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## "Sociological Legitimacy" in Supreme Court Opinions

Michael L. Wells

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# "Sociological Legitimacy" in Supreme Court Opinions

Michael L. Wells\*

## *Abstract*

*Analysis of a Supreme Court opinion ordinarily begins from the premise that the opinion is a transparent window into the Court's thinking, such that the reasons offered by the Court are, or ought to be, the reasons that account for the holding. Scholars debate the strength of the Court's reasoning, question or defend the Court's candor, and propose alternative ways of justifying the ruling. This Article takes issue with the transparency premise, on both descriptive and normative grounds. Especially in controversial cases, the Court is at least as much concerned with presenting its holding in a way that will win allegiance from its audience, or at least deflect and soften criticism. Drawing on sociologist Erving Goffman's study of "appearance management," the Article shows that the Court's opinions often reflect more concern with its audience's sensibilities than with the reasons that drive the outcomes of cases. The Article then considers the normative issues raised by the Court's appearance management. It argues against blanket condemnation of the practice, because it is not an unalloyed evil. At the same time, by identifying the merits and demerits of judicial appearance management, we can identify contexts in which it may be more or less deserving of criticism.*

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### I. Introduction

In *A Political Court*, Judge Richard Posner dismisses the reasoning of many Supreme Court opinions as "professional varnish"<sup>1</sup> and a "mask,"<sup>2</sup> behind which the real work of deciding cases takes place. Like Judge Posner, many readers of the Court's decisions believe we can distinguish between two kinds of reasons: (a) those that do the work of deciding the cases, and (b) those that are put forward for the purpose of creating an impression of judicial deference to text and history.<sup>3</sup> These are the work horses and the show horses of

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1. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 52 (2005) (asserting that "[t]here is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish").

2. *Id.* at 44, 88.

3. This distinction is a central tenet of legal realism. See BRIAN LEITER, NATURALIZING JURISPRUDENCE 16 (2007) ("[T]he core of Realism is, indeed, a certain sort of descriptive claim about how judges decide cases according to which judges rationalize, after-the-fact, decisions reached on other grounds." (emphasis omitted)). The tendency to favor the second sort of

constitutional argument. The work horses consist largely of value choices between competing political and social goals, while the show horses include, at least some of the time,<sup>4</sup> the "intent of the framers," precedent, and the application of multi-part tests. Scholars have accumulated considerable evidence of the existence of show horses: The Court advances historical arguments when doing so suits the Court's purpose and ignores them when they are inconvenient.<sup>5</sup> It cites precedents to support its rulings, yet acknowledges that precedent is a weak constraint in constitutional cases.<sup>6</sup> Its formulae amount to "an attempt to achieve one effect: that the words, once in place, will do the work as the judges watch, recording the score."<sup>7</sup> Meanwhile, the majority's

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reason over the first may be especially prominent in Supreme Court opinions, because the Court's docket consists largely of cases in which text, history, and other legal materials do not furnish a clear answer. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 621-22 & n.39 (2000) (noting the selection bias and policy preferences of the Supreme Court's caseload).

4. My point is not that these arguments are properly characterized as "show horses" whenever they are advanced. My examination of them will be worthwhile so long as their role in a significant number of the Supreme Court opinions that employ them is to decorate the opinions rather than to produce the outcome.

5. See Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 581 (2000) (discussing the Court's use of historical arguments). He states:

The legal profession's use of history is a disguise that allows the profession to innovate without breaching judicial etiquette, which deplores both novelty and a frank acknowledgment of judicial discretion and likes to pretend that decisions by nonelected judges can be legitimated by being shown to have democratic roots in some past legislative or constitutional enactment.

*Id.*

6. See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 905 (2005) (noting that precedent "has a limited, rather than a completely absent or robust, degree of path dependency in constitutional adjudication"); see, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack."); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (observing that the policy of *stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions"); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (noting that "*stare decisis* is not an inexorable command" in constitutional cases); *United States v. Barnett*, 376 U.S. 681, 699 (1964) ("It is true that adherence to prior decisions in constitutional adjudication is not a blind or inflexible rule."). When the Court purports to respect precedent, the most that can be said for the precedent is that the majority does not strongly disapprove of it. E.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with [*Miranda v. Arizona*'s] reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

7. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 196 (1985); see also Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1441 (1995) (noting that this style "conveys an impression of deliberateness, of moving step by step, of leaving no stone unturned").

political and social aims may drive the outcomes of hard cases even when they receive comparatively little attention in the opinions.<sup>8</sup> Commentators give short shrift to the show horses. They argue over whether a given argument falls into the show horse or the work horse category, lambaste the show horses, and then set them aside in order to pursue serious constitutional analysis.<sup>9</sup> A widely-shared premise of constitutional scholarship is that the Court ought to give true rather than false reasons.

This Article rejects that premise. My thesis is that the Court's opinions may serve worthy goals and earn our respect even if other reasons account for outcomes. To borrow Judge Posner's metaphor, I believe that the Court's professional varnish and its masks deserve more scholarly attention and a kinder assessment than they have received. Deployed with skill and prudence, false (but widely acceptable) reasons help maintain the appearance that the Court is in step with the broad public, to whom it is ultimately accountable. Adept appearance management can succeed even when segments of the public differ sharply among themselves as to the norms of constitutional adjudication. In this way, putting an attractive face on its rulings may serve the Court's vital institutional need for public confidence. Appreciating the role of appearance management in ensuring the Court's institutional effectiveness enhances our understanding of the opinions and opens the door to a whole new set of criteria for evaluating them. In making these points, I borrow Richard Fallon's illuminating distinction between "legal legitimacy" and "sociological legitimacy."<sup>10</sup> Legal legitimacy requires that an opinion candidly state the reasons for the outcome.<sup>11</sup> Sociological legitimacy is achieved by an opinion that secures public acceptance of the Court's rulings.<sup>12</sup> Badly-reasoned

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8. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194 (1987) ("[A]lthough value arguments occupy the lowest rung in the hierarchy, they are likely to exert a very powerful influence on conclusions within other categories in a successful effort to reach coherence."); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 274 & n.88 (2005) ("[A]ttitudinal findings that Supreme Court Justices vote according to their own ideology might evoke a sort of 'ho hum' reaction on the part of the legal cognoscenti.").

9. See Fallon, *supra* note 8, at 1204 ("Value arguments . . . enjoy almost total predominance [in] much of the most respected modern constitutional scholarship.").

10. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005). Fallon also discusses "moral" legitimacy, which "is a function of moral justifiability or respect-worthiness." *Id.* at 1796. This Article concentrates on the Court's reasoning more than its outcomes, while moral legitimacy is concerned with the Court's holdings rather than its reasoning. See *infra* notes 84–89 and accompanying text (distinguishing between sociological and moral legitimacy).

11. See *id.* at 1822–23 (describing "legal" legitimacy).

12. See *id.* at 1790–91, 1795–96 (describing "sociological" legitimacy).

opinions may lack legal legitimacy, yet succeed in winning sociological legitimacy. There may be a difference between reasons that will please the Court's audience and those that do the work of deciding cases.

As the term "sociological legitimacy" signals, this Article treats the Justices as social actors who have a common interest in the Court's success as an institution. Like anyone who does not live on a desert island, the Court, in order to achieve its goals, has to be concerned with what other people think of it.<sup>13</sup> In any given case, and especially in the most prominent ones, the Court must take care to behave in a way that inspires or maintains public confidence, even as it insists on a large role for itself. In the course of resolving a case, the Court needs to make not only legal decisions, but also strategic choices as to the contents of the opinion. The general problem has come up in a variety of contexts and throughout our history. To take some prominent examples, in *Ex parte McCardle*,<sup>14</sup> the Court was faced with a statute that stripped it of jurisdiction over constitutional challenges and had to decide not only how to respond on the merits, but also how to compose an opinion that would appease Congress without surrendering.<sup>15</sup> It handled the dilemma by larding the opinion with deferential rhetoric while carefully declining to address the broad issue of congressional power.<sup>16</sup> In *Brown v. Board of Education*,<sup>17</sup> the problem was how to strike down segregated public schools without appearing to disrupt settled expectations too much.<sup>18</sup> Its solution was to cite dubious social science evidence instead of forthrightly articulating the broad principle of racial equality on which the result actually rested.<sup>19</sup> In *Bush v. Gore*,<sup>20</sup> the majority

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13. For an extended discussion of the nuances and implications of this common sense notion, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 4–5 (1959) (suggesting that when a person interacts with others, he has an interest in controlling the impressions others have of him, and can try to do so "by expressing himself in such a way that will lead them to act voluntarily in accordance with his own plan"). One of my aims in this Article is to use Goffman's lens to study the Supreme Court, an institution that presents itself to the public almost exclusively through its opinions.

14. See *Ex parte McCardle*, 74 U.S. 506, 512–13 (1868) (upholding a statute limiting the Court's power to hear habeas corpus appeals).

15. See *infra* notes 191–98 and accompanying text (discussing the Court's dilemma in *Ex parte McCardle*).

16. *Id.*

17. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (finding racial segregation in public schools unconstitutional).

18. See *infra* notes 155–61 and accompanying text (discussing the Court's approach in *Brown*).

19. *Id.*

20. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (finding that a court ordered recount of votes cast in a presidential election violated the Equal Protection Clause).

rejected a plausible, though novel, theory based on Article II of the Constitution in favor of equal protection reasoning that could more readily be linked to settled doctrine, though at the cost of withering academic criticism.<sup>21</sup>

The analysis unfolds in three steps. Part II shows that the requirements of legal and sociological legitimacy may conflict, and offers reasons why the Court will likely choose to sacrifice legal legitimacy for the sake of public acceptance. Accordingly, it is fair to infer that the unspoken aim in many "badly-reasoned" cases is to enhance the Court's standing with the relevant segments of public opinion. My argument is that the Court's preference for sociological legitimacy stems from its concern with the "countermajoritarian difficulty."<sup>22</sup> Because the Court's constitutional rulings thwart the popular will, the legitimacy of its interventions will often be contested, and it must take care to ensure that people have confidence in its performance. As a result, the Court must pay attention to public perceptions, ever on the lookout for ways to win, or shore up, or minimize erosion of public acceptance of controversial decisions. Over the whole range of cases the Court adjudicates, the prime candidates for false reasons will be those in which the reasons that account for outcomes are least widely shared, and the main test for selecting false reasons to stand in their place will be broad acceptability.

Part III shows how this preference for acceptable (but false) reasons influences the contents of opinions and, with the accretion of cases over time, shapes constitutional doctrine. Some arguments, notably those that depend heavily on the existence of constitutional values that cannot be traced uncontroversially to the text and history of the Constitution, receive comparatively little attention in Supreme Court opinions, despite their often decisive role in resolving hard issues.<sup>23</sup> Instead, the Court employs a "rhetoric of inevitability," aimed at creating the impression that the work of deciding the case has already been done by the framers and by prior cases.<sup>24</sup> To this end, it favors arguments based on precedent and the intent of the framers,

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21. See *infra* notes 222–35 and accompanying text (describing the controversy surrounding the Court's decision in *Bush*).

22. Barry Friedman has written a series of articles chronicling the history of the "countermajoritarian difficulty." See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (exploring "the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy").

23. See Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2011–12 (2000) (suggesting that Supreme Court opinions "are written to make it seem that there is only one correct result and that it was derived in a formalistic fashion that excludes individual value choices").

24. *Id.* at 2008.

and it chooses doctrinal formulae that can be deployed to resolve issues without any apparent exercise of judgment.

Part IV shifts gears to consider the normative issues raised by the tension between appearance management and the value of judicial candor. I defend the Court's concern with appearances against the threshold objection that judicial candor is the paramount value in opinion writing and identify considerations bearing on the wisdom of the practice in a variety of contexts. In particular, the value of appearance management must be weighed against its costs in assessing opinions that employ this technique. Moreover, appearance management always carries risks. While an opinion written for the purpose of managing appearances may merely mask good (but controversial) reasons, the mask may also be used to conceal weak arguments, or even reasons that should be off limits to judges. Here, we can appreciate one of the merits of good doctrinal scholarship, for its meticulous attention to the text of an opinion exposes these abuses of appearance management.

## *II. Legitimacy and the Supreme Court*

Government officials routinely wield power in ways that oblige persons to comply with their commands—to pay taxes, report for jury duty, obey the criminal law, and so on. Their commands are "legitimate" to the extent they are entitled to our obedience, and scholars debate just what criteria they must meet in order to deserve compliance. For most officers, the legitimacy of their decisions is mainly a product of democratic decision making, subject only to constitutional constraints.<sup>25</sup> When we complain about the acts of legislators or executive officers, the usual answer is that in a democracy the majority has its way.<sup>26</sup> These officers were elected, or are responsible to other officers who were elected for the purpose of making and implementing public policy. Their job is to choose how to deploy limited resources among competing claims, and the losers typically have no recourse other than the polls. But elected officers do not enjoy absolute power. The American theory of government holds that the democratic check on official transgressions may fall short. Accordingly, we have enacted constitutional (and statutory) curbs on the state's power, and the

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25. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 4–7 (1980) (discussing the legitimacy of decisions made by the elected branches of government).

26. See Fallon, *supra* note 10, at 1842–44 (noting the sources of legitimacy supporting the executive and legislative branches).



role of courts is to enforce those limits.<sup>27</sup> But judges, too, are supposed to be constrained by law, and they, too, must legitimize their rulings.

### *A. Three Kinds of Legitimacy*

For judges, and especially for Supreme Court Justices, achieving legitimacy presents different and greater challenges than those faced by elected officials and their underlings. Federal judges are not elected to policy-making posts and are not directly accountable to anyone. Yet the Court may thwart the will of the democratic branches by handing down constitutional rulings that cannot be overturned through the ordinary legislative process. Unsurprisingly, the practice is controversial, and American scholars have labored long and hard over the conflict between majority rule and judicial authority.<sup>28</sup> Along the way, they have spun out many theories designed to justify, explain, and critique what judges do.<sup>29</sup>

Insofar as the Court is concerned, academic theories may not be adequate to the task at hand. The pressures and constraints it faces go well beyond the need to satisfy a law professor's theory of judicial review, for legitimacy is neither a unitary concept nor an unambiguous one. In a recent article, Richard Fallon provides a helpful starting point.<sup>30</sup> He sets out "to clarify what we characteristically mean when we talk about legitimacy, especially in constitutional law."<sup>31</sup> His article distinguishes between "three kinds of standards that produce different concepts of legitimacy—legal, sociological, and moral"<sup>32</sup> and shows that each figures in the debate over whether a given judicial decision or other act of government is legitimate or not.<sup>33</sup> Thus, "legal

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27. See generally *Marbury v. Madison*, 5 U.S. 137 (1803) (outlining the core principle of judicial review). Not every legal objection against legislative and executive officials will entail a claim of illegitimacy. But every claim of illegitimacy must be based on an assertion of illegality.

28. See Fallon, *supra* note 10, at 1821 ("The gravest difficulty in assessing charges of legally illegitimate judicial decisionmaking arises from disagreement about the legal bounds of judicial authority under the Constitution."). A British observer points out that Americans, due to the institution of judicial review, devote an especially large amount of intellectual firepower to this general issue. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 122–25 (1983) (examining the "concentration of American thought on the judicial process").

29. See Friedman, *supra* note 22, at 167–215 (exploring the "academic attention" given to the counter-majoritarian problem in the mid-twentieth century).

30. See Fallon, *supra* note 10, 1813–42 (describing "judicial" legitimacy).

31. *Id.* at 1790.

32. *Id.* at 1794.

33. See *id.* at 1851–53 (concluding that these three concepts of legitimacy impact the

legitimacy and illegitimacy depend on legal norms."<sup>34</sup> By contrast, "[w]hen the term is used in a moral sense, legitimacy is a function of moral justifiability or respect-worthiness."<sup>35</sup>

Assessments of the legal and moral legitimacy of judicial action entail normative judgments. Sociological legitimacy, on the other hand, is a descriptive concept in Fallon's model: "When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."<sup>36</sup> Sociological legitimacy "in a *weak* sense" is a matter of "mere acquiescence."<sup>37</sup> It exists when "the public, or broad sections of it, have not overtly resisted claims of political authority."<sup>38</sup> The article goes on to delineate the interrelations and conflicts among these three strands of legitimacy. For example, the "legally" legitimate ruling in a given case may differ from the "sociologically" legitimate one if one view enjoys widespread public support, while the other finds more favor in the legal materials.<sup>39</sup> By untangling the three strands of legitimacy, Fallon aims for "increased understanding of constitutional debates, enhanced precision of thought, and the potential for clearer expression."<sup>40</sup>

Starting with Fallon's three-part conception of legitimacy, I pursue a different inquiry. My aim is to consider the bearing of the three aspects of legitimacy—especially sociological and legal legitimacy—on the opinion-writing strategies of Supreme Court Justices. Three sets of criteria for evaluating opinions imply three sets of criteria for writing them as well. Whatever the outcome of a case, the holding may be justified by reasons that satisfy the requirements of legal, moral, or sociological legitimacy, or some combination of the three. Consequently, the three-part nature of legitimacy sometimes obliges the Court to make choices as to how to justify outcomes, even when achieving legitimacy is its sole goal.<sup>41</sup> The point here is not that

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decisionmaking of courts and public officials).

34. *Id.*

35. *Id.* at 1796.

36. *Id.* at 1795.

37. *Id.* at 1796.

38. *Id.*

39. *See id.* at 1850 (noting "the potential for conflict" among these concepts of legitimacy).

40. *Id.* at 1791.

41. *See id.* at 1790 ("[T]he term legitimacy invites appeal to three distinct kinds of criteria that in turn support three concepts of legitimacy: legal, sociological, and moral.").

every case requires such a choice. If the demands of legal, moral, and sociological legitimacy are all satisfied by the same set of reasons for the holding in a case, then no choices need to be made among the three. The vast majority of cases adjudicated by federal and state courts fit this description. Still, the requirements of the three types of legitimacy may point in different directions, and cases in which this is so are disproportionately likely to turn up on the Supreme Court's docket, simply because the Court typically selects the thorniest issues for review.<sup>42</sup> This difference between the Supreme Court and lower courts explains why my focus is on the Supreme Court. To the extent sociological legitimacy influences the content of opinions, its impact will be more pronounced in Supreme Court opinions than in decisions of lower courts.

### B. Sociological Versus Legal Legitimacy

Legal professionals ordinarily work from the premise that legal, not sociological, legitimacy is the Supreme Court's guideline. Supreme Court opinions show how the Court reasoned its way from the relevant constitutional provisions, statutes, precedents and other legal materials to the holding in the case at hand.<sup>43</sup> By assuring that the Court's ruling complies with the law,<sup>44</sup> the opinion demonstrates that the majority has satisfied the requirements of legal legitimacy.<sup>45</sup> To this end, the opinion must consist of a full and candid

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42. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 621–22 & n.39 (2000) (suggesting that, more often than not, the Court grants certiorari in cases in which Justices have strong policy preferences).

43. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 219 (1986) ("Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation."); Richard H. Fallon, Jr., *"The Rule of Law" As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 18 & n.79 (1997) (describing the Legal Process view that adherence to the rule of law entails, among other things, "reasoned elaboration of the connection between recognized, pre-existing sources of legal authority and the determination of rights and responsibilities in particular cases"); James B. White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367–68 (1995) (arguing that "[i]t is . . . in the creation of legal authority . . . that the opinion performs its peculiar and most important task," and that makes "two claims of authority: for the texts and judgments to which it appeals, and for the methods by which it works"); J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 792–98 (1989) (describing the role of reasoned opinions in maintaining the rule of law).

44. See Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 968–69 & nn.91–93 (1995) ("The written opinion increases the prospect of decision-making on the basis of generally applicable principle and external authority rather than on less predictable or acceptable considerations.").

45. See Fallon, *supra* note 10, at 1794–95 ("That which is lawful is also legitimate."). Fallon does not suggest that every wrongly decided case is illegitimate. *Id.* On the contrary,

exposition of the Court's reasoning.<sup>46</sup> The professional commitments of lawyers, lower court judges, and mainstream scholars oblige them to adopt the Court's premise, at least in their working lives. Scholarly analysis and criticism of Supreme Court opinions concentrates on whether and how skillfully the Court has pursued and achieved these aims.<sup>47</sup> Otherwise, no one would take the opinions seriously, briefs could not credibly cite them as authority, lower court judges would lack guidance, and doctrinal scholarship would be useless. Gaps and flaws are presumed to be the product of analytical error,<sup>48</sup> hurry,<sup>49</sup> more or less isolated instances of duplicity,<sup>50</sup> or the exigencies of the need for compromise among Justices who agree on the result but differ as to the reasons.<sup>51</sup> Debate about whether a given Supreme Court opinion falls short is itself one of the central themes in legal scholarship.

Understanding the judicial opinion as an exercise in legal legitimacy provides standards for critique and guidance that serve us well for most

"[a] charge of illegitimacy typically implies a strong condemnation not warranted by all legal errors." *Id.* at 1794.

46. See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.").

47. See Fallon, *supra* note 43, at 30 (noting that "Legal Process accounts [of the Rule of Law] maintain that a reasoned connection between recognized legal norms and sources of authority and the outcome in particular cases often will satisfy the requirements of the Rule of Law"). Fallon further observes that "[i]n contemporary constitutional law, the influence of the Legal Process ideal type is enormous, if not pervasive . . . . [C]ountless arguments and opinions presuppose Legal Process premises, even if they do not pause to defend their presuppositions." *Id.* at 31.

48. See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

49. See Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 84 (1959) (acknowledging the temporal demands placed on Supreme Court Justices).

50. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, 174 (2001) (asserting that the ruling in *Bush v. Gore* "may be ranked as the single most corrupt decision in Supreme Court history").

51. See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811–31 (1982) (arguing that inconsistent decisions are often the result of the compromises necessary to produce majority opinions on a multi-member Supreme Court); Friedman, *supra* note 8, at 280–86 (discussing the political science literature documenting the proposition that "[w]hen it comes to the written opinion, collegial pressures almost certainly temper what judges can do").

The *independent* significance of this theme may be limited. To the extent these pressures are themselves a product of the desire by some members of the majority to give reasons that will win public support, the driving force behind collegial constraints seems to be sociological legitimacy.

purposes. The general success of our legal system in providing fair and efficient adjudication of disputes favors retaining the traditional model. But an inherent feature of models is that they simplify reality. No one can fully understand every aspect of anything by sticking with a single point of view. Like all models, the foregoing account omits some significant truths about Supreme Court opinions. The attentive reader of opinions sometimes finds that the reasons the Court stresses do not fully account for the outcome, and the sense that the opinion does not tell the whole story is strongest in hard cases with persuasive arguments on both sides.

### 1. *The External Perspective*

Much legal scholarship, "characterized by an identification of the scholar with the judge, by an internal perspective on the role of the judiciary, and by a consequent reluctance to see judges as (even partly) self-interested and potentially ambitious political actors,"<sup>52</sup> takes it for granted that what Justices do, or at least what they ought to do, is to strive for legal legitimacy, both in the outcomes they reach and the reasons they give.<sup>53</sup> This body of scholarship idealizes the Justices, treating them as "oracles of the law"<sup>54</sup> who grapple with the legal materials in the quest for the right outcomes and the right reasons, though often going wrong.<sup>55</sup> Despite the prevalence of this view, there are good reasons to believe that the Court will more likely than not resolve conflicts between sociological and legal legitimacy in favor of the former.

Some of the truth about a practice is hard to perceive when one always experiences it from the inside.<sup>56</sup> One of the reasons we idealize judges is that, working within the legal system, we adopt its norms as our own. If we put

52. Schauer, *supra* note 42, at 616.

53. Of course, legal and moral legitimacy may point in different directions, raising the question of what circumstances justify sacrificing one for the other. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 197 (1975) (characterizing the issue in the slavery context as "whether the moral values served by antislavery . . . outweighed interests and values served by fidelity to the formal system").

54. JOHN P. DAWSON, *THE ORACLES OF THE LAW* xi (1968) (borrowing the phrase from Blackstone).

55. See Posner, *supra* note 1, at 33–34 (describing the internal perspective of traditional doctrinal scholarship); see also *id.* at 49 (noting that there are "many examples of the Justices' voting against the grain—more precisely, voting for results that they would not favor if they were legislators or other policymakers, and in that role were unconstrained by political considerations").

56. See Posner, *supra* note 1, at 32–34 (distinguishing between the aspects of the legal system that can be appreciated by way of an external perspective and an internal perspective).

aside the presuppositions of actors within the legal system, judges appear in a different and less flattering light. When the judicial process is examined from an external perspective, it appears more plausible, indeed likely, that the Justices strive more for sociological than legal legitimacy.

Viewed from outside the system, the Justice does not at all resemble an oracle. He is a human being clothed with the authority of the state, making decisions about conflicts over the distribution of social benefits and burdens, like many other officials. Accordingly, one may better understand the opinion-writing choices the Justices make by beginning from the premise that they behave like human beings obliged to choose between competing goals,<sup>57</sup> faced with a demanding set of requirements they cannot always meet without sometimes cutting corners.<sup>58</sup> The Justices will bring to this task not only their professional commitments as leaders of the judicial system, but all their human qualities, including their interest in maintaining their authority and enhancing their reputations.<sup>59</sup> If they are like other ambitious human beings, they crave public approbation and a favorable place in the history books. Their nightmare is that they may be lumped together with the "Four Horsemen" who, during the Great Depression, blocked government programs aimed at economic recovery, and who were ultimately repudiated.<sup>60</sup> No one wants to be remembered as

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57. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39 (1994) ("Judges are rational, and they pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do.").

58. In this respect, this Article is in the tradition of Legal Realism, with its insistence on treating the judge as a human being, subject to all the influences that bear on decision making by human beings in everyday life. See Schauer, *supra* note 42, at 617–18 (noting the importance of studying the "self-interested motivations" of judges).

At the same time, there is an important sense in which this Article is not Realist. While the "core claim" of Realism is that "judges respond primarily to the stimulus of facts," Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997), I assume that the Court's holdings can be justified by reference to legal materials. I distinguish between the reasoning that may have produced the outcome and the reasoning that appears in the opinions, and direct my attention solely to the content of the opinions. At the same time, my thesis is compatible with Realism, as none of my conclusions turn on whether results can be grounded in legal materials.

59. See Schauer, *supra* note 42, at 625–26 (arguing that reputation is an important motivation for Supreme Court Justices); *id.* at 629 (noting that, as a consequence, the Justices may "seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups").

60. See ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 117–20 (2d ed. 1994) (describing how President Roosevelt's court-packing plan of 1937 caused a crisis for the Court); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 134–47, 500–07 (15th ed. 2004) (describing the heightened judicial scrutiny of economic regulations from the *Lochner* era through the New Deal).

having been "callously indifferent to the commonweal,"<sup>61</sup> as those Justices were (fairly or unfairly) characterized by their critics.

## 2. *Costs, Benefits, and Judicial Incentives*

When the demands of sociological legitimacy clash with legal legitimacy, the Justices may be forced to choose between them in selecting reasons for inclusion in the opinion. One line of reasoning will better satisfy the demands of fidelity to law, while another provides the public with a rationale it prefers. Faced with a conflict between legal and sociological legitimacy, the Court has to decide which to sacrifice or subordinate. If the Justices are rational and self-interested, the choice will depend on an assessment of the costs and benefits of each alternative. The practical benefits of enhanced legitimacy—whether it is achieved by way of giving the true reasons for outcomes or giving false ones—include greater judicial effectiveness due to less resistance to the Court's rulings, as well as greater prestige for the Justices.

Now compare the two routes to this goal. Sociological legitimacy aims directly at public acceptance and its benefits can be grasped in the short term. Critics may take issue with one's reasoning, but so long as the reasons given are plausible the critique can do little damage to the Court's standing.<sup>62</sup> By contrast, legal legitimacy has only an attenuated bearing on whether and how quickly the ruling will win public support. Justices who meet its criteria cannot be as confident that they will win public acceptance. For example, the Justices who relied on *Lochner v. New York*<sup>63</sup> to thwart New Deal reforms in the early

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61. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559 (1997). Professor Cushman goes on to argue that the reputation is undeserved: "The Four Horsemen were themselves closet liberals. It appears that they struck a reactionary pose in celebrated cases in order to retain the good graces of the conservative sponsors to whom they owed their positions and whose social amenities they continued to enjoy." *Id.* at 560–61. Cushman's thesis highlights one of the challenges that confront a Justice concerned about what others think. The impression that wins favor today may subject one to obloquy in the future, simply because intellectual fashions change.

62. See Friedman, *supra* note 8, at 325–28 (noting that the Court "maintain[s] a reservoir of popular favor even among those who dislike [its] immediate decisions").

63. *Lochner v. New York*, 198 U.S. 45 (1905).

1930s had plenty of authority to back them up.<sup>64</sup> Nonetheless, the public rejected their rulings, both as to results and reasoning.<sup>65</sup>

In addition, a sound cost-benefit equation must take account of the likelihood of success at achieving the goal for which one aims. Sociological legitimacy is ordinarily an attainable goal, as ascertaining the relevant public attitudes is usually a manageable task. However much one strives for legal legitimacy, one can never be confident of success. Hard cases, with plausible arguments on both sides, are the ones most likely to give rise to conflict between legal and sociological legitimacy.<sup>66</sup> No matter what line of reasoning the Court chooses, there will be room for dispute as to whether the legal materials support the outcome. The problem is that the Justices must defend their outcomes in a world of sharp disagreement as to both substance and methodology, as the legal elites who make judgments about legal legitimacy differ among themselves about what counts as a good legal argument. Granting that in Fallon's scheme judges can achieve legal legitimacy without necessarily being right,<sup>67</sup> a risk-averse Justice can never be certain that critics will be generous in appraising perceived errors. A sincere Justice, sacrificing popular acclaim for the sake of articulating the legally correct argument, may find that he has erred on the law and end by losing both legal and sociological legitimacy.<sup>68</sup>

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64. See Jack M. Balkin, *"Wrong the Day It Was Decided": Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 692-94 (2005) ("[T]he Supreme Court was duty bound to defend the old order until a constitutional moment changed the foundations of the American constitutional system.").

65. See MCCLOSKEY, *supra* note 60, at 117 (describing "the constitutional revolution of 1937").

66. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81 (1977) (describing the characteristics of a hard case).

67. See Fallon, *supra* note 10, at 1817-18 ("[W]e can say that a legal decision was legally legitimate . . . even though we disagree with it.").

68. The premise underlying the reasoning in this paragraph is that legal legitimacy does not depend on what anybody in the audience thinks. Everyone may think the decision meets the test of legal legitimacy, and yet be wrong, or vice versa. This is my understanding of Fallon's concept of legal legitimacy. The alternative is to suppose that legal legitimacy *does* depend on how the "interpretive community" evaluates a ruling. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 303-22 (1980) (arguing that "meanings are the property neither of fixed and stable texts nor of free and independent readers but of interpretive communities that are responsible both for the shape of a reader's activities and for the texts those activities produce"). In that event, the "legal" legitimacy of a ruling seems to depend on whether a certain segment of the audience—members of the legal elite, probably—thinks it can arguably be justified by the legal materials, not on whether its reasoning is faithful to the legal materials. If this were so, it would follow that legal legitimacy does not compete with, but instead collapses into, sociological legitimacy. Since its existence would depend on whether a particular, albeit rather narrow, audience approves of the Court's



Furthermore, over time the Justice who wins sociological legitimacy can usually be confident of procuring legal legitimacy in the long run as well, for general public acceptance of a principle eventually produces legal legitimacy.<sup>69</sup> Thus, the winning side in the constitutional revolution of the late 1930s overturned fundamental constitutional principles and overruled many precedents. Both their reasoning and their results may have lacked legal legitimacy in the short term. Yet today, virtually no one questions the legal legitimacy of the new regime.<sup>70</sup> On the other hand, legal legitimacy does not produce sociological legitimacy, as the Justices who lost the constitutional battle of the 1930s learned to their chagrin.<sup>71</sup> To a pragmatic, self-interested Justice, the choice is clear. The cost-benefit calculation persistently favors the sociological version of legitimacy over the legal variety.<sup>72</sup> Nor is this calculus limited to the self-aggrandizing, power-seeking Justice. An astute Justice who puts legal legitimacy at the core of the judicial process will appreciate the need for the Court to pay attention to public attitudes in order to accomplish anything of value. Only a renegade—perhaps Justice Douglas is the best example—will ignore the requirements of sociological legitimacy.

The Justices would surely deny that they deliberately choose false reasons for the sake of obtaining public approval.<sup>73</sup> But another characteristic of human

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performance, the choice the Court would face is not between legal and sociological legitimacy but between different versions of sociological legitimacy.

69. See Fallon, *supra* note 10, at 1823–24 (noting that judicial precedent can attain legal legitimacy "because it is viewed as legally valid among judges and lawyers and is at least acquiesced in by enough of the rest of the citizenry").

70. A judge who, intent on fidelity to legal legitimacy, pays no attention to anyone else, runs the risk of becoming isolated and ineffectual. Holmes, with his bold dissents on substantive due process and free speech, took that chance and ultimately prevailed. See RICHARD A. POSNER, *THE ESSENTIAL HOLMES* xii–xiii (Richard A. Posner, ed. 1992) (noting that Holmes's dissenting positions on freedom of speech and substantive due process were ultimately adopted by the Court). Justice William O. Douglas may have remained true to his own views of constitutional law, but he is not remembered as an influential voice on the Court. See Richard A. Posner, *The Anti-Hero*, *NEW REPUBLIC*, Feb. 24, 2003, at 27 (reviewing BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003)).

71. See *supra* notes 60–61 and accompanying text (discussing the Court's reaction to the Court-Packing Plan of 1937).

72. See, e.g., Friedman, *supra* note 8, at 320–24 & nn.351, 358 & 372 (citing concerns by Justices O'Connor and Kennedy on the need to pay attention to public attitudes).

73. For some anecdotal evidence that public perceptions do influence their behavior, see generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* (1979). *E.g.*, *id.* at 122 (noting Chief Justice Burger's determination to vote one way rather than another in order to improve his image); *id.* at 169 (noting Justice Douglas's view that "Stewart was more concerned with the appearance of his jurisprudence than with its substance"); *id.* at 186 (describing Justice Blackmun's effort to draft the *Roe* opinion so as to obtain "more votes, which could mean wider public acceptance"); *id.* at 188 (noting some Justices' concern that Justice Douglas might

decisionmaking is at play. Judges, like everyone else, are prone to engage in self-deception in order to cope with truths that would damage their self esteem.<sup>74</sup> Faced with unpalatable alternatives, they diminish the cognitive dissonance by convincing themselves that the choices they make satisfy all of the conflicting values at play. For most Justices, the way out of the legal/sociological legitimacy dilemma is to offer reasons that are both sufficiently plausible to satisfy their own psychological need to believe they are striving for legal legitimacy and sufficiently widely held to meet the concerns of sociological legitimacy. In this way, they avoid facing the uncomfortable fact that sociological legitimacy has triumphed. Nonetheless, reasons that are plausible may not be the reasons that do the work of deciding the case, and fidelity to the ideal of legal legitimacy demands the latter.

My argument is not that sociological legitimacy is a kind of trump card that always wins. Rather, I maintain that there is a systematic bias in favor of sociological legitimacy in the hard cases that make up a significant part of the Supreme Court's docket, not that it will prevail in every case. Suppose that in a given case the perceived gain from putting forth reasons that aim for sociological legitimacy is slight, because the decision will be endorsed by most people no matter what the reasoning. At the same time, one set of reasons is plainly superior from the perspective of legal legitimacy. In such a case, the balance of costs and benefits would favor opting for legal legitimacy. These are the "easy cases" that make up most of the decisions of most courts most of the time.<sup>75</sup>

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commit "a form of treason" by "making public the Court's inner machinations," since the Court's "strength derived from the public belief that the Court was trustworthy, a nonpolitical deliberative body"); *id.* at 234 (noting Stewart's belief that "Blackmun was hesitant to admit" the substantive due process basis of *Roe*); *id.* at 345 (noting Brennan's view of the need for unanimity in the Nixon tapes case). *See also* Friedman, *supra* note 8, at 321 & n.358 (discussing Justice O'Connor's sensitivity to public attitudes).

Apart from evidence of particular Justices' sensitivity to what people think, there is a large body of work by political scientists documenting the Court's sensitivity to public opinion. *See* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606-08 & nn.29-36 (2003) (reviewing the literature).

74. *See* DANIEL GOLEMAN, *VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION* 21 (1985) (discussing "the trade-off of a distorted awareness for a sense of security"); DAVID NYBERG, *THE VARNISHED TRUTH* 87 (1993) ("We cannot just live; we must live worthily if we can, and *seem* to do so even if we can't always.").

75. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414 (1985) (defining "easy cases" as those disputes "in which the legal results are commonly considered obvious").

### 3. *A Comparative Perspective*

By allowing us to step outside our system and compare it with others, the external perspective on judging yields another argument for the primacy of sociological legitimacy in Supreme Court opinion writing. Judges, lawyers, and scholars working within the American legal system, educated in the notion that the Constitution and the Rule of Law are sacred,<sup>76</sup> resist the notion that sociological legitimacy could appropriately override its legal and moral dimensions. Sacrificing fidelity to law and justice for the sake of public approval seems to threaten our core values.<sup>77</sup> Standing outside our system permits one to see that this is not so. An agreeable way of life, a high standard of living, a sophisticated legal system, a set of safeguards against abuse of state power, and a substantial individual liberty do not depend on judicial opinions that give priority to legal legitimacy. These qualities can accompany a judicial system in which the opinions hardly ever give an adequate account of the reasons behind the ruling. In France, for example, judicial decisions are justified by one sentence "arrets" (as they are called), in the form of deductive arguments, tersely stating the legal texts bearing on the outcome and the judges' conclusions as to their relevance to the case at hand.<sup>78</sup> The demands of legal legitimacy are not ignored. Far more elaborate justifications are prepared internally, but these are not published.<sup>79</sup> The main explanation for the gap between the rationale presented to the public and the genuine grounds is that, for historical reasons, the French audience conceives of law in highly positivist terms, as a realm of rules that leaves little room for judicial discretion or reasoning.<sup>80</sup> Accordingly, that audience expects an opinion couched in rule-like terms and, following the norms of sociological legitimacy, French courts honor that preference. Whatever the merits of French judicial form, its very existence challenges the notion that establishing the legal legitimacy of the

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76. See PAUL W. KAHN, *THE REIGN OF LAW* 1–4 (1997) (describing America's "faith in the rule of law").

77. See, e.g., JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 101 (1990) ("[I]t is . . . essential to any legal system worthy of respect that it invite the use of mind and judgment in its readers, that it create an occasion for a certain sort of wholeness of thought that does not otherwise exist.").

78. See Michael Wells, *French and American Judicial Opinions*, 19 *YALE J. INT'L L.* 81, 92–99 (1994) (describing the characteristics of French judicial opinions).

79. See Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 *YALE L.J.* 1325, 1355–58 (1995) (describing the "unofficial discourse" that arises between judges and their colleagues regarding the merits of cases).

80. See Wells, *supra* note 78, at 104–06 (explaining why positivist influences stemming from the French Revolution still impact modern French judicial opinion writing).

outcome is the natural and inevitable aim of a judicial opinion. Indeed, French practice belies the notion that well-reasoned opinions are in some sense necessary, and compels one to consider the choices judges must make about the type of legitimacy to pursue in the crafting of opinions.<sup>81</sup>

From the perspective of an insider, French judicial opinions are satisfactory.<sup>82</sup> Only an outsider, familiar with other ways of justifying outcomes, can fully appreciate their drawbacks. The same is true of American opinions. Working with them from the beginning of law school, many American lawyers and legal scholars come to take it for granted that the reasons set forth are presumptively authentic. They must believe this in order to work with the opinions, or else risk succumbing to corrosive cynicism. For Americans, flaws in the reasoning indicate either that the judge has committed an error or that he has ignored his obligation to be candid. From an external perspective, the striking feature of the Supreme Court's opinions is the sheer number of instances in which they, at least arguably, fail to satisfy the requirements of legal legitimacy. Lack of competence is hardly a plausible explanation. It is belied by the Justices' professional qualifications, and by their access to brilliant law clerks and other resources. And it cannot account for the typical pattern of opinion writing, in which a Justice whose analytical skills seem woefully lacking when he writes a majority opinion regains stature when in dissent. In any domain, persistent failure to meet a standard is evidence that the point of the enterprise lies elsewhere. For example, low graduation rates for some top-ranked Division I-A college football teams suggest that graduating from college is not the point of the players' presence there.<sup>83</sup> In the same way, the chronic problems with Supreme Court opinions

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81. The form of both French and American judicial decisions—and the continuing allegiance of each of these legal cultures to opinions that are not particularly functional—illustrates Erving Goffman's insight that "a given social front tends to become institutionalized in terms of the abstract stereotyped expectations to which it gives rise, and tends to take on a meaning and stability apart from the specific tasks which happen at the time to be performed in its name." GOFFMAN, *supra* note 13, at 27.

82. See Wells, *supra* note 78, at 102 (noting support for the "syllogistic façade of the French opinion" in French academia).

83. See, e.g., *College Football Study Provides a Reality Check on Academic Performance*, SARASOTA HERALD-TRIB., Dec. 27, 2006, at A12 (noting that in a study of graduation rates for schools competing in bowl games, "[n]ational championship contender Ohio State ranked next to last, graduating 32 percent of black players, outranking only Georgia (24 percent)"); *Almost Half of Bowl Teams Falling Short in Classroom*, HARTFORD COURANT, Dec. 6, 2005, at C4 ("Forty-one percent of this year's bowl-bound teams fall below the NCAA's new academic benchmark, and almost half lack a 50 percent graduation rate, according to an annual study."); see also Ray Melick, *APR Progress: Academic Focus or Hocus-pocus?*, BIRMINGHAM NEWS, May 3, 2007, at 1B (arguing that NCAA figures on graduation rates cannot be trusted, because the NCAA "has to trust the numbers provided by schools that are secretive

provide support for the thesis that the Justices are pursuing some other agenda besides legal legitimacy.

### C. Sociological Versus Moral Legitimacy

While few of the issues addressed year-in and year-out by the Court concern choices between morally legitimate and illegitimate alternatives, the Court does sometimes encounter conflicts between sociological legitimacy and moral legitimacy. At the time of *Plessy v. Ferguson*,<sup>84</sup> for example, it was no less morally illegitimate for the Court to enforce racial segregation than it was fifty years later when *Brown v. Board of Education*<sup>85</sup> overturned *Plessy*. Yet *Plessy* "caused scarcely a ripple when it was announced on May 18, 1896."<sup>86</sup> However much one would like to think that the Court will put moral over sociological legitimacy, our history suggests otherwise. The NAACP understood as much when it laid the foundations for attacking *Plessy*. Rather than a head-on assault on the moral (or legal) grounds for that case, it undertook an extensive litigation strategy, beginning with comparatively easy cases—like that of segregation in graduate school admissions where no alternative was available—and gradually worked its way up to harder ones like the separate-but-equal doctrine as applied in the public schools. Besides shifting the legal framework, proceeding in this way helped to change public attitudes, so that the moral and legal case against separate-but-equal would have a better chance to prevail.<sup>87</sup> Combined with other changes in society during and after World War II, *Brown* became "a realistic judicial possibility in 1954."<sup>88</sup> The truth the NAACP grasped is that no matter how strong one's moral and legal arguments, without sufficient public support, an effort to

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in matters of academic integrity when it comes to athletes and that have compelling reasons to report high graduation rates and good APR numbers to justify the huge investment made in college football and basketball").

84. See *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896) (upholding racial segregation in public accommodations under the "separate but equal" doctrine).

85. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

86. HARVEY FIRESIDE, *SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM* 222 (2004). Though the ruling did not produce a groundswell of moral revulsion, reactions were mixed. Fireside notes that southerners and Democrats tended to hail the decision while Republicans and blacks deplored it. See *id.* at 223–28 (gauging the public's reaction to the decision through newspaper accounts).

87. See generally MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987).

88. P. BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 739 (4th ed. 2000).

vindicate them might nonetheless fail. Rightly or wrongly, as a descriptive matter, sociological legitimacy is often a key consideration.

In any event, when conflicts between moral and sociological legitimacy arise, the problem invariably concerns the outcome more than the reasoning of the opinion. Thus, the topic I am concerned with in this Article—namely, the choices the Court makes in writing opinions—is one as to which conflicts between moral and sociological legitimacy have little bearing. *Plessy* is condemned and *Brown* applauded on moral grounds because of their holdings, not the Court's reasoning. *Dred Scott v. Sandford*,<sup>89</sup> defending slavery, would have been morally repugnant no matter what the reasoning. Whether the Court's abortion decisions are morally compelled, morally neutral, or morally abhorrent has little to do with their craftsmanship.

### III. Appearance Management in Supreme Court Opinions

One way for the Court to strive for sociological legitimacy is to focus on results, by generating holdings that accord with widespread public preferences, or at least elite preferences.<sup>90</sup> The "positive" political science literature on the Supreme Court yields considerable evidence that the Court is, over time, sensitive to popular views in adjudicating constitutional issues.<sup>91</sup> The Court's abrupt change of direction in the late 1930s is an especially vivid example of a broader tendency. But this is only part of the story of how the Court defers to public attitudes. The political science literature focuses too narrowly on outcomes, and pays little attention to the reasons the Justices offer.

This distinction between reasoning and results may seem counter-intuitive. Common sense suggests that the broad public is concerned almost exclusively with outcomes, and pays little attention to judicial reasoning. But the general

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89. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 529 (1856) (holding that slaves or persons of African descent are not citizens of the United States).

90. See Schauer, *supra* note 42, at 629 (suggesting that there may be "some reference groups that even life-tenured and highly prominent Supreme Court Justices desire to appeal to in a more or less conscious way"); see also Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 347–48, 350–62 (2003) (arguing that the outcome in *Grutter* and other cases reflect this theme). Another is for the Justices to strive for consensus, present a united front and discourage dissents, as the Court did in the late nineteenth and early twentieth centuries. See Friedman, *supra* note 8, at 288–89 (describing "this early norm of consensus and its collapse in the twentieth century").

91. See Friedman, *supra* note 73, at 2598 (noting that his project is to describe "research in the social sciences that suggests there is substantial congruity between popular opinion and the decisions of constitutional judges"); Friedman, *supra* note 8, at 322–23 (citing studies by political scientists exploring the connection between judicial decisions and popular opinion).

public is perhaps the least important part of the immediate audience for judicial decisions. A more important segment of that audience, and one that will ultimately influence public attitudes as well, consists of dissenting Justices, opinion leaders, and constitutional theorists. These elites do pay attention to reasons as well as results. Their reactions to the Court's work will, in turn, have a significant bearing on the attitudes of the public at large. Appeals to (the majority's understanding of) legally legitimate reasons for outcomes may not suffice, as these legal elites disagree sharply among themselves as to what methods of constitutional interpretation are legally legitimate, even when they more or less agree on the legitimacy of a given outcome. They devote considerable attention to knocking down, defending, and rehabilitating the Court's reasoning.<sup>92</sup> There are partisans on either side of such questions as how much weight should be accorded the constitutional text, the specific purposes of the framers, precedent, evolving standards over time, current costs and benefits, and other methods of constitutional interpretation.<sup>93</sup>

In this environment, a strategy of accommodation to popular preferences will likely fail if it is limited to decisions about who wins and loses. Often, as in *Bush v. Gore*,<sup>94</sup> the outcome will give rise to controversy no matter which side the Court takes. Outcomes that meet with popular approval, as the curbs on habeas signaled by *Teague v. Lane*<sup>95</sup> surely would, still must be reconciled with legal materials that seem to favor a different result. Even where a comparatively safe resolution of the merits is available, as it was in *Brown v. Board of Education*,<sup>96</sup> the Court may conclude that the substantive merits of a bolder holding are worth bearing the costs of controversy. In all of these cases, the Court cannot count on procuring sociological legitimacy by virtue of its substantive holding alone. It must instead turn to the reasoning of the opinion as a means of gaining acceptance, or at least minimizing the intensity of

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92. See generally WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (collecting suggestions by scholars for improving the opinion); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (similar).

93. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 747 (2006) (arguing that "[t]here is no single, canonical recognitional community for U.S. law").

94. *Bush v. Gore*, 531 U.S. 98 (2000).

95. See *Teague v. Lane*, 489 U.S. 288, 310 (1989) (prohibiting the retroactive application of most new rules of criminal procedure in federal habeas corpus proceedings).

96. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). For example, the Court might have retained the "separate but equal doctrine" and ruled that the legality of school segregation would turn on whether, in a given school district, the factual record supported the plaintiffs' claim.

disagreement.<sup>97</sup> Even if critics cannot be convinced of the rightness of a given outcome, inoffensive reasoning can mute their objections, assure their "diffuse support" of the Court,<sup>98</sup> and thereby maintain sociological legitimacy at least in the "weak" sense.<sup>99</sup>

So it is the quest for sociological legitimacy that pervades the reason-giving stage of adjudication. Though no one questions the legal legitimacy of *Brown*, for example, the social science evidence the Court relied on seems better understood as an effort to maximize public acceptance than as a forthright account of the constitutional principles underlying the holding. Because sociological legitimacy figures in the Court's strategies of justification, we can better understand the Court as an institution and can better appraise the doctrine it generates by setting aside the traditional legal legitimacy model, if only for the purposes of inquiry, and paying attention to the influence of sociological legitimacy on the content of its opinions. This Part of the Article describes how the Court caters to its audience's expectations in its choice of reasons, and identifies some of the main tools it uses to manage appearances.

Sociological legitimacy turns on whether "the relevant public regards [a decision] as justified, appropriate, or otherwise deserving of support," or at least acquiesces in it.<sup>100</sup> In order to achieve this goal, the Court must pay

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97. See Fallon, *supra* note 10, at 1826, 1828–29 (associating sociological legitimacy primarily with public attitudes toward substantive outcomes, and discussing the Court's reasoning as an aspect of legal legitimacy). This account of the elements of sociological legitimacy seems unduly restrictive. Whether the general public follows the nuances of the Court's reasoning or not, the elite groups who shape public opinion base their views of the Court on the Court's methodology as well as on the substantive rules it hands down. Accordingly, it seems appropriate to treat the Court's reasoning as part of its strategy for enhancing its sociological legitimacy. In at least one instance, Fallon seems to take this view. See *id.* at 1836 (defending the Court's less-than-candid reasoning in *Bolling v. Sharpe* on the ground that candor "might have precipitated a sociological legitimacy crisis").

For his basic position that sociological legitimacy is a product of outcomes, Fallon relies on Michael J. Klarman's article. See Fallon, *supra* note 10, at 1829 n.185 (citing Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001)). Indeed, Klarman begins by declaring that "history's verdict on a Supreme Court ruling depends more on whether public opinion ultimately supports the outcome than on the quality of the legal reasoning or the craftsmanship of the opinion." Klarman, *supra* at 1722. Yet, as Klarman acknowledges, "[t]he Justices themselves . . . seem convinced of the opposite view: that the Court's legitimacy depends on its ability to convince observers that its rulings are based on sound legal principle, rather than political calculation or personal preference." *Id.* at 1723. There is no real conflict between Klarman's view and the one he attributes (correctly, I think) to the Court. Given a controversial substantive result, the reasoning of the opinion is the Court's means of trying to win public support.

98. Fallon, *supra* note 10, at 1828 n.180.

99. *Id.* at 1796.

100. *Id.* at 1795–96.



attention to the impressions that its opinions engender in its audience, including the legal elites who pay attention to reasons. Consequently, the reasons set forth most prominently in the opinions may differ from the ones that weigh most heavily in resolving the case. Because the true reasons may be suppressed or minimized, legal legitimacy will sometimes be sacrificed for the sake of the sociological version.

The underlying point here is that the Supreme Court is not just a court and not just the head of the judicial branch of government. It is also an actor in society, and its stature depends, like that of any social actor, on how well it gets along with others. Sociologist Erving Goffman's study of social interaction furnishes a helpful analogy for understanding the Court's appearance management strategy.<sup>101</sup> Goffman observes that the individual, in his dealings with others, seeks to influence their impressions of him so that they will think well of him and give him what he wants.<sup>102</sup> For this reason, people nearly always pay attention to the image they project.<sup>103</sup> The same is true of groups, or, in Goffman's terminology, "teams" who work together, like the staff of a hotel, toward a common appearance management goal.<sup>104</sup> Goffman's perspective on social behavior merits attention for what it can teach us about

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101. See generally ERVING GOFFMAN, *THE GOFFMAN READER* (Charles Lemert & Ann Branaman eds., 1997) (collecting Goffman's writings on social theory); GOFFMAN, *supra* note 13 and accompanying text (discussing Goffman's theory on social interaction).

102. See GOFFMAN, *supra* note 13, at 4 (suggesting that one accomplishes this goal "by expressing himself in such way as to give them the kind of impression that will lead them to act voluntarily in accordance with his own plan").

103. See *id.* at 4 ("[W]hen an individual appears in the presence of others, there will usually be some reason for him to mobilize his activity so that it will convey an impression to others which it is in his interests to convey.").

104. See *id.* at 77–105 (noting that, in the group context, appearance management "serves mainly to express the characteristics of the task that is performed and not the characteristics of the performer"). While most of the Justices see themselves as a team working together to manage public impressions, there may be renegades who insist on pursuing more personal goals, to the chagrin of their colleagues. Justice William O. Douglas may be the best modern example. See, e.g., RICHARD N. GOODWIN, *REMEMBERING AMERICA* 28–29 (1988) (describing Justice Frankfurter's view that Justice Douglas was selfish and irresponsible); WOODWARD & ARMSTRONG, *supra* note 73, at 189 (1979) (describing Justice Brennan's view that, by 1972, "Douglas had become an intellectually lazy, petulant, prodigal child"). See also James Ryerson, *Dirty Rotten Hero*, N.Y. TIMES, Apr. 13, 2003, at 19 (reviewing BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003)). Drawing on details documented in the book, Ryerson asserts that Justice Douglas "lied about everything . . . , flagrantly, easily and in the service of his own rags-to-riches legend," and that Douglas could be "a rotten and unscrupulous person." *Id.* Despite Murphy's sympathetic portrayal of Douglas as a Justice, Ryerson finds it "hard to avoid the impression that Douglas was, on the Court as well as off, a showboat and a troublemaker, and—as his nickname suggests—too wild for his own good." *Id.*

the Court, because the Court resembles any other group of persons pursuing their interests through a collaborative effort.

Like any other group, the Court has goals and would prefer to be more rather than less effective in realizing them. Prominent among its goals is public acceptance of a strong role for the Court in governance. With this aim in mind, the Justices find it highly useful, if not essential, to influence the impressions others have of them. By managing appearances in this way, the Court hopes to achieve the sociological legitimacy it craves. Just as any of us in our daily lives will try to control the impressions others have of us in order to win the confidence of our various audiences, so also do the Justices. In particular, we all strive to limit access to the "backstage" of our public lives, where "the capacity of a performance to express something beyond itself may be painstakingly fabricated."<sup>105</sup> So it is with the Supreme Court. The Justices limit public access to their work, appear before the public almost exclusively in the highly structured settings of oral argument and the texts of opinions, and lay down confidentiality norms to dissuade employees with access to inside information from revealing secrets.<sup>106</sup> Notwithstanding the occasional renegade—a prominent example is the book *Closed Chambers*, by former Blackmun clerk Edward Lazarus<sup>107</sup>—the Court has, for the most part, managed to control the image it projects. Moreover, the Justices believe the best personal strategy is, by and large, to create impressions that further the prestige of the group as a whole.<sup>108</sup>

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105. GOFFMAN, *supra* note 13, at 112.

106. See Friedman, *supra* note 8, at 327–28 (suggesting that Court-imposed limitations on access to information influence public attitudes). Goffman explains:

Since the vital secrets of a show are visible backstage and since performers behave out of character while there, it is natural to expect that the passage from the front region to the back region will be kept closed to members of the audience or that the entire back region will be kept hidden from them.

GOFFMAN, *supra* note 13, at 113.

107. See generally EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (1998) (detailing the Court's internal deliberations). For an especially harsh attack on Lazarus, see Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430, 1434 (1999) ("[T]his review will address ethical lapses in the book that have troubled the author of this review and others.").

108. This focus on the institution does not exclude the possibility that some of the Justices from time to time pursue a personal strategy and an institutional one at the same time. For example, several Justices were sources for BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* (1979), and Justice Stewart is said to have been the book's "secret instigator and primary early source." David J. Garrow, *The Supreme Court and The Brethren*, 18 CONST. COMMENT. 303, 304 (2001). Later, some of the same Justices complained about the book. Compare *id.* at 304 (noting Justice Powell's cooperation), with *id.* at 310 (noting Justice Powell's criticisms); Compare *id.* at 312 & n.51 (suggesting Justice Brennan's tacit cooperation

### A. *The Rhetoric of Inevitability*

Conceiving the Supreme Court as a social actor helps one to decode certain otherwise puzzling features of its opinions. As Erwin Chemerinsky has pointed out, "Opinions are written to make results seem determinate and value-free, rather than indeterminate and value-based . . . to appear consistent with precedent, even when they are not . . . [and] to make decisions seem restrained, rather than activist."<sup>109</sup> Among other examples, Chemerinsky cites *Brandenburg v. Ohio*,<sup>110</sup> a key free speech case restricting the state's power to punish someone for advocating violence, where the per curiam opinion makes "it seem that [the] decision [was] consistent with precedent even when it [was] not."<sup>111</sup> Other opinions give the impression that no value choices need to be made. Thus, the Court's sovereign immunity cases "never acknowledge" that they are "all about a choice between protecting government immunity or ensuring government accountability."<sup>112</sup> A recent instance of the rhetoric of inevitability, again from the sovereign immunity context, is *Central Virginia Community College v. Katz*.<sup>113</sup> There, the Court held, in a 5-4 ruling, that Congress may abrogate state sovereign immunity when acting pursuant to its Article I bankruptcy power.<sup>114</sup> The holding came as a surprise to many observers, because two other recent cases had held, again by 5-4, that Congress may not abrogate state immunity when acting under Article I powers.<sup>115</sup> Admitting that neither the majority nor the dissenting opinions in the earlier cases had drawn any distinctions among Article I powers,<sup>116</sup> Justice Stevens'

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with the authors), *with id.* at 312-13 (noting Justice Brennan's denial of cooperation).

109. Chemerinsky, *supra* note 23, at 2010. *See also* Posner, *supra* note 7, at 1430 & n.17 (discussing "rhetoric of inevitability").

110. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (limiting the government's ability to restrict speech to that which is likely to incite imminent lawless action).

111. Chemerinsky, *supra* note 23, at 2016.

112. *Id.* at 2014.

113. *See* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (allowing Congress to abrogate state sovereign immunity through its Article I powers).

114. *Id.*

115. *See* *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress cannot "subject nonconsenting States to private suits for damages in state courts"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that the Indian Commerce Clause does not give Congress the power to "grant jurisdiction over a State that does not consent to be sued"). Justice O'Connor had voted for upholding immunity in *Alden* and *Seminole Tribe*, but joined the dissenters in those cases to make a majority for rejecting immunity in *Katz*. She did not write an opinion in *Katz*.

116. *See* *Katz*, 546 U.S. at 363 ("We acknowledge that statements in both the majority and the dissenting opinions in [*Seminole Tribe*] reflected an assumption that the holding in that case

opinion for the *Katz* majority nonetheless indicates no doubt about the outcome, nor any sense that the outcome depends on anything other than the distinctive history of bankruptcy.<sup>117</sup> Thus, though the Court cited no direct evidence from that history, "[t]he ineluctable conclusion . . . is that States agreed in the plan of the Convention" to give up sovereign immunity in bankruptcy cases.<sup>118</sup>

Some potential explanations for this characteristic of Supreme Court opinions are implausible. It cannot be that results really can be derived from the legal materials in a straightforward fashion. The Court agrees to hear only a tiny fraction of the cases submitted to it, and it usually chooses the ones that present the hardest problems. Most cases on the Court's docket raise tough issues, turn on choices between conflicting social goals, and could go either way.<sup>119</sup> Nor can one credibly argue that the author of the majority opinion lacked the time or intellectual resources needed to perceive and wrestle with the hard questions the case raised. Even if a given Justice's chambers were fairly described as incompetent, help is available from other members of the majority. For that matter, dissenting opinions often take pains to identify the issues the Court has glossed over, and drafts of the dissents are typically available to the majority well in advance of publication.<sup>120</sup>

Judicial preference for minimizing the scope of judicial creativity is a pervasive feature of opinion-writing, at least in the modern era.<sup>121</sup> The deductive style is so ubiquitous that experienced judges, lawyers, and scholars rarely call attention to the practice, but take it for granted as a part of the legal

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would apply to the Bankruptcy Clause.").

117. *Id.* at 375 (noting that the history of the Bankruptcy Clause does "not contravene the norms this Court has understood the Eleventh Amendment to exemplify").

118. *Id.* at 377.

119. For an especially blunt statement of this point, see Posner, *supra* note 1, at 40 (declaring that "Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly").

120. Dissenting opinions identify chinks in the majority's armor and in this way mitigate the aura of inevitability surrounding the majority opinion. In the ordinary case, this possibility does not seem to trouble the majority much. There is, however, some evidence that in especially sensitive cases where public acceptance is crucial, some Justices use the threat of a dissent as a weapon for having their way. See WOODWARD & ARMSTRONG, *supra* note 73, at 44 (recounting Justice Black's threat to dissent in a school desegregation case in which he thought the proposed disposition insufficiently forceful); *id.* at 85, 187, 206–07 (reporting on instances in which Justice Douglas used threats in this way).

121. Perhaps it is typical of every era. See S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 107 (2003) ("It is because law has to present the appearance of continuity that change comes about behind such screens as unchanging words.").

landscape. The Court's rhetorical stance has been described as a "convention" of opinion-writing, and so it is.<sup>122</sup> But people do not adopt conventions in the first place without some reason for doing so. Nor is a convention likely to persist over time and in the face of changes in personnel unless it generates some benefit. From the Court's perspective, one advantage of the rhetoric of inevitability is that its use enables the Justices, as well as members of their audience, to avoid psychological conflict. While a given ruling may draw harsh criticism from dissenters and some commentators, both the Justices and their professional audience tend to overlook, explain away, or minimize the significance of evidence that the Court's performances may not tell the whole story.<sup>123</sup> Richard Posner observes that "judges are not comfortable" writing opinions that reveal doubt.<sup>124</sup> A likely reason for the Justices' unease is that their commitment to the Rule of Law obliges them to write opinions that purport to show that the law, and not the discretionary judgment of human beings, compels the outcome.<sup>125</sup> And the audience, like the audience for popular fiction, movies, and television, prefers happy and harmonious endings over uncertainty, persistent conflict, and tragic choices.

Seen in this light, the characteristics of Supreme Court opinions that Professor Chemerinsky documents are the product of a more or less conscious choice on the part of the Justices to rank sociological legitimacy above legal legitimacy in constructing opinions. In hard cases, legal legitimacy demands thorough assessment of all aspects of the issue and a candid acknowledgment of

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122. See RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION* 17 (1961) (suggesting that "the departure from the deductive model is effected quite unconsciously"); Nagel, *supra* note 7, at 192, 195–97 (asserting that the deductive style is a "convention").

123. Lawyers preparing briefs in later cases do not call attention to the faults they perceive in the precedents, but seek to use or distinguish them. The same is true of academic writing on the impact of earlier cases on current issues. Cf. GOFFMAN, *supra* note 13, at 229–32 (discussing "the tactful tendency of the audience and outsiders to act in a protective way in order to help the performers save their own show," and attributing this tendency to, among other things, a desire "to ingratiate themselves with the performers for purposes of exploitation").

124. Posner, *supra* note 7, at 1441; see also Posner, *supra* note 1, at 56 ("And 'comfortable' is the right word; there is a psychological need to think one is making the right decision rather than just taking a stab in the dark.").

125. This point is one of the central themes in PAUL W. KAHN, *THE REIGN OF LAW* (1997). Kahn argues that the Rule of Law is a "myth" in which Americans repose their faith, *id.* at xi, that "[t]he judge is responsible for maintaining and articulating the rule of law," *id.* at 116, and that "whether we continue to believe in the rule of law is, to some degree, a function of how well judges maintain appearances," *id.* at 126. The appearance of judicial discretion must be avoided, because "[i]f the decision to impose the rule of law upon the political domain depends upon the subjectivity of individual judges, then the distinction between the rule of law and the rule of men collapses." *Id.* at 164. They are uncomfortable expressing doubt because they understand that their social role would be undermined by doing so.

the difficulties with the holding, in the manner of a dispassionate law firm memo or a well-reasoned law review article. By contrast, sociological legitimacy calls for reasons that the public can readily endorse without much cognitive dissonance. The dissonance problem is a severe one, because Americans expect a lot from the Court. Throughout our history, many Americans have treated the Constitution as a quasi-religious document,<sup>126</sup> and they tend to "conflate the Court and the Constitution."<sup>127</sup> Americans vaguely want the Court both to reach just outcomes and to avoid judicial activism.<sup>128</sup> In order to satisfy these somewhat contradictory expectations, the Justices try to tamp down controversy and encourage public acceptance by making the outcome seem ineluctable rather than problematic, no matter how close the case may be. They do this by systematically suppressing the role of judicial discretion in resolving the issues in favor of less controversial grounds that in fact have little or no influence on the outcome. Citing precedent helps "to create the impression that the Court is rule-bound rather than rudderless."<sup>129</sup> It meticulously applies multi-part tests in order to "convey[] an impression of deliberateness, . . . give[] the impression of great thoroughness, . . . [and] create

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126. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–17 (1988) (exploring the views of those who believe the Constitution is divinely inspired).

127. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 9 (1986).

128. See, e.g., DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 208 (1997) (describing the "social construction" of a judge). Kennedy states that:

Most Americans, I suppose, want the [j]udge to be . . . a person who does his job with a vengeance, rendering himself thinglike or factoid, a mere transmission belt for legal necessity. At the same time, they want to believe that law is justice, the product of the Judge's laser intuition, with no contradiction between the two elements.

*Id.*; see also Fallon, *supra* note 10, at 1811 (noting that "[m]any Americans experience the Constitution as part of an integrated normative universe in which no sharp boundaries divide the legal from the moral"); *id.* at 1813–14, 1827, 1828 (describing the debate over judicial power).

An indication of the joinder of the two elements is the tendency of Americans to infer that any ruling they do not like must be the result of judicial activism. For example, in *Kelo v. City of New London*, the Court upheld a city's condemnation of land (for resale to a private developer) against a charge that it violated the Fifth Amendment's requirement that takings be for "public use." *Kelo v. City of New London*, 545 U.S. 469, 484 (2005). A spate of letters in the *Wall Street Journal* a few days later castigated the "liberal" majority, asserted that the holding was an "egregious example[] of judicial activism," and declared that the "ruling in fact mandates the opposite of a market outcome." Letters to the Editor, *A Terrible Property Rights Decision*, WALL ST. J., June 28, 2005, at A15.

129. Posner, *supra* note 1, at 44. Otherwise, "the public [may] realize the epistemic shallowness of the body of constitutional law the Supreme Court has erected upon the defenseless text of the Constitution." *Id.* at 45.

a soothing facade of facticity."<sup>130</sup> The unspoken assumption behind the Court's opinion-writing style seems to be that legitimacy is best secured by appearing to do less rather than more,<sup>131</sup> even at the price of issuing opinions that often mislead the reader as to the true grounds for the holding.<sup>132</sup>

### B. *Satisfying the Audience's Expectations*

Anyone concerned with appearances is well-advised to pay attention to his audience. For the sake of exploring the implications of the Court-as-social-actor model of judicial behavior, we may compare the Supreme Court with a political candidate, a college freshman seeking entrance to a fraternity, a restaurant, or a hotel. These participants in social life must identify the image that will attract and hold voters, gourmands, and travelers. The Court's agenda is no doubt less narrowly focused on personal gain than that of many other social actors. Nonetheless, the Court faces a similar predicament. It cannot ignore what people think, as its influence depends on public esteem. Hence, it must determine how best to portray itself in order to buttress its standing with the public. Because the Court writes its opinions with its audience in mind, the content of opinions will turn on the Court's perceptions of who is in the audience, which members of the audience are worthy of attention, and what kinds of reasoning will appeal to them. Every citizen is, at least indirectly, a

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130. Posner, *supra* note 7, at 1441.

131. Thus, appearance management does not imply an effort to convince people that one is more powerful than one really is. Quite the contrary. See GOFFMAN, *supra* note 13, at 38 (noting that "many classes of persons have had many different reasons for exercising systematic modesty and for underplaying any expressions of wealth, capacity, spiritual strength, or self-respect").

132. As for the extent to which judges deliberately manipulate the materials or unconsciously fall into accepted patterns of behavior, I find persuasive Duncan Kennedy's account. He argues that "judges are half-conscious." KENNEDY, *supra* note 128, at 191. He continues:

Judges keep the secret, even from themselves, in part because participants in legal culture and in the general political culture want them to. Everyone wants it to be true that it is not only possible but common for judges to judge nonideologically. But everyone is aware of the critique, and everyone knows that the naive theory of the rule of law is a fairy tale, and those in the know fear that the sophisticated versions of contemporary jurisprudence aren't much better.

*Id.* at 192; see also Posner, *supra* note 1, at 52 (arguing that the Justices may believe they conform to "the conventional law-constrained conception of judges," yet they are mistaken in so thinking); *id.* at 56 ("[A]cknowledging to themselves [that] the political dimension of their role . . . would open a psychologically disturbing gap between their official and their actual job descriptions.").

member of the audience to whom opinions are addressed. But most people do not read opinions, nor even detailed accounts of the Court's reasoning. They probably form their views of the Court's performance by relying on legal elites—including lawyers, judges, and scholars—along with journalists, bloggers, talk show hosts, television commentators, and other pundits. Supreme Court opinions are directed primarily to these opinion leaders.<sup>133</sup>

The Court's effort to secure public acceptance runs into problems because the United States is a heterogeneous society. Opinion leaders disagree among themselves about what the judiciary should do, and their disagreements are echoed in the public at large. Accordingly, the Court faces a tougher challenge than some other social actors. Hotels and restaurants can aim for a segment of the market, and the freshman can hone in on one or two fraternities. The politician will probably calculate that his chances of success are greater if he ignores part of the electorate in order to strengthen his appeal to the rest of it. If the Court is to maintain its status as the impartial voice of the Rule of Law, it cannot mimic the politician. It must undertake the harder task of convincing a broad cross section of the public that it acts legitimately in handing down decisions, even the ones that reach especially controversial results like those in *Bush v. Gore*,<sup>134</sup> *Roe v. Wade*,<sup>135</sup> and *Brown v. Board of Education*.<sup>136</sup>

In pursuing this aim, the Court engages in appearance management, generating a gap between the reasons that do the work of deciding cases and the reasons that appear in its opinions. The array of plausible reasons that are typically available provides the Court with opportunities to increase the chances for winning broad acceptance for a decision, or at least to soften the opposition from those who find fault with the substantive outcome. Though the legal elites and other leaders that make up the bulk of the audience for opinions may disagree among themselves as much about what interpretive techniques are legitimate in constitutional cases as about the legitimacy of particular substantive decisions, there is a key difference between methodological and substantive quarrels. Unlike most disputes about substance, the disagreement over methodology is not between mutually exclusive sets of reasons, such that the Court must choose one to the detriment of the other. Most of the opinion leaders who influence public views of the Court agree that certain kinds of

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133. See, e.g., Nagel, *supra* note 7, at 169 (noting that the Supreme Court's reasoning reaches only a "few elite groups").

134. *Bush v. Gore*, 531 U.S. 98 (2000).

135. *Roe v. Wade*, 410 U.S. 113 (1973).

136. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).



reasoning furnish legitimate grounds for constitutional rulings, though that consensus is coupled with controversy about other techniques.

A rough list of the chief types of constitutional arguments (one that is sufficient for present purposes) would include: (a) textual arguments; (b) arguments based on the intent of the framers; (c) arguments based on precedent; and (d) arguments based on constitutional values that cannot uncontroversially be traced to the text and intent of the framers.<sup>137</sup> Among the opinion leaders whom the Court seeks to influence, the degree of support for these arguments takes the shape of a pyramid. At the base, virtually everyone endorses arguments based on the text and the intent of the framers of the Constitution.<sup>138</sup> Then the pyramid begins to narrow a bit. Nearly everyone accepts arguments based on precedent,<sup>139</sup> but more significant disputes arise when attention turns to such matters as the level of generality at which the framers' aims are to be assessed,<sup>140</sup> or to the existence of constitutional norms

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137. For a more comprehensive treatment of constitutional arguments, see Fallon, *supra* note 8, at 1189–91 (exploring how these arguments "fit together or weigh against each other in a single, presumptively coherent, constitutional calculus").

138. See RICHARD A. POSNER, *OVERCOMING LAW* 245 (1995) ("The dominant rhetoric of judges, even activist judges, is originalist, for originalism is the legal profession's orthodox mode of justification."); see also Fallon, *supra* note 43, at 11–14, 44 (describing "historicist" conceptions of the Rule of Law and their critics, some of whom challenge the practicality of the enterprise, though not its legitimacy).

139. Some of Justice Thomas's opinions suggest that he gives little weight to precedent. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320 (2005) (Thomas, J., concurring) (noting a willingness to overturn precedent in appropriate cases); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (arguing against the application of existing precedent in the commercial speech context). See also Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23 (1994) (noting that "[l]egal analysis—by lawyers, courts, and academics—typically begins and ends with precedent").

140. See *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) (Scalia, J., plurality) (noting that "the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court'"). An issue in the case was how to give content to the "liberty" guaranteed by the due process clause. *Id.* at 119. Starting from the proposition that "the asserted liberty interest [must] be rooted in history and tradition," *id.* at 123, Justice Scalia asserted that the appropriate "level of generality" at which to assess a claim was "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127–28 n.6. By contrast, Justice Brennan argued for treating the constitution as a "living charter," treating history as a source of general principles rather than specific rules. *Id.* at 141 (Brennan, J., dissenting). The latter view carried the day in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See *id.* at 848 ("Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

that have no obvious textual foundation.<sup>141</sup> Thus, "[v]alue arguments have a profoundly ambivalent status in our constitutional practice."<sup>142</sup> They may prove decisive, yet their significance is "resisted and occasionally denied by commentators and by judges."<sup>143</sup>

The pervasiveness of this ranking scheme in constitutional debate can be illustrated by the framework of constitutional interpretation outlined by Sanford Levinson.<sup>144</sup> He distinguishes between "catholic" and "protestant" camps in constitutional interpretation, arguing that the latter puts more stress on the constitutional text, while the former includes a bigger role for judicial exegesis of the document.<sup>145</sup> But the two groups do not categorically disagree on interpretive methodology, such that one must choose one interpretation to the exclusion of the other.<sup>146</sup> The common ground between them is that arguments drawn from the text and the intent of the framers are always welcome.<sup>147</sup> Similarly, arguments that cannot be closely tied to the Court's precedents must surmount significant hurdles under both the catholic and protestant approaches.<sup>148</sup> Given these features of the legal landscape, an advocate seeking support for his client's position and a Justice seeking to cobble together a majority will be inclined to favor base-of-the-pyramid reasoning that will attract

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141. Compare Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (arguing for an "acceptance of the courts' additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution"), with Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972) (suggesting that constitutional interpretation, even of an opaque text like that of the Fourteenth Amendment, "necessarily attributes the asserted principle to the political act of adopting that text").

142. Fallon, *supra* note 8, at 1264.

143. *Id.*

144. See LEVINSON, *supra* note 126, at 27–30 (proffering "religious analogies for understanding the role of the Constitution").

145. *Id.* at 27.

146. See *id.* at 29 (noting that "a significant number of constitutional debates can be organized" under a combination of both interpretive views).

147. Similarly, Akhil Amar and his critics agree that the text and structure ought to weigh heavily in constitutional interpretation and disagree about where to go from there. Compare Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (the fact that "various words and phrases recur in the document . . . gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation"), with Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble With Intratextualism*, 113 HARV. L. REV. 730, 760 & n.159 (2000) (advancing objections to Amar's interpretive technique).

148. See LEVINSON, *supra* note 126, at 27–29 ("Any discussion of methods of constitutional interpretation carries with it a threat of political instability.").

support from both camps rather than more cogent, but more controversial, arguments.

Given the nature and scope of the disagreement among opinion leaders over appropriate grounds for constitutional rulings, a core theme in the Court's strategy for winning sociological legitimacy is to systematically favor reasons that, at least in the abstract, enjoy broad support, calculating that general assent to its methodology will weigh more heavily in public perception than doubts about the reasoning of a given case. Arguments drawn from near the base of the pyramid, including text, history, and precedent, will be systematically favored over those that are more controversial. The Court highlights them even though they are virtually always equivocal in the hard cases. By contrast, the principle that drives the outcome is typically one chosen by the Justices from among competing values. In *Brown v. Board of Education*<sup>149</sup> it was that invidious distinctions based on race violate equal protection, despite precedent and legislative history seemingly to the contrary. In *Roe v. Wade*<sup>150</sup> it was that constitutional "liberty" includes a woman's right to control over her body, despite majoritarian prerogatives and the absence of textual support for this conception of liberty. In *Central Virginia Community College v. Katz*<sup>151</sup> it was, at least for most of the Justices in the majority, that state sovereign immunity ought to bow before congressional authorization of suits against states.<sup>152</sup> It is, in short, some proposition that cannot uncontroversially be derived from the authoritative sources, for they will typically point in both directions.

As a matter of "legal" legitimacy, value arguments may be compelling.<sup>153</sup> Even so, they are rarely featured prominently in Supreme Court opinions.<sup>154</sup>

149. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

150. *Roe v. Wade*, 410 U.S. 113 (1973).

151. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

152. Apart from Justice O'Connor, the other members of the *Katz* majority had endorsed that broader position repeatedly. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) (noting that the majority opinion "prevents Congress from providing a federal forum for a broad range of actions against States"); *id.* at 100 (Souter, J., dissenting) (finding "no bar to the exercise of congressional authority under the Commerce Clause in providing for suits on a federal question by individuals against a State"); *Alden v. Maine*, 527 U.S. 706, 761 (1999) (Souter, J., dissenting) (noting that "if the Court's current reasoning is correct, the Eleventh Amendment itself was unnecessary"). Justice Stevens's opinion in *Katz* suggests no reason to think that either he or any of the other members of this group have changed their minds.

153. *See* Fallon, *supra* note 8, at 1246–47 (asserting that "moral and political values importantly influence the perception of arguments," such as arguments from text, arguments of historical intent, arguments of theory, and arguments from precedent); *see also id.* at 1244–45 (describing these other categories of constitutional argument).

154. There are, of course, exceptions. Some years after *Roe*, the Court in *Casey* bolstered the reasoning behind the right to choose an abortion with an explicit declaration that personal

Lacking the straightforward and indisputable links to the constitutional text, history, and structure that sociological legitimacy demands, these arguments are inherently more vulnerable to attack than those in the first group. Aiming for public acceptance, the Court often prefers to subordinate them to the former set of arguments, even when arguments in the latter group actually account for results. *Brown v. Board of Education*<sup>155</sup> illustrates the general theme. The Court made a bow to precedent, but could not rely heavily on earlier cases because the one most directly on point, *Plessy v. Ferguson*,<sup>156</sup> had upheld the separate-but-equal doctrine the Court was determined to bring down.<sup>157</sup> Nor could it rest its holding on the intent-of-the-framers, for the history was at best equivocal.<sup>158</sup> So it resorted to social science evidence of the psychological impact of segregation on black children, a move that "has been the focus of considerable controversy."<sup>159</sup> Later, the Court made it clear that *Brown* and other "strict scrutiny of racial classifications" cases rest on a powerful constitutional value condemning invidious race discrimination.<sup>160</sup> Yet the Court's opinion in *Brown* avoids putting much weight on that value, no doubt because, in 1954, it feared that rationale—in the still massively segregated culture of the 1950s—would expose it to more dangerous attacks than the narrower quasi-scientific rationale it chose. At the very least, objections based on values could be deflected for a time. Critics of the implicit value judgment at the heart of the opinion were obliged to challenge the science, and the

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decisions of this kind, "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). The Court continued:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* The Court did not cite any direct authority for these propositions. See also Posner, *supra* note 1, at 84 (characterizing Justice Kennedy's opinions in *Lawrence v. Texas* and *Roper v. Simmons* as "startlingly frank appeals to moral principles that a great many Americans either disagree with or think inapplicable to gay rights and juvenile murderers").

155. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

156. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

157. *Id.* at 543.

158. See *Brown*, 347 U.S. at 489 (noting that there is "so little in the history of the Fourteenth Amendment relating to its intended effect on public education").

159. SULLIVAN & GUNTHER, *supra* note 60, at 678.

160. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (stressing the impermissibility of invidious racial discrimination in striking down a statute that prohibited racial intermarriage involving white persons).

dubious merits of the Court's rationale were hashed out in obscure scholarly journals.<sup>161</sup>

### C. *Show Horses and Work Horses*

When Supreme Court opinions in hard cases are written with an eye toward satisfying the audience's expectations, the arguments the Court deploys can fairly be characterized as "show horses," decorating the opinions while doing little or none of the work of deciding the case. Meanwhile, constitutional values are the "work horses" that determine who wins and why, but get little attention in many of the opinions. The main source of show horses is the array of base-of-the-pyramid arguments that dominate the Court's opinions, while constitutional values, the work horse, are accorded a subsidiary role if they are mentioned at all. In particular, the Court's fondness for rationales emphasizing intent-of-the-framers and precedent is far out of proportion to their justificatory power. The "values" considerations that do the work of deciding the case typically appear not as freestanding arguments, but as thumbnail summaries of the policies behind constitutional provisions and precedents.<sup>162</sup> The overall effect is to create the impression that text, intent-of-the-framers, and precedent are determining outcomes, while the driving force is actually some constitutional value for which the base-of-the-pyramid arguments serves as a convenient vehicle. For the sake of avoiding confusion, let me stress the limited nature of my objection to base-of-the-pyramid arguments. I do not contend that such arguments are incoherent, or unsound, or unwise, or otherwise categorically inappropriate grounds for constitutional decisions. My

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161. Another feature of the Court's appearance management strategy in *Brown* is Chief Justice Warren's ultimately successful effort to present a united front by securing unanimity on the part of the Justices. See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34-44 (1979) (discussing Chief Justice Warren's efforts).

162. The Court's practice is illustrated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964), which, for the first time, held that the First Amendment limits the scope of defamation law. Justice Brennan's opinion for the Court relied on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. The Court located this principle in prior cases, none of which had anything to do with free speech constraints on tort liability for defamation, and on the early history of criminal punishment of seditious libel. *Id.* at 269. Critics have pointed out that none of these sources provide persuasive support for the Court's proposition. See, e.g., Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 787 (1986) (arguing that the decision "was influenced too heavily by the dramatic facts of the underlying dispute").

point is that the Court purports to place far more weight upon these types of arguments than they will bear. Its opinions often claim that such considerations as text, intent-of-the-framers, and precedent control outcomes, when in fact the decisive factor is some constitutional value that is barely mentioned in the opinion, if not wholly ignored.<sup>163</sup> |||

Arguments that have considerable explanatory power qualify as work horses, while the show horses are those that seem to be advanced or ignored depending on the outcome the Court wishes to reach. The distinction between the two categories is rarely air tight and many lines of cases can be read in two or more ways.<sup>164</sup> As a result, it is not always crystal clear whether a given argument is a show horse or a work horse. Nonetheless, no experienced reader of Supreme Court opinions would deny that some arguments are for show while others do the work. Indeed, one of the aims of doctrinal scholarship is to identify arguments that fall into one camp or the other. The doctrinal scholar often believes that in doing so he has exposed a flaw in the opinion. Often, however, the so-called error is really an exercise of appearance management.

#### *IV. Normative Issues Raised by Appearance Management*

Should the Supreme Court engage in appearance management? If so, in what circumstances and under what constraints? For a variety of reasons, the pluses and minuses of appearance management receive little attention in legal literature. Despite the prominence of appearance management in Supreme

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163. For an argument (backed up by an empirical study) that the Court's resort to these techniques varies depending on doctrinal context, and is especially pronounced in jurisdictional law, see Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 78 (1998).

164. For example, prior to *Flast v. Cohen*, 392 U.S. 83 (1968), the Court had rejected efforts by taxpayers to challenge federal expenditures on constitutional grounds. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447, 483 (1923) (upholding the standing of a taxpayer to challenge a congressional expenditure for aid to religious schools as a violation of the Establishment Clause). In *Flast*, the Court explained that a federal taxpayer may challenge a federal statute if there is (a) a nexus between taxpayer status and the type of legislative enactment he challenges and (b) a nexus between taxpayer status and the nature of the constitutional infringement alleged. *Flast*, 392 U.S. at 102. The first nexus was met in *Flast* because the taxpayer challenged a spending statute. *Id.* at 103. Likewise, the second nexus was met because the Establishment Clause is aimed at curbing the government's use of the taxing and spending power to aid religion. *Id.*

The *Flast* reasoning may be read as a "disingenuous" effort to distinguish *Frothingham* and other prior cases, *Hein v. Freedom of Religion Foundation*, 127 S. Ct. 2553, 2577 (2007) (Scalia, J., concurring), as a doctrinal framework that should be retained in a narrow category of cases, *id.* at 2564–72 (plurality opinion), or as a general principle that ought to be extended to other Establishment Clause cases, *id.* at 2584–88 (Souter, J., dissenting).

Court opinions, the majority and the dissent never join issue on the merits of the practice. Doing so would require the Justices to acknowledge the existence of the practice, thereby destroying its value. Traditional doctrinal scholars, working from the internal point of view of a participant in the judicial process, follow the Court's lead.<sup>165</sup> For them, legal legitimacy is the norm the Court must satisfy, and the reasons that were, or should have been, given in the opinions are the only ones that count in making that judgment. Upon finding that the Supreme Court has manipulated history, ignored its precedents, or selectively invoked the constitutional text, commentators profess disappointment<sup>166</sup> (or even shock)<sup>167</sup> at the Court's lack of craft. They infer that the author of the majority opinion has either committed a regrettable analytical error or deliberately flouted the law to achieve some impermissible end. Champions of the Court's work rally to the defense and issues like fidelity to precedent, the framers' intent, and the proper application of the Court's formulae are thoroughly aired. Whether the debate is carried on in the Justices' concurring and dissenting opinions or in legal scholarship, the participants concentrate on the viability of the Court's reasoning, the thoroughness of its research, and the plausibility of the judgments it makes on the way to its outcome.<sup>168</sup> Whatever their differences, all sides share the premise that the grounds given in the opinion are, or ought to be, the grounds for decision. The debate precedes from the assumption that judicial reasoning either is, or is not, legally legitimate. The difficulty with such reasoning, of course, is that it wrongly omits sociological legitimacy from the analytical toolbox. The most-criticized features of opinions may well result from conscious judicial efforts to maximize public acceptance, regardless of legal legitimacy.

As for the skeptics, they reject legal legitimacy and systematically doubt the Court's proffered reasons. Noting that law is a social phenomenon, they typically focus their effort on looking outside the opinions for explanations of

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165. See POSNER, *supra* note 138, at 83–91, 94–95 (identifying the features of doctrinal scholarship and contrasting it with other types of scholarship).

166. See, e.g., Ely, *supra* note 48, at 947 (noting that the Court's decision in *Roe v. Wade* is "bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"); Hart, *supra* note 49, at 100 ("Regretfully and with deference, it has to be said that too many of the Court's opinions are about what one would expect could be written in twenty-four hours.").

167. See, e.g., Akhil Reed Amar, *Supreme Court: Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at M1 (expressing outrage over *Bush v. Gore*); Vincent Bugliosi, *None Dare Call It Treason*, NATION, Feb. 5, 2001, at 11, 14 (same); Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18 (same).

168. See, for example, the essays collected in THE VOTE: BUSH, GORE & THE SUPREME COURT (C. Sunstein & R. Epstein eds., 2001) (attacking and defending *Bush v. Gore* on a variety of grounds).

outcomes and simply dismiss the Court's opinions as rationalizations, or as expressions of the Justices' ideology.<sup>169</sup> Yet this sweeping skepticism leads to a dead end for anyone seeking insights into the judicial process, because it fails to take legal argument seriously. Ronald Dworkin explains how the skeptics go wrong:

Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions . . . . Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective.<sup>170</sup>

Dworkin, of course, believes that the skeptics err in trying to explain outcomes by looking outside the legal materials. For present purposes it is not necessary to take sides on that issue. Whether or not the true answers to legal questions are found in legal materials, the skeptics misapprehend the nature of legal practice. Lacking interest in the reasons set forth in the opinions, they have no occasion to assess the merits of opinion-writing strategies.

This part of the article sets aside global skepticism, challenges the doctrinal scholar's disdain for sociological legitimacy, and addresses three normative issues raised by appearance management: (A) Do the constraints imposed by legal legitimacy necessarily preclude the Court from giving reasons aimed at satisfying its audience rather than the ones that do the work of deciding the case? (B) May opinions be evaluated according to how well or poorly they manage appearances? (C) What are the tradeoffs between appearance management and other goals?

#### *A. Appearance Management Versus Judicial Candor*

Complaints by scholars about poorly crafted opinions may come down to disagreement with the Court's agenda. In Professor Fallon's vocabulary, the Court is, to some degree, concerned with "sociological legitimacy," while scholars demand "legal legitimacy."<sup>171</sup> According to the scholarly tradition,

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169. See AMERICAN LEGAL REALISM 165 (William W. Fisher III et al. eds., 1993) (describing the Realists' account of the gap between the content of opinions and the factors that determine outcomes).

170. DWORKIN, *supra* note 43, at 13–14.

171. See *supra* notes 10–12, 31–41 and accompanying text (distinguishing between these two forms of appearance management).



judges are virtually always obliged to be candid. They violate this norm when they give reasons that diverge from the reasons that account for the outcome. Appearance management serves the goal of sociological legitimacy; it is anathema to legal legitimacy. But this dichotomy does not surface in doctrinal scholarship. Commentators do not conceive of legitimacy as a multi-faceted concept, do not examine the implications of sociological legitimacy, and rarely consider any arguments in favor of appearance management. Working within the realm of legal legitimacy as their analytical framework, they believe the candor requirement silences any discussion of whether the reasons given in the opinion may diverge from the ones that decide the case. The whole argument rests on the premise that legal legitimacy necessarily overrides the sociological version.

Offering both ethical and utilitarian arguments, David Shapiro defends a strong norm of judicial candor against suggestions that it may appropriately be sacrificed for other goals.<sup>172</sup> He argues that "The case for honesty in all human relations . . . rests in part on the importance of treating others with respect."<sup>173</sup> A "lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker."<sup>174</sup> Besides the ethical argument, the case for candor "also rests on a more instrumental ground: the need for trust in the carrying on of human affairs."<sup>175</sup> Supreme Court opinions serve as an essential resource for participants in the legal process. Legal materials—constitutional text structure and history, precedents, principles embedded in and derived from authoritative sources, and the like—furnish the legitimate reasons for outcomes. The point of the opinion is to show how the Court reasoned its way through those materials to the holding.<sup>176</sup> Lawyers rely upon opinions in crafting arguments, lower-court judges look to them for guidance, and scholars take the Court's reasoning as the starting point for assessing the strengths and weaknesses of its effort. Everyone working within the system must begin from the presumption that the Court is sincere in setting forth reasons. In order to satisfy these needs, the Court should identify the relevant legal materials and apply them to the issues before the Court. Justices who fail to carry out this task should be called to account for incompetence, inattention to craft, or deliberate lawlessness.

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172. Shapiro, *supra* note 46, at 736.

173. *Id.*

174. *Id.* at 736–37.

175. *Id.* at 737.

176. See Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL'Y 807, 824 (2000) (suggesting that, absent a reasoned opinion justifying the outcome, judges would "forfeit the claim that they depend not on will but on reason").

Opinions must be candid so that critics have the materials necessary to do their work.<sup>177</sup> The only exception that Shapiro would make to a general obligation of judicial candor is for rare situations in which an extraordinary moral duty to lie overrides a legal right to hear truth from the judge.<sup>178</sup>

Professor Shapiro's argument is unassailable so long as one accepts his premise that the pursuit of legal legitimacy is the sole aim of opinion writing, save the unusual case involving a compelling moral value. But this premise ignores the critical role of public acceptance in shoring up the Court's credibility and effectiveness.<sup>179</sup> Legal legitimacy, however admirable as an ideal, is worth little standing alone. The Court learned in the 1930s that it cannot afford to ignore public perceptions. It almost found itself turned into a puppet by a popular President irked by its rulings, and was saved only by a combination of prudent retreat and a reservoir of public support.<sup>180</sup> Absent public acceptance, the Court will struggle to achieve substantive goals, and will be constantly vulnerable to attack by the other branches.

For this reason, the Court is on solid ground in ranking sociological legitimacy ahead of legal legitimacy, even at the cost of constant criticism from the academy for failure to meet legal requirements. Recognizing a primary role for sociological legitimacy lays the groundwork for a strong instrumental argument against candor and in favor of appearance management. Absent public acceptance, the Court cannot be effective. Yet society benefits from the enforcement of "rule of law" values by a strong judicial branch, even if the Court itself sometimes falls short of perfect fidelity to law. The Court's solution is to appear to be principled.<sup>181</sup> Sociological legitimacy always demands attention to appearances at some cost to legal legitimacy, as the point of sociological legitimacy is to win a measure of acceptance from diverse

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177. See, e.g., Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) (suggesting that the practice of omitting from opinions factors relied upon by Justices is "wholly inconsistent with the root concepts of principled decision-making"); see also Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958) (arguing that "when men are compelled to explain and defend their decisions, the effect will generally be to pull those decisions toward goodness").

178. See Shapiro, *supra* note 46, at 739–50 (arguing that an inescapable moral duty may justify a departure from judicial candor).

179. See Fallon, *supra* note 10, at 1805 (suggesting that "[w]ith respect to the most fundamental matters, sociological legitimacy is not only a necessary condition of legal legitimacy, but also a sufficient one").

180. See Friedman, *supra* note 8, at 324–25 & n.378 ("[P]opular sentiment for the independent judiciary likely saved it in the face of the politicians' attack in 1937.").

181. See Posner, *supra* note 1, at 51–52 (noting that "the appearance of being 'principled' is rhetorically and politically effective").

audiences who do not agree on what qualifies as a legally legitimate argument. Sacrificing candor is the unavoidable consequence.<sup>182</sup>

Shapiro's ethical argument fares no better. As with his instrumental case for candor, it assumes that legal legitimacy is the only norm the Justices must satisfy, moral duties aside. Yet the Court, in order to husband its authority, must also pursue sociological legitimacy. Recognizing as much adds a layer of complexity to the ethical issue. The justification for dissembling is that it shows no lack of respect to give people the reasons they demand to hear.<sup>183</sup> Nor is the audience always deceived. On the contrary, the Court's primary audience consists of legal elites who will typically understand well enough that the opinion does not tell the whole story of how the Court arrived at its outcome.<sup>184</sup> Most legal elites are perceptive enough to grasp the truth of the "external" perspective taken by skeptics. At the same time, they take an "internal" perspective on the judicial process in their working lives. Experience has taught them to conceive of the Court's reasons not so much as pronouncements etched in stone, but as weapons to be manipulated as the needs of a given piece of litigation or scholarship require.

An uncompromising champion of candor would look for ways of ensuring that the Court obeys the candor norm, by obliging the Justices to practice greater transparency. For example, the public could be given access to internal memoranda related to its decision making, and clerks could be encouraged to discuss their experiences in the public forum. Yet neither Professor Shapiro nor anyone else advocates more openness.<sup>185</sup> It is as if the demand for candor

182. Accordingly, my claim for the role of appearance management in Supreme Court opinions differs radically from the thesis advanced in Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995). Professor Hellman defends the Court's "claim that an opinion must *look principled* as well as *be principled* in order to legitimately and justifiably fulfill the judicial function." *Id.* at 1108. Her reasoning, as I understand it, is that both criteria should be met. I argue that "looking principled" can conflict with "being principled" and that the former takes priority over the latter in a significant range of Supreme Court cases.

183. *Cf.* GOFFMAN, *supra* note 13, at 18 (arguing that people who dissemble in their work may do so for reasons other than selfish ones; thus "[w]e know that in service occupations practitioners who may otherwise be sincere are sometimes forced to delude their customers because their customers show such a heartfelt demand for it").

184. *See supra* note 133 and accompanying text (discussing the role of legal elites).

185. On the contrary, some of them vehemently object to insiders who lift the curtain on the Court's work, a bit like the bishops who refused to look through Galileo's telescope for fear they may see something that contradicted their model of the cosmos. *See, e.g.,* Painter, *supra* note 107 (reviewing EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998)). Professor Painter criticizes Lazarus, a former clerk for Justice Blackmun, for "ethical lapses" in revealing confidential information. *Id.* at 1434. *See also* David J. Garrow, "The Lowest Form of Animal Life?":

were more a rhetorical stance than a practical objective.<sup>186</sup> One force driving judicial appearance management may be the psychological need of some judges, law professors, lawyers, and other opinion leaders to believe that conventional reasons account for the holdings of hard cases.<sup>187</sup> As for the general public, most of them pay little attention to the particulars of Supreme Court opinions.<sup>188</sup> All the same, it seems unlikely that many of them are deceived. Most people are familiar with the ways of the world and probably benefit from a healthy skepticism as to whether the Court is, or always should be, completely straightforward. With regard to all segments of the audience, the Court's practice of offering them the argument they want to hear seems more accurately described as deferring to their preferences than as manifesting lack of respect.

These objections do not categorically refute the case for candor. Legal legitimacy is a worthy goal and our system includes means by which it will, more or less, receive its due. Dissenting Justices, aided by an army of legal scholars, stand ready to call attention to the Court's failures to state the true reasons for decisions. Indeed, scholars sometimes disapprove of the reasoning put forward by the Court to justify outcomes they like. In that event, their

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*Supreme Court Clerks and Supreme Court History*, 84 CORNELL L. REV. 855, 856–57 nn.5–15 (1999) (citing published criticisms of Lazarus's work); Painter, *supra* note 107, at nn.3–4 (same).

186. One need not question the sincerity of those who lament the indiscretions of Lazarus and others in order to point out that, viewed from the perspective of appearance management, the social norm against such disclosures is best understood as a way of protecting the Court's secrets in order that it be more effective at putting on a show for its audience. As Goffman puts it:

A basic problem for many performances . . . is that of information control; the audience must not acquire destructive information about the situation that is being defined for them. In other words, a team must be able to keep its secrets and have its secrets kept.

GOFFMAN, *supra* note 13, at 141.

187. See NYBERG, *supra* note 74, at 92–93 (describing the psychological desire to avoid "explicit consciousness" of certain thoughts and ideas). For example, it appears that in many, if not all the Justices' chambers, the law clerks draft the opinions, often with little or no editing by the Justices. See Garrow, *supra* note 185, at 865 & n.72, 872, 874 & n.131 (1999) (noting the substantive impact of law clerks on draft opinions). Granting that the Justices themselves determine the outcomes of the cases, law clerks are responsible for much of the reasoning in the opinions. *Id.* Yet later opinions often claim that the outcome is governed not by the results but by the reasoning of earlier cases. To the extent this is so, it seems to follow that the clerks bear substantial responsibility for the outcomes of later cases. To the extent it is not so, the reasoning is fairly regarded as window dressing for more or less naked value judgments.

188. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2621–23 (2003) (discussing the lack of detailed understanding of Supreme Court rulings among the general public).

concern with legal legitimacy comes to the fore, and the scholarly project may consist of rewriting the opinions in ways that seem to them to better satisfy the requirements of legal legitimacy.<sup>189</sup> In addition to doctrinal scholarship, the papers of retired Justices, biographies, and books that go behind the scenes of the contemporary Court to reveal details about its work are helpful correctives to anyone who thinks that the opinion is a transparent window into the reality of the decision making process.<sup>190</sup>

Nonetheless, the case for candor—and against appearance management—is less certain than Professor Shapiro supposes. Both legal and sociological legitimacy have value, and the need for one or the other may vary depending on context. There is no "one size fits all" answer to the question whether the Court ought to engage in appearance management in a given case. Rather than asking whether legal or sociological legitimacy takes priority, the questions the Court and its academic overseers should ask include whether in the case at hand there is a way to sidestep the need to choose between them, and if not, how to choose between them in a given set of circumstances, and whether in a particular case the motive for appearance management is a worthy one. Here are some illustrations.

### 1. *Avoiding the Conflict Between Legal and Sociological Legitimacy*

Sometimes conflicts between the legal and sociological legitimacy can be avoided by clever opinion writing. *Ex parte McCardle*<sup>191</sup> illustrates the technique. After the Civil War, Congress, as part of the post-war Reconstruction program, imposed military government in the South.<sup>192</sup> McCardle, a Mississippi newspaper editor, ran afoul of the military rulers, was imprisoned by the army, and challenged the Reconstruction scheme on constitutional grounds.<sup>193</sup> He appealed to the Supreme Court under an 1867 statute.<sup>194</sup> When the Supreme Court agreed to hear the case, Congress feared

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189. See *supra* note 92 and accompanying text (noting scholarly attempts to rewrite landmark decisions).

190. See, e.g., David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS, May/June 2005, at 28 (observing that a "troubling story emerges from the pages of Blackmun's papers, one that remains almost wholly unreported"). According to Garrow, Blackmun "ceded to his law clerks much greater control over his judicial work than did any of the other 15 judges from the last half-century whose papers are available." *Id.*

191. *Ex parte McCardle*, 74 U.S. 506 (1868).

192. *Id.* at 507.

193. *Id.* at 508.

194. *Id.* at 507.

that the Court would overturn its program, and responded by repealing the relevant portion of the 1867 statute, thereby depriving the Court of the jurisdiction *McCardle* asserted.<sup>195</sup> The Court, probably influenced by fear that Congress would retaliate against it for an insufficiently deferential ruling, held that the statute validly deprived it of jurisdiction, declaring unequivocally:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.<sup>196</sup>

Then, at the end of the opinion, the Court remarked that the jurisdiction-limiting statute applied only to the 1867 statute and "does not affect the jurisdiction which was previously exercised."<sup>197</sup> The opinion abruptly ends, without commenting on whether Congress could block the alternative avenue as well.<sup>198</sup> The point of this opaque reference became clear when, a year later, the Court in *Ex parte Yerger*<sup>199</sup> upheld access to habeas by way of the route Congress had failed to cut off.<sup>200</sup> As a result, one cannot tell for sure whether *McCardle* is extraordinarily broad or quite narrow.<sup>201</sup> A fair reading of *McCardle*, though certainly not the only plausible one, is that the Court employed deliberate ambiguity to spare itself the hard choice between the "legally legitimate" reason for the outcome (that Congress had in fact merely foreclosed one avenue of access) and the one that would satisfy its most important audience, made up of ardent congressional defenders of Reconstruction and the equally ardent voters who had put them in office (that Congress possesses absolute power over the Court's jurisdiction).<sup>202</sup> In this view of the case, the Court showed judicial statesmanship, grasping the need to maintain its institutional role while avoiding an unnecessary confrontation with Congress.

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195. *Id.* at 508.

196. *Id.* at 514.

197. *Id.* at 515. At this point, the Court dropped a footnote citing an earlier round in the *McCardle* litigation.

198. For a brief discussion, see R. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 330 n.\*\*\* (5th ed. 2003).

199. See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1869) (requiring unambiguous congressional intent to restrict the Court's jurisdiction over writs of habeas corpus).

200. *Id.*

201. For a broad reading, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1601-05 (1986).

202. William Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 247-48 (1973).

## 2. *Weighing the Costs and Benefits of Appearance Management*

*McCardle* aside, conflicts between the demands of legal and sociological legitimacy cannot always be dodged. One set of reasons will reflect the Court's thinking and another will have greater appeal for its audience, and the Court will have to decide between them. The wisdom of its choice depends on how well it assesses the costs and the benefits of opting for appearance management in a given circumstance. Despite later academic criticisms, the 1954 Court can hardly be faulted for resorting to social science evidence in *Brown v. Board of Education*.<sup>203</sup> Squarely stating a general prohibition on invidious race discrimination, with its implication of drastic and sudden social change, would have further inflamed an already tense situation in the South. For somewhat different reasons, the Court probably made the right choice in *West Coast Hotel v. Parrish*,<sup>204</sup> where it began dismantling the economic due process doctrine that had grown increasingly controversial in the 1930s. Under threat of Roosevelt's court-packing plan, the Court purported to apply the settled doctrine, but subtly reformulated it without calling attention to the change.<sup>205</sup> In this way it gave the impression of continuity when in fact a radical break had occurred. Announcing forthrightly an abrupt doctrinal transformation would have indicated weakness on the Court's part, perhaps with good reason. In such a situation, the Court's institutional needs come to the fore. Dependent on public confidence for its continuing authority, the Court was obliged to save face.

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203. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing scientific evidence detailing the psychological impact of discrimination and segregation).

204. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 398–99 (1937) (upholding the constitutionality of a state minimum wage law).

205. In the era of "economic substantive due process," the Court curbed the power of legislatures to regulate economic activity, on the theory that regulation may violate the Fourteenth Amendment's prohibition on depriving persons of "liberty" or "property" without due process of law. In one well-known case from the period, the Court struck down a New York law that had limited bakers to working no more than ten hours a day or no more than sixty hours in any one week, finding that there was "no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard . . . the health of the individuals who are following the trade of a baker." See *Lochner v. New York*, 198 U.S. 45, 58 (1905).

When the Court changed direction, it did not abruptly overrule the earlier cases. Though *Nebbia v. New York*, 291 U.S. 502 (1934) upheld legislative regulation of milk prices against a substantive due process challenge, the opinion retained the old formula. As always, validation required that "the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia*, 291 U.S. at 525. At the same time, and of greater long-term significance, "the decision undertook little independent examination of the economic rationality of the legislation, nor did it undertake to answer the dissent's critique of its economic premises." KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 376 (16th ed. 2007).

In other cases it is not so clear in retrospect that the appearance management strategy was the right one. *Flast v. Cohen*<sup>206</sup> was a suit by federal taxpayers objecting on First Amendment Establishment Clause grounds to a statute that provided financial support for educational programs in religious schools. The obstacle they faced was *Frothingham v. Mellon*,<sup>207</sup> which had held that suits by federal taxpayers challenging congressional expenditures are nonjusticiable.<sup>208</sup> The problem is that the taxpayer's interest is infinitesimal, in that a victory will likely not affect the amount he owes.<sup>209</sup> Despite that precedent, the Court permitted the case to go forward.<sup>210</sup> Chief Justice Warren's opinion for the Court explained that *Flast* was different from *Frothingham*.<sup>211</sup> In order for a federal taxpayer to have standing, the Court explained, he must meet a two-prong test:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.<sup>212</sup>

Both nexus requirements were satisfied in *Flast*, the Court reasoned.<sup>213</sup> There is a link between taxpayer status and spending statutes, and between taxpayer status and establishment clause claims. The first prong was met, but the latter prong was lacking in *Frothingham*, as there had been no allegation there that Congress "had breached a specific limitation upon its taxing and spending power."<sup>214</sup>

206. See *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (upholding taxpayer standing to challenge federal spending under the Establishment Clause).

207. See *Frothingham v. Mellon*, 262 U.S. 447, 483 (1923) (finding that taxpayers must demonstrate injury in order to challenge congressional spending).

208. See *Flast*, 392 U.S. at 85 (discussing "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment").

209. See *Frothingham*, 262 U.S. at 487 (noting that a taxpayer's interest in the treasury's funds is "comparatively minute and indeterminable").

210. See *Flast*, 392 U.S. at 94 ("Whatever the merits of the current debate over *Frothingham*, its very existence suggests that we should undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits.").

211. *Id.* at 91–94 (noting that the assumptions underlying the *Frothingham* decision are "not consistent with modern conditions").

212. *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968).

213. *Id.* at 103.

214. *Id.* at 105. The taxpayer in *Frothingham* had challenged a statute that provided funds to pregnant women and infants, on the ground that it was not authorized by any of Congress's Article I (or any of its other) powers. *Frothingham v. Mellon*, 262 U.S. 447, 479 (1923).



This two-prong test was made up by the *Flast* Court and seemed to do the job for which it was devised: It permitted the Establishment Clause challenge to be litigated, while giving the appearance of respect for precedent. Nonetheless, it was an exercise in appearance management, for the driving force behind the outcome was a judgment on the part of the majority that Establishment Clause challenges ought to be adjudicated despite the plaintiff taxpayer's lack of a substantial interest in the outcome. The difficulty with it became clear some years later, when a newly constituted Court heard a claim that was similar in policy terms but sufficiently different on the facts to permit *Flast* to be distinguished. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,<sup>215</sup> taxpayers sought to challenge on Establishment Clause grounds a decision by federal officials to transfer property to a religious college.<sup>216</sup> In substance, the plaintiffs' interest in raising their First Amendment claim is virtually identical to that of the plaintiffs in *Flast*. The policy behind *Flast* of opening the federal courts to adjudication of such claims is as applicable to *Valley Forge* as it was to *Flast*.<sup>217</sup> But the majority, preferring to curb the powers of the federal courts in this area, found it easy to distinguish *Flast*. The first *Flast* prong was not met, because the plaintiffs challenged the act of executive branch officials, not an act of Congress.<sup>218</sup> The distinction is specious, but it was the *Flast* Court's failure to state its reasons more candidly that made the earlier case vulnerable to such distinctions. In retrospect, Chief Justice Warren and his allies in the *Flast* majority would have built a sturdier shield for the rule of that case by openly breaking with *Frothingham* for Establishment Clause claims.<sup>219</sup>

### 3. Appearance Management Abuses

Legal practice consists mainly of arguments over the implications of precedents, statutes, and other legal materials on the issue at hand. Participants disagree about the content and relevance of those materials, but they share the premise that there exists a "canon of acceptable arguments," so that some

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215. See *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485–86 (1982) (rejecting taxpayer standing to challenge the transfer of federal property from the executive branch to a religious organization).

216. *Id.* at 469.

217. *Id.* at 508 (Brennan, J., dissenting) (noting that appellants satisfied *Flast*'s standards).

218. *Id.* at 479.

219. For the theoretical underpinnings of the rights-based argument the Court might have advanced, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

arguments are out-of-bounds.<sup>220</sup> They condemn the judge who takes bribes in exchange for his vote, or who favors whites over blacks, or who rules against his personal enemy. Throughout this Article, my premise has been that the true reasons for outcomes are within the canon, though they may be too controversial for unadorned presentation in the opinions. But the unscrupulous judge may employ appearance management to hide reprehensible reasons as well.<sup>221</sup> By teaching judges that they should not adopt reasons they would be ashamed to state in their opinions, a strong norm of judicial candor helps to combat departures from the canon of acceptable arguments. One of the costs of tolerating appearance management is that the more ubiquitous the practice becomes, the easier it will be for badly-motivated judges to conceal reasons that are out-of-bounds. When the reader cannot trust any of the opinions to give the real reasons, it may become harder to detect the opinion that hides unacceptable reasons.

Some commentators maintain that *Bush v. Gore*<sup>222</sup> is such a case. Following a very close presidential election in Florida, the Florida Elections Canvassing Commission declared George W. Bush the winner.<sup>223</sup> At the behest of Vice President Gore's campaign, the Florida Supreme Court ordered a recount, approved a process under which recounts may be conducted under different standards from one county to another, and ruled that a "legal vote is one in which there is a 'clear indication of the intent of the voter.'"<sup>224</sup> The U.S. Supreme Court reversed, holding that the lack of uniform standards violated the Equal Protection Clause.<sup>225</sup> Five of the Justices—all appointed by Republican Presidents—ruled that it was too late for a properly conducted recount to go forward.<sup>226</sup> Across the ideological spectrum, commentators faulted the Court's equal protection reasoning, charging that it "had no basis in precedent or in

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220. Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 89 (1998).

221. Judge Posner identifies this risk, pointing out that the Justice who is especially talented at appearance management presents the greatest danger. See Posner, *supra* note 1, at 78–79 (pointing out that "better packaging could be dangerous—could enable the Justices to get away with being more aggressive than if they didn't hide the ball as skillfully").

222. *Bush v. Gore*, 531 U.S. 98 (2000).

223. *Id.* at 101.

224. *Gore v. Harris*, 772 So. 2d 1243, 1257 (2000).

225. See *Bush*, 531 U.S. at 105–09 (noting that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another").

226. See *id.* at 110–11 ("[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection."). On this point, Justices Stevens, Souter, Breyer, and Ginsburg dissented. *Id.* at 129. As to the equal protection ruling, only Justices Stevens and Ginsburg dissented. *Id.* at 143–44.

history,"<sup>227</sup> and calling it "a confused nonstarter at best, which deserves much of the scorn that has been heaped upon it."<sup>228</sup>

But for some critics the Court did not merely err; the five Justices who stopped the recount so ruled because they preferred that Bush become President.<sup>229</sup> The decision was a "disgrace,"<sup>230</sup> the Court had "trampled on . . . basic principles of adjudication,"<sup>231</sup> and "Scalia, Thomas et al., are criminals in the very *truest* sense of the word."<sup>232</sup> Akhil Amar lamented that he must now tell his students to "[p]ut not their trust in judges."<sup>233</sup> These accusations may well be overblown. Pamela Karlen—no right-winger—rejected the notion that *Bush v. Gore* was aberrant, though she found fault with the substance of the equal protection doctrine it reflects.<sup>234</sup> Be that as it may, the point is that false reasons may be set forth in an effort to conceal motives that deserve condemnation, and perhaps *Bush v. Gore* illustrates the danger. It does not follow, however, that the danger is sufficiently great to justify an effort to impose a blanket obligation of judicial candor on the Supreme Court.<sup>235</sup> Even if *Bush* qualifies as an abuse, instances of out-of-bounds appearance management are rare. Under the watchful eyes of dissenting Justices and vigilant scholars, Supreme Court majorities are unlikely to try to make a habit

227. Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 758 (2001).

228. Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 14 (C. Sunstein & R. Epstein eds., 2001).

229. The two sides of the controversy over the legitimacy of the Court's ruling are described in Cass Sunstein, *Introduction: Of Law and Politics*, in *THE VOTE*; *id.* at 1–8.

230. Rosen, *supra* note 167, at 18.

231. Herman Schwartz, *The God That Failed*, *THE NATION*, Jan. 1, 2001, at 5–6.

232. Bugliosi, *supra* note 167, at 11.

233. Amar, *supra* note 167, at M1. See also Lonny Sheinkopf Hoffman, *A Window into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533, 1552–55 (2001) (reviewing SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2001)).

234. Pamela S. Karlen, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE*, *supra* note 228, at 77–78. My own view is that the alternative argument Chief Justice Rehnquist laid out in his concurring opinion furnishes a persuasive rationale for the outcome. See *Bush v. Gore*, 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring) (stating that the Florida Supreme Court acted contrary to the Florida legislature's intent); see also Michael L. Wells & Jeffrey M. Netter, *Article II and the Florida Election Case: A Public Choice Perspective*, 61 MD. L. REV. 711, 727–32 (2002) (attempting to bolster Chief Justice Rehnquist's reasoning).

235. Though abuses may undermine the "diffuse support" that is the bedrock of the Court's sociological legitimacy, the costs of perceived abuses and the benefits of taking steps to prevent them may be exaggerated by opinion leaders who are outraged by a particular ruling. *Bush v. Gore* seems to have done little damage to the Court's "diffuse support" among the public at large. Friedman, *supra* note 8, at 326 & n.388.

of it. If we think of the Court as a team engaged in appearance management, the role of the doctrinal scholar vis-à-vis the Court's opinions resembles that of "the person who is hired to check up on the standards that performers maintain in order to insure that in certain respects fostered appearances will not be too far from reality."<sup>236</sup>

### *B. Skillful and Clumsy Appearance Management*

If the Court must sustain its sociological legitimacy in order to be effective, and if shrewd appearance management is the path to sociological legitimacy, then skill at managing appearances ought to serve as one measure of judicial performance. Accepting appearance management as a necessary part of opinion-writing implies that the traditional standards by which opinions are evaluated should be modified. Scholars seeking to determine the real-world merits of an opinion should evaluate it with sociological legitimacy in mind. To the extent the opinion is an exercise in appearance management, its focus is not on reasoning from the legal materials to the holding, but on identifying reasons that will appeal to the Court's audience. Naturally, opinions written with this aim in mind will not meet the exacting criteria of the rigorous doctrinal analyst. Many analytical flaws result from the sacrifice of legal legitimacy for the sake of giving reasons that will appeal to the audience. A realistic assessment of judicial opinions would not concentrate solely on whether the Court's holdings and reasoning meet the demands of legal legitimacy. In addition, a realistic assessment would consider how well a given opinion manages appearances.<sup>237</sup> In general, sociological legitimacy requires that the opinion emphasize reasons that can attract broad support over those that are more controversial. Even a bold substantive ruling may be defended in ways that are more or less open to attack along these lines, and some Justices succeed better than others at artfully highlighting the reasons that can attract support while concealing from public view the most controversial aspects of the rationale.

Compare the opinions of Justices Douglas and Harlan in *Griswold v. Connecticut*.<sup>238</sup> There, the state had criminalized the provision of birth control

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236. GOFFMAN, *supra* note 13, at 147. In this regard, the honest scholar should be distinguished from the "shill," who "is someone who acts as though he were an ordinary member of the audience but is in fact in league with the performers." *Id.* at 146.

237. See also *supra* Part IV.A (discussing how a realistic assessment of the Court's holdings would entertain the argument that the latter good might take priority over the former).

238. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding that a state law forbidding the use of contraceptives unconstitutionally interferes with the right to marital

devices to married couples.<sup>239</sup> The issue was whether the statute violated any constitutional limit on state authority.<sup>240</sup> Nothing in the text of the Constitution explicitly constrains state power on this topic, yet the Court was determined to strike down the statute.<sup>241</sup> The obvious candidate was substantive due process, as some precedents supported its application to the birth control statute. In *Pierce v. Society of Sisters*,<sup>242</sup> the Court had ruled that the state could not oblige parents to send their children to public rather than private schools. And *Meyer v. Nebraska*<sup>243</sup> held that the state may not punish a teacher for teaching the German language. The appearance management problem with relying on substantive due process was that thirty years earlier, during the New Deal, substantive due process had acquired a bad reputation. It was used by conservative justices in the first third of the twentieth century to strike down economic and social legislation aimed at ameliorating harsh working conditions and increasing workers' bargaining power. The Court had repudiated that use of the doctrine in the late 1930s.<sup>244</sup>

For this reason, in writing for the Court, Justice Douglas eschewed the substantive due process route.<sup>245</sup> He mentioned *Meyer* and *Pierce*, but ignored their substantive due process pedigree.<sup>246</sup> Instead he tried to devise a new rationale, declaring that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>247</sup> Thus, "Various guarantees create zones of privacy."<sup>248</sup> These include the First Amendment, with its implicit "right of association," the Third Amendment, "in its prohibition against the quartering of soldiers 'in any

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privacy).

239. *Id.* at 480.

240. *Id.*

241. *Id.* at 482.

242. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925) (recognizing a parent's liberty interest in directing the upbringing and education of their children).

243. *See Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a state law forbidding the teaching of foreign languages in public schools on grounds that it violates the liberty interest protected under the Fourteenth Amendment).

244. *See SULLIVAN & GUNTHER*, *supra* note 60, at 144–48 (documenting the Court's shift on Commerce Clause issues); *id.* at 503–09 (noting the shift on due process issues).

245. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").

246. *Id.* at 482–83.

247. *Id.* at 484.

248. *Id.*

house' in time of peace," the Fourth Amendment, in forbidding unreasonable searches, and the Fifth Amendment, in recognizing the right against self-incrimination.<sup>249</sup> Turning to the birth control issue, Justice Douglas next asserted that the case "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," and that this "right of privacy" was violated by the Connecticut statute.<sup>250</sup>

Justice Harlan's opinion concurring in the judgment took a different tack. Rather than avoiding substantive due process, he stoutly embraced it and took advantage of our legal culture's sympathy for arguments based on history.<sup>251</sup> Stressing the novelty of Connecticut's statute and the tradition of governmental respect for marital privacy, he maintained that the law violated a long-established aspect of the substantive "liberty" protected by the Due Process Clause.<sup>252</sup> He relied directly on *Meyer* and *Pierce*, and distinguished the economic due process cases on the ground that they were not rooted in long-standing practice.<sup>253</sup> Harlan took care to fend off concerns that the Court was arrogating power to itself.<sup>254</sup> Striking down the Connecticut law, he assured the reader, would not necessarily produce other limits on the state's power over sexual matters, for nonmarital sex did not enjoy the history of state noninterference on which he grounded his reasoning.<sup>255</sup>

Each of these opinions pushed toward exactly the same substantive outcome in *Griswold*. Moreover, each was and is vulnerable to attack on legal legitimacy grounds. Neither of them had plausible textual support. Nor is there

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249. *Id.* at 484–85.

250. *Id.* at 485–86.

251. Justice Harlan had addressed the merits of the Connecticut statute a few years earlier, in *Poe v. Ullman*, 367 U.S. 497, 539–45 (1961) (Harlan, J., dissenting), a case the Court dismissed on justiciability grounds. His brief opinion in *Griswold* refers the reader to the earlier opinion for an extended discussion of his views. See *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (referencing Justice Harlan's dissenting opinion in *Poe*).

252. *Id.* at 500 (Harlan, J., concurring) ("In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'").

253. *Id.* (Harlan, J., concurring).

254. *Id.* at 501 (Harlan, J., concurring) (declaring that judicial self-restraint in due process cases will only be achieved "by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms").

255. See *Poe*, 367 U.S. at 539–53 (1961) (Harlan, J., dissenting) (distinguishing marital privacy from those "established intimacies which the law has always forbidden and which can have no claim to social protection").

any indication that the framers of the Constitution intended to protect marital privacy, especially with respect to twentieth century birth control devices. For that matter, Justice Harlan never directly suggested that they did. Stripping away Justice Douglas's references to a variety of provisions and Justice Harlan's discussion of history reveals that each Justice's opinion reflects an assertion of judicial power to identify constitutional rights not explicitly recognized in the document's text.<sup>256</sup> Yet the test of sociological legitimacy is not whether the legal foundations of the ruling are sound, but whether the reasoning can obtain wide public acceptance. Justice Harlan's opinion was an especially effective exercise in appearance management, creating a sense of continuity with the past and caution in identifying new constitutional rights, even while articulating one. Justice Douglas's references to penumbras and emanations have proved less convincing.<sup>257</sup> Indeed, they have vanished from the constitutional lexicon. Later cases have by and large followed Justice Harlan, making it clear that the right recognized in *Griswold* indeed finds its constitutional basis in the substantive protection of "liberty" afforded by the Due Process clauses of the Fifth and Fourteenth Amendments.<sup>258</sup>

### C. *The Trade-Off Between Appearance Management and the Optimum Substantive Outcome*

Even when the reasons set forth in Supreme Court opinions are show horses rather than work horses, they will influence the later development of doctrine because lower courts and litigants are entitled and obliged to take them seriously, to use them in framing arguments, and to cite them in justifying

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256. *Griswold v. Connecticut*, 381 U.S. 479, 507–27 (1965) (Black, J., dissenting) (addressing these and other separate opinions).

257. See, e.g., Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 135–36 (1988) (arguing that Justice Douglas's "attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 802 (1989) (suggesting that "what drove privacy into the penumbras . . . was a perceived need to differentiate the privacy doctrine from the language of substantive due process"). Rubenfeld further notes that "this insecurity on privacy's part . . . resulted in the very thing feared; by resorting to shadows, the right to privacy has simply invited critics to expose it—and to brand it, of course, with the scarlet letter of Lochnerism." *Id.* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1113 (2002) ("Justice Douglas's opinion for the Court reads more like an amateur exercise in metaphorical poetry than law . . . . Strikingly, though, his argument seems unpersuasive. The reason is simple: it looks like all the reasoning is being done by a patchwork of images and metaphors.").

258. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

holdings. As a result, substantive constitutional law may take one direction rather than another on account of the impact of earlier appearance management on later outcomes. One cannot reach a definitive judgment as to the wisdom of a given instance of appearance management without considering the potential substantive side effects.

Though it is too early to tell for certain, *Grutter v. Bollinger*,<sup>259</sup> the Court's most recent affirmative-action-in-higher-education case, may illustrate the point. In an equal protection challenge, the Court upheld a University of Michigan Law School admissions plan that favored minority students over white students.<sup>260</sup> The black letter rule in this area is that racial classifications are subject to strict scrutiny and can only be justified by a compelling state interest.<sup>261</sup> Before *Grutter*, the only government programs that had met this test were affirmative action plans that compensated for past discrimination,<sup>262</sup> and the World War II internment of Japanese-Americans.<sup>263</sup> The latter ruling had met with withering criticism,<sup>264</sup> and the law school chose not to rely on the compensatory rationale. Instead, Michigan argued that it had a compelling interest in exposing law students to students with a variety of backgrounds and perspectives and in training a diverse work force.<sup>265</sup> Agreeing that "the Law School has a compelling interest in attaining a diverse student body," the Court upheld its admissions policy.<sup>266</sup> The law school's admissions process took a number of factors into account under the general heading of diversity.<sup>267</sup> By contrast, in *Gratz v. Bollinger*,<sup>268</sup> a companion case, the Court struck down an

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259. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (finding that a law school had a compelling interest in achieving diversity and that an individualized, race-conscious admissions policy did not violate the Equal Protection Clause).

260. *Id.*

261. *Id.* at 326.

262. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (rejecting a city plan requiring government contractors to subcontract at least 30% of the value of each contract to minority businesses); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (finding that an "extremely irregular" and racially-suspect North Carolina redistricting plan, serving no apparent compelling state interest, could be challenged in court by citizens).

263. See *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) ("[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.").

264. See generally GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* (1949); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489 (1945).

265. *Grutter v. Bollinger*, 539 U.S. 306, 328–35 (2003).

266. *Id.* at 328–29.

267. *Id.* at 337.

268. See *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (finding that an undergraduate race-



undergraduate admission plan that focused facially on race without giving weight to other elements of diversity.<sup>269</sup>

Perhaps the majority takes diversity as seriously as the reasoning in the *Grutter* and *Gratz* opinions suggests. Yet it is hard to believe that the benefits of diversity count for enough to qualify as a compelling state interest as that concept has been understood in the past.<sup>270</sup> In particular, the issue of race-conscious admissions only arose because Michigan had chosen to operate an elite law school. Its interest in diversity could only be compelling on the premise that it had a compelling interest in admitting an elite student body to begin with, and this is an implausible proposition.<sup>271</sup> Viewed as an exercise in appearance management, the opinions in these cases make more sense. The majority sought to achieve approval for admissions plans that focused on helping minority students.<sup>272</sup> A simple rule favoring such plans on compensatory grounds, however, would have raised sociological legitimacy objections, as many people object to taking race into account in such a bald way.<sup>273</sup> The Court deflected attacks on its endorsement of race-based

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based admissions policy was not narrowly tailored to achieve diversity and, thus, violated the Equal Protection Clause).

269. *Id.* at 275–76.

270. See Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 4 (2004) (characterizing the diversity rationale as "window dressing"); see also *id.* at 5 ("Justice O'Connor's opinion amounts to [saying] that if universities can disguise their admissions systems so that it is not too blindingly obvious that they are pursuing racial representation for its own sake, they can get away with it.").

271. See *Grutter v. Bollinger*, 539 U.S. 306, 357–60 (2003) (Thomas, J., dissenting) ("[T]here is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school."); see also *id.* at 387–89 (Kennedy, J., dissenting) (questioning the Court's sincerity in advancing the diversity rationale); Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1635 (2003) ("Given that Michigan does not have anything that would qualify as a 'compelling' state interest in establishing or maintaining an elite law school in the first place, how could it have a 'compelling' state interest in racial and ethnic diversity at that law school?"). Cf. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (finding that the interests of a child in avoiding social stigmatization is not a compelling state interest that would justify taking race into account in awarding custody when the parents divorce).

272. In his dissent, Chief Justice Rehnquist points out the tight correlation between the percentage of each minority group in the applicant pool and the percentage of offers of admission granted each minority group. See *Grutter*, 539 U.S. at 381–85 (Rehnquist, C.J., dissenting) (concluding that the law school "clearly does employ racial preferences in extending offers of admission").

273. See Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. ON LEGIS. 217, 225–28 (2003) (citing public opinion polls and other evidence for the assertion that most Americans oppose racial preference

admissions by dressing the *Grutter* holding in diversity garb. The potential problem is that the diversity reasoning has become part of constitutional doctrine and can be advanced as a way of retarding as well as advancing the Court's basic project. When "diversity" is a compelling state interest, the focus on race may ultimately be diluted in favor of other goals.<sup>274</sup> Moreover, some helpful tools for increasing educational opportunities for blacks, such as race-based scholarships, may not withstand scrutiny under *Grutter*.<sup>275</sup> Thus, the unintended consequence of upholding race-conscious admissions on the diversity rationale may be that the substantive goal of affirmative action for blacks will be compromised.<sup>276</sup>

### V. Conclusion

By stepping outside legal practice, taking an external perspective on the Supreme Court, and viewing the Justices as fallible, ambitious, talented, and risk-averse human beings, we can more fully understand the challenges they face and the choices they make. In hard cases, Americans expect the Justices to make wise substantive choices and to obey the law at the same time. The task is daunting, partly because of sharp disagreements about what substantive choices are wise, and partly because the legal justification of substantive rulings often depends on controversial value judgments. The Court responds to these difficulties by handing down opinions aimed at managing appearances and winning public acceptance (and, hence, sociological legitimacy) rather than at identifying the legal materials that produced the outcome (legal legitimacy). To that end, the Court's reasons are sometimes show horses advanced for their

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policies in higher education).

274. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622–25 (2003) (discussing ways in which "diversity . . . avoid[s] addressing directly the barriers of race and class"); *id.* at 1625–28 (discussing the potential for more litigation on account of the distinction the Court drew between *Grutter* and *Gratz*); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 239 (2004) (arguing that *Grutter*, in rejecting "unapologetically race-conscious" efforts, "consigns the concept of affirmative action to a role of marginal utility"); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 208–11 (2004) ("Affirmative action to remedy past discrimination is too narrowly circumscribed in employment and education to serve as the foundation for large-scale policy interventions.").

275. See Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid After Grutter and Zelman*, 14 S. CAL. INTERDISC. L.J. 237, 239 (2005) (noting that *Grutter* and *Gratz* "requires us to carefully ponder whether to import race-conscious admissions principles into the financial aid context").

276. For another example of appearance management gone awry, see Rubinfeld, *supra* note 257, and accompanying text (discussing the failure of appearance management in the right to privacy cases).

popular appeal, though they do not do the real work of deciding the case. Like the staff of a hotel, a restaurant, or a law firm, the Court tries to manage the impressions it makes on others while the work of determining how hard cases should be decided, and why, goes on behind the scenes.

Appearance management implies that some types of argument—those that are especially useful for satisfying an audience's expectations—figure more prominently in the opinions than in actually producing the holdings of cases. The converse is also true. Some principles exert far more influence on decisionmaking than their treatment in Supreme Court opinions would suggest. Because lower courts, lawyers, law teachers, and law students pay close attention to the content of Supreme Court opinions, the Court's appearance management techniques will color the whole legal culture. There is an irony here. As between the appearance management reasons set forth in the opinions and the genuine grounds for decisions, the former may influence the law that is taught to students, the analysis contained in doctrinal scholarship, and lower court adjudication more than the latter. Teachers risk losing the confidence of students if they persistently declare that the real law is not to be found in the opinions. No lawyer is likely to persuade judges by routinely questioning the Court's sincerity, and a lower court judge who failed to frame his rulings in the Court's terms would risk repudiation of his reasoning, if not outcomes. Doctrinal scholarship simply cannot be done without (at least provisional) respect for the doctrine. Even skeptics are obliged to take the Court's opinions at face value as their working premise. As a result, appearance management will have a big part in shaping the constitutional doctrine that guides brief-writing, doctrinal scholarship, and lower court opinions. Eleventh Amendment scholarship illustrates the point.<sup>277</sup> Whether or not history actually accounts for much of the law of state sovereign immunity, it certainly figures prominently in the scholarship in the area, thanks to the Supreme Court's focus on historical arguments.

Some readers may reject this appearance management model of Supreme Court practice as unduly cynical. In one respect, the charge of cynicism is on target, as the appearance management thesis does reject the Court's claim of fidelity to the rule of law in opinion-writing. On the other hand, showing that

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277. See generally James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1998); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

the Court's reasons fall short does not imply that there are no good (albeit unexpressed) reasons for the outcome.<sup>278</sup> My thesis does not carry with it any implication that the Court's true reasons are themselves illegitimate, or even mistaken. My argument is that the genuine reasons, whatever their merit, give rise to controversy the Court would prefer to sidestep.

Nor do I think that the Court deserves opprobrium for managing appearances. On the contrary, the role of public attitudes in maintaining the Court's authority suggests that appearance management is a vital feature of Supreme Court decisionmaking, and one that deserves the attention the Court accords it. It does and should take priority over legal legitimacy in a range of controversial cases. In this crucial respect, my argument differs from the Realists' critique of judicial opinions. The Realists fail to appreciate the affirmative case for managing appearances. They believe that "by making each decision seem inevitable, opinions deflect popular criticism of the courts' rulings and conceal from the judges themselves the true bases of their rulings."<sup>279</sup> On the contrary, opinions ordinarily serve a valuable social function when they satisfy popular attitudes and thereby bolster the Court's authority. The only exception is the rare case in which the Court manipulates appearances to distract attention from unacceptable reasons, as some critics think it did in *Bush v. Gore*.<sup>280</sup> I plead guilty to skepticism, but not cynicism.

To the extent one's goal is to understand why opinions are written as they are, the appearance management account of the content of opinions holds an advantage over focusing exclusively on legal legitimacy, because it yields a more plausible explanation for the chronic weakness of many Supreme Court opinions in close cases. From one generation to the next, critics armed with rule-of-law norms have no difficulty finding fault with the Court, often landing telling blows. The reason is not that Supreme Court Justices are unable to write candid and cogent majority opinions. It is that their agenda differs from that of their critics. They are more concerned with sociological legitimacy.

Legal professionals—lawyers, lower court judges, and mainstream scholars—are obliged to take the Court's legal legitimacy model as the set of norms governing their daily work. No argument that fails to take the Court's

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278. See WASSERSTROM, *supra* note 122, at 23–24 (noting a distinction between opinions grounded in formal logic and opinions supported by other criteria).

279. AMERICAN LEGAL REALISM, *supra* note 169, at 165. The context indicates that these authors use "legitimation" in a different sense from Fallon's conception. They mean to get across the idea that the "legitimacy" courts acquire by virtue of their opinions is based on a false premise of fidelity to law.

280. See *supra* notes 230–33 and accompanying text (collecting criticisms of *Bush v. Gore*).

opinions at face value is likely to get anywhere. But practicing a healthy skepticism toward the Court's proffered reasons will help them to do their jobs better. Certainly law teachers should teach law students "the judicial game," as Judge Posner calls it.<sup>281</sup> But we owe them a more complete picture of the judicial process. We should teach students to be at once skeptical of anything they read in an opinion and wary of cynicism when they find that the Court does not always mean what it says. They should learn that any piece of legal analysis or argument they undertake ought to pay respect both to the Court's stated reasons and to the often unstated or muted set of constitutional values that does much of the work of deciding hard cases.

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281. POSNER, *supra* note 138, at 8. Judge Posner uses the term "game" to denote the "set of rules" that constitute an activity. *Id.* at 131-34.

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