports expressed a clear awareness that Court legitimacy was dependent on maintaining public confidence in the judiciary, Chief Justice William Rehnquist vastly expanded the type of legitimacy concerns that were articulated in the reports and Chief Justice Roberts extensively linked judicial salary and budgetary concerns to judicial independence. The chapter begins by discussing the research design and the specific concerns that indicate an awareness of and preoccupation with the Court's democratic deficit. Subsequently, the findings and their implications are presented. A content analysis of the Chief Justices' year-end reports suggests that (1) the Chief Justices articulate legitimacy concerns in the annual reports that parallel those that are evident in the Court's abortion decisions, (2) the type of articulated concerns with legitimacy fluctuated between 1970 and 2015, (3) the articulation of concerns with the Court's legitimacy in the year-end reports increased in the middle of Rehnquist's nineteen-year tenure as Chief Justice, (4) the year-end reports present administrative solutions to articulated legitimacy concerns, and (5) there appears to be a disconnect between the way that legitimacy concerns are articulated in the year-end reports and those that emerge in the popular press. These findings highlight that although the Chief Justices are aware of institutional legitimacy and may utilize the reports to propose *administrative* solutions to perceived impending legitimacy crises, it is difficult to discern the specific causes of the Chiefs' concerns as individual cases are not referenced.

I. Parameters of Analysis: The Chief Justice's Annual *Year-End Report on the Federal Judiciary*

The annual year-end reports were analyzed to identify instances when the Chief Justices recognized and/or were concerned with the Court's democratic deficit. Specifically, the forty-six year-end

reports delivered between 1970 and 2015 were assessed for instances in which Chief Justices Burger, Rehnquist, and Roberts both explicitly and implicitly articulated concerns with the extent of the Court's legitimacy and/or emphasized the need to maintain Court legitimacy. Five different types of legitimacy concerns, discussed in the following section, were identified within the reports. A tally was kept of the total number of times that these specific legitimacy concerns were articulated in each report; as in Chapter Four, the tallies of legitimacy concerns in the year-end reports were based on the number of sentences within which the concern was articulated.

The reports are typically written and delivered at the end of the year and address any new or ongoing challenges that faced the judiciary over the year that was coming to a close, i.e. the 1990 year-end report refers to the challenges that faced the Court during 1990 and was delivered/published in January 1991. While reports have been accurately titled after the year they review (rather than after the year in which they were published) since the 1990 report, the reports between 1975 and 1989 often erroneously reference the year they were published within their titles. For example, the year-end report entitled "The State of the Judiciary – 1975" actually provides a review of the Court during 1974, as it was delivered by Chief Justice Burger to the American Bar Association on February 23, 1975 and 1975 was still in its infancy.[9] To avoid any confusion surrounding the titles of the reports and the years that they actually address, the data is reported based on the year that was reviewed by each report (the year that had just come to an end) and not necessarily the year that is identified in the title.

The limitations to analyzing the legitimacy concerns that were articulated in the year-end reports also require mention. For one, the year-end reports provide only very brief synopses of the new challenges that faced the Court over the year or that had continued to affect the judiciary's proper functioning from the previous year(s). The reports are typically partitioned into specific topics that are discussed for only a few paragraphs. Due to their brevity, the Chief Justices often do not extensively explain their thoughts or concerns such that identifying the source of their concern can be challenging. Additionally, the year-end reports are almost exclusively administrative. For example, they include

[9] Warren E. Burger, "The State of the Judiciary – 1975," *American Bar Association Journal* 61 (April 1975).

caseload statistics, evaluations of any new legislation or bills that were instituted and affect the judiciary, analyses of reports, commemorations of notable federal judges who had passed away during the year, etc. The year-end reports do not analyze the constitutional questions or individual cases that the Supreme Court faced over the previous year. Accordingly, it is difficult to determine if the Chief Justices' articulation of legitimacy concerns in year-end reports are responses to public disapproval or diminished specific support due to the handing-down of controversial Supreme Court decisions. Hence, the chapter does not attempt to link the trends in the Chiefs' articulation of legitimacy concerns to specific controversial cases; there is no way to know how such cases influenced the legitimacy concerns articulated in the year-end reports.

II. Evidence of Legitimacy Concerns in the Chief Justices' Year-End Reports

Five different legitimacy concerns appeared in the Chief Justices' year-end reports to signal unease or awareness with the Court's democratic deficit. These concerns emerged in terms of (1) expressly discussing the extent of the public's confidence in the Court, (2) defending the judiciary against claims of judicial activism, (3) asserting that the federal judiciary has limited jurisdiction, (4) reinforcing the judiciary's commitment to upholding the federalist principles articulated in the Constitution, and (5) emphasizing the need to ensure and maintain judicial independence. The number of times these concerns were articulated in sentences within each of the year-end reports is summarized in Table 5.1. A majority, sixty-three percent, of the year-end reports included at least one indication of a concern with the Court's legitimacy. While Burger was primarily concerned with the extent of the public's confidence in the Court, Rehnquist greatly expanded the type of concerns he referenced in his decisions and Roberts primarily embraced Rehnquist's concern with ensuring the independence of the judiciary was maintained.

Table 5.1 Legitimacy concerns in the Chief Justices' annual year-end reports, 1970-2015.

Year	Public Confidence	Judicial Activism	Limited Jurisdiction	Federalism	Judicial Independence
1970	2	0	0	0	0
1971	2	0	0	0	0

Year	Public Confidence	Judicial Activism	Limited Jurisdiction	Federalism	Judicial Independence
1972	3	0	0	0	0
1973	1	0	0	0	0
1974*	1	0	0	0	0
1975	1	0	0	0	0
1976	3	0	0	1	0
1977	0	0	0	0	0
1978	0	0	0	0	0
1979	0	0	0	0	0
1980	0	0	0	0	0
1981	2	0	0	0	0
1982	0	0	0	0	0
1983	2	0	0	0	0
1984	1	0	0	0	0
1985**	0	0	0	0	0
1986	0	0	0	0	2
1987	1	0	0	0	0
1988	0	0	0	0	0
1989	0	0	0	0	0
1990	0	0	0	0	0
1991	0	0	1	2	0
1992	0	0	1	1	0
1993	0	0	0	0	0
1994	0	0	0	2	0
1995	0	0	1	0	3
1996	0	0	0	0	0
1997	0	0	3	1	0
1998	0	0	0	6	0
1999	5	0	3	1	1
2000	1	0	0	0	1
2001	0	0	0	0	0
2002	0	0	0	0	1
2003	0	0	0	0	3
2004	3	3	0	0	5
2005	0	0	0	0	6
2006	0	0	0	0	7
2007	0	0	0	0	0
2008	0	0	0	0	0
2009	0	0	0	0	0
2010	0	0	0	0	1
2011	1	0	0	0	2
2012	0	0	0	0	1
2013	0	0	0	0	2
2014	0	0	0	0	0
2015	0	0	0	0	0

*Two year-end reports regarding 1974 were published. Both sources were consulted for evidence of legitimacy concerns, but none were present in the October 1974 report.[10]
**Excerpts from Burger's 1985 year-end report were consulted instead of the full report.[11]
Highlighted boxes indicate instances when a specific legitimacy concern was referenced at least once in a given report.

[10] Warren E. Burger, "Report on the Federal Judicial Branch – 1974," *American Bar Association Journal* 60 (October 1974); Burger, "The State of the Judiciary – 1975," 441.
[11] Warren E. Burger, "Chief Justice Releases 1985 Year-End Report," *The Third Branch* 18 (February 1986).

II.a. ***Public Confidence as a Reflection of Judicial Legitimacy***

As is discussed in Chapter One, extrajudicial perceptions of the Court's legitimacy are, in part, dependent on the extent of the Supreme Court's specific and diffuse support. As long as the Court's specific and diffuse support is maintained – and scholars do in fact contend that the Court benefits from a "reservoir of goodwill" – the Court's legitimacy is secure.[12] Yet, as the Court's institutional legitimacy rests on specific and diffuse support, there is an inherent link between the extent of public confidence in the judiciary and justices' concerns with legitimacy. Therefore, when Chief Justices discuss the extent of the public's support for the judiciary in their year-end reports, they are inherently suggesting that they are cognizant of the importance of securing public support for the judiciary. This awareness of the link between public opinion and perceptions of judicial legitimacy has the potential to escalate to concern with maintaining legitimacy if public opinion appears to falter.

References to public opinion appeared in the year-end reports in three contexts: (1) to suggest that maintaining confidence in the judicial branch is important, (2) to express concern with wavering public support for the judiciary, and (3) to discuss the public's general support for the judiciary. First, assertions were made that public confidence in the judiciary was important to maintain the integrity of the judicial branch. Although such references to public opinion do not imply that public confidence in the judiciary was waning and threatening legitimacy, they do suggest that the Chief Justices are aware of the importance of upholding public confidence in the courts to maintain the judiciary's legitimacy and proper functions. Specifically, public confidence was first discussed in this way in Chief Justices Burger's first year-end report where he maintained that "A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people…"[13] He again reiterated a similar sentiment in his 1973 year-end report in offering support for the new Code of Judicial Conduct because it would "contribute to

[12] On the Court's "reservoir of goodwill," see Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science* 36 (August 1992): 658, James L. Gibson and Michael J. Nelson, "The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto," *Annual Review of Law and Social Science* 10 (November 2014): 205, and James L. Gibson and Michael J. Nelson, "Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?," *American Journal of Political Science* 59 (January 2015): 171.

[13] Burger, "The State of the Judiciary – 1970," 934.

clarifying standards for judges and maintaining public trust and confidence in the integrity of the judicial process."[14]

Additionally, discussion of public opinion emerged when the Chief Justices' suggested that waning public confidence in the judiciary was a cause for concern. For example, a concern with the extent of the public's confidence in the judiciary emerged in Burger's 1972 year-end report when he asserted that the federal courts were "still laboring under what has been called a crisis in the confidence of the judicial system" and was similarly reiterated in one of the 1974 reports when Burger warned that "[the judicial branch] must not close [its] eyes to the public disenchantment with legal institutions."[15] Chief Justice Rehnquist similarly expressed concern with public criticism of the Court in his 2004 year-end report and opined about its undesirable effects when he suggested that "criticism of judges [had] dramatically increased in recent years, exacerbating in some respects the strained relationship between the Congress and the Federal Judiciary."

On the opposite side of the spectrum are instances in which the Chief Justices recognized the public's widespread support for the judiciary. Specifically, in his 1975 year-end report, Burger stated that the proper functioning of the judicial branch "[was] reflected in the relatively high popular esteem of the courts."[16] Rehnquist found that public support for the judiciary was similarly high in 1987 and 1999. In his 1987 year-end report Rehnquist invited the judicial branch to "take pride in the ultimate efficiency and soundness of the third branch of government and in the respect with which the branch [was] viewed by the general public" and, in his 1999 report, Rehnquist explicitly discussed Gallup polling data that provided direct evidence of widespread support for the judiciary.[17] In discussing 1999, Rehnquist

[14] Warren E. Burger, "Report on the Federal Judicial Branch – 1973," *American Bar Association Journal* 59 (October 1973): 1126.
[15] Warren E. Burger, "The State of the Federal Judiciary – 1972," *American Bar Association Journal* 58 (October 1972): 1049; Warren E. Burger, "The State of the Judiciary – 1975," 441.
[16] Warren E. Burger, "Chief Justice Burger Issues Yearend Report," *American Bar Association Journal* 62 (February 1976): 189.
[17] William H. Rehnquist, "Chief Justice Outlines Court's Changes, Needs," *Chicago Daily Law Bulletin* 134 (January 1988): 10; William H. Rehnquist, "The 1999 Year-End Report on the Federal Judiciary," *The Third Branch* (January 2000): 2.

concluded that "Public recognition of the strengths of the federal judiciary [was] encouraging."[18] While public support for the judiciary insulates the Court's legitimacy, references to public opinion, even when confidence in the judiciary was high, implicitly suggest that justices, at least Chief Justices, monitor the judiciary's standing among the public. The Chief Justices' recognition of public opinion in year-end reports ultimately underscores that justices are aware that Court legitimacy is partially dependent on a positive public relationship with the judicial branch.

II.b. *Responding to Claims of Judicial Activism*

In what came to be his last year-end report, Chief Justice Rehnquist decided to respond to mounting criticisms that the judicial branch was engaging in judicial activism.[19] Not only does Rehnquist's decision to respond to these criticisms reinforce the idea that justices monitor public opinion, as discussed in the previous section, but it also suggests that there is a concern with judicial legitimacy should the courts been deemed judicially activist. As identified by Rehnquist, claims of judicial activism were often previously leveled at the Supreme Court during the Warren and Burger years, when federal judges were attacked for their "some might say activist, decisions in the desegregation cases."[20] An activist judiciary undermines its legitimacy as it pushes the bounds of its constitutional power in deciding cases that may not belong in the courts and should be resolved by more democratic processes. Therefore, Rehnquist's attempt to refute criticisms of judicial activism was likely influenced by a need to protect judicial legitimacy and distance federal courts from claims that they were activist or, in other words, acting illegitimately.

II.c. *Jurisdictional Limits and Federalism*

Although the Constitution is vague about the breadth of the judicial branches' power, i.e. the

[18] Rehnquist, "The 1999 Year-End Report on the Federal Judiciary," 2.
[19] William H. Rehnquist, "2004 Year-End Report on the Federal Judiciary," (January 2005) retrieved from http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.
[20] Ibid.

power of judicial review is not explicitly articulated in the Constitution, Article III does list the type of cases and disputes that fall under the federal judiciary's authority.[21] In providing for the specific type of cases that federal courts were to hear, the Constitution clearly established a judiciary of limited jurisdiction. As the judiciary gets its institutional mandate from the Constitution, anxiety regarding unprecedented and unconstitutional expansions of the courts' jurisdiction reflects a concern with undermining the judiciary's legitimacy. Additionally, as is discussed in Chapter Four, the Constitution clearly articulates a federalist system of governance that reflects the idea that federal courts have limited jurisdiction. Discussions of either the federal judiciary's jurisdictional limits or the importance of federalism clearly indicate a concern with judicial legitimacy.

References to the judiciary's limited jurisdiction in year-end reports were manifested in (1) explicit discussions that the judicial branch is composed of "courts of limited jurisdiction" and (2) assertions that expanding judicial jurisdiction would undermined judicial standards and uniformity.[22] Both types of concerns with expanding the judicial branches' jurisdiction were solely present in Chief Justice Rehnquist's year-end reports. Specifically, in regards to the first way that jurisdictional concerns were discussed in the reports, Rehnquist articulated the concern in his 1997 year-end report that the federal judiciary "[would] lose its traditional character as a distinctive judicial forum of limited jurisdiction" if the scope of its jurisdiction continued to expand.[23] Losing the "traditional character" of the judicial branch was an undesirable transition as "the federal courts have traditionally been courts of limited jurisdiction."[24]

Concerns with expanding judicial jurisdiction were also discussed in terms of the effect that an expansive judiciary would have on the consistency of constitutional interpretation. In his 1995 report, Rehnquist discussed the judicial opposition to "unlimited expansion of the federal judiciary, because an appellate court that is too large often become unwieldly, and may have difficulty maintaining consistency

[21] U.S. Constitution, art. 3.
[22] Rehnquist, "The 1999 Year-End Report on the Federal Judiciary," 3.
[23] William H. Rehnquist, "The 1997 Year-End Report on the Federal Judiciary," *The Third Branch* 30 (January 1998).
[24] Ibid.

of precedent."[25] In reviewing 1991, Rehnquist also explicitly discussed the negative effect that jurisdiction expansions would have on the Supreme Court in suggesting that expanding the jurisdiction of federal courts would lead the Supreme Court to be "incapable of maintaining uniformity in federal law."[26] Concern with limiting the federal courts' jurisdiction in order to maintain consistency across the judicial branch highlights Rehnquist's, and presumably the other justices', awareness that arbitrary and foundationless decision-making threatens judicial legitimacy. Despite recognizing that justices do have personal ideological and policy preferences, the public generally supports the judiciary as long as decision-making does not appear to be standardless or arbitrary.[27] Criticisms tend to emerge once decision-making seems to be based on justices' personal preferences. For example, as discussed in Chapter Two, the Supreme Court has faced criticisms that Legal Realist interpretation led to arbitrary decision-making and undermined Court legitimacy. Thus, the concern evident in the year-end reports regarding expanding the judiciary's jurisdiction is a reflection of the awareness that such expansion negatively impacts judicial legitimacy.

Additionally, specific concerns with undermining federalism first emerged in Burger's 1976 year-end report and were then revisited by Rehnquist during the 1990s. Burger first suggested that "if [the federal government] really believe[d] what [was] the subject of so much rhetoric about returning government to the people and to the states, it would help if [the judiciary] had [legislative action] to match the rhetoric" and returned unnecessarily federalized areas of jurisprudence to state courts.[28] Similarly, in referencing the importance of following federalism in his 1998 year-end report, Rehnquist warned that "The trend to federalize crimes that traditionally have been handled in states…threaten[ed] to

[25] William H. Rehnquist, "1995 Year-End Report on the Federal Judiciary," *American Journal of Trial Advocacy* 19 (Spring 1996): 495.
[26] William H. Rehnquist, "Chief Justice's 1991 Year-End Report on the Federal Judiciary," *The Third Branch* 24 (January 1992): 2.
[27] James L. Gibson and Gregory A. Caldeira, "Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination," *American Journal of Political Science* 53 (January 2009): 147
[28] Warren E. Burger, "Annual Report on the State of the Judiciary," *American Bar Association Journal* 62 (April 1976): 444.

change entirely the nature of [the] federal system."[29] The expressed desire to remain faithful to the traditional dichotomy between state and federal courts ultimately reinforces the judiciary's recognition that federal courts do have constitutionally limited jurisdictions and that upholding federalism is important, as it is a basic principle of the Constitution.

II.d. *Judicial Independence*

When the Framers wrote the Constitution, they provided for three independent branches that operate under a system of checks and balances. For example, the Framers recognized the relative power asymmetry of the judicial branch in relation to the more powerful executive and legislative branches and provided that federal judges and Supreme Court justices should hold office during "good Behavior."[30] The Good Behavior Clause ultimately intended to insulate the courts from being "overpowered, awed, or influenced" by the other branches and "to secure a steady, upright, and impartial administration of the laws."[31] However, while the judicial branch does have insulated, independent powers, it is very much beholden to the executive and legislative powers. Alexander Hamilton identified some of the ways that judicial power was intentionally constrained in *Federalist* No. 78. For example, he maintained that the judicial branch "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever [*sic*]. It may truly be said to have neither FORCE nor WILL, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements."[32] As the judiciary does not have control over the purse, the judiciary is dependent upon the legislative branch because the judiciary's budget and federal judicial raises require approval from Congress. Though the Judicial Compensation Clause in Article III, Section I of the Constitution does provide that judicial officers' salaries cannot be "diminished during their Continuance in Office," it does not provide how regularly judicial raises should be approved to

[29] William H. Rehnquist, "The 1998 Year-End Report on the Federal Judiciary," *The Third Branch* 31 (January 1999).
[30] U.S. Constitution, art. 3, sec. 1.
[31] Alexander Hamilton, *Federalist* No. 78, in *The Federalist Papers*.
[32] Ibid.

adequately take into account inflation and cost-of-living increases, and to maintain judicial independence.[33]

Beginning with Rehnquist's first year-end report, many of the following reports continued to remind the other branches, legal community, and public that an independent judiciary is constitutionally mandated and necessary for the proper functioning of the federal government. In continuously reiterating the importance of an independent branch and providing for the ways that judicial independence should be maintained, the year-end reports signal that Rehnquist was and Roberts continues to be concerned with insuring the judiciary's institutional legitimacy. Specifically, within the reports, lack of judicial pay raises were often discussed in terms of the effect that such failure to increase judicial salaries has on judicial independence. For example, in his 2002 year-end report Chief Justice Rehnquist maintained that "Inadequate compensation seriously compromises the judicial independence fostered by life tenure" and Chief Justice Roberts asserted in his 2007 year-end report that the failure to increase the compensation of federal judges/justices had "reached a level of constitutional crisis that threaten[ed] to undermine the strength and independence of the federal judiciary."[34] Additionally, judicial independence was discussed in terms of the importance of maintaining the separation of powers provided for in the Constitution. In his 1995 report, Rehnquist maintained that "The Third Branch has long stood as a powerful example of the way in which a properly functioning legal institution in a democracy can work – when there are three separate, independent, co-equal, interactive branches of government."[35] There are few ways that judicial legitimacy could be more blatantly denied than if the judiciary were stripped of its independence.

III. Findings and Implications

This section highlights the major findings of the content analysis of the Chief Justices' annual

[33] U.S. Constitution, art. 3, sec. 1.
[34] William H. Rehnquist, "2002 Year-End Report on the Federal Judiciary," (January 2003) retrieved from http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx; John G. Roberts, Jr., "2006 Year-End Report on the Federal Judiciary," (January 2007) retrieved from http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.
[35] Rehnquist, "1995 Year-End Report on the Federal Judiciary," 491.

year-end reports and their implications. Content analysis of the year-end reports suggests that (1) the Chief Justices' legitimacy concerns parallel those that emerged in the Court's abortion decisions, (2) the articulated concerns regarding judicial legitimacy have not been the same since Chief Justice Burger's first 1970 year-end report, (3) the extent of the concern with judicial legitimacy increased in the middle of the 1990s, (4) the year-end reports forego explicit discussion of cases and instead propose administrative solutions to resolve judicial legitimacy concerns, and (5) legitimacy concerns are articulated differently in the year-end reports than in popular press, especially in those authored by Chief Justice Roberts. The first finding suggest that justices are aware of institutional legitimacy. The second indicates (1) that the justices' ideologies do matter, at least insofar as they influence the type of legitimacy concerns that are identified by justices, and (2) that external pressures influence the perceived level of judicial security. The third finding suggests that a lack of an interpretive monopoly may exacerbate judicial concern with legitimacy. The fourth finding suggests that the Chief Justices use the year-end reports to protect the judiciary's fundamental role by proposing administrative solutions to remedy legitimacy concerns. Finally, the fifth finding suggests that there is a dichotomy between the actual and expected ways that legitimacy concerns are articulated in the year-end reports.

III.a. *The Legitimacy Concerns Articulated in Year-End Reports and Court Decisions*

The legitimacy concerns articulated in the year-end reports parallel the keywords and claims that emerged in the Court's abortion decisions (discussed in Chapter Four). The legitimacy concerns that were articulated in both the year-end reports and abortion decisions alluded to (1) the Court's jurisdiction, (2) federalism, and (3) judicial independence. Chief Justice Rehnquist discussed the limits on the Court's jurisdiction in year-end reports to highlight that the Court's power and legitimacy were not inexhaustible and that the judiciary needed to maintain standards of review. Rehnquist's former claim is mirrored in Chapter Four's discussion of judicial review because expanding the scope of judicial review necessarily leads to an increase in perceived federal jurisdiction. Additionally, Rehnquist's emphasis on the need to monitor increases in jurisdiction in order to ensure standards were conserved parallels the justice's

recognition that it was important to maintain precedent when deciding cases. Maintaining uniform standards and upholding precedent both ensure that law is consistent and is not wholly dependent on the federal judges or Supreme Court justices who are on the bench.

Federalism was also discussed in both the reports and abortion decisions. Federalist notions appeared in both the reports and the decisions to remind Congress and the other justices, respectively, that intrusion upon state powers violated a fundamental principle of the Constitution. Within their reports, the Chief Justices articulated instances when this principle was violated due to the federalization of cases that should be decided in state courts. Similarly, within the abortion decisions, a few justices charged the Court with illegitimately abridging state power (e.g. the state's police power). The necessity of upholding the independence of the federal judiciary to maintain legitimacy was also articulated in both the year-end reports and abortion decisions. While the Chief Justices suggested judicial independence was threatened when Congress did not provide the judiciary with adequate funding, Chapter Four discusses the justices' claims that judicial independence was threatened when justices were unduly influenced by public pressure. Although there are parallels in the legitimacy concerns that appeared in the Chief Justices' annual year-end reports and the Supreme Court's abortion opinions, an important difference exists regarding how these claims were discussed. In general, legitimacy concerns emerged in the year-end reports as a response to other actors that were undermining the Court's legitimacy. Conversely, similar legitimacy keywords and claims emerged in abortion decisions in response to justices that were believed to be undermining the Court's legitimacy. Legitimacy concerns in year-end reports largely accused other, *non-judicial actors* of harming the judiciary's legitimacy, while those in abortion decisions accused other *justices* of threatening the Court's legitimacy.

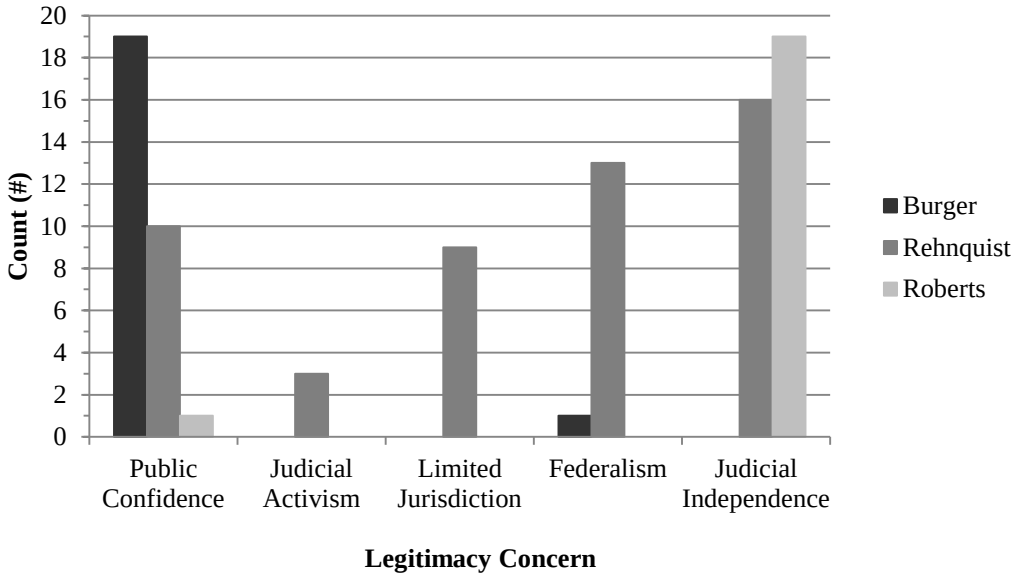
Articulation of legitimacy concerns in both year-end reports and abortion decisions ultimately illustrates judicial concern with maintaining the Court's legitimacy. The Chief Justices' willingness to identify how certain factors and non-judicial actors (i.e. Congress) threaten the Court's legitimacy suggests that they are highly aware of the Court's institutional legitimacy. As the institutional steward of

the judicial branch, the Chief Justice is in the position to identify when such threats emerge and challenge the Court's legitimacy.

III.b. *The Relationship between the Presiding Chief Justice and the Type of Articulated Legitimacy Concerns*

The specific legitimacy concerns articulated in the year-end reports varied based on who held the Chief Justiceship. Specifically, Burger almost entirely discussed legitimacy concerns arising from public opinion, Rehnquist was concerned with a variety of factors threatening judicial legitimacy, and Roberts was largely focused on maintaining judicial independence to prevent the complete undermining of judicial legitimacy (Fig. 5.1). These differences in the ways that legitimacy concerns were articulated in the year-end reports are likely due to both the ideological differences between the three Chief Justices and the differing political and social environments during the years that each of the justices held the Chief Justiceship.

Figure 5.1 Legitimacy concerns articulated in year-end reports based on report author, 1970-2015.



In regards to the former, Burger, Rehnquist, and Roberts had different approaches to constitutional interpretation. While Roberts is less beholden to one interpretive approach, Burger was a Legal Realist and Rehnquist was an Originalist. These Legal Realist and Originalist predispositions are especially reflected in the type of legitimacy concerns identified in the year-end reports authored by Burger and Rehnquist, respectively. Burger's discussion of public confidence in his reports parallels Legal Realists' greater focus on public opinion and societal norms during decision-making. Legal Realists are more overtly aware of popular opinion than are Formalists, Originalists, and Common Law Constitutionalists, which is reflected in Burger's greater awareness of public confidence in his reports than in both Rehnquist's and Roberts'.[36]

Conversely, Rehnquist was an Originalist who identified with the extensive criticisms of Legal Realism that, as Chapter Two discusses, were being leveled at the Supreme Court when he inherited the Chief Justiceship in 1986. The more nuanced legitimacy concerns Rehnquist referenced in his year-end reports parallel the ways that Originalists sought to insulate Court legitimacy and respond to attacks targeting Legal Realism. For example, Rehnquist's discussion of (1) criticisms of a judicially activist judicial branch, (2) the need to maintain a federal judiciary of limited jurisdiction, and (3) recognition of the importance of federalism can be seen as responses to activist and "standardless" Supreme Court decision-making under the guidance of Legal Realism.[37] Rehnquist's emphasis on limiting the federal judiciary's jurisdiction was likely largely influenced by his Originalist concern that arbitrary decision-making undermines judicial legitimacy. Additionally, Rehnquist's discussion of judicial activism in his 2004 year-end report and Burger's lack of reference to judicial activism, despite Rehnquist's reminder that many decisions of the Legal Realist Warren and Burger Courts were challenged as being activist, underscores the influence that ideological and interpretive predispositions have on the legitimacy

[36] For a review of the four main schools of judicial thought, see Morgan Marietta, *A Citizen's Guide to the Constitution and the Supreme Court: Constitutional Conflict in American Politics* (New York: Routledge, 2014).
[37] Ibid, 126 (claiming that interpretation by Living Constitutionalists (Legal Realists) was criticized because it is "standardless").

concerns articulated in the year-end reports.[38] Furthermore, evidence that the Chief Justices were particularly influenced by their interpretive values is found in Rehnquist's 2000 year-end report. In once again discussing the need for judicial raises, Rehnquist employed an argument about the intentions of the Constitution's Framers, including a quotation from Alexander Hamilton on this subject. This very Originalist argument likely only emerged in the report as Rehnquist was ideologically aligned with Originalism.[39]

Despite Roberts' ideological flexibility, his preferences still reflect the type of legitimacy concerns that emerged in his year-end reports. Specifically, Roberts' lack of one dominant interpretive ideology could have influenced his articulation of a concern that is not reflective of a school of thought. Judicial independence is one of the most fundamental principles to emerge from the Constitution and secure judicial power. Concern with maintaining judicial independence is not a characteristic difference of the schools of thought as Formalists, Legal Realists, Originalists, and Common Law Constitutionalist all aim to secure judicial independence and legitimacy. Hence, Roberts' legitimacy concerns were also influenced by his ideological preferences, though, in Roberts' case, his lack of loyalty to one interpretive approach informed his articulated legitimacy concerns. The legitimacy concerns articulated by Burger, Rehnquist, and Roberts can all be traced back to the ideological and interpretive approaches each embraced/embraces.

In addition to the influence that Chief Justice ideology has on the legitimacy concerns articulated in the year-end reports, the political and social climates also likely influence the type of referenced concerns. Beginning with the Burger year-end reports, Chief Justice Burger discussed public confidence in 62.5% of his year-end reports. Burger's consistent references to public support in the year-end reports occurred only a few years after Gallup began to systematically track public support for the Supreme Court in their polling. While Or Bassok recognizes that Gallup began to measure the extent of public confidence in the Court as early as 1930, he maintains that systematic tracking of public support for the Court only

[38] Rehnquist, "2004 Year-End Report on the Federal Judiciary."
[39] William H. Rehnquist, "2000 Year-End Report on the Federal Judiciary," (January 2001) retrieved from http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

began in the 1960s.[40] Accordingly, by Burger's first year-end report, Gallup polling would have been in the early stages of reporting data indicating any fluctuations in public confidence in the Court. While Bassok argues that the "Rehnquist Court change[d] its way of understanding its own normative legitimacy following the rise of public opinion culture…," evidence that the "public opinion culture" was influential prior to Rehnquist's tenure as Chief Justice emerges in Burger's year-end reports. Even though Burger did not explicitly reference Gallup polling data in his reports, as did Rehnquist in his 1999 year-end report, Burger was clearly consulting external sources to identify the amount of public confidence in the Court.[41]

Additionally, Burger's awareness of public opinion in his year-end reports could reflect the increasing salience of the Supreme Court and judiciary following the Senate's filibuster of President Lyndon B. Johnson's Chief Justice nominee in 1968. After Chief Justice Earl Warren's retirement was announced in 1968, President Johnson proposed that Associate Justice Abe Fortas assume Warren's vacated position. Fortas' nomination was not well received by many Senate members, who attacked Chief Justice Warren's and President Johnson's timing as politically calculated, and ultimately led to the first senate filibuster that successfully blocked a presidential judicial nominee.[42] Importantly, the filibuster of Fortas' nomination did not occur in a vacuum and was instead highly publicized; in fact, as Barry Wukasch maintains, "a primary purpose of the opposition committee members [i.e. the opponents of Fortas' nomination] seemed to be to mobilize public opinion through the mass media coverage of the hearings."[43] While Supreme Court and Chief Justice nominations were not always highly salient, there

[40] Or Bassok, "The Two Countermajoritarian Difficulties," *Saint Louis University Public Law Review* 31 (January 2012): 338; Or Bassok, "The Supreme Court's New Source of Legitimacy," *Journal of Constitutional Law* 16 (October 2013): 157.
[41] Bassok, "The Supreme Court's New Source of Legitimacy," 166 (regarding the Rehnquist Court and "public opinion culture").
[42] Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles* (Washington, D.C.: National Press Books, Inc., 1992), 284; Donald Grier Stephenson, Jr., *Campaigns & the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), 184-5; Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (New Jersey: Princeton University Press, 2009), 222; Stephen M. Engel, *American Politicians Confront the Court* (New York: Cambridge University Press, 2011), 306.
[43] Barry C. Wukasch, "The Abe Fortas Controversy: A Research Note on the Senate's Role in Judicial Selection," *The Western Political Quarterly* 24 (March 1971): 25.

has been an increasing trend regarding the role that external organizations play in influencing who fills Supreme Court vacancies and increasing the salience of the nomination debates.[44] These organizations played an unusually important role in the controversy over Fortas' Chief Justice nomination.[45] Hence, the high public salience of the Fortas filibuster and hearings could have led to public disillusionment with the "apolitical" judiciary and influenced Burger to consistently revisit the amount of public confidence in the judiciary in his year-end reports.

Chief Justice Rehnquist's specific legitimacy concerns were also responsive to the political climate during which he authored his year-end reports. Regardless of Rehnquist's personal Originalist preferences (which were discussed above as influencing the content of his year-end reports), the political environment of the 1980s was filled with extensive attacks challenging the legitimacy of Legal Realism. As discussed in Chapter Two, the attacks of Legal Realism led to the disruption of the Legal Realist interpretive monopoly and emergence of Originalism in the 1980s. Given the widespread criticism of Legal Realism when Rehnquist assumed the Chief Justiceship, his reliance on Originalist principles to ensure judicial legitimacy in his reports were likely influenced as much by his personal Originalist tendencies as they were by the legitimacy challenges facing the highest Court in the federal judiciary.

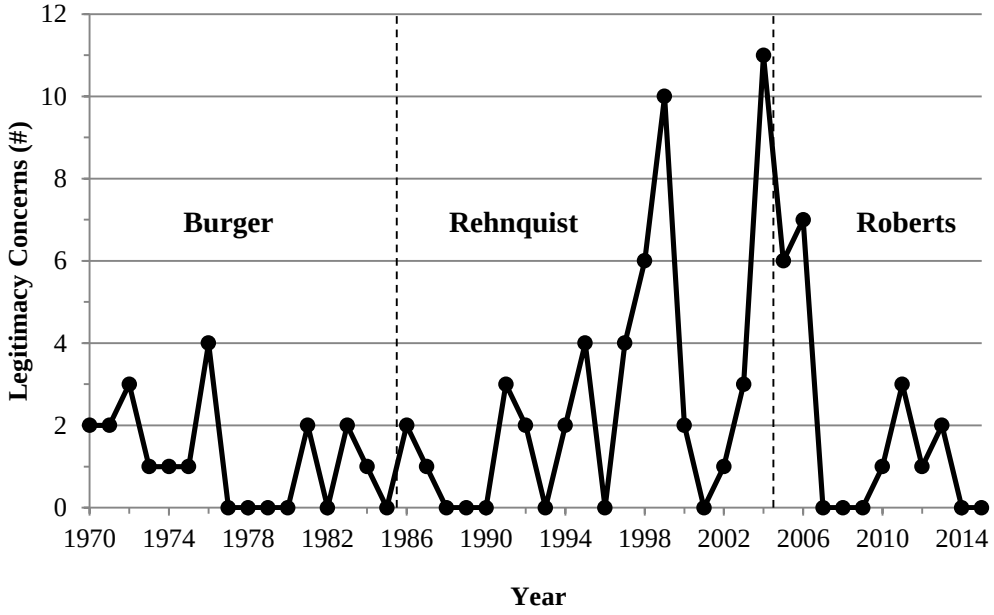
III.c. *Trends in the Total Legitimacy Concerns Articulated in Each Year-End Report*

Although legitimacy concerns were evident in the early year-end reports, the extent of the concern with judicial legitimacy increased in the mid-1990s (Fig. 5.2). On average, approximately one (1.17) legitimacy concern per decision was articulated in the first twenty-three year-end reports (1970-1992). In comparison, nearly three (2.7) legitimacy concerns were articulated per year-end report in the latter twenty-three reports (1993-2015). Reports from 1993 through 2015 included more than double the number of legitimacy references that were evident in reports from 1970 through 1992. This trend in the

[44] Simon, 39.
[45] Ibid.

increasing prevalence of legitimacy concerns in year-end reports suggests that there was a shift in the extent of the Chief Justices' concern with judicial legitimacy.

Figure 5.2 Trend in the number of legitimacy concerns articulated in year-end reports over time, 1970-2015.



The increase in the number of legitimacy concerns articulated in the year-end reports in the mid-1990s may be due to the failure of one school of thought to monopolize judicial interpretation after attacks emerged undermining Legal Realism. As argued in Chapter Two, judicial schools of thought emerged and were embraced to insulate the Supreme Court from attacks undermining Court legitimacy. However, after Legal Realism was challenged in the 1980s as causing illegitimately activist and constitutionally problematic interpretation and decision-making, neither Legal Realism, Originalism, nor Common Law Constitutionalism emerged as the dominant interpretive approach. This transition, from a state where the Court was insulated due to their reliance on one interpretive monopoly to the current state of the judiciary, where one judicial school of thought has not emerged, parallels the overall increase in the number of legitimacy concerns that were articulated in year-end reports. As this transition began in the 1980s, the increase in legitimacy concerns after interpretive disequilibrium was evident in the 1990s

corresponds to the increase in Rehnquist's references to legitimacy concerns in his reports. Similarly, the overall increase in the number of legitimacy concerns evident in Roberts' reports also parallels the continued lack of an interpretive monopoly. It was suggested at the end of Chapter Two that the lack of a single interpretive approach may cause justices to become increasingly concerned with their institutional legitimacy. The finding that more legitimacy concerns were evident in the late-Rehnquist and Roberts annual year-end reports than were articulated in the Burger and early-Rehnquist reports provides direct evidence that the lack of an interpretive monopoly does in fact exacerbate justices' concerns with judicial legitimacy.

III.d. ***Proposing Administrative Solutions to Remedy Concerns with the Judiciary's Legitimacy***

Aside for the 2000 year-end report, the Chief Justices neither implicitly nor explicitly reference the year's Supreme Court cases within their reports. The 2000 year-end report was the exception as Chief Justice Rehnquist began this report by referencing the chaos of the presidential election of 2000 and *Bush v. Gore* (2000). Specifically, the report begins: "Despite the seesaw aftermath of the Presidential election, we are once again witnessing an orderly transition of power from one Presidential administration to another. This Presidential election, however, tested our Constitutional system in ways it has never been tested before. The Florida State courts, the lower federal courts and the Supreme Court of the United States became involved in a way that one hopes will seldom, if ever, be necessary in the future."[46] While Rehnquist referenced the strain that had been placed on the "Constitutional system," he is likely referring to both the failure of the normal electoral process to identify a president and the Court's involvement in deciding the presidency. However, Rehnquist does not allude to the emergence of a legitimacy concern with the Court's decision to play such a key role in deciding the election.

Instead of discussing the extent that specific Court decisions contribute to the emergence of legitimacy concerns, either because of an unfavorable public reaction or because of the implications of the justices' reasoning, the Chief Justices use the year-end reports to introduce legitimacy concerns that are

[46] Rehnquist, "2000 Year-End Report on the Federal Judiciary."

independent of Court decisions and offer administrative solutions to these concern. Each of the legitimacy concerns discussed above was accompanied by a brief description of a remedy that would presumably insulate and reestablish the judiciary's legitimacy. For example, when discussing instances when public confidence had seemed to decline or there was reason to be concerned about the level of public confidence, one of the Chief Justices' proposed remedies was to increase judicial efficiency in order to decrease the public's frustrations with the courts. Specifically, in his 1972 year-end report, Burger noted that excessive jury wait times were contributing to the "disturbing hostility" directed "toward the courts" and suggested that "improving jury utilization [would] not only save several million dollars a year, but [would] make friends for the courts and speed up the entire process."[47] Burger also maintained in his 1981 report that "With court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore nonjudicial routes to resolving disputes."[48] Both of these remedies to the public's crisis in confidence regarding the judiciary are attempts to make the administration of justice less onerous.

Similarly, administrative solutions were also proposed to remedy concerns with expanding the jurisdiction of federal courts beyond their traditional limited jurisdiction and resolving concerns with undermining federalism. In both cases, these remedies predominantly involved returning cases that belonged in state courts back to state judiciaries. In order to monitor the extent of Congress' expansion of federal jurisdiction, Rehnquist suggested in his 1994 report that Congress should remain aware of "judicial input" regarding cases that should and should not be federalized.[49] Furthermore, in his 1998 report, Rehnquist asserted that "matters that can be handled adequately by the states should be left to them; matters that cannot be so handled should be undertaken by the federal government."[50] He further suggested that "A re-examination of diversity jurisdiction [when opposing parties are residents of different states] is also warranted" as such "lawsuits account[ed] for a substantial percentage of the

[47] Burger, "The State of the Federal Judiciary – 1972," 1051.
[48] Warren E. Burger, "Isn't There a Better way?," *American Bar Association Journal* 68 (March 1982): 275.
[49] William H. Rehnquist, "1994 Year-End Report on the Federal Judiciary," *American Journal of Trial Advocacy* 18 (Spring 1995): 503.
[50] Rehnquist, "The 1998 Year-End Report on the Federal Judiciary."

federal caseload, and as state law [was] applied in such cases in any event, there [was] no good reason to keep them in federal court."[51] Rehnquist was ultimately of the opinion that "there [were] certainly no lack of candidates for possible curtailment" and a reexamination of the grossly expanded federal courts' jurisdiction could remedy the legitimacy concerns that accompanied unnecessary expansion of federal jurisdiction and undermining of federalism.[52]

Additionally, the Chief Justices – mostly Chief Justice Roberts – suggested remedies to resolve their legitimacy concerns regarding infringement of judicial independence. These remedies predominantly included the passage of judicial raises by Congress and limiting operational costs. For example, in the 2000 year-end report, Rehnquist beseeched Congress to "abandon the approach to judicial salaries that puts off the inevitable increases until salaries have so eroded in value that substantial increases are necessary."[53] In his first year-end report, Chief Justice Roberts similarly suggested that the executive and legislative branches could help ensure the judiciary's independence by "first, enacting a significant pay raise for federal judges, and second, eliminating or at least sharply lowering the courthouse rent that the judiciary is required to pay GSA [the General Services Administration]."[54] As with the remedies proposed by the Chief Justices in response to the other legitimacy concerns that were articulated in the year-end reports, those proposed to resolve concerns with judicial independence were also solely administrative. Ultimately, the Chief Justices' proposed solutions to the legitimacy concerns raised in the year-end reports are notably not aimed to change the foundation or principles of the judiciary's role in the federal government.

It is likely that the proposed solutions to the Chief Justices' legitimacy concerns solely call for administrative changes because other judicial fixes would actually serve to further undermine the judiciary's legitimacy. As the judiciary must remain politically neutral, a political fix would cast doubt on the Court's independence. For example, calling for the appointment of justices with specific ideological

[51] Ibid.
[52] Rehnquist, "Chief Justice's 1991 Year-End Report on the Federal Judiciary," 3.
[53] Rehnquist, "2000 Year-End Report on the Federal Judiciary."
[54] John G. Roberts, Jr., "2005 Year-End Report on the Federal Judiciary," (January 2007) retrieved from http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

predispositions, perhaps to remedy concerns with maintaining consistent interpretation of law and the Constitution, would openly admit that the judiciary is largely influenced by the ideological preferences of the judges/justices. Hence, the proposal of an administrative fix reinforces that the Court must remain politically neutral. Similarly, advocating that changes be made to the fundamental role of the judiciary would significantly strip the courts of their institutional role and legitimacy. The Chief Justices' goals were to insulated the judiciary's institutional role rather than drastically alter the way in which the third branch contributes to the federal government. The administrative solutions propose minor changes rather than a reevaluation of the federal judiciary. Proposing administrative fixes is the Chiefs Justices' only legitimate option, as other fixes implicate the judiciary in the political fray or indirectly undermine the courts' institutional role.

III.e. ***The Actual Versus Expected Legitimacy Concerns Articulated in the Year-End Reports***

The year-end reports are surprising in their articulation of legitimacy concerns that are drastically different than those that are directly discussed with the press. In other words, there are notable instances in which the articulation of concerns in the year-end reports is different than how scholars and the public typically think about the Court's legitimacy. This dichotomy is particularly apparent in Chief Justice Roberts' year-end reports. As Roberts actively discusses Court legitimacy concerns with the media, it would be expected that the concerns that emerge in his year-end reports mirror those that are articulated in the popular press. Journalistically, Roberts asserts a concern with split-decisions. Since he first assumed the Chief Justiceship, Roberts has actively denounced fragmented Court decisions because he believes they delegitimize the Court. In a 2006 speech, Roberts maintained that it was "'a high priority to keep any kind of partisan divide out of the judiciary.'"[55] He was of this opinion because "'Unanimity or near unanimity promote clarity and guidance to lawyers and to the lower courts trying to figure out what the Supreme Court [means]'" and "'Perhaps most importantly there are jurisprudential benefits: the

[55] John G. Roberts, quoted in Jeffrey Rosen, "Promises, Promises, Promises," *The New Republic,* 10 March 2010, https://newrepublic.com/article/73617/promises-promises-promises.

broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible grounds.'"[56] Chief Justice Roberts implicated a concern with the Court's legitimacy even more directly by stating in a 2006 interview that it was time to return to the unanimous or near unanimous decision-making of the Marshall Court "'because if [the Court] doesn't it's going to lose its credibility and legitimacy as an institution.'"[57]

Based on Roberts' openness about his concern with non-unanimous decisions and assertion that he would actively champion unanimity at the start of his Chief Justiceship, it would be expected that similar legitimacy concerns be articulated in his year-end reports. However, despite his clear willingness to publically discuss split-decisions, Roberts almost exclusively addressed a legitimacy concern regarding the need to uphold judicial independence in his year-end reports. Within his reports, Roberts discussed judicial independence in terms of ensuring adequate judicial compensation. This discussion of judicial salaries is drastically different than what he discusses with the press. Further, the connection between judicial independence and judicial salaries is also different than how the popular press and scholarly literature think about judicial independence. Though scholarly literature addresses the extent of judicial Court-curbing by both the executive or legislative branches, it does not propose that failing to increase judicial salaries is a Court-curbing mechanism.[58] The dichotomy between the legitimacy concerns that are expected to be articulated in the year-end reports and those that actually are articulated suggests that the ways in which Court-curbing is typically discussed may need to be expanded.

IV. Conclusion

The year-end reports provide one more perspective by which to analyze whether the judiciary's democratic deficit has resonated with justices. The findings that Chief Justices Burger, Rehnquist, and

[56] Ibid.
[57] Ibid.
[58] On the legislative branches' relationship with the Court, see Charles G. Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Michigan: University of Michigan Press, 2008) and Engel; on the executive branches' relationship with the Court, see Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (New Jersey: Princeton University Press, 2009) and Engel.

Roberts referenced judicial legitimacy in their year-end reports contributes to the findings discussed in the preceding chapters that claims of judicial illegitimacy do resonate with justices and invoke explicit responses from the judiciary. Specifically, within the year-end reports, the type of legitimacy concerns that were articulated depended on the ideological predisposition of the Chief Justice that authored the opinion and the political and social environment. Legitimacy concerns were also exacerbated by the lack of an interpretive monopoly after the emergence of Originalism and Common Law Constitutionalism, a state of disequilibrium that continues to be the case today. The year-end reports also present solutions to the articulated legitimacy concerns; these solutions are notable as they focus on making administrative changes to ensure the judiciary's legitimacy and do not suggest changes that influence the judiciary's institutional role. Finally, in considering Roberts' year-end reports, a clear disconnect emerges regarding the type of claims he articulates in his reports and those that he is typically know to articulate in the popular press.

Although the year-end reports are a message from the Chief Justice, rather than the collective Supreme Court or judiciary, it is likely that the Associate Justices on the Supreme Court share many of the same concerns with Court legitimacy as articulated by the Chiefs. The claims that are less ideologically influenced, e.g. concerns with judicial independence, are especially likely to be shared by more than just the Chief Justice. Therefore, the year-end reports provide a glimpse into the concerns that are likely openly discussed by justices and recognized in the judicial branch.

CONCLUSION

This project has asked whether Supreme Court justices have responded to and internalized the Court's democratic deficit, and, if they have, how that position affects scholarly understanding of the so-called norm of judicial supremacy and security of judicial authority. The question arose out of a perceived lack of scholarly focus regarding how claims of the Court's democratic deficit, due to the countermajoritarian dilemma, affect the justices themselves. One area of judicial politics scholarship focuses on how public understanding of the Court's legitimacy changes over time in the face of dissatisfaction with individual decisions and/or the judiciary as an institution. The other area of judicial politics scholarship addresses how the executive and legislative branches interact with the Court in influencing, recognizing, and enforcing the justices' decisions. Accordingly, scholarly literature on this topic predominantly focuses on the actors who call the Court's legitimacy into question (i.e. the "attackers") and largely ignores how such attacks may be internalized by the justices (i.e. the "attacked") who operate in an institution of tenuous authority and legitimacy. The two bodies of scholarly work that actually focus on the justices themselves include multimember panel literature and judicial biographies. However, these sources of research do not provide sufficient answers to the question this project sought to answer, as the former largely does not consider how the institution's legitimacy is perceived by the justices and the latter does not consider the effects on the Court as a whole. Given the apparent lack of focus on how the Court's legitimacy crisis has resonated with Supreme Court justices, this project aimed to fill the gap and analyze whether and, if so, how attacks calling judicial legitimacy into question are internalized by the justices.

Chapter one was a literature review that introduced the relevant scholarly literature regarding the Court's legitimacy crisis and identified the areas of scholarship that this project aimed to fill. Chapter Two re-conceptualized the four main schools of judicial thought as responses to attacks that directly challenged the Court's institutional legitimacy. Chapter Three then began the project's two chapter case-study on the Court's abortion jurisprudence and specifically analyzed the justices' internal

correspondence and communications regarding *Roe v. Wade* (1973) and *Doe v. Bolton* (1973) to identify the extent that concerns with maintaining the Court's legitimacy emerge during the justices' deliberation process. Chapter Four continued Chapter Three's analysis of *Roe* and *Bolton* by conducting a content analysis of the Court's twenty-one cases that deal with a right to abortion in order to identify the type of legitimacy keywords and claims that are articulated within decisions. Finally, Chapter Five provided another perspective on the project's motivating question by focusing on the Chief Justices; it examined whether and how legitimacy concerns emerge within their annual reports on the state of the federal judiciary.

Given all that has been said and presented in the preceding chapters to answer the project's central question, the remainder of this conclusion describes four main "takeaways" and ends with one final implication. The "takeaways" that will be discussed include: (1) Supreme Court justices are certainly aware of the constant criticisms of the Court, such that they are preoccupied with maintaining, insulating, and reasserting its legitimacy, (2) the norm of judicial supremacy is an invalid understanding of the current state of judicial politics, at least in relation to how the justices perceive their own institution's standing within the United States' political system, (3) the justices seem to recognize a link between the extent of the public's specific and diffuse support, despite the absence of scholarly literature that has adequately characterized this relationship, and (4) the evidence presented in this project reinforces the neoinstitutional model of judicial decision-making.

I. Justices' Concern with the Court's So-Called Legitimacy Crisis

Aside for Chapter One, the remaining four chapters all suggest that Supreme Court justices have internalized the legitimacy crisis that emerges from the Court's democratic deficit. Specifically, the chapter analyses suggest that the mode of judicial constitutional interpretation, deliberations during decision-making, rhetoric used in final decisions, and yearly summaries on the state of the judiciary are all influenced by the justices' understanding of the extent of the Court's legitimacy at a given point in time. In Chapter Two, it was argued that the way in which the justices interpret the Constitution is

directly linked to the legitimacy crises facing the Court. When new legitimacy crises emerge and target the Court, a direct response is observed within the way that justices justify Court decisions. That the justices are responsive to external attacks of the Court's legitimacy, suggests that they are influenced by the Court's democratic deficit. Similarly, although the focus of Chapters Three and Four was on the Court's abortion cases, the broader findings of both chapters – that concerns with judicial legitimacy do emerge during deliberations and appear in final decisions – are likely evident in other controversial areas of Court jurisprudence. For example, a similar articulation of concern with judicial legitimacy would be expected in cases that address gay rights, affirmative action, and first amendment rights, given the salience of such issues within the social sphere. The likelihood that abortion is not the sole jurisprudential area in which justices express concern with legitimacy further speaks to the extent that the justices have internalized the Court's democratic deficit. Even more notably, that the Chief Justices reference Court legitimacy in their largely *administrative* year-end reports indicates the extent that the Court's legitimacy dictates the way in which justices' operate within the Court's institutional framework.

While the justices have clearly internalized the Court's democratic deficit, the consistency of their concern with the Court's legitimacy would seem to be responsive to the level of extrajudicial attacks facing the Court. As a result, certain factors can exacerbate the justices' preoccupation with legitimacy. Some of these factors have been discussed within the previous chapters. For example, the contemporary Court's lack of an interpretive monopoly that is discussed in Chapter Two will likely increase the justices' preoccupation and concern with the Court's legitimacy. The absence of an interpretive monopoly within the current Court is particularly troubling given that increasing criticism of the Court is likely to emerge as the election year continues, the Court begins to hand down decisions for highly salient cases, and the judicial confirmation process continues to be embroiled in the politics of the election year and party polarization. Additionally, the Court's current position as a "bobtailed" Court is likely to exacerbate justices' awareness of the Court's strained legitimacy. As discussed in Chapter Three, some justices are uncomfortable with engaging in constitutional interpretation with a diminished Court. In the context of *Roe* and *Bolton,* Justice Harry Blackmun was very concerned with issuing Court decisions without a full

nine-membered Court.[1] Accordingly, the Court's current vacancy will likely increase some of the justices' concerns with legitimacy, especially if the vacancy extends throughout the remainder of President Barack Obama's last year in office as Republicans refuse to consider his Supreme Court nominations.

II. The Supposed Norm of Judicial Supremacy

The justices' persistent concern with the Court's democratic deficit suggests that they do not recognize the emergence of the norm of judicial supremacy. Insofar as the justices do not recognize their constitutional interpretation as supreme, the norm of supremacy cannot explain the way in which the justices understand their position within the nation's democratic system. The justices' consistent concern with legitimacy is most readily apparent in the legitimacy rhetoric that was articulated throughout the Courts' abortion jurisprudence and in the year-end reports. As *Roe* and *Bolton* were handed down in 1973, all of the Court's abortion cases were decided well after the norm of supremacy purportedly emerged. Similarly, as Chief Justice Warren Burger began the tradition of issuing year-end reports to summarize judicial happenings in 1970, these reports have also been exclusively written during a period where judicial interpretation of the Constitution has been considered to be supreme. The articulation of legitimacy concerns within these sources evidences that the justices have not recognized this norm. Justices who recognize the norm's emergence would not be concerned with the Court's legitimacy because the norm confers legitimacy on the Court. In failing to recognize the norm of judicial supremacy, the justices continue to perceive their position as tenuous. Although the norm of judicial supremacy is not actually reflective of how the justices' view their position within the federal government, that is not to say that the norm is completely invalid. Instead, the norm is perhaps better able to describe extrajudicial perceptions of the Court. Nevertheless, as the norm clearly does not reflect an accurate understanding of

[1] Harry A. Blackmun, Memorandum to the Conference, 31 May 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 3; Harry A. Blackmun, Letter to William Rehnquist, 20 July 1987, from the Library of Congress, *Harry A. Blackmun Papers, 1913-2001,* Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 3.

how Supreme Court justices view their own institution's legitimacy, the norm does not present the full picture of how judicial authority is recognized within the American political system.

III. The Relationship Between Specific and Diffuse Support

As discussed in Chapter One, specific and diffuse support are descriptors of the level of public support for either individual Court decisions and justices or the Court as an institution, respectively. While scholarly literature suggests, but has yet to substantiate, claims that there is a point at which losses in specific support must affect the extent of the public's diffuse support, this project has suggested that the Supreme Court justices seem to perceive a link between the two types of public support. For example, Chapter Two suggests that mere concern with the public's specific support will not lead to the emergence and judicial acceptance of a new interpretive monopoly; it is only when justices seem to perceive that the Court's institutional legitimacy is threatened and diffuse support may be affected that internalization of a new interpretive approach appears to be a justifiable remedy. Similarly, it is suggested in Chapter Three that Justice Blackmun's concerns with how *Roe* and *Bolton* would be received by the public, in light of the Court's likely controversial death penalty decisions, suggests a concern with how losses in specific support could potentially influence diffuse support.[2] Blackmun did not express that the decisions should be decided to minimize public discontent, but rather that controversial decisions should be distributed so that a cumulative loss of specific support did not lead to losses in diffuse support. Although Chapter Four was almost exclusively focused on justices' concerns with the state of the Court's institutional legitimacy, it was observed that the justices also implicate specific support in their decisions. Hence, justices seem to recognize a connection between specific and diffuse support.

That the justices perceive a link between specific and diffuse support is not particularly surprising, as scholars also recognize that such a link must exist (it is just the identifying of when specific support bleeds into diffuse support that has troubled scholars). However, this finding does not fill the gap

[2] Willian J. Brennan, Opinions of William J. Brennan, Jr.: October Term, 1971, from Library of Congress, *William J. Brennan Papers, 1945-1998*, Part II: Case Histories, 1958-1989, Box II:6, Folder 14.

in the relationship between specific and diffuse support. As this project was centered on justices' perceptions, rather than the public's concern with the judiciary, this finding does not necessarily provide evidence of when public specific support influences diffuse support. It also does not suggest the point at which the justices shift from expressing concerns with specific support to diffuse support. However, it does appear to be the case that the justices are receptive to both specific and diffuse support, and that the latter, more so than the former, is more troubling to the justices as it threatens the Court's institutional legitimacy.

IV. The Neoinstitutional Model of Judicial Decision-Making

Although this project did not set out to address decision-making on multimember panels, the ultimate findings that justices are concerned with the Court's legitimacy and have internalized the Court's democratic deficit reinforce the neoinstituional model of judicial decision-making, rather than the attitudinal model. The attitudinal model emphasizes that judicial decision-making is heavily, if not solely, influenced by the justices' ideological preferences. In summarizing the way in which attitudinalists view constitutional decision-making, Charles Geyh suggests that "For attitudinalists, judicial independence undermines, rather than promotes, the rule of law, by enabling judges to flout the law and implement their political predilections without fear of reprisal."[3] Contrary to this attitudinalist tenet, this project adds to the growing literature that suggests there are numerous ways in which other actors respond to judicial decisions, such that justices are not isolated in their constitutional interpretation and do in fact fear reprisal for their decisions.[4]

As this project suggests that justices are aware of the Court's legitimacy crisis, judicial decision-making is very much influenced by the justices' desire to maintain Court legitimacy. Insofar as justices are aware of the Court's democratic deficit and act in a way to preserve the Court's legitimacy, the

[3] Charles G. Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Michigan: University of Michigan Press, 2008), 14-5.
[4] See ibid and Stephen M. Engel, *American Politician Confront the Court* (New York: Cambridge University Press, 2011).

justices are not unconstrained in their decision-making. Specifically, Chapter Three's analysis of Blackmun's priorities in writing the *Roe* and *Bolton* majority opinions illustrates how ideological preferences are not solely at play in judicial decision-making. Justice Blackmun was significantly more motivated by his fear of undermining the Court's legitimacy in drafting the decisions for the *Abortion Cases* than he was interesting in pursuing his ideological preference. In fact, Blackmun abandoned his preferred position in *Roe* (i.e. following *U.S. v. Vuitch*'s (1971) vagueness standard to preclude the necessity of reaching the abortion rights issue) to achieve less fragmented final opinions.[5] Similarly, Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter's authoring of the majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) that upheld *Roe* (discussed in Chapter Four) clearly exemplifies an instance in which the expected ideological outcome, given the Court's conservative majority, was not reached. Instead, Justices O'Connor and Souter directly opposed their conservative leanings, and if the language in *Casey* provides any indication of why, they did so because they were concerned with irrevocably damaging the Court's legitimacy. These examples that have been pulled from the project's substantive chapters highlight that justices' internalization of the Court's democratic deficit leads to decision-making that is more constrained than attitudinalists maintain.

To the extent that this project demonstrates how judicial decision-making is constrained, it contends that the neoinstitutional model provides a more accurate account of judicial decision-making. Judicial decision-making is constrained by a variety of factors, one of which is the justices' awareness of and concern with the Court's democratic deficit as is evidenced by this project. Additionally, this project not only provides evidence that judicial decision-making is constrained, but further indicates that one of the constraints of decision-making is the need to maintain the Court's institutional legitimacy. In other words, the project contributes to the neoinstitutionalist model by providing clear and repeated evidence of another factor influencing decision-making, namely the justices' concerns with maintaining institutional legitimacy.

[5] Harry A. Blackmun, Memo to William H. Rehnquist, 18 May 1972, from Library of Congress, *Harry A. Blackmun Papers, 1913-2001*, Supreme Court File, 1970-1999, Case File, 1970-1994, Box 151, Folder 4.

V. In Conclusion

Solely considering the Court's legitimacy crisis from the perspective of the "attackers" provides an insufficient and incomplete understanding of the ramifications of the Court's democratic deficit. Scholars also need to understand the "attacked" in order to fully appreciate the influence that specific and diffuse support or Court-curbing has on the judiciary. The perspective of the "attacked" matters immensely. It is inadequate to state that the Court suffers from a legitimacy crisis, experiences a loss in specific support, or is used by the executive or legislative branches as a political pawn, without considering how such situations resonate with justices. As this project concludes, such acts that criticize or undermine the Court's legitimacy do influence justices and lead to their various attempts to voice and preserve institutional legitimacy.

The Introduction of this project began by suggesting that the Supreme Court is currently under incredible strain. The justices are operating during a time when there is a crisis of confidence in the judiciary, i.e. public support for the judiciary is low, it is an election year, the Supreme Court's docket consists of highly salient and controversial cases, and the Court is embroiled in the post-Bork, heavily politicized nomination process as President Obama attempts to fill the late Justice Antonin Scalia's seat.[6] Additionally, as suggested in Chapter Two and summarized above, the current lack of an interpretive monopoly is likely to exacerbate the justices' concern with the state of the Court's legitimacy. Out of all this strain emerges an example that highlights how undermining the Court's legitimacy resonates with the justices. In giving a speech regarding the politicization of the judicial confirmation process less than two weeks before Justice Scalia's passing, Chief Justice John Roberts articulated a need to preserve the Court's institutional legitimacy. Though quoted in the Introduction, his comments are worth repeating. Roberts suggested "'When you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it will be viewed in those terms'…'If the Democrats and Republicans have been fighting so freely about whether you're going to be confirmed, it's natural for some member of the

[6] Gallup, (2015) *Supreme Court* [Data set], retrieved from http://www.gallup.com/poll/4732/supreme-court.aspx.

public to think, well, you must be identified in a particular way as a result of that process.'"[7] He continued, "'We don't work as Democrats or Republicans'…'and I think it's a very unfortunate impression the public might get from the confirmation process.'"[8] Roberts' statements highlight that the judiciary is supposed to be above the political fray and, given all the other factors that are challenging its legitimacy, the Court cannot continue to be further delegitimized by the broken judicial confirmation process.

Roberts' comments further suggest that there are additional ways that justices perceive attacks on the Court's legitimacy beyond the ways that scholars typically explore. In suggesting that the political judicial appointment process infringes on Court legitimacy, Roberts indicates that attacks that are not necessarily directed at the Court, e.g. jurisdiction-striping legislation or rhetorical attacks on decisions or judges, can also serve to delegitimize its institutional legitimacy. For example, in the current judicial nomination standoff, it is the Senate rather than the judiciary that is being attacked. The hashtag of #DoYourJob has spread through social media as a way to publicly shame Senators for not considering the nomination of Merrick Garland.[9] Although the Senate Republicans justify their refusal to consider Obama's nominee by referencing the language of the Constitution's Appointments Clause and thereby call for the people to decide the issue via the next election, their rationale has been openly criticized by the press.[10] The *Los Angeles Times* editorial board maintained that the Senate Republicans' position "is a tortured and transparently political interpretation of the advice and consent power."[11] Even though such attacks are focused on the Senate and aim to undermine that institution's legitimacy, Roberts' timely denunciation of the judicial nominations process suggests that the Senate's obstruction itself indirectly

[7] John G. Roberts quoted in Adam Liptak, "John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy," *The New York Times*, 21 March 2016, http://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html.
[8] Ibid.
[9] Rachel Dicker, "The Internet Wants Congress to #DoYourJob and Consider Merrick Garland," *U.S. News & World Report*, 17 March 2016, http://www.usnews.com/news/articles/2016-03-17/doyourjob-hashtag-asks-congress-to-consider-merrick-garland-for-supreme-court.
[10] The Times Editorial Board, "Senate Republicans' Refusal to Consider Merrick Garland's Supreme Court Nomination is Dangerous Obstructionism," *Los Angeles Times*, 16 March 2016, http://www.latimes.com/opinion/editorials/la-ed-garland-scotus-20160317-story.html.
[11] Ibid.

affects the Court's legitimacy. Such indirect attacks – that seem focused on one institution but may influence the legitimacy of another given the constitutional requirements that link the two institutions – have yet to be explored in the scholarly literature as scholars generally think about Court delegitimization via direct attacks on the Court, e.g. from Court-curbing, reconstructive presidents, or public backlash.[12] Stephen Engel argues that judicial "harnessing" is now much more commonplace than Court-curbing, such that the judiciary is increasingly used by politicians to achieve political ends.[13] But Engel leaves unexplored a key implication of this thesis: insofar as the judicial nomination process can be considered an act of judicial "harnessing" because it attempts to confirm justices based on ideology, Roberts' assertions suggest that judicial "harnessing" can actually delegitimize the Supreme Court. The irony that Engel and other scholars who solely focus on the "attackers" at the expense of the "attacked" do not recognize is that attempts by "attackers" to utilize judicial power can damage the very legitimacy of the institution they aim to "harness." Thus, in not focusing on the justices and failing to recognize that they are very much aware of the Court's democratic deficit, the current understanding of the Court's legitimacy crisis is incomplete. While this project has aimed to fill part of the void, there is much more research to be done before a complete understanding of how the justices have internalized the Court's democratic deficit is achieved.

[12] On Court-curbing, see Geyh and Engel; on reconstructive presidents, see Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (New Jersey: Princeton University Press, 2009); on public backlash, see Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004) and Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Illinois: University of Chicago Press, 2008).
[13] Engel, 36-8.

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