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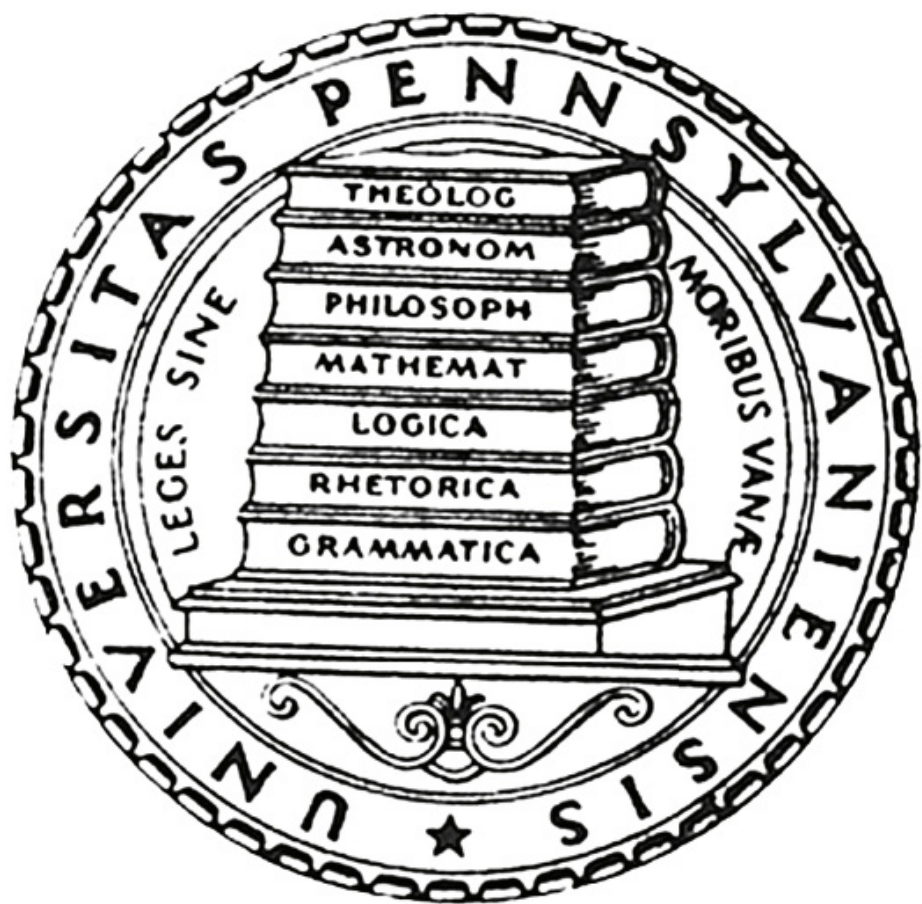
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ARTICLE

JUDGE AND COMPANY: TRACING THE CONTOURS AND IMPORTANCE OF LAW CLERK TRIBUTES

Abigail Roston, Northwestern University

Abstract

Sociolegal scholars and historians alike identify federal law clerks as critical players within the apparatus of the federal judiciary. Yet we know little about the writings of law clerks themselves and the lasting impact of the stories told about the clerkship and the judiciary at large. I approach this problem by focusing on law clerk tributes written for federal judges and Supreme Court justices written by law clerks across time and published in law reviews. My research focuses on these law clerk tributes—the stories, anecdotes, quirks, and controversies—and the dimensions of power inherent within their pages. I contend that taken as a body of literature, law clerk tributes strip away the individuality and humanity of a judge, and instead lift up their superior and superhuman qualities. I argue that as a result, law clerk tributes contribute to the elevation of judges and justices beyond other members of government and cement a culture of hero-worship in the judiciary. Finally, I draw on two outlier cases in which negative experiences about the clerkship were memorialized to illustrate the grip of the hagiographical tradition of law clerk writing. My thesis calls into question the elevation of judges and justices as untouchable figures and interrogates the importance of stories told within the pages of law clerk tributes.

Introduction

“The law is not made by one judge alone, but by judge and company” - Jeremy Bentham

In 1957, William H. Rehnquist launched a public crisis on the influence of Supreme Court law clerks. Then a young lawyer and former law clerk to Justice Robert Jackson, Rehnquist argued that ideologically liberal clerks manipulated the review of petitions for certiorari and influenced their conservative justices into voting in a more traditionally liberal fashion. Rehnquist characterized the liberal

viewpoints of the clerks as sympathetic to Communists and criminal defendants, in favor of expanding federal power at the expense of individual states, and highly sympathetic toward any government regulation of businesses.¹ Rehnquist critiqued the law clerk class for beguiling their older justices and supplanting the justices' opinions with their own. While he asserted that the "specter of the law clerk as a legal Rasputin" lacked merit, Rehnquist hypothesized that many clerks allowed their personal biases to affect their work.² Rehnquist thus publicly purported the existence of a cabal of law clerks engaged in highly politicized behavior with virtually no constraint on their actions. In doing so, Rehnquist launched both a popular and scholarly movement centered on investigating the extent to which clerks are able to influence their justices and the outcomes of the Supreme Court.

Although increased scholarly interest into the power and influence of law clerks burgeoned following Rehnquist's accusations, historical and sociological studies overlooked the voices of law clerks themselves. While historians and sociolegal scholars charted the historical development of the institution of the clerkship and studied the quantifiable influence of law clerks across the legal profession, the voices of law clerks remain unanalyzed and overlooked. My project injects the voices of law clerks into scholarly discussions of the clerkship by utilizing the writings of former law clerks codified in tributes to their judge or justice. Despite the commonly understood importance of law clerks, no study has dealt with law clerk tributes as a collection of sources and interrogated their impact across the legal profession. I argue that law clerk tributes resemble a body of hagiographical writing, depicting former judges and justices as saint-like and superhuman. Additionally, I argue that in the rare cases in which negative versions of judges were memorialized in tributes, beliefs about a judge's status, power, and ethics begin to crumble. Ultimately, I argue that the overwhelmingly positive stories we tell about judges and justices prevail over accusations of harassment or wrongdoing.

My analysis is based on tribute pieces written by former law clerks to their judges and justices. To find the full collection of tributes written about Supreme Court justices, I traced the publication of tributes for every justice of the United States Supreme Court who retired or died since the origins of the Court. Using this method, I compiled an extensive document of every justice on the court and every piece of tribute literature written about them by their law clerks. I read every published tribute written by a law clerk for a Supreme Court justice. Because

1 William Rehnquist, "Who Writes Decisions of the Supreme Court," *US News and World Report*, December 13, 1957, <https://www.usnews.com/opinion/articles/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence>.

2 *Ibid.*, 1.

numerous Supreme Court law clerks served as law clerks for judges at the lower level, I tracked the author (clerk) of each tribute to see if they served on a lower court and wrote a tribute for a judge at a lower level. Accordingly, I read every tribute written to a judge or justice connected to a former Supreme Court law clerk. I paid particular attention to the language they utilized to describe their time in chambers, relationship with their boss, and recollections of the experience of clerking.

Supreme Court and federal law clerks have a long and rich history. The employment of law clerks at the Supreme Court began in 1852 under the tenure of Justice Horace Gray.³ Since clerical help for the justices was not authorized for funding by Congress, Justice Gray compensated the clerks out of his own pocket.⁴ Frequent delays in court rulings throughout the latter half of the nineteenth century prompted Attorney General A. H. Harland to recommend to Congress making permanent the role of the Supreme Court law clerk. Congress subsequently acted on his recommendation in the Sundry Civil Act of August 4, 1886. The act specifically provided for a “stenographic clerk for the Chief Justice and for each Associate Justice of the Supreme Court.”⁵ In July of 1919, Congress reauthorized the allocation of funding for clerks but tailored the language to provide each justice with one “law clerk” with a salary not exceeding \$3,600.⁶ Although funding appropriation changed since 1919, the number and function of law clerks remained unchanged until Justice Stone began employing two law clerks to assist him in the early 1950s.⁷ Justice Stone designated his clerks as “senior” and “junior” and the clerks received different salaries accordingly. Though some justices in the later half of the 1950s toyed around with the model utilized by Stone, many justices hired a singular class of law clerks in the summer who served for the entirety of the Court’s term before ascending to higher government positions, private practice, or academia. While the salaries of the law clerks differed over time, this pattern of hiring remained prevalent throughout the later half of the twentieth century by associate justices and lower court judges.⁸ Thus, law clerks remain consistently selected to serve one-year terms under their respective justices across time and

3 Chester A. Newland, “Personal Assistants to Supreme Court Justices: The Law Clerks,” *Oregon Law Review* 40, no. 4 (June 1961): 299-317; and Barrett McGurn, “Law Clerks - A Professional Elite,” *Yearbook: Supreme Court Historical Society* 1980 (1980): 98-102.

4 Newland, “Personal Assistants to Supreme Court Justices,” 304.

5 *Sundry Civil Appropriations Act of 1886*, S. Rep. No. 1814, 50th Cong., 1st Sess. (1888).

6 *Ibid.*, 3.

7 *Ibid.*

8 James L. Magrish, “The Common Law Tradition: Deciding Appeals, by Karl N. Llewellyn,” *Indiana Law Journal* 36, no. 4 (Book Reviews): 550-560.

through today.

Justice Brandeis fundamentally altered the growth of the modern Supreme Court law clerk by introducing an emphasis on academic appointment and public service following the clerkship. Justice Brandeis operated under the belief that lawyering was intimately tied to educating the public and creating “enlightened public opinion.”⁹ Brandeis’s clerks reflected his guiding legal philosophy, as the vast majority of his applicants aspired to work in academia. For Brandeis, interest in an academic career could be supplanted by a desire to work in public or government service but above all else, he did not want his clerks to “waste [their talents] on a New York or other law office.”¹⁰ While Brandeis diverged from the usual model of selecting graduates from exclusively Ivy League law schools, his model of clerking for a greater cause yielded incredible success.¹¹ Of his twenty-one clerks, eleven, representing over 50% of the total Brandeis clerks, obtained academic appointments. Additionally, three became government servants, including Dean Acheson who ultimately served as Secretary of State in the Truman Administration. Only seven clerks defected from Brandeis’s model and moved into private practice or the business world. Brandeis’s understanding of the clerks as influential players in the American legal arena represented an almost revolutionary change in the understanding of clerks. No longer were these young lawyers functioning exclusively as note-takers and fact checkers for the justices. Instead, Brandeis recognized the potential of these young people to gain invaluable firsthand experience and carry their knowledge of the Court into academia and liberal legal strategy.

The pipeline to a federal clerkship is rigid, with little differentiation between the clerks who are picked to serve in the chambers of federal courts. The primary pathway to a Supreme Court clerkship flows through a very small number of highly competitive law schools and then to selective federal appeals

9 See Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge: Harvard University Press, 1984): 95-96 and 122-124.

10 See Louis D. Brandeis, Melvin I. Urofsky and David W. Levy, *Letters of Louis D. Brandeis: Volume I, 1870-1908* (New York: SUNY Press, 1971): 404. (Notable that generally, Justice Brandeis encouraged his clerks to leave major east-coast cities and “[g]o home and be...leader[s] in...[their] own communit[ies].” Nathaniel L. Nathanson, “Mr. Justice Brandeis: A Law Clerk’s Recollections of the October Term, 1934,” 15 *American Jewish Archives* no. 6 (1963): 13.)

11 Notably, Brandeis wanted to use his clerkship as a tool for upward mobility of American Jews into prestigious academic posts, see Louis D. Brandeis, Melvin I. Urofsky and David W. Levy, *Letters of Louis D. Brandeis: Volume I, 1870-1908* (New York: SUNY Press, 1971): 74 and 404; and Irving Dillard, *Mr Justice Brandeis, Great American: Press Opinion and Public Appraisal* (St. Louis: Modern View Press, 1941).

clerkship. Today, the clerks at the Supreme Court are almost always recent law school graduates from the best law schools in the country who completed a year of clerking for a Judge on the US Court of Appeals.¹² Since the 1940s, most justices relied primarily on five main law schools (Harvard, Yale, Chicago, Stanford, and Columbia) to source their law clerks. While some justices tended to hire from a broader range of schools,¹³ by date, a little less than half of the total law clerks of the Supreme Court graduated from Harvard and Yale Law School.¹⁴ At a 1999 Judiciary hearing, Justice Souter solidified this trend when he remarked that no candidate could “be seriously considered” if they failed to graduate from a top law school.¹⁵ Further, he added that for “practical purposes” candidates without a lower clerkship would not be considered. Therefore, students from the most selective law schools with outstanding grades, law review experience, and strong recommendations from certain professors and lower court judges form the pool of the most competitive applicants for Supreme Court law clerks.¹⁶

A Supreme Court clerkship is a position desired by many but attained by few, particularly with respect to female and minority candidates. Since 2005, white clerks made up 85% of all Supreme Court law clerks.¹⁷ Additionally, despite increasing numbers over time, the percentage of African American and Hispanic law clerks remains low.¹⁸ Women comprise a third of all Supreme Court law clerks, and are continually underrepresented in clerkship classes when compared to women’s

12 See Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 *DePaul L. Rev.* 51 (2008).

13 Commonly, Supreme Court justices source law clerks from their alma maters or the districts their seat represents on the Court.

14 *Ibid.*, 12.

15 See Fiscal 2000 Commerce, *Justice, State and Judiciary Appropriations: Hearings Before the Subcomm. on Commerce, Justice, State, and Judiciary of the H. Comm. on Appropriations*, (Mar. 10, 1999)

16 For further scholarship related to the necessity of law review scholarship, excellent law school grades, and strong recommendations, see Richard A. Posner, Christopher Avery, Christine Jolls & Alvin E. Roth, “The Market for Federal Judicial Law Clerks,” 68 *University of Chicago Law Review* 793 (2001); Lawrence Baum and Corey Ditslear, “Supreme Court Clerkships and ‘Feeder Judges’,” 31 *The Justice System Journal* no. 1 (2010); Aaron L. Nielson, “The Future of Federal Law Clerk Hiring,” 98 *Marquette Law Review* 181 (2014); and Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 *Marquette Law Review* 289 (2014).

17 Tony Mauro, “Supreme Court clerks are overwhelmingly white and male. Just like 20 years ago.” *USA Today*, January 8, 2018. Available at: <https://www.usatoday.com/story/opinion/2018/01/08/supreme-court-clerks-overwhelmingly-white-male-just-like-20-years-ago-tony-mauro-column/965945001/>

18 *Ibid.*

admissions into elite law schools.¹⁹ One-year clerkship positions frequently do not come with any time off, therefore making the position near unattainable for any caregivers or clerks relocated far from loved ones.²⁰ Being that law clerks tend to serve during their late twenties to early thirties, the lack of vacation time and inflexibility stands as a strong deterrent to women in particular. Furthermore, the financial burden of the clerkship stands in the way of many applicants, as federal law clerks forgo competitive salaries across private practice and academia in favor of a comparatively low salary. While that may not deter students who come from higher socioeconomic status, many law students may not have the ability to take a significant pay cut in the face of substantial student loans.

The importance and prestige of a federal and Supreme Court clerkship relates to the rare access into the judicial process granted to young attorneys. As University of Michigan Law Professor Leah Litman and Attorney Devah Shaw remind readers, many of the internal procedures of particular courts are “easily accessible only to people within the system.”²¹ A law clerk in chambers will quickly learn internal operating procedures, including the near priceless understanding of how cases are assigned and how judges vote. Bennett Brosky, a law clerk for Justice Stone, highlighted the unparalleled access he received in chambers throughout his clerkship in a collection of essays. Specifically, Brosky noted that with respect to cases accepted by the Court for oral argument and discussion on the merits, “Stone was always open to discuss with his law clerk about how he would cast his vote at conference or even later.”²² Likewise Beth See Driver (1960-1961), a past clerk for Justice Frankfurter, revealed that lively conversation and intense debate on hot issues of constitutional law with the Justice served as the “cornerstone” of the Frankfurter clerkship.²³ Clerks are privy to other insider information as well: what arguments are likely to persuade a judge, which judges are most respected by their colleagues, which judges are good bosses, and which issues judges are interested in ruling on. Overall, the experience of the clerkship historically provided clerks with unparalleled access to judges and justices, and these experiences continue to serve as defining features of the clerkship.

19 See David H. Kaye, and Joseph L. Gastwirth. “Where have all the women gone? The Gender Gap In Supreme Court Clerkships,” *Jurimetrics* 49, no. 4 (2009): 411–37. <http://www.jstor.org/stable/29763020>.

20 See Leah M. Litman and Deeva Shaw, “On Sexual Harassment in the Judiciary,” 115 *Northwestern University Law Review* no. 2 (2020): 600-648.

21 *Ibid.*

22 Quoted in Peppers and Ward, see Todd C. Peppers and Artemus Ward, *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (University of Virginia Press: 2012): 102.

23 Peppers and Ward, *In Chambers*, 143.

Alongside intellectual debate and legal analysis with their employers, law clerks spend considerable amounts of time with their bosses both in and outside of chambers. Randall P. Bezanson (1972-1973) spent seven days a week in chambers, beginning at 7:00 A.M. and concluding at 7:00 P.M.²⁴ As a Blackmun clerk, Bezanson worked on Saturdays from 9:00 A.M. to mid afternoon. Charles Reich (1953-1954), a law clerk for Justice Hugo Black, lived with the Justice in his home in Alexandria, Virginia, and spent the entire day with the Justice throughout the year of his clerkship.²⁵ Similarly, Beth See Driver would arrive at Justice Frankfurter's Georgetown residence to drive with him to work. Finally, Alan Dershowitz (1963-1964) noted that Justice Goldberg took specific interest in his law clerk's lives and their intellectual development, including the clerks in his weekly Friday lunches or teas with "notable people."²⁶ All of these stories illuminate the remarkable amount of time law clerks spent with their bosses. Beyond chamber arguments or legal preparations, the law clerks developed close relationships and substantial personal ties with their employers.

The careers of law clerks following their time at the Court indicate the associated prestige of the clerkship. Armetus Ward and Christina Dwyer argue that since the beginning of the clerkship, former law clerks "have parlayed their apprenticeships" into various high level positions across private practice, government, academia, and public interest organizations.²⁷ Many past law clerks went to the Department of Justice, including some at the highest levels: current Attorney General Merrick Garland (Brennan), former Attorney General Elliot Richardson (Frankfurter), past Attorney General Francis Biddle (Holmes), current Solicitor General Elizabeth Prelogar (Kagan), numerous past solicitors general, and even more deputy solicitors general.²⁸ Outside of the Department of Justice, the top echelons of government are teeming with past law clerks, including past Secretary of State Dean Acheson (Brandeis), past Transportation Secretary William A. Coleman Jr. (Goodrich and Frankfurter), and past chairman of the Federal Communications Commission Newton N. Minow (Vinson).²⁹ Some turned to the world of business for post-clerkship careers: Katherine Adams (O'Connor and Breyer), general counsel of Apple; Irving Olds, chairman of the board of United States Steel (Holmes); George L. Harrison, president of New York Life

24 Peppers and Ward, *In Chambers*, 338-339.

25 Peppers and Ward, *In Chambers*, 111.

26 Peppers and Ward, *In Chambers*, 301.

27 See Armetus Ward, Christina Dwyer, and Kiranjit Gill, "Bonus Babies Escape Golden Handcuffs: How Money and Politics Has Transformed the Career Paths of Supreme Court Law Clerks," 98 *Marquette Law Review* 227 (2014).

28 Barrett McGurn, "Law Clerks - A Professional Elite," *Yearbook: Supreme Court Historical Society* 1980 (1980): 98-102.

29 McGurn, "Law Clerks- A Professional Elite."

Insurance Company (Holmes); and Arthur Seder (Vinson), president of American Natural Gas Service. Many past law clerks moved into academic writing or publishing: Philip L. Graham, president of the *Washington Post* (Frankfurter and Reed); David Reisman (Brandeis), author of *The Lonely Crowd - A Study of the Changing American Character*; Professor Alexander Bickel of Yale Law School (Frankfurter); and numerous others. Further, the highest echelons of academia are riddled with past clerks, including Dean Martha Minow (Marshall) of Harvard Law School, Dean Heather Gerken (Reinhardt) of Yale Law School, and Dean Jennifer S. Martinez (Breyer) of Stanford Law School. Finally, ten Supreme Court justices served as law clerks before ascending to the Court: Justice Byron White (Vinson), Justice William H. Rehnquist (Jackson), Justice John Paul Stevens (Rutledge), Justice Stephen G. Breyer (Goldberg), Justice John G. Roberts (Rehnquist), Justice Elena Kagan (Marshall), Justice Neil M. Gorsuch (White and Kennedy), Justice Brett M. Kavanaugh (Kennedy), Justice Amy Coney Barrett (Scalia), and Justice Ketanji Brown Jackson (Breyer). As noted by William H. Simon, “A few clerkships, notably those in the United State Supreme Court, are so spectacularly prestigious that they give off a more luminous signal of hot shot status than almost anything else that a 25-year old could put on her resume.”³⁰ Thus, the prestige of a law clerk does not start and end with the attainment of a clerkship, but instead is carried throughout one’s professional career.

The nine justices endowed with the power to interpret and craft the Supreme Court’s opinions have long fascinated scholars. Over time, far less attention and historical scholarship centered on the individuals assisting Supreme Court justices and other judges in the process of adjudication and judgment. Yet, law clerks occupy a central position in both academic and popular accounts of the Supreme Court and the inner workings of the judiciary. Large literatures in law and political science document the role that clerks play in everything from the management of disputes in district courts to the drafting of opinions at the Supreme Court.³¹ Political scientists and sociologists demonstrated the role of law clerks in defining and shaping elite legal culture.

Despite their influence, historians paid minimal attention to Supreme Court law clerks and other law clerks across the federal judiciary. Todd C. Peppers, a professor of practice at the Washington and Lee Law School, leads the current historical academic discussion on law clerks. His books—*Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*,

30 William H. Simon, Judicial Clerkships and Elite Professional Culture, 36 *Journal of Legal Education* 129 (1986).

31 See Chester A. Newland, “Personal Assistants to Supreme Court Justices: The Law Clerks,” *Oregon Law Review* 40, no. 4 (June 1961): 299-317; and Paul R. Baier, “The Law Clerks: Profile of an Institution” (1973). *Journal Articles*. 294.

In Chambers: Stories of Supreme Court Law Clerks and Their Justices, and *Of Courtiers and Princes: Stories of Lower Court Clerks and Their Judges*—describe and analyze the history of Supreme Court law clerks as an institution.³² Each book offers historical analysis alongside collections of interviews with past law clerks and archival materials. However, his collections largely focus on amassing stories of the law clerk experience and shy away from critical insight into the institution.³³ The Peppers books are best understood as story collections of past law clerks. Building from the scholarship of Peppers, other historians have frequently analyzed the evolution of the clerkship, charting change over time through formal legal processes conducted by the clerks.³⁴

Legal scholars focus on the role of clerks as advisors and therefore trusted sources of information to judges and justices. In this way, scholars contend that clerks function like congressional aides or workers in bureaucratic agencies—asserting that law clerks are utilized in the same way a justice relies on amicus briefs, the solicitor general, and the attorneys presenting cases.³⁵ Kromphardt argues that because the justices discuss impending cases with their law clerks, they open their decision-making process to clerk influence. Accordingly, Kromphardt argues that as a result, the direct influence of law clerks may be observable at

32 See Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford Law and Politics, 2006); Todd C. Peppers and Artemus Ward, *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (University of Virginia Press, 2013); and Todd C. Peppers, *Of Courtiers and Princes: Stories of Lower Court Clerks and Their Judges* (University of Virginia Press, 2021).

33 For reviews of Peppers's work, see Carolyn Shapiro, "The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court," *Florida State University Law Review* 37, no. 1 (Fall 2009): 101-136; and David R. Stras, "Book Review Essay—The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process," *Texas Law Review* 85 (2007): 947-997.

34 See David J. Garrow, "How *Roe v. Wade* Was Written," 71 *Wash. & Lee L. Rev.* 893 (2014) and Adam Bonica, Adam Chilton, Jacob Goldin, Kyle Rozema and Maya Sen, "Legal Rasputins? Law Clerk Influence on Voting at the US Supreme Court," 35 *The Journal of Law, Economics, and Organization* (2019): 1-69.

35 See Kelly J. Lynch, "Best Friends - Supreme Court Law Clerks on Effective Amicus Curiae Briefs," *Journal of Law & Politics* 20, no. 1 (Winter 2004): 33-76; Christopher R. Benson, "A Renewed Call for Diversity among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution," *Harvard Blackletter Law Journal* 23 (2007): 23-54; Todd C. Peppers & Christopher Zorn, Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment, 58 *DePaul Law Review* 51 (2008); and Miller, Mark C. "Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward." *Law & Social Inquiry* 39, no. 3 (2014): 741-57. doi:10.1111/lisi.12074.

stages of the decision-making process at the Supreme Court and lower courts.³⁶ Within this tradition of thought, other scholars attempted to isolate the effects of law clerk influence throughout case studies and interviews between judges and clerks.³⁷

Therefore, numerous pieces of socio-legal scholarship center on the exact roles performed by law clerks throughout their tenure in chambers. Legal scholars examined the pathway to the clerkship from law school onwards and its solidification over time. Avery, Jolls, Posner, and Roth explore the processes by which judges choose clerks and problematize the lack of uniformity in the selection process. Trenton Norris provided an applicant's point of view in the appellate clerkship process.³⁸ Other scholars have weighed in on issues of disorganized and chaotic selection processes in lower chambers and at the Supreme Court.³⁹ Critically, scholars focus on the role of personal connections and "feeder judges" in obtaining clerkships at all levels of the judiciary.⁴⁰ Baum and Distlear verified that justices rely heavily on certain court of appeals judges as sources of law clerks

36 Christopher D. Kromphardt, "US Supreme Court Law Clerk as Information Sources," 3 *Journal of Law and Courts*, no. 2 (September 2015): 277-304.

37 For more sources attempting to isolate the influence of law clerks on the judicial process, see Todd C. Peppers & Christopher Zorn, "Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment," 58 *DePaul Law Review* 51 (2008); Alex Kozinski and Fred Bernstein, "Clerkship Politics," 2 *The Green Bag* no. 1 (Autumn, 1998); and Stephen L. Wasby, "Clerking for an Appellate Judge: A Close Look," 5 *Seton Hall Circuit Review* (2008): 20-96.

38 See Trenton H. Norris, "The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapefruit, and Fruitful Reform," 81 *California Law Review* no. 3 (May, 1993): 765-800.

39 See David Margolick, "The Law: At the Bar; Annual Race for Clerks Becomes A Mad Dash, With Judicial Decorum Left in the Dust," *The New York Times*, March 17, 1989, available at: <https://www.nytimes.com/1989/03/17/us/law-bar-annual-race-for-clerks-becomes-mad-dash-with-judicial-decorum-left-dust.html>; Richard A. Posner, *The Federal Courts—Challenge and Reform, Revised Edition* (Harvard University Press, 1999); John G. Kester, "The Law Clerk Explosion," 9 *Litigation* no. 3 (Spring 1983); and Louis F. Oberdorfer & Michael N. Levy, "On Clerkship Selection: A Reply to the Bad Apple," 101 *Yale Law Journal* 1097, 1106 n.43 (1992).

40 For more sources on the rise and influence of feeder judges, see Howard M. Wasserman, "Academic Feeder Judges," *FIU Legal Studies Research Paper Series* (April 2021): 61-74; Aaron L. Neilson, "DC Circuit Review- Reviewed: 'All Purposes' Feeder Judges," *Notice and Comment, Yale Journal on Regulation*, August 31, 2018; Christopher D. Kromphardt, "Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court," 98 *Marquette Law Review* 289 (2014); and Adam Liptak, "A Sign of the Court's Polarization: Choice of Clerks," *The New York Times*, September, 6, 2010, available at <https://www.nytimes.com/2010/09/07/us/politics/07clerks.html>.

and that justices differ considerably in the sets of feeder judges from whom they draw.⁴¹

Overwhelmingly, legal scholars situate law clerks and the Supreme Court clerkship within a broader conversation on elitism and the reproduction of hierarchy in the legal profession. William H. Simon argues not only that the clerkship reproduces elite legal culture but also that the institution is ultimately detrimental to the individuals who choose to engrain themselves in the system.⁴² Simon asserted that the institution of the clerkship offers an opportunity to prolong a style of adolescence as opposed to innovation within the law, which, he argued, allowed privileged Americans attending elite law schools to become “compulsively habituated.”⁴³ Moreover, Barrett McGurn’s traces of the placements of past clerks give substantial weight to the importance of the relationships cultivated by clerks with their respective Justices and their ability to move into top positions across the legal world.⁴⁴ Furthermore, Kevin McGuire concluded that throughout the 1980s and 1990s, an elite group of lawyers emerged within Washington D.C. that specializes in Supreme Court practice and is led by past law clerks.⁴⁵ These authors collectively understand the clerkship as part and parcel of a discrete elite class within the legal profession. Despite interest in the lives, careers, and experiences of law clerks, scholars largely fail to bring in the opinions or thoughts of former law clerks themselves.

The voices of law clerks themselves are uncommon within existing conversations of the Supreme Court clerkship. While judges periodically weigh in on various aspects of the clerkship selection process or provide defenses of their own actions, law clerk voices are a rarity.⁴⁶ Decades later, some law clerks situate themselves at the center of the action in important cases such as *Brown v. Board of Education* and *Roe v. Wade*.⁴⁷ Most commonly, however, the voices and

41 Baum and Distlear, “Supreme Court Clerkships and ‘Feeder Judges’.”

42 William H. Simon, “Judicial Clerkship and Elite Professional Culture,” *Journal of Legal Education* (1986): 129-138

43 Simon, “Judicial Clerkship and Professional Elite Culture,” 136.

44 Barrett McGurn, “Law Clerks as a Professional Elite,” *Yearbook: Supreme Court Historical Society* no. 80. (1980): 98-102.

45 Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* (University of Virginia Press, 1993) and see Kevin T. McGuire, “Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites,” 37 *American Journal of Political Science* no. 2 (May, 1993): 365-390.

46 For judges commenting on law clerks, primarily law clerk selection see Patricia M. Wald, “Selecting Law Clerks,” 89 *Michigan Law Review* 152 (1990); and Alex Kozinski, “Confessions of a Bad Apple,” 100 *The Yale Law Journal* (1991).

47 For law clerks commenting on their position in relation to landmark cases, see John

direct experiences of law clerks emerge following the resignation of judges and justices from their judicial posts in tribute pieces. Published in law reviews, law clerks historically share recollections and memories of working with their bosses in chambers during their formative years.

Despite the tremendous number of clerk tributes written over time, few historians or scholars have commented or analyzed the contents of the law clerk tributes.⁴⁸ Thus, I will be drawing on the existing literature of law clerk tributes to assert the importance of law clerk tributes and outline the career narratives about the clerkship built and perpetuated within the pages of tributes. Utilizing the voices and experiences of clerks, my thesis fills a definitive gap in historical scholarship related to the analysis of clerk tributes and the stories told about judges and justices throughout the pages of tributes. Importantly, this thesis does not chart the historical development of the institution of the clerkship or of any individual judge or justice. Instead, my thesis takes seriously the memorializations of past judges and justices by law clerks within their tributes. In doing so, I bring the stories, experiences, and career narratives of past law clerks into current academic discussions on the role of clerks and their associated influence across the legal profession.

Stories memorialized in tributes elevate judges and justices beyond humans and contribute to a culture of hero worship throughout the judiciary. Notably, neither politicians nor presidents are memorialized in the same manner as these prominent members of the judiciary. Unlike judges and justices, politicians at every level face critique and scrutiny from the media, their constituents, and even their colleagues. An ethical norm of silence and secrecy like that of the Judiciary does not apply to members of the executive or legislative branch, as employees frequently speak out against their bosses and produce all kinds of personal and professional critiques.⁴⁹ Any rudimentary search into a politician or

David Fassett, Earl E. Pollock, E. Barrett Prettyman Jr., Frank E.A. Sander & John Q. Barrett, "Supreme Court Law Clerks' Recollections of *Brown v. Board of Education*," 78 *Saint John's Law Review* 515 (2004); Scott L. Nelson, "Case Study and Commentaries, Dun and Bradstreet Revisited—A Comment on Levine and Wermiel," 88 *Washington Law Review* 103 (2013); David J. Garrow, "How *Roe v. Wade* Was Written," 71 *Washington and Lee Law Review* 893 (2014); and James D. Robenalt, "The Unknown Supreme Court Law Clerk Who Single-Handedly Created the *Roe v. Wade* Viability Standard," *The Washington Post*, November 29, 2021, available at <https://www.washingtonpost.com/history/2021/11/29/viability-standard-abortion-supreme-court-hammond/>.

48 The closest that I could find was past law clerks themselves arguing for the importance of clerk tributes and calling for future analysis. These sources will be later drawn out throughout the text of chapter one.

49 Recent examples coming from the Office of the Vice President profoundly demonstrate this claim. Despite working for the Vice President, employees of Kamala Harris

president will result in the discovery of public critique and criticism; such dissent is a core component of our American theory of governance. Even presidents who are memorialized as modern-day heroes, such as President Theodore Roosevelt or President Harry S. Truman, for example, are not understood to be perfect human beings or saint-like figures. Critique and voices of dissent, both from within their time period and beyond, call into question their heroic status and enduring legacy. Furthermore, should any politician attempt to memorialize himself a hero, plenty of media stories and publications exist to the contrary.

The stories we tell about Supreme Court justices and federal judges, therefore, are unique amongst top public figures in American government. Not only are they the sole individuals across the government memorialized as superhumans and heroes, but voices to counter the narratives of perfection never emerge.⁵⁰ Judges and justices therefore occupy a unique position in American consciousness, and few countervailing voices break through the mounds of hagiographical writing to challenge their standing. Emerging from the collection of superhuman tributes and unbroken narratives is a culture of hero worship throughout the judiciary. Judges and justices are heralded as superhuman figures with unquestionable legacies, and their status as complex human operators fades into the background.

This unique culture of hero worship surrounding judges and justices calls into question the emphasis placed by socio-legal scholars on the courts. Influenced by the post-*Brown v. Board of Education* era of Supreme Court jurisprudence and the rise of the Warren Court, legal scholars of the 1970s began emphasizing the role of the Courts in creating and enacting real world change. In the words of journalist Anthony Lewis, the Warren Court's record confirmed "an implausible idea, temperamentally and historically...a revolution made by judges."⁵¹ Legal scholars honed in on the power of individual judges and justices to

frequently leaked disapproval and disfavor of their boss to the press. *See for example* Clever R. Wootson Jr. and Tyler Pager, "Kamala Harris's staff exodus reignites questions about her leadership style—and her future ambitions," *Washington Post*, December 4, 2021, <https://www.washingtonpost.com/politics/2021/12/04/kamala-harris-staff-departures/>.

⁵⁰ The confirmation hearings of both Justice Kavanaugh and Justice Thomas threaten to unsettle this stability. Both of the men faced severe scrutiny and allegations from women of sexual harassment. These allegations and the associated confirmation hearings certainly influenced public perception of the Justices at the time. Yet, because both of them are sitting Supreme Court Justices at the time of this paper, we lack information on how either of them will be memorialized or appear in tributes. In keeping with past trends, however, I think it is not unreasonable to predict or anticipate a lack of critical insight into their legacies throughout future clerk tributes.

⁵¹ Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University

sway constitutional doctrine and exact substantive change through their position. Scholarship continues to focus on the role of singular judges and justices in crafting a legal and jurisprudential legacy. Coupled with a culture of hero worship, circular reasoning propels the continued emphasis paid to individual judges and justices. Specifically, the logic is as follows: judges and justices are more often described and memorialized as heroes, and scholars treat that information as fact, valorizing these members of the Judiciary as heroes and resulting in a culture of hero-worship. Stories to the contrary largely fail to sway conceptions of judges and justices, and so the cycle continues. Clerk stories, therefore, serve as reinforcements to judges' legacies as they allow for the reputations of individual justices and judges to be memorialized in exclusively positive terms.

Beyond the reputations of individual justices and judges, clerk stories present a certain idea about the Court as an institution and help cement the court system's legitimacy. Indeed, as Justices O'Connor, Kennedy, and Souter remind us in *Planned Parenthood of S.E. Pa. v. Casey*,

The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands... The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.⁵²

In other words, the power of the Court and their legitimacy lies in the public's trust of the institution. The mention of judicial legitimacy by justices themselves is not unique to the *Casey* decision. Since the Court's decision in *Brown*, justices mentioned judicial legitimacy or presented theories of judicial legitimacy within the text of decisions seventy-one times, compared to only nine times in the prior 164 years.⁵³ The text of the decisions demonstrate that the justices are keenly aware of the need to secure the legitimacy of the Supreme Court as an institution. As clerk stories present an image of the justices as faultless, the stories transmit an understanding of the institution of the Court as fundamentally above the other branches of government. Therefore, in addition to an individual justice's reputation

Press, 1996): page 43.

52 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

53 Dion Farganis, "Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy." *Political Research Quarterly* 65: (2012): 206-216.

at stake, the legitimacy of the judiciary as an institution is linked to the telling of clerk stories.

Prior to the Court's decision in *Brown v. Board of Education*, the prevailing academic view of judicial legitimacy situated legitimacy as equivalent to institutional loyalty. Recall the observation of Publius on the virtues of the judiciary: "It may truly be said to have neither FORCE nor WILL but merely judgment."⁵⁴ Decades later, Alexis de Tocqueville expressed a similar view while commenting on the power of judicial review. De Tocqueville observed that the Supreme Court justices' power "is immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when they scorn it."⁵⁵ Publius and de Tocqueville represent early theorists purporting the idea of diffuse support—the public accepts and supports the Court as the primary constitutional interpreter irrespective of particular outcomes reached or positions taken by the justices. The institutional loyalty thesis of judicial legitimacy went largely unchallenged until the public fallout and lack of action on behalf of the states following the Court's decision in *Brown*.

Subsequent to the Court's decision in *Brown*, a robust academic conversation on judicial legitimacy erupted.⁵⁶ Yale Political Scientist Robert A. Dahl challenged the baseline assumption of the Supreme Court as a politically neutral institution of government.⁵⁷ In his seminal paper, Dahl asserted that Supreme Court justices are better viewed as "part of the national governing coalition" rather than as independent legal guardians safeguarding the rights of minority citizens. Throughout his study, Dahl demonstrated that the justices rarely challenged the actions of Congress except when the governing majority that passed the legislation was no longer in power, or when the rapid rise of a new governing coalition temporarily put the Court out of sync with the policy preferences of new party leaders.⁵⁸ Dahl's understanding of the Court was premised on the assumption

54 Alexander Hamilton, John Jay, and James Madison, *Federalist Paper No. 78* (J. & A. McLean: 1778).

55 Alexis de Tocqueville, *Democracy in America* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835)

56 For more scholarship on the role of *Brown* in opening an academic conversation on judicial legitimacy, see Michael Heise, "Brown v. Board of Education, Footnote 11, and Multidisciplinarity," 90 *Cornell Law Review* 279 (2005) Available at: <http://scholarship.law.cornell.edu/clr/vol90/iss2/1>; and Sanjay Mody, "Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy," *Stanford Law Review* 54, no. 4 (2002): 793–829. <https://doi.org/10.2307/1229579>.

57 Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6, no. 2 (Fall 1957): 279-295.

58 Dahl, "Decision Making in a Democracy," 286.

that the Supreme Court is a policy-making body, and that presidents and senators select justices on the basis of whether their views coincide with the values and preferences of the appointing party. Dahl posited that because the Court is rarely out of sync with the political majority, the exercise of its power of judicial review should not be seen as a threat to democratic theory and confers legitimacy to the Court.⁵⁹ Thus, Dahl cemented the understanding of the Court as a political operator in United States government, and the legitimacy of the Court as tied to their lockstep with majoritarian politics.

Following Dahl's observations on the Court and thesis of institutional legitimacy, political scientists dove into questions related to the general public's acceptance of the Supreme Court's legitimacy. Political Scientists Gregory Caldeira and James Gibson found that support for the United States Supreme Court is fairly widespread, and despite oscillation over time, most Americans judge their Supreme Court to function as a legitimate institution.⁶⁰ Additionally, through an analysis of support over time for the Court, Caldiera concluded that public opinion on the Court is most swayed by policy outputs decided by the Court, such as the case in *Brown*.⁶¹ Other scholars focused on tracing public opinion of the Supreme Court consistently found above average support for the legitimacy of the Supreme Court when compared to other branches of government. Thus, while Congress and the Presidency are often seen by the public as divisive, ideologically polarized and even uncivil, conventional scholarly wisdom suggests that the Supreme Court is understood by Americans as relatively more objective, legalistic, and above the political fray.⁶²

To understand how citizens might acquire different pictures of judging, political scientists drew on scholarship related to the effects of "framing" on

59 Dahl, "Decision Making in a Democracy," 291.

60 Gregory A. Caldeira, and James L. Gibson. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36, no. 3 (1992): 635–64. <https://doi.org/10.2307/2111585>.

61 Gregory A. Caldeira, "Neither The Purse Nor The Sword: Dynamics of Public Confidence in the Supreme Court," 80 *American Political Science Review* no. 4 (1986): 1209-1226.

62 See James L. Gibson and Michael J. Nelson, "The Legitimacy of the United States Court: Conventional Wisdoms, and Recent Challenges Thereto," *Annual Review of Law and Social Science* 10 (November, 2010): 201-219; Luis Fuentes-Rohwer, "Taking Judicial Legitimacy Seriously," 93 *Chicago Kent Law Review* 505 (2018). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol93/iss2/9>; and Walter F. Murphy and Joseph Tannenhouse, "Public Opinion and The Supreme Court: Mapping Some Prerequisites for Court Legitimation of Regime Change," 2 *Law & Society Review* no. 3 (May, 1968): 357-384.

political and social attitudes. Framing “is the process by which a [source] defines and constructs a political issue or public controversy.”⁶³ By framing an issue in a certain fashion, an actor defines its causes and consequences while also setting out the criteria for evaluating the correctness of the solution.⁶⁴ Perhaps Americans adopt an uncritical, apolitical, and unrealistic view of Supreme Court justices and the Court because it is the view that judges themselves promulgate. Courts and judges seek to appear as rendering formalistic and neutral opinions, as opposed to functioning as Dahl’s political actors. Indeed judges and justices in the United States take great pains to frame decisions as a process of deducing outcomes from first principles—utilizing analytical tools of original intent, literal words, legal precedent, dictionary definitions, and statutes.

Justice Antonin Scalia pulled back the curtain on framing in his *American Trucking Association v. Smith* (1990) decision. In a concurring opinion, Justice Scalia articulated that “To hold a governmental act to be unconstitutional is not to announce that we forbid it, but that the Constitution forbids it.”⁶⁵ Essentially, Justice Scalia framed the role of a justice as that of an apolitical interpreter. Justices, in this conception, do not render policy decisions or serve as political actors in a democracy but instead as objective and neutral translators of the Constitution. Legal scholars Valerie Hoekstra and Jeffrey Segal argued that when ordinary people hear judges of the nation’s highest court frame their decisions in this fashion, they often believe the judge’s account of why they arrived at their stated conclusion. James Gibson, Gregory Caldeira and Vanessa Baird asserted that to know the courts is to love them, because to know them is “to be exposed to a series of legitimizing messages” focused on symbols and frames of justice, judicial objectivity, and impartiality.⁶⁶ As Gibson, Caldeira, and Baird explain, positivity bias may be associated with exposure to legitimizing symbols that “all courts so assiduously promulgate.”⁶⁷

The relationship between knowing the Court and elevating the Court above

63 Thomas E. Nelson, Rosalee A. Clawson, and Zoe M. Oxley. “Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance.” *The American Political Science Review* 91, no. 3 (1997): 567–83. <https://doi.org/10.2307/2952075>.

64 Thomas E. Nelson, and Donald R. Kinder. “Issue Frames and Group-Centrism in American Public Opinion.” *The Journal of Politics* 58, no. 4 (1996): 1055–78. <https://doi.org/10.2307/2960149>.

65 *American Trucking Association v. Smith*, 110 LED. 2d 148, 1990, at 174.

66 Gibson, James L., Gregory A. Caldeira, and Vanessa A. Baird. “On the Legitimacy of National High Courts.” *The American Political Science Review* 92, no. 2 (1998): 343–58. <https://doi.org/10.2307/2585668>.

67 James L. Gibson and Gregory A. Caldeira, *Citizens, Courts, and Confirmations* (Princeton: Princeton University Press, 2009).

other branches of government yielded a substantial body of sociological and political science research. In some of the earliest research on this question, University of Missouri Political Scientist Gregory Casey found that respondents more attentive to the Court were more, not less, likely to subscribe to the mythology of judicial neutrality and objectivity in decision making.⁶⁸ Since Casey's research, scholars agreed that ordinary people who know little about the courts have few reasons to believe that judges make decisions differently from any other politicians.⁶⁹ Those attentive to the court system, however, adopt a different view. Duke Law Professors Tom Tyler and Gregory Mitchell concluded that greater awareness of the court system is associated with the perception that judges are different—that they rely on law not values in making decisions, and that members of the federal judiciary operate as “objective” actors.⁷⁰ Greater awareness of the institution, they asserted, thus creates a less realistic view of the nature of judging, and a view that contributes heavily to the legitimacy of the court system.

Legal scholars across the disciplines of sociology and political science agree that legal elites possess high levels of perceived legitimacy for the Supreme Court as an institution.⁷¹ This conclusion should be somewhat unsurprising. Legal elites are socialized into their profession through both law school and professional associations which depend on the legitimacy of the court system. Law schools inculcate norms and principles of the profession and teach the “proper performance of professional roles.”⁷² Further, legal elites' interactions with the court system—

68 George Casey, “The Supreme Court and Myth: An Empirical Investigation,” 8 *Law & Society Review* no.3 (Spring, 1974): 409. *See also*, Murphy, Walter F., and Joseph Tanenhaus. “Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes.” *Law & Society Review* 2, no. 3 (1968): 357–84. <https://doi.org/10.2307/3052894>; Walter F. Murphy, Joseph Tannenhouse, and Daniel L. Kastner, *Public Evaluations of Constitutional Courts, Alternative Explanations* (Sage Publications: 1973).

69 *See also* Assaf Meydani, “The Supreme Court as a Political Entrepreneur: The Case of Israel,” *Israel Studies Review* 27, no. 2 (2012): 65–85. <http://www.jstor.org/stable/41804803>.

70 Tom R. Tyler and Gregory Mitchell, “Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights,” 43 *Duke Law Journal* (1994).

71 Legal elites are defined as those admitted to the federal bar.

72 *See* Martha Mahoney, John O. Calmore, and Stephanie Wildman, *Social Justice: Professionals, Communities and Law, Cases and Materials* (West, 2003); Cramton, Roger C., “The Ordinary Religion of the Law School Classroom” (1978). *Cornell Law Faculty Publications*. 972, available at: <https://scholarship.law.cornell.edu/facpub/972>; and Howard S. Erlanger, and Klegon, Douglas, “Socialization Effects of Professional School: The Law School Experience and Students' Orientation to Public Interest Concerns,” 13 *Law & Society Review* 11 (1978).

including the Supreme Court—could motivate acceptance of the Court as a legitimate institution due to repeated exposure to legitimating symbols (such as impartiality and strict adherence to the law) from the members of the Court, and their careers' dependence on the Court's legitimacy.⁷³ Since the courts help define their profession identity and role as participants in the system, legal elites have a vested interest in the legitimacy of the Court and the judicial system in general. According to Gibson and Caldera, the message of these powerful symbols is that "courts are different," and owing to these differences, courts are worthy of more "respect, deference and obedience—in short, legitimacy."⁷⁴ Because courts utilize nonpolitical processes of decision making, and since judicial institutions associate themselves with symbols of impartiality and insulation from ordinary political pressures, those more exposed to the Court and its inner-workings come to accept the "myth of legality."⁷⁵

Scholars have analyzed the connection between storytelling and justice. Robert M. Cover, a legal historian at Yale University, argued that no set of legal institutions or legal prescriptions exist apart from "the narratives that locate it and give it meaning."⁷⁶ Cover contended that for every constitution, proclamation, and binding legal document, there is an epic and an origin story consisting of legitimizing narratives and stories. Cover asserted that once law is understood in the context of narratives that give it meaning and legitimacy, law becomes not merely a system of rules to be observed, "but a world in which we live."⁷⁷ Within this tradition of law as narrative, David Wilkins, a law clerk to Justice Marshall, argued that at its core, law is comprised of a series of narratives through which we define ourselves and our relationships to others.⁷⁸ Each participant in the legal arena, Wilkins asserted, presents their own narrative account of the meaning of legal texts. These stories, in turn, form the basis of additional texts such as statutes, judicial opinions, and legal briefs which, in time, create and leave behind their own narrative history.⁷⁹ Thus, Wilkins concluded that understanding the ways in which narratives are constructed and employed generates important insights. Other legal scholars have examined the implications of strong narratives in forming law, as

73 James L. Gibson and Gregory A. Caldeira, *Citizens, Courts, and Confirmations*.

74 *Ibid.*

75 George Casey, "The Supreme Court and Myth."

76 Robert M. Cover, "Foreword: Nomos and Narrative," 97 *Harvard Law Review* no. 5 (1983-84): 4-68.

77 Robert M. Cover, "Foreword: Nomos and Narrative," 7.

78 David B. Wilkins, "Justice as Narrative: Some Personal Reflections on a Master Storyteller," 6 *Harvard Blackletter Journal* 68 (1989): 68-78.

79 David B. Wilkins, "Justice as Narrative: Some Personal Reflections on a Master Storyteller," 72.

well as the connections between storytelling and law's legitimacy.⁸⁰ My project takes seriously the world building power of law and narrative, and inserts the voices of law clerks into the tradition of law as narrative.

My work situates the writing of law clerk tributes within the greater literature on judicial legitimacy and the role of storytelling. In chapter one, I argue that law clerk tributes resemble a body of hagiography as past clerks shy away from critical insight into their judge or justice and instead share a resoundingly positive story of their experience as a law clerk. Overall, as a result of this hagiographical tradition, I argue that judges and justices receive special treatment in their memorialization as their personalities fade away and they are lifted up as saint-like figures. Accordingly, such saint-like memorializations result in judge's and justice's outsized importance in scholarship and popular perceptions of the judiciary. Alongside analysis on the memorializations of judges and justices within law clerk tributes, I bring to light the common themes and narratives across tributes to past male judges and justices by law clerks. Finally, in chapter two, through two different cases of clerk tributes focused on misconduct by judges, I explicate what happens when a clerk memorializes a negative and threatening version of their boss. I utilize these two stories to problematize the tradition of hagiographical writing throughout clerk tributes. Overall, my thesis brings to life the experiences of law clerks and provides an additional understanding of power and influence within the judiciary at large.

Judge and Justice Stories: Larger Currents of Law Clerk Tributes

Introduction

For most of the Supreme Court's history, a codified rule of confidentiality that applied to Supreme Court law clerks did not exist. The legal community, however, generally accepted as an "article of faith" and norm of the profession that law clerks owed (and continue to owe) a duty of confidentiality to their employers.⁸¹ As the Seventh Circuit noted in *Gregorich v. Lund* with respect to

80 See also Hayden White, "The Value of Narrativity in the Representation of Reality," 7 *Critical Inquiry* no. 1 (Autumn, 1980): 5-27; Lon L. Fuller, *The Law in Quest of Itself* (The Lawbook Exchange Ltd, 2012); Lon. L Fuller, "Positivism and Fidelity to Law- A Reply to Professor Hart," 71 *Harvard Law Review* no. 4 (1958): 630-672; and Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

81 David Lane, "Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality," *Georgetown Journal of Legal Ethics* 18, no. 3 (Summer 2005): 867.

those who work closely with judges, “needless to say, confidentiality is essential”.⁸² While the Federal Judicial Center began publishing and distributing the “Law Clerk Handbook” in 1977, official norms for the Supreme Court clerkship were not codified until the late 1980s. Provoked by a series of highly publicized leaks by law clerks, in 1989 the Supreme Court adopted an official *Code of Conduct*. Drafted by a committee consisting of Justices O’Connor, White and Brennan, the 1989 *Code of Conduct* outlines the duties of confidentiality and secrecy with respect to information obtained by clerks during their clerkship.⁸³

Canon One of the *Code of Conduct* explicitly addresses confidentiality for law clerks. Specifically, the Canon asserts that “A law clerk should observe high standards of conduct so that the integrity and independence of the Judiciary may be preserved. The provisions of this code should be construed and applied to further that objective.”⁸⁴ With respect to trustworthiness, the *Code of Conduct* describes that a law clerk owes their individual Justice, all other Justices, and the Court as an institution the “duties of complete confidentiality, accuracy and loyalty.” Confidentiality is presented as an absolute necessity to the process of adjudication. Moreover, the *Code* detailed the requirement of a law clerk to abstain from “public comment about a pending or impending” proceeding at the Court.⁸⁵ The *Code* also noted that a law clerk should never disclose to any person any confidential information received during their tenure as a clerk, nor should any clerk “employ such information for personal gain”. Thus, clerks are sworn to secrecy during and after their clerkship with respect to the confidential information obtained during their tenure. The Justices specified in the *Code of Conduct* that the duty of confidentiality is “a continuing one” and former law clerks remain subject to the same obligations outlined in the *Code* as current clerks. Furthermore, any breach of the provisions within the *Code of Conduct* is defined as “prejudicial to the administration of justice” and sanctions will be applied accordingly.⁸⁶ The *Code of Conduct* permits some flexibility in speaking and publishing about the personality of a clerk’s employer so long as they conceal all details of the judicial process, or the opinion of the judge or justice. However, prior to the creation of an official code of conduct, the ethical norms of the judiciary already stressed confidentiality, loyalty, and secrecy.⁸⁷

82 *Gregorich v. Lund*, 54 F.3d 410, 417 (7th Cir. 1994).

83 *CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES* (June 15, 1998).

84 *CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES* (June 15, 1998).

85 *Ibid.*

86 *Ibid.*

87 The duty of confidentiality has been described by commentators as “tacitly understood,” Faye A. Silas, “Mum’s the Word: The Law Clerk as Confidant,” 71 *American Bar*

Despite ethical norms and a formal code which prioritized secrecy and confidentiality, clerk tributes exist as an outlet for past law clerks to praise their judge, solidify their legacy, and share “judge stories” related to their time in chambers. As Heather K. Gerken (1994-1995) noted in her own tribute to Judge Stephen Reinhardt, past clerks tell quirky anecdotes about the legacy of their employer “because it’s not polite to say, ‘I clerked for one of the Great Ones, a judge larger than life.’”⁸⁸ We are left with remarkable “judge stories” of birthday parties, basketball games and lively discussions between justices and law clerks in chambers. Notwithstanding the *Code of Conduct*, clerk tributes are replete with tales about a judge or justice’s legendary habits, eccentricity, and entertaining personality. Frequently published in the *Harvard Law Review* or the law review of the judge or justice’s alma mater, these tributes constitute most of our understanding of judges and justices outside of their formal opinions or public speeches.⁸⁹ Tributes written by past law clerks are one of the primary mechanisms of memorialization of judges and justices for generations to come. Their content as a body of memorial to high status members of the judiciary merits scrutiny and analysis. Utilizing the collection of clerk tributes by law clerks at the Supreme Court and lower courts, this chapter interrogates the common themes across clerk writings within tributes and problematizes the lasting legacy of judges and justices created by law clerk tributes. This chapter details the overarching trend of law clerk tributes resembling

Association Journal 36 (1985), and as “a strongly held norm,” Sally J. Kenney, “Puppeteers or Agents? What Lazarus’s Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court,” 25 *Law and Society Inquiry* 185, 213 (2000).

88 Heather K. Gerken, “Judge Stories,” 120 *Yale Law Journal*, no 3. (December 2010), Available at: <https://www.yalelawjournal.org/tribute/judge-stories>. “Whenever Judge Reinhardt’s clerks are asked about the clerkship, they tell “Judge stories.” There are an infinite number of wry stories about how hard he worked and how hard he worked us. Inevitably, the clerks try to best each other with increasingly over-the-top tales about the Judge’s legendary eating habits or his shockingly funny bluntness. An outsider might think we tell “Judge stories” simply because they are entertaining, or perhaps because they are veiled complaints in a culture in which it’s considered bad form to speak ill of your clerkship. That’s not it. We tell these stories because we are trying to avoid bragging. We tell these stories because it’s not polite to say, “I clerked for one of the Great Ones, a judge who is larger than life, a Warren Court judge in the Age of John Roberts. And how was your clerkship?”

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89 Recently, events in which justices addressed members of the non-Judiciary have not maintained their public nature. For example, at the Eight Annual Florida Chapters Conference of the Federalist Society, Justice Neil Gorsuch addressed the group on Friday February 4th. As noted by the event website, the event and thus the remarks of the Justice, are closed to the press. See <https://fedsoc.org/conferences/2022-annual-florida-chapters-conference#agenda-item-cocktail-reception-13>

hagiographical literature as tributes are riddled with over the top praise for an individual's justice and stories related to their superhuman pursuits within the law. Finally, law clerk tributes help contribute to a culture of hero worship throughout the judiciary.

Stories of the Supreme Court Clerkship

The earliest writing of tributes produced by law clerks surfaced following the death of Justice Louis Brandeis in 1941. Historians Todd Peppers and Artemus Ward described the emergence of several “tribute pieces” published in law reviews and legal journals in the years following the death of Justice Brandeis.⁹⁰ Peppers and Ward cite the Brandeis clerks as the originators of the clerk tribute, a “literary tradition now followed by scores of former law clerks” from all levels of the American judiciary.⁹¹ Within the text of their tributes, Brandeis clerks extolled the virtues of their Justice and stressed his saint-like qualities. Law clerk H. Thomas Austern (1930-1931) described Brandeis as some combination of “Jesus Christ and a Hebrew Prophet.”⁹² Likewise, past clerk Adrian S. Fisher (1938-39) noted that Justice Brandeis “seemed to be a combination of Isaiah the prophet and Abraham Lincoln.”⁹³

While Brandeis's commanding appearance appeared frequently throughout his tributes, Brandeis clerks consistently mentioned the almost crushing work expectations set by the Justice.⁹⁴ Dean Acheson (1919-1921) recalled Brandeis's expectations of his law clerks' work as nothing short of “perfection”.⁹⁵ William Sutherland (1921-23) recalled in his tribute that all of the clerks “worked like hell

90 Todd C. Peppers and Artemus Ward, *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (University of Virginia Press: 2012).

91 Peppers and Ward, *In Chambers*, 81

92 Peppers and Ward, *In Chambers*, 69. H. Thomas Austern (1906-1984) was a senior partner of Covington and Burlington.

93 Peppers and Ward, *In Chambers*, 69. Adrian S. Fisher (1914-1983) was an American lawyer and federal public servant.

94 Peppers and Ward, *In Chambers*, 69. “The Justice was an arresting figure; his head of Lincolnian cast and grandeur, the same boldness and ruggedness of features, the same untamed hair, the eyes of infinite depth under bushy eyebrows, which in moments of emotion seemed to jut out. As he grew older, he carried a prophetic if not intimidating aura. It was not in jest that later law clerks referred to him as Isaiah.”

95 Peppers and Ward, *In Chambers*, 74. Dean Acheson (1893-1971) served as the 51st United States Secretary of State and served as President Truman's main policy advisor from 1945-1947.

for Brandeis checking cases and doing research.”⁹⁶ Because of Brandeis’s norm of perfection for his clerks, the Brandeis law clerks memorialized Justice Brandeis as a legal giant and brilliant jurist with an incredible work ethic. The Brandeis clerks cemented the prophet-like status of their Justice and emphasized his qualities of “diffident courtesy.”⁹⁷ Taken together, the Brandeis clerks highlighted the incredible characteristics of Justice Brandeis and allowed for his more human qualities or imperfections to fade away. These first examples set the norm of overly positive writing by clerks about their bosses. Though they could certainly never anticipate the growth of the law clerk tribute, the Brandeis clerks set into motion the practice of lionizing one’s judge or justice and remarking on their overwhelmingly positive or even superhuman qualities.

Despite the over the top praise, Justice Brandeis cemented a model of discipleship evident throughout the text of tributes. In the eyes of the former law clerks, Justice Brandeis imparted to his clerks specific writing tools, legal models, and modes of thinking to tackle pressing legal issues. The clerks noted the specificity of such training throughout their tributes to Justice Brandeis. At the same time, Justice Brandeis stood at the center of this equation as the figurehead of progress and an embodiment of potential success in the eyes of his former law clerks. Brandeis consolidated this model for future generations of justices and clerks to come.⁹⁸

Early tributes by law clerks stressed the importance of the entrance into the Supreme Court’s ecosystem and the unparalleled access into the judiciary granted to the young law clerks. In one of the earliest published tributes, Roderick M. Hills (1955-1957) recalled the “priceless human experience” of the clerkship.⁹⁹ A law clerk to Justice Stanley F. Reed in the 1950s, Hills noted that most former clerks he encountered regarded the clerkship as truly priceless, and he doubted that any single past clerk regretted their time at the Supreme Court. Other early tributes

96 Peppers and Ward, *In Chambers*, 73. William Sutherland founded the law firm Ever-sheds-Sutherland in 1924.

97 Peppers and Ward, *In Chambers*, 69.

98 See William E. Nelson; Harvey Rishikof; I. Scott Messinger; Michael Jo, “The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation,” 62 *Vanderbilt Law Review* 1747 (2009); and Chester A. Newland, “Personal Assistants to Supreme Court Justices: The Law Clerks,” *Oregon Law Review* 40, no. 4 (June 1961): 299-317.

99 Roderick M. Hills, “Law Clerk at the Supreme Court of the United States, A,” *Los Angeles Bar Bulletin* 33, no. 11 (September 1958): 333-338. Roderick M. Hills (1931-2014) served as the chairman of the United States Securities and Exchange Commission between 1975 and 77. He later worked at the investment bank of Drexel Burnham Lambert and then at the law firm of Donovan, Leisure, Newton & Irvine.

by law clerks emphasized the exceptional interactions with justices, exposure to pressing legal issues, and important governmental figures these young lawyers encountered as a result of their clerkship.¹⁰⁰ In a tribute to Justice Byron White, Kevin J. Worthen (1983-1984) echoed Hills sentiment, adding that “to be able to engage in free-flowing debate on important legal issues...was an unforgettable and, for many White clerks, a never-again-to-be-paralleled experience.”¹⁰¹ To those who doubted the importance or value of a clerkship, Worthen asserted that in a period of one year a clerk would be exposed to most of the current substantive and procedural problems active in federal litigation. Particularly in an age devoid of social media, same-day reporting, or the internet, the clerkship provided rare exposure to the Supreme Court. The references to such exposure in tributes demonstrate the self-perceived importance of the clerkship. Thus, the tributes of the twentieth century Supreme Court law clerks reflected the tremendous opportunity given to the clerks—the ability to work in the Supreme Court building, intimately learn from a justice, and absorb the pressing legal questions of a generation.

Across time, former law clerks highlighted the positive traits and impartiality of their bosses throughout the bulk of their tributes. In his tribute to Justice Reed, William Rogers (1953-1954) asserted that Justice Reed operated in an entirely apolitical manner at the Court. Rogers maintained that the justice’s own views never influenced his official opinions, questions, or any form of work at the Court.¹⁰² As evidence for this viewpoint, he pointed to the range of cases Justice Reed penned, which Rogers imagined left no room for personal influence or conviction in his official decisions.¹⁰³ Rogers memorialized an incredible version of the Justice, and one that might indeed be true. Yet, it is challenging to imagine

100 For other early tributes written by law clerks, see Alfred McCormak, “A Law Clerk’s Recollections,” 49 *Columbia Law Review* no. 5 (September, 1946): 710-718; and for photographs taken by an early law clerk of the Stone Court, see John Q. Barrett, “Law Clerk John Costelloe’s Photographs Of the Stone Court Justices, October 1943,” 42 *Journal Of Supreme Court History* (October 2021), available at <https://doi.org/10.1111/jsch.12267>.

101 Kevin J. Worthen, *Shirt-Tales: Clerking for Byron White*, 1994 *BYU L. Rev.* 349 (1994). Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1994/iss2/6>. Kevin Worthen currently serves as the President of Brigham Young University.

102 William D. Rogers, “Do Law Clerks Wield Power in Supreme Court Cases,” *Brief* 53, no. 3 (Spring 1958): 182-190.

William Rogers (1927-2007) was an American lawyer and served as U.S. Assistant Secretary of State for Inter-American affairs and as the Undersecretary of State for Economic Affairs in the Ford Administration. He was a founding member of Henry Kissinger’s consulting firm, Kissinger and Associates.

103 *Ibid.*, 11. He points to the main opinions which concern questions of administrative law, criminal procedure, copyright, and army duty assignment to assert that they are too procedural and leave no room for any personal sway.

the existence of a Supreme Court Justice completely unswayed or unprovoked by personal conviction. While Supreme Court Justices are designed to be removed from politics, they are not shielded from their own humanity. In a tribute to Harry Blackmun, Harold Hongju Koh (1981-1982) lustrously described working with Justice Blackmun. Koh asserted that the Justice “...never gave an order. He worked constantly, arriving at seven, leaving at seven, and reading at home until midnight.”¹⁰⁴ Koh added that the Justice never cut corners and never pretended that producing judgements lacked serious effort and research.¹⁰⁵ Koh memorialized an astonishing vision of his Justice that seems almost superhuman. In Koh’s depiction of Justice Blackmun, the Justice loses the human qualities of imperfection or impatience. He is perfect. Regardless of the truth of his remarks, Justice Blackmun is commemorated as a flawless scholar and Supreme Court Justice.

In her tribute to Justice Anthony Kennedy, Cheryl Ann Krause (1994-1995) compared the process of working with Kennedy to a “true metamorphosis”.¹⁰⁶ Krause described the opinions she reached with the Justice as “something transcendent, rooted in law and reason but beautiful, sometimes quite colorful, and capable of soaring into the future.”¹⁰⁷ Through her language, Krause cemented the understanding of Justice Kennedy as a living embodiment of the best of the legal profession. By drawing on images of a metamorphosis and the creation of decisions capable of guiding future generations, she highlighted Kennedy’s ability to transcend the boundaries of the present moment and create legal precedent for lawyers to come. Krause praised Justice Kennedy for his incredible legal qualities and thus placed Justice Kennedy within the tradition of over the top praise. Yet, only time will tell the vitality and applicability of Kennedy’s decisions. Collectively, former law clerks memorialized the exceptional work ethic and qualities of impartiality and excellence throughout their tributes to Supreme Court Justices.

Rogers, Koh and Krause are in good company as many existing tributes highlight not only the positive attributes of justices, but memorialize judges and justices as above and beyond humans.¹⁰⁸ Any stench of human imperfections—

104 Harold Hongju Koh, “A Tribute to Justice Harry A. Blackmun,” 108 *Harvard Law Review* no. 1 (November 1994): 20-22. Harold Hongju Koh is the Sterling Professor of International Law at Yale Law School.

105 “He never pretended that decision was effortless. No case was beneath his dignity, nor any task so trivial that it could be done carelessly. ‘This is the end of the line,’ he often said, and everything we did mattered.” *Ibid.*, page 20.

106 Cheryl Ann Krause, “In Tribute: Justice Anthony M. Kennedy,” 132 *Harvard Law Review* no. 1 (November 2018): 6-8. Cheryl Ann Krause is currently a United States Circuit Judge of the United States Court of Appeals for the Third Circuit.

107 *Ibid.*, 15.

108 Other past law clerks over time asserted a range of claims related to the saint-like

making mistakes, losing patience, one's sense of personal stake or interest—is erased from the official memory of justice. Therefore, in this respect, many tributes written by former clerks are better characterized as hagiographies. Specific mentions of a judge or justice's work ethic, impartiality, extraordinary scholarship, and intellectual fortitude define the contours of the hagiographical law clerk tribute. While this is not necessarily surprising, as the goal of a tribute is for the former law clerk to pay respect to their judge or justice, the near total lack of negativity or humanness allows for past judicial figures to be memorialized as heroes, without criticism or critical commentary. Judges and justices are thus elevated as untouchable and immune from critique.

A hallmark of the clerk-justice tribute is the reverence given to the close relationship developed between the law clerks and their bosses. In one of the earliest clerk tributes, Alfred McCormack (1925-1926) contended that the personal side of his justice, whom he got to know well, “is more memorable than the judicial.”¹⁰⁹ McCormack described Justice Harlan F. Stone's devotion in following the careers of all his clerks, making time to meet with them regardless of his schedule, and frequent anniversary dinners with all his clerks where he celebrated the time elapsed since their clerkships.¹¹⁰ Clerking decades after McCormack, Alexandra Walsh (2003-2004) described a similar closeness between Justice Stephen Breyer and his clerks. Specifically, Walsh detailed the tradition of Justice Breyer who would “mention one thing about every single law clerk he ever had, including when he was on the First Circuit” during parties hosted by the Justice along the

qualities of their judge or justice. For more tributes written by clerks which display this tendency, see Richard A. Posner, “In Memoriam: William J. Brennan,” 111 *Harvard Law Review* 9 (1997); Miguel A Estrada, “In Tribute: Justice Anthony M. Kennedy,” 132 *Harvard Law Review* no. 1 (November 2018): 6-8; David B. Wilkins, “Justice As Narrative: Some Personal Reflections on a Master Storyteller,” 6 *Harvard Blackletter Journal* 68 (1989); and Riley Beggin, “The Everyday Extraordinary: Seven Former SCOTUS Clerks Share Stories from the Court's Last 70 Years,” *Super Lawyers*, April 22, 2020, <https://www.superlawyers.com/washington-dc/article/the-everyday-extraordinary/422d4671-7a91-4cbc-aa0b-59ae9be0d675.html>

109 Alfred McCormack, “A Law Clerk's Recollections,” 46 *Columbia Law Review* no. 3 (1946):717. Alfred McCormack (1901-1956) worked as a partner at the Wall Street Law Firm, Cravath.

110 “From the standpoint of Stone's law clerks, the personal side of him is more memorable than the judicial. He delighted in his contact with young men fresh from the Law School; and they were the beneficiaries of his irrepressible desire to teach. He liked his law clerks, He followed their later careers, wrote to them at significant times in their lives, was never too busy to see them when they were in Washington, and every five years, on the anniversary of his accession to the Court, he entertained the group at dinner.” *Ibid.*, 18.

years.¹¹¹ This ritual demonstrates the close relationship and bonds developed between Breyer and his clerks both during and after the clerkship. Finally, Rakesh N. Kilaru (2011-2012) noted that at every career turn or decision point, he called Justice Kagan for advice and support. Kilaru also noted the high frequency of “out of the blue” notes from Justice Kagan when something good occurred in his career. Kilaru’s recollections highlight the close, warm bond between a justice and law clerk when all goes right.¹¹² The aforementioned clerks, and many others, felt so compelled by the relationship they created with their justices that they wrote about them in tributes to codify the lasting relationships with their employers. Overall, the inclusion of the special relationship between justices and law clerks is a commonality throughout clerk tributes over time.

Consciously or not, in highlighting the lasting relationships and closeness with a justice, the clerks are reinforcing the necessity of a smooth clerkship and positive relationship with their judge or justice. Should clerks’ relationships with their bosses go awry, they lose the valuable long-term friendships and support of immensely powerful people in their professions. Moreover, the clerk risks the public ostracization among their family of clerks at dinner parties held by the justice, in professional settings which revolve around the Courts and in the larger community of the judiciary. Rory Little (1984-1985) highlighted the stakes of a close and personal relationship with one’s justice both during and after the clerkship.¹¹³ Little noted that “one commonplace mark of this individual-Justice tradition” is that Supreme Court law clerks are often described by mention of the justice for whom they clerked.¹¹⁴ Moreover, he explained the commonality of clerks often self-identifying by their justice, calling themselves “a Scalia clerk,” for example. Little concluded his article by characterizing the lasting stakes of self-identification with a justice as “long, strong and often unconscious.”¹¹⁵ Thus, should a clerk fail to align with their justice, they could suffer the loss of a core benefit of the clerkship—both in career advancement and self-identification within the institution. The lasting relationships memorialized in clerk tributes contribute to the necessity of a smooth clerkship and the need to speak positively about one’s

111 Riley Beggin, “The Everyday Extraordinary: Seven Former SCOTUS Clerks Share Stories from the Court’s Last 70 Years,” *Super Lawyers*, April 22, 2020. (Specifically taken from Alexandra Walsh’s commentary under “The Interviews” section of the article.) Alexandra Walsh is currently the founder of Walsh Law firm.

112 *Ibid.*, *Super Lawyers*. Rakesh Kilaru is currently a partner at Wilkinson Stekloff.

113 Rory Little, “Clerking for a Retired Supreme Court Justice—My Experience of Being ‘Shared’ Among Five Justices in One Term,” *The George Washington Law Review Arguendo* 88, no. 83 (July 2020): 83-114. Rory Little is currently the Joseph W. Cotchett Professor of Law at UC Hastings Law School.

114 Little, “My Experience Being Shared,” 102.

115 Little, “My Experience Being Shared,” 102.

judge or justice throughout clerk stories.

A handful of clerks liken the close bond they developed with their judge or justice in chambers to that of a parental relationship. While male judges and justices are rarely memorialized explicitly with the words “father” or “parent,” the clerks consistently indicated that their experiences in chambers mirrored that of a child learning from a father. In a tribute to Judge Gerald Bruce Lee, Miles Galbraith (2015-2016) described the discipline of the Judge as “imbu[ing] him with a parental air, and as a consequence his interns and clerks worked hard to meet his high expectations out of respect.”¹¹⁶ Additionally, Justice Neil Gorsuch (1993-1994) recalled feeling as though Justice Kennedy “adopted” him and treated him “every bit a member of his... family” while he served as his law clerk.¹¹⁷ While both tributes rely on language related to the family structure, neither law clerks describe their bosses as affectionate parents but as stern and authoritative figures. In an oral history about Justice Thurgood Marshall, David Wilkins (1981-1982) described Justice Marshall as closer to a wise elder with a multitude of life experiences and stories to share. In his oral history, Wilkins described a ritual shared between him and the Justice in which “everyday [at] about four o’clock the judge would kind of walk in” and he would begin sharing stories.¹¹⁸ These recollections are consistent across clerk tributes written about male judges and justices.

While clerks developed close bonds with their male bosses in chambers, they do not characterize their relationships with such employers as parental in the warm and comforting sense of a parent fixing the mistakes of their child or cheering them up. The male judges and justices are imposing, authoritative, and

116 Miles L. Galbraith, “Reach Back and Lift Up: A Tribute to Judge Gerald Bruce Lee On Behalf Of His Law Clerks, Interns, And WCL Students.” *67 American University Law Review* 1443 (2018): page 1460. Miles Galbraith is currently an associate at Covington & Burling.

117 Neil Gorsuch, “In Tribute: Justice Anthony M. Kennedy,” 132 *Harvard Law Review* no. 1 (November 2018).

Neil Gorsuch currently serves as a Justice on the United States Supreme Court. For more information on the clerkship of Gorsuch, see Adam Liptak and Nicholas Fandos, “How Gorsuch the Clerk Met Kennedy the Justice: A Tale Of Luck,” *The New York Times*, March 3, 2017, available at <https://www.nytimes.com/2017/03/03/us/politics/neil-gorsuch-anthony-kennedy-supreme-court.html>

118 David B. Wilkins, “David B. Wilkins remembers clerking in the United States Supreme Court for Thurgood Marshall, pt. 1.” Interview by The History Makers, The History Makers, April 29, 2013, <https://www.thehistorymakers.org/biography/david-b-wilkins>. David Wilkins is currently a Professor of Law at Harvard Law School, as well as the Director of Harvard’s Center on the Legal Profession and a Vice Dean for Global Initiatives on the Legal Profession.

sometimes reserved figures. Thus, in the sense that the male justices and judges are memorialized as parents, the characterizations lended to them were of power and might. Accordingly, the memorialization of the judges and justices as father-like figures contributes to their ability to exercise power in chambers as cool yet trusted leaders by the clerks.

Though a few clerks described mild discomfort toward the institution of clerkship in tributes, clerks are careful to critique the justice system at large and intentionally lack comments on their individual boss. Matthew Tokson (2011-2012) articulated a sharp discomfort towards the death penalty appeals process at the Supreme Court through which “the Justices and their clerks become involved... in the process of execution.”¹¹⁹ In this critique, Tokson carefully navigated rules and norms of confidentiality as he shared parts of the death penalty appeals process already known to the public. For example, Tokson included the system through which each justice is assigned a list of scheduled executions and a clerk from every chamber is assigned to “monitor” each case.¹²⁰ Tokson described sincere discomfort with the process of reviewing death penalty petitions and the role of Supreme Court law clerks as intermediaries in executions irrespective of their personal convictions.¹²¹ His voice, however, is a rarity in the archive as most other clerks who level criticism against the Supreme Court clerkship or the judiciary are concerned with questions of loyalty and secrecy.

The handful of clerks who challenged the norms of the judiciary within their tributes focused on the closeness of law clerks with their employers alongside the consequences of unwavering loyalty. This group of clerks stayed within the traditional boundaries of critique as they leveled criticism towards the institution at large and not towards their judge or justice.¹²² Rory Little noted that “the duties of loyalty and confidentiality take on an interesting dualistic character for Supreme Court law clerks.”¹²³ Little referenced a tribute written by past law clerk Scott Nelson (1984-1986) for Justice Byron White which described the duty of confidentiality for clerks as “*both* toward his or her Justice *and* toward the Court as an institution.”¹²⁴ Little’s critique is extremely careful in two main regards.

119 Matthew Tokson, “Supreme Court Clerks and the Death Penalty,” *George Washington Law Review* Arguing 88 (2020): 48-53. Matthew Tokson is currently a Professor at the College of Law at the University of Utah.

120 Tokson, “Supreme Court Clerks and the Death Penalty,” 49.

121 *Ibid.*, 32.

122 For more on the traditional boundaries of acceptability *see* David Lane, “Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk’s Duty of Confidentiality,” *Georgetown Journal of Legal Ethics* 18, no. 3 (Summer 2005): 863-880.

123 *Ibid.*, 102.

124 *See* Scott Nelson, “Dun & Bradstreet Revisited—A Comment on Levine and Wer-

Little focused on the ominous rules of confidentiality and not the critique of a specific individual. Furthermore, he elevated a past clerk's voice, Scott Nelson, in his substantive critique of dual loyalty within the Court. Little memorialized his concerns related to confidentiality through the voice of Nelson and protected his own standing in the institution. Two other clerks leveled critiques similar to Little's commentary.¹²⁵ Dahlia Lithwick (1997-1998) argued that "The relationships between law clerks and their judges are mostly built on worshipful silence... There is no other work relationship left in America that is comparable."¹²⁶ Together, these voices consist of small cries in a larger body of literature which gives over the top praise to judges and justices. Therefore, despite concerns related to exactly what sits in the archive written by clerks, the voices of former clerks concerned with secrecy are largely drowned out.

In a tribute to Judge Ed Carnes, Paul Horowitz (1998-1999) argued that the clerkship—primarily the close relationship between clerk and employer—imperils the future of the legal community. Horowitz argued that the familial relationship between clerks and their employers "threatens to prolong the style of adolescence to which privileged Americans tend to become compulsively habituated."¹²⁷ The near uniform closeness of the clerks and their employers is detrimental to the advancement of the legal profession by constantly relegating the clerks to the role of child and threatens to harm young lawyers by fortifying a lasting power imbalance in the profession. Additionally, Horowitz noted that "...especially given that such relationship[s] begin at a formative point in the law clerks' careers, the loyalty, and the spirit of the...protege, that is cultivated during the clerkship can last for decades."¹²⁸ Horowitz elucidated the challenge of functioning as a clerk for life. He noted that the clerkship comes at a defining moment for young lawyers and problematized the relationship between powerful-judge and vulnerable-clerk. In Horowitz's conception, both the legal profession and the judiciary are held back

miel," 88 *Washington Law Review* 103 (2013). Scott Nelson is currently an attorney at Public Citizen.

125 For more on secrecy, see David Lane, "Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality," *Georgetown Journal of Legal Ethics* 18, no. 3 (Summer 2005): 863-880; and Todd C. Peppers, "Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk," 7 *Charleston Law Review* no. 1 (Fall 2012): 95-110.

126 See Lithwick, Dahlia. "He Made Us All Victims and Accomplices," *Slate.com*. last modified December 13, 2017. Dahlia Lithwick is currently a Senior Editor at *Slate* and a lecturer at the University of Virginia School of Law.

127 Paul Horowitz, "Clerking for Grown Ups: A Tribute to Judge Ed Carnes," *Alabama Law Review* 69, no. 3, (2018):667. Paul Horowitz is currently the Gordon Rosen Professor of Law at the University of Alabama Law School.

128 Horowitz, "Clerking for Grown Ups,"673.

by lawyers who are unaccustomed to leadership or the presentation of new ideas. Horowitz's voice is not alone in modern discussions of the clerkship, yet he stands alone in the sense that he voiced his concerns in a tribute to his judge.

Finally, a small group of clerks engaged in self-conscious reclamation of the law clerk tribute attempted to break the trend of hagiography and leave behind a positive but more human record of their boss. Following the death of Justice John Paul Stevens, past law clerk George Rutherglen (1975-1976) described the flood of law clerk reminiscences published in the *Harvard Law Review* in his own tribute to the Justice.¹²⁹ In his memorial to Justice Stevens, "Self-Portrait In A Complex Mirror," Rutherglen insisted on deviating from the tradition of hagiography to "reflect on the man, the lawyer, and the judge" for whom he clerked. Rutherglen is explicitly clear that he did not want to memorialize Justice Stevens as a saint as to do so would serve as an affront to Justice Stevens' personality and belief in the power of humanity.¹³⁰ Likewise, in her tribute to Justice Scalia entitled "The Real Justice Scalia," Chistine Jolls (1996-1997) lamented the heroic status afforded to Scalia in tributes written by former clerks and scholars alike. She noted that he consistently presented himself as a regular human more than a legal icon, which served as a "source of chagrin to some of his clerks."¹³¹ Jolls described Scalia as a person who actively modeled "a form of regard and authenticity," which sometimes resulted in "raw, unravished hurt" when he lost.¹³² Jolls asserted that her human memorialization of Justice Scalia served as a compliment to his legacy and memorialized the real version of the person for whom she clerked.¹³³ Like Rutherglen's perception of Justice Stevens, Jolls chose to elevate the humanity of

129 George Rutherglen, "Self Portraits in a Complex Mirror: Reflections on The Making of a Justice: Reflections on my first 94 years by John Paul Stevens," 106 *Virginia Law Review Online* (April 2020): 28-46. "This Essay takes up a different task: to reflect on the man, the lawyer, and the judge as portrayed in his memoirs, *The Making of a Justice: Reflections on My First 94 Years*, published only months before he died at age ninety-nine. If the reflections in this Essay suffer from the distortions of hagiography, I hope they do so only to this extent: in observing that Justice Stevens does not need hagiography and would not have wanted it." George Rutherglen is currently the John Barbee Minor Distinguished Professor of Law and the Barron F. Black Research Professor at the University of Virginia.

130 *Id.* at 28.

131 Christine Jolls, "The Real Justice Scalia," 126 *The Yale Law Journal* (2017): 1629-1633. Christine Jolls is currently the Gordon Bradford Tweedy Professor of Law and Organization at Yale Law School.

132 *Id.* at 1630.

133 "Justice Scalia had a life to lead—and he did. For someone of his office and his level of jurisprudential influence, he was remarkably disinterested in the calculated, detached pursuit of an optimal 'completed narrative'. Instead he led with his heart. He was 'REAL'."

Scalia as a compliment to his legacy.

Leah Litman (2011-2012) purposefully elevated the human version of Justice Anthony Kennedy in her tribute as an effort to break with hagiographical traditions of law clerk tributes. Published on SCOTUSBLOG.com following the resignation of Justice Kennedy, Litman noted that her tribute to the Justice “...isn’t the piece of schmaltz that tributes to judges or justices tend to be”.¹³⁴ Litman argued that the existing collection of tributes to justices is “about saints who have never made a wrong decision and who always follow the law, free of any preconceived beliefs about the world or experiences in their lives. But that milquetoast story would be just that, a story.” Litman recalled enjoying working with Justice Kennedy particularly because of his humble qualities and sense of being in touch with the people he worked for and with.¹³⁵ She concluded her tribute with a call to elevate the humanness of all justices instead of burying their personal qualities and quirks.¹³⁶ Like Rutherford and Jolls, Litman focused on the humanness and human qualities of Justice Kennedy to compliment his record and legacy. And yet, the voices of these few clerks are largely drowned out by the inundation of hagiographical tributes left by past law clerks. Thus, the few clerks who memorialized their judges and justices in ways that reflect their humanness remain a rarity in the archive.

As a collection, clerk tributes largely focus on the glorification of their judges and judges, allowing the intrinsic human qualities of their employers to fade away. While the subsequent chapters demonstrate the divergent commemoration of female justices and two rare cases in which clerks memorialized negative versions of their bosses, the bulk of the stories told by clerks portray superhuman male justices at work. Throughout the “judge stories” in the archive of tributes, clerks rarely share imperfections or nuanced critique of their justices. The loss of human qualities or imperfections in the archive permits judges and justices to achieve a public memorialization similar to saints or saint-like figures. The number of clerks engaged in critiques of the institution of the Judiciary throughout their tributes remain few and far between. The handful of clerks who sought to reclaim the tribute process and memorialize a more encompassing version of their justice or judge are more recent, but still largely muffled by the strong currents of hagiographical writing in law clerk tributes. Clerk tributes are informed by each other; the norm as it stands instructs clerks to memorialize a superhuman

134 Leah Litman, “Tribute: Justice Kennedy’s counter-clerks,” *Scotusblog*, June 29, 2018, <https://www.scotusblog.com/2018/06/tribute-justice-kennedys-counter-clerks/>. Leah Litman is currently an Assistant Professor of Law at the University of Michigan Law School.

135 *Id.* at 44.

136 *Ibid.*

and incredible vision of their judge or justice, even if their actual experience with a judge or justice is different. In doing so, the clerks ex post facto imbue their employers with incredible discretion in exercising their power.

The Popular Works: *The Brethren* and *Closed Chambers*

Given the controversial decisions of the Warren Court throughout the nineteen sixties, court watchers, attorneys, and interested citizens alike became fascinated with gaining insider access to the Supreme Court. As a result of this fascination with the Supreme Court, even the law clerks gained attention from popular media and average Americans. Published in 1979, *The Brethren* by Bob Woodward and Scott Armstrong fundamentally altered the public understanding of the influence of clerks.¹³⁷ The publication of a book on the mundane operations of the Supreme Court, with law clerks as central figures, is an indication of the popular fascination with the Court by the general public. *The Brethren* opened with the retirement of Chief Justice Earl Warren and the appointment of his successor, Warren E. Burger, and concluded with the end of the 1975 term. Woodward and Armstrong provided their readers an inside look on some of the most important issues of the century: capital punishment, abortion, obscenity, the Vietnam War, women's rights, racial integration and Watergate. The topics are flashy and the writing is riddled with behind the scenes conversations held between justices and their clerks. As Ben Weeks noted in his review for the *American Business Journal*, the intent of the authors "seems to be to demonstrate that the men who comprise the court are people who are subject to all of the frailties that are generally attributed to 'mere mortals'".¹³⁸

Woodward and Armstrong relied on "off-the-record" interviews with a multitude of past clerks, an anonymous Justice, and a handful of other Court employees.¹³⁹ Peddled as factually accurate, *The Brethren* painted the image of ambitious law clerks pushing their unique legal philosophies into Court opinions and catching the errors of senile, politically motivated Justices. Essentially,

137 Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, 138 New York: Simon and Schuster, (1979).

138 Ben Weeks, *The Brethren: Inside the Supreme Court*, Bob Woodward and Scott Armstrong, 18 *American*

139 David J. Garrow, *The Supreme Court and The Brethren*, 18 *Constitutional Commentary* 303-318, (2001). (Through research into the letters and private papers of Justice Powell, Garrow describes the frenzy among the Justices upon learning that Woodward and Armstrong were contacting clerks and detail the efforts by Justices to halt the breach of confidentiality of the clerks by speaking with the two journalists.)

through questionable methods *The Brethren* exposed the turmoil and chaos first espoused by William Rehnquist over a decade earlier. Furthermore, Woodward and Armstrong provided a critical dimension to the stories we tell about the clerkship. The two journalists cemented the legacy of clerks as behind the scenes string pullers and influential figures within the apparatus of the Supreme Court. Woodward and Armstrong contributed to the consolidation of the clerkship as a place for young attorneys to exercise influence and gain access to not only the justices, but important people in the institution of the Court.

The publication of *The Brethren* triggered a Court-wide debate on tightening norms of confidentiality. Woodward and Armstrong's book also gained severely negative attention among the vocal community of past clerks.¹⁴⁰ In his reconsideration of *The Brethren* in 2001, historian David Garrow chronicled the reception of the book amongst clerks, highlighting the dismay they expressed due to breaches of confidentiality and negative portrayals of their justices. Through a close analysis of Justice Powell's papers, Garrow located a letter from past clerk Robert D. Comfort who lamented that "such a massive breach of personal and professional integrity is nearly enough to make one ashamed of belonging to the group."¹⁴¹ Equally pessimistic, Garrow found a letter written by past clerk Christina Whitman who told Powell that a former Brennan clerk believed their "whole generation of clerks will be remembered with shame."¹⁴² As these quotes highlighted, *The Brethren* exposed the American public to the tremendous possible impact the clerks may have on their justices and former clerks attempted to save their image as a group of Supreme Court employees.

These reactions from members of the clerk community, however, are to be expected. The attention paid towards *The Brethren*, and the subsequent interest in law clerks, threatened a two-pronged attack on the institution of the Supreme Court clerkship. On the individual level, the

The Brethren exposed the public to the prestige and power of the Supreme Court clerkship. Aside from legal elites and those already ingrained into the world of

140 For scholarly responses to *The Brethren*, see Paul Bender, "The Brethren," *University of Pennsylvania Law Review* 128, no. 3 (January 1980): 716-728; Norman Vieira, "Journalists in the Supreme Court: A Review of the Brethren," *Idaho Law Review* 16, no. 2 (Spring 1980): 235-246; and Anthony Lewis, "Brethren: Inside the Supreme Court - A Review, The," *New York State Bar Journal* 52, no. 3 (April 1980): 205-214. For responses by clerks to *The Brethren*, see David Garrow, "Supreme Court and The Brethren," 8 *Constitutional Commentary* no. 2 (Summer 2001).

141 David Garrow, *Supreme Court and The Brethren*, 8 *Constitutional Commentary* 311, (2001).

142 *Id.* at 51.

prestigious lawyering, the Supreme Court clerkship received little popular or scholarly attention. Accordingly, few rules, regulations or even norms governed the conduct of Supreme Court law clerks. Further, *The Brethren* threatened to rattle the settled image of the Court as a legitimate, apolitical, and unproblematic institution in the eyes of the American public. The prestige and legitimacy of the Supreme Court lends power and privilege to those serving as law clerks. The Supreme Court is where law clerks draw their own power and elite standing. The presentation of the Court as an institution as weak and vulnerable threatened the channel of power that is pivotal to the clerkship. Woodward and Armstrong exposed the general public to a new understanding of the Court that of course former clerks wished to dispel. In *The Brethren*, the Supreme Court law clerks are intentional political agents of change, and sometimes deception.

In the late 1990s, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* by Edward Lazarus rocked the Court and the public.¹⁴³ A former law clerk to Justice Harry Blackmun, Lazarus asserted that a cabal of conservative clerks were exerting undue influence on swing-Justices to produce conservative legal outcomes. In his description of the “cabal” of conservative clerks, Lazarus detailed the drive of these clerks to pursue their purported ends as “manifested...in an amazing bloodthirst, a revelry in execution reminiscent of the celebratory crowds that years ago thronged to public hangings.”¹⁴⁴ Moreover, Lazarus described his lack of preparation in law school to deal with the “guerilla war that liberal and conservative clerks conducted, largely out of sight of those Justices, to control the course of constitutional law.”¹⁴⁵ Early in his book, Lazarus described a Court “where Justices yield great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses and the institution they ostensibly serve.”¹⁴⁶ Additionally, while Lazarus conceded that the ultimate power to grant or deny a case rested with the Justices,

When the final arguments reached the Court, the Justices were almost always long since home for the night, isolated from the tall stacks of paper in which the crucial elements of the case lay buried. The Justices counted on their clerks to distill for them the essence of the case, the facts, the issues, and the precedents that should inform their vote.

143 Edward Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court*, New York:

144 *Id.* at 266.

145 *Id.* at 261.

146 *Id.* at 6.

They relied on us for advice.¹⁴⁷

Lazarus's cabal of clerks not only influenced the vote of swing-Justices, but touched each case heard by the Court and the respective constitutional outcome. While arguably Lazarus raised genuine objections to the political nature of the Supreme Court and the Supreme Court clerkship, his over the top language and imagery drowned out any substantive critique he leveled against the institution. And yet, Lazarus's book raised notable concerns surrounding the influence of Supreme Court clerks. Lazarus provided nothing short of a bold refutation of the neutral law clerk functioning as an uninfluential member of the Court. Instead, he asserted a vision of the Supreme Court law clerk as vicious and drunk with unchecked power.

Members of the academic community responded negatively to the publication of *Closed Chambers* and those associated with the Court critiqued Lazarus for breaching norms of confidentiality. Todd Peppers, a pioneering historian on the influence of law clerks, summarized Lazarus's account as a collection of "gossipy stories" of conservative clerks manipulating their gullible Justices and argued the entire book ought to be viewed as ahistorical.¹⁴⁸ Legal scholar Erwin Chemerinsky argued that Lazarus revealed no confidential information in the book, and instead understood Lazarus as contributing to a growing literature on the internal development of Supreme Court rulings.¹⁴⁹ Published in the same journal as Chemerinsky, Judge Alex Kozinski asserted that Lazarus's behavior was not only highly unethical but potentially illegal and worthy of exclusion from the legal community.¹⁵⁰ The scholarly discussion on confidentiality at the Court and the role of gossip in Lazarus's account, therefore, overshadowed the actual substantive concerns of influence exerted by clerks.

The stories of *Closed Chambers* can be "gossipy" and true at the same time. Like *The Brethren*, *Closed Chambers* exposed faults throughout the daily operations of the Court's business and threatened to unsettle the precious legitimacy of the Supreme Court and the clerkship. Accordingly, it is again unremarkable that historians and legal scholars renounced the content of *Closed Chambers*. A former law clerk himself, Judge Alex Kozinski's review of *Closed Chambers* mirrored the feelings of former law clerks following the publication of *The Brethren*. For almost identical reasons, following the publication of *Closed Chambers*, those attached to the Court and the clerkship sought to reclaim the image of the institution as

147 *Id.* at 122-123.

148 Mark C. Miller, Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward, *Law and Social Inquiry* (2014).

149 Erwin Chemerinsky, Opening Closed Chambers, 108 Yale L.J., (1999).

150 Alex Kozinski, Conduct Unbecoming, 108 Yale L.J., (1999).

legitimate and dispel any claims to the contrary. Particularly because Lazarus served as a law clerk himself, the necessity of dispelling Lazarus's claims rose. The attack on Lazarus for breaking norms of confidentiality represent poorly veiled attempts from Court insiders to shield the Court from scrutiny or attack.

Both *The Brethren* and *Closed Chambers* contributed to the stories told about the clerkship. At their core, the two books offer parallel concerns—law clerks exerting influence over their justices due to uncontrolled authority and justices actively beguiled by young, smart attorneys seeking to enshrine their ideologies into the opinions of the Supreme Court. Both *The Brethren* and *Closed Chambers* told a story completely different from the tradition of hagiography espoused by former law clerks in tributes to their employers. And yet, historians and court insiders disregarded the works of Woodward, Armstrong, and Lazarus from the collective creation of clerk stories. The two books threatened to disturb the settled legitimacy of the clerkship and of the institution of the Supreme Court due to their complicated and negative portrayal of the institution. The clerk stories shared in the books are not overly positive nor do they detail the superhuman abilities of justices. Instead, *The Brethren* and *Closed Chambers* presented an image of the Court as unstable and in need of further scrutiny. To protect both the standing of former clerks and the institution of the clerkship, those attached to the Court ensured that the stories shared throughout the popular texts would not enter the collection of stories told about the clerkship nor the Supreme Court.

Narratives of the Clerkship

It should be noted that there is nothing inherently wrong with praising someone who has lent you a tremendous professional opportunity and invested time into your growth, as judges and justices undoubtedly do for their clerks.¹⁵¹ Yet, the aggregation of these “judge stories” and the discarding of public skepticism on the clerkship resulted in the creation of an environment where over-the-top praise

151 For sources detailing the importance of the clerkship professionally and associated prestige of obtaining a clerkship, see Paul R Baier, “The Law Clerks: Profile of an Institution”. *Journal Articles* 294 (1973), https://digitalcommons.law.lsu.edu/faculty_scholarship/294; Christopher D. Kromphardt, Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court, *98 Marquette Law Review* 289 (2014), Available at: <http://scholarship.law.marquette.edu/mulr/vol98/iss1/14>; and Chad Oldfather and Todd C. Peppers, “Introduction: Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks,” *98 Marquette Law Review* 1 (2014). Available at: <http://scholarship.law.marquette.edu/mulr/vol98/iss1/3>.

is the norm in clerk tributes.¹⁵² Likely, the reality and in-chambers experience is far more nuanced. Thus, the stories memorialized about judges and justices in clerk tributes transmit a narrow understanding of notable members of the judiciary. This section details the resulting professional implications of the stories we hear about judges and justices. Ultimately, this section elucidates the scaffolding throughout the legal profession that permits for the retelling of harmful or only partially true judge stories.

As a body of literature, the clerk tributes largely function as hagiographical literature published in prominent law reviews at elite legal institutions. Tributes to judges and justices are typically published in their law school's law review to pay homage to their legacy and roots. Accordingly, a vast majority of Supreme Court justice tributes are published in the *Harvard Law Review* as eighteen of our total justices graduated from Harvard Law School. Yet, out of custom or tradition, the *Harvard Law Review* publishes all tributes to past Supreme Court justices even if they attended other institutions for their legal education.¹⁵³ Indeed, the majority of tributes to justices (and a sizable number of judges) can be found within the pages of one of the most prestigious law reviews in the country. Subsequent to a 2020 House Judiciary Subcommittee hearing titled "Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct", the *Harvard Law Review Blog* offered a lamentation on their own role in the perpetuation of judge hagiographies.¹⁵⁴ Specifically, the editors disclosed that they engaged in a practice of blind publishing, in which the publication of clerk tributes and other comments on judges occurred "without questioning" their validity or truth.¹⁵⁵ The editors asserted that "journals should elevate the role that such tributes play in lionizing and even idolizing such figures."¹⁵⁶ Despite sweeping language, it is not clear that the *Law Review* added new standards or changed their approach to publishing law clerk tributes. Yet, by lionizing judges and allowing

152 Heather K. Gerken, "Judge Stories," 529.

153 While they list no official policy on their website pertaining to the publication of law-clerk tributes or special issues for Judges or Justices, it appears to be custom to do so. For their official policies, see "Submit," *Harvard Law Review*, <https://harvardlawreview.org/submissions/>.

154 See *Harvard Law Review*, "Recent Event: House Judiciary Committee Hearing on Harassment and the Judiciary," *Harvard Law Review Blog*, March 25, 2020, <https://blog.harvardlawreview.org/recent-event-house-judiciary-committee-hearing-on-harassment-and-the-judiciary/>; and "Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other workplace misconduct," House Committee on the Judiciary, February 13, 2020, <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2791>.

155 *Ibid.*

156 *Id.*, at 50.

for their complexities to dissipate, the *Harvard Law Review* admitted wrongdoing in perpetuating “profound injustices” throughout the legal profession.¹⁵⁷ While the *Harvard Law Review* is just one example, the role of legal institutions in perpetuating harmful images of judges and justices is robust.

In relation to the publication of judge and justice tributes, the connection between law reviews and the legal elite is salient. By publishing the tributes written by law clerks to judges and justices, the editors are signaling and publicizing their connection to the highest levels of the judiciary. With this added context, the editors of the *Harvard Law Review* were not shrugging their responsibility as editors. Instead, the choice to disregard their duties of fact checking represented a necessity in demonstrating the law review’s viability as a site of elite reproduction within the legal profession. A process of fact checking or deeper analysis could have threatened the position of the *Harvard Law Review*, or other law reviews publishing tributes written to judges and justices.

Legal institutions circulate superhuman images of judges and justices through a variety of commonplace channels across all levels of the legal profession. As noted by Litman and Shah, “professors might tell stories in the classroom or when advising students about clerkships; lawyers will share stories with one another in the workplace; and occasionally stories will find their way into more public spheres, such as social media or law reviews”.¹⁵⁸ As hinted by Litman and Shah, at the educational level, law schools share judge stories to their students which emphasize the incredible opportunity of the clerkship and the ability to work under legal stars as their direct aides. Fawning stories told about judges and justices can prime students to exalt their future employers.¹⁵⁹ Through these stories, incoming law clerks default to glorifying their bosses before even entering the workplace and meeting their employers. Beyond the educational sphere, at the professional level lawyers share judge stories to signal their elite status and contribute to a culture of valorization. Prominent legal institutions frequently share judge stories to maintain close relationships with both past clerks and judges.¹⁶⁰

157 Ibid.

158 Leah Litman and Deeva Shah, On Sexual Harassment in the Judiciary, 115 Northwestern University Law Review no. 2 (2020): 600-648.

159 For more information on the further implications of these narratives in relation to sexual harassment, see footnote 74.

160 See Aaron L. Nielson, “The Future of Federal Law Clerk Hiring,” 98 *Marquette Law Review* 181, 188 (2014). For a specific case-study example of sharing stories with institutional scaffolding, see Dahlia Lithwick & Susan Matthews, “Investigation at Yale Law School,” Slate.com, last modified Oct. 5, 2018, <https://slate.com/news-and-politics/2018/10/jed-rubinfeld-amy-chua-yale-law-school.html> [<https://perma.cc/7W-FC-YP9G>].

Thus, at multiple levels within the legal profession, a culture of hero-worship is developed surrounding judges and justices and kept alive through the retelling of judge stories. Regardless of the reality of clerking or the true character of a person, justices and judges are consistently promoted by legal institutions as untouchable superhumans in tandem with their exalting commemoration in tributes.

Robust incentive structures exist to support the status quo. Immediately following the conclusion of the clerkship, law firms target outgoing clerks and offer exorbitant bonuses upon hiring.¹⁶¹ In 2018, at least six different law firms were willing to offer \$400,000 bonuses to Supreme Court law clerks.¹⁶² Treating the stamp of a clerkship as a proxy for legal talent, these known bonuses encourage law clerks to bury critique of the institution or risk losing a huge financial reward for their clerkship.¹⁶³ Related to monetary incentives, law schools prize clerkships in hiring as clerkships can serve as “credential for professors”.¹⁶⁴ As Judge Trenton Norris explained, “[L]aw schools consider clerkships a plus because former clerks have already been screened, have gained experience in researching and writing about legal issues, and bring with them the prestige of having worked closely with respected jurists.”¹⁶⁵ Perhaps most importantly, however, a clerk’s intimate connection to their judge and their understanding of other judges on the bench becomes a professional tool. Law firms frequently tout an associate’s recent clerkship in “pitch materials to woo clients by demonstrating a potential ‘in’ for a specific case”.¹⁶⁶ Moreover, younger lawyers use their clerk networks and families to refer work to each other and ask their fellow lawyers questions, thus reinforcing the importance of clerking and not breaking with the status quo. Therefore, from

161 See Leah Litman and Deeva Shah, “On Sexual Harassment in the Judiciary,” 115 *Northwestern University Law Review* no. 2 (2020): 600-648; and Artemus Ward, Christina Dwyer, and Kiranjit Gill, “Bonus Babies Escape Golden Handcuffs: How Money and Politics Has Transformed the Career Paths of Supreme Court Law Clerks,” 98 *Marquette Law Review* 227 (2014). Available at: <http://scholarship.law.marquette.edu/mulr/vol98/iss1/12>

162 Staci Zaretsky, “\$400K Is Now the Official Market Rate for Supreme Court Clerk Bonuses,” *Above the Law*, November 15, 2018, <https://abovethelaw.com/2018/11/400k-is-now-the-official-market-rate-for-supreme-court-clerk-bonuses/>

163 Note that to take a clerkship directly out of law school means passing on entry level associate salaried positions at law firms or other well paying opportunities following the conclusion of a costly legal education. See *Courting the Clerkship: Perspectives on the Opportunities and Obstacles for Judicial Clerkships*, 40 *JUDGES’ J.* 10, 11 (2001).

164 *Ibid.*, 61.

165 Trenton H. Norris, “The Judicial Clerkship Selection Process: An Applicant’s Perspective on Bad Apples, Sour Grapes, and Fruitful Reform,” 81 *California Law Review* 765, 776 (1993).

166 *Ibid.*

the moment a clerk finishes their clerkship to later in their professional lives, maintaining the standard upheld throughout clerk tributes and memorials is vital. As demonstrated in the third chapter, those who broke from the norm suffered professionally and personally. Thus, incentive structures throughout the legal profession cement the culture of hero worship.

Lawyers and legal elites therefore take clerk stories at face value because the stories contribute to the legitimacy of the Supreme Court. Overly positive clerk stories benefit those invested in the Court and their retelling contributes to the safeguarding of the Court's legitimacy as an institution. Another partial answer to the question of what is at stake in retelling clerk stories is the image of the Court presented throughout the texts of tributes. Tributes present images of individual justices as motivated by superhuman work ethics and endowed with extraordinary legal talent. Moreover, the institution of the Supreme Court is heralded as spotless throughout the stories. Recall even the careful critiques of those uninterested in leaving behind hagiographical tributes such as Leah Litman or Christine Jolls. Even more measured tributes and subsequent clerk stories about individual justices contain few mentions of negative experiences or critique of the institution of the Supreme Court. The culture of hero-worship kept alive by the publication of tributes and telling of clerk stories therefore allows for the notion of judicial supremacy to be elevated and perpetuated.

Conclusion

Heather Gerken concluded her article entitled "Judge Stories" by describing the two times her judge kicked her out of his chambers. Despite Gerken's self assurance that she performed well as a clerk, she noted that Judge Reinhardt "unceremoniously kick[ed] me out of his office on the fifth and last day" of her clerkship because she failed to write a satisfactory opinion.¹⁶⁷ Gerken argued that most fellow Reinhart clerks most likely share similar stories to hers, and yet those moments of intense discipline are not the stories shared from the experience of clerking. Rather, Gerken argues "we tell 'Judge stories' which allow us to maintain our patina of sophisticated cynicism even as we talk about how much we loved clerking for him."¹⁶⁸ Regardless of this incident, Gerken's tribute is a story on the superhuman abilities and work ethic of Judge Reinhardt. Even a story with a climax of an over-the-top discipline practice is still a part of Gerken's narrative on Judge Reinhardt's incredible personality and extraordinary judicial abilities.

167 Heather K. Gerken, "Judge Stories," 532.

168 Heather K. Gerken, "Judge Stories," 533.

This chapter demonstrated the universality of Gerken's tribute to Judge Reinhardt and the lasting impacts of clerk-tributes as a collection. Like Gerken, many clerks memorialized an incredible version of their judge or justice with near superhuman qualities and the lack of human imperfections. Clerk tributes center on the positive personality traits and work ethics of their former bosses and for the most part, clerks do not stray from this norm of hagiography. Taken together, these clerk tributes elevate high level members of the judiciary as superhumans, and their complexity as human beings fade away. Furthermore, institutional scaffolding throughout the legal profession allows for the norm of hagiography to continue unchallenged. Perhaps most problematically, these "judge stories" contribute to the elevation of members of the judiciary above other political figures in American government. Should these career norms and "judge stories" be threatened, not only is the reputation of a single justice at stake, but the larger judicial system's legitimacy. Ultimately, the stories we hear about judges and justices convey an air of superiority and sacredness. The stories we tell, however, perpetuate rigid career narratives about both the clerkship and the judiciary.

Chapter Two: Shattered Narratives, Lasting Systems

Introduction

The stories we hear and tell about the clerkship are not confined within the pages of law reviews or unopened archives. Instead, the stories told by clerks in tributes and interviews contribute to the rigid career narratives of the clerkship that privilege hard work, silence, and loyalty to both the institution of the judiciary and one's employer. The clerkship is understood by the legal profession as a gateway to legal elite circles through rare exposure to judges and justices while in chambers, and acclaimed opportunities in government and private practice following the conclusion of a clerkship. Near unwavering deference to legal institutions allows for these narratives on the judiciary and the clerkship to continue and remain largely unchallenged. Uniform career narratives built by clerk tributes directly affect current and past law clerks who are left to reconcile their unique experiences of the clerkship with the stories they heard from past generations and colleagues.

This chapter will interrogate the collision of lived negative experiences with established positive narratives on the clerkship. Through two different cases of clerk tributes focused on harassment and misconduct by judges, this chapter will explicate what happens when a clerk memorializes a negative and threatening version of their judge. When this occurs, beliefs about a judge's power, status, and ethics, as well as our popular belief that judges adjudicate fairly, begin to crumble.

Ultimately, the overwhelmingly positive stories we tell about judges prevail over accusations of harassment or wrongdoing. Accordingly, legal institutions that stand at the periphery of the clerkship remain unscathed, and individual judges are let off the hook for their actions. Yet, these two stories reveal the importance of clerkship stories in endowing judges and justices with the discretion to act however they see fit in the pursuit of their end. Olivia Warren, a former Ninth Circuit law clerk, accused Judge Stephen Reinhardt of repeated sexual harassment throughout her tenure as a clerk in his chambers. She also described repeated verbal torment and emotional harassment. Olivia Warren's accusations against Judge Reinhardt add the complication of a liberal hero, heralded for his service to women's equality in tributes, being called out for sexual harassment. Similarly, Heidi Bond accused Judge Alex Kozinski of ongoing verbal harassment throughout her time as a clerk at the Ninth Circuit. Bond accused the Judge of treating her like a servant and controlling her eating, sleeping, writing, and personal life. The response to both Heidi Bond's early accusation against Judge Alex Kozinski, and other women's subsequent support of Bond, demonstrates the legal hierarchies and institutions that remain intact following an accusation against a judge. I utilize the two stories to problematize the tradition of hagiographical writing throughout clerk tributes. Both stories illuminate the tendency within the legal community to prioritize outcomes at the expense of individuals. Above all, this chapter details how hagiographical writing combined with settled currents within the legal profession convey the message that judges may act with little concern for ethics and the consequences of their behavior.

A Liberal Lion Under Attack

On March 29, 2018, Judge Stephen Reinhardt died after serving almost 40 years as a Judge on the United States Court of Appeals for the Ninth Circuit. Throughout his time on the bench, Judge Reinhardt earned a reputation as an important liberal voice in an increasingly conservative federal judiciary. In 2010, following the announcement of the Ninth Circuit's panel hearing on *Perry v. Hollingsworth*, former clerk Michael Dorf described Judge Reinhardt as the "Chief Justice of the Warren Court in exile."¹⁶⁹ The name stuck amongst members of the legal community. Judge Reinhardt championed reproductive rights, marriage equality, the separation of church and state, and the right to determine the time

169 Mike Dorf, "Hail to the Chief Judge of the Warren Court in Exile," Dorf on Law, last modified December 2, 2002, <http://www.dorfonlaw.org/2010/12/hail-to-chief-justice-of-warren-court.html>. Accessed 3/16/22.

and manner of one's own death throughout his opinions.¹⁷⁰ Upon his death, an outpouring of adoration and reverence by former colleagues, clerks, sitting judges, and justices appeared throughout the pages of the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Politico*.¹⁷¹ Consistently, the commemoration of Judge Reinhardt focused on his excellent stewardship of the law and exceptional devotion to creating a better world. In her tribute to him, Justice Sonia Sotomayor recalled Reinhardt's fierce dedication to those affected by the law. Justice Sotomayor characterized Judge Reinhardt as someone who "never lost sight" of those impacted by his decisions and never "forgot that we as judges have a truly awesome responsibility".¹⁷² Linda Greenhouse, a *New York Times* Supreme Court commentator, recalled witnessing Judge Reinhardt speak at a Yale Law School event focused on his jurisprudence. During the event, a student asked the Judge if he could comment on the impact of his cases given that the Supreme Court reversed the majority of his decisions. Greenhouse described Reinhardt smiling and responding with a few simple words of open defiance—"They can't catch 'em all."¹⁷³ Again and again, lawyers and commentators alike heralded Judge Reinhardt for his role on the Ninth Circuit as a needed contrarian, liberal lion, and brilliant jurist. Indeed, his judicial legacy is studded with liberal causes championed against stacked odds.

Judge Reinhardt's legal legacy is rich with decisions and dissenting opinions which conveyed a progressive view of the law. In 1988, Judge Reinhardt wrote the majority opinion for *Gutierrez v. Municipal Court of the Southeastern Judicial District, County of Los Angeles* which struck down an "English-only" workplace rule in a Los Angeles municipal court.¹⁷⁴ In 2012, Judge Reinhardt wrote

170 Ben Wizer, "The Exile: In Memory of Judge Stephen Reinhardt," American Civil Liberties Union, last modified April 4, 2018, <https://www.aclu.org/blog/civil-liberties/exile-memory-judge-stephen-reinhardt>. Accessed 3/16/22.

171 See Sam Robert, "Stephen Reinhardt, Liberal Lion of Federal Court, Dies at 87," *New York Times*, last modified April 2, 2018; Maura Dolan, "Stephen Reinhardt, Liberal Lion of the 9th Circuit Dies," *Los Angeles Times*, last modified March 29, 2018, <https://www.latimes.com/local/lanow/la-me-ln-reinhardt-obit-20180329-story.htm>. Accessed 3/16/22; and Lara Bazelon, "Stephen Reinhardt: The Liberal Judge with a Fighting Spirit," *Politico*, last modified December 30, 2018, <https://www.politico.com/magazine/story/2018/12/30/stephen-reinhardt-obituary-federal-judge-2018-223311/>. Accessed 3/16/22.

172 Sonia Sotomayor, "In Memoriam: Judge Stephen Reinhardt," 131 *Harvard Law Review* no. 8 (June 2018).

173 Linda Greenhouse, "Dissenting Against the Supreme Court's Rightward Shift," *New York Times*, last modified April 12, 2018, <https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html>. Accessed 3/16/22.

174 *Gutierrez v. Municipal Court of the Southeastern Judicial District, County of Los*

the majority opinion striking down California's Proposition 8, which effectively banned gay marriage. "A rose by any other name may smell as sweet," Judge Reinhardt wrote, "but to the couple desiring to enter into a lifelong committed relationship, a marriage by the name of 'registered domestic partnership' does not."¹⁷⁵ While Reinhardt's opinion was overturned on technical grounds, his view ultimately prevailed in 2015 when Justice Kennedy held that the prohibition against same-sex marriage violated the equal protection and due processes clauses of the Constitution.¹⁷⁶ Colleagues of Judge Reinhardt single out his death penalty record as an exemplification of his belief in a progressive understanding of the law.¹⁷⁷ Any time an execution was scheduled in any of the states of the Ninth Circuit, Reinhardt and his clerks would stay in chambers until the final moments in case there was a last-minute appeal. Every time, Judge Reinhardt dissented, sometimes alone, when the court failed to halt an execution. While Judge Reinhardt repeatedly expressed his appreciation for precedent, his decisions featured novel legal ideas, references to famous dissents, and the lasting call for change to be created through the courts. Thus, one could expect the champining of progressive causes throughout the text of Judge Reinhardt's decisions.

In their tributes, former Reinhardt clerks echoed the popular sentiments about their Judge's liberal convictions and emphasized his commitment to shepherding his clerks through impactful legal careers. Heather Gerken, a clerk from 1994-95 who wrote of "judge stories", recalled the symbolism of Judge Reinhardt's graduation year from Yale law school coinciding with the *Brown v. Board* decision.¹⁷⁸ Perhaps motivated by this convergence, Gerken speculated that immediately after law school, Reinhardt "began what amounted to a quest to bend history toward the rights of the poor, the disenfranchised, and the underprivileged."¹⁷⁹ Other clerks reiterated Reinhardt's commitment to those overlooked by the criminal legal system and placed his motivations as rooted in

Angeles, 838 F.2d 1031 (9th Cir. 1988).

175 *Perry v. Brown*, S189476 (2011).

176 *Obergefell v. Hodges* 576_US (2015).

177 Ben Wizer, "The Exile: In Memory of Judge Stephen Reinhardt," American Civil Liberties Union, last modified April 4, 2018, <https://www.aclu.org/blog/civil-liberties/exile-memory-judge-stephen-reinhardt>. Accessed 3/16/22; *see also* Stephen Reinhardt, "Anatomy of An Execution: Fairness vs 'Process'," 74 *New York University Law Review* no. 2 (May 1992), available at <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-74-2-Reinhardt.pdf>. Accessed 3/16/22.

178 Heather Gerken is currently the Dean and Sol & Lillian Goldman Professor of Law, Yale Law School. Her words appeared throughout my first chapter focused on the hagiographical traditions of law clerk tributes to their bosses.

179 Heather Gerken, "In Memoriam: Judge Stephen Reinhardt," 131 *Harvard Law Review* no. 8 (June 2018): 2099.

a previous era of legal liberalism. David J. Barron, a clerk during the 1994-95 term, argued that Reinhardt's voice "recalled the legal era defined by the Court he so admired, the Warren Court."¹⁸⁰ Further, Barron argued that despite the Judge's temporal distance from the Warren Court, Reinhardt made the motivations and prescriptions of that era sound "contemporary, vigorous, confident, and undiminished".¹⁸¹ Collectively, the past Reinhardt clerks convey the image of an awesome judge motivated by a higher sense of duty and a lasting commitment to justice. They depict a judge unshaken by changing times and norms, but steadfast in his own beliefs and ability to change the world. Through their recollections of the Judge's commitment to carrying on the legacy of the Warren Court, the clerks evoke an image of their Judge as a sort of freedom fighter. Like past saint-like depictions of judges and justices, the Reinhardt clerk tributes evoke an image of their Judge as an ethereal force, undeterred by present day challenges.

Alongside reflections on the Judge's liberal convictions, past Reinhardt clerks placed themselves squarely within Reinhardt's legacy, functioning as disciples of his liberalism. At the end of his tribute, David Barron concluded that after his short time with the Judge, he gained a "new sense of what I should do as a lawyer and a lasting connection to a man I came to love."¹⁸² More pointedly, Andrew Crepsio placed clerks and students at the heart of Reinhardt's broad theory of legal change. Crepsio argued that alongside the change Reinhardt envisioned for those impacted by the law, the other lasting change he foresaw surrounded his clerks and a generation of young lawyers trained with his convictions.¹⁸³ Crepsio asserted that each Reinhardt clerk left the Judge's chambers with a new or renewed passion to fight for good in the world, armed with the tools of the law. In a sense, Crepsio and Barron articulated a vision of deliberate training and discipleship

180 David J. Barron is currently a Judge for the United States Court of Appeals for the First Circuit, and the Honorable S. William Green Visiting Professor of Public Law, 2017–2018, Harvard Law School.

181 "The Judge not only changed the lives of those whose cases came before him. He also sketched arguments that lawyers and judges all over the country used to do their own part in righting wrongs — often when, in the sea of precedents available to them, little besides that one tightly reasoned and much-worried-over Reinhardt opinion supported their view."

182 David Barron, "In Memoriam: Judge Stephen Reinhardt," 131 *Harvard Law Review* no. 8 (June 2018): 2102.

183 "The other change, though, I think may have been one that he sought to effectuate in us — his clerks — and, more broadly, in the generation of young lawyers whom he met with when speaking at law schools across the country: 'Change will not come easily. It will take hard work on the part of well-trained advocates and creative legal thinkers who refuse to accept' the status quo, and who through 'their words and deeds' strive to 'inspire' others to take up the cause of justice as well.'"

instituted by Reinhardt in an effort to bolster his view of the law. Finally, Heather Gerken finished her own tribute to Reinhardt by describing the future lawyers he created as a result of the clerkship. Gerken described “a generation trained by one of the finest lawyers I have ever known. A generation of lawyers trained to seek justice. A generation of people who worked for him precisely because they are as stubborn and exasperating and as relentless as he was.”¹⁸⁴ Thus, taken together, the past law clerks of Reinhardt describe a system of training under the Judge that mirrors a form of discipleship. Under their Judge, they gained an enlightened understanding of the functioning of the law, the proper levers to pull, and effective arguments to assert on behalf of his mission.

The Reinhardt clerks commemorated their Judge as a larger than life figure and titan, which follows the pattern of hagiographic tributes written by former law clerks. Andrew Crespo noted that while he never knew the Judge as a young man, he “never knew him as an old man either.”¹⁸⁵ Instead, he recalled that six days a week and frequently 12 hours or more a day, Crespo and the other clerks who worked for Reinhardt struggled to keep up with his incredible energy and vigor. Similarly, Adriaan Lanni, a clerk from 2000-2001, described the Judge working “well past dinner most weeknights and at least one day on every weekend.”¹⁸⁶ Moreover, he recalled the crushing weight of the workload for one year, and wondered how the Judge maintained such a “punishing workload” for forty years.¹⁸⁷ In his speculations, Lanni hinted at an almost above human persistence exercised by Reinhardt. Despite the demands of the job, Michael Dorf echoed Laani’s sentiments and memorialized the Judge as a figure “larger than life”. Dorf, a clerk from 1990-91, recalled the shock of losing “such a titan” so abruptly.¹⁸⁸ For Dorf, the sudden death by heart attack of his Judge failed to fit the mold of the superhuman person he clerked for in chambers; his sudden death shattered his image of Reinhardt as above human ailments.

Much like past clerk tributes, the truth of these remarks are not up for

184 *Ibid.*, page 2111.

185 Andrew Crespo, In Memoriam: Judge Stephen Reinhardt, 2103.

186 Adriaan Lanni, In Memoriam: Judge Stephen Reinhardt, 131 *Harvard Law Review* no. 8 (2018). Adriaan Lanni is currently the Touroff-Glueck Professor of Law at Harvard Law School.

187 “He worked well past dinner most weeknights and at least one day on every weekend. I can say from experience that this is a punishing workload even for just one year, but the Judge did it for almost forty years, keeping a full docket right up to the end. This is one of the purest kinds of integrity there is, and, invisible though it is, it probably does more to humanize the exercise of power by our government than the finest prose in the Federal Reports.”

188 Judge Stephen Reinhardt died by a heart attack on March 29, 2018, *see* footnote 3.

debate. Following Dorf's assertions, Judge Reinhardt could have spent 72 hours a week in chambers, amounting to thousands of hours over his forty years on the Ninth Circuit.¹⁸⁹ Yet, the clerk tributes of Reinhardt cement the incredible work ethic and almost superhuman abilities of their Judge over time. Taken together, the past Reinhardt clerks commemorated Reinhardt as a figurehead of a movement as much as he functioned as their employer. To the clerks, Reinhardt led a movement without compromise, weekends, or doubt. Thus, the past clerks extolling the virtues of their Judge allowed for questions on exertions of power or force to subside. The Reinhardt clerks paint a picture of a titan and therefore endow their leader with whatever means necessary to accomplish his pursuit.

Despite subtle comments on the struggles of working for such a leader, the Reinhardt clerks largely shrink away from critique of their boss. They commemorate him as demanding in some tributes, but ultimately caveat that such demand contributed to the mighty and holy cause of justice. Therefore, the stories told by clerks about Judge Reinhardt cemented his place in the history books as a liberal hero and historic Judge willing to give his life to the pursuit of equity. Moreover, the clerks memorialized a version of their Judge endowed with an incredible ability to exercise power. The clerks seem to characterize Reinhardt as a demanding boss who cared little about their personal well being or their happiness. Past clerk Ben Wizner noted that "while we sometimes joked that clerking for Judge Reinhardt was the price one paid for the lifelong privilege of being his former clerks, the truth is that we were all in awe of his brilliance...and his commitment to using the law to protect the powerless."¹⁹⁰ Thus, due to Reinhardt's holy pursuit of justice and equity, the means to his end fade away. To some extent, the clerk tributes granted *ex post facto* to Reinhardt the ability to exercise whatever methods required for his divine pursuit.

On February 13, 2020, former law clerk Olivia Warren shattered the settled story told publicly about Judge Reinhardt during a Congressional Subcommittee hearing on workplace misconduct within the federal judiciary.¹⁹¹ Warren insisted that her testimony ought not be used to "destroy the Judge" but instead aid in protecting future clerks who experience misconduct and harassment.¹⁹² Even so,

189 The Court is open from 8:30 A.M.- 5 P.M. every weekday except for federal holidays. For the most part, the clerks are describing time spent with their judges (and days spent with their judges) outside of the confines of when the court hears cases.

190 *Ibid.*, 4.

191 Since 2018, Congress has been researching and investigating the prospects of extending the protections of federal civil rights laws to the judiciary. The supporting documents for the Subcommittee hearing can be found at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4883>. Accessed 3/16/22.

192 "At the outset, I would like to emphasize that it is not my intention to destroy Judge

Warren problematized the power exerted by Judge Reinhardt to institute his vision of legal change by detailing her experiences of harassment and inappropriate behavior by the Judge. As a clerk during the last year of Reinhardt's life, Warren described learning early in her clerkship the tendency of the Judge to assess women's physical appearance and keep pictures of his "pretty" clerks on a particular shelf in his chambers.¹⁹³ Warren articulated the regularity of Judge Reinhardt making "disparaging statements" about her physical appearance, views on feminism, and intimate relationship with her husband.¹⁹⁴ Additionally, she described instances in which the Judge would publicly berate her, discredit her experience with sexual harassment in other workplaces, and belittle her.¹⁹⁵

Warren shared her experience at Harvard Law School where mentors and professors pushed her to gain a clerkship over any other option due to her academic success. Specifically, she noted that during her first year in law school at Harvard, she "was strongly encouraged by many of my mentors to pursue a clerkship with a federal judge. The advice was echoed by every available source at Harvard."¹⁹⁶ Warren explicated the chains of students, professors, and mentors who conveyed the message and expectation that a clerkship functioned as the "end-all be-all" for students of her caliber. Warren hinted at the fact that her advisors at Harvard knew about the abusive tendencies of Judge Reinhardt and still encouraged her to pursue a clerkship in his chambers. She concluded the section of her testimony on Reinhardt's behavior by noting that while she did not attempt to recount every instance of sexual harassment that she witnessed or even experienced, as after the day she began her clerkship, "there may have been a day in which I was not harassed... but I cannot remember one after searching my memory."¹⁹⁷ Thus, Warren

Reinhardt's legacy, to erase his significant contributions to the law, or to condemn him. I was drawn to the practice of law by an interest in indigent defense work, and, especially as a capital defense attorney, I believe it is essential to see the enormous capacity for both good and bad in all people. I view Judge Reinhardt no differently. Moreover, I am very proud of the cases we handled and the opinions that the judge authored during my clerkship."

193 "Early in my clerkship, I also learned about a shelf in the judge's office where he kept pictures of some of his female 'pretty' clerks, many of which included Judge Reinhardt in the photo as well. Judge Reinhardt made it clear that photographs of male law clerks would not be placed on the shelf and that the shelf was special."

194 Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, 117 Cong. 1 (2008) (Statement of Olivia Warren), available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4883>.

195 *Ibid.*, page 4, section II.

196 *Ibid.*

197 *Id.*, at 11.

broke from past stories on Judge Reinhardt which endowed him with unwavering and unproblematic power in his pursuit of Warren-Court era reform. She instead recalled stories of his harassment and harm done to her; harm that would not be written off as part of a divine mission towards justice.

Both the direct testimony of Olivia Warren and her departure from past norms of clerk recollections rattled the legal community and legal institutions. The panel's ranking Republican, Martha Roby of Alabama, expressed interest in swift Congressional action to curtail inappropriate behavior. Specifically, Roby told the press that "No matter where you work, everyone should feel comfortable in the workplace."¹⁹⁸ Additionally, Representative Hank Johnson, a Democrat from Georgia, expressed concern and alarm upon hearing that some of Warren's mentors warned her about taking a clerkship with Reinhardt.¹⁹⁹ Johnson publicly stated that "There's no way we would sit back and allow this phenomenon of women coming forward to report sexual harassment to end up reducing the number of women serving as law clerks."²⁰⁰ Immediately following her testimony, the US Court system's administrative office published a statement decrying the behavior Warren described and vowed to take her testimony seriously.²⁰¹ Despite Warren's reflections on the pressure she felt from her alma-mater Harvard Law School to obtain a clerkship and deal with the behavior of Reinhardt, the school failed to produce a response.²⁰² Warren's testimony unraveled the established legacy of Judge Reinhardt and called into question the institutions surrounding the clerkship. Above all, Warren's testimony illustrated the problem inherent to hagiographical tributes produced by past clerks about their employers. Within these tributes, abusive or simply inappropriate actions fade away as judges and justices are

198 Josh Gerstein, *Ex Clerk Says Deceased Federal Appeals Judge was Sexual Harasser*, POLITICO, Feb. 13, 2020, online at <https://www.politico.com/news/2020/02/13/ex-clerk-accuses-late-9th-circuit-judge-ofharassment-114817>.

199 "During my first year of law school, I was strongly encouraged by many of my mentors to pursue a clerkship with a federal judge. This advice was echoed by every available source at Harvard. Beyond my mentors, the faculty as a whole and nearly all of my first-year classmates talked about clerkships as if they were the be-all and end-all for high-performing law students. This is because clerkships are viewed as singular opportunities within the legal profession to develop close relationships with judges, to gain first-hand experience with the judicial system as a young lawyer, and, through the connections to judges' former clerks, to develop a robust professional network that can open professional doors and lead to further opportunities."

200 *Id.*, at 26.

201 Letter response to The Honorable Henry C. "Hank" Johnson, Jr., Chairman: Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary, Administrative Office of the Courts (Feb. 7, 2020) (Statement of James C. Duff).

202 *Id.*, at 27.

painted as saint-like figures. In the case of Reinhardt, not only did his negative personality traits fade into the background of tributes, but the clerks, intentionally or not, endowed their judge with the power to act however necessary in his pursuit of justice.

Warren's testimony and Harvard Law School's subsequent lack of action revealed a pointed example of elite law schools' contributions to the reproduction of traditional hierarchies. Duncan Kennedy, in "Legal Education and the Reproduction of Hierarchy", asserted that a long-lasting message law schools impart to their students occurs through the representation of gender, race, and class among professors.²⁰³ Within the classroom, the professors set the tone for the legal profession as a whole. Because the professors are largely "a white, male, middle class" body, law students are subconsciously taught to understand those traits as the embodiment of the legal profession. Despite Kennedy's article having originated in 1982, the same holds true for today. Students gradually become accustomed to this uniformity, Kennedy argues, and even "come to expect that as a lawyer they will live in a world in which essential parts of them are not represented."²⁰⁴ In Kennedy's conception of lawyering, legal education reproduces existing inequality rather than incentivizing fighting for justice and progress. Judge Reinhardt seamlessly fell within those boundaries as a white, middle class male. Harvard's lack of response to Warren's allegations—that her professors encouraged her to take a clerkship repeatedly, that without a clerkship her network would suffer dramatically, and that a clerkship would be an "end-all be-all" for a student of her caliber—is thus somewhat unsurprising. Had Harvard spoken at all, regardless of if their message included support for Warren, their voice would risk fracturing deep-rooted hierarchies within the profession that support the power of individuals like Reinhardt. Instead, within their sphere of influence, the traditional hierarchy lived on as the white, male, middle class judge and faculty members failed to receive condemnation.

In Kennedy's and other scholars' conception of law school education, Warren's testimony is far more surprising than Harvard Law School's lack of action. Early in his article, Kennedy asserted that because students believe what they are told from professors and institutions about the world they are entering after law school, "they behave in ways that fulfill the prophecies the system makes about them and about that world."²⁰⁵ Australian law professor Margaret Thornton advanced Kennedy's argument on reproduction of hierarchy by adding the specific

203 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, LEGAL EDUC. 591 (1982).

204 *Id.*, at 605.

205 *Id.*, at 591

gendered assumptions implicit in the legal profession. Specifically, Thornton asserts that discrimination against women within the legal profession functions as an inevitable consequence of the “fraternal bonds which have always sustained relationships” across the profession.²⁰⁶ Thornton suggests that women operated as “fringe dwellers in the jurisprudential community” and would remain so until the fundamental character of the legal profession shifted to recognize the importance of supporting women. In Thornton’s conception, female lawyers, students, and legal professionals relegate themselves to the shadows of the legal profession and endure the blows of sexism throughout their careers.²⁰⁷ Kennedy and Thornton together suggest that Warren’s schooling and lived experience would render her silent with respect to the issues of sexism and inappropriate behavior she faced by Judge Reinhardt. Despite subtle messaging through her teaching at Harvard, Warren broke with her legal education, which taught her to yield to individuals like Warren due to their inherent status as leaders in the profession. Warren testified explicitly about the patriarchal and hierarchical bonds she witnessed in law school and refused to participate in.²⁰⁸ Reinhardt’s status as a judge did not stop Warren from testifying, but after time emboldened her. Her uniquely female experience with Reinhardt did not keep her in the fringe of the profession but motivated her deep concerns with Judge Reinhardt and the judiciary at large. Thus, Warren’s testimony defied settled understandings of power and hierarchy within the legal profession.

One week after her testimony to Congress, over 70 past Reinhardt clerks signed an open letter supporting Warren’s experience in chambers and contributed to the disruption of settled stories related to the legacy of their judge. The letter noted that “Most of us were as shocked as the rest of the world to learn of [Warren’s] experience in Judge Reinhardt’s final year.”²⁰⁹ But the letter also added more voices to the counter narrative provided by Warren. While not identified specifically, the letter included the mention of other clerks who experienced or witnessed sexist conduct and “workplace bullying or mistreatment.”²¹⁰ Michael Dorf, Heather Gerken, Andrew Crespo, and Adriaan Lanni all signed the letter—the aforementioned clerks who contributed to the saint-like and superhuman memorialization of the judge through tributes. A chorus of past clerk voices backed

206 MARGARET THORNTON, *DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION* (1st ed. 1996).

207 *Id.* at 34. See also E. Cowdery, Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession*, *LAW TEXT CULTURE* 3 243-246 (1997).

208 *Id.*, at 27.

209 Deborah Cassens Wiess, *Over 70 former Reinhardt clerks urge judiciary to change reporting procedures and training*, *ABA JOURNAL*, Feb. 21, 2020, online at <https://docs.google.com/document/d/1d6Xvp2FuRAaSI-W7c2nX-qlfppB5N38xzSoHWlmd15g/edit>.
210 *Id.*, at 37

Warren's testimony and experiences of misconduct within the Reinhardt chambers.

The open letter also demonstrated the experience of the messy collision between the stories told about the judge as a saint-like figure and the human they actually worked for as clerks. Collectively, the clerks affirmed Warren's experience of harassment by the judge and called out the particular situational discomfort that Reinhardt had championed gender equality, civil rights, and labor rights throughout his career.²¹¹ Although a small part of the larger letter, this mention of uneasiness surrounding the judge's legacy is emblematic of the reconciliation between judge-stories and lived experiences. Judge-stories told about Reinhardt, including those by some of the signatories themselves, suggested that his pursuit of justice and superhuman status overrode any problematic behavior or questionable actions. Yet, alongside Warren's testimony, the letter called into question the story of their judge as a liberal titan and called for accountability in the future. In doing so, the signatories questioned past and future exercises of power by judges, regardless of their professional endeavors. This is the collision between the stories told about Reinhardt with the reality of his clerks: problematic or inappropriate behavior could no longer be overridden by his emphasis on human rights and justice within the pages of his opinions.

Judge Reinhardt's death blocked his ability to face any consequences. But Olivia Warren's testimony changed the existing conversation and collective memory of Judge Reinhardt. One year after her testimony, Warren published an article in the *Harvard Law Review* about her decision to testify against the judge and the lasting effects of his harassment. In "Enough is Enough: Reflection on Sexual Harassment in the Judiciary," Warren argues for greater accountability within the legal community and a shift in norms away from collective silence.²¹² In a possible response to the US Court Administrators message, Warren argued that a "private apology" to her is not sufficient to change the judiciary: the "language of our shared profession requires a public finding of liability in order to remediate harm." Thus, in Warren's eyes, the apology from Court administrators and the anguish privately described to her failed to remedy the harm she experienced.²¹³

211 Ibid.

212 Olivia Warren, *Enough is Enough: Reflections on Sexual Harassment in the Judiciary*, 134 *HARV. L. REV.*, 455 (2021).

213 Throughout the text of the article, Warren shares multiple individuals who reached out to her after she testified to share their experiences, apologize for their complicity, or simply share their disgust at the situation.

"Every single Reinhardt clerk knows that everything you said (and much, much more) is true and nevertheless, we have all given him a pass because we believe in the rest of what he did (and, let's face it, that clerkship is really good for our careers)."

Warren concluded by asserting that to recognize an individual's "complacency or complicity" while failing to change their conduct or face any consequences is only to perpetuate cycles of abuse within the profession. In light of existing hierarchies, structures of power, and norms of silence within the legal community, Warren's article must be viewed as a powerful repudiation of harassment within the judiciary and a call to action for all parties to change their behavior. Both Warren's original testimony and law review article altered the civic memory of Judge Reinhardt, his unquestioned power, and existing structures within the legal profession that allow for harassment to continue.

Only time will tell the effectiveness of Warren's act of courage. As a history of the recent past, this story lacks a clean closure or neat ending. Yet, this section demonstrates the problem inherent in attributing saint-like or superhuman qualities to a judge within clerk tributes. Ascribing unchallenged power to Judge Reinhardt in clerk tributes following his death reflect the leeway he had already accrued throughout the course of his career. The clerk tributes written following his death cemented his legacy as a supposedly untouchable legal giant. Additionally, on a larger scale, the tributes reinforce the power of judges generally even after their death. Overwhelmingly, clerk tributes stressed the divine pursuit of Judge Reinhardt, and extolled the judge's virtuous qualities despite his demanding work style. Olivia Warren directly challenged previous narratives of the judge alive throughout the legal profession and forever altered our civic memory of Judge Reinhardt.

A Genius But...

Alex Kozinski sat as judge on the same circuit as Judge Reinhardt for twenty-two years. President Ronald Regan nominated Kozinski to the Ninth Circuit Court of Appeals in 1985. The clerk stories told about Judge Alex Kosinski centered on his status as a legal lion and intellectual giant. In an interview published in *Litigation*, journalist Jeffery Cole noted that the judge gained a reputation as "the darling of the Federalist Society" and as "one of the brightest superstars in the federal judicial firmament."²¹⁴ Additionally, Cole described Kozinski as "an Article III celebrity with Tom Cruise-esque proportions" accompanied by the air of a ringmaster. In fact, at the time of publication, Judge Kozinski stood as the sole judge in the judiciary with a fan-created website.²¹⁵ Beyond mentions of his

214 Jeffrey Cole, My Afternoon with Alex: An Afternoon with Judge Kozinski, 30 LITIGATION 4, 6-10 (Summer 2004).

215 The blog was shut down on August 4, 2021 but remains accessible online. See <https://underneaththeirrobes.blogs.com/>. Accessed 3/16/22.

looks and celebrity status, articles frequently exalted the intellect and conservative fortitude of the judge.²¹⁶ As a small sampling of his persistent past praise, Adam Liptak of the *New York Times* described Kozinski as “an intellectual powerhouse” and Peter Lattman of the *Wall Street Journal* characterized Kozinski as a “big-time judge.”²¹⁷ Many other journalists, law professors, and lawyers echoed their collective sentiments. Thus, Judge Kozinski amassed an incredible number of voices publicly acclaiming his intelligence and affirming his spot as a leader in the conservative judicial movement.

A self-described textualist judge, Judge Kozinski’s opinions reflect his fondness for rules and precedent.²¹⁸ Judge Kozinski’s decisions demonstrate his deference to authorities and interest in the plain text and statutes of the law.²¹⁹ Judge Kozinski is well known amongst the legal community for his First Amendment decisions specifically related to the areas of commercial speech and the right of publicity.²²⁰ During an interview in 1998, Kozinski observed that “To me, the First Amendment stands for the basic principle that the government does not decide what citizens can say, speak, write, or read.”²²¹ His opinions of the Ninth Circuit consistently reflect this understanding of the First Amendment. In *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, Kozinski voted in the minority which would have rejected the civil suit against the publishers of protests and a website that provided personal information on abortion providers.²²² Kozinski also dissented in *Harper v. Poway Unified School District*; the majority decision resulted in the disciplining of a student for wearing a t-shirt with an anti-gay message.²²³ In addition to his First Amendment

216 For example, see James Barron, “In Latin vs. Yiddish, The ‘Oys’ Have It,” *The New York Times*, December 3, 1993, <https://www.nytimes.com/1993/12/03/news/in-latin-vs-yiddish-the-oys-have-it.html>. Accessed 3/16/22.

217 See Adam Liptak, “Chief Judge Contributed to Racy Website,” *The New York Times*, June 12, 2008, <https://www.nytimes.com/2008/06/12/us/12judge.html?searchResultPosition=4>. Accessed 3/16/22; and Peter Lattman, “Spotlight on the Ninth Circuit’s Alex Kozinski,” *The Wall Street Journal*, October 19, 2007, <https://www.wsj.com/articles/BL-LB-4689>. Accessed 3/16/22,

218 Jeffrey Cole, “My Afternoon with Alex: An Afternoon with Judge Kozinski.”

219 See Clay Calvert and Robert D. Richards, “Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press,” 23 *Loyola of Los Angeles Entertainment Law Review* 259 (2003).

220 “Alex Kozinski,” Articles, The First Amendment Encyclopedia, last modified November 2018, <https://www.mtsu.edu/first-amendment/article/1342/alex-kozinski>. Accessed 3/16/22.

221 Ibid.

222 *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

223 *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006)

jurisprudence, Judge Kozinski consistently championed the Second Amendment and warned against the amendment's constraint. In *Silveira v. Lockyer*, Judge Kozinski issued a dissent related to the Ninth Circuit's denial to hear the case *en banc*. In his dissent, Kozinski asserted that the "simple truth" of the Second Amendment "is that tyranny thrives best where government need not fear the wrath of an armed people."²²⁴ Judge Kozinski's decisions gained a reputation among the legal community as comedic and humorous despite their oftentimes monotonous content.²²⁵ Throughout his time on the bench, Judge Kozinski consistently defended classically conservative legal causes with a textualist viewpoint.

Throughout his tenure at the Ninth Circuit, Judge Kozinski gained the reputation of a prominent "feeder judge" to the Supreme Court. Between 1995-2004, just a sampling of his entire time on the bench, Judge Kozinski shepherded 18 of his past clerks to Supreme Court clerkships.²²⁶ Of the 18 clerks Judge Kozinski sent to the Supreme Court, eight served in the chambers of Justice Anthony Kennedy. A separate study concluded that between 1985-2002, Judge Kozinski supplied 28 total clerks to the Supreme Court.²²⁷ Notably, Kozinski himself served as a law clerk to then-Judge Anthony Kennedy of the Ninth Circuit during the 1975-76 term. Reflecting on his time with Kennedy in chambers, Kozinski noted that the clerkship "changed my life" and placed him on the "treadmill" to the Supreme Court clerkship.²²⁸ The enduring relationship formed between Kennedy and Kozinski enabled Kozinski to supply numerous clerks to the judge and then Justice overtime and reap the rewards of a feeder status. As Rex Bossert noted in his book, through keeping in touch with all of his past clerks, Kozinski is able to gain added intelligence about "what the Justices are interested in, that is, hot issues and what may be right for certiorari petitions."²²⁹ Thus, Kozinski gained insider

224 *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003).

225 See David A. Golden, "Humor, the Law, and Judge Kozinski's Greatest Hits," 1992 *BYU Law Review* 507 (1992).

"Its not easy to describe the many ways in which the panel's opinion conflicts with those of every other federal court to have applied section 924(c) but I will try."; "The Mellons partook of piscine fare; Mr. Mellon had the mahi mahi, Mrs. Mellon had the shrimp."

226 Lawrence Baum and Corey Ditslear, "Supreme Court Clerkships and 'Feeder Judges'," 31 *The Justice System Journal* no. 1 (2010). For additional context on Kozinski's influence in clerk placement, during each term, there are a maximum of 36 law clerks total serving as Supreme Court law clerks.

227 David R. Stras, "Keynote Address: Secret Agents: Using Law Clerks Effectively," 98 *Marquette Law Review* 151 (2014).

228 *Ibid.*, 39. Following his clerkship with Anthony Kennedy at the Ninth Circuit, Kozinski himself went on to clerk at the Supreme Court. In the 1976-1977 term, Kozinski served as a law clerk for Chief Justice Warren Burger.

229 See Rex Bossert, "Clerks Route to Top Court: Their Choice of Circuit and Judge

knowledge about the upcoming cases at the Court and the issues the Justices were interested in tackling.

At the same time that Kozinski earned widespread recognition for his jurisprudence, his quirks and eccentricities contributed to his reputation as a self-proclaimed “Bad Apple.”²³⁰ Multiple public and large-scale ethical scandals called into question the reputation of Kozinski as an unproblematic legal giant and genius. In 2008, the *Los Angeles Times* reported that Judge Kozinski contributed to a website that featured sexually explicit materials. According to the *Times*, the website included a video showing a “sexually aroused animal, a photograph of naked women painted to look like cows, and images of masturbation and public sex.”²³¹ In an interview with the *Los Angeles Times*, Judge Kozinski said the website contained contributions from many other individuals and pointed to his son as the full owner of the site. Moreover, the judge maintained that the website functioned as a private page, and he noted that “There is a ton of stuff on there... It’s not a porn site. There’s some funny stuff on there.”²³² The site, understood to be utilized as a “Web server by the family” gained notoriety among the legal community as Kozinski was presiding over an obscenity trial at the time the news broke. He later recused himself from that trial.²³³ An ethics investigation by judges on the United States Court of Appeals for the Third Circuit criticized Kozinski for not ensuring that the material remained private, but ultimately found that the judge acted legally.²³⁴ Aside from the web server, Judge Kozinski’s “Easy Rider Gag list” gained public scrutiny after the email list surfaced in the ethics investigation.²³⁵

Shapes Chance To Serve Supremes,” *National Law Journal* (October 1997).

230 See Alex Kozinski, “Confessions of A Bad Apple,” 100 *The Yale Law Journal* (1991): 1707. “When they complain about the bad apples, they’re usually talking about me, although I’m far from alone.”

231 Scott Glover, “Judge e-mailed jokes to ‘gag list’,” *Los Angeles Times*, last modified December 8, 2008, available at <https://www.latimes.com/archives/la-xpm-2008-dec-08-me-gaglist8-story.html>. Accessed 3/16/22.

232 Adam Liptak, “Chief Judge Contributed to Racy Website,” *The New York Times*, June 12, 2008, <https://www.nytimes.com/2008/06/12/us/12judge.html?searchResultPosition=4>. Accessed 3/16/22.

233 John Schwartz, “California: Judge Cleared of Wrongdoing,” *The New York Times*, July 2, 2009, available at https://www.nytimes.com/2009/07/03/us/03brfs-JUDGEIS-CLEAR_BRF.html?searchResultPosition=5. Accessed 3/16/22.

234 *Ibid.*

235 *Ibid.*, 49. “One joke sent last spring poked fun at the Taliban, stating, ‘You may be a Taliban if . . .’ any of the following 12 statements are true. Among the statements: ‘You own a \$3,000 machine gun and \$5,000 rocket launcher, but you can’t afford shoes’ and ‘You wipe your butt with your bare left hand, but consider bacon ‘unclean.’” The most graphic joke was set up as a three-page letter ostensibly written by a man to his estranged wife. The man sarcastically tells his wife that he still loves and misses her while at the

Sent to past law clerks, colleagues on the federal bench, prominent attorneys and journalists, the jokes Kozinski sent ranged from silly and harmless to raunchy and sexual. Notably, jokes labeled “P&T” in the subject heading indicated the jokes contained in the email sent by the judge were “puerile and tasteless.” When reporting on the emails of Kozinski, the *Los Angeles Times* noted that these “P&T” jokes “were cruder and more sexually explicit and used language that defies quotation in a general circulation newspaper.”²³⁶ Arthur Hellman, an expert on the Ninth Circuit and judicial ethics at the University of Pittsburgh, argued that Kozinski’s distribution of some of the more sexual and inappropriate jokes most likely violated an ethical canon that prohibits judges from engaging in social activities that “detract from the dignity of the judge’s office.”²³⁷

Questionable actions surrounding ethical violations followed Kozinski throughout his professional life. Lower profile comments and scandals contributed to the image of Kozinski as slightly rough around the edges despite his established genius status. Following the conclusion of Kozinski’s hearings ahead of confirmation to the Ninth Circuit in 1985, allegations surfaced questioning the accuracy and authenticity of testimony presented to the Judicial Committee related to Kozinski’s character. Senator Carl Levin (D-MI) notified Senate Judiciary Committee Chairman Storm Thurmond in a confidential memo that it appeared Kozinski lacked the “judicial temperament necessary for, and expected of, a federal appeals court.”²³⁸ Furthermore, Levin argued that Kozinski acted “intemperately, unfairly, erratically, and with a lack of compassion” in his past official positions.²³⁹ While the Committee confirmed Kozinski, the questions of character brought by Senator Levin stained his reputation. Additionally, Kozinski kept a public diary for Slate.com throughout the summer of 1996 in their popular diary series. Alongside reflections on his identity as an immigrant and the child of Holocaust survivors, Kozinski described an invitation from an unnamed law clerk to a lingerie party (“DBS’s Fourth Annual Pajama and Lingerie Party.”) While Kozinski concealed

same time detailing his recent sexual escapades with a young student, a single mother and his wife’s younger sister. The single mom, the man says, acts like ‘a real woman . . . [who is] not hung up about God and her career and whether the kids can hear us.’”

236 *Ibid.*, 49.

237 *Ibid.*

238 See Chris Chrystal, “Senate Panel to reopen Kozinski hearing,” UPI Archives, last modified October 31, 1985, available at <https://www.upi.com/Archives/1985/10/31/Senate-panel-to-reopen-Kozinski-hearing/3933499582800/>; and *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary, United States Senate, Ninety-ninth Congress, First Session, on Confirmation Hearings on Appointments to the Federal Judiciary and the Department of Justice* (U.S. Government Printing Office: 1985).

239 *Ibid.*, 56.

any details about his own actions at the party, he noted that the attendees milled about the house “in pajamas, robes and teddies.”²⁴⁰ One can only imagine the surprise of the other partygoers to run into a sitting federal judge at their lingerie party in Malibu. Finally, in 2004, during National Public Radio’s summer reading series, the Judge told NPR that his current reading included *Playboy Stories* and *The Bedside Playboy*.²⁴¹ The Judge’s love of *Playboy*’s short stories appeared frequently in his public persona, including in a public speech he gave at Yale Law School.²⁴² Kozinski mentioned to the group of students that, “I used to read *Playboy* for the short stories. It’s true! I looked at the pictures. And the jokes. But really, I got it for the short stories.”²⁴³ While the Judge could truly just be reading the stories for his own nonsexual enjoyment or following suit with a common joke, the dissemination of stories published in *Playboy* likely raised discomfort for some of his law clerks. Thus, taken together, lower profile scandals tainted the image of Judge Kozinski. Though not detracting from his brilliant legal status, the judge acquired a reputation riddled with questionable actions in the public eye.

The command of the story of Judge Kozinski’s brilliance overrode the open secret of his harassment and shielded him from accountability and recourse. Even before he functioned as a feeder judge to the Court, stories about Judge Kozinski indicated his threatening status and inability to function appropriately in workplace settings. Recall that in 1985, Judge Kozinski’s fitness as a manager functioned as the centerpiece of the investigation following Senator Levin’s concerns. During this confirmation, Laura Chin, then at Public Information Office for the Office of Special Counsel, shared that she “believed that [Kozinski] engaged in sadistic behavior because at the time he appeared to enjoy mistreating individuals.”²⁴⁴ Moreover, she added that Kozinski “simply did not treat the human beings at the Office with dignity and respect.” Beth Don, then an attorney who served in the

240 Alex Kozinski, “Day Two,” *Slate.com*, July 22, 1996. Accessed 3/16/22.

241 Weekly Edition Sunday, “Judge Alex Kozinski: Books and Tapes for Summer,” *National Public Radio*, July 4, 2004, <https://www.npr.org/templates/story/story.php?storyId=3098003>. Accessed 3/16/22.

242 “...and then there was my playboy reading when I was in college. Its true! I used to read playboy for the short stories. Its true! I looked at the pictures. And the jokes. But really, I really got it for the short stories.” (18:54-19:30)

243 See David Lat, “Messing with Chief Judge Kozinski,” *Above the Law*, December 17, 2012, <https://abovethelaw.com/2012/12/messing-with-chief-judge-kozinski/>, Accessed 3/16/22. See further, <https://vimeo.com/55556568> for the recorded conversation between Judge Kozinski and Noah Messing. Accessed 3/16/22.

244 See *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary, United States Senate, Ninety-ninth Congress, First Session, on Confirmation Hearings on Appointments to the Federal Judiciary and the Department of Justice* (U.S. Government Printing Office: 1985): 792-795.

U.S. Merit Systems Protection Board, shared that while she served at the Office with Kozinski, a female federal employee filed a complaint of sexual harassment against her male supervisor. Don argued that “While Mr. Kozinski professed to have a strong commitment to prosecute persons accused of sexual harassment, his actions were the direct opposite...”²⁴⁵ Meaning, Kozinski failed to prosecute individuals accused of sexual harassment despite his official charge to do so. John Hollingsworth, then former Director of Administration and Programs for the Office of Special Counsel, asserted that Kozinski took a “number of adverse actions and humiliating actions toward many employees” including himself.²⁴⁶ Moreover, Hollingsworth described a pattern of behavior in which Kozinski frequently exhibited “callous disregard” for the people around him. Senator Levin read these exact statements, and many more, into the Congressional record decades earlier. Despite Levin’s advocacy against Kozinski, the story told about the judge as a genius legal mind and his ability to produce overrode the lived experiences of people who worked with him.

The public awareness of Kozinski’s legal prowess and accrued genius status tapped into a larger current within the legal profession which privileges results. Consistently across time, scholars noted the tendency of the legal profession as a whole to prioritize action, results, and decisions over process, means and people involved. Karl Llewellyn, a prominent legal scholar of the 20th century, observed that prestige within the legal community functioned as directly connected to the ability of a lawyer to complete tasks and “do business.”²⁴⁷ Moreover, he asserted that stemming from a preoccupation with American business, the public perceptions of lawyers are “shaped in greatest part by what he *does*.”²⁴⁸ Socio legal scholars Edward Laumann and John P. Heinz reminded readers that the legal profession is “more concerned with the facilitation of business, with ‘getting things done,’ than with alleviating human suffering or helping people.”²⁴⁹ Thus, Kozinski’s ability to amass a reputation largely unharmed by ethical scandals is intimately linked with his ability to crank out decisions on the Ninth circuit, yield legal wins for the conservative movement, and place clerks on the Supreme Court. Despite blotches

245 *Confirmation Hearings on Federal Appointments* (U.S. Government Printing Office: 1985): 716-719.

246 *Ibid.*, 802-812.

247 See K. N. Llewellyn, “The Bar Specializes—With What Results?,” 167 *The ANNALS of the American Academy of Political and Social Science* no. 1 (1933): 177-192.

248 *Ibid.*, 62.

249 Laumann, Edward O., and John P. Heinz. “Specialization and Prestige in the Legal Profession: The Structure of Deference.” *American Bar Foundation Research Journal* 2, no. 1 (1977): 155–216. <http://www.jstor.org/stable/828016>. See <https://www.courtneymilan.com/metoo/kozinski.html>; Courney Milan is a pseudonym for Heidi Bond. Accessed 3/16/22.

on the Judge's reputation due to ethical scandals and employee treatment, the larger story told about Kozinski centered on his ability to produce.

In 2017, Heidi Bond broke from past characterizations of Judge Kozinski and classic narratives on the clerkship. Instead, Bond asserted the prevalence of frequent abuse by Judge Kozinski while she served as his clerk and argued that the genius of Kozinski, or any judge, should not compromise the safety and livelihood of any federal clerk.²⁵⁰ Bond described inappropriate behavior by the Judge which began on her first day in his chambers. She recalled the Judge grabbing her arm while smiling, and saying, "It's too late now! She can't escape any longer. She's my slave."²⁵¹ Bond disclosed her repeated experience with Judge Kozinski pulling up porn on his computer and asking Bond if the images turned her on.²⁵² Perhaps most shockingly, Bond described the coercion and regulation implemented by Kozinski on the food she ate, the material she wrote, and the time she slept while working as a clerk in his chambers.²⁵³ Bond carefully noted that the harassment she experienced remained emotional and psychological, with "endlessly worrying on [her] part about whether there would be [physical harassment], and if there was, if [she] would be able to say no".²⁵⁴ Thus, Bond strayed from past characterizations of the Judge and instead highlighted his inappropriate behavior and questionable actions.

While Bond noted that she believed Kozinski to be one of the "most brilliant, capable legal minds sitting on the federal bench", her recollection ultimately called into question his brilliance.²⁵⁵ Whereas other pieces and tributes to the Judge treated the questionable actions of Kozinski as a small piece of his personality, Bond presented an image of the Judge defined by his harassment. Additionally, Bond shattered the career narrative of the clerkship as overwhelmingly

250 See <https://www.courtneymilan.com/metoo/kozinski.html>; Courtney Milan is a pseudonym for Heidi Bond. Accessed 3/10/22.

251 "For the purpose of narrative flow, I've chosen to use quotation marks. I have only chosen to do this when my recall of the events is close enough that I am certain I am capturing the sentiment expressed. Except where noted, I do not recall exact phrasing."

252 "This time, the thing he needed an opinion on was a set of pictures. He pulled them up from where he had saved them—a private server, run by his son, that he used as a massive external hard drive. Those pictures showed a handful of naked college-age people supposedly at a party where other people were clothed and drinking beer. In one of those photos, a man and a woman were sitting naked on a couch. 'I don't think your co-clerks would be interested in this,' he said. 'Do you think this is photoshopped?'"

253 "He laid down the law—I was not to read them anymore. "I control what you read," he said, "what you write, when you eat. You don't sleep if I say so. You don't *shit* unless I say so. Do you understand?"

254 *Ibid.*, 65.

255 *Ibid.*

positive. Furthermore, she problematized the closeness she experienced with her Judge. In doing so, Bond publicly decried the silence of everyone surrounding Judge Kozinski—law professors who knew his jokes occasionally moved into reality, past clerks who failed to warn other women entering his chambers, and the network of other judges and lawyers who came into regular contact with the Judge. Thus, Bond’s reflections on Judge Kozinski threatened not only the Judge’s settled reputation, but the public image of professionals surrounding the judge who understood the open secret of Kozinski’s abuse.

Allegations by Bond and other women jeopardized the stable reputation of the off kilter but brilliant Judge Kozinski and the legal profession as a whole. On December 15, 2017, the *Washington Post* published the stories of nine women who experienced harassment, inappropriate behavior, and sexualized remarks by Judge Kozinski.²⁵⁶ The article included a range of allegations by those involved in the legal world: a law student who experienced Kozinski touch the side of her breast at a University function, a lawyer whom Kozinski kissed on the lips at a legal community event, a law professor who Kozinski touched under the table at a professional dinner, and six others. These women challenged the common story of Kozinski as a harmless character. Further, representing all levels of the legal profession, the women accusing Kozinski of assault and harassment destabilized settled narratives on the saint-like qualities of judges as a whole. Bond, Murphy, Litman, and six others told the story of a man acting in detrimental ways to the legal community as a whole. Within each story, they called out not only a single harasser, but harassment and harmful norms within the legal community which thrived on tradition, unchallenged stories, and conventional hierarchies. Thus, they challenged the impending codification of Kozinski as a saint-like figure and attempted to tell a new story about the legacy of Judge Kozinski.

Subsequent to the accusations of multiple women, law professors and legal professionals publicly rebuked their own behavior in tacitly supporting Judge Kozinski. Lawyer and legal analyst Dahlia Lithwick recalled her own uncomfortable experiences with Judge Kozinski and her part in allowing his behavior to continue unquestioned.²⁵⁷ Specifically, Lithwick recalled sitting on

256 Matt Zapposky, “Nine more women say judge subjected them to inappropriate behavior, including four who say he touched or kissed them,” *Washington Post*, last modified December 15, 2017, available at https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html. See <https://www.courtneymilan.com/metoo/kozinski.html>; Courney Milan is a pseudonym for Heidi Bond. Accessed 3/10/22.

257 Dahlia Lithwick, “He Made Us All Victims and Accomplices,” *Slate.com*, last modified December 13, 2017. Accessed 3/10/22.

panels, at dinner tables, and at high-status events with the Judge knowing that his behavior “was a show of juvenile formulaic bad-assery designed to co-opt you into the bargain.” Additionally, Lithwick argued that the entirety of the legal world wound up “colluding to pretend” that the behavior and inappropriate actions of Kozinski were harmless.²⁵⁸ Complacency within the larger community rendered Lithwick silent throughout her career and frequent interactions with the Judge.²⁵⁹ Additionally, in a blog post published after Bond’s article, law professor Nancy Rapoport recalled her own uncomfortable interactions with Judge Kozinski as a law clerk in chambers near his.²⁶⁰ Rapoport recalled arriving at a bar following a long day, expecting to be with other clerks, and instead wound up alone with Judge Kozinski. Rapoport recalled Kozinski asking her that night, “What do single girls in San Francisco do for sex?”²⁶¹ Other instances with Kozinski left a sour impression of the Judge in Rapoport’s mind. After her time on the Ninth Circuit, Rapoport advised “countless female law students” to pass on clerkships with Kozinski and she refused to write letters of recommendations for his chambers.²⁶²

Rapoport concluded her blog piece by noting that she occasionally advised female colleagues to not end up alone with the judge for fear of harassment, but her advice remained private and secret. Given the power Kozinski held related to the Supreme Court clerkship, this was a real problem. Many legal professionals echoed the sentiments of Lithwick and Rapoport: the harassment and inappropriate behavior of Judge Kozinski functioned as an open secret within the legal community.²⁶³ Yet, his brilliance and position of power allowed him to remain

258 “I have seen Judge Kozinski dozens of times in the past two decades, moderated his panels, sat next to him at high-powered, high-status events and dinners. My husband will tell you he once fielded a call from the judge to my home, in which Kozinski described himself as my “paramour.” I have, on every single such occasion, been aware that part of his open flouting of empathy or care around gender was a show of juvenile, formulaic bad-assery designed to co-opt you into the bargain. We all ended up colluding to pretend that this was all funny or benign, and that, since everyone knew about it, it must be OK. It never was.”

259 “At a different reception in a different hotel in San Francisco this past summer, a friend was so shocked watching the judge greet me with yet another too-long, too-exuberant public kiss that he felt he had to check in with me later. I was mortified, as my texts that night reflected. The fact that I had simply acceded to this treatment, at age 50, with teenage children, took my breath away. I texted my husband and my two best friends. But this was our deal. I’d always agreed to it.”

260 See Nancy Rapoport, “There are likely several more stories to come,” *Nancy Rapoport’s Blog*, last modified December 9, 2017, available at <https://nancyrapoport.com/blog/2017/12/09/there-are-likely-several-more-stories-to-come/>. Accessed 3/10/22.

261 *Ibid.*, 75.

262 *Ibid.*

263 Charlotte Garden, “On Judge Kozinski and Open Secrets,” *Take Care*, last modified

unchallenged and invulnerable. Thus, all levels of the legal profession—legal analysts, legal professions, and law professors alike—were forced to reconcile the stories they told about the Judge with the allegations leveled against him.

The public reconciliation of prominent legal figures following the accusations against Kozinski illuminates the incentive structures within the legal profession to downplay abuse and replicate hierarchies. Particularly due to Judge Kozinski's role as a "feeder judge", individuals surrounding the Judge understood him to hold an immense amount of power over not only their own professional careers but students and law clerks in their orbit. As Leah Litman and Devah Shaw argue with respect to "tastemakers" within the legal community, the problem is twofold.²⁶⁴ On the most basic level, granting that much power to any individual leads to a situation that is "rife for abuse and fear of retaliation". Secondly, offering that level of power also enables tastemakers to "replicate their views and gain influence on a much larger scale".²⁶⁵ If a student, law professor, or public commentator disagrees or publicly defies someone in the position of feeder judge, they suffer tremendous professional consequences. Thus in the case of Judge Kozinski, for a clerk to speak out against him or his treatment, they would suffer the loss of professional networks, a clear pathway to the Supreme Court clerkship, and a future recommendation from an influential person in the legal community. On a more abstract level, Christopher Williams contends that the reproduction of inequality within the legal profession is "often guised under notions of meritocracy, which allows legal actors to explain inequality away due to the lack of specific animus towards diversity." William's contention can be applied to the situation of Kozinski as a feeder judge. Although it may seem as though Kozinski elevated individuals to the Supreme Court based on their personal achievement, in fact elevation by Kozinski could also center on deference to him and his actions. Overall, incentive structures within the legal profession privilege silence in the face of abuse or harm.

Judge Kozinski's inappropriate actions with his law clerks called into question his ability to uphold the values of impartial judgment he vowed to respect as a federal judge. Judge Kozinski challenged the idea that judges are tasked with rising above their individual beliefs and predilections. As Aristotle stated, "the law is reason free from passion" and judges are obligated to cushion their own passions and interpret the facts and statutes in front of them.²⁶⁶ The *Code of Conduct for United States Judges* includes the provision that "A judge should perform the

December 13, 2017, available at <https://takecareblog.com/blog/on-judge-kozinski-and-open-secrets>. Accessed 3/10/22.

264 Leah Litman and Deeva Shah, "On Sexual Harassment in the Judiciary".

265 *Ibid.*, 628.

266 Aristotle, *Aristotle's Politics* (Oxford : Clarendon Press, 1905).

duties of the office fairly, impartially and diligently.”²⁶⁷ Judge Kozinski failed to uphold this professional standard and norm throughout his tenure on the court, and in direct relation to his inappropriate behavior. Beyond his own professional responsibility, Judge Kozinski challenged the popular belief that judges adjudicate all issues, regardless of their substance, fairly. Through constant remarks on sex and women’s sexuality in particular, Judge Kozinski impugned his capacity as a fair jurist related to cases involving sexual assault and harassment. Judge Kozinski possibly colored the outcomes of cases he presided over due to his personal beliefs about women and harassment.

Following the allegations brought women surrounding Judge Kozinski, journalists and legal scholars reexamined Kozinski’s past jurisprudence with specific respect to cases involving sexual harassment and workplace discrimination to explore the possible role of person bias in his past decisions. In 2001, Judge Kozinski handed down the majority decision in *Swenson v. Potter*.²⁶⁸ The case concerned the experience of Melody Swenson, a deaf woman who worked as a janitor for the Postal Service in 1977. Despite her disability, she worked her way up to operating as a mail sorter by August of 1993. Through her rise in the ranks, she attracted the attention of a co-worker named Philip Reinher who subjected her to a stream of unwanted attention over the span of several months.²⁶⁹ He made continual inappropriate verbal comments about her body and once he even grabbed Swenson in the workplace. After a complaint to the manager, the supervisor moved Swenson to another work area against her wishes, and without an explicit explanation. Swenson took her claims to the Equal Employment Opportunity Commission (EEOC) in 1994.²⁷⁰ An administrative judge conducted a three-day hearing and concluded that Feiner had harassed Swenson in the workplace, and that the Postal Service’s investigation had been inadequate. The Postal Service rejected the EEOC’s findings and Feiner was never disciplined. Swenson continued to see and encounter Feiner and finally quit her job in 1995. Swenson later sued the Postal Service in federal court, claiming it had mishandled her harassment claims. The jury found that the Postal Service had violated Title VII of the Civil Rights Act and the Postal Service appealed in 2001.

267 *CODE OF CONDUCT FOR UNITED STATES JUDGES* (March 12, 2019).

268 *Swenson v. Potter* 271 F.3d 1184 (9th Cir. 2001).

269 Sam Sankar, “Judge Alex Kozinski’s Opinion in this 2001 Sexual Harassment Case is Even More Alarming Now,” Slate.com, last modified December 15, 2017, available at <https://slate.com/news-and-politics/2017/12/judge-alex-kozinskis-opinion-in-a-2001-sexual-harassment-case-is-alarming.html>, Accessed 4/29/22. “He told her that she had a ‘beautiful sexy body,’ that he was ‘watching her ass moving,’ and that he dreamed about her at night. He signed crude ‘hourglass’ gestures while mouthing the word ‘sexy.’ He gave her an unwanted gift. He asked to kiss her, and even grabbed her once.”

270 *Ibid.*, 101.

The decision for the Ninth Circuit, written by Judge Kozinski, took the dramatic step of setting aside the jury's verdict and ruling against Swenson. Judge Kozinski's opinion pointed out that at first, Swenson did not "tell Feiner that his attention was unwelcome," and highlighted the fact that supervisors could not confirm Swenson's story.²⁷¹ In doing so, he overlooked the fact that the Postal Service failed to interview the co-workers Swenson identified—one of whom, the jury learned, had noticed Feiner's "pattern of victimizing women who did not communicate in English well."²⁷² Judge Kozinski observed that the supervisors offered to transfer Swenson to another city, then hinted that her refusal proved that Feiner's abuse couldn't have been that bad. Judge Kozinski's opinion also emphasized Feiner's "unblemished" disciplinary record and characterized Swenson's claims as "weak and disputed."²⁷³ Under his professional mandate as a judge, Judge Kozinski's opinions should be respected and unquestionable. Yet if one believes Heidi Bond, Emily Murphy, and the other women who came forward, Judge Kozinski had no business judging this kind of case due to his personal conduct in chambers. It is hard to imagine a situation in which a woman alleging discrimination could receive a fair judgement from a judge who frequently made women uncomfortable himself and doubted the existence of sexual harassment as problem.²⁷⁴ Over his tenure as a judge, Kozinski heard and adjudicated numerous cases involving sexual harassment and discrimination in the workplace. Legal scholars called into question the ability of Kozinski to function fairly and free from person bias as a judge in light of recent allegations of sexual harassment and abuse.

On December 18, 2017, Judge Kozinski resigned from the federal bench as a result of the allegations surfaced regarding his sexual harassment of female law clerks. In a statement released by his attorney, Judge Kozinski partially apologized for his inappropriate actions but attempted to frame the issue as a misunderstanding of his humor. The statement included the note from Kozinski that he "always had a broad sense of humor and a candid way of speaking to both male and female law clerks alike."²⁷⁵ Kozinski assumed responsibility for not being "mindful enough of the special challenges that women face in the workplace."²⁷⁶ Upon his resignation, Kozinski stated that he "cannot be an effective judge and simultaneously fight his

271 *Ibid.*, 101.

272 *Ibid.*, 101.

273 *Ibid.*, 101.

274 *Ibid.*, 82.

275 Vanessa Romo, "Federal Judge Kozinski Retires Following Sexual Harassment Allegations," *NPR*, last modified December 18, 2017, available at <https://www.npr.org/sections/thetwo-way/2017/12/18/571677955/federal-judge-retires-in-the-wake-of-sexual-harassment-allegations>, Accessed 4/29/22.

276 Vanessa Romo, "Federal Judge Kozinski Retires Following Sexual Harassment Allegations".

battle. Nor would such a battle be good for my beloved federal judiciary.”²⁷⁷

In spite of Judge Kozinski’s resignation from the federal bench in 2017, the stories told by the legal community about the Judge continue to center on his brilliance and esteemed legal career. In 2018 Kozinski discreetly reentered public life through an hour-long interview with a California public radio station centered on his relationship with Justice Anthony Kennedy.²⁷⁸ The interview failed to mention the allegations against Kozinski and instead stressed the intellectual and close relationship shared between Kozinski and Kennedy. Additionally, the *Daily Journal*, a paywalled legal publication, published Kozinski’s tribute to the Justice. In the piece, entitled “Kennedy and I”, Kozinski stressed the decency and civility of Justice Kennedy and the Justice’s respect for personal autonomy.²⁷⁹ Kozinski concluded the piece by asserting that he attempted to impart these values to his own clerks.²⁸⁰ Thirteen women, all accusers of Judge Kozinski, wrote a letter to the editor of the *Daily Journal* decrying the choice to publish the work of Kozinski, particularly a piece in which he attempted to salvage his own legacy. In the letter, the women argued the legal world ought to do better in supporting accusers instead of shielding abusers.

As demonstrated primarily by Kozinski’s soft entrance back into public life, this story lacks a clean ending or pretty resolve. The future risk of Kozinski achieving hagiographical memorialization remains. The signatories of the letter to the editor believe that “if [women] come forward with credible allegations of deplorable conduct, nobody will care [at least, not in six month’s time].”²⁸¹ Yet, for the time being, the public record of Kozinski’s behavior is riddled with stories of sexual harassment, assault, and inappropriate conduct. After all, he formally resigned from the bench because of these allegations of sexual harassment and

277 Niraj Chokshi, “Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations,” *The New York Times*, December 18, 2017, available at: <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>. Accessed 3/10/22.

278 Matt Zapotosky, “Judge who quit over sexual harassment allegations reemerges, dismaying those who accused him,” *The Washington Post*, July 24, 2018, available at https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375_story.html. Accessed 3/10/22.

279 Alex Kozinski, “Kennedy and I,” *Daily Journal*, July 9, 2018. “I have tried to impart the lessons I learned from Kennedy to my own law clerks, some of whom are judges and, no doubt, are imparting these lessons to their own clerks. Above all, Justice Kennedy’s decency and wisdom will perpetuate so long as the United States continues to be decent and wise. May his legacy long endure.”

280 See “Kennedy and I” letter to the editor signed by the accusers- <https://drive.google.com/file/d/12NYv9RpY2gwY3P2s9o09kFGuG7YwXPo/view>. Accessed 3/10/22.

281 Ibid.

abuse. Thus, despite Kozinski's subtle entrance back into public discourse and the prominence of hagiographical clerk tributes, perhaps Kozinski will be an outlier.

Conclusion

While no formal lawsuit against Judge Kozinski succeeded, recent cases involving sexual harassment in the judiciary are challenging the narratives of the power and discretion of judges in the workplace.²⁸² On April 26, 2022, a federal appeals court revived a former public defender's lawsuit challenging the federal judiciary's handling of her sexual harassment and discrimination claims.²⁸³ The three-judge panel sided in part with Caryn D. Strickland, a former public defender, held that U.S. court leaders are not entirely shielded from being sued by judiciary employees. In its unanimous ruling, the panel recognized Strickland's constitutional right to be free from sexual discrimination in the workplace.²⁸⁴ The ruling in Strickland's favor comes as leaders of the federal judiciary are attempting to overhaul the court's process for reporting misconduct.²⁸⁵ While not a law clerk engaged in a suit against their boss, Ms Strickland's lawsuit would fundamentally alter the protections afforded to law clerks, and all members of the federal judiciary. Congress is considering legislation to extend protections to the judiciary's more than 30,000 employees who currently lack civil rights protections given to other government and private-sector employees.²⁸⁶

This section displayed the resulting events when hagiographical literature collides with lived experiences of law clerks that fail to match the overwhelmingly positive text of tributes. The memorialization of judges and justices moves beyond the archive to affect the lived experiences of current and future law clerks. But

282 For more information on the failed suit against Kozinski which alleged judicial bias, see Maeve Allsup, "Kozinski Porn Suit Judicial Bias Claims Tossed By Federal Court," *Bloomberg Law*, last modified May 25, 2021, available at <https://news.bloomberglaw.com/us-law-week/kozinski-porn-suit-judicial-bias-claims-tossed-by-federal-court>, Accessed 4/29/22.

283 See Anne E. Marimow, "Court revives sexual harassment lawsuit targeting federal judiciary," *Washington Post*, last modified April 26, 2022, available at <https://www.washingtonpost.com/politics/2022/04/26/federal-judiciary-sexual-harassment-lawsuit/>, Accessed 4/29/22.

284 See *Caryn Devins Strickland v. United States of America; Judicial Conference of the United States; Brian Stacy Miller* No. 21-1349 (F4th Cir. 2022).

285 *Ibid.*, 116.

286 See "Protecting Federal Judicial Employees From Sexual Harassment, Discrimination, and Other Workplace Misconduct," 116 Congress (2019-2020), available at <https://www.congress.gov/event/116th-congress/house-event/110505>, Accessed 4/28/22.

some have called into question the settled norms of overly positive law clerk tributes and of the clerkship perpetuated through commemorations of judges and justices, which has given unchallenged power *ex post facto* to judges and justices. Olivia Warren shattered the settled narratives on Judge Stephen Reinhardt as an unproblematic liberal lion. She asserted a version of the Judge who crossed boundaries, sexually harassed her, and should no longer be commemorated as simply a positive force for good. She called into question his personal actions in chambers which directly contradicted his liberal jurisprudence as an advocate for gender equity and other liberal causes. Warren's case demonstrates the burden on accusers to dispel settled hagiographical norms and the weight of breaking the chain of power allocated to judges within tributes. Additionally, Heidi Bond challenged the future memorialization of her judge as slightly rough around the edges but overwhelmingly defined by his brilliance. Bond, and over 12 other women, asserted that Judge Kozinski's harassment could not be trumped by his genius. Only time will tell the impact of Bond, Murphy, Litman, Rapoport and many other women's accusations on Kozinski's reputation, but they nonetheless called into question the supporting channels of power across the legal profession.

Conclusion

David B. Wilkins concluded his tribute to Justice Thurgood Marshall by noting that justice "requires that our legal narratives respond and be responsive to the real life stories of people."²⁸⁷ This project traced the development and contours of legal narratives and stories produced from law clerk tributes. Law clerk tributes written for male judges and justices resemble a body of literature better understood as hagiography, as the narratives produced elevate judges and justice beyond other figures in our American system of governance. The tributes of Olivia Warren and Heidi Bond diverge from the hagiographical tradition of clerk tributes and demonstrate the lasting power of law clerk narratives. Both stories illuminated the tendency within the legal profession to prioritize outcomes at the expense of individuals. Above all, the stories of Warren, Bond, and many others detailed how hagiographical writing combined with settled norms within the legal profession conveyed the message that judges may act with little concern for ethics and the consequences of their behavior.

The stories told in law clerk tributes reach beyond the pages of the law reviews in which they are published. Instead, these stories make up career narratives and norms on the clerkship that instruct how legal insiders and outsiders think

about the clerkship and the judiciary at large. The stories told within the text of law clerk tributes inform our understanding of individual justices' personalities, quirks, and habits within chambers. Individual people are heralded as superhumans, and exemplars of the best and brightest of the legal profession. Regardless of the truth of law clerk tribute stories, we gain an understanding of judges and justices as unproblematic and unchallengeable individuals. Even in cases where negative versions of judges were memorialized by clerks, the overwhelmingly positive stories we tell about judges prevail over accusations of wrongdoing. Thus, from the individual level to the structural, we understand the judiciary as composed of superhuman judges adjudicating issues entirely impartially. To a large extent, both the reputations of individual judges and justices as well as the legitimacy of the court system depends upon the telling of overly positive clerk stories.

These stories published in law clerk tributes create our understanding of the judiciary and even law surrounding the clerkship. Law is a product of our understanding of stories. The stories we tell make it acceptable that employees of the federal judiciary, such as law clerks, lack protections from federal civil rights protections. According to the stories we hear and tell about the clerkship, any claim that law clerks could benefit from such protections lack merit or backing. Law clerk stories build both a world and legal narrative that overlooks the struggles or lived realities of our federal law clerks.

Yet, law clerk stories fail to capture the possible reality of the clerkship and the actual experience of clerking for a judge or justice. These stories are told by fundamentally unreliable narrators, as law clerks' future careers and reputations are dependent on the praise of the highly powerful people they work for. Thus, we miss out on gaining a full understanding of the clerkship, our judges and justices, and the judiciary. The stories fail to capture the full and complex experience of working for some of the most powerful people in American government. No single job is made up exclusively of overly positive stories and praise. Such loss of nuance not only creates a culture of hero worship throughout the judiciary, but shields individual judges and justices from consequences. The retelling of overly positive experiences in chambers and with judges creates legal narratives that fail to match up to real life stories of people. This mismatch resulted in an unresponsive judiciary, as demonstrated by the lived experiences of Olivia Warren, Heidi Bond, and other women who attempted to dismantle false narratives of the clerkship.

One is left asking: Where is the justice David Wilkins described? As it stands, our legal narratives built and supported by law clerk tributes fail to respond to real life stories of law clerks and contribute to a culture of hero worship in the judiciary. Law clerk stories are continually published and remain largely within the tradition of hagiography. No individual can stop the overly positive trend of

law clerk tributes, just as no single clerk built the superhuman narrative propelled throughout the pages of law clerk tributes. Yet, individuals hold the power to question the stories told to them, and interrogate the origin stories that support their existence.

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ARTICLE

JUDICIAL RESPONSES TO WEAPONIZED CITIZENSHIP IN ZIMBABWE

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ABSTRACT

Descendants of migrant laborers living in Zimbabwe were rendered stateless due to the Zimbabwean government's interpretation of its citizenship laws that banned dual citizenship. Individuals with ties to foreign countries were blocked from accessing their Zimbabwean citizenship on the grounds that they must first renounce their potential claim to a foreign citizenship. Between 2000 and 2006, Zimbabwean courts were inundated with legal challenges to the government's interpretation of its dual citizenship laws. After reviewing High Court and Supreme Court decisions, I found that the High Court continuously ruled in a way that protected citizenship rights. The Supreme Court, after being manipulated, chose a pro-government interpretation of citizenship law. I argue that a country's highest court faces larger incentives to decide cases in favor of the government, and faces larger risks when it defects from the government's agenda. Lower courts, on the other hand, may be structurally supported when they choose to defect from the ruling party. My findings indicate that the High Court of Zimbabwe was able to retain some independence during the Mugabe-era, despite being manipulated by the ZANU-PF government. The project concludes that a manipulated judicial system will not always succumb to the government, even in the most politically sensitive cases.

INTRODUCTION

In autocratic regimes and backsliding democracies, executives often attempt to consolidate power by thwarting the independence of the judiciary. This has become especially true in a global era of judicialization, whereby courts are increasingly left to adjudicate questions of high political significance or "mega-politics."¹ Of the types of mega-political questions that

1 Ran Hirschl, "The Judicialization of Politics," *The Oxford Handbook of Political*

courts have been left to answer, Ran Hirschl identified issues of “collective identity and nation building” as the most problematic manifestation of judicialization.² This is because issues of national identity seek to define the parameters of belonging to a nation and its polity.

An example of the judicialization of national identity comes from Zimbabwe: a multiracial, multiethnic, former settler colony that is still “in the process” of becoming a nation.³ Beginning in 2000, Zimbabwean citizens who had ties to foreign countries found themselves stateless, lacking the citizenship rights of any country. The Zimbabwean government believed that these individuals possessed the potential to claim dual citizenship. The ruling party perceived them as uncommitted to being Zimbabwean, and believed their loyalty was divided between two countries. In response to the government’s stripping of their citizenship, Zimbabweans turned to the courts, arguing their rights had been unfairly withheld. This left the Zimbabwean judiciary responsible for drawing the line that separated Zimbabweans from those no longer considered as nationals.

How did Zimbabwean courts respond to these questions of dual citizenship and belonging? Did the courts agree with the government’s attempts to denationalize citizens who did not fit its definition of Zimbabwean? Or, did the courts uphold individuals’ nationality rights? This paper analyzes High, Supreme, and Constitutional Court cases that sought to draw the parameters of belonging. It finds that the Supreme Court originally upheld individuals’ citizenship rights. This changed, however, once President Robert Mugabe manipulated the judiciary. The Supreme Court then reversed course. It instead agreed with the government’s interpretation of dual citizenship law that withheld nationality from individuals with the potential to claim a foreign citizenship. The High Court, on the other hand, consistently ruled in favor of individuals whose citizenship rights had been abused. In 2013, a new constitution came into effect that created the Constitutional Court. This new court has followed the High Court’s precedent of upholding citizenship rights.

How can one account for the differences in rulings that these courts issued? This paper provides a theoretical framework to explain why the High Court and Constitutional Court have consistently ruled in favor of individuals whose citizenship rights were abused, whereas the Supreme Court reversed course by adopting a pro-government interpretation of citizenship law. The paper finds

Science (2011): 1.

2 Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *The Annual Review of Political Science* (2008): 98.

3 Alois S. Mlambo, “Becoming Zimbabwean: Identity, Nationalism, and State-Building,” *Africa Spectrum* 48, 1 (2013): 49.

that rational choice explanations that rely solely on the electoral context of the era to explain judges' behavior may help explain the Constitutional Court's anti-government stance, but are insufficient in explaining the differences between the High and Supreme courts' respective anti-government and pro-government rulings. Instead, I explain the differences by analyzing the hierarchical structure of the judiciary and the individual structures of the High and Supreme courts to account for their differences. I also analyze the background of the individual judges themselves, and suggest that President Mugabe was more successful in capturing the Supreme Court than the High Court.

THE ORIGINS OF STATELESSNESS, AND DUAL CITIZENSHIP IN ZIMBABWE

First this section provides the background of migration into Zimbabwe from neighboring countries. This helps demonstrate why the government's new interpretation of citizenship law was so detrimental to the over one million Zimbabweans with ancestry from neighboring African countries. Then, this section details the history of dual citizenship law in Zimbabwe, beginning when Zimbabwe was under British colonial rule. This illustrates why Zimbabwe was primed for an environment in which dual citizenship would become so politically salient.

BACKGROUND

When Zimbabwe was under British colonial rule, its government relied on foreign labor from Malawi, Mozambique, and Zambia to operate farms and mines. These foreign workers started families in Zimbabwe, and today, third and fourth generation Zimbabweans of Malawian, Zambian, and Mozambican descent call the country home. Most of these Zimbabweans of foreign ancestry were Zimbabwean citizens through *jus soli*.⁴ However, this changed in the early 2000s when President Robert Mugabe's government changed its interpretation of the state's citizenship laws. Dual citizenship had been banned since the 1980s; however, the Registrar General began requiring individuals with ties to foreign countries to renounce their "potential" to claim a foreign citizenship, rather than only requiring actual dual nationals to renounce their foreign citizenships. Those affected included Black Zimbabweans with ancestry from neighboring countries, white settlers with ties to a colonial power, and Zimbabweans of mixed foreign and indigenous parentage. This new interpretation of dual citizenship law rendered stateless descendents of colonial-era laborers with the potential to claim

4 At independence in 1980, anyone born in Zimbabwe was provided with Zimbabwean citizenship. This included descendants of migrant workers.

a foreign citizenship, leaving 300,000 descendants of migrant workers at risk of statelessness today.⁵ President Robert Mugabe and his political party argued that these laws targeted white settlers, but they caused the greatest harm to descendants of migrant workers from neighboring African states.

THE HISTORY OF DUAL CITIZENSHIP IN ZIMBABWE AND CONTEMPORARY IMPLICATIONS

Citizenship in Zimbabwe is particularly politically salient because of Zimbabwe's settler colonial past. To accommodate British settlers, the British colonial government provided for dual citizenship under the Southern Rhodesia Citizenship and British Nationality Act of 1949.⁶ This allowed white settlers to maintain the citizenship of their home country and also gain Southern Rhodesian citizenship. Contrastingly, Black Zimbabweans were designated as second-class citizens, only to be defined as "British subjects" who lacked full citizenship rights.⁷ When Rhodesian Prime Minister Ian Smith issued the Unilateral Declaration of Independence (UDI) to create a white-minority government independent of Britain in 1965, he continued the British precedent of allowing dual citizenship. This was because the international community responded to Smith's UDI by sanctioning the apartheid government and refusing to recognize Rhodesian issued passports.⁸ As a result, the Rhodesian economy grew dependent on traders with multiple nationalities who traveled on foreign passports.⁹ Following Smith's declaration, the Zimbabwe War for Liberation ensued.

After the war, the British imposed the Lancaster Constitution upon Zimbabwe, providing for the continuation of permitting dual citizenship.¹⁰ In 1983, the constitution was amended to prohibit dual citizenship because the

5 Amnesty International, *We are like Stray Animals: Thousands Living on the Margins due to Statelessness in Zimbabwe*, 2021, 5

6 J. L. Fisher, "Decolonising Settler Citizenship: The Decolonisation of White Identity in Zimbabwe," in *Pioneers, Settlers, Aliens, Exiles* (Canberra, Australia: The Australian National University, 2010), 129.

7 *Ibid*, 107.

8 Musiwaro Ndakaripa, "The State and Contested Citizenship in Zimbabwe, 1980-2011" in *Nationalism and National Projects on Southern Africa* (Pretoria, South Africa: Africa Institute of South Africa, 2013), 296

9 *Ibid*, 296.

10 John Hatchard, "The Constitution of Zimbabwe: Towards a Model for Africa?" *Journal of African Law* 35, 1/2 (1991): 79. Bronwen Manby, "Report on Citizenship Law in Zimbabwe," *European University Institute: Robert Schuman Centre for Advanced Studies* (January 2019): 4.

ruling Zimbabwe African National Unity-Patriotic Front (ZANU-PF) argued that dual citizens and expatriate workers were “promoting foreign political and economic interests.”¹¹ Dual citizens were labeled “half-hearted citizens,” due to the perception that they had split loyalties.¹² The Mugabe government believed that dual citizenship would inhibit the formation of a Zimbabwean identity, and that it existed to appease non indigenous Zimbabweans (particularly the land-owning white settlers who owned 70 percent of arable land at independence).¹³

In 1984, the Mugabe government adopted the Citizenship of Zimbabwe Act, which provided that Zimbabwean citizens with dual citizenship must declare, within one year, that they had renounced their other citizenship.¹⁴ The Act did not mention individuals who lacked dual citizenship but retained the potential to claim a foreign citizenship. Individuals who failed to renounce their foreign citizenship would automatically lose their Zimbabwean citizenship.¹⁵ However, there was no requirement that individuals show proof from the foreign country that they had renounced their foreign nationality.¹⁶ Additionally, these individuals, labeled ‘aliens,’ retained the enfranchisement that they held since 1980.¹⁷ The ZANU-PF had enjoyed the support of migrant workers and their descendants until the emergence of the opposition party, the Movement for Democratic Change (MDC), in late 1999.¹⁸

The emergence of the opposition at the turn of the millennium is one factor that triggered a change in the government’s interpretation of the Citizenship Act. The government warned white settlers that they would be stripped of their Zimbabwean citizenship if they “could not produce foreign documentation showing they had no entitlement to the citizenship of another country.”¹⁹ The government hoped to strip citizenship from, and thus disenfranchise, the remaining 30,000 white settlers who largely supported the opposition party.²⁰ The ban on dual citizenship was therefore

11 Ndakaripa, 294.

12 Daimon, “ZANU (PF)’s Manipulation of the ‘Alien’ Vote in Zimbabwean Elections: 1980-2013,” 117.

13 Mahove, Christopher. “c.” *Reuters* (January 30, 2018). Ndakaripa, 299.

14 Citizenship of Zimbabwe Act, Section 9(8).

15 Manby, “Report on Citizenship Law in Zimbabwe,” 5.

16 *Ibid*, 5.

17 Daimon, “ZANU (PF)’s Manipulation of the ‘Alien’ Vote in Zimbabwean Elections: 1980-2013,” 116.

18 Anusa Daimon, “Politics of Othering and the Struggle for Citizenship in Independent Zimbabwe: Voices from Malawian Descendants,” *Africa Insight* 44, 1 (June 2014): 142.

19 Bronwen Manby, *Natives and Settlers, in Struggles for Citizenship in Africa* 43 (2013).

20 Anusa Daimon, *Politics of Othering and the Struggle for Citizenship in Independent*

regarded as an attack against the remaining white settlers, which was a perception the government tried to foster.

However, this policy had a disproportionate effect on the 1.5 million Zimbabweans of Malawian, Mozambican, and Zambian ancestry.²¹ The Citizenship Act was interpreted in such a way that those with the potential to claim a foreign citizenship, i.e. descendants of migrant workers and white settlers, must also renounce their claim to a foreign citizenship. However, foreign governments would not let individuals renounce a mere potential claim to citizenship. Second, third, and fourth-generation Malawian migrant workers, for example, could not renounce Malawian citizenship because they had no claim to it; under Malawian citizenship laws, anyone who left Malawi for another country automatically lost their citizenship at age twenty-one.²² Many descendants of migrant workers were therefore rendered stateless, as the Zimbabwean government still stripped citizenship from those who were unable to renounce their alleged claim to a foreign citizenship.

Following the government's new interpretation of the Citizenship Act, Registrar General Tobaiwa Mudede and his office refused to renew the Zimbabwean passports of dual nationals and also those with the potential claim to a foreign citizenship. He argued that those denied must first renounce any entitlement to foreign nationality in accordance with the laws of the foreign state.²³ This was inconsistent with the 1984 Citizenship Act in two ways. First, the Citizenship Act did not require individuals with the mere entitlement to foreign citizenship to renounce it; only individuals who actually possessed dual citizenship were required to renounce it. Second,

the 1984 Citizenship Act did not require individuals to renounce their citizenship in accordance with the laws of a foreign country, only in accordance with domestic Zimbabwean law. As a result, individuals whose citizenship rights were abused approached the courts for relief. The Supreme Court cases of *Carr v. Registrar General* and *Purser v. Registrar General* were the first to challenge the Registrar General's interpretation of the Citizenship Act.

Zimbabwe: Voices from Malawian Descendants, 44 *Africa Insight* 142 (2014).

21 *Ibid*, 123, 142.

22 Amnesty International, 13.

23 Bronwen Manby, Natives and Settlers, in *Struggles for Citizenship in Africa* 43 (2013).

THE JUDICIARY

This section begins by exploring the Supreme Court's initial response to the dual citizenship questions that arose following the Registrar General's new interpretation of the Citizenship Act. I find that the superior court initially resisted the government's attempts to denationalize individuals with ties to foreign countries through two key decisions: *Carr v. Registrar General* and *Purser v. Registrar General*. These cases fit into a series of court challenges that this paper identifies as "faux dual citizenship" cases. This is because these cases involved individuals who did not actually possess dual citizenship; most only had an ancestral connection to a foreign country. Next, the chapter examines how the government retaliated against the Supreme Court's refusal to issue a pro-government interpretation of dual citizenship law. I situate the government's response within the political context of the era to explain why dual citizenship became so politically salient in the early 2000s. Then, the chapter explains why and how the ZANU-PF manipulated the judiciary. This is necessary to interpret the court cases that are heard following the Supreme Court's initial two decisions.

THE SUPREME COURT'S INITIAL ANSWER TO CITIZENSHIP QUESTIONS

In 2000, the Registrar General refused to renew the passport of Robyn Carr, who was of British descent.²⁴ Her application was rejected on the grounds that she must first prove renunciation of her British citizenship under British law.²⁵ In response, Carr took the issue to the Supreme Court. In the case of *Carr v. Registrar General*, the Supreme Court ordered that her passport be renewed because she had complied with the renunciation of foreign citizenship.²⁶ Further, the court argued that the Registrar General lacked the power to require Carr to renounce her citizenship under British law because the law did not require proof of renunciation of foreign citizenship.²⁷

A similar case came to the Supreme Court in 2001. Sterling Purser, who was born in Zimbabwe to a British father, had been denied a passport on the grounds that he had not renounced his entitlement to foreign citizenship.²⁸

24 *Carr v. Registrar-General*, 2 U.S. 433 (2000).

25 *Ibid.*

26 *Ibid.*

27 Bronwen Manby, *Natives and Settlers, in Struggles for Citizenship in Africa*, 43 (2013).

28 *Ibid.*, 43.

In *Purser v. Registrar General*, the Supreme Court followed its precedent set in *Carr* and ruled that Sterling Purser was entitled to a Zimbabwean passport.²⁹ The 1984 Citizenship Act did not address individuals with only the entitlement to foreign citizenship. So, the court argued that Purser, who did not possess dual citizenship, could not be required to renounce it. Together, the *Carr* and *Purser* decisions addressed the two ways in which the government's interpretation of the Citizenship Act was inconsistent with the written text of the law. Further, the two cases illustrate that the Supreme Court was initially willing to rule against the government on the mega-political issue of dual citizenship.

THE CITIZENSHIP AMENDMENT ACT

In 2001, the government intensified its campaign against Zimbabweans with ties to foreign countries, partly in response to the Supreme Court's *Carr* and *Purser* decisions and partly in response to the unfolding political context. First, the Mugabe government amended the Citizenship Act to require renunciation of dual citizenship under the relevant foreign law, not only under Zimbabwean law, which had been the case since 1984.³⁰ This directly countered the *Carr* decision. However, the British government hit back, announcing that it did not recognize Zimbabwe's law requiring the renunciation of foreign citizenship.³¹ Thus, individuals who had technically renounced British citizenship still remained British citizens under British law.³² This safeguard protected many white settlers, a privilege Black Zimbabweans of foreign ancestry did not enjoy. This further illustrates how Black Zimbabweans with ties to neighboring countries were most impacted by the government's intolerance of "aliens." There was some publicity of the amendment in urban areas, but many affected rural-dwellers remained uninformed until the six-month deadline passed and their Zimbabwean citizenship had been stripped.³³ The amendment rendered stateless between 100,000 and 200,000 African migrants and their descendants.³⁴

Further, the amendment followed two political tests that called into question the strength of the ruling party's grip on power: the failed constitutional

29 *Ibid*, 43.

30 Citizenship of Zimbabwe Act, Section 9(12).

31 Musiwaro Ndakaripa, *The State and Contested Citizenship in Zimbabwe, 1980-2011, Nationalism and National Projects on Southern Africa* 306 (2013).

32 *Ibid*, 306.

33 Bronwen Manby, *Natives and Settlers, in Struggles for Citizenship in Africa* 43 (2013).

34 Lawyers for Human Rights, *Statelessness and Nationality in South Africa*, 2011, 19.

referendum and the 2000 parliamentary elections. In a national referendum in February 2000, the Mugabe government proposed a new constitution that was rejected by voters. This was the first time the ZANU-PF had failed electorally since independence.³⁵ The failed referendum was interpreted as a “test of the government’s popularity” and Mugabe worried it would foreshadow his party’s success in the impending parliamentary elections.³⁶ Predictably, with the rise of the most popular opposition party since independence, the 2000 parliamentary elections were the first in which the ZANU-PF faced serious competition.³⁷ The opposition party, the MDC, shrunk the ruling party’s grasp on legislative control, capturing fifty-seven parliamentary seats to the ZANU-PF’s sixty two.³⁸

After the ZANU-PF’s failed constitutional referendum and its marginal victory in the parliamentary elections, Mugabe felt that his power was threatened ahead of the March 2002 presidential election.³⁹ This prompted his decision to disenfranchise a key swing vote: ‘alien’ farm workers of Malawian, Mozambican, and Zambian descent.⁴⁰ Mugabe argued that the

descendants of migrant workers, the ‘aliens’ with the potential to claim a foreign citizenship, were to blame for his declining support.⁴¹ He believed that white farmers funded the formation of the MDC and that farm workers extended their support to the opposition party.⁴² Thus, the government saw Black Zimbabweans who supported the MDC opposition party as “sell-outs,” “traitors,” and “puppets of the West.”⁴³ Under the new amendment to the Citizenship Act, dual citizens had to prove renunciation of their foreign citizenship by proof provided by the foreign government.⁴⁴ If individuals failed to show proof from the respective foreign

35 Derek Matyszak, *Creating a Compliant Judiciary in Zimbabwe, 2000–2003, Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World* 332 (2006).

36 *Ibid*, 332.

37 Peter Alexander, “Zimbabwean Workers, the MDC & the 2000 Election,” *Review of African Political Economy* 85

38 Norma J. Kriger, “Robert Mugabe, Another Long Too-Serving African Ruler: A Review Essay,” *Political Science Quarterly* 118, 2 (2003): 309.

39 Anusa Daimon, ZANU (PF)’s manipulation of the ‘alien’ vote in Zimbabwean elections: 1980–2013, 116 *South African Historical Journal* 117 (2016).

40 Clement Chipenda, Land Reform, Citizenship and Aliens in Zimbabwe, 13 *Africa Review* 17 (2021).

41 Zimbabwe Premier’s Office Working on Proposal to Change Citizenship Laws, BBC Monitoring Africa (2009).

42 Alois S. Mlambo, Becoming Zimbabwe or becoming Zimbabwean: Identity, Nationalism and state-building, 48 *Africa Spectrum* 49–70 (2013).

43 *Ibid*, 50.

44 Citizenship of Zimbabwe Act, Section 9(12).

government in six months, they were automatically stripped of their Zimbabwean citizenship.⁴⁵ The short deadline was provided in hope that white settlers and farm workers of foreign descent would be disenfranchised before the 2002 election.⁴⁶

LAND REFORM CONTEXT

Moreover, the party believed it would be unable to implement the second phase of its land reform program if interfering foreign interests were able to permeate Zimbabwean society via white settlers and Zimbabweans of foreign descent.⁴⁷ Land reform in Zimbabwe can be divided into two periods.⁴⁸ The first period began in 1980 with the adoption of the Lancaster Constitution and lasted until 2000, when Mugabe sought to accelerate land redistribution.⁴⁹ During the first period, land reform existed on a “willing buyer, willing seller” basis, meaning that all land transactions had to be voluntary.⁵⁰ By 2000, many Zimbabweans grew frustrated by the glacial pace of land reform, so war veterans resorted to invading and occupying farms.⁵¹ The farm invasions, which would become known as the Fast Track Land Reform Program (FTLRP), constitute the second period of land reform.⁵²

In 2000, the Commercial Farmers Union (CFU) won three High Court cases that declared the farm invasions illegal, and forced the police to remove occupiers from farms.⁵³ In one of these cases, *CFU v. the Minister of Agriculture Land and Resettlement*, Judge Paddington Garwe ordered the Commissioner of Police to evict the farm invaders within twenty-four hours.⁵⁴ The Commissioner

45 Lawyers for Human Rights, *Statelessness and Nationality in South Africa* (2011): 19.

46 Anusa Daimon, ZANU (PF)’s manipulation of the ‘alien’ vote in Zimbabwean elections: 1980–2013, 116 *South African Historical Journal* 117 (2016).

47 Musiwaro Ndakaripa, The State and Contested Citizenship in Zimbabwe, 1980-2011, *Nationalism and National Projects on Southern Africa* 306 (2013).

48 Simbarashe Moyo, “A Failed Land Reform Strategy in Zimbabwe. The Willing Buyer Willing Seller,” *Public Policy and Administration Review* 2, 1 (March 2014): 67.

49 *Ibid.*

50 A. Chilunjika & D. E. Uwizeyimana, Shifts in the Zimbabwean Land Reform Discourse from 1980 to the present, 8 *African Journal of Public Affairs* 131 (2015).

51 *Ibid.*, 131.

52 *Ibid.*, 131.

53 Nqobizitha Ndlovu and Enyinna S. Nwauche, “A Review of Land and Property Rights of Internally Displaced Persons in Zimbabwe: Steps Toward Restitution,” in *National Protection of Internally Displaced Persons in Africa* (Cham, Switzerland: Springer Cham, 2021): 58.

54 *Ibid.*, 58.

appealed the decision to the Supreme Court, but the case was dismissed.⁵⁵ The police ignored the High Court's decision, so the CFU approached the Supreme Court.⁵⁶ In *CFU v. Minister of Agriculture Land and Resettlement*, the Supreme Court upheld the High Court's ruling, declaring the farm invasions illegal.⁵⁷ In response to these legal challenges, the government adopted the Land Acquisition Act in 2002, codifying the FTLRP into law. The Mugabe government perceived migrant workers and their descendants as loyal to the white settlers who employed them, and by default, also against the Land Acquisition Act.⁵⁸ There was thus a political motivation to abolish dual citizenship to ensure full civilian loyalty to the 2002 Land Acquisition Act.⁵⁹ Additionally, only indigenous Zimbabweans were supposed to benefit from the land redistribution program.⁶⁰ Therefore, Zimbabweans of foreign ancestry were denationalized to also prevent them from obtaining Zimbabwe's land.

JUDICIAL MANIPULATION

In November 2000, the ruling party embarked on a campaign to manipulate the judiciary. President Mugabe and his ZANU-PF forced independent judges off the bench, added party loyalists, expanded the Supreme Court, and threatened and bribed judges. How can we account for Mugabe's decision to manipulate the judiciary? What triggers prompted the government to undermine judicial autonomy? First, the CFU's legal challenges to the land reform issue in 2000 indicate the judicialization of the land reform issue. This means that the ruling party's key policy goal became a legal question that could be adjudicated. Further, the judges who ruled in the CFU case "signaled" to the executive their willingness to deliver anti-government rulings on an issue of utmost importance to the ruling party. The ZANU-PF thus sought to ensure that legal challenges to the land reform program could no longer be delegitimized by the courts. The electoral context also helps account for Mugabe's decision to manipulate the judiciary. Mugabe had evidence to suggest that he could be ousted in the impending presidential election following the rejected constitution and the close parliamentary election results. The combination of three variables- judicialization, judges signaling their

55 Nqobizitha Ndlovu & Enyinna S. Nwauche, A Review of Land and Property Rights of Internally Displaced Persons in Zimbabwe: Steps Toward Restitution, National Protection of Internally Displaced Persons in Africa 58 (2021).

56 *Ibid*, 59.

57 *Ibid*, 59.

58 Chipenda, 3.

59 *Ibid*, 294.

60 *Ibid*, 16.

willingness to issue anti-government rulings on major political questions, and an uncertain electoral context- prompted the ruling party to circumvent judicial independence.

These three variables that explain Mugabe's decision to manipulate the judiciary are substantiated by Peter VonDoepp and Rachel Ellett's comparative project on three other southern African states. They find that an executive is more likely to manipulate the judiciary when his or her power is threatened.⁶¹ This is especially true when judges have "signaled" to the executive that they are willing to issue anti-government rulings on major political cases, and when major political questions have been judicialized. Executives who have reason to believe that judges will issue unfavorable rulings on cases that could further impede his or her grasp on power are more willing to manipulate the judiciary. When major political questions are answered in the courts, an executive faces larger incentives to ensure that judges are loyal to himself or herself so that favorable rulings are more likely.

VonDoepp and Ellett's findings, along with my findings, suggest evidence contrary to that proposed by other scholars working outside the African context. Scholars attempting to account for an executive's decision to manipulate a judiciary or, on the contrary, respect judicial autonomy, often propose rational choice arguments (known as "thin strategic models" or "insurance theory") to explain why judges defect. These models posit that leaders uphold judicial independence when they expect to be out of office in the near future.⁶² The rationale is that an independent judiciary may protect the outgoing government's interests and policies once it is out of power and a new government has come in. However, these thin models do not hold in the context of sub-saharan Africa, as demonstrated by VonDoepp and Ellett's findings, as well as this paper's. VonDoepp and Ellett's finding is more consistent with Zimbabwean realities. Their research concludes that an uncertain electoral context and a judiciary that signals its willingness to issue anti-government rulings on judicialized, mega-political issues prompts government manipulation of the judiciary.

VonDoepp and Ellett also established a framework for accounting for different types of judicial manipulation by identifying six types: general institutional assaults, personnel manipulation, remuneration manipulation,

61 Peter VonDoepp and Rachel Ellett, "Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies," *Comparative Politics* 43, 2 (January 2011).

62 Rachel Ellett, "Judicial Power" in *Routledge Handbook of Democratization in Africa* (London: Routledge, 2019).

personal attacks, patronage, and personal linkages and communications.⁶³ Of these six forms, the Zimbabwean judiciary experienced at least four from 2000 to 2003 under President Robert Mugabe: general institutional assaults, personnel manipulation, personal attacks, and remuneration manipulation.

General institutional assaults is an encompassing category of judicial manipulation, involving attempts by governments to undermine judicial authority and legitimacy, often by changing the rules of the game.⁶⁴ First, Mugabe and the ZANU-PF launched rhetorical attacks against the judiciary as a whole, and defamed individual judges. For example, the Minister of Information accused Supreme Court Chief Justice Anthony Gubbay of being biased in favor of white land owners at the expense of the landless majority.⁶⁵ Verbal attacks like this were designed to delegitimize independent judges issuing anti-government rulings and legitimize the government's choice to ignore court orders.

The Supreme Court justices and High Court judges were themselves challenged by the citizenship disputes that they sought to address in their rulings. These citizenship attacks were another way the government tried to delegitimize judges who were willing to issue unfavorable rulings. In 2000, a year before the judicial purges and packing began, two of the five supreme court judges were white, including Chief Justice Anthony Gubbay, and four of at least twenty High Court judges.⁶⁶ The government claimed that Justice Gubbay had not properly renounced his claim to British citizenship, and therefore was not a Zimbabwean citizen.⁶⁷ Similarly, the government told High Court Judge Micheal Gillespie that he was not a Zimbabwean citizen because of his British ties.⁶⁸ During this period, at least six Supreme Court and High Court judges had their Zimbabwean citizenship contested, and Mugabe announced that he would force them to retire if he found that they possessed dual citizenship.⁶⁹

Following the Supreme Court ruling that declared Mugabe's land reform program illegal, the government declared that the judiciary was prohibited from

63 VonDoepp and Ellett, "Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies."

64 *Ibid.*

65 George Douvelos, *Anthony Roy Gubbay: A Judicial Life* (London: Wildly, Simmonds & Hill Publishing, 2017): 98.

66 "Mugabe Regime Prepares to Axe White Judges," *The Guardian* (June 4, 2000).

67 *Ibid.*

68 *Ibid.*

69 Derek Matyszak, "Creating a Compliant Judiciary in Zimbabwe, 2000-2003," in *Appointing Judges in an Age of Judicial power: Critical Perspectives From Around the World* (University of Toronto Press, 2006): 337.

ruling on cases related to the land reform program. In 2005, the controversial Constitutional Amendment No. 17 was adopted. It provided that farm occupiers who had invaded white-owned farms could no longer be evicted, thereby legalizing the farm invasions.⁷⁰ The amendment also stripped the courts of their power to adjudicate land reform-related cases.⁷¹ Nearly 4,000 pending court applications by commercial farmers challenging the seizure of their properties were subsequently removed from the court's roll.⁷² By decreasing the range of issues that the courts could adjudicate, Mugabe attempted to counter the judicialization of land reform. But, even before the courts were stripped of their ability to adjudicate land reform cases, the government had already refused to comply with unfavorable decisions on land reform and also on faux dual citizenship questions.

The government often relied on force and threats of violence to manipulate court personnel. On November 24, 2000, 200 Mugabe-supporting war veterans invaded the Supreme Court to prevent a court case about the farm invasions from being heard.⁷³ A month after the invasion, Mugabe "disowned" the courts, arguing that the courts were "not courts for our people" and that Zimbabweans should "not even be defending [themselves]" in them.⁷⁴ Chief Justice Gubbay received death threats from party sympathizers, and the Minister of Information called on him to resign.⁷⁵

President Robert Mugabe strategically launched his judicial purges ahead of the 2002 election. Independent judges were pressured to resign and Mugabe sympathizers were appointed to both the High Court and the Supreme Court.⁷⁶ Following the Supreme Court invasion, the government told Chief Justice Anthony Gubbay that it could no longer protect him from physical violence and forced him to retire.⁷⁷ Chief Justice Anthony Gubbay was replaced by former Deputy Minister of Justice Godfrey Chidyauku, a supporter of the ZANU-PF and a proponent of the Land Acquisition Act, in March 2001.⁷⁸ Gubbay's removal

70 Ndlovu and Nwauche, 59.

71 *Ibid*, 59.

72 *Ibid*, 59.

73 Douvelos, 8.

74 *Ibid*, 7.

75 *Ibid*, 32, 98.

76 Justice Anthony R. Gubbay, "The progressive Erosion of the Rule in Zimbabwe," from the *Third International Rule of Law Lecture: Bar of England and Wales* (December 9, 2009): 2.

77 Douvelos, 32.

78 Bureau of African Affairs, "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," Wikileaks Cable: 02HARARE38_a, dated January 4, 2002 "Mugabe Appoints his Judges," *News24*, (July 27, 2001).

came just five days after the Supreme Court had struck down Mugabe's attempt to nullify the MDC's petitions against the 2000 parliamentary election results.⁷⁹ The MDC had filed petitions with the court that the election had been rigged in thirteen constituencies that the ZANU-PF had won.⁸⁰ After Chief Justice Gubbay was replaced, Justice Simbarashe Mucchechere died and Justice Nicholas McNally retired after reaching the mandatory retirement age.⁸¹ Both Justice Mucchechere and Justice McNally had challenged the Mugabe government through their rulings in important political cases, so their losses further impeded the independence of the Zimbabwean Supreme Court. Justice Mucchechere had pushed back on the Mugabe government's human rights abuses and the white, South African-born Justice McNally had ruled against Mugabe's land reform program.⁸²

The removal of so many judges created an opportunity for the government to appoint new judges described as government sympathizers to the bench. It also provided the added benefit of creating a backlog in the judiciary, delaying major political cases from being heard in a timely manner.⁸³ In 2000 and 2001, the ZANU-PF militia threatened to invade judges' homes and drive them from the country.⁸⁴ One government minister threatened to forcibly remove judges if they did not resign.⁸⁵ On the High Court, ten judges whom the government criticized for their rulings in "politically sensitive cases" resigned in protest or after facing intimidation.⁸⁶ Justice Minister Patrick Chinamasa unsuccessfully attempted to force Supreme Court Justice Ahmed Ebrahim into resigning using threats.⁸⁷ High Court Judge James Devittie was forced off the bench in 2001 after receiving death threats.⁸⁸ He was specifically targeted to prevent him from adjudicating an election challenge to the parliamentary elections, as he had already signaled to the

79 Legal Resources Foundation, 10.

80 "Zimbabwe's Opposition Party Files Petitions Against Poll Results," *Xinhua* (April 20, 2005).

81 Bureau of African Affairs, 2002.

82 "Mugabe Demands Zimbabwean Judges Quit President Bristles at Criticism of Human-Rights Record after Journalists Say they were Tortured," *The Globe and Mail, Toronto* (February 8, 1999). "Retired Supreme Court Justice Nicholas McNally Dies," *Zimbabwe Situation* (January 25, 2021).

83 Joseph Winter, "Zimbabwe judges under pressure," *BBC* (October 15, 2004).

84 Matyszak, 339.

85 *Ibid*, 339.

86 Legal Resources Foundation, 12.

87 "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," January 4, 2002.

88 Daniel Compagnon, "The Judiciary: From Resistance to Subjugation" in *A Predictable Tragedy: Robert Mugabe and the Collapse of Zimbabwe* (Philadelphia: University of Pennsylvania Press, 2010): 157.

government his willingness to overturn fraudulent ZANU-PF electoral victories in previous electoral challenges.⁸⁹ Judge Fergus Blackie of the High Court, who had adjudicated corruption cases involving ZANU-PF party leaders, was illegally arrested and forced to resign in 2002.⁹⁰ Judge Benjamin Paradza was imprisoned for allegedly trying to influence a government minister into releasing his business partner's passport.⁹¹ Further, well-respected lawyers from the Zimbabwe Lawyers for Human Rights were harrassed by police, beaten while in their custody, and "prosecuted on trumped up charges" due to their relationships with top judges who issued major anti-government rulings.⁹²

During the era in which dual citizenship and land reform questions went through the judiciary, case allocation at the High Court became "strategic because of the perception of selective deployment."⁹³ Judge President Godfrey Chidyausiku took control of the allocation process and assigned cases of higher political importance to judges believed to be loyal to the ZANU-PF.⁹⁴ This process continued by the new judge president after Chidyausiku was appointed chief justice.⁹⁵ Judges who were less willing to align themselves with the government faced additional harassment.⁹⁶

On July 27, 2001, Mugabe's government announced that it was expanding the size of the Supreme Court from five justices to eight, and in August, Misheck Cheda, Vernanda Ziyambi, and Luke Malaba took the bench.⁹⁷ The opposition described the expanded court as a mechanism for the government to extend its influence over the judiciary, as the new appointees were described as "sympathetic to the Mugabe regime."⁹⁸ The opposition argued that the "real reason" for the enlarged Supreme Court was to "ZANU-ize" the judiciary, while the ZANU-PF maintained that the expanded Supreme Court was designed to decrease the caseload for the justices.⁹⁹ The ZANU-PF further defended the expansion by masking itself

89 *Ibid*, 157.

90 *Ibid*, 157.

91 "Discussion on arrest of High Court Judge," *Southern Africa Documentation and Cooperation Centre* (March 6, 2003).

92 Compagnon, 147.

93 Charles Goredema, "Whither Judicial Independence in Zimbabwe?," in *Zimbabwe: Injustice and Political Reconciliation* (2004): 117.

94 Matyszak, 339.

95 *Ibid*, 339.

96 *Ibid*, 340.

97 "Mugabe Appoints Three New Judges," *The New Humanitarian* (July 27, 2001).

98 "Zimbabwe Leader Swears in Three Supreme Court Judges," *BBC Monitoring Newsfile, London* (August 2, 2001).

99 "Mugabe Accused of Nominating Sympathetic Judges," *Breaking News, Cork* (July

behind the shield of legality. The expansion of the Supreme Court was consistent with the 1980 Constitution, which did not provide for a specific number of justices and instead provided that the court would be headed by the Chief Justice and joined by at least two other justices.¹⁰⁰ The Constitution, therefore, gave the president the power to expand the number of justices as he or she wished.¹⁰¹

Finally, the government attempted to bribe judges into compliance. Instead of withholding salaries to discipline noncompliant judges or offering salary raises to loyal judges, the Zimbabwean government offered land that was seized from commercial farmers to superior court judges.¹⁰² The *Zimbabwe Independent* launched investigations that found at least ten judges received land through the FTLRP.¹⁰³ The government also distributed cars, homes, and electronics to judges.¹⁰⁴

To what degree did executive-sponsored judicial manipulation impact the rulings coming from the courts? Were the new judges more willing to defer to the government's interests on questions of citizenship and belonging? How did judges respond to citizenship cases after enduring manipulation?

COURT RESPONSES TO FAUX DUAL CITIZENSHIP QUESTIONS, POST MANIPULATION

While Mugabe was threatening, bribing, purging, and packing the courts, dual citizenship cases continued to make their way through the judicial system. This chapter begins by providing all of the faux dual citizenship cases that the High Court and Supreme Court of Zimbabwe heard following the *Carr* and *Purser* decisions, and following the government's attempts to manipulate the judiciary. The cases explored in this chapter demonstrate the unique mixture of individuals who were impacted by the government's interpretation of its dual citizenship laws: Black Zimbabweans of foreign ancestry, Zimbabweans of mixed Black and white parentage, and well off white settlers. Then, the chapter explains the adoption of the new constitution in 2013, and the shifting political landscape. The chapter concludes by providing both the faux and real dual citizenship cases that were

27, 2001).

100 Constitution of Zimbabwe, 1980, Section 80(2)(b).

101 *Ibid*, Section 80(2)(b).

102 Goredema, 106.

103 Elias Mambo, "More judges got govt farms," *Zimbabwe Independent* (October 5, 2012).

104 *Ibid*.

decided following the adoption of the new constitution.

The table below includes all of the faux dual citizenship cases explored in this paper. From left to right, the courts appear in hierarchical order.¹⁰⁵ The High Court was the second highest court in Zimbabwe until 2013, when a new constitution created the Constitutional Court. Today, the Constitutional Court is the state's highest court, replacing the Supreme Court's previous position as the apex of the judicial system. The decisions are presented chronologically, with the oldest at the top of the columns and the most recent at the bottom. Cases in green indicate that the decision was decided in favor of the individual whose citizenship rights were violated. Cases in red were decided in favor of the registrar general and are pro-government decisions.

105 See appendix Figure 1 for a visual representation of the hierarchy of the Zimbabwean judiciary

Faux Dual Citizenship Court Cases (2000-2022)¹⁰⁶

High Court	Supreme Court
Peak of judicial manipulation (Nov. 2000-2002) <i>Tsvangirai v. Registrar General of Elections</i> (2002) <i>Todd v. Registrar General</i> (2002) <i>Job Sibanda v. Registrar-General of Citizenship and Others</i> (2005) <i>Ricarudo Manyere v. Registrar General</i> (2002) <i>Lewis Uriri v. Registrar General of Citizenship and Another</i> (2003) <i>Trevor Ncube v. Registrar General</i> (2006)	<i>Carr v. Registrar General</i> (2000) <i>Purser v. Registrar General</i> (2001) Peak of judicial manipulation (Nov. 2000-2002) <i>Registrar General & Ors v. Tsvangirai</i> (2002) <i>Registrar General of Citizenship v. Todd</i> (2003)
Adoption of new constitution (2013) <i>Piroro v. Registrar General</i> (2011) <i>MDC-T & Ors v. ZEC & Ors</i> (2017)	
Key Ruled against the Registrar General (anti-government ruling) Ruled in favor of the Registrar General (pro-government ruling)	

THE CASES

This section moves chronologically through the table, beginning in 2002 when the High Court ruled in *Tsvangirai v. Registrar General of Elections* that it could not be assumed that a person had a right to foreign citizenship only because his or her parents were born elsewhere.¹⁰⁷ Further, the court held that a person could not be required to renounce what he or she never possessed.¹⁰⁸ Morgan Tsvangirai, the MDC presidential candidate, brought the case to the High Court because he sought an extension of the deadline to renounce foreign citizenship. He wanted to ensure that more MDC supporters were able to vote. The court extended this deadline from January 6, 2002 to August 6, after the March presidential election.¹⁰⁹ The Registrar General appealed the decision a month before the election to the recently-packed Supreme Court, in *Registrar General & Ors v. Tsvangirai*, which unanimously overturned the High Court's decision.¹¹⁰ During voting, even

¹⁰⁶ This chart does not include court cases in which an individual actually possessed dual citizenship. To see a table containing all court cases discussed in this paper, see appendix Figure 2.

¹⁰⁷ *Morgan Tsvangirai v. Registrar-General and Others* (Judgment HH 29/2002), February 26, 2002.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ G. Friedman, "Tsvangirai v Registrar-General of Elections of Zimbabwe: Report by

individuals who were granted orders by magistrate courts to be reinstated on the voters' roll were denied from casting their ballots.¹¹¹

The Registrar General's refusal to renew the passport of an individual with the potential to claim a foreign citizenship was challenged in another 2002 High Court case: *Todd v. Registrar General*. The Registrar General refused to renew Judith Garfield Todd's passport, on the grounds that she had lost her Zimbabwean citizenship when she failed to renounce her potential claim to New Zealand citizenship.¹¹² This case was particularly high profile because Judith Garfield Todd was the daughter of former Rhodesian Prime Minister Sir Garfield Todd, who had also lost his Zimbabwean citizenship.¹¹³ She had spent her life as an activist, first protesting against the apartheid government of Ian Smith, then criticizing violence perpetrated by President Robert Mugabe's government.¹¹⁴ Judge Sandra Mangwira of the High Court found that Todd was still a Zimbabwean citizen, and ordered her passport to be restored.¹¹⁵ The government appealed to the Supreme Court, in *Registrar General of Citizenship v. Todd*, and the newly packed Supreme Court sided with the Registrar General.¹¹⁶ Todd tried to renounce her potential to claim New Zealand citizenship, but New Zealand said her application could not be processed because she did not have New Zealand citizenship to renounce.¹¹⁷

Despite the Supreme Court's rulings in *Registrar General & Ors v. Tsvangirai* and *Registrar General of Citizenship v. Todd*, the High Court continued to rule against the Registrar General in similar cases. The High Court ignored the Supreme Court's higher authority and the doctrine of precedent by repeatedly handing down judgements contrary to those of its superior counterpart. By law, the High Court is bound to the decisions of the Supreme Court. This means that the High Court was acting inconsistently with the rules of the judiciary by continuously issuing anti-government rulings on the citizenship question.

The High Court adjudicated a third, faux dual citizenship case in 2002, when Ricarudo Manwere approached the court. Manwere was born in Zimbabwe

the Independent Observer to the Forum for Barristers and Advocates of the International Bar Association: Notes," *The South African Law Journal* 120, 2 (January 1, 2003): 211.

111 Manby, "Natives and Settlers," 47.

112 *Judith Garfield Todd v. Registrar-General of Citizenship & Minister of Home Affairs* (HC 55/2002), May 7, 2002.

113 "Mugabe was Rotten From the Start," *The Sunday Times* (September 23, 2007).

114 *Ibid.*

115 *Ibid.*

116 *Registrar General of Citizenship v. Todd* (SC 58/02), February 27, 2003.

117 *Ibid.*

to a Zimbabwean mother and a Mozambican father.¹¹⁸ The Registrar General refused to renew Ricarudo Manwere's passport, arguing that he had lost his Zimbabwean citizenship when he failed to renounce his Mozambican citizenship by descent.¹¹⁹ In *Ricarudo Manwere v. Registrar General*, the court held that the Registrar General must prove Manwere to be a Mozambican citizen by providing a copy of Mozambican nationality laws as evidence.¹²⁰ However, Mozambique did not allow dual citizenship, and citizenship by descent was not automatic. Therefore, Manwere was not a Mozambican citizen and the court ordered the Registrar General to renew Manwere's passport. Despite the ruling, the Registrar General continued to refuse passports to those he considered to have a foreign citizenship or the potential to claim a foreign citizenship.

After protests broke out in southern Africa surrounding the treatment of descendants of migrant workers in Zimbabwe, the government made some concessions.¹²¹ It amended the Citizenship of Zimbabwe Act in 2003 to allow Zimbabwean-born individuals, whose parents came from Southern African Development Community (SADC) states as laborers, to apply for confirmation of their Zimbabwean citizenship and sign a form renouncing their foreign citizenship.¹²² In practice, however, Zimbabweans of foreign descent continued to be blocked from accessing their citizenship.¹²³ As a result, "dual" citizenship cases continued to make their way through the judiciary.

In 2003, the High Court was faced with yet another case in which an individual with the potential to claim a foreign citizenship lost Zimbabwean citizenship. Lewis Uriri, born in Zimbabwe to Mozambican migrants, tried to obtain a birth certificate for his son.¹²⁴ The Registrar refused to grant it on the basis that Uriri must first renounce his Mozambican citizenship by descent, despite the fact that he had never claimed it.¹²⁵ In *Lewis Uriri v. Registrar General of Citizenship and Another*, the High Court again ruled that individuals with the potential to claim a foreign citizenship cannot renounce what they do not possess.¹²⁶ Just as the High Court continued to rule against the Registrar General, the Registrar General continued to ignore the High Court and resumed the same practice.¹²⁷

118 *Ricarudo Manwere v. Registrar General* (HH 87/02), February 27, 2002.

119 *Ibid.*

120 *Ibid.*

121 Manby, "Natives and Settlers," 49.

122 Manby, "Report on Citizenship Law in Zimbabwe," 6.

123 *Ibid.*, 6.

124 *Lewis Uriri v. Registrar General of Citizenship and Another* (HH 7128/03), 2003.

125 *Ibid.*

126 *Ibid.*

127 Manby, "Report on Citizenship Law in Zimbabwe," 17.

Passport politics continued at the High Court when Job Sibanda approached the bench following the Registrar General's refusal to renew his travel document. Sibanda was born in Zimbabwe to a Zimbabwean mother and a Malawian father.¹²⁸ The Registrar General refused to renew Job Sibanda's passport on the grounds that Sibanda must first renounce his Malawian citizenship by descent, although he never possessed it.¹²⁹ As with the *Todd* decision, in *Job Sibanda v. Registrar-General of Citizenship and Others*, Judge Tedious Karwi of the High Court found that Sibanda was a citizen of Zimbabwe and ordered the Registrar General to renew his passport.¹³⁰

Like Judith Garfield Todd, Ricarudo Manwere, and Job Sibanda, opposition journalist Trevor Ncube found himself stateless after he was unable to renew his Zimbabwean passport in 2006.¹³¹ However, Ncube's passport and citizenship troubles first began in 2005, after landing in Bulawayo, Zimbabwe from South Africa.¹³² Upon arrival, Registrar General Mudede seized Ncube's passport.¹³³ Mudede reasoned that Ncube's name appeared on a list of sixty-four civil society leaders, human rights activists, journalists, and business executives whose passports were to be seized due to the government labeling them as "enemies of the country."¹³⁴ The government empowered itself to seize opposition leaders' passports through Amendment 17, which included a provision that enabled the government to seize the passports of individuals perceived to be working against "national interests."¹³⁵ After the government had confiscated his passport, Ncube took the issue to the High Court and Judge Chinembiri Bhunu declared the passport seizure illegal.¹³⁶

128 *Job Sibanda v. Registrar General of Citizenship and Other* (HH 3626/02), February 20, 2005.

129 *Ibid.*

130 "Judge Delivers Landmark Ruling on Citizenship Case," *ZimOnline* accessed from *Kubatana* (June 16, 2005).

131 *Trevor Ncube v. Registrar General and Another* (HH 7316/06), 2006.

132 "Publisher's Passport Released," *MISA-Zimbabwe* accessed from *Kubatana* (December 14, 2005).

133 "Confiscation of Passports Belonging to Government Critics," *Media Monitoring Project Zimbabwe (MMPZ)* accessed from *Kubatana* (December 11, 2005).

134 "Ncube Hearing Postponed," 2007.

135 "Confiscation of Passports Belonging to Government Critics," 2005. United States Department of State, *Country Reports on Human Rights Practices for 2005 Volume I*, submitted to the Committee on International Relations US House of Representatives and the Committee on Foreign Relations US Senate (May 2006): 633.

136 "Ncube Humiliated by Threats," *News24* (January 23, 2007). Thomas Chiripasi, "Zimbabwe Publisher Seeks Court Relief in Passport Seizure," *Voice of America* (December 12, 2005).

Although Trevor Ncube's passport was eventually returned, his passport struggles persisted. He found himself stateless in 2006 after the Registrar General refused to renew it, arguing that Ncube was a Zambian citizen by descent.¹³⁷ Ncube's father was born in Zambia but had become a Zimbabwean citizen; however, the Registrar General contended that Ncube had not renounced his Zambian citizenship within the prescribed period between July 6 and January 6, 2002.¹³⁸ In 2006, Ncube took the issue to the High Court, arguing that the withdrawal of his citizenship was unlawful as he had only ever been a citizen of Zimbabwe.¹³⁹ During this era of citizenship struggles, Ncube owned three prominent newspapers that were all critical of Mugabe's government: *The Standard*, *The Zimbabwe Independent*, and *The Mail and Guardian*.¹⁴⁰ While *The Mail and Guardian* operated in South Africa, *The Standard* and *The Zimbabwe Independent* were the last two independent newspapers in Zimbabwe at the time.¹⁴¹ Without Zimbabwe citizenship, Ncube could only own a 40 percent share of his newspapers, meaning he would no longer be in control of them.¹⁴² By stripping Ncube's citizenship, Mugabe sought to either close the critical newspapers, or force them under the control of a new owner who would be more supportive of the government.¹⁴³

As a journalist, Ncube was privy to the growing autocratic Zimbabwean state, yet he recognized the judiciary as a place where fair rulings could still exist. In fact, Ncube expressed that he had no doubt that the court would rule in his favor. He stated that he was "aware" of "efforts to appoint compliant judges" but knew of "many good judges on the bench who were still issuing sound judgements."¹⁴⁴ Ncube noted that the government's new interpretation of the Citizenship Act was designed to disenfranchise likely MDC supporters before the presidential election in 2002.¹⁴⁵ Although this was largely the design, the government also benefited

Trevor Ncube, "Extended Interviews: Trevor Ncube" in "Zimbabwe: Shadow of Lies," by Alexis Bloom, *Frontline World* (June 27, 2006).

137 "Court 'Abandons' Case Against Ncube," *ZimOnline* accessed from *Kubatana* (January 25, 2007).

138 *Ibid.*

139 "Ncube Hearing Postponed," *MISA-Zimbabwe* accessed from *Kubatana* (January 24, 2007).

140 "Court 'Abandons' Case Against Ncube," 2007. "Zimbabwe Court Orders Government to Restore Citizenship of Newspaper Publisher," *BBC Monitoring Africa* (January 26, 2007).

141 Trevor Ncube, "Extended Interviews: Trevor Ncube," 2006.

142 "Stateless Ncube Fights for Citizenship," *Mail and Guardian (SA)* accessed from *Kubatana* (January 27, 2007).

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

from the denationalization of prominent figures in society, like Trevor Ncube and Judith Garfield Todd.

As Ncube expected, Judge Chinembiri Bhunu of the High Court once again ruled in his favor, stating that the Registrar General's refusal to renew Ncube's passport was "unlawful, null and void, and of no force and effect."¹⁴⁶ The judge also declared that the Registrar General was acting in defiance of his previous ruling in 2005 when he forced the Registrar General to release Ncube's passport for the first time.¹⁴⁷ Judge Bhunu ordered Mudede to restore Ncube's Zimbabwean citizenship immediately, to renew his passport within seven days, and forbade the Registrar General from interfering with Ncube's possession and use of his passport.¹⁴⁸

In 2009, the Government of National Unity formed, creating an MDC-ZANU-PF coalition. The coalition government adopted an amendment to the Constitution that did not explicitly ban dual citizenship, but instead allowed parliament to create legislation to ban it.¹⁴⁹ Despite the change, holders of foreign citizenship and those with ties to foreign countries were still blocked from accessing their Zimbabwean citizenship. One reason for this is because Section 9 of the Citizenship Act still banned dual citizenship for all Zimbabweans. Further, the new amendment provided that acts of parliament have the power to determine any matter regarding citizenship, including the loss of citizenship, and renunciation of citizenship procedures.¹⁵⁰ The amendment's deferral to parliament thereby extinguished the potential of the amendment to allow dual citizenship, as acts of parliament that provided for total bans on dual citizenship still remained in effect. As a result, citizenship challenges continued.

In 2011, Sebastian Piroro went to the High Court after being denied a passport for allegedly possessing dual citizenship.¹⁵¹ Piroro was born in Zimbabwe to a Mozambican father and a Zimbabwean mother. When he tried to renew his passport in 2010, he was denied on the basis that he failed to renounce his potential to claim Mozambican citizenship. The Registrar General argued that Piroro must renounce his claim to Mozambican citizenship, in accordance with Mozambican law, before he could be issued a new Zimbabwean passport. In *Piroro v. Registrar*

146 "Renew Ncube's Passport: Court," *The Herald (Zimbabwe)* accessed from *Kubatana* (January 26, 2007).

147 Ray Matikinye, "Mudede Disgraced," *The Zimbabwe Independent* accessed from *Kubatana* (January 26, 2007).

148 *Ibid.*

149 Constitution of Zimbabwe Amendment (No.19) Act 9(A), 2009.

150 Constitution of Zimbabwe Amendment (No.19) Act 9(B-D), 2009.

151 *Piroro v. Registrar General of Citizenship & Ors* (HC 7248 of 2010), July 5, 2011.

General, the High Court ruled unconstitutional the 1984 Citizenship Act's provision that required a citizen from birth with dual citizenship to renounce the other citizenship.¹⁵² Despite the ruling, the Registrar General continued to operate under the pre-2009 constitutional amendment that dual citizenship was prohibited for all.¹⁵³

THE 2013 CONSTITUTION AND THE CONSTITUTIONAL COURT

In 2013, the coalition government adopted a new constitution that provided for dual citizenship for Zimbabwean citizens by birth, but maintained that parliament retains the power to prohibit dual citizenship from registered citizens and citizens by descent.¹⁵⁴ However, legal questions surrounding dual citizenship still persist. This is because the Registrar General continued to deny citizenship from those with the potential claim to a foreign citizenship, and from individuals who actually acquired dual citizenship following the adoption of the 2013 Constitution. There are three main reasons that explain why the Registrar General was able to keep applying his interpretation of citizenship law. First, it took until 2019 for the 1984 Citizenship Act to be amended in accordance with the new constitutional provision permitting dual citizenship.¹⁵⁵ This, along with the Supreme Court cases of *Registrar General & Ors v. Tsvangirai* and *Registrar General of Citizenship v. Todd*, legitimized the Registrar General's refusal to comply with the High Court's attempts to protect individuals' citizenship rights. Therefore, the High Court of Zimbabwe's attempts to undo President Mugabe's politicization of dual citizenship law were largely unsuccessful. Finally, the allowance of dual citizenship was unpopular among Zimbabweans. In 2012, immediately before the Constitution was adopted, AfroBarometer found that 71 percent of Zimbabweans believed that an individual who wished to hold dual citizenship should not have the right to be a citizen of Zimbabwe.¹⁵⁶ Thus, there would have been little domestic pressure on the government to recognize dual citizenship.

The 2013 Constitution also created the Constitutional Court, which became the final court of appeal for questions of "constitutional matters."¹⁵⁷

152 *Ibid.*

153 Manby, "Report on Citizenship Law in Zimbabwe," 7.

154 Constitution of Zimbabwe, 2013, Section 42(e).

155 Chipenda, 8.

156 Eldred V. Masunungure; Heather Koga, "Zimbabweans' (Mostly) Tolerant Views on Citizenship," AfroBarometer, Briefing Paper No. 16 (March 2013): 3.

157 Constitution of Zimbabwe, 2013, 167(1)(a).

The new constitution specified that the Constitutional Court would seat a chief justice, a deputy chief justice, and five other justices, while maintaining the 1980 Constitution's minimal requirement of "no fewer than two" justices on the Supreme Court bench.¹⁵⁸ The 2013 Constitution also included a provision that reduced the president's power in judicial appointments. The Judicial Service Commission (JSC) is an agency that acts as a "watchdog to conduct checks and balances over the president and ensures that judicial appointments are made without any undue political influence."¹⁵⁹ While the commission had been in existence since the 1980 Constitution, the 2013 Constitution granted it enhanced powers. When a judge position opens up on the High Court, Supreme Court, or Constitutional Court, the JSC must advertise the vacancies and hold public interviews with the candidates.¹⁶⁰ Then, the JSC prepares a list of three qualified candidates to submit to the president, from which the president must select.¹⁶¹ This provision weakens the president's capacity to appoint loyalists to the judiciary because he or she can only select appointees that have been vetted by the JSC.

However, the JSC is not foolproof. Because the commission is partly composed of members appointed by the president, it runs the risk of being filled with presidential loyalists who could nominate other loyalists to judicial positions. When the 2013 Constitution was adopted, there was a seven-year transition period before the JSC could start working to fill the Constitutional Court.¹⁶² During the transitional phase, during which the following cases were decided, the Constitutional Court consisted of the Chief Justice, the Deputy Chief Justice, and seven judges of the Supreme Court, all of whom were Mugabe appointments.¹⁶³

However, the Constitutional Court followed the trend set by the High Court of upholding citizenship rights, rather than the Supreme Court's precedent of denying citizenship rights. This can be explained by two reasons. First, the new constitution legalized dual citizenship. Second, there was a decrease in the political saliency of questions of dual citizenship. Because of the new unity government, the judiciary felt less pressure to rule in accordance with President Mugabe's former attempts to consolidate power by means of stripping citizenship from those with ties to foreign countries. Further, with the land reform program already implemented, there was less pressure to rule on behalf of the government

158 *Ibid*, 168(1)(b).

159 Amanda Shivamba, "An Analysis of Zimbabwe's Proposed Constitutional Amendment Related to the Judiciary," *Southern African Litigation Centre*, No. 3 (2020): 1-6.

160 Constitution of Zimbabwe, 2013, 180(4).

161 *Ibid*, 180(4).

162 "Court Watch 11-2021 - Appointment of Constitutional and Supreme Court Judges," *VertiasZim* (2021).

163 *Ibid*.

from a policy standpoint.

Since the promulgation of the 2013 Constitution and the legalization of dual citizenship, the Zimbabwean judiciary has adjudicated several cases related to dual citizenship law. But unlike the previous cases heard at the High Court and Supreme Court, these cases dealt with individuals who actually possessed dual citizenship, rather than the mere “potential” to claim a foreign citizenship.

The new Constitutional Court has heard two cases related to dual citizenship law. In 2013, the court heard *Mawere v. Registrar General & Others*. Zimbabwean businessman Mutumwa Mawere was born in the country to parents who were also born in Zimbabwe, but he eventually acquired South African citizenship.¹⁶⁴ After losing his Zimbabwean national identity document, Mawere went to the Registrar General’s office to get a duplicate.¹⁶⁵ Without the national identity document, he would be unable to register as a voter before the 2013 election.¹⁶⁶ Because he remained a South African citizen, the Registrar General prohibited him from accessing his Zimbabwean national identity document.¹⁶⁷ The Constitutional Court upheld Mawere’s right to Zimbabwean citizenship without having to renounce his acquired South African citizenship.¹⁶⁸

After *Mawere v. Registrar General & Others*, the Supreme Court adjudicated *Roland Whitehead v. Registrar General and Ors* in 2013. This is another example of an important opposition figure being denationalized. Topper Whitehead was a computer scientist close to determining how the ZANU-PF rigged the 2002 presidential election when he was stripped of his Zimbabwean citizenship.¹⁶⁹ Whitehead was born in Zimbabwe to a Zimbabwean mother and South African father.¹⁷⁰ In 2005 the Registrar General confiscated Whitehead’s Zimbabwean passport for failing to renounce his potential claim to South African citizenship. In response, Whitehead decided to take up South African citizenship through his father, and approach the High Court in an attempt to gain a court order declaring him to be a citizen of Zimbabwe. The High Court, however, refused to recognize Whitehead as a Zimbabwean citizen because he had acquired South African citizenship. Judge Dube found that Whitehead was not stripped of his Zimbabwean citizenship, only of his passport. Thus, he argued that Whitehead *did* hold dual Zimbabwean and South African citizenship. This makes this case unique

164 *Mutumwa Dziva Mawere v. Registrar General & Ors* (CC 27/13), June 25, 2013.

165 *Ibid.*

166 *Ibid.*

167 *Ibid.*

168 *Ibid.*

169 Matikinye.

170 *Whitehead v. Registrar General* (SC 21 of 2015), September 12, 2013.

from those the High Court previously adjudicated, as those cases did not involve individuals who actually possessed a foreign citizenship. In fact, in his judgment, Judge Dube stated:

“The facts of this case are different from those in *Piroro v. Registrar*

General and Ors HH128/11, *Trevor Ncube v. The Registrar General and Anor* HC 7613/06, *Ricardo Manwere v. Registrar General of Citizenship and Anor* HH 17/02 and *Job Sibanda v. Registrar General* HC3626/02.

The applicants in all these cases were citizens of Zimbabwe by birth and they all had either one or both parents who had foreign origins. They all

had not acquired the citizenships of the countries of their parents’ origins and they had not lost their Zimbabwean citizenship and had no citizenship to renounce. They had no dual citizenship. The court in all these cases was correct in finding that they all had no foreign citizenship to renounce. The applicant has acquired foreign citizenship which he has not renounced. He holds dual citizenship.”

Although Judge Dube disagreed with the *Piroro* decision’s conclusion that dual citizenship was allowed for Zimbabweans citizens by birth, acts of parliament banning dual citizenship give credence to his interpretation. This means that Judge Dube was not deferring to the government’s interests without sound legal reasoning. However, once the new constitution that legalized dual citizenship came into effect, Whitehead took his case to the Supreme Court. In *Whitehead v. Registrar General and Ors* the Supreme Court held that Whitehead was a Zimbabwean citizen despite also being a citizen of South Africa.

In 2014, the Constitutional Court heard the case of *Madzimbamuto v. Registrar General & Others*. Madzimbamuto was born in Zimbabwe to one Zimbabwean parent and one South African.¹⁷¹ He was unable to submit an application to renew his Zimbabwean passport after enduring long lines and bureaucratic obstacles at the Registrar General’s office. So, he obtained South African citizenship through his mother.¹⁷² In 2012, Madzimbamuto returned to Zimbabwe permanently and applied for citizenship when the 2013 Constitution was promulgated but was denied.¹⁷³ The Constitutional Court confirmed Madzimbamuto’s right to dual Zimbabwean and South African nationality.¹⁷⁴

171 *Ibid.*

172 *Farai Daniel Madzimbamuto v. Registrar General & Ors* (CC 114/13), February 12 & June 25, 2014.

173 *Ibid.*

174 *Ibid.*

In 2017, the High Court heard the case of *MDC-T, MDC-N, and Kachingwe v. ZEC, Registrar-General, Minister of Home Affairs, & ZANU-PF*. The MDC argued that its members were at risk of being disenfranchised because those possessing identity documents demarcated ‘alien’ were denied the right to register to vote; the Registrar General refused to give them citizen ID cards.¹⁷⁵ The High Court issued an order that those with an ‘alien’ identity card who had connections to another southern African country should be able to register to vote without further confirmation of citizenship.¹⁷⁶ However, the Zimbabwe Election Support Network, a union of civil society organizations, found that individuals holding alien ID cards faced challenges registering to vote in the 2018 election.¹⁷⁷ Although this case differs from the High Court cases that preceded it, it is relevant in that the court once again proved willing to protect the rights of individuals with ties to foreign countries.

The most recent dual citizenship case was delivered in March 2022 at the High Court. In this case, Brian Shaw and his daughter possessed South African citizenship. The Registrar General would not recognize their Zimbabwe citizenship because they also held South African citizenship. The court ruled that the two were citizens of Zimbabwe and that this was not conditional upon renunciation of their South African citizenship.

FINDINGS

The analysis of the court cases presents three main findings. First, before the Supreme Court was manipulated, it was willing to issue anti-government rulings on the faux dual citizenship question, as seen in the *Carr* and *Purser* decisions. Then, judicial manipulation began. After the Supreme Court was purged, packed, threatened, and bribed, it issued pro-government rulings on the faux dual citizenship question, as seen in the *Todd* and *Tsvangirai* decisions. After the High Court was manipulated, it began hearing faux dual citizenship cases. But unlike the Supreme Court, it continuously issued anti-government rulings. Finally, in 2013, a new constitution was adopted, the Constitutional Court was created, and the unity government was installed. The new court proved willing to issue anti-government rulings on real dual citizenship cases, as seen in the *Mawere* and *Madzimbamuto* cases. How can we account for the shift in the Supreme Court’s behavior, the High Court’s continued willingness to issue anti-government

175 *Movement for Democratic Change (T) and Movement for Democratic Change (N) and Sarah Kachingwe v. Zimbabwe Electoral Commission and Registrar General N.O and Minister of Home Affairs and Zimbabwe African National Union Patriotic Front (ZANU-PF)* (HC 10623/17), November 29, 2017.

176 Manby, “Report on Citizenship Law in Zimbabwe,” 16.

177 *Ibid*, 16.

rulings, and the new Constitutional Court's willingness to follow the High Court's precedent of anti-government rulings on citizenship questions?

THE ABILITY OF COURTS TO ISSUE ANTI-GOVERNMENT RULINGS IN AUTOCRATIC REGIMES

My findings suggest that the High Court of Zimbabwe may have been able to retain some independence during the Mugabe-era. This supports judicial scholars' arguments that courts in autocratic environments are not necessarily extensions of the ruling party that invariably issue rulings favorable to the government.¹⁷⁸ The question then becomes, what explains the differences between the High Court and Supreme Court rulings? Why did the High Court continuously issue anti-government rulings after it was purged and packed, while the Supreme Court took the government's side on questions of faux dual citizenship, post-manipulation? Further complicating the question is the fact that the High Court ignored the superior court's higher legal authority. When the Supreme Court adopted the government's interpretation of citizenship law in the *Tsvangirai* and *Todd* cases, the High Court continued to side with individuals whose citizenship rights were abused, despite being bound to the Supreme Court's precedent. Both courts' independence was undermined, yet one continued to issue anti-government rulings. How can we account for this difference in rulings? My findings also call into question why the Constitutional Court was willing to issue anti-government rulings on real dual citizenship questions. This chapter first addresses the differences between the Supreme Court and High Court, and then explains the Constitutional Court's anti-government dual citizenship decisions

RATIONAL CHOICE EXPLANATIONS

In order to answer these questions, this section first builds upon the theoretical framework established in the "Judicial Manipulation" section that explains why Mugabe decided to target the judiciary when he did. In this section, the paper analyzes a leading rational choice explanation that attempts to account for judges' behavior. Gretchen Helmke's theory of strategic defection applies the logic of "thin strategic models" or "insurance theory" to explain when and why judges decide to issue anti-government rulings or pro-government rulings.

¹⁷⁸ Tamir Moustafa, "Law and Courts in Authoritarian Regimes," *Annual Review of Law and Social Science* 10 (November 2014): 281-299.

Helmke's theory of strategic defection suggests that judges are more willing to hand down anti-government rulings in periods of "institutional insecurity."¹⁷⁹ In her study of the Argentine Supreme Court, Helmke found that when judges predict a new government is likely to take power, they are more willing to issue anti-government rulings. This is because judges are attempting to protect themselves from removal by a new government. Helmke argues that the legitimacy of judges is compromised in the eyes of a new government if they are perceived to be overtly loyal to the outgoing government. Derived from thin strategic models that are based upon the electoral context in which judges are operating, Helmke argues that judges attempt to distance themselves from the outgoing government through anti-government rulings, once it becomes clear that the sitting government is losing power.

Does Helmke's strategic defection argument explain the differences in High Court and Supreme Court rulings in Zimbabwe? While President Robert Mugabe was manipulating the judiciary, and the citizenship cases made their way through the courts, he was facing his largest electoral competitor since he first took office. Morgan Tsvangirai was growing in popularity, the Movement for Democratic Change had won a significant proportion of parliamentary seats, the ZANU-PF's proposed constitution was rejected by voters, and Mugabe had only narrowly won the fraudulent presidential election of 2002. Could this era of institutional insecurity motivate judges to strategically defect from the government? Helmke's theory does not explain Zimbabwean realities. Why would the High Court, and not the Supreme Court, practice strategic defection? Both courts lost independent judges, saw an increase in judges described as party loyalists added to the bench, and endured physical and rhetorical attacks. Why would only High Court judges strategically defect when the era of institutional insecurity existed for both the High Court and the Supreme Court?

Further, before Mugabe began manipulating the High Court, it was issuing anti-government rulings on questions of mega-politics, notably, land reform cases. The new era of institutional insecurity did not drastically change High Court behavior. Both before and after judicial manipulation began, the High Court demonstrated willingness to rule against the government. Before Mugabe began manipulating the judiciary at the turn of the millennium, the judiciary enjoyed independence. For the first two decades of Mugabe's rule, the Supreme Court issued pro-human rights judgements, and the government generally listened to

179 Gretchen Helmke, "The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy," *American Political Science Review* 96, 2 (June 2002): 291-303.

court orders.¹⁸⁰ The Supreme Court, however, adopted a more pro-government stance once judicial manipulation was in full swing at the end of 2000. During his early years in power, Mugabe did not appoint partisan judges, although nothing in the constitution barred him from doing so.¹⁸¹ In fact one scholar suggests that there is “near consensus” that in the early years of Mugabe’s tenure he respected the independence of the judiciary.¹⁸² While some judges had stronger connections to the government than others, until 2000, they all “behaved professionally in their judicial capacity.”¹⁸³ The Supreme Court, however, saw an increase in pro-government rulings on mega politics questions once it was manipulated.¹⁸⁴

Rational choice theories also “downplay internal institutional culture as shaped by the historical development of the judiciary.”¹⁸⁵ The institutional culture of the Zimbabwean judiciary is important to consider because the judges who were first appointed at independence fostered a “common professional ethos” on the bench.¹⁸⁶ Once new judges were appointed, they also developed this “judicial culture” because judges found it difficult to write judgments not grounded in strong legal reasoning.¹⁸⁷ This judicial culture carried into professional, legal organizations that encourage independence on the bench. Government ministers, for example, avoided threatening Zimbabwe’s Bar Council and the Zimbabwe Law Society because lawyers were willing to criticize the government when it attempted to manipulate the judiciary.¹⁸⁸ Similarly, both domestic and international NGOs also helped foster independence on the bench by encouraging judges to criticize executive encroachments on the judiciary.¹⁸⁹

STRUCTURALLY EXPLAINING JUDGES’ BEHAVIOR: THE INTERACTION BETWEEN A COLLEGIAL APEX COURT AND A SOLITUDINAL SUBORDINATE COURT IN A HIERARCHICAL JUDICIAL SYSTEM

A final critique with models like strategic defection is that they downplay systemic explanations, particularly by discounting judges’ own role in shaping

180 Douvelos, 14-15.

181 Compagnon, 143.

182 *Ibid*, 143.

183 *Ibid*, 146.

184 *Ibid*, 145.

185 Ellett, “Judicial Power,” 152.

186 Compagnon, 162.

187 *Ibid*, 145-147.

188 *Ibid*, 147.

189 *Ibid*, 163.

executive behavior.¹⁹⁰ Helmke's theory of strategic defection relies solely on the electoral context of the era.¹⁹¹ His theory ignores other factors that shape judges' behavior. This section seeks to build upon Ellett and VonDopp's argument that a country's electoral context is not enough to account for judges' behavior. They remediate thin models that rely solely on the electoral context to explain judges' behavior by introducing a structural rationalization. I analyze two structures within the Zimbabwean judiciary. The first is the separate internal structures of the High and Supreme courts. The second is the hierarchical structure of the judiciary that separates the two courts from each other. My analysis of the internal structures of the two courts separately will demonstrate how the High Court's design may facilitate greater independence than the Supreme Court's. Analyzing the hierarchical structure as a whole will demonstrate how the relationship between courts affects judges' decisions. The internal structures of each court and their relationship with each other in a hierarchical system suggests that the High Court may be systematically more able to issue anti-government rulings.

First, I begin by comparing the individual structures of each court. This builds upon Peter VonDoepp's finding that the high courts of Zambia, Malawi, and Namibia were more willing to issue anti-government rulings than its superior counterpart, the Supreme Court.¹⁹² When accounting for this phenomenon in Zambia, VonDoepp compares the structure of the High Court to the Supreme Court. In Zambia, there are more High Court judges than Supreme Court justices.¹⁹³ Further, there are multiple cities with a branch of the High Court, whereas there is only one Supreme Court.¹⁹⁴ At the High Court, judges issue their decisions on an individual basis, as opposed to a panel like the Supreme Court.¹⁹⁵ VonDoepp interprets this to mean that Supreme Court justices are more susceptible to the influence of their colleagues than High Court judges. Additionally, court cases are allocated by the "judge in charge" of the High Court, who may not know which High Court judges to trust with "politically sensitive cases."¹⁹⁶ The government thus faces more structural challenges in managing the High Court than it does the Supreme Court.

This structuralist argument holds when applied to Zimbabwe, since the High Courts of Zambia and Zimbabwe share a similar composition. At the time

190 Ellett, "Judicial Power."

191 *Ibid.*

192 Peter VonDoepp, *Judicial Politics in New Democracies: Cases from Southern Africa* (Boulder, Colorado: Lynne Rienner Publishers, 2009): 65.

193 *Ibid.*, 65

194 *Ibid.*, 65

195 *Ibid.*, 65

196 *Ibid.*, 65

of the citizenship cases, there were between twenty and twenty-three High Court judges and eight Supreme Court justices (five before Mugabe elongated the bench in 2001).¹⁹⁷ The larger number of High Court judges dilutes the visibility of each judge in the eyes of the executive. In comparing the government's attempts to purge independent judges from the High and Supreme courts, one scholar suggested that the purge in the High Court was "less severe" because there were more judges to "deal with."¹⁹⁸

Moreover, High Court judges may be less susceptible to the influence of their colleagues than Supreme Court justices. This means that judges loyal to Mugabe on the High Court may have had a weaker influence on more independently-minded judges than justices loyal to Mugabe on the Supreme Court. This is for two key reasons. First, there are multiple cities hosting branches of the High Court in Zimbabwe, as in Zambia. At the time of citizenship cases, there were two high court locations: one in Harare and the other in Bulawayo.¹⁹⁹ This means that if one Mugabe loyalist was added to the High Court in Harare, the judges in Bulawayo would have been geographically isolated from that judge. As a result, judges in Bulawayo could have largely avoided pressure from the judge loyal to Mugabe in Harare, if they encouraged pro-government rulings in any capacity.

Second, High Court decisions of original jurisdiction are heard by a single judge.²⁰⁰ Although panels of two judges exist for appellate cases, the dual citizenship questions that went to the High Court were matters of original jurisdiction. This structure provides a single judge to issue a decision that may help insulate judges from the influence of their colleagues. A Zimbabwean Supreme Court justice, on the other hand, always rules on a panel with her colleagues.²⁰¹ This collegial structure may open up more room for justices to influence each other as they decide cases together, work in close proximity, and listen to each other's legal interpretations.

Finally, it may be more difficult for an executive to identify compliant judges to appoint to the High Court than to find loyal judges for the Supreme Court. In Zimbabwe and Zambia, executives generally select Supreme Court

197 "Mugabe Regime Prepares to Axe White Judges," *The Guardian* (June 4, 2000).

198 Compagnon, 157.

199 In 2016, two high courts were established in Mutare and Masvingo. In 2021, a third was opened in Chinhoyi.

200 High Court Act 2001, Part II 3a, b, c, d.

201 For constitutional cases, panels consist of five justices. On appeal from the High Court, three justices rule. Only two justices deliver decisions on appeal from courts other than the High Court. Three to five justices rule on "difficult or important questions of law." See "Court Watch 1-2011," *VeritasZim* (November 2011).

justices from judges on the High Court. This allows the executive to research a judge's past rulings on political cases and predict if they would be a compliant Supreme Court justice. It is not as easy to predict the loyalty of a potential High Court judge nominee. This is because High Court judges are often chosen from the magistrate courts (the lower level of the judicial hierarchy beneath the High Court), which do not as frequently adjudicate political cases. Further, with so many High Court judge positions, it is more difficult to ensure that all appointees are loyal to government interests. This is especially true in countries like Zimbabwe, which historically relied on judges from foreign countries to fill judicial positions due to a lack of indigenous lawyers and judges in the country. Thus, it is possible that Mugabe was unable to find enough candidates for High Court appointments who signaled loyalty to his party.

Next, this paper analyzes how the broader structure of the Zimbabwean judiciary may have helped facilitate the High Court's greater willingness to issue anti-government rulings after being manipulated, as compared to the Supreme Court. The Supreme Court was the apex court until 2013, when a new constitution created the higher Constitutional Court. The High Court sits hierarchically beneath the Supreme Court, followed by magistrate and local courts. This paper argues that the Supreme Court—being the final court of appeal when the faux dual citizenship cases were being heard—was under increased pressure to rule on the side of the Mugabe government. The High Court, whose decisions could be appealed, felt less political pressure to side with the regime, knowing that the Registrar General could appeal to a packed Supreme Court that could overturn the ruling. This increased the political salience of the Supreme Court's rulings compared to its subordinate counterpart, the High Court. Further, High Court judges may have been more willing to issue anti-government decisions because they are more peripheral to the executive than the Supreme Court. As members of a lower, subordinate court, High Court judges may have felt more insulated from the government than their colleagues on the superior court.

This argument is supported by VonDoepp's findings in neighboring Malawi, where the High Court was also more willing to issue anti-government rulings than the Supreme Court. VonDoepp reports that the Malawian government was "confident" in the Supreme Court's willingness to produce favorable rulings.²⁰² This is why the Malawian government often tolerated High Court judges who sometimes ruled in ways that opposed the government's interests. The government understood that anti-government rulings issued at the High Court could be appealed and overturned at the Supreme Court. Like in Zimbabwe, the government of Malawi tried to manipulate the judiciary, which had signaled its willingness to

202 VonDoepp, 89.

produce unfavorable decisions.²⁰³ By 2000, it was clear that the Malawian Supreme Court was willing to side with the executive.²⁰⁴ Yet Malawian High Court judges continued to rule in ways that countered the executive's interests.²⁰⁵

In Zimbabwe, issuing anti-government rulings may have also been an attempt by High Court judges to increase domestic and international legitimacy, since Mugabe's manipulation of the judiciary was widely reported. With the knowledge that their rulings could be overturned on appeal, the High Court may have seen anti-government stances on faux dual citizenship questions as an easy way to increase legitimacy with few political consequences. For example, one observer of Zimbabwean judicial politics noted that many of Mugabe's recent appointments to the High Court who were "suspected of political bias" issued "some honest, brave judgments" in important political cases.²⁰⁶ Even these "political judges" were still hoping to "maintain a pretense of legality" because the judicial culture born at independence created a judiciary dependent upon legitimacy and credibility.²⁰⁷ With the degradation of the rule of law, pro-ZANU-PF judges were forced to maintain some semblance of autonomy in order to maintain their professional integrity.²⁰⁸

Moreover, the land reform issue was at the forefront of all political debate in Zimbabwe and the media. Judges may have felt that issuing an anti-government ruling on the dual citizenship question would quickly be forgiven and forgotten, given that land reform was *the* issue in Zimbabwe. This would be consistent with scholarly research on the ability of courts to issue anti-government rulings in autocratic environments. Judicial scholars have found that courts reserve anti-government rulings for cases that are less politically meaningful to the government, and pro-government rulings for the most important political cases.²⁰⁹ Should this be the case in Zimbabwe, one would predict that the High Court judges who issued anti-government rulings on the faux dual citizenship question would issue rulings favorable to the government in land reform cases. However, Amendment 17 stripped the courts of their power to adjudicate cases concerning the FTLRP.²¹⁰ Thus, other mega-political cases are explored in the "Meet the Judges" subsection. Important political cases are identified as decisions concerning election disputes, government officials, politicians, and those that received a high volume of media

203 *Ibid*, 95.

204 *Ibid*, 95.

205 *Ibid*, 95.

206 Compagnon, 160-161.

207 *Ibid*, 160-162.

208 *Ibid*, 162.

209 Ellett, "Judicial Power," 152.

210 Adeola, 59.

coverage.

That section finds, however, that the High Court judges who issued anti-government rulings on faux dual citizenship cases proved largely willing to issue anti-government decisions in other mega-political cases. This is consistent with VonDoepp's findings in Malawi, where High Court judges were equally willing to issue anti-government rulings when key opposition figures or the president was involved in a case, as they were in less politically important cases.²¹¹ This section argues that the individual structures of each court, combined with the hierarchical structure of the judiciary as a whole, helps account for the differences in Supreme Court and High Court rulings, post-manipulation. When a court seats a large number of judges who issue decisions on an individual basis in cities around the country, the judges are less subject to the influence of their colleagues. When a comparatively smaller number of judges issue decisions as a panel on a single bench, they are more likely to be influenced by their colleagues. These differences in individual court structures interact with the broader, hierarchical structure of the judiciary that places Supreme Court justices closer to the executive and gives them the power of the final word.

MEET THE JUDGES

The last argument that this paper explores to understand why the difference exists between the Supreme Court and High Court's rulings on faux dual citizenship cases examines the judges issuing the decisions. Secondary source literature indicates that the High Court held on to more independence than the Supreme Court.²¹² Was Mugabe more successful in manipulating the Supreme Court than the High Court? Were the new High Court appointments more independently-minded than traditionally perceived? This section analyzes the background of the judges who adjudicated citizenship cases to determine if they were recent Mugabe appointments with known ZANU-PF sympathies or established judges with a track record of independent rulings.

This chart includes all of the judges who issued the faux dual citizenship cases that this paper analyzes, except the judges who issued the Lewis Uriri and Purser decisions. This is because the author was unable to locate the original judgments for these cases or find secondary sources that include the judges names. The first column of the table provides the name of the case. The second column includes the judges' names.

211 VonDoepp, 91.

212 Compagnon.

Judges Ruling on Faux Dual Citizenship Cases (2000-2011)

<i>Carr v. Registrar General</i> (SC 2000)	Wilson Sandura Adam ²¹³ Ahmed Ebrahim Simbarashe Muchechetere Roger Korsah
<i>Purser v. Registrar General</i> (SC Jan 2001)	Missing data
<i>Tsvangirai v. Registrar General of Elections</i> (HC Feb 26, 2002)	Ishmael Adam
<i>Registrar General & Ors v. Tsvangirai</i> (SC 2002)	Godfrey Chidyausiku Wilson Sandura Misheck Cheda Vernanda Ziyambi Luke Malaba
<i>Todd v. Registrar General</i> HC (May 7, 2002)	Sandra Mungwira
<i>Ricarudo Manwere v. Registrar General</i> (HC June 5, 2002)	Yunus Omerjee
<i>Lewis Uriri v. Registrar General of Citizenship and Another</i> (HC 2003)	Missing data
<i>Registrar General of Citizenship v. Todd</i> (SC Feb 26, 2003)	Godfrey Chidyausiku Vernanda Ziyambi Luke Malaba
<i>Job Sibanda v. Registrar-General of Citizenship and Others</i> (SC June 2005)	Tedious Karwi
<i>Trevor Ncube v. Registrar General</i> (HC 2006)	Chinembiri Bhunu
<i>Piroro v. Registrar General</i> (HC 2011)	Susan Mavangira

213 See footnote 257.

This section begins by looking at the High Court judges who issued anti-government rulings on questions of faux dual citizenship. Did the faux dual citizenship cases at the High Court happen to be adjudicated by judges who had been on the court before Mugabe manipulated it? This section finds that the High Court judges adjudicating the faux dual citizenship cases were a combination of recent Mugabe appointments and judges who had been appointed prior to the era in which most judicial manipulation occurred. Most of the judges have strong backgrounds in issuing anti-government rulings, while only one proved more willing to defer to the government's interests. This indicates that the High Court's anti-government rulings on questions of faux dual citizenship were not an exception to a court that otherwise produced decisions favorable to the ruling party.

The first faux dual citizenship case at the High Court was *Tsvangirai v. Registrar General of Elections*, adjudicated by Judge Ishmael Adam. Although the author was unable to identify notable political cases that Judge Adam adjudicated, he displayed willingness to defect from the government through off-bench resistance. Although judges' behavior outside of the courtroom has largely been ignored in judicial politics literature, off-bench resistance gives judges the opportunity to go on strike, gather support, speak to the media, and negotiate with allies and enemies.²¹⁴ For example, Judge Adam once sent a letter to Mugabe urging him to reaffirm the rule of law by making a public statement, following the release of two journalists from *The Standard*.²¹⁵ In response, President Mugabe chastised him—along with other judges who had written similar letters—for improperly using his power as a judge to interfere with the executive branch.²¹⁶

Following the Tsvangirai case, the High Court heard *Todd v. Registrar General*, adjudicated by Sandra Mungwira. Sandra Mungwira joined the bench in 1996 when President Mugabe selected her from a magistrate court.²¹⁷ The “independent” Mungwira who “answered only to the law” never received land from the FTLRP, unlike most of colleagues on the High Court.²¹⁸ She delivered

214 Alexei Trochev and Rachel Ellett, “Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance,” *Journal of Law and Courts* 2, 1 (Spring 2014): 68.

215 Jacob Chikuhwa, *A Crisis of Governance Zimbabwe* (New York: Algora Publishing, 2004): 55.

216 Chikuhwa, 55-56.

217 “Mungwira Buried in Scotland,” *The Zimbabwe Independent* (October 26, 2007). Government of Zimbabwe, “Zimbabwean Government Gazette: Appointment of Judges of the High Court of Zimbabwe,” (September 27, 1969): 869.

218 “Zimbabwean Legal Crusader Dies,” *Voice of America* (October 29, 2009).

her most notable decision in 2004, when she issued a major anti-government ruling in a highly political case. In this case, she acquitted six opposition party activists who were accused of murdering a ZANU-PF loyalist in 2001.²¹⁹ She found that the fourteen policemen who served as witnesses had all lied in court.²²⁰ Judge Mungwira also determined that the defendants' confessions were false, as they had been derived under duress.²²¹ Throughout the trial, Mungwira's court staff was harassed by government agents, and defense attorneys and their families were threatened by pro-government forces.²²² Judge Mungwira herself faced threats following her ruling, forcing her into exile in the UK.²²³ However, despite the highly political nature of this case and the risk of violence, Justice Mungwira was still willing to issue an anti-government decision.

One month later, Judge Yunus Omerjee adjudicated *Ricarudo Manwere v. Registrar General*. In a leaked document from late 2000 by former US ambassador to Zimbabwe Tom McDonald, Justice Omerjee reported that he was "increasingly fearful" that "government harassment and intimidation [of the judiciary] were just around the corner."²²⁴ He criticized Mugabe, saying the president would do "whatever is necessary to remain in power," including appointing government loyalists to the bench.²²⁵ His criticisms also extended to his colleague, Chief Justice Godfrey Chidyausiku, whom he called a "rabid party man through and through."²²⁶ Like Sandra Mungwira, Justice Omerjee also issued major anti-government rulings in highly political cases. In 2003, police raided the offices of the independent newspaper the *Daily News* and confiscated computers.²²⁷ In response, Justice Omerjee issued a decision ordering the electronics to be returned.²²⁸ In a 2008 ruling, Omerjee ordered police to release thirty-two opposition activists who had

219 *Ibid.*

220 *Ibid.*

221 *Ibid.*

222 "Our Hands are Tied: Erosion of the Rule of Law in Zimbabwe," *Human Rights Watch* (November 8, 2008).

223 Jailed Zimbabwe Activists Caught in Legal Battle, CNN (Dec. 27, 2008), <http://edition.cnn.com/2008/WORLD/africa/12/27/zimbabwe.police/index.html>

224 MacDonald Dzirutwe, Zimbabwe Judge Orders Immediate Release of Activist, Reuters (Dec. 24, 2008, 2:34 am), <https://www.reuters.com/article/uk-zimbabwe-crisis/zimbabwe-judge-orders-immediate-release-of-activist-idUKTRE4BN10220081224>

225 Inyasha Chivara, "Vicious Smear Campaign to Oust Law-Abiding Judge in Zimbabwe," *Mail and Guardian* (April 5, 2013).

226 *Ibid.*

227 "Police Raid Offices of Daily News," *Committee to Protect Journalists* (September 16, 2003). 228 Andrew Meldrum and Rory Carroll, "Zimbabwe Paper Shut Despite Court Order," *The Guardian*, September 20 (2003).

228 "Jailed Zimbabwe Activists Caught in Legal Battle," CNN (December 27, 2008).

been arrested and imprisoned.²²⁹ In 2011, Omerjee dealt another major blow to the government by ordering the release of six former army officers accused of plotting a coup against President Mugabe.²³⁰

The author was unable to gain access to the name of the judge who adjudicated *Lewis Uriri v. Registrar General of Citizenship and Another*. As a result, we skip to *Job Sibanda v. Registrar-General of Citizenship and Others*, adjudicated by Judge Tedious Karwi. Like his colleagues Justice Omerjee and Justice Mungwira, Karwi also has a history of issuing anti-government rulings in major political cases. In one 2009 order, Justice Karwi upheld the conviction and imprisonment sentence of state prosecutor Andrew Kumrie, on a contempt of court charge.²³¹ Judge Karwi also “urged the government” to provide medical treatment to eight imprisoned journalists and human rights activists.²³² In another 2009 case, Karwi ordered an MDC opposition leader, Roy Bennett, to be released on bail after being charged with terrorism and treason.²³³

Judge Chinembiri Bhunu, who adjudicated the Trevor Ncube case, was the one exception to the strong background of independent rulings of the other High Court judge. President Mugabe appointed Bhunu to the High Court in 2003 from the Labour Court.²³⁴ Bhunu is well known for his rulings against members of the opposition.²³⁵ He is known for purposely letting cases sit for years without giving them their day in court.²³⁶ In 2016, after waiting five years to deliver his decision, Judge Bhunu found two MDC activists guilty of killing a police officer.²³⁷ However, even Bhunu’s record is mixed. He has also issued rulings that have gone against the ZANU-PF’s interests. In 2013, Bhunu released four of Morgan Tsvangirai’s aides on bail.²³⁸ He also ordered the release of twenty-one MDC activists from prison.²³⁹

229 “Jailed Zimbabwe Activists Caught in Legal Battle,” *CNN* (December 27, 2008).

“Zimbabwe Judge Orders Immediate Release of Activist,” *Reuters* (December 24, 2008).

230 Columbus Mavhunga, “Court Orders Release of Alleged Coup Plotters in Zimbabwe,” *CNN* (May 24, 2011).

231 “Justice Karwi Confirms Imprisonment of State Prosecutor Kumire,” *Zimbabwe Lawyers for Human Rights (ZLHR)* accessed from *Kubatana* (October 27, 2009).

232 “Judge Denies Bail to Photographer who Claimed to Abuse,” *Committee to Protect Journalists* (January 16, 2009).

233 “Zimbabwe Judge to Rule in Opposition Official Case,” *CNN* (March 4, 2009).

234 “Chinembiri Bhunu,” *Pindula* (January 8, 2018).

235 “Justice Chinembiri Bhunu Exposed,” *Zim Morning Post* (September 28, 2020).

236 *Ibid.*

237 “Chinembiri Bhunu,” *Pindula*.

238 “Judge Grants Bail to Tsvangirai’s Research Aides,” *Zimbabwe Human Rights NGO Forum* (March 28, 2013).

239 Laura Klein Mullen, “Zimbabwe Court Orders Release of 21 Members of Opposi-

The activists were part of a group of twenty-nine, known as the Glenview 29, who were imprisoned for allegedly murdering a police officer in the Harare suburb of Glenview.²⁴⁰

The last faux dual citizenship case heard before the adoption of the 2013 constitution was *Piroro v. Registrar General*, adjudicated by Susan Mavangira. She was appointed to the High Court in 2002, after being selected from the Administrative Court where she served as President.²⁴¹ Although she received land through the FTLRP, she has a history of anti-government rulings in critical political cases. In 2003, Judge Mavangira released Morgan Tsvangirai on bail after he was jailed for organizing demonstrations against President Mugabe.²⁴² Today, Mavangira—who has been elevated to the Supreme and Constitutional courts—continues to issue major anti-government rulings. In 2021, she overturned Judge Bhunu’s ruling which convicted two MDC activists for murdering a police officer.²⁴³

A review of the High Court judges who issued anti-government decisions on faux dual citizenship cases reveals that they proved willing to issue anti-government rulings in highly political cases with the exception of Judge Bhunu, whose record is more mixed. This is consistent with secondary source literature, which suggests that even recent Mugabe appointments to the High Court did not completely defer judgments to the benefit of the government. Although the author was unable to determine when all of these judges joined the High Court, this section reveals that some were recent Mugabe appointments who had joined the bench during the era of judicial manipulation, while others had been on the bench for years. Judges who had been on the court for a few years and recent Mugabe appointments alike were willing to produce anti-government rulings in major political cases. This reveals two things. It reflects Peter VonDoepp’s argument that suggests it is more difficult for the government to find loyal judges to appoint to the High Court. It also reveals that the Judge President may have been unsuccessful in identifying compliant judges to distribute important cases to. Now, let us turn to the Supreme Court justices who adjudicated faux dual citizenship questions. Was Mugabe more successful in manipulating the Supreme Court than the High Court? Were the new Supreme Court justices more solidly pro-government than those on

tion Party,” *Jurist* (September 19, 2003).

240 “Court Watch 10-2021 - The Last of the Glenview 29 Finally Acquitted - Ten Years Later,” *VeritasZim* (June 9, 2021)

241 Lydia Polgreen, “A Zimbabwe Judge Frees Opposition Leader Jailed by Mugabe,” *New York Times* (June 21, 2003).

242 “Susan Mavangira,” *Pindula* (December 12, 2016).

243 “Supreme Court Frees 2 MDC Activists Jailed for ‘Killing’ Zimbabwe Policeman,” *Voice of America* (June 4, 2021).

the High Court?

This section begins by analyzing the Supreme Court justices who adjudicated the first dual citizenship case heard after judicial manipulation commenced. The *Tsvangirai* decision was decided by a full panel of five Supreme Court justices: Chief Justice Godfrey Chidyausiku, Wilson Sandura, Misheck Cheda, Vernanda Ziyambi, and Luke Malaba. The three latter judges were those Mugabe added to the bench to increase the size of the Supreme Court from five to eight justices. Chief Justice Godfrey Chidyausiku's pro-government tendencies were widely known when President Mugabe appointed him to replace Anthony Gubbay in 2001. His career began as a ZANU-PF lawyer and member of parliament at independence.²⁴⁴ Mugabe eventually appointed him as Deputy Minister, and then to the High Court where he served as Judge President.²⁴⁵ As Judge President, Chidyausiku changed the way cases were allocated to judges. Cases were traditionally allocated on a roster basis.²⁴⁶ This was until Judge Chidyausiku took control of the allocation process and assigned cases of higher political importance to judges believed to be loyal to the ZANU-PF.²⁴⁷ This process continued by the new judge president after Chidyausiku was appointed chief justice, and into the era in which faux dual citizenship cases were adjudicated.²⁴⁸ President Mugabe relied on Chidyausiku's help to rewrite the constitution in 2000 and ensure it aligned with the wishes of the ruling party.²⁴⁹ Justice Chidyausiku went on to issue a pro-government ruling in the Supreme Court's *Todd* decision, but he is most known for writing the judgment that legalized the FTLRP and overturned the Supreme Court's initial declaration that the program was illegal.²⁵⁰

Wilson Sandura, who was appointed by President Mugabe in 1998 and remained on the bench until his retirement in 2011, had a less convincing record of pro-government tendencies. In a wikileaks cable from 2002, US ambassador to Zimbabwe Tom McDonald stated that Sandura was "widely respected for his non-partisan reading of the law" and was "one of the last...independents" on the Supreme Court.²⁵¹ In 1989, President Mugabe appointed Wilson Sandura to

244 Alex Magaisa, "BSR: Chief Justice Chidyausiku - A Judge of the Revolution," *Big Saturday Read* (February 25, 2017).

245 *Ibid.*

246 Goredema, 117.

247 Matyszak, 339.

248 *Ibid.*, 339.

249 *Ibid.*, 339.

250 Magaisa, 2017.

251 Bureau of African Affairs, "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," Wikileaks Cable: 02HARARE38_a, dated January 4, 2002; "Mugabe Appoints his Judges," *News24*, (July 27, 2001).

lead a corruption scandal investigation known as Willowgate, which led to the resignation of top ZANU-PF cabinet members.²⁵² Sandura was also the sole judge to oppose a prison sentence on the MDC treasurer general, Roy Bennet.²⁵³ Justice Sandura also dissented in a case that ruled journalists must be “accredited before operating in the country,” as he perceived it as an attack against freedom of speech and a tool used to silence critics.²⁵⁴

Despite Sandura’s record of independence, he still ruled to overturn the High Court’s decision and issue a pro-government ruling on the faux dual citizenship question in the *Tsvangirai* case.²⁵⁵ However, because Sandura had been on the court since 1998, he had also ruled on the *Carr* decision (the first faux dual citizenship case which was heard in 2000). In this case, Sandura issued an anti-government decision by ruling in favor of Robyn Carr whose citizenship rights were abused. This demonstrates that Sandura changed his interpretation of dual citizenship law. He previously recognized the illegality of withholding Zimbabwean citizenship from those with the potential to claim a foreign citizenship in the *Carr* case, but changed his interpretation in the *Tsvangirai* decision.

If Sandura was recognized as an independent justice, why would he rule in favor of the government in the *Tsvangirai* case? Sandura’s flip can be explained by two factors. First, Tsvangirai was the leading opposition candidate against Mugabe and brought the case to the court ahead of the 2002 presidential election as an attempt to enfranchise more of his supporters. This likely increased the political saliency of the decision, and thus the motivation to side with the government. Second, the composition of the Supreme Court looked drastically different in 2000 during the *Carr* decision than it did in 2002 when the *Tsvangirai* decision was issued. The new judges, particularly the new chief justice, may have influenced Sandura to take a pro-government stance, giving further credence to the idea that the Supreme Court’s collegial structure may help explain its switch from anti-government rulings to pro-government rulings on the faux dual citizenship question. The new judges added to the Supreme Court may have swayed Sandura into issuing a pro-government ruling in the *Tsvangirai* case.

When Sandura ruled on the *Carr* case, he issued the decision with Ahmed

252 Karl Maier, “3 Cabinet Ministers Quit in Zimbabwe as Corruption Report is Published,” *Washington Post* (April 15, 1989).

253 Gibbs Dube, “Zimbabweans Say Retired Late Justice Sandura Made Rulings Without Fear, Favour,” *Voice of America* (March 12, 2015).

254 *Ibid.*

255 Although Sandura agreed with the ruling, he issued some reservations concerning Chidyausiku’s legal arguments.

Ebrahim, Simbarashe Mucshete, Roger Korsah, and Adam.²⁵⁶ Mugabe appointed Justice Ebrahim to the Supreme Court in 1990.²⁵⁷ In 2001, Justice Ebrahim was the only justice to dissent in the Supreme Court decision that legalized the FTLRP.²⁵⁸ He was remembered for issuing rulings unfavorable to Mugabe's party, resisting government pressure to retire early, and his "respect of the law and independent thinking."²⁵⁹ Similarly, Justice Simbarashe Mucshete was perceived to be "independent of party politics."²⁶⁰ In 1999, Justices Mucshete, Sandura, and McNally warned Mugabe that he was "inviting anarchy by ignoring two High Court orders to release editor Mark Chavunduka of *The Standard*, after he was illegally detained by military police."²⁶¹ Justice Roger Korsah, a foreign judge from Ghana, was known for issuing a High Court decision in the 1980s against the government for attempting to seize property from a white businessman.²⁶² News reports on these judges reveal that Sandura was working on a Supreme Court with more independence during the *Carr* decision. This helps explain why Sandura flipped from an anti-government interpretation to a pro-government stance. The composition of the court looked different and influenced him, giving further credence to the argument that the collegial structure of the Supreme Court leaves the justices more susceptible to the influence of their colleagues.

Misheck Cheda was one of Robert Mugabe's newest appointments, only just joining the bench in 2001 with the two other justices Mugabe had appointed to accommodate a larger Supreme Court of eight justices.²⁶³ Before joining the Supreme Court, Cheda had been a judge on the Bulawayo High Court since 1991.²⁶⁴ When Cheda was first appointed, Law Society President Sternford Moyo

256 Unfortunately, the original judgment does not include Judge Adam's first name. This is an issue because there were two judges with the last name of Adam: Ishmael Adam and Mohamed Ali Adam. The author was also unable to locate secondary source materials that could determine which of the two judges adjudicated this case.

257 "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," dated January 4, 2002.

258 Compagnon, 155.

259 "Ahmed Ebrahim," *ESPN CricInfo*, <https://www.espncriinfo.com/player/ahmed-ebrahim-55398>. "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," dated January 4, 2002.

260 "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," dated January 4, 2002.

261 Angus Shaw, "Zimbabwe Leader Accuses Judges," *AP News* (February 7, 1999).

262 "Foreign News Brief," *United Press International* (November 11, 1983).

263 "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," dated January 4, 2002. "Cablegate: President Mugabe Appoints Three Additional Supreme Court Judges," dated August 8, 2001.

264 "Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF's Influence Over Bench," dated January 4, 2002.

described Cheda as a “sound judge who renders judgments based on his reading of the law, not political affiliation.”²⁶⁵ Cheda criticized Chidyausiku’s pro-government ruling on the FTLRP that overturned the High Court’s decision declaring it illegal, calling the Chief Justice’s decision “erroneous.”²⁶⁶ However, his record on the bench reflects stronger ZANU-PF tendencies. Although he was said to produce “fair judgments at the High Court,” his nomination to the Supreme Court was political in that he was appointed ahead of more senior High Court judges.²⁶⁷ As a beneficiary of the FTLRP, Cheda also ruled in favor of legalizing the farm invasions.²⁶⁸

Vernanda Ziyambi was the first woman to join the Zimbabwe Supreme Court bench when Mugabe selected her from the High Court of Harare.²⁶⁹ She was considered a political appointment because she was selected over more qualified judges and was described as having “weaker legal credentials than her counterparts.”²⁷⁰ Further, her husband was Minister of Justice for President Mugabe until he was killed in a car accident in 1991.²⁷¹ Ziyambi’s ties to the ZANU-PF through her husband led some observers to be suspicious of her, suggesting she did not “possess the same caliber of legal mind” as the other judges appointed.²⁷² Not everyone was convinced that she would be loyal to the ruling party at the time of her appointment. Sternford Moyo, for example, believed her “strong religious convictions would play a more important role in guiding her decisions than any political sympathies.”²⁷³ However, Ziyambi followed her pro-government ruling in the *Tsvangirai* decision by also issuing a pro-government ruling in the *Todd* decision a year later.

Luke Malaba was another justice who ruled on the *Tsvangirai* and *Todd* cases and was another one of the three justices Mugabe added to the Supreme Court to increase the number of justices on the bench.²⁷⁴ Moyo described Justice Malaba as a “sound and capable lawyer” and “one of the most able in Matabeleland.”²⁷⁵

265 *Ibid.*

266 “Cablegate: President Mugabe Appoints Three Additional Supreme Court Judges,” dated August 8, 2001.

267 Compagnon, 155.

268 *Ibid.*, 155.

269 “Loss of Two Zimbabwe Supreme Court Justices Strengthens ZANU-PF’s Influence Over Bench,” dated January 4, 2002.

270 *Ibid.*

271 *Ibid.*

272 *Ibid.*

273 *Ibid.*

274 *Ibid.*

275 *Ibid.*

He also stated that Justice Malaba has a “strong human rights background,” an analysis he likely derived from Malaba’s “fair judgments” on the High Court.²⁷⁶ Others argue that Malaba was still a political appointee. He was a war veteran with a “reputation as a dedicated ZANU-PF supporter,” he was appointed over more senior judges, he was a beneficiary of the FTLRP, and he was selected on the suspicion that he would produce a pro-government ruling on land reform.²⁷⁷ As a recipient of land seized from the FTLRP, it is unsurprising that he delivered on the government’s hopes when ruled to overturn the High Court’s decision that declared the FTLRP illegal in December 2001.²⁷⁸ In 2008, the SADC established a special tribunal for the FTLRP and the court found the program illegal. In response, Justice Malaba wrote a judgment declaring that the SADC tribunal bore no legal weight in Zimbabwe and that the country was not required to comply. In 2013, Justice Malaba dissented on a decision that required President Mugabe to set an official date for the election.²⁷⁹

POLITICAL SALIENCY OF DUAL CITIZENSHIP IN POST-2013 CONSTITUTION ZIMBABWE

Now that we have attempted to explain the differences in Supreme Court and High Court rulings, we now turn to the Constitutional Court’s rulings on dual citizenship. The Constitutional Court was operating in an environment in which questions of dual citizenship became less politically salient. With the legalization of dual citizenship, a unity government between the Movement for Democratic Change and the ZANU-PF in place, and the land reform program already implemented, the court upheld individuals’ citizenship rights. The issue of dual citizenship became less important in the new political context. Moreover, the Constitutional Court has largely sided with the new president’s government.²⁸⁰ The Constitutional Court may have ruled against the Registrar General partly because his legal interpretation of citizenship law represented a footprint of Mugabe’s government and did not necessarily reflect the new administration’s goals.

²⁷⁶ *Ibid.*

²⁷⁷ Compagnon, 155. “Three judges asked to withdraw from land case,” *News24* (September 19, 2001).

²⁷⁸ Compagnon, 155.

²⁷⁹ “Con-Court Bench Members’ Profile,” *Bulawayo 24* (August 23, 2018).

²⁸⁰ Ellett, “Judicial Power,” 155.

IMPLICATIONS

This paper's findings provide two key contributions to judicial politics literature. First, lower courts may be better equipped to maintain independence in backsliding democracies and autocratic regimes than the apex court, due to structural factors. In Zimbabwe, these structural factors exist within each individual court and they interact with the broader hierarchy of the judiciary. Second, not all judges appointed by an executive who attempt to manipulate the judiciary are always loyal to the government, even in highly sensitive political cases. Recent scholarship suggests that judges are more willing to defer to the government in more important political cases, and issue anti-government rulings in cases less salient to the government's interests. However, my findings reveal that the High Court judges who adjudicated faux dual citizenship cases, were willing to issue anti-government rulings even in the most critical cases. This is unlike the Supreme Court, which proved more willing to succumb to pro-government judgments.

CONCLUSION

The difference between the High Court's and Supreme Court's rulings on questions of dual citizenship reflect upon the hierarchical structure of the judicial system. The Supreme Court, being the final court of appeal until 2013, was under increased pressure to rule on the side of the Mugabe government when a dual citizenship case went to the court. The High Court, whose decisions could be appealed, felt less political pressure to side with the regime, knowing that the Registrar General would appeal to a packed Supreme Court that would overturn the ruling. Additionally, issuing anti-government rulings may have also been an attempt by the High Court to increase domestic and international legitimacy, as Mugabe's manipulation of the judiciary had been no secret. Knowing that its rulings could be overturned on appeal, anti-government stances on faux dual citizenship questions may have been seen as an easy way to increase legitimacy with few political consequences. Moreover, the collegial structure of the Supreme Court created an environment that opened up more room for justices to influence each other. This is unlike the High Court, where judges usually adjudicate cases on an individual basis. The Constitutional Court was operating in an environment in which questions of dual citizenship became less politically salient. With a unity government, the land reform program implemented, and the legalization of dual citizenship the court upheld individuals' citizenship rights.

Today, the judiciary and the 2013 Constitution are under assault, opening up the possibility that questions of citizenship and belonging could return to the

courts. Because the seven-year transition phase that provided for the temporary appointment of high-ranking judges to the Constitutional Court ended in 2020, President Emmerson Mnangagwa has sought to manipulate the judiciary. In 2021, the Constitution was amended to increase the mandatory retirement age for judges from seventy to seventy-five.²⁸¹ Further, High Court, Supreme Court, and Constitutional appointments can now be made by the President, without conducting public nominations and interviews, which were originally provided for in the 2013 Constitution.²⁸² However, these amendments are beginning to be challenged in the courts. The High Court has already ruled that extending the mandatory retirement age is unconstitutional.²⁸³ While the cases are still unfolding, it is promising that the High Court has already declared Mnangagwa's manipulation of the retirement age unconstitutional. As Zimbabwe continues to struggle with democratization, and the courts are left increasingly judicialized, the possibility that questions surrounding citizenship will return to the courts remains. However, my findings provide some hope in the current, global era of democratic backsliding. Even in the autocratic environment of Mugabe-era Zimbabwe, the manipulated High Court was able to maintain some independence. It continued to issue anti-government rulings on dual citizenship questions, ignoring the Supreme Court's higher authority.

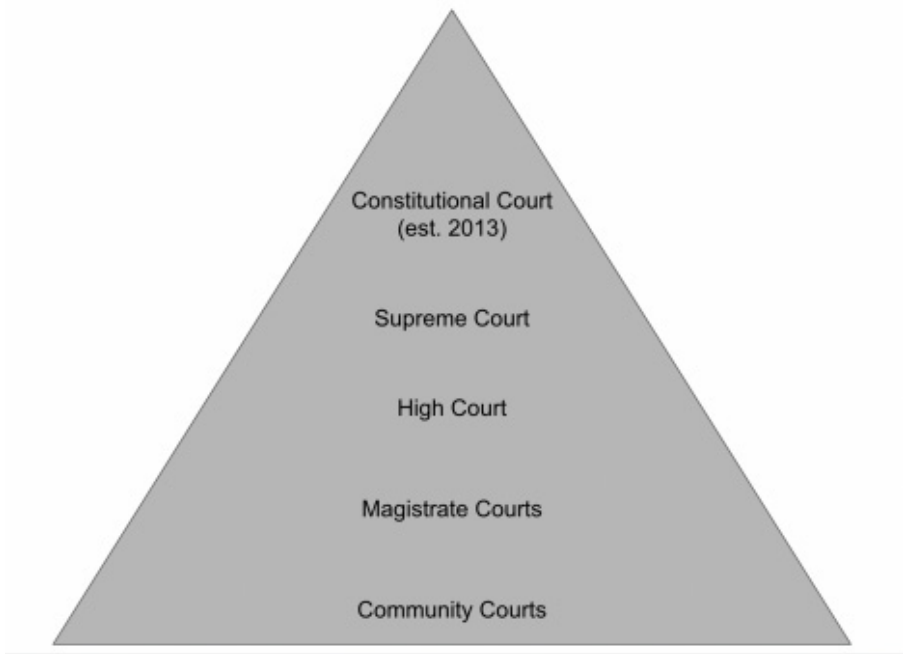
281 Arthur G. O. Mutumbara, "Constitutional Amendment: Implications for Democracy and Constitutionalism," *ZimLive* (May 7, 2021).

282 *Ibid.*

283 Macdonald Dzirutwe, "Zimbabwe Court Rules Chief Justice's Tenure Extension is Invalid," *Reuters* (May 15, 2021).

Appendix

Figure 1: Hierarchical Structure of the Zimbabwean Judiciary²⁸⁴



284 From bottom to top, the courts are arranged from the lowest level (community courts) to the highest level (Constitutional Court).

Figure 2: Faux Dual Citizenship and Real Dual Citizenship Cases (2000-2022)

High Court	Supreme Court	Constitutional Court
<p>Court packing & purges (2001-2002)</p> <p><i>Tsvangirai v. Registrar General of Elections (2002)</i></p> <p><i>Todd v. Registrar General (2002)</i></p> <p><i>Ricardo Manyere v. Registrar General (2002)</i></p> <p><i>Lewis Uiri v. Registrar General of Citizenship and Another (2003)</i></p> <p><i>Job Sibanda v. Registrar-General of Citizenship and Others (2005)</i></p> <p><i>Trevor Ncube v. Registrar General (2006)</i></p> <p><i>Roland Whitehead v. Registrar General & Ors (2012)*</i></p> <p>Adoption of new constitution (2013)</p> <p><i>Piroro v. Registrar General (2011)</i></p> <p><i>MDC-T & Ors v. ZEC & Ors (2017)</i></p> <p><i>Shaw and Another v. Registrar General of Citizenship and 3 Others (2022)</i></p>	<p><i>Carr v. Registrar General (2000)</i></p> <p><i>Purser v. Registrar General (2001)</i></p> <p>Court packing & purges (2001-2002)</p> <p><i>Registrar General & Ors v. Tsvangirai (2002)</i></p> <p><i>Registrar General of Citizenship v. Todd (2003)</i></p> <p>Adoption of new constitution (2013)</p> <p><i>Roland Whitehead v. Registrar General, Co-Ministers of Home Affairs, & Ors (2013)*</i></p>	<p><i>Mawere v. Registrar General & Others (2013)*</i></p> <p><i>Madzimbamuto v. Registrar General & Others (2014)*</i></p>
<p style="text-align: center;">Key</p> <p style="text-align: center;">Ruled against the Registrar General (anti-government ruling)</p> <p style="text-align: center;">Ruled in favor of the Registrar General (pro-government ruling)</p> <p style="text-align: center;">*indicates a real dual citizenship case (not a faux dual citizenship case)</p>		

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ARTICLE**THE UPDATED CASE FOR THE LEGISLATIVE OVERRIDE**

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Abstract

Recent discourse over alternative judicial systems has led to some scholars considering an American legislative override.¹ A legislative override would be a statute or constitutional amendment passed by Congress that increases its role in constitutional interpretation. This paper shows that a legislative override, following an updated version of the Stephanopoulos model, would make the United States more democratic by increasing the public's role in constitutional interpretation without infringing upon rights or giving Congress a dangerous amount of power. In order to do this, I attempt to determine if Canadian and Israeli overrides and state pseudo-usage in the United States have meaningfully increased public discourse over and participation in constitutional interpretation. I conducted a content analysis of news articles, opinion pieces, and editorials to determine this. I coded for references to the override and attitudes taken towards it in three different case studies. These case studies revealed that Canadian and Israeli overrides and state pseudo-usages may have meaningfully increased public discourse over and participation in constitutional interpretation. Using these case studies, I also seek to refine and update the Stephanopoulos model. I encourage a close adherence to the existing model along with a removal of the establishment, free exercise, and privileges and immunities clause from the list of provisions that may be overridden.

There have been six presidential elections in America in the 21st century. Presidents who lost the popular vote won two of these elections.² Combined, these two presidents nominated five justices to lifetime appointments on the Supreme Court, making up a majority of the bench. This creates concerns within the American public that the Court does not represent the people's interests and ideologies. Additionally, the Court has recently come under fire for numerous ethics concerns; most notably, Ginni Thomas, Justice Clarence Thomas's wife, has

1 Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 *UCLA J. INT'L L. & Foreign Aff.* 250 (2005).

2 Jesse Wegmen, *Let the People Pick the President* (2020).

recently been the subject of investigative journalism for her role in the January 6th insurrection.³ On top of these issues of representation and ethics, the public has begun viewing the Supreme Court as an increasingly politicized branch.⁴

Policymakers and thinkers have proposed numerous reforms to solve some of these issues including dismantling the electoral college system, requiring justices to sign ethics agreements, expanding the Court, and instituting term limits for justices.⁵ The concerns addressed by these reforms are just the beginning of a long list of grievances that the American people have with the Supreme Court and the institution of government as a whole. One of the most important concerns on this list is the size of the American public's role in constitutional interpretation. One reform proposed to address this concern is the legislative override.⁶

A legislative override would be either a statute or constitutional amendment passed by Congress that increases its role in constitutional interpretation. According to Stephanopoulos's construction of the reform, an override would work in the following way. After the Supreme Court finds an act of Congress to be unconstitutional, Congress would re-pass the law with a new clause stating that the law will continue to function notwithstanding the section of the Constitution that the Court found it to violate. Canada and Israel currently have overrides written into their constitutions.⁷ While there are no official legislative overrides anywhere in the United States, the ease with which states can amend their constitutions is somewhat similar to that of an override. A depth of literature hypothesizes that legislative overrides increase the public's role in constitutional interpretation.⁸

In this paper, I show that a legislative override, following an updated version of the Stephanopoulos model, would make the United States more democratic by increasing the public's role in constitutional interpretation without

3 Danny Hakim & Jo Becker, *The Long Crusade of Clarence and Ginni Thomas*, NYT (Sept. 1, 2022), <https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html>.

4 Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. (2012).

5 Michelle Adams et. al., *Presidential Commission on the Supreme Court of the United States Draft Final Report*, U.S. WHITE HOUSE (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

6 *Id.*

7 *Supra* note 1.

8 Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221 (2002); Peter H. Russell, *Standing Up For Notwithstanding*, 29 ALBERTA L.R. 293 (1991); Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457 (2011).

infringing upon rights or giving Congress a dangerous amount of power. In order to do this, I attempt to determine if Canadian and Israeli overrides and state pseudo-usage in the United States have meaningfully increased public discourse over and participation in constitutional interpretation. Per existing literature, I hypothesize that it will increase discourse and participation. I also seek to refine and update the Stephanopoulos model. This paper will begin with a consideration of existing literature and the methods used to answer these questions. I will then report the results of the work done to answer these questions. The paper will then end with a consideration of the normative consequences of this research, including a refinement of the Stephanopoulos model.

Making Constitutional Interpretation More Democratic

The Problem with Judicial Review

Judicial review, the power that allows a court to determine the constitutionality of actions taken by a legislative branch, was claimed by the United States Supreme Court in *Marbury v. Madison*.⁹ Starting with *Dred Scott v. Sandford* in 1857, the Court began practicing judicial review with relative frequency. Today, the power of judicial review is completely institutionalized in American democracy. This power has been extended so far that Supreme Court decisions are now thought to bind the future actions of Congress, the President, and the states.¹⁰ The public, the press, and even most officials in the legislative and executive branches believe in judicial supremacy.¹¹ However, many scholars today are concerned by the theoretical dangers wide, sweeping judicial review, like judicial supremacy, pose to democracy.¹² The two main issues with strong judicial review are its inherent democratic illegitimacy and its falsely claimed superiority

9 William E. Nelson, Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860, 120 U. PA. L. REV. 1166 (1972).

10 *Supra* note 5.

11 Neal Devins, *Congressional Responses to Judicial Decisions*, WILLIAM & MARY LAW SCHOOL SCHOLARSHIP REPOSITORY (2008), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2671&context=facpubs>.

12 Alon Harel & Adam Shinar, Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review, 10 INT'L J. CONST. L. 950 (2012); Ran Hirschl, Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in

Comparative Perspective, 34 U. RICH. L. REV. 415 (2000); Miguel Schor, Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty, 16 MINN J. INT'L L. 62 (2007); Mark Tushnet, Taking the Constitution Away from the Courts (1999).

at protecting rights.¹³

Since federal judges are not elected, the public does not get the chance to select them, meaning that judges cannot be true representatives of the people.¹⁴ Additionally, these officials are not beholden to public opinion, as they do not rely on voters to retain their position through elections. Additionally, these officials are not beholden to public opinion, as they do not rely on voters to retain their position through elections. Such a lack of accountability allows the Court to interpret the Constitution without deference to the public's interpretation. Excluding the public from representation in decisions surrounding legality is inherently not democratic. Such exclusion also hinders democratic function by making constitutional interpretation a monologue rather than a dialogue. Customarily investing all power to interpret the Constitution in a single branch of the government hinders discussion of the Constitution's meaning.¹⁵ Constitutional interpretation is fundamentally poorer when the other branches and the public are not allowed to participate in the debate.¹⁶

The other major concern is that the courts are not superior to the other branches or the public in ensuring rights are protected. History has shown that judges, like all people, get caught up in the rush of social movements, which makes them unlikely to actually prevent tyranny.¹⁷ Since there is no evidence to support that judges are better at protecting rights in the face of majoritarianism, the concerned scholars argue that there is no good reason to allow the current, inherently not democratic system to stay in place.

13 Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L. J.* 1346 (2006).

14 Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 *U. RICH. L. REV.* 415 (2000); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

15 Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 *U. RICH. L. REV.* 415 (2000); Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 *MINN J. INT'L L.* 62 (2007).

16 James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 *BYU L. REV.* 1037 (1993).

17 Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 *INT'L J. CONST. L.* 950 (2012); Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 *U. RICH. L. REV.* 415 (2000); Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 *MINN J. INT'L L.* 62 (2007); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L. J.* 1346 (2006).

Other scholars are more concerned about the possible repercussions of shrinking the institution of judicial review. Fallon concedes that courts are no better than legislatures at protecting rights.¹⁸ He theorizes that the anti-democratic issues surrounding judicial review can be ignored, but only if democratic institutions are strong elsewhere. He finds such disregard especially acceptable if judicial review is in place to safeguard against violations of fundamental rights. However, his argument rests on the belief that judicial review only works if the judiciary and the legislature hold veto powers over legislation that violates fundamental rights. In the current system of judicial supremacy, the legislature traditionally does not utilize veto powers while the courts do.¹⁹

One Solution to the Problem: A Legislative Override

One proposed reform to ensure that the legislature and the courts both hold veto power is the creation of a formal legislative override. Legislative overrides, or notwithstanding clauses, formally give legislatures the power to interpret their nation's constitution. Legislatures may pass laws that will operate notwithstanding a provision within the constitution or charter. Canada and Israel are the only countries today with a legislative override written into their charter.²⁰ The override has been used nine times in Canada and once in Israel. Canada and Israel are both parliamentary democracies which creates numerous challenges to generalizing the functioning of the notwithstanding clause in these countries to its usage in the United States.

However, since they are the only countries with a version of legislative override, it is still worth considering how they work. Canada's override derives from Section 33 of the Canadian Charter of Rights and Freedoms. The so-called notwithstanding clause allows parliament and provincial legislatures to state that an act "shall operate notwithstanding a provision included in section 2 or sections

18 Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV L. REV. 1693 (2008).

19 Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L J. CONST. L. 950 (2012); Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415 (2000); Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 MINN J. INT'L L. 62 (2007); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

20 Boleslaw Z. Kabala & Rainey Johnson, *An American Notwithstanding Clause? Between Potestas and Potentia*, 10 LAWS 72 (2021); Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & Foreign Aff. 250 (2005).

7 to 15 of this Charter”.²¹ The clause also places a five-year sunset provision on any such declaration: parliament or the province legislature must re-enact the override every five years for its effect to continue.

Israel does not have a formal charter; instead, the country has a set of Basic Laws that serve as its charter. The Israeli override only applies to the Basic Law considering Freedom of Occupation. The override requires a simple majority of votes in the Knesset, Israel’s parliament.²² This override has a sunset provision that functions the same way as Canada’s, but for four years instead of five.

The United States Congress has, occasionally throughout history, practiced a sort of legislative override. Sometimes when the Supreme Court rules that an act of Congress violates an existing statute, Congress will amend or repeal and replace the law that the Court found their act in violation of.²³ Perhaps the most famous example of such a usage is the Lilly Ledbetter Fair Pay Act. In 2009, Congress passed this Act in response to a Court decision that, in practice, severely limited the statute of limitations surrounding Title VII pay discrimination cases. However, this paper considers the role of the other branches and the public in constitutional interpretation, not statutory interpretation.

The closest thing to a constitutional legislative override in the United States occurs when state legislatures attempt to pass legislatively referred state constitutional amendments in response to unfavorable state court decisions. States design their own procedures for amending their constitutions, so many state constitutions are easier to amend than the United States Constitution.²⁴ The relative ease of altering the constitution in these states after a court interprets the state constitution differently from the state legislature is analogous to an override. In such an override, Congress creates legislation that conflicts with the court’s interpretation of the Constitution. The highly complicated process of changing the United States Constitution makes it impractical for Congress to change the Constitution every time they disagree with the court’s interpretation of it. State-level pseudo-overrides provide an interesting lens to consider what it might be like if it were easier for Congress to express its interpretation of the Constitution.

21 Can. Const. Act., 1982, pt. 1, §33, Canadian Charter of Rights and Freedoms, <https://laws-lois.justice.gc.ca/eng/Const/page-12.html>.

22 Basic Law: the Knesset, Freedom of Occupation (1994) (Isr.).

23 Kathryn A. Eidmann, Ledbetter in Congress: The Limits of a Narrow Legislative, 117 YALE L. J. 971 (2008); Nicholas Stephanopoulos, The Case for the Legislative Override, 10 UCLA J. INT’L L. & Foreign Aff. 250 (2005).

24 Bruce E. Cain & Roger G. Noll, Malleable Constitutions: Reflections on State Constitutional Reform, 87 TEX L. REV. 1517 (2009).

It has been argued that a formal federal legislative override would increase the role of the public and Congress in the act of Constitutional interpretation, making it inherently more democratic.²⁵ A legislative override would formally give Congress equal power to interpret the Constitution. Giving elected officials and the public more opportunity to participate in the discourse surrounding Constitutional interpretation allows the people more of a voice in this process, making the system more democratic.²⁶ The override would also make final interpretations better because the discourse would include more viewpoints that would otherwise be excluded.²⁷

Before the structure of the override can be discussed, it is important to consider whether an override would even be constitutional. After all, the Constitution does not give courts the power of judicial supremacy or even judicial review; that is a power the courts claimed for themselves. Thus, most constitutional scholars believe that a law formally instating the override power is well within the bounds of the Constitution.

Ensuring the Solution Doesn't Create a New Problem: The Structure of an American

Legislative Override

As with any reform to improve democratic function, specific limits on the override would be required to address concerns about its possible anti-democratic effects.²⁸ Stephanopoulos began the work of designing an override

25 Michelle Adams et. al., *Presidential Commission on the Supreme Court of the United States Draft Final Report*, U.S. WHITE HOUSE (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>; Boleslaw Z. Kabala & Rainey Johnson, An American Notwithstanding Clause? Between Potestas and Potentia, 10 LAWS 72 (2021); Nicholas Stephanopoulos, The Case for the Legislative Override, 10 UCLA J. INT'L L. & Foreign Aff. 250 (2005).

26 Ran Hirschl, Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective, 34 U. RICH. L. REV. 415 (2000); Miguel Schor, Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty, 16 MINN J. INT'L L. 62 (2007).

27 Tsvi Kahana, Understanding the Notwithstanding Mechanism, 52 U. TORONTO L.J. 221 (2002); Peter H. Russell, Standing Up For Notwithstanding, 29 ALBERTA L.R. 293 (1991).

28 Rivka Weill, Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power, 39 HASTINGS CONST. L.Q. 457 (2011).

that could successfully increase democratic function while also responding to the major concerns voiced about such a reform.²⁹ The first of these concerns is that a legislative override would give too much power to a slim majority of the people, leading to oppressive majoritarianism.³⁰ The Stephanopoulos model addresses this by requiring a supermajority of Congress to support the override. A supermajority makes it more difficult for Congress to use the override to deprive people of their rights.

Sunset provisions also reduce the danger overrides pose to individual rights. Canada and Israel both have sunset provisions to ensure that if constitutional interpretation changes, the law will not persist.³¹ If an override that violates rights manages to pass, a sunset provision requires another supermajority to approve this rights violation again a few years later. Stephanopoulos' override includes a sunset provision without a specific length of time for it.³²

The next major concern surrounding the usage of the override in the United States considers who is allowed to use the override. In Canada, the override can be used by legislatures in provinces, the Canadian equivalent of state legislatures.³³ Since states are often more ethnically and ideologically homogeneous than the country as a whole, arriving at the necessary supermajority to use the override would be easier at the state level than the national level.³⁴ Stephanopoulos resolves this concern by only allowing the federal legislature to use the override in his model.

Scholars also understandably worry that Congress would use the override as a way to circumvent the Constitution rather than interpret it. Stephanopoulos believes limiting what the override applies to would alleviate this concern.³⁵ Instead of applying to the entire Constitution, only specific sections of the Constitution

29 *Supra* note 1.

30 Boleslaw Z. Kabala & Rainey Johnson, *An American Notwithstanding Clause? Between Potestas and Potentia*, 10 *LAWS* 72 (2021).

31 *Can. Const. Act.*, 1982, pt. 1, §33, *Canadian Charter of Rights and Freedoms*, <https://laws-lois.justice.gc.ca/eng/Const/page-12.html>; *Basic Law: the Knesset, Freedom of Occupation* (1994) (Isr.).

32 *Supra* note 1.

33 Laurence Brosseau & Marc-André Roy, *The Notwithstanding Clause of the Charter*, LIBRARY OF PARLIAMENT (May 7, 2018), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf>; Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 *U. TORONTO L.J.* 221 (2002); Peter H. Russell, *Standing Up For Notwithstanding*, 29 *ALBERTA L.R.* 293 (1991).

34 *Supra* note 1.

35 *Id.*

are overridden, as is the case in Canada and Israel.³⁶ Stephanopoulos believes that the override should only apply to indeterminate clauses, clauses in which there is ambiguity and room for debate, except for indeterminate clauses dealing with elections.³⁷ These limitations would require that Congress adhere to all parts of the Constitution in which there is no room for debate.

The final concern over a legislative override is that its establishment would be pointless if it does encourage discourse over constitutional interpretation in reality.³⁸ If the override cannot produce more discourse, then there is no point in undergoing what is sure to be a laborious process to adopt it. Stephanopoulos attempts to ensure that the override encourages discourse in a few different elements of his model. The first of these elements is the prohibition of preemptive uses.³⁹ This prohibition requires the legislature to wait for the courts to rule on the constitutionality of a law before using the legislative override. This ensures that the courts get an opportunity to express their reasoning to the legislature before they use the override.

The next element — Stephanopoulos's requirement of explicit "notwithstanding language" — also encourages discourse by requiring Congress to explain precisely which part of the Constitution they are interpreting that allows them to pass the law.⁴⁰ Stephanopoulos's supermajority requirement and sunset provisions also help ensure discourse. The supermajority requirement requires convincing a large portion of Congress to interpret the Constitution the same way, something impossible without discourse. The sunset provision forces the discourse to be a continual process as Congress must revisit the issue after a set number of years. However, Stephanopoulos's requirements are entirely based on theory; little work has been done to determine if these requirements would effectively increase discourse over and participation in constitutional interpretation.

Methods

The Stephanopoulos model includes a supermajority vote requirement, a sunset provision, a usage restriction to the federal legislature, a limited application to all indeterminate clauses except for elections, a prohibition on preemptive

36 *Supra* note 32.

37 *Supra* note 1.

38 *Supra* note 27.

39 *Supra* note 1.

40 *Id.*

use, and an explicit “notwithstanding language” requirement. I hope to determine whether the presence or absence of these requirements in the Canadian and Israeli overrides and state pseudo-usage in the United States allow for meaningful increases in discourse over and participation in constitutional interpretation. In order to do this, I will test Stephanopoulos’s theory by determining if the usage of overrides sparked or changed public opinion on relevant constitutional interpretation.

Selecting the Case Studies

As previously mentioned, while Canadian, Israeli, and state pseudo-usages are very helpful for studying this question, they are still imperfect case studies with some issues of generalizability. This paper considers Canada and Israel because they are the only countries with overrides in their charters today.⁴¹ As the only countries with a functioning override clause, they provide essential insight into how overrides function in the real world. However, these two countries are parliamentary and have unique political environments different from that of the United States. These differences greatly complicate the generalizability of the usage of overrides in these countries to the theoretical usage of overrides in the United States.

Thus, in this paper, I also consider state pseudo-usages. I define state pseudo-usages as instances in which a legislatively referred constitutional amendment is placed on the state ballot following a state court decision that finds the issue at play in the amendment to violate the state constitution. The state legislature interprets the state constitution differently than the state courts so the legislature introduces an amendment to alter the constitution to enshrine their interpretation. State pseudo-usages are helpful to consider because they occur in the general American political structure and environment that Canadian and Israeli usages lack. Additionally, these state pseudo-usages also require that the court act before the legislature steps in, which tests Stephanopoulos’s requirement that preemptive uses not be allowed.

However, they are still an imperfect case study, as states are often more homogeneous politically than the country as a whole, making issues of polarized gridlock between branches less of a concern. The states are only completing a pseudo-usage of an override — not an actual override — which raises another concern about generalizability. Actual overrides require the legislature to demonstrate their disagreement by using their power to change the interpretation

41 Boleslaw Z. Kabala & Rainey Johnson, *An American Notwithstanding Clause? Between Potestas and Potentia*, 10 *LAWS* 72 (2021); Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 *UCLA J. INT’L L. & Foreign Aff.* 250 (2005).

of their constitution. On the other hand, pseudo-usages change the constitution, not just the way it is interpreted, so the legislature's disagreement with the courts is typically only implied. Thus, these pseudo-overrides preserve judicial supremacy.

Conducting the Content Analysis

These case studies still provide valuable insight into the functioning and effects of legislative overrides, but I will remain cautious in generalizing these findings. Due to a lack of alternative measures of public opinion, such as polls, I rely on the press as an indicator of the thoughts and beliefs of the public in these three case studies.⁴² This paper includes a content analysis of news articles, opinion pieces, and editorials which I coded for references to the override and attitudes taken towards it. While political scientists have used newspapers for years to measure public opinion, there are still flaws to note with this method.

Since editors have authority over what is published, it is possible that newspapers will not always align with public opinion. However, because people rely on newspapers and derivatives of these papers to get a large portion of their news, the biases in these newspapers often ultimately become public sentiment anyways. One additional concern that arises when analyzing newspapers is the challenge of accessing old newspapers. Some newspapers are absent from databases or require fees to access articles that are not within the budget of this research. This gap in the data has the potential effect of biasing the results. The final problem with using newspapers is an issue of a different type of accessibility. Only English-language papers could be analyzed and coded. This is another potential source of bias. For example, French-language newspapers may include different public sentiments than English-language newspapers.

The remainder of this method's section will anatomize the different methods used for each of the three case studies.

The Canadian Case Study

The newspapers used in the Canadian case study were selected from the Library and Archives Canada of the Government of Canada.⁴³ For each usage of

42 Russell Brooker & Todd Schaefer, *Public Opinion in the 21st Century: Let the People Speak?* (2006).

43 *Canadian News Online*, LIBRARY AND ARCHIVES CANADA (2018), <https://>

the override, all accessible English-language newspapers listed under the province in which the override was used were analyzed. The Library and Archives did not list any newspapers for New Brunswick, so papers for that province were pulled from w3newspapers.com, a website with the goal of creating lists of reliable, fact-based newspapers.⁴⁴ The newspapers ultimately analyzed can be found below in *Table 1*.

Table 1: *Provinces in which the Notwithstanding Clause Was Used and Newspapers Analyzed for These Usages*

Province	Year	Newspapers Analyzed
Alberta	2000	<i>The Daily Herald Tribune, The Edmonton Journal, and The Lethbridge Herald</i>
New Brunswick	2019	<i>The Acadie Nouvelle, The Saint Croix Courier, and The Aquinian</i>
Ontario	2021	<i>The Hamilton Spectator, The Ottawa Citizen, The Hill Times, The Record, and The Windsor Star</i>
Quebec	1982, 1988, & 2018	<i>The Gazette</i>
Saskatchewan	1986 & 2017	<i>Leader-Post and The Star Phoenix</i>
Yukon	1982	No accessible newspapers.

Articles within these newspapers were selected for analysis if they fit the following criteria:

- i) The article discussed the act in which the notwithstanding clause was used.
- ii) The article was published within three days of a significant action on the bill (i.e., the bill's introduction, passage, or overturning).

Due to the time constraints surrounding this research, three days was selected as the time period since it covers the majority of the initial public reaction while keeping the number of articles to analyze manageable.

www.bac-lac.gc.ca/eng/discover/newspapers/newspaper-collection/Pages/canadian-news-online.aspx.

⁴⁴ *New Brunswick Newspapers and News Sites*, NEW BRUNSWICK NEWSPAPERS ONLINE (2021), <https://www.w3newspapers.com/canada/newbrunswick/>.

- iii) If the article had a town or province listed as its location, that location must be within the province in which the override was used (i.e., a piece being written in Ottawa would not be considered for an analysis of an override used in Quebec).
- iv) The article was not identical to an article already analyzed (i.e., if an article was published in multiple newspapers, it would only be coded once).

After an article was selected for analysis based on the above qualifications, it was read and coded for the following criteria:

- i) Did the article include the term “notwithstanding clause”?
- ii) Did the article include a discussion of constitutional interpretation? While a specific mention of the sections of the constitution being interpreted was not required, this criterion required, at minimum, a discussion of the rights or freedoms protected by the section being interpreted.
- iii) Did the article indicate approval or disapproval for the usage of the notwithstanding clause?

An article indicated approval if more than two-thirds of the article was dedicated to the arguments or opinions of proponents of using the notwithstanding clause. Disapproval was indicated when more than two-thirds of the article was dedicated to the arguments or opinions of opponents. If an article remained relatively balanced, the article was coded as neither indicating approval nor disapproval.

- iv) Did the article indicate approval or disapproval for the usage of the notwithstanding clause?

An article indicated approval if more than two-thirds of the article was dedicated to the arguments or opinions of proponents of using the notwithstanding clause. Disapproval was indicated when more than two-thirds of the article was dedicated to the arguments or opinions of opponents. If an article remained relatively balanced, the article was coded as neither indicating approval nor disapproval.

- v) If the article indicated approval or disapproval, did this indication match the final outcome (i.e., if the article indicated approval, did the legislature pass and enact the act?)

The Israeli Case Study

Unfortunately, no English-language Israeli newspapers could be confirmed to be reliable to utilize for this study. Since the override has only been used once in Israel's history, the paper will utilize existing academic literature to provide a summary of its usage to reference later in the paper while considering refinements of the Stephanopoulos model.

The State Pseudo-Usage Case Study

State pseudo-usages were identified using Ballotpedia's comprehensive list of state constitutional amendments from 2006 to 2021.⁴⁵ Only legislatively referred constitutional amendments were selected for analysis under the aforementioned definition of a pseudo-usage. Additionally, only amendments that were on the ballot between 2011 and 2021 were selected. This time frame was chosen because it is large enough to contain multiple pseudo-usages while small enough to be reasonable to study and accurately capture today's political climate. Ballotpedia's entry on each amendment within this time frame was read to determine if it followed a state court opinion that struck down a previous state statute. Once an amendment was determined to be a state pseudo-usage, a content analysis similar to the one done for the Canadian case study was completed.

The newspapers used in the American case study were selected from the United States Library of Congress's list of newspapers currently received.⁴⁶ For each usage of the override all accessible English-language newspapers listed under the state in which the pseudo-usage occurred were analyzed. *Table 2* below lists the newspapers ultimately analyzed.

45 *Constitutional amendments from 2006 through 2022*, BALLOTPEDIA (2022), https://ballotpedia.org/Constitutional_amendments_from_2006_through_2022.

46 *US Newspapers Currently Received*, U.S. LIBRARY OF CONGRESS, https://www.loc.gov/r/news/ncr_list.php.

Table 2: States in which a Pseudo-Usage of the Notwithstanding Clause Occurred and Newspapers Analyzed for These Usages

State	Year	Newspapers Analyzed
Alabama	2016	<i>Birmingham Real-Time News and The Montgomery Advertiser</i>
Arizona	2018	<i>The Arizona Daily Sun, The Arizona Republic, The Arizona Daily Star, and The Yuma Daily Sun</i>
Florida	2012	<i>Daytona Beach News Journal, Florida Times Union, The Orlando Sentinel, The Herald-Tribune, and The Tampa Bay Times</i>
Georgia	2011	<i>Atlanta Journal, Atlanta Daily World, The Augusta Chronicle, and Savannah Morning News</i>
Louisiana	2014	<i>The Advocate and New Orleans Tribune</i>
New Jersey	2012	<i>Press of Atlantic City and The Jersey Journal</i>
North Carolina	2018	<i>Asheville Citizen-Times, Fayetteville Observer, Greensboro News & Record, Star-News, and The Winston-Salem Journal</i>
Oklahoma	2012 & 2016	<i>Enid News and Eagle, The Constitution, and The Oklahoman</i>
Oregon	2020	<i>Register-Guard, The Oregonian, The Scanner, and The Statesman-Journal</i>
Pennsylvania	2021	<i>The Morning Call, Eerie Daily Times, Patriot News, The Philadelphia Inquirer, The Philadelphia Tribune, The Pittsburgh Tribune Review, and The York Dispatch</i>
Texas	2017	<i>American-Statesman, The Caller Times, The Morning News, and The Avalanche Journal</i>
West Virginia	2018	<i>Times-West Virginian, Parkersburg News, and The Wheeling News Register</i>

Articles within these newspapers were selected for analysis if they fit the following qualifications:

- i) The article discussed the amendment in which the pseudo-usage occurred.
- ii) The article was published before the votes were counted on the ballot upon which the amendment appeared. This time frame is much larger than that of the Canadian case study because all of these articles were digital, making a wide search more manageable.
- iii) If the article had a town or state listed as its location, that location must be within the state where the pseudo-usage occurred.
- iv) The article was not identical to an article already analyzed.

After an article was selected for analysis based on the above qualifications, it was read and coded for the following criteria:

- i) Did the article indicate that a pseudo-usage would occur? (i.e., did the article include the fact that the amendment was in opposition to a previous state court ruling?)
- ii) Did the article include a discussion of state constitutional interpretation?
- iii) Did the article indicate approval or disapproval for the pseudo-usage?
- iv) If the article indicated approval or disapproval, did this indication match the final outcome.

Results

The Canadian Case Study

The Canadian notwithstanding clause has been included in nine bills passed by provincial legislatures. The federal legislature has never used the clause. *Table 3*, below, is a summary of each usage and the results of the content analysis conducted. Following this table is a summary of each usage organized chronologically into three content-based categories. These three categories include usages surrounding issues of civil rights or civil liberties, usages involving elections, and a catch-all category for the rest of the usages.

Table 3: *Public Discourse in Newspaper Articles Relevant to Canadian Usages of the Notwithstanding Clause*

Province	Year	# Of News paper Articles Analyzed (n)	% Of articles discussing use of notwithstanding clause	% Of articles including a discussion of constitutional interpretation	% Of articles indicating preference for or against usage of notwithstanding clause	% Of articles that indicated a preference consistent with the final outcome
Quebec	1988	32 ⁴⁸	93.8%	84.4%	90.6%	79.3% (n=29)
Alberta	2000	2 ⁴⁹	100%	100%	100%	100% (n=2)
Saskatchewan	2017	7 ⁵⁰	100%	85.7%	85.7%	83.3% (n=6)
Quebec	2018	5 ⁵¹	100%	100%	100%	0% (n=5)
New Brunswick	2019	2 ⁵²	100%	100%	50%	100% (n=2)
Ontario	2021	18 ⁵³	100%	83.3%	94.4%	0% (n=17)
Quebec	1982	7 ⁵⁴	57.1%	57.1%	85.7%	100% (n=6)
Saskatchewan	1986	11 ⁵⁵	63.6%	45.5%	72.7%	75% (n=8)

Usages involving Civil Rights or Civil Liberties

Quebec (1988)

The Quebec provincial legislature used the notwithstanding clause in 1988 in An Act to Amend the Charter of the French Language. This Act altered existing rules about displaying bilingual and English language signs. The first row of *Table 3* summarizes the results of this content analysis conducted on Quebec newspapers published within three days of the bill being introduced and passed. A large percentage of these articles discussed the notwithstanding clause and the constitutional questions involved. Language requirements of signage are closely tied to civil rights preventing discrimination based on ethnicity.

Thus, this use of the notwithstanding clause drew opposition from two different sides. One side believed the alteration did not do enough to make Quebec accessible to its English-speaking citizens. The other side believed the alteration was a dangerous attack on French-speaking citizens. Of the articles analyzed from three days after the passage of this Act, 84.4% expressed opposition to the use of the notwithstanding clause. The Act was ultimately amended in 1997 to remove the notwithstanding clause, giving credence to the side that was concerned about the accessibility of English-speaking citizens. So, the final constitutional interpretation matched the majority of opinions expressed in these newspapers.

Alberta (2000)

In 2000, the Alberta provincial legislature passed the Marriage Amendment Act.⁴⁷ The Act defined marriage in Alberta as exclusively heterosexual, notwithstanding Section 15 of the Canadian Charter of Rights and Freedoms, which, among other things, guarantees equal protection and benefit of the laws on the basis of sex, a civil right. Since marriage is within the jurisdiction of the federal legislature in Canada, the Act was never enacted. The second row of *Table 3* summarizes the results of the content analysis conducted on Alberta newspapers published within three days of the bill being passed. All of these articles discussed the usage of the notwithstanding clause and the constitutional interpretation its use was promoting. All of these articles were opposed to the usage of the notwithstanding clause. Since the bill was never enacted, this opposition matched the final interpretation of the constitution.

47 Laurence Brosseau & Marc-André Roy, *The Notwithstanding Clause of the Charter*, LIBRARY OF PARLIAMENT (May 7, 2018), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf>.

Saskatchewan (2017)

In 2017, the Saskatchewan provincial legislature passed the School Choice Protection Act.⁴⁸ This Act utilized the notwithstanding clause to effectively overrule a Court of Queen's Bench decision that kept the government from providing funds for non-Catholic students to attend Catholic separate schools. The issue of funding religious schools is closely tied to civil liberties regarding practicing religion. The third row of *Table 3* summarizes the results of the content analysis conducted on Saskatchewan newspapers within three days of the bill being passed. A majority of these articles discussed the usage of the notwithstanding clause and the constitutional issues relevant to the situation. Most of the articles indicated approval of the usage of the notwithstanding clause. Since the bill was enacted, this approval matched the final interpretation of the constitution. Additionally, the Saskatchewan Court of Appeal later interpreted the Charter the same way the legislature did, making the notwithstanding clause unnecessary.

Quebec (2018)

In 2018, the Quebec provincial legislature passed An Act Respecting the Laicity of the State.⁴⁹ This prevented province employees who held positions of authority from wearing any religious symbol, including hijabs and turbans, at work. This usage encourages questions about the protections of civil liberties regarding practicing religion and civil rights regarding workplace discrimination on the basis of religion. The fourth row of *Table 3* summarizes the results of the content analysis conducted on Quebec newspapers published within three days of the bill being passed. All articles analyzed included a discussion of the use of the notwithstanding and the Charter-protected rights being overridden through its usage. All of the articles indicated opposition to the usage of the notwithstanding clause. This Act is still good law in Quebec today, so the opposition does not match the final interpretation.

New Brunswick (2019)

In 2019, the New Brunswick provincial legislature passed An Act Respecting Proof of Immunization.⁵⁰ A measles outbreak at a high school in New

48 *Id.*

49 Jeffery B. Meyers, *First Ontario, now Quebec: The notwithstanding threat*, THE CONVERSATION (Oct. 10, 2018), <https://theconversation.com/first-ontario-now-quebec-the-notwithstanding-threat-104379>.

50 Wil Robertson, *Political column: What is going on in our NB legislature?*, THE AQUINIAN (Nov. 25, 2019), <https://theaquinian.net/political-column-what-is-going-on-in-our-nb-legislature/>.

Brunswick prompted the education minister to propose this bill which made some vaccines mandatory to attend public school. This usage raised questions concerning whether the choice to vaccinate or not vaccinate was a civil liberty. The notwithstanding clause was ultimately removed from the law in 2020.⁵¹ The fifth row of *Table 3* summarizes the results of the content analysis conducted on New Brunswick news sites within three days of the bill being passed. All of these articles discussed the usage of the notwithstanding clause and the constitutional issues relevant to the situation. All of these articles were opposed to the usage of the notwithstanding clause. Since the bill was never enacted, this opposition matched the final interpretation of the constitution.

Usages involving Elections

Ontario (2021)

In 2021, the Ontario provincial legislature passed the Protecting Elections and Defending Democracy Act which kept private organizations from running political advertisements outside of election periods.⁵² This Act greatly decreased the ability of third-party candidates to campaign. The notwithstanding clause was included because the Ontario Superior Court struck down an earlier version of the law. The sixth row of *Table 3* summarizes the results of the content analysis conducted on Ontario news sites within three days of the bill being introduced and passed. Every article analyzed included a discussion of the use of the notwithstanding clause and the issues of the Charter it overrode. Of the articles that indicated a preference, they were all opposed to the usage of the notwithstanding clause. Since the bill ultimately passed and remains good law today, this opposition does not match the final interpretation of the constitution.

51 *New Brunswick committee drops notwithstanding clause from vaccination bill*, CTV NEWS (June 17, 2020), <https://atlantic.ctvnews.ca/new-brunswick-committee-drops-notwithstanding-clause-from-vaccination-bill-1.4987933>.

52 Antonella Artuso, *Ford Gov't Introduces Notwithstanding Bill to Quash Court Ruling*, WINDSOR STAR (2021), <https://windsorstar.com/news/provincial/ford-govt-introduces-notwithstanding-bill-to-quash-court-ruling/wcm/c7845154-cb38-4d7d-802c-fa91eed3111b>.

All Other Usages

Quebec (1982)

In 1982, after the Canadian Charter of Rights and Freedoms was ratified, the Quebec provincial legislature passed An Act Respecting the Constitution.⁵³ This Act re-passed every law enacted by the Quebec provincial legislature before with a notwithstanding clause attached. Essentially, this Act exempted Quebec from sections two and seven through fifteen of the Canadian Charter. In 1987, this exemption was ended by the Meech Lake Accord. Although eventually canceled out by the Meech Lake Accord, the original Act was highly influenced by Quebec's culture of independence from the rest of Canada.

Row seven of *Table 3* summarizes the results of this content analysis conducted on Quebec newspapers published within three days of the bill being introduced, passed, and the finalization of the Meech Lake Accord. All articles written around the time of the introduction and passage included a discussion of the use of the notwithstanding. None of the articles written around the time of the Meech Lake Accord discussed the previous usage of the notwithstanding clause. Of the articles that indicated a preference, they were

all opposed to the usage of the notwithstanding clause. Since the Meech Lake Accord ended the usage of the notwithstanding clause, this opposition matches the final interpretation of the constitution.

Saskatchewan (1986)

In 1986, the Saskatchewan provincial legislature passed the Saskatchewan Government Employees Union (SGEU) Dispute Settlement Act.⁵⁴ This Act forced striking members of the SGEU to return to work. The final row of *Table 3* summarizes the results of the content analysis conducted on Saskatchewan newspapers within three days of the bill being introduced. A slight majority of these articles discussed the usage of the notwithstanding clause. Only 45.5% of the articles discussed constitutional issues relevant to the situation. Most of the articles indicated approval of the usage of the notwithstanding clause. Since the bill was enacted, this approval matched the final interpretation of the constitution. Additionally, the Canadian Supreme Court later interpreted the Charter the same way the legislature did, making the notwithstanding clause unnecessary.

53 *Supra* note 48.

54 *Id.*

Yukon (1982)

In 1982, the Yukon provincial legislature passed the Land Planning and Development Act.⁵⁵ This notwithstanding clause was used to protect the nomination process laid out in the Act for members of the Land Planning Board. Although the statute was passed, it was never actually brought into force. Unfortunately, none of the Yukon newspapers listed on the Library and Archives of Canada site were accessible, so a content analysis could not be completed for this usage.

Summary of All Canadian Usages of the Notwithstanding Clause

The Canadian notwithstanding clause has been used five times relating to issues of civil rights and civil liberties. In all of these cases, a high percentage of the articles analyzed discussed both the usage of the notwithstanding clause and the portion of the Charter being considered. In all but one of these cases, a high percentage of the articles that indicated a preference as to whether a notwithstanding clause was used or not had had their preferences match the outcome. In Quebec in 2018, however, 0% of the articles that indicated a preference had their preference matched. This could be the result of bias from a small analysis since only two articles were analyzed, or a bias of language since only English-language papers were analyzed. This result could also be indicative of public opinion failing to sway legislators to interpret the Charter the same way they did.

The notwithstanding clause was also used once in Ontario to change election rules. This usage had high percentages of discourse on the usage itself and the constitutional questions surrounding it. However, 0% of the articles that indicated a preference had their preference matched. All of the articles suggested that this usage was an unethical use of power to try to ensure the election results desired by the people in power. The majority of the articles analyzed for the two usages that did not fit into either of these aforementioned categories considered the usage of the notwithstanding clause. The percentage of these articles that considered the constitutional issue and the percentage of indications that matched the outcome were lower than those for other usages. This may be because these usages did not consider issues that excite the public as much as issues of rights, liberties, and election practices.

The Israeli Case Study

55 *Id.*

The Israeli notwithstanding clause has been used only once.⁵⁶ In 1993, the Israeli Supreme Court found a law banning the import of non-kosher meat in violation of the Basic Law on Freedom of Occupation. After this court ruling, the Knesset added the notwithstanding clause to the Freedom of Occupation Basic Law and subsequently used it to override the court's ruling. Although the Israeli notwithstanding clause has not been invoked since its original usage, many religious and nationalist parties have called for its use against what they view as an overly activist court. Due to the lack of accessible English-language newspapers, no content analysis could be completed considering the single Israeli usage of the notwithstanding clause.

The State Pseudo-Usage Case Study

Between 2011 and 2021, there have been thirteen pseudo-usages of legislative overrides at the state level in the United States. These usages have taken place in twelve different states and have been used in various circumstances. *Table 4*, below, is a summary of each usage and the results of the content analysis conducted. Following this table is a summary of each usage organized chronologically into four content-based categories. These four categories include usages surrounding issues of civil rights or civil liberties, usages involving elections, usages involving judges ruling on matters where they have a conflict of interest, and a catch-all category for the rest of the usages.

⁵⁶ *Supra* note 31.

Table 4: *Public Discourse in Newspaper Articles Relevant to State Pseudo-Usages of the Notwithstanding Clause*

State	Year	# Of Newspaper Articles Analyzed (n)	% Of articles discussing pseudo-usage	% Of articles including a discussion of constitutional interpretation	% Of articles indicating preference for or against pseudo-usage	% Of articles that indicated a preference consistent with the final outcome
Florida	2012	8 ⁶⁶	100%	100%	50	75%, (n=4)
Oklahoma	2016	11 ⁶⁷	63.6%	63.6%	72.7	25%, (n=8)
West Virginia	2018	6 ⁶⁸	66.7%	66.7%	83.3	40%, (n=5)
North Carolina	2018	14 ⁶⁹	85.7%	85.7%	71.4	100%, (n=10)
Oregon	2020	7 ⁷⁰	71.4%	71.4%	100	100%, (n=7)
New Jersey	2012	7 ⁷¹	100%	100%	85.7	50%, (n=6)
Georgia	2011	10 ⁷²	40%	30%	80	12.5%, (n=8)
Oklahoma	2012	15 ⁷³	93.3%	86.7%	80	91.7%, (n=12)
Louisiana	2014	2 ⁷⁴	0%	0%	100	100%, (n=2)
Alabama	2016	6 ⁷⁵	100%	100%	50	100% (n=3)
Texas	2017	6 ⁷⁶	33.3%	16.7%	50	66.7%, (n=3)
Arizona	2018	9 ⁷⁷	100%	88.9%	66.7	83.3%, (n=6)

Pennsylvania	2021	12 ⁷⁸	41.7%	41.7%	33.3	75%, (n=4)
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Usages involving Civil Rights or Civil Liberties

Florida (2012)

Florida voters rejected Amendment 6 on their 2012 ballot.⁵⁷ Amendment 6 was an attempted pseudo-usage of a notwithstanding clause. It sought to overturn a state court decision that stipulated the privacy protections in the state constitution extended to include protections for abortion. In the United States, abortion is controversially classified as a civil liberty stemming from the right to privacy. The abortion debate is also closely tied to the civil rights of people based on pregnancy status. The proposed Florida Amendment would have expressly declared that there was no right to abortion in the Florida Constitution broader than what is guaranteed in the United States Constitution.

The Amendment also would have prohibited public funds from being used for abortions.

The first row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. All of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. Of the articles that expressed an opinion on the matter, three-quarters of them were opposed to the pseudo-usage. Since the Amendment was ultimately rejected by Florida voters, leaving the court decision to stand as the current interpretation, their opposition matched the final interpretation of the state constitution.

Oklahoma (2016)

A pseudo-usage was attempted in Oklahoma in 2016 through State Question 790.⁵⁸ The amendment would have overruled a 2015 Oklahoma Supreme Court decision that found that the state constitution banned public money from being spent for religious purposes. This spending is closely tied to civil liberties regarding practicing one's religion and freedoms from the establishment of a state religion. The second row of *Table 4* summarizes the results of the content analysis

⁵⁷ *Florida Abortion, Amendment 6 (2012)*, BALLOTPEdia (2012), [https://ballotpedia.org/Florida_Abortion_Amendment_6_\(2012\)](https://ballotpedia.org/Florida_Abortion_Amendment_6_(2012)).

⁵⁸ *Oklahoma Public Money for Religious Purposes, State Question 790 (2016)*, BALLOTPEdia (2012), [https://ballotpedia.org/Oklahoma_Public_Money_for_Religious_Purposes_State_Question_790_\(2016\)](https://ballotpedia.org/Oklahoma_Public_Money_for_Religious_Purposes_State_Question_790_(2016)).

conducted on news articles published in the months leading up to the election. A small majority of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. Only a quarter of the articles expressing an opinion had their opinion match the final interpretation.

West Virginia (2018)

In 2018, West Virginia voters approved Amendment 1, a pseudo-usage.⁵⁹ The Amendment added an explicit statement to the state constitution clarifying that the constitution did not protect the right to or require public funding for abortions. This pseudo-usage allowed laws previously found by the courts to be unconstitutional to be valid again. One example of such a law was used to limit the usage of Medicaid funds to pay for abortion. The third row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. Two-thirds of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. Less than half of the articles that expressed opinions ended up having their opinion aligned with the final interpretation.

Usages involving Elections

North Carolina (2018)

In 2018, the North Carolina Legislative Appointments to the Elections Board Amendment was defeated by the state's voters.⁶⁰ This Amendment would have given legislative leaders the power to appoint all the members to the Bipartisan State Board of Ethics and Elections Enforcement, removing the governor's ability to appoint some members. This board is responsible for running the election process and ensuring compliance with campaign finance disclosure requirements. Amendment was an attempt at a pseudo-usage as it would have overturned a North Carolina Supreme Court decision that found such a change in appointments to be in violation of the state constitution. The fourth row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. A large majority of the articles discussed the pseudo-usage of

⁵⁹ *West Virginia Amendment 1, No Right to Abortion in Constitution Measure (2018)*, BALLOTPEdia (2018), [https://ballotpedia.org/West_Virginia_Amendment_1,_No_Right_to_Abortion_in_Constitution_Measure_\(2018\)](https://ballotpedia.org/West_Virginia_Amendment_1,_No_Right_to_Abortion_in_Constitution_Measure_(2018)).

⁶⁰ *North Carolina Legislative Appointments to Elections Board Amendment (2018)*, BALLOTPEdia (2018), [https://ballotpedia.org/North_Carolina_Legislative_Appointments_to_Elections_Board_Amendment_\(2018\)](https://ballotpedia.org/North_Carolina_Legislative_Appointments_to_Elections_Board_Amendment_(2018)).

a notwithstanding clause and the constitutional interpretation its use was promoting. Every article that demonstrated an opinion had its opinion aligned with the final constitutional interpretation.

Oregon (2020)

Oregon voters approved Measure 107 on the 2020 ballot.⁶¹ This measure was a pseudo-usage of a legislative override as it added campaign finance limits to the constitution that had previously been declared unconstitutional by the Oregon Supreme Court. The fifth row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. A majority of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. All articles analyzed expressed approval for the amendment, and since the amendment was ultimately added, their preferred interpretation became the standing constitutional interpretation.

Usages involving Court's Conflicts of Interest

New Jersey (2012)

In 2012, New Jersey voters approved Public Question 2, which contained a pseudo-usage of a legislative override.⁶² This pseudo-usage effectively overturned a New Jersey Supreme Court decision that found increasing the amount withheld from judges' salaries for their pension violated the state constitution. Since the judges ruling on the case had their pensions affected by the way they ruled, many news articles considered their ruling to be the result of a conflict of interest. The sixth row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election that this ballot measure appeared. All of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. Of the articles that expressed an opinion, half of them were in favor of clarifying the constitution to align with the legislature's interpretation.

61 *Oregon Measure 107, Campaign Finance Limits Amendment (2020)*, BALLOTPE-
DIA (2020), [https://ballotpedia.org/Oregon_Measure_107,_Campaign_Finance_Lim-
its_Amendment_\(2020\)](https://ballotpedia.org/Oregon_Measure_107,_Campaign_Finance_Limits_Amendment_(2020)).

62 *New Jersey Judicial Salary and Benefits Amendment, Public Question 2 (2012)*,
BALLOTPE-
DIA (2012), [https://ballotpedia.org/New_Jersey_Judicial_Salary_and_Bene-
fits_Amendment,_Public_Question_2_\(2012\)](https://ballotpedia.org/New_Jersey_Judicial_Salary_and_Benefits_Amendment,_Public_Question_2_(2012)).

All Other Usages

Georgia (2011)

In 2011, the Georgia Supreme Court found that the Georgia Charter School Commission violated the state constitution by approving charter schools that local school boards objected to. In 2012, Amendment 1 on the Georgia ballot was approved, effectively overruling this court decision.⁶³ The seventh row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. Only a minority of articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. A small percentage of articles that expressed an opinion had their opinion match the final standing interpretation of the state constitution.

Oklahoma (2012)

In 2012, the Oklahoma Supreme Court ruled that the state constitution allowed intangible property to be taxed.⁶⁴ State question 766 on the 2012 ballot was approved by voters and enacted a pseudo-override by adding an amendment to the constitution clarifying that intangible property could not be taxed. The eighth row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. Over 90% of the articles discussed the pseudo-usage of a notwithstanding clause, and nearly 90% discussed the constitutional interpretation its use was promoting. Over 90% of the articles that showed a clear preference for or against the pseudo-usage had their preference vindicated by the implementation of the amendment.

Louisiana (2014)

In 2014, Amendment 3 was rejected by Louisiana voters.⁶⁵ This Amendment would have effectively overruled a Louisiana Supreme Court ruling that found only the state and its public agents could collect taxes. The Amendment would

63 *Georgia Charter Schools, Amendment 1 (2012)*, BALLOTPE-
DIA (2012), [https://ballotpedia.org/Georgia_Charter_Schools_Amendment_1_\(2012\)](https://ballotpedia.org/Georgia_Charter_Schools_Amendment_1_(2012)).

64 *Oklahoma Intangible Tax Ban Amendment, State Question 766 (2012)*, BALLOTPE-
DIA (2012), [https://ballotpedia.org/Oklahoma_Intangible_Tax_Ban_Amendment_State_Question_766_\(2012\)](https://ballotpedia.org/Oklahoma_Intangible_Tax_Ban_Amendment_State_Question_766_(2012)).

65 *Louisiana Tax Collector Involvement in Tax Sales, Amendment 3 (2014)*, BALLOT-
PEDIA (2014), [https://ballotpedia.org/Louisiana_Tax_Collector_Involvement_in_Tax_Sales_Amendment_3_\(2014\)](https://ballotpedia.org/Louisiana_Tax_Collector_Involvement_in_Tax_Sales_Amendment_3_(2014)).

have clarified that the state constitution permitted authorized private firms to collect taxes for the state. The ninth row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. Neither article discussed the pseudo-usage of a notwithstanding clause or the constitutional interpretation its use was promoting. However, both articles expressed opposition to the Amendment and approval of the court's ruling by extension. Thus, both the articles' indications matched the final interpretation of the state constitution.

Alabama (2016)

Amendment 14 on Alabama's 2016 ballot considered the state's constitutionally mandated budget approval process.⁶⁶ Before the election, Amendment 448 required that the Alabama legislature approves the state's budget before passing any other laws. The state constitution allowed the legislature to pass other laws before passing the budget if the other law was passed under a Budget Isolation Resolution (BIR), which required a three-fifths majority vote of the quorum present at the time of voting. In the Alabama legislature, it is common practice for representatives to abstain from votes when the vote considers the functioning of a specific county that they do not personally represent. In 2015, the Jefferson County Circuit Court found that the state legislature violated the state constitution whenever it passed a BIR when more than two-fifths of the quorum abstained from the vote. This court ruling jeopardized hundreds of county-specific state laws. Amendment 14 was written to clarify the state constitution to allow for representatives to abstain from a BIR vote when it did not affect their county, as was tradition.

The tenth row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the vote. All of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. Of the articles that expressed an opinion on the matter, they all approved of the pseudo-usage. Since Alabama voters ultimately supported the Amendment, this approval matched the final interpretation of the state constitution.

Texas (2017)

In 2017, Texas voters approved a pseudo-usage that overruled the Texas Court of Criminal Appeals decision that courts were not constitutionally mandated

⁶⁶ *Alabama Approval of Budget Isolation Resolution Proposing a Local Law, Amendment 14 (2016)*, BALLOTPEdia (2016), [https://ballotpedia.org/Alabama_Approval_of_Budget_Isolation_Resolution_Proposing_a_Local_Law,_Amendment_14_\(2016\)](https://ballotpedia.org/Alabama_Approval_of_Budget_Isolation_Resolution_Proposing_a_Local_Law,_Amendment_14_(2016)).

to inform the state attorney general when there is a constitutional challenge to a law.⁶⁷ Proposition 4's passage added a mandate for the courts to inform the attorney general about such challenges to the state constitution. The eleventh row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. Less than half of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. Half of the articles expressed an opinion on the matter, and a majority of these articles leaned towards approving the amendment. This approval matched the final standing interpretation since the proposition was passed.

Arizona (2018)

In 2018, Arizona voters approved Proposition 125, which added a state constitutional amendment that altered the state retirement system.⁶⁸ In 2013, the Arizona Court of Appeals found that two bills passed by the Arizona state legislature that changed the pension system violated Amendment 29. These bills tied pension increases to cost-of-living changes rather than the existing permanent benefit increases. Proposition 125 amended Amendment 29 to expressly allow this altered pension system. The second to last row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the vote. All of the articles discussed the pseudo-usage of a notwithstanding clause; 88.9% discussed the constitutional interpretation its use was promoting. A majority of the articles indicating a preference were in approval of the pseudo-usage, which matched the ultimate interpretation of the state constitution.

Pennsylvania (2021)

In 2021, Pennsylvania Question 1 was approved by state voters.⁶⁹ This amendment clarified the state constitution by adding that the State General Assembly had the power to extend or terminate a governor's Declaration of an Emergency by passing a resolution and that the governor could not veto the resolution. This amendment qualified as a pseudo-usage because, in 2020, the

67 *Texas Proposition 4, Require Court to Provide Notice to Attorney General Amendment (2017)*, BALLOTPEDIA (2017), [https://ballotpedia.org/Texas_Proposition_4,_Require_Court_to_Provide_Notice_to_Attorney_General_Amendment_\(2017\)](https://ballotpedia.org/Texas_Proposition_4,_Require_Court_to_Provide_Notice_to_Attorney_General_Amendment_(2017)).

68 *Arizona Proposition 125, Adjustments to Elected Officials' and Corrections Officer's Retirement Plans Amendment (2018)*, BALLOTPEDIA (2018), [https://ballotpedia.org/Arizona_Proposition_125,_Adjustments_to_Elected_Officials'_and_Corrections_Officer%27s_Retirement_Plans_Amendment_\(2018\)](https://ballotpedia.org/Arizona_Proposition_125,_Adjustments_to_Elected_Officials'_and_Corrections_Officer%27s_Retirement_Plans_Amendment_(2018)).

69 *Pennsylvania Question 1, Legislative Resolution to Extend or Terminate Emergency Declaration Amendment (May 2021)*, BALLOTPEDIA (2021), [https://ballotpedia.org/Pennsylvania_Question_1,_Legislative_Resolution_to_Extend_or_Terminate_Emergency_Declaration_Amendment_\(May_2021\)](https://ballotpedia.org/Pennsylvania_Question_1,_Legislative_Resolution_to_Extend_or_Terminate_Emergency_Declaration_Amendment_(May_2021)).

Pennsylvania Supreme Court ruled that the state constitution granted the governor the power to veto such a resolution. The final row of *Table 4* summarizes the results of the content analysis conducted on news articles published in the months before the election. Less than half of the articles discussed the pseudo-usage of a notwithstanding clause and the constitutional interpretation its use was promoting. Of the articles that indicated an opinion, three-quarters of them approved of the pseudo-usage, an approval that matched the final standing interpretation.

Summary of All State-Pseudo Usages of a Notwithstanding Clause

Three of the state pseudo-usages were used to resolve constitutional interpretations regarding civil rights and civil liberties. A majority of the newspaper articles analyzed for all of these usages considered the pseudo-usage and the constitutional issues involved. The percentage of articles that indicated a preference in which that preference was matched was more varied. In the two usages in which the indicated preferences matched the final outcome less than half the time, Oklahoma in 2016 and West Virginia in 2018, many of the articles were letters to the editor written by clergy members or people who admitted to being highly religious. All of the usages in this category are religiously charged, which may have caused this to bias the results. Perhaps these articles represented a minority of the popular opinion, but they cared more, so they wrote more articles. It is also possible that this is one of the instances in which popular opinion did not sway policymakers' minds.

Two of the state pseudo-usages impacted the way elections were run. A large percentage of these articles discussed pseudo-usages and the constitutional issue involved. All of the articles regarding these usages that expressed an indication for or against the issue had their indications match the final outcome. Additionally, one of the state pseudo-usages considered a situation in which a court ruling was based on a conflict of interest. In this case, all of the articles considered the pseudo-usage and the constitutional issue. However, only half of these articles that had indicated a preference had that preference matched.

The content analyses of the remaining usages which did not fit into the first three categories were greatly varied when it came to considering the pseudo-usage and the relevant constitutional issue. Except for the pseudo-usage in Georgia, the majority of articles analyzed for this final catch-all category that indicated a preference for or against the pseudo-usage had that preference match the final outcome. Many of the articles in Georgia were letters to the editor, which may mean that the articles were written by people who held views in the minority of

popular opinion. However, because they cared more than the majority, they wrote all of these letters.

Summary of All Content Analyses

In order to complete a more comprehensive analysis, results have been combined into larger categories based on the location of their usage. *Table 5* below summarizes the combined results of the content analyses conducted for the use of the notwithstanding clause in Canada and pseudo-usages of the clause in the United States.

Table 5: *Public Discourse in Newspaper Articles Relevant to Canadian Usages of the Notwithstanding Clause and State Pseudo-Usages*

	# Of Newspaper Articles Analyzed (n)	% of articles discussing the usage or pseudo-usage of notwithstanding clause	% Of articles including a discussion of constitutional interpretation	% Of articles indicating preference for or against usage or pseudo-usage of notwithstanding clause	% Of articles that indicated a preference consistent with the final outcome
Canada	84	89.3%	78.6%	88.1%	58.1%, (n=74)
Canada without Quebec usages	66	86.4%	77.3%	86.4%	75.4%, (n=17)
Pseudo-usage	113	73.5%	69.9%	69%	69.2%, (n=78)
Total Canada & pseudo-usage	197	80.2%	73.6%	77.2%	63.8%, (n=152)
Total Canada (without Quebec) & Pseudo-Usage	179	78.2%	72.6%	75.4%	71.9%, (n=135)

Since the lack of French newspapers may have influenced the results of the analysis on usages in Quebec, a separate analysis of Canada without this province has been included as well. When Quebec was removed from the analysis, 78.2%

of all analyzed articles discussed the legislatures' role in taking judicial review power from the courts. 72.6% of these articles discussed the constitutional issues at the heart of the debate over these usages. These high percentages may indicate that legislative overrides increase public discourse on issues of constitutional interpretation. This indication is not a definitive finding; due to the aforementioned limitations and the lack of a sufficient control variable to compare these findings to, generalization is impossible. Generalizing whether or not public opinion affected constitutional interpretation in these case studies is tricky for the same reasons as a generalization of whether or not discourse increased. However, 71.9% of the time, public opinion expressed in newspapers matched the final outcome. This result suggests that public opinion may play a role in constitutional interpretation when a legislative override is used.

Refining the Stephanopoulos Model & Other Normative Consequences

The findings of the individual case studies and the results when they are viewed as a whole can be used to update the Stephanopoulos model. These updates and refinements help ensure that the override does give Congress too much power or allow them to infringe upon rights. These updates and refinements make his model better suited for actual use in the United States.

Refinements to Ensure the Continued Protection of Civil Rights and Civil Liberties

In the nearly two decades since Stephanopoulos published his model for an American legislative override, the Canadian override has been used four times: in Saskatchewan in 2017, Quebec in 2018, New Brunswick in 2019, and Ontario in 2021. These recent usages can be used to refine the Stephanopoulos model's content restrictions to keep Congress from having the power to limit civil rights and liberties. In his model, Stephanopoulos restricted the usage of the override to indeterminate clauses only. The recent usages of the clause in Saskatchewan and Quebec and the attempted state-pseudo usage in Oklahoma in 2016 make it worth considering whether the establishment and expression clauses of the First Amendment, although indeterminate clauses, should be excluded from the list of clauses that the American notwithstanding clause could be used upon.

The Saskatchewan and Quebec usages have increased the government's role in religion. In the United States, these usages would have undeniably violated the establishment and free expression clauses of the First Amendment. The religious,

and political climate in which these two overrides were passed is somewhat similar to the current American situation, making it possible that similar usages could occur in the United States. In fact, in Oklahoma in 2016, a state-pseudo usage was attempted that would have allowed the state to use public funds for religious purposes.

Refinements to Ensure the Integrity of Elections

The Ontario provincial legislature used an override in 2021, more than a decade after the Stephanopoulos model was designed. This usage vindicated Stephanopoulos's exclusion of all election-related content from the reach of a legislative override. The Ontario override has negatively impacted third parties by drastically decreasing their ability to campaign. This silencing of other parties is inherently anti-democratic. The strength of the two-party system in the United States suggests that a similar override could occur in America. Stephanopoulos's content requirements surrounding elections would ensure that Congress did not become powerful enough to allow a similar situation to occur.

Two state pseudo-usages also related to issues of elections. The first of these pseudo-usages was attempted in 2018 in North Carolina. If this pseudo-usage had passed, it would have given the legislature complete control over who resided on the board responsible for ensuring the fairness of elections in the state. This attempt could indicate that the federal legislature would also attempt to take full control over who gets to regulate their own elections, justifying Stephanopoulos's content restriction regarding using the override on elections.

The second pseudo-usage, in Oregon in 2020, suggests a possible refinement for what election-related issues the override could be used on. In this successful pseudo-usage, the state changed campaign finance laws. Campaign finance laws, an issue in which public opinion is often far from the interpretation of the courts, may be one area of elections worth allowing a legislative override to operate upon. However, this is still dangerous as campaign finance is closely tied to the final results of elections. Additionally, research shows the American public knows very little about campaign finance laws or the constitutional interpretation regarding them.⁷⁰ For these reasons, refining Stephanopoulos's complete ban on overrides regarding election-related issues to allow the legislature to use overrides on issues regarding campaign finance is too risky.

⁷⁰ David M. Primo & Jeffrey D. Milyo, *Campaign Finance and American Democracy* (2020).

Importance of Only Allowing the Federal Legislature to Use the Override

Exempting the establishment clause, free exercise clause, and all election-related issues from the override's reach will help keep Congress from having too much power and infringing on people's rights. However, it is important that Congress still retains a certain amount of power, especially compared to the amount of power state legislatures have. For example, all of the Canadian usages that have occurred since Stephanopoulos published his model have given citizens different rights than if they had lived in a different province. The complex and unequal nature of these rights in different provinces reinforces Stephanopoulos's requirement that the override should be a power extended only to Congress, not state legislatures.

State pseudo-usages also help inform how the Stephanopoulos model should be applied in the United States. First, state pseudo-usages reaffirm the need for the use of the override to be reserved only for the federal legislature. The pseudo-usages in Florida in 2012 and West Virginia in 2018 suggest that if states were given this power, citizens of one state would have different rights than citizens of another. The Florida and West Virginia pseudo-usages point to abortion rights as one prominent example of rights being unequal along state lines. Such differences would violate the privileges and immunities clause in Article IV of the Constitution. If states were allowed to use overrides, especially overrides of the privileges and immunities clause, the rights granted to citizens would vary based on the state. The Stephanopoulos model protects against this by not allowing states to use the pseudo-usage. However, it is also worth considering excluding the privileges and immunities clause from what can be overridden by Congress to ensure this does not happen at all.

How this Refined Model Could Make America More Democratic

Additionally, state pseudo-usage suggests that a legislative override may be an effective tool for increasing the democratic function of the United States. The pseudo-usage in New Jersey in 2012 proves that the override could be an effective tool for limiting judicial review in cases where the courts have conflicts of interest. Overall, 69.2% of articles that indicated a preference for or against the pseudo-usage indicated opinions that matched the final constitutional interpretation. This suggests that the override may also increase the public's role in interpreting the Constitution. An increased public role in interpretation is more democratic.

Although there has only been one usage of the Israeli notwithstanding clause, there has been an increase in usages and attempted usages of the Canadian notwithstanding clause in the past five years. America's current political climate includes pushing the bounds of the Constitution, an activity known as constitutional hardball.⁷¹ American constitutional hardball □ driven by polarization □ makes it likely that legislative overrides would be attempted quite frequently, just as Canadian attempted usages have surged as Canada has become slightly more polarized. The likelihood of an override being created and used only once, as is the case in Israel, is extremely unlikely. However, Stephanopoulos's requirement of a supermajority vote to pass the override makes it likely that overrides would remain an extreme measure, only used in the most desperate of times.

Although the supermajority vote would ensure the override is used infrequently, the nature of American politics makes it likely that usages of the override may be suggested or threatened frequently. Of all of the articles analyzed, 78.2% discussed the usage, pseudo-usage, or attempted pseudo-usage of the notwithstanding clause. This high percentage indicates that even just the suggestion of using a legislative override would increase public discourse about the constitutional issue. Legislators and the Court would then consider this discourse as they consider how to interpret the Constitution and whether or not to use the override. The involvement of public opinion in this process is inherently more democratic than the current system.

Conclusion & Suggestions for Further Research

I have determined that Canadian and Israeli overrides and state pseudo-usages may have meaningfully increased public discourse over and participation in constitutional interpretation. However, more research is required to ensure that such discourse and participation have truly increased. Research with the capabilities to analyze newspapers in multiple languages is recommended, especially since the three case studies in Quebec were either directly or loosely related to divisions in the province along the lines of language. Research with a more extensive analysis covering a larger time period that considers other demonstrations of public opinion is also recommended.

I have also refined the Stephanopoulos model and provided insight into what a legislative override following the basic outline of the Stephanopoulos model may look like in action. The refinements encouraged a close adherence

71 Steven Levitsky & Daniel Ziblatt, *How Democracies Dies* (2018).

to the model as well as the removal of the establishment, free exercise, and privileges and immunities clause from the list of clauses that may be overridden. In order to fully understand how the override would function, the job of refining the Stephanopoulos model must be completed. This would include selecting a duration for the sunset period and finalizing which sections of the Constitution can be overridden. This refined Stephanopoulos model could make the United States more democratic by increasing the public's role in constitutional interpretation without infringing upon rights or giving Congress a dangerous amount of power.

Appendix (Sources Analyzed in Tables 3 and 4)

Table 3: Public Discourse in Newspaper Articles Relevant to Canadian Usages of the Notwithstanding Clause

- Alberta

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ARTICLE

UNTANGLING FACT FROM FICTION: THE SEARCH FOR A SALEABLE PAST IN THE BARRETT CONFIRMATION

Jonathan Lane from Washington University in St. Louis

*“We tell ourselves stories in order to live. The princess is caged in the consulate.
The man with the candy will lead the children into the sea.”¹*

INTRODUCTION

Justices Antonin Scalia and Ruth Bader Ginsburg were close friends in life,² each an icon of opposite sides in the fierce debate on whether the Constitution’s meaning lives or was fixed by long dead Founding Fathers. They are further linked in history by the bitter controversies their own deaths engendered, controversies that may well have amused one and horrified the other. The process that resulted in the appointment of their successors spawned disparate narratives by politicians, academia and media that were dictated by the political persuasion of the teller of the tale.

In the Left’s³ telling, the Republican-controlled Senate of the 114th Congress, citing the presidential election later that year, refused to hold a hearing, much less a vote, for Judge Merrick Garland, Democratic President Barack Obama’s nominee for the Scalia vacancy.⁴ This Republican “blockade” was said

1 Joan Didion, *THE WHITE ALBUM 1* (1979).

2 Eugene Scalia, *What we can learn from Ginsburg’s friendship with my father, Antonin Scalia*, WASH. POST (September 19, 2020, 4:39 PM CT).

3 For simplicity, this Article sometimes uses the terms “Left” and “Right” to categorize a person’s political views as being, respectively, on the Democrat/Progressive or the Republican/Conservative side of the podium. I recognize the categories are oversimplifications (or as Congresswoman Alexandria Ocasio-Cortez put it in a similar context, “In any other country, Joe Biden and I would not be in the same party.” Quint Forgey, “AOC: ‘In any other country, Joe Biden and I would not be in the same party,’” POLITICO (January 6, 2020)), but retain these terms as convenient shorthand.

4 Under U.S. CONST. art. II, §2, cl. 2., no officer of the United States, including Supreme Court Justices and judges of the lower federal courts, can be appointed without first being confirmed by the Senate.

to have violated Senate norms, creating a “stolen seat”⁵ that tainted not only the newly-elected Republican President Donald Trump’s 2017 appointment of Justice Scalia’s successor (Justice Neil Gorsuch)⁶ but also Justice Ginsburg’s successor because the Republican-controlled Senate of the 116th Congress quickly held hearings and confirmed President Trump’s nominee, Judge Amy Coney Barrett, even though the date of the Ginsburg vacancy was far closer to the date of the 2020 presidential election than the Scalia vacancy had been to the 2016 election. In the tale told by the Right, as discussed in detail below, the differing Republican actions regarding the nominations of Judge Garland and Judge Barrett were firmly grounded in principle because they were said to be consistent with Senate behavior over the course of history in comparable cases.

There has been considerable scholarly analysis of the propriety of the Senate’s inaction on the Garland nomination.⁷ There is no need to replough that ground. This Article considers instead how the ghost of the Garland nomination affected the position of the Right on the Barrett confirmation. In particular, it analyzes how closely the Right’s insistence that confirming Barrett was consistent with Senate precedents comports with the precedents that were cited.⁸

5 *E.g.*, Editorial Board, *The Stolen Supreme Court Seat*, N.Y. TIMES (December 24, 2016); and Democratic Senator Jeff Merkley (Oregon), *Merkley Statement on Supreme Court* (January 31, 2017) (“[T]his is a stolen seat. This is the first time in American history that one party had blockaded a nominee for almost a year in order to deliver a seat to a President of their own party.”), https://www.merkley.senate.gov/news/press-releases/merkeley-statement-on-supreme-court?mbid=synd_msnnews

6 Editorial Board, *Neil Gorsuch, the Nominee for a Stolen Seat*, N.Y. TIMES (January 31, 2017).

7 *E.g.*, Robin Bradley Kar and Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016) (“Kar/Mazzone”) (asserting the failure to afford Garland a hearing was an improper transfer to the next administration of President Obama’s appointment power); Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017); Ed Whelan, *Law Profs Kar/Mazzone on Senate Duty on Supreme Court Vacancies*, NATIONAL REVIEW, June 6-8, 2016, Parts 1-6 (criticizing Kar/Mazzone); Carl Tobias, *Confirming Supreme Court Justices in an Election Year*, 94 WASH. U. L. REV. 1089 (2017) (not affording a hearing to Garland was unprecedented); and J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of “McConnell Majorities” in Supreme Court Decision-Making*, 80 ALB. L. REV. 743 (2016/2017).

8 This is a more in-depth analysis than the simple criticism in the press that it was hypocrisy for the Republicans to move forward to confirm Barrett while refusing to consider the Garland nomination. *E.g.*, Nicholas Goldberg, *Amy Coney Barrett’s confirmation was shockingly hypocritical*, L.A. TIMES (October 26, 2020, 5:46 PT); and Steven M. Cohen, *Why the GOP’s Supreme hypocrisy matters: Amy Coney Barrett, Mitch McConnell and*

It also examines the only scholarly work published to date analyzing the Barrett confirmation, which is from the Left and purports to discover a new constitutional convention to the effect that, with only a single exception, all presidential election year Supreme Court confirmation votes before Barrett were bipartisan.⁹ It finds both of these positions are self serving narratives.

This Article then concludes that the seeming mission of the Right and the Left to find an overarching principle to determine the propriety of Senate action on Supreme Court nominations is misguided. Under longstanding definitions of political scientists and professional political analysts,¹⁰ prior to the confirmation of Barrett, 40% of Supreme Court confirmations during a presidential election year that occurred before the election (the equivalent case to the Barrett confirmation) were through votes that are partisan.¹¹ When Senate votes prior to the death of Justice Scalia that resulted in nominees failing to be confirmed are included, votes have been partisan in 55% of the cases.¹² That the Scalia and Ginsburg vacancies were filled through partisan action and that the Senate's action on the Garland nomination was also partisan only provide three more instances in a history of partisan behavior that dates back to the earliest days of the Court.¹³

The overruling of *Roe v. Wade*¹⁴ by *Dobbs v. Jackson Women's Health Org.*¹⁵ shows that partisan action by the Senate on Supreme Court nominations can have profound consequences.¹⁶ That said, this Article does not address whether

the abandonment of all principle, N.Y. DAILY NEWS (October 8, 2020, 3 PM).

⁹ Rivka Weill (hereafter "Professor Weill"), *Court Packing as an Antidote*, 42 CARDOZO L. REV. 2705 (2021) (hereafter "*Court Packing*"). When the convention found by Professor Weill is violated, court packing (the addition of seats to the Court) is the remedy intended by the Founders. *Court Packing* 2708-10, 2740-43. Professor Weill is an Israeli comparative law constitutional scholar. In the U.S., she has been a visiting law professor at, among other institutions, University of Chicago Law School (2017) and Yale Law School (2018).

¹⁰ These definitions are set forth in Part III.A. of this Article.

¹¹ Part IV. of this Article.

¹² *Id.* During these periods, no failures to confirm occurred other than as a result of a Senate vote.

¹³ In a highly partisan December 15, 1795 vote, the Senate rejected confirming John Rutledge (nominated by President George Washington) as Chief Justice. See text at ns. **57** and **169** *infra*.

¹⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (Sup. Ct. June 24, 2022).

¹⁶ Justices Gorsuch (who filled the Scalia vacancy) and Barrett (who filled the Ginsburg vacancy) were two of the five justices in *Dobbs* who voted to overrule *Roe*. (The limit in the Mississippi abortion statute at issue in *Dobbs* was at variance with *Roe*; Chief Justice John Roberts concurred in the Court's judgment in *Dobbs* upholding the statute but dis-

such Senate action is proper or whether there should be any structural changes to the Court on account of it.¹⁷ My work is intended only to dispel questionable narratives so that policy discussion can be conducted on a basis that recognizes actual Senate history.

I. WHAT REPUBLICANS SAID ABOUT THEIR REFUSAL TO CONSIDER THE GARLAND NOMINATION

The timeline of the Garland nomination is straightforward. Justice Scalia died unexpectedly on February 13, 2016. On March 13, 2016, President Barack Obama nominated Garland to fill the vacancy. The Senate, under the control of its Republican majority, refused to hold Judiciary Committee hearings on the nomination, which nevertheless remained pending.

On November 8, 2016, Donald Trump was elected President and the results of that day's elections for senators whose terms would expire on January 3, 2017, led to the Republicans' maintaining their Senate majority (although it decreased by two).¹⁸ With the start of the 115th Congress on January 3, 2017, the Garland nomination lapsed.¹⁹

About an hour after reports of Justice Scalia's death broke, Republican Senate Majority Leader Mitch McConnell (Kentucky) issued a statement, the second (and final) paragraph of which said, "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."²⁰

agreed with the Court's need to overrule *Roe* to reach that result.)

17 "Some proponents of Supreme Court expansion . . . see expansion as particularly justified in light of Senate Republicans' handling of the election-year nominations of Judge Garland and Justice Barrett." PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, *Final Report* 75 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>

18 At the end of the prior 114th Congress there were 54 Republican Senators; at the beginning of the 115th Congress there were 52 Republican Senators.

19 U.S. Senate, *Standing Rules of the Senate*, Rule XXXI, para. 6, <https://www.rules.senate.gov/rules-of-the-senate>, provides that nominations not acted on by the end of a Senate session cannot be acted on at a subsequent session without being resubmitted by the president.

20 The statement is available at <https://www.republicanleader.senate.gov/newsroom/press-releases/justice-antonin-scalia>. The 9th Republican presidential debate would occur that night. According to McConnell's Chief of Staff, McConnell wanted to preempt Republican Senator and presidential candidate Ted Cruz from being the first to stake out a position on the vacancy. Carl Hulse, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH 16-17 (2019).

On February 22, 2016, the first Senate session after the death of Scalia, Majority Leader McConnell expanded upon his initial statement, saying on the Senate floor that “...the Senate has not filled a vacancy *arising in an election year* when there was a divided government²¹ since 1888—almost 130 years ago (emphasis added).”²² The next day, he said, “It has been more than 80 years since a Supreme Court vacancy *arose and was filled* in a Presidential election year, and that was when the Senate majority and the President were from the same political party. . . . Since we have divided government today, it means we have to look back almost 130 years to the last time a nominee was confirmed *in similar circumstances* (emphasis added).”²³ In a press conference in the afternoon after his Senate remarks, McConnell said We know what would happen if the shoe was on the other foot. . . . A nominee of a Republican president would not be confirmed by a Democratic Senate *when the vacancy was created* in a presidential election year. . . . You’d have to go back to 1888 when Grover Cleveland was president to find the last time a *vacancy created* in a presidential election year was approved by a Senate of a different party (emphasis added).²⁴

On the same day as the press conference, all 11 Republican members of the Senate Judiciary Committee released a letter to McConnell in which they informed him that they would not consent to any nominee to fill the Scalia vacancy until the new president was inaugurated nor would they hold hearings on any nominee submitted by President Obama. Carefully echoing McConnell’s earlier comments, the letter also said, “Not since 1932 has the Senate confirmed in a presidential election year a Supreme Court nominee to *a vacancy arising in that year*. And it is necessary to go even further back to 1888 in order to find an election year nominee who was nominated and confirmed under divided government, as we have now (emphasis added).”²⁵

21 Divided government occurs when the president and the Senate majority are from different political parties; united government occurs when they are from the same party.

22 Congress.gov., *Congressional Record Senate Articles*, <https://www.congress.gov/congressional-record/2016/02/22/senate-section/article/S894-3>. The 1888 confirmation McConnell referred to is the confirmation of Melville Fuller to be Chief Justice (discussed at text a n. 126 *infra*).

23 Congress.gov., *Senate - Feb 23, 2016*, <https://www.congress.gov/congressional-record/2016/02/23/senate-section>.

24 Mitch McConnell, “Senate Republican Agenda,” *C-SPAN* video, 15:09, February 23, 2016, <https://www.c-span.org/video/?405143-1/senate-republicans-legislative-agenda>.

25 The letter is quoted in News Release, *Judiciary Committee Republicans to McConnell: No Hearings on Supreme Court Nomination* (February 23, 2016), <https://www.nytimes.com/interactive/2016/02/23/us/politics/document-Senate-SCOTUS-Letter.html>. In his statement a few hours after the news of Scalia’s death broke, the Committee’s Chairman, Senator Chuck Grassley (Iowa), was not so careful: “it’s been standard practice over the last 80 years to not confirm Supreme Court nominees during a presidential

In a televised interview on March 20, 2016, shortly after Garland was nominated, McConnell said, “You have to go back 80 years to find the last time a vacancy on the Supreme Court *created in a presidential election year* was filled. You have to go back to 1888 when Grover Cleveland was in the White House to find the last time when a *vacancy was created in a presidential year*, [and] a Senate controlled [by the] party opposite the president confirmed.”²⁶

McConnell was careful in defining the boundaries of his category: (1) a vacancy arising in a presidential election year, (2) for which a nominee was confirmed (or not), and (3) distinguishing between whether there was united government or divided government.²⁷ Indeed, McConnell acknowledged in his February 23, 2016, press conference that he was trying to be precise in his language: “You know, I have many faults, but getting off-message is not one of them.”²⁸

Why did McConnell believe it was so important to avoid “getting off-message”? While the Constitution gives the Senate power to determine the fate of those nominated to the Court, politicians seem to believe (because that is how they act) that it is not good politics to exercise that power (or to refuse to exercise it)

election year.” J. Freedom du Lac, *Grassley: “Defer to the American people,”* WASH. POST NATIONAL LIVE BLOG (February 13, 2016, 2:37 PM). As discussed at text at n. 29 *infra*, Anthony Kennedy was confirmed 28 years before Grassley’s statement. Presumably in the rush to get on record within the news cycle, Grassley’s staff neglected to include the “for a vacancy created in an election year” qualifier. Even if the qualifier had been included, however, the statement would have to be marked as misleading because there had been no vacancies created in a presidential election year for the last 80 years. There can be no “standard practice” for a set that is empty.

26 *McConnell vows to hold the line against Obama’s SCOTUS pick; Does John Kasich have a path to the GOP nomination?*, FOX NEWS, January 23, 2017, <https://www.fox-news.com/transcript/mcconnell-vows-to-hold-the-line-against-obamas-scotus-pick-does-john-kasich-have-a-path-to-the-gop-nomination>. Note that this transcript says, “a Senate controlled about it party opposite,” which is an inaccurate recital of what McConnell said; the text quoted above has been edited to what transcript would have said if it were accurate.

27 See n. 21 *supra*. for the distinction between united and divided government. McConnell’s various comments, as quoted above, were not enough to convince some in the media that the united-divided government distinction was important: “But at the time [of the Garland nomination], that [the united-divided government distinction] was not a main element of the Republican argument; their case was that a presidential election was gearing up and the voters should decide who gets to fill that seat.” Carl Hulse, *For McConnell, Ginsburg’s Death Prompts Stark Turnabout From 2016 Stance*, N.Y. TIMES (September 18, 2020, updated November 3, 2020),

<https://www.nytimes.com/2020/09/18/us/mitch-mcconnell-rbg-trump.html>.

28 McConnell press conference n. 24 *supra*.

without some principle ostensibly justifying why the Senate is acting the way it is. That principle is precedent, which means acting consistently with Senate “norms” or simply said, what the Senate has done historically in cases said to be equivalent.

McConnell, by defining the boundaries of his category to encompass only vacancies arising during a presidential election year, avoids the “problem” of Anthony Kennedy’s confirmation. Kennedy filled the last Supreme Court vacancy that was open in a presidential election year during divided government before the death of Scalia²⁹ – the circumstances of the Garland nomination. Yet Kennedy was confirmed by a vote of 97-0 on February 3, 1988.³⁰ This is hardly the precedent (both in relative recency and in the overwhelming bipartisan nature of Senate confirmation) that would justify a Senate refusal to consider the Garland nomination.

McConnell recognized the predicament the Kennedy confirmation posed for the Republican position on the Scalia vacancy³¹ and he solved it by defining a precedent category that would exclude that confirmation. According to this rationale, the Kennedy confirmation is not proper precedent for the Scalia vacancy even though the vacancy to which Kennedy was confirmed existed during the presidential election year, because not only was that vacancy created in June of the year before the presidential election, but Kennedy’s nomination was also already pending in the year before the election and was the third nomination for that vacancy. Why these circumstances should, as a matter of principle capable of reasoned articulation, exclude Kennedy as precedent for the Garland nomination were not explained by McConnell at the time, nor have they been explained in the years that have followed.³²

29 Kennedy’s confirmation followed the Senate’s October 23, 1987, refusal to confirm Robert Bork. On October 29, 1987, President Ronald Reagan announced his intention to nominate Douglas Ginsburg to the vacancy for which Bork had been nominated but on November 7, 1987, Ginsburg withdrew his name from consideration due to the controversy that arose over allegations of his marijuana use, including while teaching at Harvard Law School. James Gerstenzang and Karen Tumulty, *Ginsburg Withdraws, Citing Furor Over Use of Marijuana*, L.A. TIMES (November 8, 1987), <https://www.latimes.com/archives/la-xpm-1987-11-08-mn-21549-story.html>.

30 100th Cong., Senate, Vote 436, Voteview.com.

31 “In 1988, Justice Kennedy . . . was confirmed, but that was a vacancy created six months before that to which [Robert] Bork was nominated and subsequently defeated; [Douglas] Ginsburg was nominated and subsequently withdrew. The vacancy had existed for quite some time prior to the presidential election.” McConnell press conference n.

24 *supra*. President Reagan announced his intention to nominate Douglas Ginsburg, but contrary to McConnell and as indicated in n. 29 *supra*, Ginsburg withdrew from consideration and was not actually “nominated.”

32 In 2020, the Right still insisted Kennedy was a proper exclusion but provides no

Defining the category in this way had the additional benefit of excluding a second vacancy that had been filled through Senate confirmation in a presidential election year during divided government – the January 16, 1888, confirmation of Lucius Q. C. Lamar, another nominee of President Grover Cleveland. Like Kennedy, the vacancy Lamar filled occurred in the year prior to the election year and he was nominated in December of the prior year. If Kennedy and Lamar were included, these confirmations would join not only the 1888 divided government confirmation for a vacancy that arose during the election year that McConnell expressly acknowledged as within his category (the confirmation of Chief Justice Melville Fuller) but also the immediately prior confirmation in the same circumstances (the 1880 confirmation of William Woods), which McConnell did not mention. There would then be a total of four divided government confirmations that occurred during a presidential election year. Even worse, these four confirmations were the *last* four nominations during divided government before Garland and *all* had been confirmed during a presidential election year. Defining the category to include only vacancies arising in the presidential election year lopped off half of these troubling precedents, permitting the two remaining

substantive answer to this question. Ilya Shapiro, author of *SUPREME DISORDER, JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT* (2020), says only that “Kennedy doesn’t count because that was the Bork vacancy [he means it was the vacancy resulting from the retirement of Justice Lewis Powell, for which Robert Bork was the initial nominee] that arose the year before . . .” Federalist Soc. podcast, *Court-Packing, Term Limits and More: the Debate Over Reforming the Judiciary* (December 16, 2020), transcript at 17, <https://fedsoc.org/events/court-packing-term-limits-and-more-the-debate-over-reforming-the-judiciary>.

Dan McLaughlin, responding to criticism of his *History is on the Side of Republicans filling a Supreme Court Vacancy in 2020* article in *National Review* (this article is extensively discussed beginning at the text at n. 38 *infra*), says only, “I did not count Anthony Kennedy because he was Ronald Reagan’s *third* nominee for a seat that had been open since June 1987. Thus, holding the seat open would have meant the Court was short-staffed for more than a year and a half. Democrats had already delayed that nomination for as long as was politically feasible at the time (emphasis added).” Dan McLaughlin, *Historical Precedent Supports Republicans on Supreme Court Nominations*, *NATIONAL REVIEW* (September 24, 2020).

Contrary to McLaughlin, Kennedy was the second *actual* nominee, not the third; see n. 29 *supra*. On McLaughlin’s point that the Democrats’ delay was as long as politically feasible and the Court being short-staffed, the Scalia vacancy lasted about 12 months while the Court was in session (that is, not counting the July-September recess) and about 15 months in total, while the vacancy Kennedy filled lasted only about five months while the Court was in session (eight months in total, not McLaughlin’s “more than a year and a half”). If Kennedy had been rejected, it would have taken seven more months of the Court being short-staffed to equal the time of the short-staffing resulting from the delay in filling the Scalia vacancy.

ones to be indirectly tarred by the charge that they were simply too old to be meaningful in 2016.³³

II. THE RIGHT'S NARRATIVE OF THE BARRETT CONFIRMATION

As with the Garland nomination, the timeline of the Barrett confirmation is not complicated. On September 18, 2020, after a number of prior hospitalizations during 2020,³⁴ Ginsburg died. President Trump nominated Barrett to fill the vacancy on September 29, 2020. The Senate Judiciary Committee held hearings from October 12-15, 2020, and recommended confirmation by a unanimous vote of all members present (who were only the 12 Republican members, as all Committee Democrats boycotted the vote). On October 26, 2020, the Senate confirmed Barrett by a vote of 52-48, with all Republicans but one (Senator Susan Collins, Maine) voting in favor and all Democrats plus Senator Collins voting against.³⁵

Shortly before President Trump nominated Justice Barrett, Republican Senator Ted Cruz (Texas) gave a speech to the Senate Judiciary Committee in which he said, The circumstance of a Supreme Court vacancy in a presidential election year is not unusual. In our nation's history . . . that situation has occurred 29 times.... What happens when a vacancy occurs during a presidential election year? . . . What does a president do if a president has a vacancy during a presidential election year? The president makes a nomination.... [O]f the 44 individuals who served as the president of the United States, 22 of them – half – have made nominations of Supreme Court justices for vacancies that occurred in a presidential election year. If the president and the Senate are of the same party, the Senate confirms the nominee. . . . What does history show us? Of the 29 times this has happened, [in] 19 of them, the president and Senate were of the same party, 19 times. The Senate confirmed the nominee 17 of those times.³⁶

33 Criticizing *Kar/Mazzone*, Whelan, *Senate Duty – Part 4*, n. 7 *supra*, asks, referring to confirmations in “1888 and 1892. Does anyone really think that . . . distant history has any meaningful normative bearing on how today’s Senate should exercise its responsibilities?” The 1888 confirmation referred to by Whelan is the Fuller confirmation, which as McConnell notes in his remarks about not filling the Scalia vacancy was the last confirmation during divided government for a vacancy created in an election year. The 1892 confirmation referred to by Whelan is the united government confirmation of George Shiras, which Whelan mistakenly assigns as occurring during divided government.

34 Ginsburg had been hospitalized in May and July and had previously been treated for cancer.

35 116th Cong., Senate, Vote 652, Voteview.com. Except as otherwise indicated, all voting results and party identification in this Article are taken from Voteview.com.

36 Ted Cruz Press Release, “*Sen. Cruz Sets Record Straight On SCOTUS Precedent*,” (September 25, 2020), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz->

On the same day Cruz spoke, Republican Utah Senator Mike Lee echoed Cruz saying, “There has been a Supreme Court vacancy arising in an election years (sic) 29 times in American history. . . . There have been 19 times when a Supreme Court seat became vacant in an election year where both the presidency and the Senate were controlled by the same party. Only one nominee . . . was rejected.”³⁷

The support for the confirmation statistics Senators Cruz and Lee used are from an August 2020 National Review article by Dan McLaughlin³⁸ (hereafter the “McLaughlin Article” and “McLaughlin,” respectively), which also served as the basis for statements by other Republican Senators and other Republicans.³⁹ As discussed below, the statements of these Senators, including Cruz and Lee deviate meaningfully from the history the McLaughlin Article reports. Also, the McLaughlin Article, while paying lip service to the precedents McConnell used to justify the Republican refusal to proceed with the Garland nomination, changed the basis on which McConnell derived those precedents in an attempt to make the case in the McLaughlin Article even stronger that the Barrett confirmation was consistent with Senate norms. Moreover, the clear picture painted by the

sets-record-straight-on-scotus-precedent. This press release reproduces a portion of the Senator’s September 24, 2020, remarks to the Senate Judiciary Committee. Senator Cruz says in a part of his remarks not reproduced above but included in this press release, that the 29 instances of a Supreme Court vacancy occurring in a presidential election year include 10 times during divided government.

37 Sen. Mike Lee: Supreme Court justice confirmations in election years are common – despite Dem complaints, FOX NEWS (September 23, 2020), <https://www.foxnews.com/opinion/supreme-court-vacancy-sen-mike-lee>. The difference between Cruz’s numbers (two confirmation failures) and Lee’s numbers (one failure) is discussed in n. 61 *infra*.

38 Dan McLaughlin, *History is on the Side of Republicans filling a Supreme Court Vacancy in 2020*, NATIONAL REVIEW (August 7, 2020), <https://www.nationalreview.com/2020/08/history-is-on-the-side-of-republicans-filling-a-supreme-court-vacancy-in-2020/>.

39 Republican Senator Deb Fischer (Nebraska) linked and referenced the *McLaughlin Article*, Press release Deb Fischer, *Fischer Statement on Supreme Court Vacancy* (September 22, 2020), <https://www.fischer.senate.gov/public/index.cfm/news?ID=E9B95758-4035-42E6-966E-0D4EC1BA4E65>. Senator Chuck Grassley (Iowa), a former Chair of the Senate’s Judiciary Committee, reproduced a portion of the McLaughlin Article in his September 23, 2020, press release. Press release, Chuck Grassley, *ICYMI: History Is on the Side of Republicans in Filling a Supreme Court Vacancy in 2020* (September 23, 2020), <https://www.grassley.senate.gov/news/news-releases/icymi-history-side-republicans-filling-supreme-court-vacancy-2020>. White House Press Secretary Kayleigh McEnany tweeted a link to the McLaughlin Article on September 21, 2020. Kayleigh McEnany (@PressSec45) Twitter, *History is on the Side of Republicans in Filling a Supreme Court Vacancy in 2020*, (September 21, 2020), <https://twitter.com/PressSec45/status/1308038434536259585>.

McLaughlin Article – in the words of Senator Lee, “confirming Supreme Court justices when both parties control the White House and the Senate in an election year is perfectly normal”⁴⁰ – becomes considerably blurry when viewed through a principled lens focused on circumstances comparable to the Barrett nomination.

As discussed in Part I., McConnell’s focus on “vacancies created in” a presidential election year became the Republican keystone for building the precedent to support their refusal to confirm Garland. The McLaughlin Article, published in the month before Ginsburg’s death, reports “the Washington press corps and senators [are] openly discussing what would happen if she dies,” noting that “some Republicans are already balking” at filling the vacancy that would result. The unstated purpose of the McLaughlin Article was to prevent any Republican defections from the Trump Administration’s effort to confirm a nominee to a potential Ginsburg vacancy. The stated purpose of the McLaughlin Article was to accomplish that goal by demonstrating History supports Republicans filling the seat. Doing so would not be in any way inconsistent with Senate Republicans’ holding open the seat vacated by Justice Antonin Scalia in 2016. The reason is simple, and was explained by Mitch McConnell at the time. Historically throughout American history, when their party controls the Senate, presidents get to fill Supreme Court vacancies at any time – even in a presidential election year, even in a lame-duck session after the election, even after defeat.

Historically, when the opposite party controls the Senate, the Senate gets to block Supreme Court nominees sent up in a presidential election, and hold the seat open for the winner. Both of these precedents are settled by experience as old as the republic.⁴¹

But the “simple” history McLaughlin says McConnell “explained” is not the history McConnell recited. As discussed above, McConnell’s precedents for Garland are limited to vacancies *created in* an election year. McLaughlin expands McConnell’s boundary so that vacancies *existing in* an election year, even if they were created in the year prior to the election (or in the lame-duck period of the *next* year), qualify. Then to avoid the problem that the outcome of the last four divided government vacancies existing in an election year before Garland was confirmation,⁴² McLaughlin “[does] not [count] vacancies for which there was a nomination already pending when the year began such as happened in . . . 1987-

40 Lee press release n. 37 *supra*. Lee’s reference to “when both parties control the White House and the Senate” is a clear mistake; given the context, he means “when one party controls both the White House and the Senate.”

41 *McLaughlin Article 2*.

42 The four are Justices William Woods (confirmed December 21, 1880); Lucius Lamar (1888; discussed at text at n. 129 *infra*); Melville Fuller (1888; discussed at text at n. 126 *infra*); and Kennedy (1988; discussed at text at n. 29 *supra*).

88.”⁴³ *Mirabile dictu!* The troublesome Kennedy (and Lamar) precedents vanish. Perhaps in 2016 McConnell should have been prescient about what precedents he would need in 2020 to support a confirmation during united government while maintaining the correctness of the Republican refusal to confirm Garland during divided government. McConnell could have defined his category in 2016 in the same way McLaughlin defines his category four years later. But McConnell didn’t. McLaughlin’s portrayal of his precedents as being consistent with the precedents McConnell used is incorrect.

In his remarks quoted above, Senator Cruz tries to have it both ways. He refers to “a Supreme Court vacancy in a presidential election year” and “a president [having] a vacancy during a presidential election year,” both of which could encompass a vacancy occurring prior to the presidential election year that continues into the election year, whether the vacancy results in

a confirmation during the election year or not. But he also asks, “what happens when a vacancy *occurs during* a presidential election year?” and refers to “nominations for *vacancies that occurred in* a presidential election year (emphasis added).”⁴⁴ And Senator Lee simply repeats the numbers in McLaughlin’s data (which not only counts vacancies occurring before the election year but also counts vacancies occurring *after* the election year as long as they occur during the term of the president in office during the election year) while assigning them to the different category McConnell defined (vacancies arising during the election year).

What are the precedents, considered on a principled basis, for filling the Ginsburg vacancy, when they are reviewed as McLaughlin defined the category into which he fit them and when they are reviewed on an equivalent basis to how McConnell defined the category for the Garland nomination?

McLaughlin asks the first part of this question (but, of course, not the second): “So what does history say about *this* [the Ginsburg vacancy] situation, where a president is in his last year in office, his party controls the Senate, and the branches are not in conflict (emphasis in original)?”⁴⁵ To support his conclusion that “historical practice and tradition provides a clear and definitive answer: In the absence of divided government, election-year nominees get confirmed,” McLaughlin includes a chart listing each of the 19 precedents⁴⁶ that Cruz and Lee refer to in the aggregate.⁴⁷

43 *McLaughlin Article 3.*

44 Text at n. 36 *supra*.

45 *McLaughlin Article 8.*

46 *McLaughlin Article 9.*

47 Lee provides no detail in his press release nor does Cruz in his September 25, 2020, Judiciary Committee remarks. In a September 19, 2020, Fox News published opinion,

A. The Post-Election Precedents

Nine of the 19 precedents are for nominations that were made *after* the presidential election. While to McLaughlin, these precedents are perfectly valid to justify filling a Ginsburg vacancy (“presidents get to fill Supreme Court vacancies at any time – . . . even in a lame-duck session after the election, even after defeat”⁴⁸), viewed through a principled lens, they are not.

First, post-election confirmations are clearly not “*this situation*” (emphasis in original). The Ginsburg vacancy (as did the Scalia vacancy) arose *before* the presidential election and was to be filled *before* the election. Of the nine post-election precedents McLaughlin cites, eight are for vacancies that arose *after* the election (and, of course, were filled after the election), including five that arose in the *year* after the election.⁴⁹

Also, none of these nine post-election vacancies is an appropriate precedent for independent reasons. Two were for new seats created on the last day of Democratic President Andrew Jackson’s second term in March 1837, more than two months after the presidential election year. The confirmations for these two nominations occurred *after* Jackson *left office* and the appointments to the seats were made by his successor, President Martin Van Buren, who was also a Democrat (and Jackson’s Vice President during his second term).⁵⁰ Confirmations to two Supreme Court seats that are newly-created by legislation, of course, requires passage of a bill that expands the Court not only by the Senate but also by the House of Representatives. At the time of the Barrett confirmation, the House was controlled by the Democrats. As applied to Barrett’s circumstances,

Cruz links to the McLaughlin Article. Ted Cruz, *Sen. Ted Cruz: After Ginsburg - 3 reasons why Senate must confirm her successor before Election Day*, FOX NEWS (September 19, 2020), <https://www.foxnews.com/opinion/sen-ted-cruz-ginsburg-senate-election>.

48 *McLaughlin Article 2*.

49 The remaining vacancy arose before the election from the October 12, 1864, death of Chief Justice Roger Taney, but because the Senate was out of session until after the election, it was not possible to make a nomination until after the election, much less to have a nominee confirmed. Ironically, this vacancy also became the subject of a mini narrative. In the October 7, 2020 vice presidential debate, then candidate, now Vice President Kamala Harris said Lincoln had not filled the seat because “Honest Abe said, ‘It’s not the right thing to do. The American people deserve to make the decision about who will be the next president of the United States, and then *that* person will be able to select who will serve on the highest court of the land.’” Gillian Brockell, *Kamala Harris’s “little history lesson” about Lincoln’s Supreme Court Vacancy wasn’t exactly true*, WASH. POST (October 8, 2020, 6:33 AM CT) (emphasis in original).

50 These two confirmations were of John Catron and William Smith. See n. 106 *infra*.

a confirmation for a new seat that effectively requires the consent of the House as well as the Senate would be classified as occurring during divided, not united, government. The political reality is that confirmations equivalent to these two Jacksonian era confirmations could not have occurred in 2020 and therefore cannot be precedent for filling the Ginsburg vacancy.

Another post-election nomination in the year after the election is the confirmation of Democrat Howell Jackson in 1893 two weeks before Republican President Benjamin Harrison, who had lost his reelection bid to Democrat Grover Cleveland, left office. The election flipped the incoming Senate from control by Republicans to Democrats. Harrison wanted to nominate a Republican, but knew Democrats would delay proceeding on any Republican nominee so Cleveland could fill the vacancy. Hence, the Republican Harrison nominated a Democrat.⁵¹

The confirmation of a nominee from the party opposite to the one that controlled the presidency and the Senate, as was the case for Howell Jackson, would be as if President Trump had nominated Garland, not Barrett. Once again, these circumstances are not proper precedent for the confirmation of Barrett.

Of the remaining six post-election confirmations, four were nominations by presidents who had won reelection;⁵² one was nominated by a president who had lost reelection to an opponent from the other party and confirmed through virtual chicanery by a Senate whose control would flip to the other party within a week;⁵³ and the final one, for reasons more extensively described for certain pre-election confirmations in Part II.B. below, was confirmed after the nominating president's election loss at a time when the importance of the Supreme Court in the life of the nation was but a shadow of what it is today.⁵⁴ None of these six are remotely similar to the circumstances of the Barrett confirmation.

Second, and most important, drawing a line between election year nominations and confirmations that occur before Election Day (even those, like Barrett, on the eve of the election) and those that occur afterwards is a substantively meaningful distinction. Cruz and others on the Right are not content simply to cite that under the Constitution the president has power to nominate, and the Senate has power to confirm. They maintain the president's and Senate's exercise of this power during united government is justified by the mandate to do so given by the

51 Keith E. Whittington, *Presidents, Senates and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 418.

52 The four (and their nominating presidents) are: William Paterson (George Washington; n. 61 *infra*); Salmon P. Chase (Lincoln; n. 49 *supra*); Ward Hunt (Ulysses S. Grant); and Harlan F. Stone (Calvin Coolidge).

53 This is the confirmation of Peter Daniel; text at ns. 96-99 *infra*.

54 This is the confirmation of John Marshall; n. 60 *infra*.

electorate in the last presidential election and in Senate mid-term elections.

In 2016 . . . Donald Trump promised to nominate justices in the mold of Scalia and Thomas. . . . The American people chose President Trump. That election has consequences. But it's not just the president's election. The American people elected a Republican majority in the Senate. Not once, not twice, three times. In 2014, in 2016, in 2018 – the last election, [when] the American people grew our Republican majority in the Senate. . . . In our elections, judicial nominations and judicial confirmations were front and center. . . . [W]hen we act now to confirm a constitutionalist justice, that is consistent with our promises to the voters and it is the voters who have put the president and the Senate majority in the position to make that choice.⁵⁵

This rationale cannot survive Election Day. Once the presidential election occurs, the electorate has expressed a mandate that supersedes the prior one. Perhaps the new mandate is the same as the prior one. Perhaps it is different. But the old one can no longer be the basis to assert that nominations and confirmations are justified by the results of past elections that have now been superseded. Confirmation precedents under the new post-election mandate cannot be properly applied to support a pre-election confirmation such as Barrett under the old mandate. Or as Cruz, echoing President Obama's famous remark,⁵⁶ said, "That election has consequences."

B. The Pre-Election Precedents

When the nine post-election confirmations are eliminated, 10 vacancies of the 19 identified by McLaughlin remain – 9 confirmations and one failure to confirm. Before reviewing the details of these vacancies, a number of errors, albeit technical ones, in his list should be corrected for the sake of historical accuracy. Most of the errors stem from the June 29, 1795, resignation of John Jay, the Court's first Chief Justice. John Rutledge was a July 1, 1795, recess appointment by President George Washington to fill the Chief Justice vacancy. Washington's December 10, 1795, nomination of Rutledge to be Chief Justice on a permanent basis (Rutledge's term as a recess appointee would have continued until June 1, 1796) was rejected by the Senate on December 15, 1795, and he resigned on December 28, 1795.⁵⁷ On January 26, 1796, Washington nominated William

⁵⁵ Cruz press release n. 36 *supra*.

⁵⁶ "Elections have consequences, and at the end of the day, I won." Obama to Eric Cantor, then House Republican Whip, January 2009, as reported in Eric Cantor, *What the Obama Presidency Looked Like to the Opposition*, N.Y. TIMES (January 14, 2017).

⁵⁷ I THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-

Cushing, then an Associate Justice and an original member of the Supreme Court, to fill the vacancy resulting from Rutledge's resignation. Cushing was confirmed the next day, appointed to the office by Washington and actually served as Chief Justice for a brief period at the beginning of the Supreme Court's February 1796 term. On a date in early February 1796 lost to history, he decided he would not continue as Chief Justice and would remain an Associate Justice.⁵⁸ Washington nominated Oliver Ellsworth for Chief Justice on March 3, 1796. His confirmation the next day finally filled the office on a more than a transitory basis.

McLaughlin fills the interregnum between Jay and Ellsworth only with Rutledge, forgetting Cushing.⁵⁹ He also lists Ellsworth as filling the Jay vacancy, apparently (incorrectly) viewing the recess appointment of Rutledge as a nullity in this context. But it was Cushing who filled the vacancy created by Rutledge's resignation, and it was Ellsworth who filled the vacancy resulting from Cushing's declining to serve as Chief Justice. That Cushing ultimately decided not to continue as Chief Justice does not mean his appointment did not occur. The conclusion that Ellsworth filled the Cushing vacancy is dictated by the initial holding of Chief Justice John Marshall in *Marbury v. Madison*: "When a person, appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office and had created the original vacancy."⁶⁰

When the nine post-election confirmations are eliminated, 10 vacancies of the 19 identified by McLaughlin remain – nine confirmations and one failure to

1800 100 (Maeva Marcus, ed. 1985) (setting forth the text of Rutledge's resignation letter).

58 The Supreme Court's website does not list Cushing as Chief Justice on the ground that he never took his oath of office as Chief Justice. The subject of Cushing's purported Chief Justiceship, including how he could have remained on the Court without being renominated and confirmed after his decision not to continue as Chief Justice, is extensively discussed in Ross E. Davies, *William Cushing Chief Justice of the United States*, 37 U. Tol. L. Rev. 101 (2006).

59 "Rutledge was voted down in [the] pre-election year, replaced with Ellsworth." *McLaughlin Article 9*.

60 5 U.S. 137 (1803). McLaughlin's list of post-election nominations also contains errors involving the confirmation of John Marshall as Chief Justice. Ellsworth resigned as Chief Justice on December 15, 1800. President John Adams nominated Jay on December 18, 1800, to fill the vacancy and he was confirmed the same day. But Jay declined the appointment on January 2, 1801. Adams then nominated Marshall on January 20, 1801, and he was confirmed a week later. McLaughlin lists Marshall as filling the vacancy resulting from the resignation of Ellsworth, failing to list Jay as having been nominated or confirmed. As with Ellsworth's filling the vacancy created by Cushing, Marshall filled the vacancy created by Jay, not the vacancy created by Ellsworth's resignation.

confirm.⁶¹

McLaughlin's list, now reduced to the ten presidential election year, pre-election nominations, appears in Table 1 below.⁶²

61 In his remarks quoted at text at n. 36 *supra*, Senator Cruz says there have been 17 confirmations during united government. He does not explicitly state the number of failures to confirm but does indirectly do so when he says there have been 19 vacancies during united government. The difference of two between the vacancies and the confirmations must be failures to confirm. Senator Lee (text at n. 37 *supra*) says there have been 19 vacancies. He does not explicitly state the number of confirmations but does indirectly do so by saying there has been only one failure to confirm. The difference of one yields 18 confirmations. Hence, Cruz has 17 confirmations and two failures, and Lee has 18 confirmations and one failure.

The table in the McLaughlin Article, from which the Senate Republicans counts are taken, is confusing. The table lists 19 vacancies and *three* failures to confirm. However, one of the failures is John Rutledge, whose nomination occurred before the election year and therefore should not in the table in the first place; text at n. 57 *supra*. The second failure in the McLaughlin table is William Paterson, whose February 27, 1793, nomination by President Washington was withdrawn the next day. Paterson was in the Senate during the passage of the Judiciary Act of the 1789 (and was a co-drafter of the Act). Henry J. Abraham, *JUSTICES, PRESIDENTS AND SENATORS, A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 64 (5th ed., 2007). The Act specified the number of Supreme Court Justices. While he was no longer a Senator at the time of his nomination, the term of office to the Senate seat to which he had been elected would not end until March 3, 1793. Under U.S. CONST. art. I, §6, cl. 2, Paterson was not eligible for appointment to an office created during that term. He was renominated on March 4, 1793 and confirmed. In these circumstances, Paterson is not a confirmation failure. Lee is right – there are 18 confirmations and one failure to confirm.

62 Two changes have been made to the table appearing in *McLaughlin Article* 9. The format of his table was changed, and two nominees listed by McLaughlin do not appear in Table 1. The first nominee is John Rutledge, whose nomination was rejected by the Senate before the election year and therefore does not meet McLaughlin's criterion for inclusion in the category (nominations that are made in the election year; *McLaughlin Article* 3). The second is Homer Thornberry, who was nominated for the seat that would have become vacant had the nomination of already-serving Justice Abe Fortas for Chief Justice not been withdrawn. After the withdrawal, Fortas remained on the Court so there was no vacancy for Thornberry. The Fortas nomination is discussed at text at n. 82 *infra*.

TABLE 1 – PRESIDENTIAL ELECTION YEAR, PRE-ELECTION NOMINATIONS

CREATED BY JUSTICE	VACANCY DATE	NOMINEE	SENATE ACTION DATE	RESULT
John Blair	October 25, 1795	Samuel Chase	January 27, 1796	Confirmed
John Jay	June 29, 1795	Oliver Ellsworth	March 4, 1796	Confirmed
Alfred Moore	January 24, 1804	William Johnson	March 24, 1804	Confirmed
Joseph Bradley	January 22, 1892	George Shiras	July 26, 1892	Confirmed
John M. Harlan	October 14, 1911	Mahlon Pitney	March 13, 1912	Confirmed
Joseph Lamar	January 2, 1916	Louis Brandeis	June 1, 1916	Confirmed
Charles E. Hughes	June 10, 1916	John Clarke	July 24, 1916	Confirmed
Oliver W. Holmes	January 12, 1932	Benjamin Cardozo	February 24, 1932	Confirmed
Pierce Butler	November 16, 1939	Frank Murphy	January 16, 1940	Confirmed
Earl Warren	Not applicable ⁶³	Abe Fortas	October 1, 1968	Not Confirmed

Are all nominations that satisfy McLaughlin’s criteria equally valid precedent for the Barrett nomination, with the exercise becoming a matter of merely counting them, as McLaughlin does? For reasons explained by Ed Whelan, a respected commentator on the Right,⁶³ who was analyzing the *Kar/Mazzone*⁶⁴ precedents on the Garland vacancy, the answer is “no.”

The larger problem with the *Kar/Mazzone* enterprise is that it is deeply ahistorical and blinkered. Like so many modern political scientists, *Kar/Mazzone* collect and aggregate their data points without conducting any qualitative consideration of their value, and they draw grand conclusions for their data that are divorced from the historical and political realities that they ignore.⁶⁵

Whelan’s point was made to eliminate precedents that were inapposite in Whelan’s view but were used by *Kar/Mazzone* to criticize the Republican Senate’s refusal to afford Garland a hearing. Whelan’s point has equal force when references to “*Kar/Mazzone*” are replaced with “McLaughlin” and applied to the precedents justifying the Republican Senate’s confirmation of Barrett.

One “qualitative consideration” of precedential value for Whelan is age. Referring to two 1888 and 1892 precedents cited by *Kar/Mazzone* to support their argument that it was incumbent upon the Republican Senate to give Garland a hearing,⁶⁶ Whelan asks, “Does anyone really think that sparse and distant history

63 See his biography at https://eppc.org/author/edward_whelan/.

64 N. 7 *supra*.

65 Whelan, *Senate Duty – Part 4*, n. 7 *supra*, <https://www.nationalreview.com/bench-memos/kar-mazzone-senate-duty-4/>.

66 While he does not identify the confirmations, as discussed in n. 33 *supra*, they are

has any meaningful normative bearing on how today's Senate should exercise its responsibilities?"⁶⁷ Whelan's criticism in this regard wields a cleaver instead of a paring knife. The age of a precedent is a proper consideration but not because the precedent is "distant history." One valid reason to consider age is to determine whether the position of the Court at the time of the precedent is similar to the circumstances of the Court at time of the nomination under review.

Of the first three of the Senate Republicans' precedents listed in Table 1, two (Chase and Ellsworth) are clearly from a time when the importance of the Court in the life of the nation was so minimal – "It was Marshall who raised the Court from its lowly, if not discredited, position to a level of equality with the executive and the legislative branches . . ." – or the job so unappealing that it was not unusual for confirmed nominees to decline to serve or to resign (other than for reasons of health), including to accept other judicial positions.⁶⁹ When the third precedent (Johnson) was confirmed, the historical stature of the Court could not have been materially different from its "lowly position" when Marshall (who served as Chief Justice for 34 years) joined the Court three years earlier. There had only been two terms (the 1802 term was abolished),⁷⁰ and the Marshall-led Court had delivered only 30 of its eventual 1,000-plus opinions,⁷¹ with *Marbury v. Madison* the only major decision during these three years. Under qualitative standards, the first three confirmation precedents are not proper support for Barrett's confirmation to the Supreme Court of today.

Of the six confirmations remaining, two should not be viewed as good precedent because their circumstances were extraordinary. On June 10, 1916, Charles Evans Hughes resigned from the Court to accept the presidential nomination of the Republican Party. He was defeated by President Woodrow Wilson in the 1916 election. John Clarke was nominated by Wilson on July 14,

Chief Justice Fuller and Justice Shiras, respectively.

67 Whelan, *Senate Duty – Part 4*, n. 7 *supra*, 3rd paragraph.

68 Abraham, n. 61 *supra* at 67.

69 Of the first 17 nominees to the Court prior to the William Johnson confirmation (the third precedent in Table 1), four (24%) resigned or declined to serve other than for reasons of health: Harrison (declined to serve); John Rutledge (an original member of the Court, resigned for the first time in 1791 to become the Chief Judge of a South Carolina court); William Cushing (declined to become Chief Justice in 1796; text at n. 58); and John Jay (declined to become Chief Justice in 1800; n. 60 *supra*).

70 Legislation enacted in April 1802 abolished the Court's 1802 term. Melvin I. Urofsky, *Judiciary Act of 1801*, ENCYCLOPEDIA BRITANNICA, February 19, 2018, <https://www.britannica.com/topic/Judiciary-Act-of-1801>.

71 Anne Ashmore, *Dates of Supreme Court Decisions and Arguments, United States Reports Volumes 2-107 (1791- 1882)*, <https://www.supremecourt.gov/opinions/datesofdecisions.pdf>.

1916, to fill the vacancy and confirmed by unanimous consent eight days later.⁷² Clarke's confirmation is indeed a nomination in a presidential election year during united government, but simply to conclude that this nomination is valid precedent because it satisfies the criteria for the category misses the critical point that the circumstance of this vacancy is unique. When a Supreme Court Justice of the opposite party to the president resigns to run for president against the sitting president (with one effect that if the Senate takes no action on the vacancy and the Justice is elected, he will be able to nominate his own successor), can there be a good faith argument that the Senate of the president's party should not confirm the sitting president's nomination to fill the vacancy? Constructing that argument would seem impossible. To put a current spin on it, could the Democrats have validly objected to the Republican Senate confirming Barrett to a vacancy that had been created by Justice Kagan's resigning to accept the 2020 presidential nomination of the Democratic Party? Again, the result is that Clarke's confirmation cannot be precedent for Barrett under qualitative standards.

The February 1932 confirmation (by unanimous consent,) of Benjamin Cardozo to the Court following the retirement of Oliver Wendell Holmes is also not a valid precedent for Barrett under qualitative standards. Cardozo was ranked last on Republican President Hoover's list of potential nominees shortly before his nomination was announced. But powerful Republican senators insisted on his nomination even though he was a Democrat; a sitting Justice (future Chief Justice Harlan Fiske Stone, appointed to the Court by Hoover's immediate predecessor, Republican President Calvin Coolidge) told Hoover he would resign to enable Cardozo to be confirmed. Cardozo was the most respected sitting judge at that time, with "labor, as well as business leaders, liberals as well as conservatives, advocates of judicial self-restraint as well as judicial activists" favoring his nomination.⁷³ Hoover had no choice and conceded. The circumstances of Cardozo's confirmation are not the circumstances of Barrett's.

Before summarizing how many of McLaughlin's 18 original confirmation precedents still remain, a failure to confirm that is not on his list of united government nominations needs to be addressed. The McLaughlin Article classifies the February 21, 1861, Senate rejection of Jeremiah Black, a nominee of Democratic (lame-duck) President John Buchanan, as occurring during divided government.⁷⁴ At the beginning of the 36th Congress in 1859, which continued until March 3, 1861, the Democrats controlled the Senate. In the months before

72 Abraham, n. 61 *supra* at 145.

73 The quote and the circumstances of Cardozo's nomination are taken from Abraham, n. 61 *supra* at 160-61.

74 *McLaughlin Article* 6 (table titled "Supreme Court Presidential Election Year Nominees, Senate Controlled by Opposing Party, 1828-2016").

the attack on Fort Sumter that marked the start of the Civil War, states seceded from the Union and their Democratic Senators resigned. At the time of the vote on Black, the Senate was split 26 Democrats, 26 Republicans, and two Senators from the American Party.⁷⁵ The Chairman of the Judiciary Committee, appointed by the majority party, did not change from Democrat James Bayard of Delaware. Black's nomination was rejected as a practical matter by a 25-26 vote on a procedural basis.⁷⁶ All Democrats voting (two were absent) voted in favor of the nominee; all Republicans (none were absent) voted against one of the two American Party members voted for, and the other was absent.⁷⁷ There is no landmark to indicate a change in the united government classification that applied at the start of the 36th Congress. Control of the Senate did not shift away from the party holding the presidency. In these circumstances, categorizing the Black confirmation failure as occurring during a divided government seems wrong.⁷⁸ It occurred during a united government. As a result, there are 20 vacancies during united government for which nominations were made during McLaughlin's broad presidential election year definition,⁷⁹ of which 18 nominations were confirmed and two (now including Black) were not.

Turning to the pre-election nominations listed in Table 1 above, when five

75 These 26 Democrats included Senators from North Carolina, Texas, and Virginia, who voted in favor of Black. These states seceded later. 36th Cong., Senate, Vote 515, Voteview.com.

76 The procedural motion was that "the Senate proceed to consider the nomination of Jeremiah S. Black." U.S. Senate Executive Journal, 36th Cong., 2nd sess., February 21, 1861, [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ej01195\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ej01195)))).

77 36th Cong., Senate, Vote 515, Voteview.com.

78 McLaughlin may be relying on Whittington, n. 51 *supra* at 424, who says that "[a]t the time of Black's nomination [which was 16 days before the vote] the Republicans held a one-seat advantage in the Senate, and Black was voted down in a straight party-line vote." Whittington cites as his source the Senate Executive Journal cited in n. 77 *supra*. He is correct that the vote was 25-26 but his conclusion on Senate control seems to be based on two incorrect assumptions from the bare fact of the vote: that all Senators voting were either Democrats or Republicans (in fact, one Senator voting in favor of proceeding was from the American Party); and that no Senators failed to vote (in fact, two Democrats did so). Whittington's mistake provides an example of how an initial factual error is cited as a source and repeated in scholarship in eminent publications years later. Chafetz (n. 7 *supra* at 122) says of the composition of the Senate at the time of the Black vote that "the withdrawal of senators from seceding states had given Republicans a slim Senate majority," citing this portion of the Whittington article.

79 His category includes vacancies "in a lame-duck session before the next presidential inauguration." *McLaughlin Article 3*.

of the pre election nominations are removed for the qualitative reasons discussed above,⁸⁰ four confirmations (Justices Shiras, Pitney, Brandeis, and Murphy) and one failure to confirm (Fortas) remain as valid precedent for Senate Republicans to confirm Barrett under a qualitative standard. This four-to-one split paints a markedly different portrait than Senate Republicans' picture of 18 confirmations and one failure.

What remains of that portrait shrinks further when the last election year before Barrett in which there was united government and Senate action on a Court nomination (Abe Fortas in 1968) is a failure to confirm. McLaughlin tries to explain the Fortas failure by distorting what happened. The basic facts are that lame-duck President Lyndon Johnson nominated Justice Abe Fortas, an Associate Justice of the Supreme Court, to succeed Chief Justice Earl Warren, whose retirement was contingent on the confirmation of his successor, but the nomination was filibustered. After a vote to end debate, which required a two-thirds majority at the time, failed (45 in favor, 43 opposed)⁸¹ on October 1, 1968, Johnson withdrew the nomination and did not submit another one. (Warren continued on the Court until his retirement during the next administration.)

McLaughlin suggests the failure occurred and was justified because Fortas was not qualified: "the only failure [of a pre-election nomination] being the ethically challenged Abe Fortas as chief justice in 1968."⁸² However, according to a scholarly review of the confirmation, many factors led to the defeat of Fortas: "The *major issue* in this case was based on ideological dissensus [the unhappiness of many senators with the activist Warren Court of which Fortas was a member], *supplemented by* partisanship, institutional and individual issues" (emphasis added).⁸³ The "individual issue" had two parts – Fortas continuing to serve as an advisor to Johnson while he was on the Court and an ethical problem involving the amount and source of a fee he received for giving a series of lectures at a university. Keith Whittington does not refer to an ethical issue at all when he discusses the Fortas nomination.⁸⁴ There was also a circumstance similar to that of Garland: half

80 Text at ns. 69-74 *supra*.

81 90th Cong., Senate, Vote 570, Voteview.com.

82 *McLaughlin Article* 10.

83 Donald G. Tannenbaum, *Explaining Controversial Nominations: The Fortas Case Revisited*, 17 PRESIDENTIAL STUDIES QUARTERLY, 573, 582 (1987). The "institutional" issue was the proper role of the Supreme Court versus the legislature and the states, which Professor Tannenbaum says is similar to the "ideological issue" that he lists as the "major issue."

84 "Conservative Democrats in the Senate pilloried Fortas at his confirmation hearings and the Republican [presidential] candidate Nixon and the media questioned the propriety of the coordinated resignation-nomination on the eve of the election." Whittington, n. 51 *supra* at 418.

of the Senate Republicans signed a petition saying that Johnson should not fill the vacancy and it should be left to the next president.⁸⁵

After the defeat of the nomination, Fortas remained on the Court without any call for his resignation. He resigned from the Court in May 1969 shortly after it became public that while serving as a justice he was receiving payments from a business executive convicted of illegally selling stock in his company and whose conviction had been appealed to the Court while Fortas was on it. While these circumstances certainly justify McLaughlin's "ethically challenged" description, they were unknown until seven months *after* the defeat of his nomination. They cannot be relevant to why this united government confirmation failed.⁸⁶

Importing McConnell's limitation on which divided government confirmations should be considered – only vacancies created in the presidential election year – into the united government category (which should be done for consistency) reduces the number of confirmations to only two (Justices Shiras and Brandeis) because Justices Pitney and Murphy, confirmed to fill vacancies arising in the year before the presidential election, are now excluded. Two is a far cry from the 17 touted by Cruz and the 18 touted by Lee. And if Whelan's "distant history" were accepted as a qualitative constraint⁸⁷ Shiras, confirmed in 1892, would also be excluded. The confirmation precedents would then be reduced to only one, with an offsetting confirmation failure (Fortas) being the most recent precedent.

Moreover, the argument underlying why the precedents support the Barrett nomination – the mandate from the voters – is also suspect. The rationale is that what the voters decided during a presidential election almost four years ago coupled with what they decided in mid-term elections almost two years ago governs with undiminished force. Why those past decisions trump what the voters will decide in

85 Tannenbaum, n. 84 *supra* at 581.

86 Senate Republicans adopted McLaughlin's misleading characterization. In a Senate speech shortly after Ginsburg's death, McConnell explicitly attributed the Fortas confirmation failure to the ethics problem involving the payments from the business executive that was unknown at the time of the failure: "Every such [united government] nominee [for a vacancy arising during the election year] has been confirmed, save one bizarre exception of a nominee who had corrupt financial dealings. So let me say again, except for Justice Abe Fortas and his ethical scandals . . ." Congress.gov. *Congressional Record Senate Articles*, <https://www.congress.gov/congressional-record/2020/09/22/senate-section/article/S5733-6>. Senator Lee's September 23, 2020 press release said, "Fortas was rejected on a bipartisan basis after an ethics scandal." Lee press release n. 37 *supra*. As indicated in n. 165 *infra*, contrary to Senator Lee, the Fortas rejection was not bipartisan under longstanding definitions of that term.

87 Text at n. 66 *supra*. As indicated above, mere age should not be sufficient to reject a precedent, but this would be the result if it were.

a week is not addressed or explained.

In the Right's telling, confirmations for vacancies occurring in presidential election years during united government are "normal."⁸⁸ But the precedents that meaningfully supported the Senate moving forward with the Barrett nomination are few, at best. "Normal" is not supported by facts. While perhaps uncomfortable to admit openly that political power is being used without the blessing of principle, it does seem better to be candid. Candor seems preferable to constructing a narrative that on detailed examination cannot stand, further undermining the electorate's weakened faith in the institutions of government.⁸⁹

III. A COUNTER-NARRATIVE ON BARRETT FROM THE LEFT: "THE SCOTUS BIPARTISAN CONVENTION"

Professor Rivka Weill asserts⁹⁰ there is a constitutional convention⁹¹ (dubbed by her the "SCOTUS Bipartisan Convention" and hereafter the "Bipartisan Convention") that applies to a Supreme Court nomination occurring

88 Senator Lee, n. 37 supra.

89 According to Gallup polling in 2021, the proportion of Americans expressing a "great deal" or "quite a lot" of confidence in the Supreme Court, Congress, and the Presidency is only 36%, 12%, and 38% respectively. Megan Brenan, *Americans' Confidence in Major U.S. Institutions Drops*, GALLUPJ(uly 14, 2021), <https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx>. "Only about one-quarter of Americans say they can trust the government in Washington to do what is right . . . 'most of the time'" or a higher portion of the time. This data is from a moving average of polls ending in April 2021. , PEW RESEARCH CENTER, *Public Trust in Government 1958-2021* (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/>.

90 *Court Packing*, n. 7 supra.

91 According to Professor Weill, a constitutional convention requires that "(1) political actors must act consistently; (2) they use rhetoric that recognizes the existence of a convention that guides their behavior; and (3) there should be a constitutional rationale that justifies this convention." *Court Packing* 2711, paraphrasing a quote from an *English* constitutional treatise that is contained in an opinion of the Supreme Court of *Canada* on a proposed amendment to the *Canadian* Constitution. Weill *Court Packing* 2711, n. 14. It is a mystery why Professor Weill chose to resort to *foreign* sources as her *sole* description of a *U.S.* constitutional convention. She could have quoted scholarly work analyzing *U.S.* constitutional conventions that is to the same effect, e.g., "A convention is a practice not memorialized in a formal rule but regularly engaged in out of a sense of obligation, where the sense of obligation arises from the view that adhering to the practice serves valuable goals of institutional organization and the public good." Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 482 (2018).

in the calendar year of a presidential election or a confirmation vote occurring within 12 months prior to the newly elected president taking office, a time period she refers to as the presidential election year “broadly defined.”⁹² “[S]ince the founding of the Republic,”⁹³ all confirmations within these time criteria have been achieved through a “bipartisan” Senate vote, with only a single exception prior to the confirmation of Justice Barrett. If the Bipartisan Convention is breached, expanding the size of the Supreme Court to neutralize the partisan appointment is justified.⁹⁴

According to Professor Weill, the single exception prior to Justice Barrett is the March 2, 1841 confirmation of Justice Peter Daniel. The vacancy arose from the death of Justice Philip Barbour only five days earlier. President Martin Van Buren, a Democrat, had lost his re-election bid to Whig⁹⁵ William Henry Harrison, who would take office two days after the confirmation vote. The Senate, whose term would end two days after the confirmation vote, had a membership of 29 Democrats and 23 Whigs. The incoming Senate had almost exactly flipped: 29 Whigs and 22 Democrats, with one vacant seat.⁹⁶ The midnight vote⁹⁷ to confirm Justice Daniel was 22 Democrats in favor, with four Democrats and one Whig opposed.⁹⁸

It is odd that an article asserting the existence of the Bipartisan Convention

92 *Court Packing* 2715.

93 *Id.* 2712.

94 *Id.* 2708-10, 2040-43.

95 The Whig Party was an effective force in U. S. national politics from the early 1830s until its demise in the mid 1850s. It began as a reaction against the policies of President Andrew Jackson. *See n. 150 infra.*

96 Until U.S. CONSTIT. XXTH amendment, effective with the 1936 presidential election, the terms of the president and Congress ended on March 4.

97 Earl M. Maltz, *Biography is Destiny: The Case of Justice Peter V. Daniel*, 72 BROOK. L. REV. 199, 203 (2006).

98 26th Cong. Senate Vote 315 Voteview.com. Outgoing President Van Buren expressed his pleasure with the appointment in a March 12, 1841 letter to his presidential predecessor, Andrew Jackson, which also demonstrates how current issues involving “originalism” and a justice’s politics go back at least two centuries: “My dear General I had an opportunity to put a man on the Supreme Bench at the moment of leaving the government who will I am sure stick to the true principles of the constitution, & being a Democrat *ob ovo* [from the egg] is not in so much danger of falling off in the true spirit. The Federalists [the Federalist Party had ceased to exist as a practical matter by the early 1830s; Van Buren is sarcastically referring to the Whigs as Federalists] have rallied [railed?] about the selection of our old friend Daniel of Va., but that did not distress me as much as some supposed it would do.” PAPERS OF MARTIN VAN BUREN, 1782-1862, <https://vanburenpapers.org/document-mvb03224>.

never meaningfully proffers a definition of what “bipartisan” means. The most Professor Weill directly provides is that a vote is bipartisan if it “involve[s] the support of some Senators from the opposition.”⁹⁹ The “opposition” is the party of which the president is not a member. The Daniel confirmation vote was not “bipartisan” under this definition because no Whigs voted with the Democrats (nor was the Barrett confirmation, in which no Democrats voted with the Republicans).¹⁰⁰ But beyond these easy cases under Professor Weill’s bipartisan test, how many is “some”? Because Professor Weill offers no explicit guidance but asserts that all favorable confirmation votes meet the Bipartisan Convention (apart from Justices Daniel and Barrett), it is necessary to derive what she considers “bipartisan” by reviewing the extent of opposition support in the votes she reviewed to assert the existence of the Convention.

Professor Weill could not determine the actual opposition support for the March 1912 confirmation of Justice Mahlon Pitney, but concludes that there must have been support from at least two Senators.¹⁰¹ Because the Daniel confirmation is the only confirmation she says is not bipartisan prior to the Barrett confirmation, the Pitney confirmation must be bipartisan in her view.¹⁰² That means the vote of two opposition senators is sufficient to make a confirmation bipartisan.

Professor Weill, expands the scope of the Bipartisan Convention by defining presidential election year confirmations that are partisan to also meet the Bipartisan Convention if they are confirmed by the session of the Senate that begins after the presidential election, which will have about one-third of the Senate newly-elected¹⁰³ (a “fresh mandate”).¹⁰⁴ Presumably, the theory is that the purported legitimacy issue arising from a partisan confirmation vote is cured through the antidote of one-third of the Senate being newly-elected. Unfortunately, Professor Weill’s application of the “fresh mandate” is inconsistent. The two

99 *Court Packing* 2719.

100 Text at n. 35 *supra*.

101 *Court Packing* 2750, Appendix 2, United Gov & Roll Call Vote to Supreme Court, #11, Mahlon Pitney.

102 As discussed under Part III.B., Mahlon Pitney, in fact there were 12 additional opposition Senators who voted for confirmation. That the actual opposition votes favoring confirmation are more than the minimum Professor Weill was willing to use to establish bipartisanship does not affect the conclusion that in her view two votes were enough to make the Pitney confirmation bipartisan.

103 “Article I, section 3 of the Constitution requires the Senate to be divided into three classes for the purposes of elections. Senators are elected to six-year terms, and every two years the members of one class—approximately one-third of the senators—face election or reelection.” *Qualifications and Terms of Service—Terms of Service* at Senate.gov.

104 *Court Packing* 2712, 2719.

“fresh mandate” confirmations in Professor Weill’s dataset are from two post-election nominations by President Jackson to fill newly created Supreme Court seats: Justice John Catron and William Smith (who declined to serve).¹⁰⁵ Catron had the support of two opposition Senators (Whigs) while Smith had no opposition support. “Jackson . . . had his nominees confirmed in the new Senate *despite the lack of bipartisan support* by relying on the fresh mandate of the incoming Senate (emphasis added).”¹⁰⁶ Yet Justice Catron (who by this language is said to *lack* bipartisan support) had two votes from opposition senators,¹⁰⁷ the same number as Justice Pitney, whose confirmation Professor Weill counts as bipartisan. Perhaps this inconsistency can be resolved by assuming it was only William Smith’s confirmation, which had no opposition support, that needed the “fresh mandate” antidote. And perhaps Professor Weill’s failure to recognize that Justice Catron’s confirmation met the Bipartisan Convention without need for the help of the “fresh mandate” was simply an oversight. If those explanations are correct, it is additional evidence that, in Professor Weill’s view, only two votes from the opposition party are necessary to make a vote bipartisan.¹⁰⁸

A. The Longstanding Accepted Definitions of Bipartisan/Partisan Votes

How does Professor Weill’s “two votes are enough” definition comport with the tests used by political science academics and other professional political analysts to determine whether a vote is bipartisan? An initial observation is that

105 On the last full day of the Jackson Administration (March 3, 1837) the Court was expanded to add two new seats to correspond to the two new judicial circuits that were also added at that time. On March 8, 1837, after President Jackson had left office and newly-elected Democratic President Martin Van Buren had taken office, the new Senate confirmed Catron and Smith to those seats. As Professor Weill recognizes (*Court Packing* n. 43), these “fresh mandate” confirmations can no longer occur due to a change in Senate rules; see n. 19 *supra*.

106 *Court Packing* 2719 (emphasis supplied).

107 Two opposition votes are taken from Voteview.com, 25th Cong., Senate, Vote 5; Professor Weill does not indicate the number of opposition votes for either Catron or Smith.

108 Another inconsistency, although one without any potential explanation, is why the confirmations of Catron and Smith are even included in the dataset in the first place. The dataset is supposed to be comprised of “all instances in which either the SCOTUS nomination was in the same *calendar year* as the presidential election or the confirmation vote was within twelve months *prior* to the President taking office.” *Court Packing* 2713-14, 2731 (emphasis supplied). The Catron and Smith nominations were *not* in the calendar year of the election (they were in the following year) and their confirmations occurred *after* the new president took office. This inconsistency is compounded because the only use of the “fresh mandate” by Professor Weill is for the Catron and Smith confirmations. Hence, it seems she grafted the “fresh mandate” onto the Bipartisan Convention to resolve an issue that is in fact outside the bounds of the category of cases that Professor Weill herself defined.

none of these tests use absolute numbers. Using an absolute number means that two yeas from the opposition party in support of a nomination in which 10 other party members voted nay and two yeas from the opposition party in which 35 other party members voted nay have the same weight on the bipartisan/partisan scale. On a percentage basis, however, the two yeas in the first case are 16.7% of the party's total votes while the two yeas in the second case are only 5.4% of the party's total votes. Over the 23 presidential election years in the dataset Professor Weill created to vet the existence of the Convention, parties holding the majority in the Senate ranged in size from 21 (Federalists in 1796) to 69 members (Democrats in 1940) and those that were the largest minority party ranged from five (Federalists in 1824) to 48 (Democrats in 2020). To account for such differences, the professional literature defines whether a vote is bipartisan (or partisan) by looking at what percentage of each party's members who voted on a matter voted the same (or the opposite) way.

Votes that are bipartisan are not partisan and vice versa. Looking at it from the partisan perspective, the basic partisan definition, which has been in use for at least 70 years, characterizes a vote as partisan when a majority of one party votes the opposite way from a majority of the other party.¹⁰⁹ For example, on April

109 E.g., CQ ALMANAC 2010, B-17; CQ refers to such votes as "party unity votes." *Id.* B-12. Brookings Institution, *Vital Statistics on Congress* (2021 ed.) Table 8-3 reports the CQ party unity votes in each House of Congress from 1953-2016. Other examples using the majority opposition definition are Patricia A. Hurley and Rick K. Wilson, *Partisan Voting Patterns in the U.S. Senate 1877-1986*, XIV LEGISLATIVE STUDIES QUARTERLY 225, 228 (1989); and William G. Shade, Stanley D. Hopper, David Jacobson, and Stephen E. Moiles, *Partisanship in the United States Senate: 1869-1901*, IV JOURNAL OF INTERDISCIPLINARY HISTORY 185, 195 (1973).

Other studies focus on whether a vote is bipartisan. That characterization is met when a majority of each party votes the same way. E.g., Peter Trubowitz and Nicole Mellow, "Going Bipartisan": *Politics by Other Means*, 120 POLITICAL SCIENCE QUARTERLY 433, 440 (2005); James M. McCormick and Eugene R. Wittkopf, *Bipartisanship, Partisanship, and Ideology in Congressional-Executive Foreign Policy Relations, 1947-1988*, 52 JOURNAL OF POLITICS 1077, 1082 (1990).

In the literature, the bipartisan/partisan vote categories are binary; there is no indeterminate middle ground where a vote is neither bipartisan nor partisan. When majorities of each party do not vote the same way, they necessarily oppose each other. Hence, the failure to meet this bipartisan definition results in a vote that is not bipartisan or, to put it directly, partisan. See James D. Bryan and Jordan Tama, *The Prevalence of Bipartisanship in U.S. Foreign Policy: an analysis of important congressional votes* (published online Aug. 4, 2021, available through researchgate.net): "We define bipartisan votes as ones where a majority of Democrats and a majority of Republicans vote together, and define polarized votes as ones where at least half of the members of each party vote on

7, 2022, the Senate confirmed Ketanji Brown Jackson as an Associate Justice of the Supreme Court by a vote of 53-47. In that vote, 50 Democrats (100% of Democrats voting on the matter)¹¹⁰ voted “yea” while 94% of Republicans voting on the matter voted “nay.”¹¹¹ A majority (in this case 100%) of Democrats voted the opposite way (yea) from the way that a majority (in this case 94%) of Republicans voted (nay). Hence, this vote is partisan.

The majority threshold in the basic definition creates a large range for characterizing a vote as partisan; a vote in which the opposing majorities are each a bare majority (51% to use a percentage) and a vote in which they are each a substantial majority (say at least 94%, to use the lower actual opposing majority from the Brown Jackson confirmation) are both partisan votes.¹¹² Other commonly used definitions compress the percentage range of the basic definition (in which any percentage between 50.01 and 100% qualifies) by raising the majority threshold to a supermajority, 65%¹¹³ or 90% (the latter, a “stringent definition”).¹¹⁴ One definition removes the partisan characterization that would otherwise result from opposing majorities if the percentage difference between the same-way votes of the parties is not more than 20%.¹¹⁵

opposite sides.” Quote found under section titled “Bipartisanship across foreign and domestic policy” at 8.

110 Because they caucus with the Democrats, independents Bernie Sanders (Vermont) and Angus King (Maine) have been classified for this purpose as Democrats.

111 117th Cong., Senate, Vote 662, Voteview.com

112 For example, assume a hypothetical in which Brown Jackson was confirmed 51-49, with 27 Democrats having voted in favor of confirmation and 23 having voted against and 24 Republicans having voted in favor and 26 having voted against. In this hypothetical, 54% of the Democrats voting would have voted the opposite way from 52% of the Republicans voting. This vote is classified as a partisan vote in the same way as the actual Brown-Jackson confirmation vote in which 100% of Democrats voted the opposite way from 94% of Republicans.

113 KENNETH T. POOLE AND HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* (2D. REV. ED. 2017). Using this 65% opposing threshold definition, the actual Brown Jackson vote would be partisan because at least 65% of Democrats voted the opposite way from at least 65% of Republicans. Under this test, however, the hypothetical confirmation vote in n. 113 *supra* would be bipartisan because less than 65% of each party voted in the opposite way from the other party.

114 *Id.* 81, n.17; Shade et. al n. 110 *supra* at 196 recognizes the “stringency” of the 90% metric.

115 Trubowitz and Mellow, n. 110 *supra* at 440. For example, if 45% of a party voted the same way as 65% of the other party, even though party majorities opposed each other, because the difference is not greater than 20%, the vote is characterized as bipartisan. Using the hypothetical Brown Jackson confirmation vote in n. 113 *supra*, with 54% of Democrats having voted the same way as 48% of Republicans, the vote is bipartisan

The September 17, 1986 (non-election year) vote to confirm Republican President Ronald Reagan's nomination of William Rehnquist as Chief Justice illustrates the application these various definitions. Rehnquist was confirmed 65-33, with 96.1% of voting Republicans (49) voting yea and 66.0% of voting Democrats (31) voting nay; 16 Democrats (34.0% of Democrats voting) voted yea.¹¹⁶ Professor Weill should characterize this vote as having "broad bipartisan consent under her test."¹¹⁷ Yet, as shown by the table below, this vote would be characterized as partisan under three of the four definitions used by political science scholars and professional political analysts.¹¹⁸

because the difference between the same-way percentages is 6%.

116 99th Cong., Senate, Vote 647, Voteview.com

117 This is because she asserts that "after March of a[] [presidential] election year the Senate votes only on nominations that garner *broad* bipartisan consent." *Court Packing* 2722 (emphasis supplied). Professor Weill seems to be forgetting the June 1, 1916 confirmation of Democratic President Woodrow Wilson's nomination of Louis D. Brandeis, which garnered only three (12.5%) Republican (opposition party) yeas in a vote where 87.5% of Republicans opposed 97.8% of Democrats. Yes, for Professor Weill this is "bipartisan" support, but the addition of only a single vote to her two-vote bipartisan minimum cannot result in a transformation in which three votes becomes "broad bipartisan consent."

Perhaps she meant to start her "broad bipartisan consent" period in July to cover the voice vote (n. 161 *infra* explains the voice vote) confirmations of Wilson's nomination of John Clarke (July 1916) and President Benjamin Harrison's nomination of George Shiras (July 1892) and the July 1888 roll call vote confirmation of Democratic President Grover Cleveland's nomination of Melville Fuller as Chief Justice. He was confirmed with 10 Republican yea votes. That the Rehnquist confirmation vote did not occur in a presidential election year is not relevant to the question of how much opposition voting agreement is needed for a vote to be bipartisan in Professor Weill's view. The "broad bipartisan" characterization that she would apply to Fuller's confirmation results from the 10 yea votes from the opposition party (Republicans). In the Rehnquist confirmation, there were 16 yea votes from the opposition party (Democrats). While not used by Professor Weill to determine a vote's characterization, the percentage of yea opposition party votes to total opposition party votes is equivalent in both cases (33.3% for Fuller and 34.0% for Rehnquist).

118 There is some irony here in that the *very next* Senate vote on the *same day* as the Rehnquist confirmation was on another Supreme Court confirmation that has been remembered nostalgically as occurring at a time when confirmations to the Court had no trace of rancor: Justice Scalia's 98-0 confirmation. *E.g.*, "The politics surrounding SCOTUS nominations were not always this bad. In calendar years, it was not too long ago . . . [w]hen Antonin Scalia was confirmed 98-0 in 1986. . . . In political years, these consensus confirmations [also referring to the confirmations of Justices Sandra Day O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer] reflect a bygone era akin to the locomotive, the Model T and wired telephones." PRESIDENTIAL

TABLE 2—BIPARTISAN/PARTISAN TESTS REHNQUIST CHIEF JUSTICE CONFIRMATION

OPPOSING MAJORITIES	OPPOSING MAJORITIES BUT 20% OR LESS SUPPORT DIFFERENCE	65% THRESHOLD OPPOSING MAJORITIES	90% THRESHOLD OPPOSING MAJORITIES
Partisan	Partisan	Partisan	Bipartisan

B. Confirmations that Are Partisan in Addition to Justice Daniel

Prior to the confirmation of Justice Barrett, Professor Weill’s conclusion is that only the partisan confirmation of Justice Daniel did not meet the Bipartisan Convention. There are, however, six other confirmations that under the various definitions used by academics and professional analysts discussed above are clearly partisan. Each of these confirmations is discussed below.

Louis D. Brandeis: The process that resulted in the June 1, 1916 confirmation of Justice Brandeis was likely the most rancorous confirmation in history, surpassing even the confirmations of Justices Kavanaugh, Thomas and Thurgood Marshall and the failed nomination of Judge Robert Bork.¹¹⁹ Brandeis was nominated by Democratic President Woodrow Wilson and was confirmed 47-22, with 97.8% of voting Democrats (44) voting yea and 87.5% of voting

COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, *Testimony of Jeffrey J. Peck* (July 20, 2021) 3, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf>

119 Brandeis was the leading progressive lawyer-activist of his day. The time between Justice Brandeis’s nomination and confirmation is the longest in history and the number of days of Judiciary Committee hearings on him are also the longest. The inclusion of the non-election year Justice Thurgood Marshall confirmation in this quartet accepts the characterization of Stephen L. Carter, *What Thurgood Marshall Taught Me*, N.Y. TIMES MAGAZINE (July 14, 2021), who believes that the only peer to the Brandeis confirmation is Marshall’s: “To this day, [Marshall’s confirmation battle] remains one of the two most vicious in our history – the other being the . . . nomination of Louis Brandeis” While Carter is referring to the *hearings* on Justice Marshall, his confirmation *vote* is bipartisan under every metric used by academics and professional analysts – 78.3% of Democrats voted the same way as 97.1% of Republicans.

Republicans (21) voting nay.¹²⁰

Mahlon Pitney: Mahlon Pitney was confirmed on March 13, 1912 by a vote of 50-26. Judge Pitney (previously a member of New Jersey's Supreme Court) was nominated by Republican President William H. Taft and drew significant opposition due to his judicial decisions that were unfavorable to labor.¹²¹ Professor Weill could not determine a party voting breakdown¹²² but hypothesized that because four Republicans voted against Judge Pitney, at least two Democrats voted in his favor.¹²³ Her hypothesis is correct on the facts she cites in that with 52 Republicans in the Senate, when four of them vote against confirmation, assuming that all Republicans in fact voted, 48 Republican votes remain; if Pitney received 50 votes in favor of confirmation, then there must have been at least two votes from Democrats. On these facts, 92.3% of Republicans voted yea and 83.3% of Democrats voted nay.

There is, however, no reason to present a hypothesis about the party breakdown of the Pitney confirmation vote. The actual vote is available from the primary source in which such confirmation votes were recorded at the time, the Senate Executive Journal. Contrary to her hypothesis, five Republicans voted nay; 11 did not vote. Pitney was confirmed with 87.8% of Republicans (35) voting yea and 60% of Democrats (21) voting nay, with 14 voting in favor of Pitney.¹²⁴ That the actual Pitney confirmation included opposition votes far greater than Professor

120 64th Cong., Senate, Vote 147, Voteview.com.

121 Fred L. Israel, *Mahlon Pitney* in III THE JUSTICES OF THE SUPREME COURT, THEIR LIVES AND MAJOR OPINIONS 999-1000 (Rev. ed. 1997).

122 She took her information on votes and party breakdowns from *Voting Records* in the GovTrak database. *Court Packing* 2759 n.i. Neither this database nor the only other one (Voteview) that provides information about Senate votes includes the Pitney confirmation vote.

123 *Court Packing* 2750, Appendix 2, United Gov & Roll Call Vote to Supreme Court, #11, Mahlon Pitney. The source she cites for the number of Republicans voting against confirmation is Michael R. Belknap, *Mr. Justice Pitney and Progressives*, 16 SETON HALL L. REV. 381, 405 (1986). Belknap cites as his source Alexander M. Bickel, IX HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE JUDICIARY AND RESPONSIBLE GOVERNMENT (1910-21) 332 (1984); Bickel gives no source for the votes he reports.

124 Senate Executive Journal, March 13, 1912,

<https://hdl.handle.net/2027/mdp.39015073069646?urlappend=%3Bseq=229%3Bown-erid=13510798903379706-233>. The party identification was taken from a vote that was close in time to the Pitney confirmation vote, 62nd Cong., Senate, Vote 112 (March 11, 1912), Voteview.com. The report of four Republican nays in Bickel n. 124 supra. is short by one in that it does not include Miles Poindexter (Washington), whom the Senate Executive Journal lists as a nay. Equivalent to his vote against his party in the Pitney confirmation, Poindexter was one of three Republicans who voted in favor of confirming Brandeis.

Weill assumed is of no moment to her determination that “two votes are enough” for a confirmation to meet the Bipartisan Convention. She recognizes only a single exception, and she was willing to conclude her hypothesized two opposition votes for Pitney were sufficient to place him in the bipartisan category.

Melville Fuller: Melville Fuller, Democratic President Grover Cleveland’s nominee for Chief Justice, was confirmed on July 19, 1888. Fuller was confirmed 41-20, with 31 Democrats (100%) voting in favor and 20 Republicans (69.0%) opposed.¹²⁵ From Professor Weill’s perspective, the Fuller confirmation “had broad bipartisan consent.”¹²⁶

Lucius Q. C. Lamar: Democratic President Cleveland nominated Lucius Q. C. Lamar on December 6, 1887 to fill the vacancy caused by the May 14, 1887 death of Justice William Woods. The Senate was not session at time of his death and the next session did not begin until the day before Lamar’s nomination; a nomination cannot be made unless the Senate is in session. Lamar was highly controversial because he had written Mississippi’s Ordinance of Secession and had been both a Confederate general and the Ambassador of the Confederacy to Russia.¹²⁷ Lamar was confirmed 32-28 on January 16, 1888, with 29 Democrats (100%) voting in favor and 28 Republicans (93.3%) opposed.¹²⁸

Justice Lamar’s confirmation, even though it occurred in mid-January of a presidential election year (President Cleveland lost his re-election bid to Republican Benjamin Harrison) is not included in Professor Weill’s dataset. This is because she defines the dataset to include all nominations made in the calendar year of a presidential election and all confirmation votes occurring “twelve months prior to the President taking office.”¹²⁹ Lamar’s nomination did not meet the nomination criterion because he was nominated in December of the year prior to the election; and did not meet the confirmation vote criterion because the vote was in January, more than twelve months prior to the new president taking office, which at the time was March 4 of the year after the election.¹³⁰ The question is whether this exclusion makes sense. For the reasons described below, it does not.

To give the long ago Lamar confirmation the resonance of recent events

125 50th Cong., Senate, Vote 138, Voteview.com.

126 See the discussion regarding the Rehnquist Chief Justice confirmation at n. 118 *supra*.

127 Abraham n. 61 *supra* at 112.

128 50th Cong., Senate, Vote 9, Voteview.com

129 *Court Packing* 2714.

130 The xxth Amendment changed the last day of the president’s term from March 4 in the year following the election to January 20, thereby shortening the “lame duck” period by six weeks.

without affecting that confirmation's actual place in the calendar, assume a counterfactual in which Justice Ginsburg dies on December 9, 2019 and Justice Barrett is nominated on December 20, 2019 (an interval of the same length between Ginsburg's death and Barrett's nomination as actually occurred); and she is confirmed on January 16, 2020 (an interval of same length between her nomination and confirmation as actually occurred), which puts her confirmation on the same date in January as Justice Lamar's. Also assume the XXth Amendment was never adopted so that the end of the president's term is the same as when Justice Lamar was confirmed.

It would be odd to exclude this counterfactual Barrett confirmation, as Professor Weill would do, from a dataset built to determine the extent to which confirmations during a presidential election cycle were bipartisan. It is equally odd to exclude the actual Lamar confirmation. His is the first one prior to Justice Barrett that met the test of pitting at least 90% of one party against at least 90% of the other party.¹³¹ Even the Daniel confirmation (the only exception to the Bipartisan Convention recognized by Professor Weill) does not meet this "stringent"¹³² test for partisanship and therefore can be fairly viewed on a quantitative basis as *less* partisan than the Lamar confirmation.¹³³

Equally important, defining what's in and what's out of her dataset by choosing as a landmark the end of the president's term and then looking backwards 12 months ignores what should instead be the key marker – the presidential election preceding the end of the term – that underlies the two-fold rationale Professor Weill provides for the Bipartisan Convention.

The first rationale is "to enable the people to have input on the appointment

131 Professor Weill asserts that "no Supreme Court appointment in a presidential election year garnered less than 66% support in roll call votes throughout American history." *Court Packing* 2725. (The 66% support is a reference to the percentage of yeas votes to total votes in the Pitney confirmation.) The Lamar confirmation garnered only 53% support.

132 Poole as well as Shade use this descriptor, n. 110 *supra*.

133 Presumably, Professor Weill would reply that two members of the opposition party voted for Lamar's confirmation versus none for Daniel. That is true but the fact is significant only under a test constructed by Professor Weill, which is not part of the corpus of generally accepted definitions of bipartisanship or its partisan inverse. On the other hand, there are the circumstances of the Daniel confirmation – nomination less than a week before the end of the president's term by a president who had lost re-election, the change in control of the Senate that would occur two days after the vote, and the "midnight" confirmation vote, none of which are captured by these quantitative tests. Perhaps what this suggests is that it is a futile exercise to try to determine whether one confirmation that is highly partisan on a quantitative basis is more partisan than another clearly partisan one when the circumstances of the second are added to the mix.

of the Justices. Presidential candidates treat the power to appoint Supreme Court Justices as a central electioneering item and discuss their vision of the Court during campaigns.”¹³⁴ While Professor Weill is not explicit about how the Bipartisan Convention will “enable the people to have input into the appointment of the Justices,” perhaps it is that a confirmation that is bipartisan reflects agreement from both sides of the aisle, thereby presumably indirectly reflecting the input of the people who elected those representatives. “Appointing a Justice during a presidential election year raises serious concerns of legitimacy,”¹³⁵ and it is (presumably) this indirect input (through prior Senate elections) that makes the appointment legitimate.

In a prior article, Professor Weill explored legitimacy issues concerning lame-duck presidencies and caretaker governments in parliamentary systems.¹³⁶ The essence of lame-duck presidents (and caretaker governments) is the ending of a term. Yet in that article she asserted elections are the key dividing line that defines legitimacy:

Before the next election cycle, the current president enjoys a direct democratic legitimacy from the people. It may, of course, be asserted that the democratic legitimacy of the president weakens toward the end of her term, since her mandate is stale. However, such assertions are problematic In light of these [problematic] concerns, this Article focuses on defined acceptable institutionalized mechanisms to measure democratic legitimacy—elections or the loss of parliamentary support—because they are objective measures [E]lections serve as an acceptable criterion to measure democratic legitimacy in presidential systems.¹³⁷

Hence, the critical dividing line under her first rationale for the Bipartisan

134 *Court Packing* 2727.

135 *Id.* 2711.

136 Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. 1087 (2011).

137 *Id.* 1102. While in *Constitutional Transitions*, the “assert[ion] that the democratic legitimacy of the president weakens toward the end of her term” is “problematic,” in *Court Packing* she embraces such weakening because it supports the rationale of the Bipartisan Convention: “During election time [which, in the words of *Constitutional Transitions*, is “towards the end of her term”], presidents suffer from a democratic deficit [or, in the words of *Constitutional Transitions*, a weakening in “democratic legitimacy”] as it is not guaranteed that they or their party’s designated successor will win the election.” *Court Packing* 2728. Participating in a podcast in which she summarized *Court Packing*, Professor Weill made her “weakening” point in more succinct, simpler language: “During a Presidential election time, the mandate of the President is waning” Federalist Soc. podcast transcript n. 32 *supra* at 4.

Convention – whose goal is to preserve the legitimacy of Supreme Court appointments – is the election, not the end of the president’s term.

The second rationale she asserts for the Convention is the agency problem of a president acting to further their own interests, not the public good.¹³⁸ Professor Weill examined this exact “agency problem” in the context of her prior work on lame-duck and caretaker governments.¹³⁹ Again she recognizes this agency problem is defined by the election, not the end of the term.

To conclude the discussion, while agency difficulties appear even before the elections, they are largely manageable because of the impending elections, which typically constrain even last-term executives.¹⁴⁰ In most cases, the impending election serves to align the interests of even departing executives with the interests of the voters. . . . Agency difficulties are heightened in the post-election period, after the caretaker or lame-duck government has effectively lost power. . . . After all, the regular mechanism of democratic check, in the form of the will of the voter, is no longer applicable.¹⁴¹

Under the rationales Professor Weill gives for the Bipartisan Convention and the rationales she used in her prior work on lame-duck presidents and caretaker governments (which raise issues similar to the ones the Bipartisan Convention is designed to address),¹⁴² a measure that loses sight of the presidential election as the principal guidepost in favor of one that focuses on the end of the presidential term of office is flawed. It should not be used to exclude the Lamar confirmation.

In fact, had the XXTH Amendment applied to the election of 1888, Justice Lamar’s January 16 confirmation would have been included in Professor Weill’s dataset. The effect of Professor Weill’s “twelve months prior” rule is to exclude confirmations in January and February of an election year that occurs before effectiveness of the XXth Amendment.¹⁴³ There have been two: Justice Benjamin

138 *Court Packing* 2728.

139 *Constitutional Transitions* 1104; the quotes appear around “agency problem” in *Constitutional Transitions* but not when it is used in *Court Packing*.

140 A “last-term executive” is a president who “cannot be re-elected based on such issues as an illness, a reputation that is compromised by an offense involving moral turpitude or a constitutional restriction barring reelection (e.g., terms limits for U.S. presidents)” *Constitutional Transitions* 1105 (footnote reference omitted).

141 *Id.* 1106 (footnote reference omitted).

142 And similar solutions: the ultimate point of *Court Packing* is to justify court packing as a remedy for violation of the Convention, and the ultimate point of *Constitutional Transitions* is to “offer[] guidelines for the appropriate constitutional regime that should govern caretaker or lame-duck governments in both parliamentary and presidential systems during times of peaceful transition.” *Id.* 1094 (footnote reference omitted).

143 After the adoption of the XXTH Amendment, a confirmation in January of an election

Cardozo, confirmed February 24, 1932,¹⁴⁴ and Justice William Cushing, confirmed January 27, 1796.¹⁴⁵ They are included in her dataset only because their *nominations* occurred in the presidential election year. The year in which a nomination occurs should not be relevant to determining whether it should be part of a dataset of presidential election cycle bipartisan *confirmations*. Without a confirmation, a nomination is of no consequence for that purpose. Hence, when the point of the exercise is to build a dataset to determine if a particular confirmation is legitimate, the meaningful inquiry is to consider when the confirmation occurred.

Similarly, but for the XXTH Amendment, the February 2, 1988 confirmation of Justice Kennedy (by a vote of 97-0) would have been excluded from her dataset because his nomination was in the calendar year prior to year of the presidential election. Kennedy's confirmation is properly included in the dataset not because, due to the Amendment, it was within 12 months of January 20, 1989. It is properly included because his confirmation, occurring in the election year and prior to the election, meets the dual rationales Professor Weill articulates for the Bipartisan Convention discussed above.¹⁴⁶

Professor Weill provides scant explanation for her complex definition of the presidential election year that she uses to determine which confirmations she examines to assert the existence of the Bipartisan Convention, and what explanation she does provide is opaque.¹⁴⁷ It is easy to draft a simpler formulation

year that is more than 365 days prior to the president taking office on January 20 of the next year would presumably be included. Such a confirmation would be "within twelve months prior" to January 20 of that next year (when the president takes office) because the 12th month prior to January of that next year is January of the prior (election) year.

144 Cardozo's confirmation is discussed at the text at n. 74 *supra*.

145 Cushing's confirmation is discussed at the text at n. 58 *supra*.

146 Ironically, her dataset includes another January 16 confirmation (Justice Frank Murphy), albeit the year is 1940, not 1888. Professor Weill would (presumably) say Justice Murphy is included on two independent grounds: his nomination on January 4 was in the presidential election year by four days; and his confirmation was within 12 months prior to the January 20, 1941 end of the president's term (because January 1940 is 12 months prior to January 1941). As discussed above, neither the year of the nomination nor the end of the president's term should determine whether confirmation is included in the dataset. To meet Professor Weill rationale for the Bipartisan Convention, Justice Murphy's bipartisan confirmation should be included (as it is) along with Justice Lamar's partisan one (which is not).

147 "This definition tries to be expansive [insofar as the Justice Lamar confirmation is concerned, it is restrictive] while balancing between efficiency [perhaps this means that January 1 of the election year provides a reasonable starting point, but if so, it would not have been difficult to be explicit] and legitimacy [perhaps this means that post election (lame-duck) confirmations need to be included, but it would not have been difficult to be explicit here as well]." *Court Packing* 2714.

that includes every confirmation in a presidential election year or in the lame duck period: “All confirmations in the presidential election year or in the lame duck period of the next year.” This definition captures all of the confirmations she analyzed but would also include Justice Lamar’s confirmation (and would exclude the Catron and Smith confirmations, which she includes even though, as discussed above, they do not meet her own criteria for inclusion in her dataset).¹⁴⁸

Roger B. Taney and Philip Barbour: Roger B. Taney, Democratic President Andrew Jackson’s nominee for Chief Justice, was confirmed on March 15, 1836. The vote was 29-15, with 100% of Democrats voting yea in opposition to 72.2% of the votes of Anti-Jacksonians.¹⁴⁹ On the same day it confirmed Taney, the Senate confirmed another Jackson nominee, Philip Barbour, 30-11. In this vote, 100% of Democrats voting yea opposed 68.8% of Anti Jacksonians.¹⁵⁰

Six Confirmations Professor Weill Counts as Bipartisan are Partisan

Table 3 below presents the results of the four tests accepted by academics and professional analysts to these six confirmations. The table also includes the partisan confirmation of Justice Daniel, the single exception Professor Weill acknowledges to the Bipartisan Convention, to show how his confirmation fared under these tests.

148 N. 109 *supra*. Professor Weill’s definition may also intended to capture nominations during her broadly defined presidential election year that are not confirmed. She includes such nominations in her dataset, but they have no bearing on the Bipartisan Convention, which covers only nominations that are confirmed. While not needed for purposes of analyzing the Convention, capturing these nominations can be done easily by adding a final clause to the simpler formulation above: “and all nominations during those periods that are not confirmed in them.” Indeed, this definition encompasses three unconfirmed nominations that Professor Weill includes in her dataset even though they do not meet her criteria for inclusion because the nominations were made after the calendar year of the election and there was no Senate vote of any type on them. Recall that when a nomination is not made in the calendar year of the election, her criterion for inclusion is that a “confirmation vote was within twelve months prior to the President taking office (emphasis supplied).” *Court Packing 2012-13*. The three are John Read, nominated by John Tyler in February 1845; William Micou, nominated by Millard Fillmore in February 1853; and Stanley Matthews, nominated by Rutherford B. Hayes in January 1881. Barry J. MacMillon, CONG. RSCH. SERV., *Supreme Court Nominations, 1789-2020: Actions by the Judiciary Committee, the Senate and the President*, Table 1 (March 8, 2022).

149 24th Cong., Senate, Vote 40, Voteview.com The principal party opposed to the Jackson Administration at the time of this vote was referred to as the Anti-Jackson Party. During the following Congress, when Democratic President Martin Van Buren succeeded President Jackson, the Anti-Jackson Party became the Whig Party.

150 24th Cong., Senate, Vote 43, Voteview.com.

TABLE 3—SUMMARY PARTISAN/BIPARTISAN RESULTS FOR SIX

JUSTICE	OPPOSING MAJORITIES	OPPOSING MAJORITIES BUT 20% OR LESS SUPPORT DIFFERENCE	65% THRESHOLD OPPOSING MAJORITIES	90% THRESHOLD OPPOSING MAJORITIES
<i>Brandeis</i>	Partisan	Partisan	Partisan	Bipartisan
<i>Pitney</i>	Partisan	Partisan	Bipartisan	Bipartisan
<i>Fuller</i>	Partisan	Partisan	Partisan	Bipartisan
<i>Lamar</i>	Partisan	Partisan	Partisan	Partisan
<i>Taney</i>	Partisan	Partisan	Partisan	Bipartisan
<i>Barbour</i>	Partisan	Partisan	Partisan	Bipartisan
<i>Daniel</i>	Partisan	Partisan	Partisan	Bipartisan ¹⁵¹

Harvard Law School Professor Noah Feldman remarked that he had only “one substantive criticism of [the Bipartisan Convention], which is that there is a genuine question of whether there can be a ‘constitutional convention’ if no one has ever identified, noted, or found that convention before.”¹⁵² There is a second, equally cogent criticism, which is that the number of partisan confirmation exceptions to the Convention vitiates its existence.

Professor Weill recognizes only a single confirmation exception before Justice Barrett (Justice Daniel) to the Bipartisan Convention. Yet, as shown in Table 3, there is one confirmation – Justice Lamar – that is *more* partisan than Justice Daniel;¹⁵³ there are four – Justices Brandeis, Fuller, Taney and Barbour – that are as equally partisan as Daniel; and there is one – Justice Pitney – that is partisan albeit not as strongly as the others. As a scholar propounding the existence of a constitutional convention, Professor Weill bears the burden to prove her case. Surely she should do so by using definitions of bipartisanship that have received some reasonable level of acceptance by knowledgeable observers, and not through an idiosyncratic test of her own devise that is not even explicitly noted in her

151 In the Daniel vote, 86.2% of Democrats opposed the single Whig who voted (100%). 26th Cong., Senate, Vote 315, Voteview.com

152 Federalist Soc. podcast transcript n. 32 *supra* at 13.

153 *But see* the discussion in n. 134 *supra* on the difficulty of determining which of two partisan confirmations is the more partisan.

work.¹⁵⁴ There are seven exceptions to the Bipartisan Convention, not just one.

Professor Weill includes 25 confirmations in her presidential election year dataset. Adding Justice Lamar brings the number to 26. The Catron and Smith confirmations, however, violate Professor Weill's own self-determined rule on what should be included¹⁵⁵ and it seems proper to exclude them, bringing the new total to 24. Seven exceptions on that total produces an exception rate of 29.2%. That rate is far too high to support the existence of a convention given that, according to Professor Weill, the first condition to finding one is that "political actors must act consistently."¹⁵⁶ A variance of this magnitude is not "acting consistently."¹⁵⁷ Professor Weill would not seem to disagree. She classifies the Pitney confirmation vote as bipartisan even though she was willing to accept that as many as 92.3% of Republicans could have opposed as many as 83.3% of Democrats. This willingness to categorize as bipartisan a vote that objectively is

154 That is not to say others have not used their own not personal definitions of bipartisan, although in informal settings rather than scholarly ones. *E.g.*, Harvard Law School constitutional law scholar Laurence Tribe, 3/30/2022 tweet after it was reported that there would be at least one Republican vote to confirm Ketanji Brown Jackson: "So glad KBJ's [confirmation] will be bipartisan." There was some pushback: "Now 1 opposite party (to President) favorable vote = bipartisan. This is delusion writ large. That means Kavanaugh was "bipartisan," Gorsuch and Alito were even more bipartisan & Thomas was overwhelmingly bipartisan. The *partisan* takeover of the Court has died a strange death."

Another example: In her December 12, 2019 weekly press conference, the Speaker of the House of Representatives, Democrat Nancy Pelosi (California), claimed there were "over 275 bipartisan bills" passed by the House of Representatives that were not being acted on by the Senate. She gave ten examples of these "bipartisan" bills. In eight of these examples, the number of Republican yea votes on the bills was either one, three or eight. What she didn't say was in these eight bills the number of Republican nay votes ranged from 173 to 190 (which latter number of nay votes occurred in one of the two bills that had one Republican yea vote). Eugene Kiely, *Pelosi's Bipartisanship Boast* (December 17, 2019), factcheck.org, and *Transcript of Pelosi Weekly Press Conference Today* December 12, 2019, <https://www.speaker.gov/newsroom/121219-2>. One yea vote and 190 nay votes means the yea vote, as percentage of the total Republican votes cast, was 52 basis points. Put another way, 99.48% of Republicans voted against. This cannot be "bipartisan." Tribe and Pelosi are wrong because if rationality in law and politics matters (it must) terms with generally accepted meanings should be used to be consistent with those meanings. To abandon them in favor of idiosyncratic, personal meanings is to embrace a world in which facts are in the eye of the beholder.

155 N. 109 *supra*.

156 *Court Packing* 2711.

157 Had Professor Weill adopted Mark Tushnet's constitutional convention definition, which requires that the asserted practice be "regularly engaged in" (n. 92 *supra*), the percentage of exceptions would be too great to qualify as "regularly engaged in."

an outlier on the partisan spectrum suggests that in her mind even one exception beyond Daniel dooms the Bipartisan Convention. Why else would she try so hard to avoid a second exception?

It is not the purpose of this Article to explore motive, but Professor Weill was outraged by the combination of the Republican-controlled Senate's inaction on the Judge Garland nomination and its confirmation of Justice Barrett.¹⁵⁸ Perhaps this colored her analysis, resulting in her assertion of the existence of the Bipartisan Convention.

IV. ELECTION YEAR PRE-ELECTION SENATE VOTES ON COURT NOMINEES ARE MOSTLY PARTISAN

Table 4 below lists each Supreme Court nomination prior to Garland that was pending during a presidential election year before the date of the election and the result of the Senate vote on the nomination. Each nomination was voted on (including procedural votes that led to confirmation failure) and each vote was taken before the election.¹⁵⁹

158 Among other comments, the nomination and confirmation of Justice Barrett was “belligerent” (*Court Packing* 2707); a “manipulation of the appointment process” (*Id.* 2708); “a partisan abuse” (*Id.* 2709).

159 That is, each Supreme Court nomination pending pre-election before Garland was voted on by the full Senate. This statement of fact is not meant as an implied judgment about the failure to hold a vote on Garland. Even though Garland is the only case in which a pre-election nomination was not voted on in some manner, this was simply the means chosen to reach a partisan result on that particular nomination, with partisan results occurring for such nominations more often than not as shown in Table 4.

TABLE 4 – ELECTION YEAR PRE-ELECTION CONFIRMATION-RELATED VOTES

VACANCY DATE	NOMINEE	NOMINATION DATE	SENATE VOTE DATE	RESULT	PARTISAN OR BIPARTISAN
October 25, 1795	Samuel Chase	January 26, 1796	January 27, 1796	Confirmed	Bipartisan ¹⁶⁰
December 28, 1795	William Cushing	January 26, 1796	January 27, 1796	Confirmed	Bipartisan
February 1796	Oliver Ellsworth	March 4, 1796	March 4, 1796	Confirmed	Bipartisan
January 24, 1804	William Johnson	March 22, 1804	March 24, 1804	Confirmed	Bipartisan
July 6, 1835	Roger Taney	December 28, 1835	March 15, 1836	Confirmed	Partisan ¹⁶¹
January 12, 1835	Philip Barbour	December 28, 1835	March 15, 1836	Confirmed	Partisan
December 18, 1843	John Spencer	January 8, 1844	January 31, 1844	Not Confirmed	Partisan ¹⁶²
December 18, 1843	Reuben Walworth	March 14, 1844	June 15, 1844	Not Confirmed	Partisan
April 21, 1844	Edward King	June 5, 1844	June 15, 1844	Not Confirmed	Partisan
July 19, 1852	Edward Bradford	August 16, 1852	August 31, 1852	Not Confirmed	Partisan ¹⁶³
May 14, 1887	Lucius Lamar	December 6, 1887	January 16, 1888	Confirmed	Partisan
March 23, 1888	Melville Fuller	April 30, 1888	July 20, 1888	Confirmed	Partisan
January 22, 1892	George Shiras	July 19, 1892	July 26, 1892	Confirmed	Bipartisan
October 14, 1911	Mahlon Pitney	February 19, 1912	March 13, 1912	Confirmed	Partisan
January 2, 1916	Louis Brandeis	January 28, 1916	June 1, 1916	Confirmed	Partisan
June 10, 1916	John Clarke	July 14, 1916	July 24, 1916	Confirmed	Bipartisan
January 12, 1932	Benjamin Cardozo	February 15, 1932	February 24, 1932	Confirmed	Bipartisan
November 16, 1939	Frank Murphy	January 4, 1940	January 16, 1940	Confirmed	Bipartisan
Not applicable ¹⁶⁴	Abe Fortas	June 26, 1968	October 1, 1968	Not Confirmed	Partisan
June 26, 1987	Anthony Kennedy	November 30, 1987	February 3, 1988	Confirmed	Bipartisan

160 All votes shown as bipartisan were by unanimous consent or by voice votes, except for Ellsworth (80% of Democratic-Republicans and 100% of Federalists voted yea) and Kennedy (there were no nay votes). All votes shown as bipartisan, other than Ellsworth, are from Barry J. MacMillon n. 149 *supra*. Table 1. The Ellsworth vote is from 4th Cong., Senate, Vote 27, Voteview.com. All unanimous consents are bipartisan, and the assumption in this Article is that all voice votes are also bipartisan. “In a voice vote, the presiding officer states the question, then asks those in favor to say ‘yea’ in unison and those against to say ‘nay.’ The presiding officer announces the result according to his or her best judgment. In a voice vote the names of the senators and the tally of votes is not recorded.” Senate.gov, “About Voting.”

161 The lower opposing percentage for a party for each partisan confirmation is: *Taney*, 72.2%; *Barbour*, 68.8%; *Lamar*, 93.3%; *Fuller*, 69.0%; *Pitney*, 60%; and *Brandeis*, 87.5%. Additional information about each of these confirmations is in Part III.B. of this Article.

162 The lower opposing percentage for a party for each confirmation failure, other than Bradford, is (parenthetical references are from Voteview): *Spencer*, 76.2% (28th Cong., Senate, Vote 13); *Walworth*, 95% (28th Cong., Senate, Vote 197); and *King*, 90% (28th Cong., Senate, Vote 198). Bradford is discussed in n. 164 *infra*.

163 Bradford was nominated by Whig President Millard Fillmore. The Whigs did not nominate Fillmore (who succeeded to the presidency as a result of the death of President Zachary Taylor) in the 1852 presidential election and the Whig candidate (Winfield Scott) lost to Democrat Franklin Pierce in that election. The Senate was controlled by the

There are 15 confirmations listed in the table. Forty percent of them (6 of 15 cases) were by votes that were partisan; one under the most difficult 90% opposing majorities threshold; four under the 65% opposing majorities threshold; and the final one under the opposing majorities and opposing majorities but 20% or less support difference.¹⁶⁵

But looking only at confirmations is too limited a view to determine how the Senate responds on pre-election, election year nominations. The five failures to confirm are also decisions and should be considered. When they are, 55% (11 of 20 cases listed in Table 2) of the Senate's actions on nominees in this election year, pre-election category are partisan. Three (Walworth, King and Lamar) meet the 90% threshold, six more (Taney, Barbour, Spencer, Fuller, Pitney and Brandeis) meet the 65% threshold, one (Fortas) meets the opposing majorities threshold (just missing the 65% threshold by 0.2%) and the final one (Bradford) certainly meeting

Democrats and Bradford's nomination was defeated by the passage of a motion to table it on August 31, 1852, the last day prior to the Senate recessing until December 6, 1852. No roll call vote was recorded. The conclusion that this vote was partisan is based on a contemporary newspaper account and the rejection by the Senate of the two subsequent nominations made by Fillmore to fill this vacancy. "The nomination [of Bradford] . . . was postponed. This is equivalent to a rejection, contingent upon the results of the pending Presidential election. It is intended to reserve this vacancy for Gen. Pierce, provided he be elected," *Closing Hours of the Session Appointments-The Tehuantepec Treaty*, N.Y. TIMES (September 2, 1852) retrieved from <https://timesmachine.nytimes.com/timesmachine/1852/09/03/87841282.html?pageNumber=1> The rejection of Bradford is equivalent to the partisan rejection of Garland, although Bradford occurred with a vote. On January 3, 1853, after Pierce had won the election, Fillmore nominated George Badger, a sitting Senator (North Carolina) who was defeated 25-26 in a February 11, 1853 procedural vote in which 100% of Whigs opposed 93.9% of Democrats. 32nd Cong., Senate, Vote 267, Voteview.com. Fillmore's final nomination for the seat (William Micou), less than three weeks before his term of office ended, was not acted on by the full Senate.

164 Chief Justice Warren's June 13, 1968 letter to President Lyndon Johnson advised the president of Warren's intention to retire "at your leisure." Abraham, n. 61 *supra* at 227. The only vote on the nomination was on an unsuccessful motion to end debate (cloture), in which 64.8% of Republicans opposed 70.6% of Democrats (90th Cong., Senate, Vote 570, Voteview.com), so this is a partisan vote under the opposing majorities standard as well as under the opposing majorities but 20% or less than support difference standard (missing the 65% threshold by only 0.2%).

165 See ns. 162-164 *supra* for information about the votes on all nominees in Table 4 that are listed as partisan.

at least one of the tests, although which one(s) cannot be determined.¹⁶⁶

If a majority of cases establish a “norm,” then the Senate norm for nominations that are pending in a presidential election year before the election is, “it’s ok to deal with them in a partisan way.” The Garland confirmation failure and the Barrett confirmation add two more cases to this category of “nominations that are pending pre-election” and bring the partisan percentage to 59%¹⁶⁷ (although it is circular to include Garland and Barrett in data looked at to determine whether the outcome of nominations before these two nominations was partisan). While the first four nominations in Table 4 were acted on in a bipartisan way, that does not mean that partisan behavior over Supreme Court nominations only developed later. It also occurred right before the first nomination in the Table. The Senate’s December 15, 1795, rejection of the nomination of John Rutledge (a Federalist) was partisan, with Federalists opposed to Democratic-Republicans because Rutledge had spoken passionately against a pending treaty favored by the Federalists (including Federalist sympathizer President Washington) and opposed by the Democratic Republicans.¹⁶⁸

It should not be a surprise that in a majority of the cases over history a political branch acts . . . politically. When the category is “Supreme Court nominations pending in presidential election years whose outcome is determined by Senate action (or inaction) before the election,” that the Senate generally acts in a partisan way is merely a narrower instance of the wider proposition that “the

166 See n. 164 *supra*.

167 Garland was effectively 100% partisan in that no member of either party opposed their party’s position. While 100% partisan behavior on Supreme Court nominations pending pre-presidential election had not occurred before Garland, the Senate has consistently acted in a partisan way for the last eight nominations, spanning a period of more than 16 years. The last time the Senate’s action on a Court nomination was *not* partisan was the confirmation of John Roberts as Chief Justice in September 2005, and that confirmation was barely bipartisan – exactly 50% of Democrats voting were in favor of confirmation as was one Senator who had left the Republicans to become an independent caucusing with the Democrats (James Jeffords, Vermont). In addition to the partisan Garland confirmation failure during this series, the Senate dealt with the next seven confirmations after Roberts in a partisan way. The seven are (the parentheticals indicate the lower opposing percentage for a party in that confirmation vote; in computing the percentages, independents are included with the party with whom they caucus): Justices Samuel Alito (91.1%,); Sonia Sotomayor (77.5%); Elena Kagan (87.8%); Neil Gorsuch (93.8%); Brett Kavanaugh (98.0%); Barrett (98.1%); and Brown Jackson (94.0%). In addition, the October 1991 confirmation of Justice Clarence Thomas was also partisan (80.7%).

168 In the vote, 93% of Federalists opposed 100% of Democratic-Republicans. 4th Cong., Senate, Vote 18, Voteview.com.

appointments process [of judges and justices] is and always has been political”¹⁶⁹ and that “confirmation politics is part of the broader current of interbranch politics and the determinants of the success or failure of a President’s nominees will not be so dissimilar from the determinants of the success or failure of other parts of her agenda.”¹⁷⁰

The attempts by the Right and Left to propound a principle (whether dubbed a rule, norm or convention) to justify or reject the legitimacy of the Senate’s confirmation of Barrett in light of its refusal to act on Garland are flawed narratives. Flawed because the precedents relied on to prove the principle do not support the proof. Better to recognize and accept that any attempt to disguise politics in the cloak of principle will ultimately be unmasked and will fail.

169 Lee Epstein and Jeffrey Segal, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 4 (2005).

170 Chafetz, n. 7 *supra* at 129.

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ARTICLE

A MOVEMENT DIVIDED AGAINST ITSELF CANNOT STAND: HOW THE COUNTERATTACK TO THE WARREN COURT FRACTURED

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Introduction

On January 11, 1954, President Dwight D. Eisenhower nominated California Governor Earl Warren to replace recently deceased Chief Justice Fred Vinson. While the governor had no judicial experience, Vice President Richard Nixon, Senator William Knowland, and others commended Warren for his “excellent judgment.”¹ Despite some meager opposition from groups like the American Anti-Communist League and stalling by Senator William Langer in committee, the Senate confirmed him in a unanimous voice vote that lasted only 8 minutes.² Many in Washington and around the nation seemed enthusiastic about the new chief justice, with the *New York Times* noting the “good impression” Warren had made in the nation’s capital during the confirmation process.³ In the eyes of a sizable group, however, the new chief justice’s promise ended in his first two months in office.

On May 17, 1954, the Supreme Court handed down its decision in the first *Brown v. Board of Education of Topeka* (1954). Written by the new chief justice, the majority opinion declared public school segregation to be “inherently unequal,” rejecting the precedent of *Plessy v. Ferguson* (1896) and setting off a new wave of federal civil rights reform.⁴ While much of the country welcomed the decision, with *Time* magazine calling *Brown* the most important landmark in the Court’s history, Southern politicians rancorously dissented.⁵ In the months following the decision, a “dominant chorus of opposition” emerged among state and federal politicians in the South, with figures like Senator James Eastland of Mississippi claiming that the Court had been “brainwashed by Left-wing pressure

1 “Chief Justice Confirmation,” *CQ Almanac 1954*, 10th ed., Washington, DC: Congressional Quarterly, 1955. <http://library.cqpress.com/cqalmanac/cqal54-1359182>.

2 “Senate Confirms Warren By Voice,” *New York Times* (New York), Mar. 1, 1954.

3 James Reston, “Warren’s Start Good,” *New York Times*, (New York), Mar. 5, 1954.

4 *Brown v. Board of Education of Topeka*, 347 U.S. 495 (1954).

5 “The Nation: To All on Equal Terms,” *Time Magazine*, May 24, 1954, 21.

groups” and that the South would resist the decision.⁶ The Warren Court went on to champion civil rights throughout its existence, upholding the Civil Rights Act of 1964 through the commerce clause in *Heart of Atlanta Motel, Inc. v. United States* (1964) and overturning bans on interracial marriage in *Loving v. Virginia* (1967) despite continued Southern opposition.

Civil rights, however, was hardly the only controversial issue the Supreme Court took on. In 1957, for instance, the Warren Court handed down several decisions protecting communist speech and rights on the infamous ‘Red Monday,’ including *Yates v. United States* (1957) and *Watkins v. United States* (1957). The decisions were followed by immediate resistance, with anti-communist congressmen proposing dozens of anti-Court bills to diminish the Supreme Court’s power.⁷ Extra-governmental interest groups also protested the Court’s siding with American communists, organizing efforts to call for the impeachment of Chief Justice Warren himself.⁸ In addition, the Court faced intense conservative vitriol inside and outside of government for its decision against public school prayer and Bible readings in *Engel v. Vitale* (1962) and *Abington School District v. Schempp* (1963).⁹

Altogether, the decisions of the Warren Court on these issues provoked resistance from various conservative groups within and outside of government, yet no decision of the Warren Court was ever overturned or altered, at least prior to the Rehnquist Court. Opposition to the Warren Court was by no means small, emerging within the national government, through Congress and the Nixon administration, state governments, and various non-governmental interest groups. How could such a broad coalition of anti-court conservative forces fail to affect any immediate change in the Supreme Court’s jurisprudence? The answer lies simply in the state of the conservative movement in the 1950s and 1960s: it was a disunited work in progress. The Republican Party had not yet emerged as a conservative hub nor had any modern conservative legal groups, like the Federalist Society, formed. Instead, various types of conservatives were spread across different political parties and organizations with little coordination. In the face of a perceived threat to their ideology in the progressive landmarks of the Warren Court, the separate groups proposed innumerable, quickly-devised counters to cases like *Brown* and *Engel*. The result was a patchwork cacophony of ill-conceived schemes, each aimed at an individual issue, whether it be desegregation, school prayer, or communist speech.

6 Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge, MA: Belknap Press, 2000), 38.

7 Robert M. Lichtman, “McCarthyism and the Court: The Need for ‘an uncommon portion of fortitude in the judges,’” *Journal of Supreme Court History* 39, no.1 (2014), 108.

8 *Ibid*, 125.

9 Lucas Powe, *The Warren Court and its Critics*, 189.

Due to internal strife, no single proposal ever gained full conservative support, let alone mass support. It would take several more decades for the conservative movement to coalesce and establish an institutional fix to counter liberalism in the judiciary.

The State of Conservatism in the Mid 20th-Century

The conservative movement was anything but consolidated in the mid-1900s. Conservatives had enthusiastically backed the personally conservative Eisenhower in 1952 only for him to seemingly abandon their values once in office. The former general turned president recognized the popularity of New Deal policies like Social Security and labor laws and believed that if he rescinded them, no one would ever “hear of [the Republican Party] again in our political history.”¹⁰ To the chagrin of his former conservative backers, Eisenhower even expanded Social Security coverage and oversaw the construction of the national highway system, the largest public works project in American history.¹¹

Furthermore, Arizona Senator Barry Goldwater’s failed 1964 campaign also served as a blow to the movement. Conservatives wanted Goldwater, who espoused ideas of equal opportunity, individualism, and anti-communism, to return the nation to pre-New Deal conservative values, but he ultimately failed, receiving less than 40 percent of the popular vote and winning only the Deep South and his native Arizona.¹² The failed Goldwater campaign also reflected the faults of the conservative movement at the time. For one, Goldwater’s criticism of John Birch Society leader Robert Welch proceeded to divide many conservatives rather than unite the movement.¹³ In addition, Goldwater’s constant gaffes, poor campaign messaging, and vote against the Civil Rights Act of 1964 ensured that the conservative movement would retain a negative image in the public consciousness.¹⁴

Aside from failed presidential hopes, the conservative movement held

10 “Eisenhower to Edgar Newton Eisenhower November 8, 1954,” *Papers of Dwight D. Eisenhower*, Volume XV.

11 Kevin M. Kruse, *One Nation Under God: How Corporate America Invented Christian America* (New York: Basic Books, 2015), 187.

12 Donald T. Critchlow, *Republican Character: From Nixon to Reagan* (Philadelphia: University of Pennsylvania Press, 2018), 81.

13 *Ibid*, 98.

14 Michelle Nickerson, “Goldwater’s Moral Mothers: Miscalculations of Gender in the 1964 Republican Presidential Campaign” in *Barry Goldwater and the Remaking of the American Political Landscape*, ed. Elizabeth T. Shermer (Tucson, AZ: University of Arizona Press, 2013), 184.

little institutional support capable of facilitating a united front throughout the time of the Warren Court. For one, American conservatism was divided between the two dominant political parties. Throughout the years of the Warren Court, the Republican Party had not yet become the home of the conservative movement and still included a moderate and liberal wing under the leadership of Nelson Rockefeller. Furthermore, the few conservative think tanks that existed in the 1950s and 1960s occupied a “marginalized” and “obscure” position in Washington politics.¹⁵ In the conservative legal theater, the champion originalist Federalist Society did not yet exist. With constant failures at gaining national conservative leadership in the Oval Office and a dearth of supporting infrastructure, loci of conservative resistance to the Warren Court remained disharmonic.

Congressional Quantity

Within the nation’s legislature, conservative representatives and senators from around the country attempted to stop the perceived excesses of Earl Warren to no avail. After a controversial decision, certain members of Congress would often propose bills to reverse or supersede the Court. After just a few weeks, however, most bills would quickly fade into obscurity. In every instance, conservative members of Congress failed to consolidate around a single response to the Court’s supposed transgressions.

This type of congressional reaction came after the Court’s first major decision, *Brown*. Southern representatives and senators responded with disgust, including accusations of “usurpation” and “tyranny” by congressmen like Representative James Davis.¹⁶ Quickly, Southern politicians across the nation invoked states’ rights as a justification for their opposition to *Brown*, with Senator Richard Russell of Georgia contending that the Supreme Court had “repudiated the Constitution [and] spat on the Tenth Amendment.”¹⁷ Their critical outlooks materialized in dozens of bills aimed at either deferring public education to the states, enshrining “separate but equal” in the law, or limiting the Court’s jurisdiction. Senator Absalom Robertson of Virginia, for instance, even proposed a bill to amend the Constitution to specify that segregated schools fulfilled the Fourteenth Amendment’s requirements.¹⁸ The Robertson bill is one of the first examples of the unharmonious conservative response to the Warren Court. Rather than coalesce, three representatives in the House introduced three separate bills identical to

15 Jason Stahl, *Right Moves: The Conservative Think Tank in American Political Culture Since 1945* (Chapel Hill, NC: University of North Carolina Press, 2016), 13.

16 Clifford M. Lytle, *The Warren Court and its Critics* (Tucson, AZ: University of Arizona Press, 1968), 13.

17 Lucas Powe, *The Warren Court and American Politics*, 47.

18 *Ibid.*, 13.

Senator Robertson's bill. Southern conservatives introduced 55 separate bills in the House and Senate to slow integration, and none ever made it out of committee, even in the Senate where the chairman of the Senate Judiciary Committee, Senator James Eastland, was a staunch segregationist.¹⁹

Opposition to *Brown*, as well as subsequent civil rights cases, was not exclusive to the Southern wing of conservatism. Some Northern and Western conservatives also offered criticism toward *Brown* and sometimes supported action against it. For example, Representative August Johansen of Michigan argued on the floor of the House that the so-called "forced integration" the Court called for gave Americans "a preview of the obituary of the Republic."²⁰ Still, the repeated reactionary attempts against the Warren Court's civil rights jurisprudence proved unsuccessful. Some supporters of the Court, as well as subsequent historians, have highlighted the weakness and insubstantial support of these measures as due to the fact that they were more "political rhetoric than...action."²¹ Even if they succeeded in making their dissent known, *Brown* and other civil rights decisions remained on the books.

In addition to civil rights, Congress members also acted against the Warren Court in the aftermath of its controversial decisions in 1956 and 1957 that supported communist speech and due process rights. The threat of communist infiltration loomed over the entire country, but conservative politicians proved especially hysterical. When the Supreme Court stood in the way of the witch hunt by making communist speech prosecutions nearly impossible in decisions like *Yates* and limiting Congress' investigative power over communists in *Watkins*, various members of Congress launched a full-scale counterattack. In response to *Pennsylvania v. Nelson* (1956), which limited sedition prosecutions to the federal government, various representatives and senators made proposals to undo the decision, culminating in H.R. 3. This bill mandated that state law would never be preempted by federal law unless Congress explicitly affirmed that it did. Mississippi Democrat Senator Eastland and the infamous Senator Joseph McCarthy backed the bill since they believed some "secret, but very powerful Communist or pro-Communist influence" controlled the nation's highest judiciary.²² Despite eventually and overwhelmingly passing in the House in 1958, H.R. 3 was lost in a "rash of [anti-Court] bills" that overflowed in both houses, dividing conservatives

19 Ibid, 14.

20 Warren J. Davis, *The Supremacy of the Constitution Part VII: Judicial Revolution in the Warren Court and the End of Stare Decisis* (San Diego: Citizen Printing & Publishing, 1971), 8.

21 Clifford Lytle, *The Warren Court and its Critics*, 15.

22 Robert Lichtman, "McCarthyism and the Court," 113.

between various resolutions.²³

The Jenner-Butler bill was another important conservative response to the Warren Court's Red Monday decisions. Senator William Jenner, a McCarthyite Republican, introduced this bill into the Senate to remove the appellate jurisdiction of the Court over sedition laws. The bill was, as most conservative responses to the Warren Court were, a "decision-by-decision attack" that Jenner justified by claiming that it served to protect the "internal security of the United States against the world Communist conspiracy."²⁴ After Senator John Butler amended Jenner's bill by trimming some of its provisions, the Judiciary committee referred it to the Senate itself.²⁵ The Jenner-Butler bill quickly gained notoriety and support from conservative senators, including Southern Democrats like Senator Strom Thurmond. The South Carolina senator argued that the bill would call a halt to this "unconstitutional seizure of power" by the Supreme Court and "preserve the autonomy of the States" from Soviet domination.²⁶ In addition, Clarence Manion, a national conservative figure due to his radio program *The Manion Forum*, supported the bill on his program.²⁷

Regardless of the broad support for the Jenner-Butler bill among conservatives, it ultimately failed, with a tabling motion passing the Senate just a day after its introduction to the full body. One reason for the Jenner-Butler bill's failure may be tied to the rhetoric surrounding it. From its introduction, Senator Jenner surrounded the bill with accusations of the Supreme Court permitting a "communist plot against the security and freedom" of the nation.²⁸ While such arguments may have been more successful at the peak of the Second Red Scare in the early 1950s, McCarthy, the flagbearer of the communist witch hunt, had fallen from grace, along with other hysterical accusations of communism.²⁹ Americans still feared communist infiltration in 1958, yet not to the same degree as in 1951. Some, like attorney Charles A. Horsky, felt as though the conservatives behind Jenner-Butler and other anti-Court bills were engaging in "subversion" rather than

23 Daniel G. Morgan, *Congress and the Constitution* (Cambridge, MA: Belknap Press, 1966), 271.

24 Robert Lichtman, "McCarthyism and the Court," 118.

25 Daniel Morgan, *Congress and the Constitution*, 272.

26 Strom Thurmond, "Statement of Senator Strom Thurmond (D-SC) on Jenner-Butler Amendment to H.R. 6789 on Senate Floor," August 20, 1958, *Strom Thurmond Collection, Mss 100*. 1859. <https://tigerprints.clemson.edu/strom/1859>.

27 Clifford Lytle, *The Warren Court and its Critics*, 54.

28 Representative Jenner speaking on Supreme Court decisions- proposed limitation on appellate jurisdiction, on July 26, 1957, 84th Cong., *Congressional Record* 103, 12806.

29 Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday*, (Philadelphia: University of Pennsylvania Press, 1999), 120.

dissent.³⁰ The *New York Times* even published a letter they received warning that the bill's passage would allow Southern states to enact subversion prosecutions on NAACP members to curtail the civil rights movement.³¹ In addition, the conservative caucus's inability to unify behind the bill plagued it. Despite Thurmond's support, he also entertained the idea of pushing an even harsher anti-Court bill than not only the trimmed down version that made it to the Senate floor, but also the initial bill that Jenner proposed.³² In addition, numerous anti-Court bills and measures continued to be discussed throughout the rest of the 1958 session in both houses after the Jenner-Butler bill was tabled. Despite a brief appearance of coalescence behind Senator Jenner, conservatives in Congress were still unwilling to truly unite on a single plan.

Conservative representatives and senators took a similar approach to the Warren Court's school prayer decisions. In the early 1960s, the Warren Court ruled on several landmark decisions that became known as the school prayer cases, most notably *Engel v. Vitale* and *Abington School District v. Schempp*, which prevented public schools from mandating prayers or Bible readings in the classroom. Just as in response to the Red Monday jurisprudence, conservatives in Congress lashed out and levied many different bills to reverse *Engel*, totaling 59 proposals in both houses by the end of October 1962.³³ At one point, a senator introduced a sermon by Duke University's chaplain which discussed an interfaith opposition to *Engel* by arguing that leaders within the Protestant, Catholic, and Jewish faiths had spoken out against the Court's decision.³⁴ Still, politicians like Senator Jacob Javits held faith that the decision did not totally "exclude a period of prayer and devotion" in American public schools.³⁵ The Warren Court's decision in *Abington*, however, convinced many otherwise. Conservatives in Congress believed the Court was "driving God from the schools" and launched another retaliation against it.³⁶ In the months following the *Abington* decision, 147 proposals to amend the Constitution made their way to the House Judiciary Committee, culminating in a single bipartisan

30 Charles A. Horsky, "Law Day: Some Reflections on Current Proposals to Curtail the Supreme Court," *Minnesota Law Review* 42, no.6 (1958), 1109.

31 Robert L. Carter, "Curbing the Supreme Court: Threat to Equality for Negroes Seen in Jenner-Butler Bill," *New York Times* (New York) May 9, 1958.

32 Strom Thurmond, "Statement on Jenner-Butler Bill."

33 "School Prayer and the Becker Amendment," *Georgetown Law Journal* 53, no.1 (1964), 205.

34 Mr. Ervin speaking on the Supreme Court Prayer decision, on August 23, 1962, 87th Cong., *Congressional Record* 108, 17354.

35 Senator Javits speaking on Supreme Court decision on prayer in New York Public Schools, on June 29, 1962, 87th Cong., *Congressional Record* 108, 12238.

36 "School Prayer and the Becker Amendment," 215.

proposal by Representative Frank Becker.³⁷ The Becker Amendment allowed for prayers and Bible readings in all public buildings on a “voluntary basis” and that such did not “constitute an establishment of religion.”³⁸ Just as with the Jenner-Butler bill, however, the Becker Amendment’s various supporters quarreled over what the amendment should mean and include. There were debates as to whether or not the reading of “scriptures” would be limited to certain translations of the Bible, be open to any religious text, or solely include Judeo-Christian readings.³⁹ Congressmen outside the conservative caucus also offered scorn, including questioning if prayer led by a teacher could be voluntary as well as if the Becker Amendment was even constitutionally permissible considering the “preferential position” of the First Amendment.⁴⁰ Eventually, the Becker Amendment never made it out of committee, marking another failure by conservatives in Congress to coalesce around a particular countermeasure to the Warren Court.

While conservative congressmen continued to levy numerous unrefined countermeasures against individual Warren Court decisions, they did make one fleeting attempt at course-correcting the Supreme Court. Emanating from a perception that the chief justice and other liberal members of the Warren Court were unqualified, conservative representatives and senators began pushing for qualifications to be imposed on all Supreme Court nominees.⁴¹ Similar to past instances, Congress members quickly disagreed on what these qualifications should be. In both houses’ judiciary committees, conservative members argued internally over the number of years of judicial experience, citizenship status, age, and if a law degree was necessary.⁴² Yet again, internal strife and attempts at quick solutions prevented conservatives from even attempting to mount a congressional response to the Warren Court. Nonetheless, Congress was not the only medium that conservatives could wield to push back against the Warren Court.

Not Quite Massive Resistance and the Disunited States’ Pushback

State governments across the country also pushed back against the Warren Court, perhaps most famously in Southern massive resistance to the *Brown* and civil rights decisions. Following *Brown*, as well as cases that confirmed the end of segregation with “all deliberate speed,” like *Brown II* (1955) and *Bolling v. Sharpe* (1954), Southern members of Congress urged their state governments to “resist

37 School Prayer Hearings, 89th Cong., 2nd session, 240.

38 “School Prayer and the Becker Amendment,” 217.

39 *Ibid*, 218.

40 *Ibid*, 219; School Prayer Hearings, 89th Cong., 2nd session, 241.

41 “Chief Justice Confirmation,” *CQ Almanac 1954*.

42 Clifford Lytle, *The Warren Court and its Critics*, 19.

integration by any lawful means” in the infamous “Southern Manifesto” of 1956.⁴³ Aside from attempting to block integration, some state governments took their aim specifically on the Warren Court. In one instance, George Wallace, the famed populist governor of Alabama throughout the 1960s and beyond, criticized the Supreme Court as establishing itself as a “third house of Congress” and infamously blocked the door at the University of Alabama when it began integration in 1963.⁴⁴

In addition to direct attacks on the Warren Court’s civil rights jurisprudence, Southern statesmen looked to the Cold War for “novel defenses” of segregation.⁴⁵ The governor of Georgia when *Brown* was decided, Herman Talmadge, announced that he would resist the Court’s decisions that were truly “emanating from Moscow.”⁴⁶ In addition to their association of the Court with the communist enemy, segregationist politicians often accused civil rights leaders of colluding with the enemy. In one outlandish conspiracy theory, Senator Olin Johnston of South Carolina claimed in the *Columbia Record* that the communist East Germans had opened “Negro agitation training centers” to train potential civil rights activists.⁴⁷ In addition to statements, state politicians occasionally took action against Warren Court under the guise of anti-communism. In 1957, for instance, the Georgia General Assembly passed a resolution calling for the impeachment of Earl Warren and all of the liberal members of the Court for attempting to “carry out communist policies.”⁴⁸

Even when attempting to merge segregation and anticommunism, massive resisters not only could not unite with other anti-Court conservative groups but could not even find internal unity. While governors like Talmadge were willing to make the connection between the Court and communism, other Southern governors and massive resisters like Virginia’s Harry Byrd recognized that the “eyes of the world” were carefully watching the racial situation in the American South.⁴⁹ Despite his vehement opposition to integration, Byrd, and many other

43 *Brown v. Board of Education of Topeka*, 349 U.S. 298 (1955); “Southern Manifesto on Integration,” *Thirteen*, last modified December 2006, https://www.thirteen.org/wnet/supremecourt/rights/sources_document2.html.

44 Dan T. Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformations of American Politics* (New York: Simon & Schuster, 1995), 137.

45 Clive Webb, *Massive Resistance: Southern Opposition to the Second Reconstruction* (Oxford: Oxford University Press, 2005), 119.

46 *Ibid.*, 120.

47 *Ibid.*, 121.

48 D. J. Mulloy, *The World of the John Birch Society: Conspiracy, Conservatism, and the Cold War* (Nashville: Vanderbilt University Press, 2014), 113.

49 Clive Webb, *Massive Resistance*, 120.

massive resisters, recognized the potential damage the movement could have on the national image in the Cold War era and criticized more unchained figures like Talmadge.⁵⁰ An article in the *Durham Morning Herald* in 1957 even called out the “rabid segregationists” that were tainting massive resistance with McCarthy-esque conspiracy theories about communist infiltration in the federal government and civil rights movement.⁵¹

Aside from Cold War considerations, the massive resistance movement also failed to coalesce because of the movement’s principal ideals. While the argument of states’ rights is usually dismissed as a thinly veiled disguise for the ability to continue segregation, many massive resisters wholeheartedly pushed this justification for their segregationist aims to a fault, prioritizing efforts in their own states above all else. For example, Governor Byrd and other political leaders in Virginia pushed the idea of the “traditions of the state” in their conception of the “Virginia way.”⁵² Through the state’s so-called traditions regarding its sizable African American population, the governor and others emphasized the paternalistic role of white Virginians to serve as African Americans’ “guardians.”⁵³ Not only is such a justification absurd by modern standards, but likely was also irrational to non-Southern conservatives at the time as well. Establishing a “Virginia way” and other state-specific arguments rather than creating a united “Southern way,” or possibly even an “American way,” limited the appeal that massive resistance could maintain.

While state politicians in Southern states attempted everything in their power to resist integration and stifle the civil rights movement, they failed to inspire mass support for massive resistance. This in no way serves to diminish the racial terror carried out by groups of white Southerners against African Americans during the 1950s and 1960s. The fact that 40 people were killed in anti-civil rights violence in those decades is itself a shameful tragedy, but when compared to apartheid violence in South Africa and even to the Reconstruction violence in the South following the Civil War, that number is especially small.⁵⁴ In the larger picture, the program of massive resistance was unable to motivate white Southerners to support their state governments’ actions en masse. One important reason for the lack of mobilization lies within the opposition of the Southern Baptist and Presbyterian churches to massive resistance and segregation, but this

50 *Ibid*, 124.

51 Editorial, *Durham Morning Herald*, Sept. 19, 1957.

52 Candace Epps-Robertson, “The Race to Erase Brown v. Board of Education: The Virginia Way and the Rhetoric of Massive Resistance,” *Rhetoric Review* 35, no.2 (2016), 113.

53 *Ibid*, 110.

54 Clive Webb, *Massive Resistance*, 136.

will be covered in more depth in the next section.

In addition to massive resistance, state governments across the nation also retaliated against the Warren Court through their state judiciaries. In 1959, the Conference of State Chief Justices approved the publication of an anti-court report by a vote of 36-8.⁵⁵ The report argues that the Court's decisions were "denying [states] the power to keep order in [their] own house[s]," centralizing power in the federal government at the expense of the states.⁵⁶ While the report passed by such an overwhelming margin and signaled the opposition of the nation's highest state-level jurists, no mass state judicial opposition to the Warren Court ever arose. This may be due to opposing jurists' lack of a coherent counter to quell the Warren Court's supposedly-problematic jurisprudence. The state chief justices merely hoped that the Court could be countered simply through "the power of persuasion" that their contentions in the report engendered.⁵⁷ Another possible explanation may again lie within the notion of disunity, particularly in a desire by many jurists to distance themselves from segregationist figures in the South. The report itself does not incorporate the Court's civil rights jurisprudence into its argument, omitting any discussion of segregation throughout its 38 pages.⁵⁸ This aversion to association with particularly unsavory elements of conservative opposition to the Court became important in the context of not only state pushback but also to non-governmental backlash within interest groups and churches.

Segregationists and Radicals Splinter the Retaliation

As previously mentioned, the Southern push against Warren Court-mandated integration failed to incite mass support among white Southerners. The lack of success was, in large part, due to the opposition of the Bible Belt's two largest institutions: the Southern Baptist and Presbyterian Churches. In 1954, immediately following the Warren Court's decision in *Brown*, both churches passed resolutions in support of desegregation, with an overwhelming vote in the Southern Baptist Convention (SBC) of about 9,000 to 50.⁵⁹ However, the large margin did not mean that the churches' support of desegregation was universally accepted in the South. In reality, it was quite contentious, with some congregations expelling their integrationist ministers and writing letters of opposition to church leadership. Nonetheless, records indicate that only 48 out of over 31,000 Baptist congregations voiced their objections to the SBC. There was similarly weak opposition in the

55 Lucas Powe, *The Warren Court and American Politics*, 139.

56 The Conference of Chief Justices, *Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions* (Belmont, MA: American Opinion, 1958), 19.

57 *Ibid.*, 5.

58 Lucas Powe, *The Warren Court and American Politics*, 139.

59 Clive Webb, *Massive Resistance*, 137.

Presbyterian Church as well.⁶⁰ It should also be noted that the divide between segregationists and integrationists was not simply on an ideological spectrum of liberal and conservative ministers. There was also an internal divide among conservative ministers who believed many segregationist pastors were “fanatics” and were “bad for conservatism.”⁶¹ Perhaps the most confounding element of the churches’ support for desegregation was the anticlerical response of segregationists themselves. Senator Thurmond, for example, called for a “frontal assault on organized religion” for supporting integration.⁶² While anticlerical statements against religious groups meddling in politics are nothing new in the United States, the fact that a Bible Belt politician made such a statement is especially perplexing and undoubtedly drew little support from the southern segregation movement. This was in addition to the “massively popular” evangelist Billy Graham’s opposition to segregation, declaring there was “no color line in heaven” in 1957.⁶³ Resistance to integration lacked religious support, an important factor in Bible Belt politics, and somewhat divided Southern conservatives.

Again, none of this should be construed to say that opposition to integration never gained steam in the South. In Mississippi, for example, a judge helped organize the Citizen’s Council movement to serve as an “establishment-oriented, nonviolent alternative to the Ku Klux Klan.” The councils spied on civil rights leaders and forced many activists to lose their jobs. The movement quickly spread to Alabama where it gained 20,000 members by the end of 1955 and sparked government-backed “Sovereignty Commissions.” The commissions in both Alabama and Mississippi engaged in flagrantly illegal surveillance on civil rights leaders.⁶⁴ In spite of these policies, the decisions of the Warren Court stood and the federal government continued to enforce them throughout the 1960s. Movements that opposed the rulings were unable to draw mass support from conservatives outside the South and arguably even within it as well. There was one national, conservative group, however, that did support Southern massive resistance to some degree.

Under the leadership of businessman Robert Welch, the divisive John Birch Society (JBS) stood not only against the Court’s civil rights jurisprudence but against nearly all of its progressive decisions. While Southern segregationists were driven by racial attitudes, Welch and JBS were virulently anti-communist, subscribing to nonsensical conspiracy theories about communist infiltration into American society. In the aftermath of *Brown*, for example, Welch issued his

60 Ibid, 138.

61 Ibid, 140.

62 Ibid, 142.

63 Ibid, 143.

64 Lucas Powe, *The Warren Court and American Politics*, 69.

“Letter to the South,” contending that the psychologists who offered key testimony in *Brown* held “communist sympathies” and that the decision was a communist plot to push the United States into a civil war.⁶⁵ After the Red Monday decisions, the Birch Society set its communist accusations on the Supreme Court itself, calling for the impeachment of Chief Justice Warren for the decisions of his court. The Birch Society encouraged its members around the nation to begin a letter-writing campaign against the Court and established local “Impeach Earl Warren Committees.”⁶⁶ These committees performed activities like erecting “Impeach Earl Warren” signs across the country, including in places like upstate New York.⁶⁷ The society itself even conducted an undergraduate essay contest with a grand prize of \$2,500 for whoever could propose the best way to impeach the chief justice.⁶⁸ Others used anti-communist sentiment to attack the Warren Court as well. For instance Rosalie Gordon, in her widely-circulated book *Nine Men Against America*, argued that the Court had been packed with “agents and accomplices of the Red tyranny” and that the leftist law clerks were pushing justices to the far-left.⁶⁹

While other conservative groups detested the chief justice, few believed impeachment was the best option and did not join the Birch Society’s movement. L. Brent Bozell of the conservative *National Review*, for example, argued that Warren had “defiled [the nation’s] jurisprudence,” but had not committed any impeachable offenses. Bozell instead urged conservatives to step away from the Birch society and “abandon impeachment.”⁷⁰ The issue of impeachment was not the only matter of division between the John Birch Society and the rest of the segregationist movement. Conservative notables like Arizona Senator Barry Goldwater, *National Review* founder William Buckley, and radio personality Clarence Manion voiced their opposition to the radical and dangerous conspiracy theories espoused by Welch and, later, the society itself. At one point in 1961, Welch contended that a “pro-communist hierarchy” controlled the entirety of the federal government, an assertion that many conservatives could not stomach.⁷¹ Fearing that the whole movement would be tied to the radical theories of the Birch movement, Buckley ordered his editors to write Welch and eventually the

65 Robert Welch, “A Letter to the South” (Belmont, MA: Robert Welch, Inc, 1954), 4; *Ibid*, 10.

66 D. J. Mulloy, *John Birch Society*, 114.

67 “Impeach Earl Warren’ Sign Posted on Highway Upstate,” *New York Times* (New York), Aug. 6, 1961.

68 D. J. Mulloy, *John Birch Society*, 115.

69 Rosalie M. Gordon, *Nine Men against America: The Supreme Court and Its Attack on American Liberties* (New York: Devin-Adair Company, 1958), 27; *Ibid*, 116.

70 L. B. Bozell, “Should We Impeach Earl Warren?,” *National Review*, Sept. 9, 1961, 155.

71 D. J. Mulloy, *John Birch Society*, 111

entire Birch Society out of the conservative movement.⁷² *National Review* began publishing critical pieces on Welch's society, including a special feature claiming that JBS's communist conspiracy theories had an "incapacitating effect" on the anti-communist movement.⁷³ It should also be noted that Buckley's critique was not limited to conservative outlets like *National Review*, with he himself penning articles in the *Los Angeles Times*.⁷⁴ In addition, Manion began forming his own network of 'Conservative Clubs' across the nation as an alternative to the Birch Society.⁷⁵ Conservatives around the nation realized that the movement was splintering over JBS' accusations of communist sympathies in figures like Earl Warren.. After *National Review* began its critiques of the society, not only did Birchers and their allies send letters lambasting the magazine's editors for not recognizing the communist plot, but conservatives from around the nation lamented that the *Review's* public criticism of the society would split their movement.⁷⁶ In the context of Warren Court pushback, at least, what the letter writers predicted happened, ensuring that there would be no united interest group effort.

Another instance of interest group division that stymied the conservative response to the Warren Court, was in the context of the school prayer decisions and the proposed Becker Amendment. In the immediate aftermath of the Court's decision in *Abington v. Schempp*, groups like the American Legion organized a massive correspondence campaign that became one of the largest in the nation's history, with the House Judiciary Committee receiving 13,000 letters on school prayer between December 1963 and July 1964 alone.⁷⁷ Conservatives were not the only ones sending letters, however; other groups also organized campaigns against the Becker Amendment once it was proposed as well. While the campaign on the conservative side was massive, it could not coordinate with other elements of the anti-Court movement. One answer why may lay again in the division over Warren and the other liberal justices' supposed communist ties. A study of the content of the letters sent to the House found that most letters supporting school prayer and the Becker Amendment did not cite anti-communism or the threat of the Soviet

72 Nicole Hemmer, *Messengers of the Right: Conservative Media and the Transformation of American Politics* (Philadelphia: University of Pennsylvania Press, 2016), 101.

73 "The John Birch Society and the Conservative Movement," *National Review*, Oct. 19, 1965, 916.

74 William F. Buckley, "Birch Society Leader's Reaction Provides Clue to Members' View," *Los Angeles Times* (Los Angeles, California), Sept. 23, 1965.

75 Nicole Hemmer, *Messengers of the Right*, 97.

76 *Ibid*, 106.

77 Timothy Verhoeven, "'I am not a religious crackpot': School Prayer, the Becker Amendment, and Grassroots Mobilization in 1960s America," *Journal of Social History* 55, no.3 (2022), 770.

Union as a driving factor in their opinions.⁷⁸ In this way, the conservative letter-writers were split from the Birchers and McCarthyites who believed the Court was under a “powerful Communist influence.”

Another compelling answer lies within the evangelical division over Becker and school prayer. After the Court handed down its decision in *Engel*, for instance, the National Association of Evangelicals announced its support for the decision, as did the newspaper *Christianity Today*.⁷⁹ When the Becker Amendment was in committee and evangelical ministers were brought in to testify, even fundamentalists like Carl McIntire argued for the separation of church and state, contending that the government should not compose prayers or host Bible readings.⁸⁰ Other conservative and moderate evangelicals offered similar testimony, as did others in favor of the amendment. Evangelicals’ opinions on Becker and the Warren Court’s school prayer decisions were “varied and sophisticated” and, again, stood in the way of creating a united front.⁸¹ Whether evidenced by interest groups, Congressional representatives, or state politicians, conservatives failed to unite themselves into a single anti-Court front. For a brief moment, Richard Nixon’s presidential election seemed like it might finally hold the solution to reversing, or at least halting, the excesses of the Warren Court.

The Last Ditch Effort: Richard Nixon’s Failed Nominees

As part of Nixon’s attempt to solidify his support among Southerners who felt abandoned by the Democratic Party, and possibly conservatives at large, Nixon endeavored to appoint a conservative Southern judge to the Supreme Court in hopes of checking its supposed far-left slant. After U.S. Supreme Court Justice Abe Fortas retired, Nixon nominated South Carolinian U.S. Circuit Chief Judge Clement Haynsworth under the fragile facade that the judge was a strict constructionist.⁸² In reality, Haynsworth was a states’ rights absolutist, especially in the context of civil rights as he supported preventing federal interventions which intended to stop “localized, brutal oppression of Black Americans.”⁸³ The Supreme Court reversed a number of his decisions in the Fourth Circuit, which contributed

78 Ibid, 779.

79 Steven K. Green, “Evangelicals and the Becker Amendment: A Lesson in Church-State Moderation,” *Journal of Church and State* 33, no.3 (1991), 550; “Supreme Court and School Prayer,” *Christianity Today*, July 20, 1962.

80 Steven Green, “Evangelicals and the Becker Amendment,” 561.

81 Ibid, 564.

82 Jordan Alexander, “Striving for Civil Rights: Senator Edward W. Brooke, President Richard Nixon’s ‘Southern Strategy’ and the Supreme Court,” *Journal of Supreme Court History* 46, no.2 (2021), 222.

83 Ibid, 215.

to failure to be confirmed in the Senate with a vote of Senate 55–45. Nixon tried to appoint another conservative Southerner, Georgian Judge Harrold Carswell of the Fifth Circuit Court. Carswell had a similarly poor record regarding civil rights as he attempted to halt school integration in any way possible, which made his white supremacist views known to the media and nation.⁸⁴ The Senate voted 51–45 against Carswell’s confirmation, with Republican senators, such as Senator Marlow Cook of Kentucky and Senator Edward Brooke of Massachusetts breaking from party lines to vote against him.⁸⁵ Aside from a weak adherence to a strict construction of the Constitution, both candidates demonstrated a weak judicial philosophy outside of states’ rights and white supremacy, demonstrating another failed quick fix.

In the end, Nixon appointed midwestern U.S. Circuit Judge Harry Blackmun to fill Justice Fortas’ vacancy, an infamous choice since Blackmun went on to pen the Court’s majority opinion in *Roe v. Wade* (1973), which nullified most state anti-abortion laws. Out of Nixon’s four appointees, only U.S. Supreme Court Justice William Rehnquist emerged as a bona fide conservative who constantly broke from the other three Nixon appointees in Court decisions. Still, it would be a mistake to label Nixon’s efforts a total failure as the Supreme Court, under the tenure of Chief Justice Warren Burger, was undoubtedly more moderate than the preceding Warren Court, defined by dissents from liberal Justices William Douglas, Thurgood Marshall, and William Brennan in dozens of cases by 1973.⁸⁶ Nevertheless, Nixon never got a conservative Southerner on the bench and nor did his appointees overturn any Warren Court cases. Despite having four appointees in a single term as president, Nixon could not turn the Supreme Court conservative.

Conclusion: Success in a Long-Term Solution?

Whether it be in the context of desegregation, school prayer, or anti-communism, the conservative backlash to the Warren Court throughout the 1950s and 1960s failed to coalesce around any single plan of action. The inability to unite is not limited to these three instances as pushback to other Supreme Court decisions—such as in regard to cases confirming the rights of the accused like *Miranda v. Arizona* (1966) where charges that the Court was “handcuffing the police” proved inconsequential.⁸⁷ Attempts at pushback from one group often failed to rally others to their cause, such as when the American Bar Association opposed

84 *Ibid*, 219.

85 John P. Hill, “Nixon’s Southern Strategy Rebuffed: Senator Marlow W. Cook and the Defeat of Judge G. Harrold Carswell for the U.S. Supreme Court,” *The Register of the Kentucky Historical Society* 112, no.4 (2014), 621.

86 “Supreme Court- Nixon’s men in control?,” *Christian Science Monitor*, July 2, 1973.

87 Lucas Powe, *The Warren Court and American Politics*, 399.

the Court's Red Monday decisions but also dismissed jurisdiction-limiting bills in Congress like the Jenner-Butler Bill.⁸⁸ Most attempts that did witness substantial backing were ill-conceived, short-term solutions that were devised on a somewhat ad hoc basis. Solutions like the Becker Amendment and Impeach Earl Warren Movement would not have led to a lasting change in the direction of the Court's decisions due to the fundamentally feeble framework undergirding these attempts. While many campaigns against the Warren Court failed to halt its progressive jurisprudence, some elements of conservative retaliation did establish a foundation for future success. The women-led and conservative letter-writing campaigns supporting school prayer, for instance, laid the bedrock for Phyllis Schlafly's STOP ERA Movement in the 1970s, which successfully halted the ratification of the Equal Rights Amendment.⁸⁹

Most notably, several actions during and in the immediate aftermath of the Warren Court laid the foundation for the establishment of a long-term, institutional solution to Supreme Court liberalism. Nixon's almost accidental nomination of William Rehnquist in 1971 helped set the foundation for the Supreme Court's future conservative slant, ensuring a seasoned conservative presence on the bench for over thirty years.⁹⁰ In addition, during the years of the Warren Court, there were no institutional structures to support conservative jurists and political philosophers like anti-Warren Court Professor Willmoore Kendall.⁹¹ Throughout the 1980s, however, conservative law professors and their students organized the Federalist Society as a vehicle for their ideas, quickly gaining members and new chapters across the nation and promoting their judicial philosophy of originalism. The Society eventually rose to be the standard of conservative judges, with all Republican presidents since George H.W. Bush appointing only Federalist Society-vetted jurists.⁹² Through the institutional support provided by the Federalist Society and its push for originalism, as well as through the groundwork laid by Rehnquist, conservatives finally retaliated against the liberal jurisprudence of not only the Warren Court but against all post-New Deal landmarks. This began with the check on Congress's commerce power in *United State v. Lopez* (1995) and leads up to today with the possible curtailment of the right to privacy defined in Warren and Burger Court cases like *Griswold v. Connecticut* (1965) and *Roe* at the end of this Supreme Court term. While conservatives could not unite to counteract the

88 Ibid, 140.

89 Timothy Verhoeven, "School Prayer, the Becker Amendment, and Grassroots Mobilization," 771.

90 John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* (New York: The Free Press, 2001), 265.

91 Warren Davis, *The Supremacy of the Constitution*, 12.

92 Michael Avery and Danielle McLaughlin, *The Federalist Society: How Conservatives Took the Law Back from the Liberals* (Nashville: Vanderbilt University Press, 2013), 2.

Supreme Court while Earl Warren was chief justice, it seems as though they have won the long game.

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ARTICLE

FORUM NON CONVENIENS: LIBERALISATION AS AUSTRALIA'S SOLE PATH TO HARMONIZATION

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ABSTRACT

With the promise of accession to the *Hague Convention* by Parliament in 2017 yet unfulfilled, transnational venue disputes in Australia are still governed by the common law doctrine of *forum non conveniens*. This thesis examines the Australian 'clearly inappropriate forum' test of *forum non conveniens* in light of judicial treatment of the Trans-Tasman Judicial Area and existing inter-state transfer of proceedings regimes. In doing so, this thesis uses doctrinal methodologies and outlines the Australian test, its development, and eventual isolation. This thesis determines that the Australian test breeds discord between Australia and other common law jurisdictions and concludes that the Australian test must be liberalized in order to create a unified and harmonized Australian doctrine for venue disputes. Liberalization of the test will also facilitate greater clarity and certainty for litigants and encourages parties to select Australia and Australian law as choice venues for international transactions and disputes.

I. INTRODUCTION

Federal Cabinet announced in 2017 that Australia would accede to the *Hague Convention on Choice of Court Agreements* ('Hague Convention') through an International Civil Law Bill to consolidate the rules which apply to venue disputes where a choice of court agreement existed. This would have the effect of 'making the process of determining jurisdiction more transparent and predictable' and prevent frustration 'by unknown or uncertain rules and principles that are inconsistent between jurisdictions' pertaining to transnational disputes.

By enacting the Hague Convention, Australia returns to harmony with international commercial practice overseas.

The benefits of certainty and clarity to litigants would lead to more efficient outcomes and cheaper proceedings.

Unfortunately, no draft International Civil Law Bill has been tabled before Parliament and it not known when one will.

The question of venue disputes remains murky with courts relying on the doctrine of *forum non conveniens*. The Australian test of *forum non conveniens* requires the defendant to prove that Australia is a ‘clearly inappropriate forum’. Australia is proven to be ‘clearly inappropriate’ if the continuation of proceedings would lead to an ‘abuse of process’ or are ‘vexatious or oppressive’ to the defendant.

This was established by the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd* (*Voth*) which celebrates its 30th anniversary this year.

In only focusing on Australia’s own appropriateness as a venue, the Australian test is forum-centric and disregards the interests of overseas venues. By contrast, the liberal test established by *Spiliada Maritime Corporation v Cansulex Ltd* (*Spiliada*) requires the defendant to prove that another forum is the ‘more appropriate forum’ turning on a comparative examination between the competing venues by the engaged court to search the ‘most natural forum’ for the dispute. This test is more aligned with the purposes of private international law as it respects international comity, is forum-neutral, and fairer by considering the interests of the competing venues instead of focusing solely on the interests of the engaged court. The test is applied in all remaining common law nations except the United States. This thesis argues that the current Australian test is undesirable because it needs to be liberalized to return Australia to harmony with the common law world and facilitate greater transparency, certainty, and efficiency in transnational disputes.

Liberalization of the Australian test returns Australia to harmony with the other common law nations. Further benefits include providing parties in international business certainty regarding the settlement of venue disputes reducing the risks, costs, and time of cross-border transactions and disputes.

Furthermore, liberalization provides a solution to Australia’s geographic isolation by eliminating existing doctrinal isolation, the latter already recognized as a factor contributing to the obscurity of Australian law to foreign parties.

Our outlier status extends to New Zealand notwithstanding sharing a common judicial area under the Trans- Tasman Judicial Area (‘TTJA’) since 2010.

Consequently, the Australian test has led to frustrating outcomes such as simultaneous proceedings in multiple venues, maintaining a hearing in Australia where the dispute has greater links to another jurisdiction, and inefficient and expensive outcomes for litigants. Domestically, liberalization will fulfil clear legislative preference for harmony evidenced by the *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement* (‘TTCPA’) as well as the intentions for implementing the Hague Convention, already signed by the United Kingdom, the United States, Singapore, China, and the European Union which are key trading partners and well-recognized venues for transnational disputes. Finally, liberalization of the Australian test creates a clear and consistent doctrine

across interstate venue disputes, which apply the *Service and Execution of Process Act 1992* ('SEPA') and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* ('CVA') and its state counterparts (collectively the 'Cross-Vesting Acts') and trans-Tasman disputes governed under the *Trans-Tasman Proceedings Act 2010* ('TTPA') and the *Trans-Tasman Proceedings Act 2010* ('TTPANZ') applying the liberal test on one hand, and transnational disputes applying the Australian test on the other hand. By preventing doctrinal frustration by uncertain rules and assisting parties in the cost-effective and predictable settlement of disputes, these factors overwhelmingly support liberalization of the Australian test returning Australia to harmony with the common law world and facilitating greater transparency, certainty, and efficiency in venue disputes.

The current Australian test has been criticized since its adoption. The literature is divided into two distinct camps. The dissenters characterize the Australian test as biased towards 'adjudication in, and according to the domestic law', would 'too readily ... [exercise] ... jurisdiction over non-residents', and rejected both longstanding authority and recent developments.

It is also stricter than the liberal test reflected by the approaches in the United Kingdom or the United States.

The supporters believe the test is more stringent in preventing foreign companies from escaping local liabilities, avoids confusions from the balancing exercise of the liberal test, and less paternalistic because it does not compel a court to judge a foreign judicial system.

The literature post-2000 is still deeply divided between dissenters and supporters with a renewed focus on issues of harmonization and international comity. Dissenters argue the Australian test permits Australian courts to hear cases with tenuous connections with Australia, disrespects international comity, and places emphasis on the plaintiff's rights to the detriment of the defendant resulting in a forum-centricity not seen in the tests applied by other common law jurisdictions.

A comparative analysis by Gray between the *Cross-Vesting Acts*, *SEPA*, and the common law doctrine, and an analysis by Cook of the relationship between the Australian test and the TTJA call attention to the test's inconsistency with those instrument-based regimes.

Whereas the authors of *Nygh's Conflict of Laws*, the leading Australian text in the field note the liberal test is more helpful in Australian interstate venue disputes than the Australian test itself. Justice Deane, the author of the Australian test preferred the liberal test in theory.

These aspects support the call for liberalization. A prominent supporter, Arzandeh suggested the differences between the liberal test and Australian test are marginal as no significant differences would exist in outcomes.

The existing literature fails to consider two things. First, it lacks benefit of recent judicial consideration of the TTJA, since Cook's analysis was framework-oriented and did not have the benefit of judicial application of the TTJA. Second, it fails to consider the need for a consistent doctrine between interstate and transnational venue disputes. This would prevent doctrinal frustration by uncertain rules and assists parties in the cost-effective and predictable settlement of venue disputes

This article addresses these two issues by examining the Australian test against changes since 2008 and contributes to the literature by re-examining the test in light of recent developments such as the TTJA, now having been applied by the courts, and the desire for uniformity between the Australian test and Australia's statutory doctrines of venue disputes.

This thesis will focus on the doctrine of *forum non conveniens* as applied in common law countries, being Australia's closest comparators and will employ a doctrinal methodology, the accepted method in the analysis of private international law. The development of the common law across certain jurisdictions as well as statutory and treaty law applicable in Australia will be examined. The United Kingdom and New Zealand possess historical and relational relevance while review of law in the United States demonstrate the isolation of the Australian test. Outside of the scope of this thesis are Australian interstate venue disputes as our focus is its relationship with *forum non conveniens*, and civil law countries as *forum non conveniens* is not a doctrine in these jurisdictions. The argument for liberalization of the Australian test to return Australia to harmony with the other common law jurisdictions and facility efficient outcomes for litigants in this thesis is organized in the following structure. Part II provides an overview of the Australian doctrine its development and juxtaposes it with other common law jurisdictions showing the forum-centric Australian test isolates us and ignores harmonization overseas breeding discord between nations and frustrates clarity for litigants. Part III examines piece-meal legislative intervention in favor of liberalization regarding interstate and trans-Tasman disputes resulting in a lack of a unified Australian doctrine for venue disputes. It is followed by an examination of the inconsistent application of both the liberal and Australian tests and how clear discrimination against foreign litigants frustrates efficient outcomes. Part IV examines whether the argument that little differences in outcomes between the two tests support retaining the Australian test and concludes this is not persuasive in the face of overwhelming need for liberalization. Part V offers doctrinal benefits of liberalization specifically it addresses Australia's perceived parochialism and the fulfils legislative objective of harmony. This will conclude that overwhelming public policy in favor of harmony require liberalization of the Australian test. Part VI concludes this thesis by restating the problem and answering that legislative action is crucial to spur movement from the courts. Definitive legislative intervention thus far is clear and

overwhelmingly favors liberalization of the Australian test.

II. THE AUSTRALIAN TEST: INWARD PERFECTION AND AN OUTLIER

The forum-centric nature of the Australian test isolates us and ignores significant benefits of harmonization between common law nations. The Australian stance breeds discord between Australia and other common law jurisdictions and frustrates the existence of clear and consistent doctrine leading to ineffective outcomes, doctrinal confusion, and prevents parties from settling disputes. The Australian test does not resemble any of the tests applied by the other common law nations.

The majority of the common law nations including the United Kingdom and New Zealand apply the liberal test which require the court to compare the alternative forum and the local forum to look for the ‘more appropriate forum’ in the sense that ‘the case may be tried more suitably for the interests of all the parties and the ends of justice.’

The test in the United States is guided by the concept of convenience and tempered by the interests of the litigating parties and the court’s own interests.

This too does not resemble the Australian test which focuses solely on the local court with the gloss of the plaintiff’s ‘connecting factors’ to the local jurisdiction.

The crucial inquiry in the Australian test is whether continuation of proceedings are ‘oppressive, vexatious or an abuse of process’ in the sense that it would lead to an injustice. The engaged court must be a ‘clearly inappropriate forum’.

Although certain harmonization projects have occurred in Australia such as the TTJA, these have led to further discord at home exposing inconsistency in how the Australian courts handle venue disputes. This is an undesirable outcome for commercial parties as it breeds uncertainties and ignores clear legislative preference for harmony. This doctrinal inconsistency leads to a poor perception of Australian law. This part will examine the development of the Australian test and comparator common law jurisdictions such as the United Kingdom, New Zealand, and the United States and demonstrate that Australia has remained with forum-centric notions of *forum non conveniens* while the remaining common law jurisdictions have progressed to share a common harmony, one which Australia may only partake in through liberalization.

A. Australia: Rejecting liberalization, forum-centrism and supremacy of plaintiff’s rights

The Australian test revolves around the notion that the plaintiff has a right to insist on the jurisdiction of a court once it has been invoked.

In assessing whether a stay should be granted, Australian courts are not obliged to consider external factors such as the defendant’s preferred forum or whether it

is the natural forum for the dispute. This forum-centric approach leaves Australia as a pariah concerning venue disputes where all other common law nations have harmonized the liberal test. A closer look at the development of the Australian test is needed to demonstrate the lack of harmony between Australia and the common law nations. This will show how the Australian test breeds discord between jurisdictions.

The doctrine of *forum non conveniens* was first considered by the High Court of Australia in the case of *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) ('*Fay*').

This was a service-out case where the Australian plaintiff used the long-arm jurisdiction of the Australian courts against the Greek defendant. The claim concerned an injury aboard the defendant's ship whilst sailing in Greece. It is clear that apart from the plaintiff's residence, the incident had very little connection with Australia. The tickets designated the Greek courts as the venue for disputes. *Forum non conveniens* was denied at first instance. The NSW Court of Appeal majority upheld this decision requiring the defendant to show that a judicial advantage of the plaintiff would not be lost, as the plaintiff had relied on the *Contracts Review Act 1980* (NSW).

The minority argued for liberalization by adoption of *Spiliada* due to interests of international comity including the question whether the plaintiff could enforce the judgment in Greece or the United States as Australia had no reciprocity agreement with those countries.

By refusing the stay, the plaintiffs were exposed to the risk of needing further litigation for enforcement of the Australian judgment in Greece or the United States. This is an undesirable outcome as it increases the time and resources expended by parties to receive a practical outcome from a dispute. The High Court confirmed the Court of Appeal's decision. Even though the leading judge, Justice Deane, found that the most appropriate court for assessing liability for damages was Greece, a stay was refused because NSW was not shown as a 'clearly inappropriate forum'. In reaching this decision, Justice Deane required the defendant to show that continuing proceedings in the forum were objectively 'vexatious' or 'oppressive' that NSW was 'a clearly inappropriate forum'. What was referred to as the 'traditional doctrine' was abandoned as this required literal oppression or vexation from the plaintiff and only Justice Brennan favored this approach.

The minority argued for liberalization recognizing a similar approach in the UK. This outcome does not provide certainty for parties to a transnational dispute: parties do not wish to litigate in two completely different legal systems in order to determine liability and damages separately when all the issues at a dispute could have been determined at the case venue in the same jurisdiction. Consequently, it is clear that the Australian test as early as *Fay* did not provide certainty of outcome for parties and risked exposing litigants to undertake further litigation to pursue enforcement.

Opportunities for liberalization were lost in 1990 and 2008 under two separate High Court benches where parties pleaded with the court to reconsider the Australian test established by Justice Deane in *Fay*. They sought liberalization to return Australia to harmony with the common law nations. In *Voth*, the High Court stayed proceedings as NSW was a ‘clearly inappropriate forum’. However, in the case of *Puttick v Tenon Ltd* (2008) (*Puttick*), a stay was refused as Victoria was not a ‘clearly inappropriate forum’. These cases reveal the entrenchment of the Australian test despite changing circumstances leading to greater uncertainty for litigants and placing harmonization further out of the reach of Australian courts and parties.

Voth concerned a professional liability claim by a NSW company against its American accountants in Missouri who had breached American taxation regulations leading to losses in the form of underpayment of US tax and loss of Australian tax credits. Proceedings were already on foot in the US. The trial judge refused a stay because the plaintiff’s claim enjoyed advantages in NSW as their claim was statute-barred in Missouri, they could obtain costs orders for recovery of legal costs in NSW but not Missouri, and NSW had a more advantageous calculation of interest.

It is questionable why a NSW court should consider a question of US revenue law but apply NSW interest rates on damages. This undermines the application of the foreign jurisdiction’s statutory provisions. Furthermore, the decision assumed the superiority of the recovery of legal costs in NSW because the way lawyers in Missouri charged contingency fees i.e., payment was a percentage of the settlement sum. This was and still is not permitted in NSW. This facilitates an insular and deeply forum-centric principle that is anathema to harmony and would be no different to enshrining the superiority of the Australian courts. It is inconsistent that Australia denies the application of Missouri’s statute of limitations but insists on the application of its own prohibition against contingency fees. This demonstrates the haphazard nature of the Australian test and does not provide certain guidance for litigants.

The application of the Australian test in *Voth* demonstrates a superiority Australian courts bestow on themselves. The High Court majority in *Voth* stated that Australian courts should not sit ‘in judgement upon the ability’ of overseas courts to provide justice to the plaintiff as judicial restraint was essential.

However, in examining whether NSW was clearly inappropriate, the majority reaffirmed the legitimate juridical advantages of the plaintiff as considered by the Court of Appeal.

It has been stated earlier that the Australian test aims to avoid a comparative analysis, the *Voth* court found that the question of liability needed to be determined in Missouri, American revenue law applied, and the negligent act occurred in

Missouri.

A stay was granted but the appellants were ordered not to rely on the statute bar as the respondent's claim had expired under Missouri law. This is not a desirable method to settle venue disputes as the court assessed the abilities of the Missouri legal system and furthermore curtailed the exercise of the appellant's rights in another jurisdiction. Consequently, the test thus far demonstrates the rigid, narrow superiority Australian courts have applied to themselves. It is conceded that the liberal test might have resulted in the same result. However, it would not have done so under the pretense of avoiding passing judgment over another court.

In the most recent restatement of the Australian test by the High Court in *Puttick*, the myopic nature of Australian test is again brought to the fore. *Puttick* concerned a mesothelioma claim of a former employee during his employment with a subsidiary of a New Zealand company. These were continued by his wife on his death. Exposure to asbestos leading to mesothelioma occurred in Malaysia and Belgium however the claimants did not specify where or which law applied to the claim. The primary court and the Court of Appeal found that NZ law applied, in particular a statutory scheme precluding common law claims of negligence, consequently proceedings were stayed.

The existence of a comprehensive statutory scheme in New Zealand to determine such claims is a strong factor in favor of New Zealand as the appropriate forum. This was the same line of reasoning on why the High Court did not stay proceedings in *Fay*. The Victorian Court of Appeal found it undesirable for a Victorian Court to apply New Zealand law.

This is logical, respects the principle of harmony with other jurisdictions, and provides litigants with certainty of outcome. However, the High Court disagreed with this conclusion and found that the foreign law issue was not definite and even if it was, it was insufficient by itself as New Zealand law was found to possess 'geographic proximity and essential similarities' to Australian law.

Comparing *Fay* and *Puttick*, it seems that Australian courts are stringent when applying the long-arm jurisdictions of Australian statutes but hesitant to apply this uniformly when the long-arm jurisdiction of a foreign country seeks to apply itself in Australia. This is discriminatory towards foreign defendants and foreign law and is repugnant to harmony. It questions whether other courts will honor the judgments of Australian courts when our courts have blindly rejected consideration of the interests of foreign legal systems.

These cases demonstrate the high bar the Australian test requires defendants to pass in order to obtaining a stay on *forum non conveniens* grounds. In both cases, the alternative forum had at least equal connection, if not greater, to the

dispute than Australia. These demonstrate that the Australian test does not provide certain outcomes for litigants and continued use risks further isolating Australia from other common law countries and the broader international community.

B. Spiliada: the liberal test and a harmonious attitude to venue disputes

Turning now to the development of the liberal test in the United Kingdom from what was the 'traditional test' and the gradual development towards the liberal test in response to the United Kingdom's entry into the European Union and needs for harmonization. The traditional test requires a defendant seeking a stay on *forum non conveniens* grounds to show that continuing proceedings would lead to an injustice because it would be literally oppressive or vexatious, and the stay must not cause an injustice to the plaintiff including depriving the plaintiff of a special judicial advantage in the forum. This was established in *St. Pierre v. South American Stores* which concerned recovery of rent from a Chilean property under a Chilean contract written in Spanish. The Court found it was within their power to interpret and apply Chilean law by interpreting evidence led by the parties and that any inconvenience would not amount to injustice.

This outcome sounds strikingly similar to the conclusion reached by the High Court in *Fay*. However, *St. Pierre* involved two foreign parties and it was decided prior to the outbreak of the Second World War, when the British Empire still existed and the courts in the UK exercised a judicial chauvinism.

Today, Australia's place in the world is no longer the same as it was in 1936: the British Empire no longer exists, our largest trading partners are in Asia, and we have integrated with New Zealand to form a common judicial area under the TTJA.

Liberalization of traditional test first arose in *The Atlantic Star* concerning a dispute between Dutch and Belgian parties over a marine collision.

Five different proceedings were on foot in Antwerp, the governing law was Belgian and the only connection with the United Kingdom was that the vessels docked there. The primary court found these factors meant Antwerp was clearly the 'most appropriate forum' however because the defendant had not shown vexation or oppression of the plaintiff, a stay was refused.

On appeal, the House of Lords recognized the need for liberalization due to changing circumstances considering the membership of the United Kingdom in the European Union.

The economic integration of the United Kingdom entering into the EU common market necessitated harmonization. Analogous integration has occurred between Australia and New Zealand where close economic and political cooperation has culminated in the creation of a common judicial area, the TTJA

Liberalization occurred in *Spiliada*, which concerned damage suffered by a Liberian vessel managed in England and Greece and insured by English insurance in Canada on its voyage to India. This is a similar amount of connecting jurisdictions as *Puttick*. The liberal test requires a defendant to satisfy the seized court that there is another forum which would possess jurisdiction over the dispute where the dispute would be tried there more suitably for the interests of all parties and therefore be 'more appropriate' with regard to 'the interests of all the parties and the ends of justice'. In *Spiliada*, it was found that the United Kingdom was the more appropriate forum because English law applied and the insurers were all in England. Consequently, it made sense for litigation to occur where all the funding would be. This meant that the judgment would be enforced in the jurisdiction where all the monies were.

Applying the facts of *Puttick* to the liberal test, the outcome might have resulted in granted the stay as New Zealand had greater connection to the case and in any event, any judgment would need to be enforced in New Zealand to receive the compensation sought by the plaintiffs. It must be noted that during its membership, the doctrine of *forum non conveniens* in the United Kingdom does not apply to Member States of the European Union.

This is because *forum non conveniens* is a principle foreign to the civil law countries in the European Union, which apply the *lis pendens* doctrine prescribing jurisdiction to the first court seized. It is clear that this test is more harmonious with other jurisdictions and prioritizes that courts appropriately enable the best court to settle the dispute between parties.

The need for harmonization carries greater weight in light of the adoption of the liberal test by the rest of the common law nations. In New Zealand, the liberal test was accepted by the New Zealand Court of Appeal in *Club Mediterranee NZ v Wendell* [1989] where 'the interests of all parties and the ends of justice' was approved.

This case food poisoning suffered by Wendell whilst travelling in New Caledonia. The factual matrix of this case is no different to *Fay*, however the Court's analysis found that New Zealand law governed the contract, it was not clear that all the witnesses would be in Noumea while many witnesses resided in New Zealand, and there was no clear advantage of holding the dispute in Noumea.

This is a contrastingly different line of reasoning to the High Court in *Fay* which only prioritized the Australian forum's interests. *Spiliada* has been consistently applied in New Zealand since, and affirmed as recently as 2015.

It is noteworthy that commentators of both judicial and academic nature have shown concern over Australia's distance from the developments from *Spiliada*, which demonstrated a harmonization effort of English courts with other legal systems.

In one case, a New Zealand judge noted that the Australian test was in discord

with closer economic relations and harmonization between Australian and New Zealand law.

A consequence of these closer relations culminated in the *TTCPA* which enshrines the liberal test. It is clear that the forum-centric Australian test continues to thwart uniformity between Australia and other common law nations including the United States which applies a different test but is nonetheless more liberal than Australia. Although the liberal standard applies to cases involving New Zealand, this has led to an inconsistent Australian doctrine of venue disputes in Australia. Therefore, in order to return to harmony and to facilitate consistent outcomes, Australia must adopt the liberal test.

C. The US test: unique and harmonious

Australia's doctrinal isolation is enhanced when examined against the other unique test of *forum non conveniens* only applied in the United States. The US test examines private factors such as the plaintiff's choice and whether the proceedings might be oppressive or vexatious to the defendant, but also public factors such as the court's own administrative or legal view i.e. the use of judicial resources.

The American test uses the word 'convenience' and requires the court to balance the interests mentioned above with the aim of 'weigh[ing] relative advantages and obstacles to a fair trial'.

It is closer to the liberal test than the Australian test and therefore maintains harmony with common law nations where Australia does not. Private factors considered include ease of access to proof, enforceability of judgment, and harassment or oppression by the plaintiff. The US test is the only test to consider public interest factors including local interest of determining foreign controversies, the burden of jury duty on a matter which may not concern their locality, and the impact hearing the dispute may have on the justice system.

Although not the liberal test, the US test demonstrates a more comprehensive analysis of the impacts of dispute on both party and public interests demonstrating greater consideration for harmony. Furthermore, the continuous use of this doctrine means that the United States enjoys the benefit of a consistent doctrine which guides litigants adequately. The Australian test fails to provide these outcomes to parties in a dispute and consequently should be liberalized.

Although *forum non conveniens* is a feature common to all common law jurisdictions and aims to provide a harmonious settlement to venue disputes, the Australian test is an outlier presents a higher bar for defendants and is prone to the very abuse it aims to prevent by retaining disputes with little connection to

Australia. The doctrine of *forum non conveniens* has been examined including the development and adoption of the liberal test in the United Kingdom and acceptance in New Zealand, and its rejection leading to the Australian test and discord between the judicial systems of Australia and the remaining English common law countries. The US test has also been briefly examined and it has been concluded that this test is more comprehensive than the Australian test and is more similar to the liberal test. Consequently, the adoption of the liberal test offers guidance to litigants and resolves discord between Australia and foreign jurisdictions.

III. NO CONSISTENT DOCTRINE IN SIGHT: INSTRUMENT- BASED STANDARDS FOR VENUE DISPUTES

The Australian test requires defendants to show Australia is a ‘clearly inappropriate forum’. It is a clear outlier from the other common law nations. Justice Deane has noted in *Voth* that any significant changes to the doctrine should come from the legislature.

Statutory intervention has occurred in Australia, under the *Cross-Vesting Acts* and recent treaty arrangements under the TTJA which both adopt the liberal test for inter-state and Trans-Tasman venue disputes. This has led to the application of three distinct sources of law for the settlement of venue disputes in Australia:

- (a) inter-state venue disputes: where another state court with jurisdiction is ‘the appropriate court’ or if it ‘is appropriate’ for that court to determine the proceeding;
- (b) trans-Tasman venue disputes, where an Australian or New Zealand court is ‘the more appropriate court’; and
- (c) non-trans-Tasman transnational venue disputes: where the Australian test is applied.

The first two categories apply the liberal test. In adopting the terminology ‘appropriate’ legislators were informed by the desire for uniformity of outcome in venue disputes and uniformity of the rules of choice of law in Australia. Consequently, it is essential that the Australian test be abandoned in order to create a unified venue dispute doctrine for Australia providing parties with a consistent and clear doctrine which facilitates certainty and efficiency. This part will examine briefly examine the implications of these three divergent standards including that consistent application is discriminator to foreign parties and that the Trans-Tasman standard is a gradual shift towards the liberal test that must be responded with the abandonment of the Australian test and adoption of the liberal test to harmonize

and simplify Australia law.

A. Statutory standards in Australia lead to discrimination against foreign defendants

The development of the common law doctrine of *forum non conveniens* has been examined above, a similar doctrine is applied within Australia for interstate venue disputes. These are governed by *SEPA* and the *Cross-Vesting Acts*. *SEPA* provides for a court to stay proceedings where a defendant has shown that ‘a court of another state or territory is the *appropriate* court to determine the matter.’

Courts are directed to consider factors including the residence of witnesses, the financial situation of parties, and whether a choice-of-court agreement existed. The choice of the plaintiff to lodge their claim in the engaged court was not a consideration and the terms ‘appropriate court’ align themselves closer to the liberal test, rather than the Australian test.

An inefficiency therefore is created where there is a stark distinction between transnational disputes and interstate disputes where the rejected liberal test is applied in the interstate venue dispute regime. This inclination for the statutory schemes to use the liberal test for interstate disputes show a discrimination against foreign litigants as a foreign defendant seeking a stay under common law *forum non conveniens* ground must apply the Australian test and cannot rely on a broad consideration of ‘interests of justice’ that a domestic litigant possesses under the *Cross-Vesting Acts* or *SEPA*. This provides an inference that Australia is an unfriendly jurisdiction foreign plaintiffs and defendants alike which only contributes to our doctrinal isolation and further the perception of the inconsistency and lack of uniformity of Australian law. These concerns have been raised by practitioners and academics in the field of arbitration and private international law before.

SEPA and the *Cross-Vesting Acts* represent the Parliament’s intention for the existence of a coherent and uniform doctrine applying to venue disputes in Australia. In *John Pfeiffer Pty Ltd v Rogerson* (2000), the High Court found it desirable that ‘... choice of law rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated’.

By applying the Australian test, it is clear that this desire for consistency only applies to domestic disputes. No such regard is extended to transnational disputes and this attitude further isolates us from the other common law nations. For instance, it would generally be impossible for an Australian court to be declared as ‘clearly inappropriate’ where the dispute is an Australian dispute. Instead, where it is clear that the interests of justice deem another Australian court ‘more *appropriate*’ for the proceeding, then the dispute will be transferred to that alternative forum.

However, if the alleged alternative venue is a foreign one, the defendant cannot rely on arguments based on the interests of justice, they must apply the Australian test. Consequently, adoption of the liberal test harmonizes the statutory and common law tests and simplifies Australian law.

In a further attempt to harmonize certain aspects of procedural law in Australia, new rules for service out of the jurisdiction under the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR').

Part of these reforms included changing the requisite link from a particular state to Australia as a whole.

Connection with a particular state venue was no longer required. For example, this means that a plaintiff residing in NSW may under the new UCPR lodge a claim against a foreign defendant in Barcelona designating the Supreme Court of NSW for a dispute which has the closest connection to South Australia and internationally may also have an equally close connection with the courts of Barcelona. The foreign defendant may under the *SEPA*, and *Cross-Vesting Acts* transfer the dispute to South Australia, and further seek for the dispute to be moved to Barcelona under the Australian test of *forum non conveniens*. This creates further unnecessary litigation and is not an efficient manner to conduct proceedings nor does it show Australia as a foreigner-friendly jurisdiction as it actively discriminates between foreign and non-foreign defendants. Furthermore, the impact of long-arm jurisdiction is enhanced by the Australian test while statutory standards under *SEPA* and the *Cross-Vesting Acts* ensure that domestic defendants are treated fairly. This contributes to creating a foreigner-unfriendly perception of Australia and can frustrate efforts of international business to transact in our jurisdiction.

The *Cross-Vesting Acts* aim to address issues concerning jurisdictional conflict between the federal courts and the state courts. The example above shows how this interacts with the new UCPR and how it leads to discriminatory outcomes between foreign and non-foreign litigants. When this amendment to the UCPR was introduced, it was contemplated that a plaintiff might seek enforcement in a state supreme court and the defendant might seek to counterclaim in a federal court. The application of the liberal test enables the appropriate court to determine both claim and counterclaim providing resolution to both issues effectively and efficiently. Parties should not need to prove the existence of a counterclaim in the alternative venue in order to prove that dispute should be determined in this alternative venue. To do so encourages collateral preliminary litigation and does not provide certainty for venue disputes in Australia.

It is clear that the present doctrine and how courts apply it to matters is wholly inconsistent, not only internationally but also within the greater Australian

legal framework with the application of several varying standards discriminating between state resident, non-state resident, and wholly foreign plaintiffs and defendants. The factual scenario mentioned above no longer applies to NZ parties with the creation of the TTJA in 2010 where the liberal test applies. Under the common judicial area of the TTJA, both Australian and NZ legislatures demonstrated a preference for harmony by designating a single test to apply in this jurisdiction: the liberal test.¹ This will be examined below.

B. The TTJA favors the liberal test

The standard applied under the TTJA is consistent with the other statutory standards in Australia under the *Cross-Vesting Acts* and *SEPA* however these standards are inconsistent with the Australian test. Without a consistent and clear doctrine, parties lack the benefit of certain outcomes in venue disputes. Consequently, the doctrine must be liberalized for Australia to align itself with the other common law jurisdiction or, at the very least, our own statutory standard for venue disputes. These result in the adoption of the liberal test.

Commonwealth Parliament in 2008 expressed its desire to ‘reduce costs, improve efficiency, and minimize existing impediments’ where proceedings had a transnational, Trans-Tasman element.² As a result, the *TTCPA* was signed by with the aim of streamlining such disputes.³ Under these obligations, a new statutory test common to both Australia and New Zealand would be applied by courts where a *forum non conveniens* question is raised.⁴ This common statutory test applies the liberal test if a stay is sought by a defendant and the alternative forum is New Zealand.⁵ The treaty also adopts the liberal test with respect to courts declining jurisdiction.⁶ The *TTPCA* aimed to address the issue of how Australia and New Zealand treated Trans-Tasman disputes like any other foreign dispute and replaced it with a more coherent, simpler system that promoted ‘simpler, cheaper and more efficient’ proceedings.⁷

1 Department of Parliamentary Services (Cth), *Digest of Bill*, Digest No. 84 of 2010, 4-5 (2010).

2 *TTCPA*, *supra* note 14, art 2(1).

3 *TTCPA*, *supra* note 14.

4 Explanatory Memorandum, Trans-Tasman Proceedings Bill 2009 (Cth) 9 (2009).

5 *TTPA* (n 20) s 12; Davies (n 6) 205.

6 *TTCPA* (n 14) art 8(1).

7 The Parliament of the Commonwealth of Australia, Votes and Proceedings, House of Representatives, No. 136 (2009).

Consequently, where proceedings are heard by an Australian court, litigants may be presented with conflicting standards. Where the defendant alleges that a New Zealand court is a more appropriate to hear the dispute, *TTPA* provisions apply and the court cannot take into account the fact that the proceeding commenced in Australia and must apply the liberal test.⁸ However, where the defendant alleges any other foreign court is the natural forum to hear the dispute, the Australian test, holding a particular reverence to the plaintiff's choice to invoke a particular court's jurisdiction,⁹ applies.¹⁰ Australia alone maintains this plaintiff-centric attitude. The NSW Supreme Court recently found that the Australian test is informed of 'serious and unjustified trouble and harassment' to the defendant posing a high bar.¹¹ The judicial approval of the Australian test as recently as this year requires a re-examination of whether there is merit to retaining the test, and if so, whether this is sufficient to displacing the factors in favor of liberalization.

IV. THERE IS NOW A LARGE DIFFERENCE BETWEEN OUTCOMES BETWEEN THE AUSTRALIAN AND LIBERAL TESTS

The main argument in favor of the maintenance of the Australian test is that there exists little difference between the Australian and liberal tests as both lead to the same outcomes in most cases.¹² In *Fay*, Justice Deane was reluctant to see very large differences between the Australian test and the liberal tests noting only a 'small number of cases' might fail under the former but pass the latter,¹³ although the court in *Voth* recognized the abstract desirability of adopting the liberal test.¹⁴ The *Voth* majority also considered both approaches were 'likely to yield the same result ... in the majority of cases'.¹⁵ That very little practical difference exists is an unpersuasive argument if it causes friction between jurisdictions, discriminates between local and foreign parties, as well as internal inconsistencies within Australian law as discussed earlier. This defeats the harmony across jurisdictions, contributes to a poor perception of Australia as a venue for disputes, and discourages parties from litigating in a forum where they are actively discriminated against. It is clear that a distinction exists between the Australian test and the liberal test. For example, a pre-TTJA case, inconsistencies between the tests led to 'inconvenience,

8 *TTPA*, *supra* note 20, at s 19(2)

9 *Voth*, *supra* note 7, at 554.

10 *Voth*, *supra* note 7.

11 *Nilepac Pty Limited v Amstelside BV* [2020] NSWSC 57 (NSW) [hereinafter *Nilepac*].

12 *ARZANDEH*, *supra* note 36, at 491.

13 *Fay*, *supra* note 16, at 254.

14 *Voth*, *supra* note 7, at 557.

15 *Id.*, at 559.

expense and uncertainty,¹⁶ in the case of *Re Gilmore* (1993) 110 FLR 331 where a race to judgment would have occurred had settlement not occurred. Where parties are led to discontinue proceedings on the basis of cost-based attrition instead of principles of private international law is a disharmonious approach to transnational disputes and is a disincentive for parties to conduct business in Australia.¹⁷

If we were to use the factual matrix of *Puttick*, it is clear that different outcomes would have resulted if the liberal test was applied: most factors pointed towards New Zealand, especially where a statutory regime applied to arguably the whole claim. This is especially important where statutory schemes with long-arm jurisdiction exist. For example, the consumer law regime in Australia applies the use of long-arm jurisdiction capturing claims where a contract may already provide for an overseas jurisdiction.¹⁸ Similarly, the Chapter 11 Bankruptcy regime in the United States applies exorbitant jurisdiction by enforcing a worldwide automatic stay of any other enforcement proceedings against the debtor.¹⁹ In these cases, application of the liberal test would result in a different outcome to the Australian test. Circumstances have changed since *Voth* where it might be true that only a small number of cases may fail the Australian test but pass the liberal test. However, with the greater prominence of transnational contracts and the TTJA, the differences between these two tests is no longer marginal. It is clear that the Australian test must change now that Australia is even more intertwined with global trade networks, supply chains, and commerce today.

The maintenance of the Australian test correctly attracts criticism as ‘an incomplete inquiry with potentially disastrous results’,²⁰ leading to an ‘increase [in] forum shopping and jurisdictional conflict’,²¹ ‘myopic’,²² and noted to be ‘chauvinistic’ and biased in favor of continuing proceedings.²³ It also encourages parties to litigate in a bid to choose a venue, and in the course of doing so, force the other side to concede through attrition of resources at the preliminary stage. This is not a feature of a well-functioning legal system. Liberalization of the Australian test addresses these issues.

16 Trans-Tasman Working Group, *Trans-Tasman Court Proceedings and Regulatory Enforcement* 18-9 (2016).

17 DAVIES, *supra* note 6, at 47.

18 *Valve Corporation v. Australian Competition and Consumer Commission* (2017) 258 FCR 190 (Austl.) [hereinafter *Valve Corp.*]

19 Gerard McCormack, *Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies*, 63 INT’L & COMP. L. Q. 815 (2014).

20 GRAY, *supra* note 10, at 229.

21 Zhang, *supra* note 16, at 524-5 [95].

22 GRAY, *supra* note 10, at 227.

23 COOK, *supra* note 14, at 25.

V. DOCTRINAL BENEFITS OF REFORM

By adopting the liberal test, Australia returns to harmony with the other common law jurisdictions enabling smoother resolution of forum disputes and removing inconsistent application of venue dispute principles between Australian-interest cases, NZ-interest cases, and all other cases. The consistent application of the narrow Australian test has led to a perception of Australia as parochial. Parochialism in this sense means that Australian courts perceive themselves superior to other national courts by preferring to apply foreign law instead of facilitating the transfer of the proceeding to another court even if that court might inevitably apply Australian law. This is an unacceptable attitude in the modern world because this encourages friction between jurisdictions, undermines the aims of harmony, and leads to inconsistent outcomes for litigants. Furthermore, it undermines legislative intention of harmonization evidenced by the *Cross-Vesting Acts*, *SEPA*, and *TTPA*.

A. Addressing Australia's perceived parochialism

The forum-centric approach of the Australian test has now been examined by this thesis showing that it leads to Australian courts sustaining disputes to be heard here despite demonstrating greater connections overseas and even if an exclusive choice-of-court agreement existed.²⁴ That Australian courts are more willing to apply foreign law than let non-Australian forums settle Australian disputes is a 'perceived parochialism' that no longer has a place in the modern fabric of private international law.²⁵

As explained earlier, there exists institutional factors in Australia demonstrating a desire for greater international commerce and harmony, demonstrated by the *TTPA* and greater involvement in greater involvement of Australia in its international community as well as with jurisdictions from an array of legal traditions. Consider for example, the currently negotiated Australia-European Union Free Trade Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the ASEAN Australia-New Zealand Free Trade Agreement- and the recent Australia-United Kingdom Free Trade Agreement to name a few.

Switzerland, Singapore, and England are choice venues for their neutral and commercially logical principles of law including those pertaining to venue

24 MORTENSEN, *supra* note 31, at 232-3; Fay, *supra* note 16.

25 JONES, *supra* note 10, at 12-3, 15-7.

disputes.²⁶ In order to address this, the standards applied between interstate, trans-Tasman, and transnational disputes must be liberalized in order to achieve greater harmony with the other common law nations and to simply Australian law through a single doctrine settling venue disputes.

One step towards eliminating this ‘perceived parochialism’ has been achieved through the TTJA. The regime under the TTJA even permits the Federal Court of Australia to exercise jurisdiction in New Zealand in market proceedings and vice-versa.²⁷ Outside of such statutory arrangements, it would be undesirable for courts to apply foreign law as this introduces further complexity in interim proceedings.²⁸ This would also drain party resources and drive them to a race of attrition instead of settling disputes. However, it is clear that Australia’s ‘perceived parochialism’ has also infected venue disputes under the TTJA. For example, in *Australian Gourmet Pastes Pty Ltd v IAG New Zealand Ltd* (2017), the NSW Court of Appeal in *obiter* stated that the ‘more appropriate’ test enshrined in s 19 of the *TTPA* is different to the liberal test.²⁹ This statement has yet to be applied subsequently, however the resistance from Australian courts to apply the liberal test show an ongoing parochialism undermining the very aims of the *TTCPA*.

In *Re Douglas Webber Events Pty Ltd* (2014) (*‘Douglas Webber’*), Justice Brereton found that rights accrued under statute are unlikely to be litigated in a foreign court.³⁰ This case concerned whether proceedings for relief under the *Corporations Act 2001* could be stayed in favor of the High Court of New Zealand. The stay was refused although New Zealand was the place of residence of several parties, most material witnesses, and choice of forum clause in favor of New Zealand existed.³¹ Justice Brereton outlined the requirements for a successful stay under s 19 *TTPA* requiring the defendant to demonstrate that a court in New Zealand possesses jurisdiction and that it is the appropriate court for the proceeding. After proving this, ‘the statute permits’ the engaged court to stay proceedings ‘but *does not require* the court to stay the proceedings.’³² It is clear that the *TTPA* alone is insufficient to erode the culture of judicial chauvinism and parochialism in Australian courts. Notwithstanding the parliamentary intention to

26 *Id.*, 15-6.

27 *TTPA*, *supra* note 20; *TTPANZ*, *supra* note 20.

28 *Murakami v. Wiryadi* (2010) 268 ALR 377, 406 (NSW) [heretoeafter *Murakami*].

29 *Australian Gourmet Pastes Pty Ltd v IAG New Zealand Ltd* (2017) 321 FLR 345, 367, see footnote 71 (*‘Australian Gourmet Pastes’*).

30 *Re Douglas Webber Events Pty Ltd*. (2014) 291 FLR 173, 181 (NSW) [heretoeafter *Douglas Webber*].

31 *Id.*, at 183.

32 *Id.*, at 180 [emphasis added].

promote harmonize and streamline disputes with a trans-Tasman nature, it is clear from *Douglas Webber* that Australian courts will continue to gloss the Australian test to disputes under the TTJA.³³ In these circumstances, liberalization will result in a clear, consistent, unified doctrine of *forum non conveniens* and will address this ‘perceived parochialism’ of the Australian courts.

A. Fulfilling legislative objective of harmony

In *Fay*, Justice Deane mentioned that in order to adopt the liberal test, it was ‘preferable that it be done by legislation enacted after full inquiry and informed assessment of international as well as domestic considerations of a kind which this Court is not equipped to make of its own initiative.’³⁴ This has occurred. During negotiations for the TTJA, the legislative working group contemplated conformity with New Zealand considering it was recognized that no jurisdiction disregarded choice-of-court agreements such as Australia because ‘the clearly inappropriate’ test still overrode the Court’s considerations.³⁵ Therefore, it is clear that harmony is the objective of the legislature.

Australian courts fulfil the objective of harmony indicated by the legislature with the *TTJA* through adopting the liberal test. Further legislative preference for harmony is demonstrated by the announcement of accession to the *Hague Convention* which aims to ‘greater clarity and certainty for Australian businesses in the resolution of disputes arising from international transactions.’³⁶ Similarly, the venue disputes scheme under the *Cross-Vesting Acts* and *SEPA* synergies with liberal test more than the Australian test. Harmonization under the new *UCPR* rules for service out of the jurisdiction is further evidence for this intention.³⁷ Consequently, it is clear that there is overwhelming legislative support in favor for harmonization. Especially where Australia’s context today is different to what it was in 1998 or even 2008 with an array of multi-national trade treaties with numerous partners in Europe, Asia, and the Pacific Rim regions.³⁸ Now that China has surpassed the United Kingdom as Australia’s primary source for migrants in

33 *TTCPA*, *supra* note 14.

34 *Fay*, *supra* note 16, at 255.

35 *MORTENSEN*, *supra* note 31, at 234-5

36 Letter from Edward Lee, *supra* note 2, at 1.

37 *DOUGLAS*, *supra* note 13, at 339.

38 For example: Australia-European Union Free Trade Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the ASEAN-Australia-New Zealand Free Trade Agreement and the recent Australia-United Kingdom Free Trade Agreement.

2010,³⁹ and the concern of long-arm jurisdiction via the internet is greater than ever,⁴⁰ changed circumstances have led to greater disparity under the Australian test. Now more than ever, Australia must return to harmony with the remaining common law jurisdictions. The Australian test undermines these efforts.⁴¹ By adopting the liberal test, Australia is no longer an outlier by harmonizing with other jurisdictions providing certainty and consistency concerning venue disputes, facilitates a move from doctrinal isolation to commune, and fulfils legislative intention for harmony.

VI. CONCLUSION

The role of private international law is to facilitate harmony between the different legal systems applied by different jurisdictions. If private international law instead creates further friction between these legal systems it fails in this objective and puts the ecosystem of global commerce at risk as doctrinal isolation and incompatibility occurs, and inconsistency and legal uncertainty becomes the norm. The Australian test of *forum non conveniens* is such a case. Its continuous application has led to doctrinal isolation from our neighbors and sibling jurisdictions, undermines harmonization efforts on the part of the legislature, and discriminates between foreign and non-foreign litigants. These factors lead to Australia struggling to become a choice venue for disputes in our region.

Since *Puttick*, it is clear that the Australian test no longer suits the needs of parties in Australia for several reasons. First, the test no longer provides certain guidance to parties the appropriate forum to settle their dispute. The test informs parties of abuses of process but not whether that forum is best placed to hear the dispute. This results in undesirable outcomes as parties expend time and resources haphazardly and courts lists are clogged with proceedings more appropriately heard in another forum which is able to provide an effective and definitive resolution to the dispute. Encouraging collateral litigation or relitigating elsewhere is also a poor reflection on the judicial system and ultimately does not respect the interests of parties, the courts, or other jurisdictions. Furthermore, the use of cost attrition as a method of wearing parties to settlement rather than settling disputes is not a feature of any well-functioning legal system. Through liberalization, parties will

39 Janet Philips & Joanne Simon-Davies, *Migration to Australia: A Quick Guide to the Statistics*, Department of Parliamentary Services 1 (2017).

40 Micheal Douglas, *A Consideration of Current Issues in Private International Law*, 44 AUST. BAR REV. 338. (2017)

41 Thomas Schultz & Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts*, 12 J. PRIV. INT. L. 344, 369 (2016).

obtain the benefits of greater certainty and guidance in international transactions facilitating Australia's rise as a choice forum for transactions.

Second, the test entrenches Australia's isolation compounding with geographic factors preventing Australia to be selected as a choice jurisdiction for disputes.⁴² It has been recently recognized that there is an unfavorable perception of Australian law as fragmented.⁴³ This reflects poorly on Australia as a choice jurisdiction for transnational disputes and creates unnecessary burden on Australian parties as convincing foreign parties to choose Australian courts or Australian law as a governing law or forum will become more difficult. Third, there exists clear legislative intention favoring harmonization with other common law jurisdictions. This is demonstrated by Parliament's announcement of accession to the *Hague Convention* and the accession to the *TTCPA* and the harmonized inter-state venue dispute mechanism under the *Cross-Vesting Acts* and *SEPA*.⁴⁴

Finally, continuation of the Australian test means the inharmonious application of three inconsistent standards for venue disputes within Australia between interstate, trans-Tasman, and transnational with the former two applying the liberal test. This demonstrates a clear discrimination against foreign parties as only Australian or New Zealand parties receive the benefit of the liberal test. Through liberalization, Australia fulfils long-desired harmonization and facilitates efficiency and certainty through the use of a simple, uniform, and clear doctrine. In *Puttick*, Justices Heydon and Crennan mentioned that a full argument on the correctness of *Voth* was required.⁴⁵ With changed circumstances and a clear need for a consistent and clear doctrine for forum disputes, it is clear that there is a strong case against the *Voth* doctrine. Consequently, the Australian test of *forum non conveniens* needs to be liberalized to bring Australian law in harmony with the rest of the common law world, facilitating greater transparency, certainty, and efficiency in transnational disputes which is ever more important in a time where transnational transactions are becoming a norm rather than an exception.

42 JONES, *supra* note 10, at 12–3, 15–7.

43 *Id.*, at 15-6.

44 Letter from Edward Lee, *supra* note 2, at 1.

45 *Puttick*, *supra* note 16, at 280.







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