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Practical Truth: The Value of Apparent Honesty in Supreme Court Opinions

Timothy C. MacDonnell

Washington and Lee University School of Law, macdonnellt@wlu.edu

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PRACTICAL TRUTH: THE VALUE OF APPARENT HONESTY IN SUPREME COURT OPINIONS

Timothy C. MacDonnell⁺

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The focus of this Essay is on the importance of apparent honesty to the persuasive force of Supreme Court opinions.¹ Several scholars and Justices of

⁺ Clinical Professor of Law and Director, Black Lung Clinic, Washington & Lee University School of Law. I wish to extend my thanks to the many individuals who provided their advice and suggestions regarding this Essay. Particularly, I would like to thank Professors Tom Tyler and Scott C. Idleman for their willingness to share their time and thoughts on the role of honesty in judicial decision-making and Professors Gisela Striker, Chris Jenks, and Margaret Hu for their generosity in reviewing the Essay and providing invaluable edits.

1. Apparent honesty is the idea that Justices must both *be* honest and *appear* honest. The focus of this Article is distinct from judicial candor. Many scholars have addressed the topic of judicial sincerity, judicial candor, and judicial fidelity to the law. See, e.g., Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 12–

the United States Supreme Court have noted that the Court's legitimacy is uniquely tied to the persuasive force of its opinions.² Alexander Hamilton famously described the federal judiciary as possessing "neither force nor will but merely judgement."³ Hamilton employed this phrase to support his argument that the judicial branch "will always be the least dangerous to the political rights of the Constitution."⁴ However, more than explaining the infirmities of the federal judiciary as compared to the executive or legislative branches, Hamilton captured something essential about the judiciary. The Supreme Court's judgments are both the exercise of the Court's power and the justification for that power. Thus, the opinions of its Justices must be persuasive.

The study of persuasion has long recognized three principle methods or modes of convincing an audience of the correctness of a particular view.⁵ Those

16 (2016); Jeffrey Goldsworthy, *The Limits of Judicial Fidelity to Law: The Coxford Lecture*, 24 CAN. J.L. & JURIS. 305, 305 (2011); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1310–13, 1386–87 (1995) (analyzing the arguments for a pro-candor rule in judicial-opinion writing and then asserting that the arguments in favor of the pro-candor default are unpersuasive); Therese H. Maynard et al., Symposium Transcript, *Panel Exchange the Fourth Annual Fritz B. Burns Lecture Central Bank: The Methodology, the Message, and the Future*, 29 LOY. L.A. L. REV. 73, 85 (1995); David L. Shapiro, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987) [hereinafter Shapiro, *In Defense of Judicial Candor*]; Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) [hereinafter Shapiro, *Judges as Liars*]; see also Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1096 (2010) (pointing out that the sincerity debate is more far reaching than just judicial decision makers and discusses the role of sincerity in the explanations of all public decision makers).

2. See *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) ("The Court's power lies... in its legitimacy, a product of substance and perception that shows itself in people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."); see also Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEXAS L. REV. 1207, 1254 (1984) ("The Court can establish its legitimacy by writing persuasive opinions that justify its conclusions. Hence, as long as the Court follows this socially accepted judicial role, it is likely to retain its legitimacy regardless of the theory of judicial discretion that it employs."); Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99–101 (1959) (arguing that Supreme Court opinions can undermine the Court's legitimacy because they are often poorly written and have an insufficient basis in law); Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 237 (2008) ("The judiciary's power comes from its words alone—judges command no army and control no purse. In a democracy, judges have legitimacy only when their words deserve respect, and their words deserve respect only when those who utter them are ethical."). But see Marc O. DeGirolami, *Congressional Threats of Removal Against Federal Judges*, 10 TEX. J. C.L. & C.R. 111, 152 (2005).

3. THE FEDERALIST NO. 78, 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

4. *Id.*

5. See ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 38 (George A. Kennedy trans., 2nd ed. 2007) (identifying three modes of persuasion: "the character [(ethos)] of the speaker...disposing the listener in some way and...the speech [(logos)] itself, by showing or seeming to show something").

methods are appeals to logic,⁶ credibility,⁷ and emotion.⁸ All three methods of persuasion, in proper balance, are necessary and appropriate tools of rhetoric, but I assert that ethos/credibility is particularly important to a court, and, more specifically, to the United States Supreme Court.

Philosophers have discussed the significance of ethos to persuasion for thousands of years. As part of this discussion, ethos has been defined in a variety of ways but generally centers on the idea of credibility.⁹ Plato suggested that true rhetoric requires a speaker to understand the soul of his audience and then to appeal to it.¹⁰ Aristotle asserted that appeals to ethos are “almost...the most authoritative form of persuasion.”¹¹ He went on to explain that ethos-based appeals include convincing an audience that the speaker is: of good moral character; has good will for/toward the audience; and has good sense.¹² Modern rhetoricians like Perelman, Olbrechts-Tyteca¹³ and Bitzer¹⁴ have continued to

6. *See id.* at 38–39 (“Persuasion occurs through the arguments [(logoi)] when we show the truth or the apparent truth from whatever is persuasive in each case.”).

7. *See id.* at 38 (“[There is persuasion] through character whenever the speech is spoken in such a way as to make the speaker worthy of credence....”).

8. *See id.* at 39 (“[There is persuasion] through the hearers when they are led to feel emotion [(pathos)] by the speech....”).

9. *See* James S. Baumlin & Craig A. Meyer, *Positioning Ethos in/for the Twenty-First Century: An Introduction to Histories of Ethos*, 7 HUMANITIES 1, 4 (2018). Baumlin and Meyer note:

Like many terms from Greek philosophy (*logos, pistis, kairos*, to give a few) ethos remains untranslatable in any word-for-word correspondence. Numerous terms gesture in its direction, though no one word or phrase captures its nuances in English. Character, authority, charisma, credence, credibility, trust, trustworthiness, sincerity, “good sense,” goodwill, expertise, reliability, authenticity, subjectivity, “the subject,” self, selfhood, self-identity, image, reputation, cultural identity, habit, habitus, habituation, person, persona, impersonation, performance, self-fashioning, voice, personal style: these make for a sampling of stand-in terms.

Id.

10. JAMES A. HERRICK, *THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION* (4th ed. 2009) (quoting PLATO, PHAEDRUS 70) (noting that rhetoric was the “art of influencing the soul...through words” and to effectively influence an individual the speaker “must discover the kind of speech that matches each type of nature”); *see also* ETHOS: NEW ESSAYS IN RHETORICAL AND CRITICAL THEORY xv–xvi (James S. Baumlin & Tita French Baumlin eds., 1994) (noting that Aristotle’s discussion of ethos is in response to “Plato’s call for an ethical rhetoric, a rhetoric addressed to the soul of the individual”).

11. ARISTOTLE, *supra* note 5, at 39.

12. James L. Kinneavy & Susan C. Warshauer, *From Aristotle to Madison Avenue: Ethos and Ethics of Argument*, in ETHOS: NEW ESSAYS IN RHETORICAL AND CRITICAL THEORY, *supra* note 10, at 171, 174–80.

13. *See* CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 22 (John Wilkinson & Purcell Weaver trans., 1969) (1958) (“A great orator is one who possesses the art of taking into consideration, in his argument, the composite nature of his audience.”).

14. *See* Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 7–9 (1968). Bitzer’s influential work identified three constituent parts of any given rhetorical situation. One of those parts is the audience. According to Bitzer, “Since rhetorical discourse produces change by

assert that advocates must craft their rhetoric with the composition of their audience in mind. Thus, when making an ethos-based appeal the speaker should adjust his/her appeal to the character-based expectations of a particular audience. We can call this “role-based credibility.” I assert that this “role-based credibility” is particularly important in the context of Supreme Court opinions—perhaps even the most important component to a Justice’s opinion. I further assert that of the various factors that affect the credibility of a Justice’s opinion, apparent honesty is the most important.

This Essay draws a distinction between apparent and actual honesty that should be explained. Judicial honesty or judicial candor is the subject of significant scholarly attention, but it is not the focus of this Essay. Rather, my focus is on the importance that appearing honest has on the persuasive force of an opinion and the dangers associated with failing to achieve that goal. This distinction is not intended to suggest Justices should seek apparent honesty while not being actually honest. Rather, this Essay emphasizes that actually honest opinions must also be apparently honest. Thus, judicial candor is necessary to apparent honesty, but it is not always sufficient on its own.

To support my assertions, this Essay is divided into three Sections. Section I briefly discusses the elements of an Aristotelian ethos-based appeal and how such appeals are generally derived. Section II applies this approach to Supreme Court opinions and attempts to defend my formulation of apparent honesty. Finally, I identify friction points in Supreme Court decisions where there is a heightened danger of appearing less than fully honest. Given the harm failing to appear honest can have on the Court’s credibility, avoiding such an appearance is critical. I assert that there are at least three circumstances where the danger of appearing less than fully honest is increased. These three credibility “choke points” involve stare decisis, high-profile politically contentious cases, and changes in a Justice’s position.

I. ETHOS: “THE MOST AUTHORITATIVE FORM OF PERSUASION”¹⁵

As mentioned above, Aristotle claimed appeals to character are “almost...the most authoritative form of persuasion.”¹⁶ This quote is particularly relevant to opinions issued by Supreme Court Justices because, as Aristotle observed, appeals to ethos are especially powerful “in cases where there is not exact knowledge but room for doubt.”¹⁷ In most, if not all, cases heard by the Supreme Court there is room for doubt, otherwise the Court would not have granted certiorari.

influencing the decision and action of persons who function as mediators of change, it follows that rhetoric always requires an audience....” *Id.* at 7.

15. ARISTOTLE, *supra* note 5, at 39.

16. *Id.*

17. *Id.* at 38.

The Greek word *ethos* is frequently translated in English to mean character and is similar to the word *ethics*.¹⁸ Both *ethics* and *character* suggest a fixed pattern or habit of behavior. However, in the context of Aristotelian rhetoric, *ethos* has a more fluid definition.¹⁹ Further, what I speak of in this Essay is not ethical opinion writing. Rather, I speak of *ethos* in Supreme Court opinions as Aristotle described its use in *On Rhetoric*,²⁰ as a practical tool of persuasion and how apparent honesty is a necessary part of that tool.

According to Aristotle, *ethos* as a tool of persuasion, includes three component parts: “[t]hese are practical wisdom [*phronēsis*] and virtue [*aretē*] and good will [*eunoia*].”²¹ Each component is explained in some detail either explicitly or implicitly in *On Rhetoric*,²² but these terms can perhaps be better understood in the following way: we trust advocates if we believe they have good judgment, are good people, and wish good things for us—the audience.

It is important, however, to note that Aristotle is not speaking of ethical persuasion, but rather the use of appeals to the character of the speaker to persuade.²³ This distinction is worth some explanation. Ethical persuasion, which is a subject of significant importance in the law, focuses on the fair use of argument.²⁴ It is well understood that appeals to an audience’s bias or prejudice can have an inordinate impact on the outcome of a dispute. Thus, arguments which play on these flaws in human decision making can be described as unethical, as the argument is designed to cloud a decision with what should be

18. *See id.*

19. There are a number of distinct views of the role of *ethos* among classical rhetoricians. Of particular note is the distinction between Aristotle’s approach and Cicero and Quintilian’s. Aristotle discusses *ethos* as a manner of persuasion, while Cicero and Quintilian assert that people of good moral character make the best advocates. *See* Tita French Baumlin, “A good (wo)man skilled in speaking”: *Ethos, Self-Fashioning, and Gender in Renaissance England*, in *ETHOS: NEW ESSAYS IN RHETORICAL AND CRITICAL THEORY*, *supra* note 10, at 229, 232 (noting how Cicero and Quintilian focused on *ethos* as a speaker’s characteristic rather than as a principle method of persuasion). It is noteworthy that some scholars have asserted that Cicero and Quintilian *do* address *ethos*, but they discuss it as it manifests in the speaker’s manner. According to Cicero, the obligations of the speaker include charming the audience through manners “or uncorruptibility of the speaker as of affability or manners.” GEORGE KENNEDY, *QUINTILLIAN 75* (1969). Others assert that “the orator cannot be perfect unless he is a good man.” Baumlin, *supra*, at 232 (internal citation omitted).

20. *See* ARISTOTLE, *supra* note 5, at 39.

21. *Id.* at 112.

22. The title of Aristotle’s work has been translated in several different ways. Some authors have referred to Aristotle’s work as *Rhetoric* (C.D.C. Reeve trans.), *The Art of Rhetoric* (John Henry Freese trans.), or *Treatise on Rhetoric* (Theodore Buckley trans.). In this Article, I rely on George Kennedy’s translation, *On Rhetoric: A Theory of Civic Discourse*. *See* ARISTOTLE, *supra* note 5.

23. *See id.* at 38.

24. *See* RICHARD L. JOHANNESSEN, *PERSPECTIVES ON ETHICS IN PERSUASION* 28-29 (1995).

irrelevant to the resolution of the dispute.²⁵ Ethos in argumentation is the process of convincing an audience that you possess the qualities of practical wisdom, virtue (which will be described below), and good will toward the audience.²⁶ A reader might ask, is being ethical not the same as appearing ethical? Or said another way, do not those who act ethically also appear ethical? My response would be not always. It is easy to envision a circumstance where an ethical individual may make an argument that appears to lack credibility. A famous example can be drawn from the 1988 United States presidential race.

In the 1988 presidential race, then Vice President George H. Bush was running against Governor Michael Dukakis. During a debate between the candidates, Governor Dukakis was asked, “Governor, if Kitty Dukakis [(Governor Dukakis’s wife)] were raped and murdered, would you favor an irrevocable death penalty for the killer?”²⁷ The Governor had a long and well established record of opposing the death penalty.²⁸ Governor Dukakis’ response was, “No, I don’t...I think you know that I’ve opposed the death penalty during all of my life.”²⁹ After Governor Dukakis gave his answer, observers in the press room said, “He’s through.”³⁰ Governor Dukakis lost the election, and although his defeat cannot be blamed entirely on this response, it is widely believed to have contributed to the loss.³¹

Given Governor Dukakis’ life-long, steadfast opposition to the death penalty, it is likely that his answer was honest, but it did not appear credible. Some have pointed out that the Governor’s response was without emotion, and so it could be framed as a failure in pathos (appealing to emotion),³² but I believe the failure was also ethos based.³³ In addition to appearing cold, the Governor’s answer

25. See ARISTOTLE, *supra* note 5, at 31–32 (stating that it is wrong to guide a jury towards emotions like “anger or envy or pity” and comparing such an appeal to these emotions with making a “straight-edge ruler crooked before using it”).

26. See *id.* at 112.

27. Roger Simon, *Questions that Killed Candidates’ Careers*, POLITICO (Apr. 20, 2007 6:09 PM), <https://www.politico.com/story/2007/04/questions-that-kill-candidates-careers-003617>.

28. *Id.*

29. *Id.*

30. *Id.*

31. It is at least worth noting that even years later Governor Dukakis did not believe the answer was that bad. See, e.g., Andrew J. McClurg, *Armed Standoff: The Impasse in Gun Legislation and Litigation: Article: Sound-bite Gun Fights: Three Decades of Presidential Debating About Firearms*, 73 UMKC L. REV. 1015, 1022–23 (2005); M.J. Stephey, *Top Ten Memorable Debate Moments: Dukakis’ Deadly Response*, TIME (2019), http://content.time.com/time/specials/packages/article/0,28804,1844704_1844706_1844712,00.html (last visited Sep. 10, 2020).

32. See ROBERT N. SAYLER & MOLLY BISHOP SHADEL, *TONGUE-TIED AMERICA: REVIVING THE ART OF VERBAL PERSUASION* 182–83 (2nd ed. 2014).

33. Professor Sayler has discussed the example of Governor Dukakis’ answer to the question regarding his wife in lectures as part of the class he co-teaches with Professor Shadel. During these lectures Professor Sayler discusses Governor Dukakis’ answer as a failure of pathos, ethos, and logos. See, e.g., Simon, *supra* note 27.

simply did not appear believable. Perhaps the Governor could have said something like, “If someone raped and murdered Kitty I would want to kill that person myself, but what if I was wrong? What if the person I believed committed these horrible crimes did not? The horror of the crimes you describe would be redoubled by the state sanctioned murder of an innocent citizen.” It is easy to arm-chair quarterback such events, but the point is, being a person of character and using appeals to character in argument are distinct.

A. Virtue

Aristotle discusses the nature of virtue in both *On Rhetoric* and *The Nicomachean Ethics*.³⁴ In *On Rhetoric*, Aristotle states, “[V]irtue...is an ability...that is productive and preservative of goods, and an ability for doing good in many and great ways, actually in all ways in all things.”³⁵ He goes on to describe some of the subparts of virtue as, “justice, manly courage, self-control, magnificence, magnanimity, liberality, gentleness, prudence, and wisdom.”³⁶

Although honesty or truthfulness is not explicitly mentioned in this description, it is described as a virtue in *The Nicomachean Ethics*³⁷ and is clearly at the heart of Aristotle’s consideration of virtue with regard to persuasion. As described in *On Rhetoric*, Aristotle also states that the adverse outcome of a lack of virtue is where an advocate “do[es] not say what [he] think[s] because of a bad character.”³⁸ Thus, we trust good people, at least in part, because good people do not lie.

B. Practical Wisdom

Aristotle described practical wisdom or prudence as the characteristic of being able to “deliberate well.”³⁹ This sort of statement has led some to describe Aristotle’s definition of practical wisdom as “notoriously cryptic.”⁴⁰ However, it seems understandable that defining practical wisdom would, by necessity, have to be general, just as explaining or defining common sense. In an apparent nod to the importance of practical wisdom, Aristotle wrote, “Prudence as well

34. See ARISTOTLE, *supra* note 5, at 61–65, 75–83; see generally ARISTOTLE, THE NICOMACHEAN ETHICS (H. Rackham trans., 1934) (c. 384 B.C.E.) (discussing the concept of moral virtue and how man can acquire it).

35. ARISTOTLE, *supra* note 5, at 76.

36. *Id.*

37. See *id.* at 241. Much of Aristotle’s *Book IV* is devoted to discussing prudence/practical wisdom, however much of that discussion appears to be categorical: explaining how prudence is different from scientific knowledge, or wisdom, or explaining how the various intellectual virtues differ from the moral virtues. *Id.*

38. *Id.* at 112.

39. *Id.* at 345.

40. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 135–36 (1998).

as Moral Virtue determines the complete performance of man's proper function: Virtue ensures the rightness of the end we aim at, Prudence ensures the rightness of the means we adopt to gain that end."⁴¹ This, and other passages have caused some to refer to practical wisdom as the master virtue.⁴² This discussion is consistent with Aristotle's emphasis on virtue as a practical philosophy where theory must be put into action.⁴³

C. Good Will or Well Disposed Toward the Audience⁴⁴

George Kennedy, a noted classical scholar, has observed that Aristotle's discussion of displaying good will toward an audience describes a more pragmatic approach to connecting with an audience than other classical philosophers, but is also more "open to possible abuse."⁴⁵ This seems quite accurate. Aristotle suggests that speakers adjust their rhetorical appeals to the psychological make-up of the audience.⁴⁶ For example, Aristotle asserts that the character of the young includes that, "they are impulsive and quick-tempered and inclined to follow up their anger."⁴⁷ Thus, a speaker should be aware of such qualities in the process of persuasion.

At first, this aspect of ethos-based persuasion would seem least concerned with honesty or truth. If viewed in isolation, Aristotle seems to infer that a speaker should manipulate his audience based on the presumed biases or prejudices of that group.⁴⁸ However, in the broader context of *On Rhetoric*, that does not seem accurate. First, Aristotle identifies the value and purpose of rhetoric, stating, "[R]hetoric is useful...because the true and the just are by nature stronger than their opposites."⁴⁹ Further, Aristotle rejects the authors who seek to manipulate the emotions of the audiences to achieve a victory.⁵⁰ He specifically explains:

[O]ne should be able to argue persuasively on either side of a question...not that we may actually do both (for one should not persuade what is debased) but in order that it may not escape our notice

41. ARISTOTLE, *supra* note 5, at 367.

42. See Mark L. Jones, *Developing Virtue and Practical Wisdom in the Legal Profession and Beyond*, 68 MERCER L. REV. 833, 843 (2017).

43. See Marcel Becker, *Aristotelian Ethics and Aristotelian Rhetoric*, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 114 (Liesbeth Huppens-Cluysenaer & Nuno M.M.S. Coelho eds., 2013).

44. See ARISTOTLE, *supra* note 5, at 74.

45. *Id.* at 148.

46. See *id.* at 149.

47. *Id.*

48. See *id.* at 148.

49. *Id.* at 35.

50. See *id.* at 31. Aristotle writes, "[I]t is wrong to warp the jury by leading them into anger or envy or pity: that is the same as if someone made a straight-edge ruler crooked before using it." *Id.* at 31-32.

what the real state of the case is and that we ourselves may be able to refute if another person uses speech unjustly.⁵¹

It seems more likely that Aristotle's reference to being well disposed to an audience is advice to ensure speakers do not alienate an audience. As I will discuss below, I assert that apparent honesty in the context of Justices on the Supreme Court is a necessary component of being "well disposed to" the Supreme Court's audience.

D. Audience Expectation

Since the Peloponnesian War, rhetoricians have understood the importance of meeting the needs and expectations of an audience.⁵² Adjusting the method of persuasion to an audience has been discussed at length by classical rhetorical philosophers like Aristotle and Cicero,⁵³ and modern rhetoricians like Kenneth Burk, Chaim Perelman, and Lucy Olbrechts-Tyteca.⁵⁴

An early example of this dynamic is illustrated by Thucydides in *The History of the Peloponnesian War*.⁵⁵ Thucydides describes the process by which the Spartans deliberated on whether to go to war with Athens and its allies.⁵⁶ The decision was made by the Spartan assembly.⁵⁷ The Spartan King, Archidamus, urged a calm reflective decision making process,⁵⁸ while the Spartan ephor,⁵⁹ Sthenelaidas, urged immediate violent action.⁶⁰ Although the Spartan King offered several valid, logical reasons to approach the decision to go to war cautiously, the less reasoned, more passionate speech carried the day.⁶¹ One scholar has asserted that despite Archidamus' speech being more logical, he failed to account for his audience.⁶² The Spartan assembly was suspicious of long speeches, and was comprised of many soldiers who were in an angry frame

51. *Id.* at 35.

52. See David Cohen, *The Politics of Deliberation: Oratory and Democracy in Classical Athens*, in *A COMPANION TO RHETORIC AND RHETORICAL CRITICISM* 22, 25–26 (Walter Jost & Wendy Olmsted eds., 2004) (describing the deliberative process among the Spartans prior to the vote on whether to go to war with Athens and pointing out that the most persuasive speech will often be the one most tailored to the audience).

53. See HERRICK, *supra* note 10, at 8–9, 108.

54. See *id.* at 10.

55. See THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR* 33–43 (Richard Crawley trans., 2017) (1874).

56. See *id.*

57. See *id.*

58. See *id.*

59. See *Ephor*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997) (defining an ephor as "one of five ancient Spartan magistrates having power over the king" in ancient Greece).

60. See THUCYDIDES, *supra* note 55, at 43.

61. See Cohen, *supra* note 52, at 26–27.

62. See *id.*

of mind.⁶³ Sthenelaidas presented a shorter, impassioned speech that played on the Spartan's fear of Athens growing even more powerful.⁶⁴

II. ETHOS, HONESTY, AND THE SUPREME COURT

As discussed above, there is already a strong connection between the sub-elements of ethos-based appeals and honesty. Below, I will argue that this connection is even stronger when viewed in the context of the opinion of a Supreme Court Justice. The Supreme Court's audience is as diverse as any. Justices seek to persuade the parties to the action, the public, lawyers, judges, law enforcement, politicians, one another, and future audiences—particularly future Justices of the Supreme Court. Nearly all the constituent parts of the Supreme Court's audience expect truthfulness. This expectation is manifest in the idealized symbols of the Court, the structure of our government, and empirically supported by the scholarship of social psychologists and law professors researching procedural justice.⁶⁵ I will discuss one possible exception to this broad expectation of truth. This exception would apply in the circumstance where what is legally correct is morally wrong. We can call this the moral lie doctrine. The moral lie doctrine is arguably a sub-category of the more commonly known idea of a noble lie.⁶⁶ Several legal scholars have suggested that in exceedingly rare circumstances a judge's duty to the truth may

63. *See id.*

64. *See* THUCYDIDES, *supra* note 55, at 43 (“Vote therefore, Lacedaemonians, for war, as the honour of Sparta demands, and neither allow the further aggrandizement of Athens, nor betray our allies....”).

65. *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7 (2002) (explaining that people's perception of procedural justice is influenced by the degree to which they find the actors are honest and unbiased); *Symbols of Law Information Sheet*, OFF. OF THE CURATOR, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/SymbolsofLawInfoSheet%209-28-2015_Final.pdf (last updated Sep. 28, 2015) (describing the scales of justice adorning the Supreme Court building).

66. Numerous law review articles discuss the concept of noble lies in the context of judicial decision making. The term noble lie is often traced back to Plato's *Republic*, where he discusses creating an ideal society. According to Plato, as part of the ideal society there should be one or two founding noble lies. These lies, like all the citizens are of a single heritage or that the hierarchy of society was divinely ordained, serve to bind and improve society. *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1773 (2013) (“The noble lie requires that the true justification for a practice remain concealed from the population subject to a beneficial illusion, which means that judges cannot publicly offer that justification within the system.”). I distinguish a noble lie from a moral lie in this paper and assert a moral lie is a subcategory of a noble lie. Thus, all moral lies are noble lies but not all noble lies are moral lies. Justices may commit a noble lie simply because they feel their proposed solution is the best for all concerned to resolve a problem but do not feel the current legal framework would support their conclusion. I make this distinction primarily because most of the scholars who discuss the permissibility of a judicial lie do so when it is the morally right thing to do, not just the better outcome. *See id.* at 1785.

be trumped by a moral duty.⁶⁷ I will suggest, at least in the circumstance of a Supreme Court Justice, the moral lie doctrine should not apply.

A. *Images of Justice*

One of the most dominant images associated with the United States Supreme Court are the scales of justice. The scales appear both inside the Court and outside.⁶⁸ In the circular published by the Court, the scales of justice are described as “[s]ymbolizing the impartial deliberation, or ‘weighing,’ of two sides in a legal dispute. . . .”⁶⁹ In several of these images the scales are held by a blindfolded individual, further indicating the impartiality of the Court and, more broadly, justice.⁷⁰ I would also assert that blindfolded justice goes beyond mere impartiality. Blindfolding the individual holding the scales removes even the possibility of dishonesty.

The Supreme Court is, in theory, our nation’s most sophisticated scale of justice.⁷¹ However, this assumes that the Justices of the Court are not placing a metaphoric finger on one side of the balance. A Justice’s opinion is, in effect, that individual’s account of the weighing. But to lie in an opinion is to give a false weight, and it can be reasonably argued that a scale that does not measure accurately is a scale not worth having.

Of course, it could also be argued that the Supreme Court is nothing like a scale, and the scales on the Court are merely adornment. Usually, a scale

67. See Scott C. Idleman, *supra* note 1, at 1381 (analyzing the arguments for a pro-candor rule in judicial opinion writing and then asserting that there are occasions where this pro-candor default is inappropriate); see also Shapiro, *In Defense of Judicial Candor*, *supra* note 1, at 747; Goldsworthy, *supra* note 1, at 305; Richard H. Fallon Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2311, 2315 (2017) [hereinafter Fallon, *A Theory of Judicial Candor*]; Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1834–37 (2005) [hereinafter Fallon, *Legitimacy and the Constitution*].

68. See *Symbols of Law Information Sheet*, *supra* note 65. There the scales are described as: The Scales of Justice: Perhaps the most ancient symbol associated with the law is also one of the most familiar, the Scales of Justice. Symbolizing the impartial deliberation, or “weighing,” of two sides in a legal dispute, the scales are found throughout the building.

Locations: In the Courtroom Frieze, scales are held by *Equity* in the north panel, *Divine Inspiration* in the west panel, and are on the shield held by *Youth* in the east panel. The West Pediment includes a figure of *Liberty* with the scales in her lap. On the front plaza, the small blindfolded statue within *Contemplation of Justice* clutches them to her body, the figure of *Justice* on the two lampposts hold them, and a small figure on the flagpole base has them, too. The scales are also incorporated in the design of the bronze elevator doorframes . . . , as a part of a repeating relief on the building’s exterior, as one of the metopes in the Great Hall, and as a decorative motif on the ceiling of the Special Library[.]

Id.

69. *Id.*

70. See *id.*

71. See *Introduction to the Federal Court System*, OFFS. U.S. ATT’R, <https://www.justice.gov/usao/justice-101/federal-courts> (last visited Sep. 10, 2020).

measures two objects in relation to one another based on the single quality of measure. In many cases, the Supreme Court is called upon to balance the diverse needs of a nation: individual rights against the public good; policy needs against litigant needs; responsible adaptations to new realities against stare decisis; and the Court's power against the other branches of government. Take, for example, the case of *National Federation of Independent Business v. Sebelius*.⁷² The Court had to navigate questions of legislative and state authority, individual rights, and judicial interpretation of statutory language, while the nation watched and waited for its decision.⁷³ Thus, the scale metaphor fails to capture the full range of competing interests at stake in some cases.

To this argument, it can be countered that because of the complexity of the matters that are considered by the Court, the opinions of its Justices must remain at their essence simple. In the end, every decision the Court makes balances evidence, arguments, and policies in a context where one side will win, and one side will lose. Some Justices on the Supreme Court have likened being a judge to being an umpire in baseball.⁷⁴ An umpire is called upon to do more than just ensure the rules of baseball are followed.⁷⁵ Umpires encourage sportsman like conduct, look out for the safety of players, and ensure the game moves along in a timely manner, but none of that matters if they do not call balls and strikes honestly.⁷⁶

B. The Baggage of Life Tenure

Audience expectation of truthfulness can also be inferred by the unique place the Supreme Court occupies in our republic. The Court is distinctly undemocratic. Unelected and serving for life, Justices are not subject to the will of the people in the traditional sense.⁷⁷ If the people of the United States are

72. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

73. See *id.* at 562–65.

74. See, e.g., Scott Shane, *In Capital and at the Court, Baseball Rules*, N.Y. TIMES (Nov. 5, 2005), http://www.nytimes.com/2005/11/05/politics/politicsspecial1/in-capital-and-at-the-court-baseball-rules.html?_r=0 (noting that “John G. Roberts Jr., talk[ed] his way to confirmation as Chief Justice of the United States with the insight that ‘judges are like umpires’”) (emphasis added); see also Thomas Jipping, *Is a Judge a Player or an Umpire?*, HERITAGE FOUND. (Apr. 9, 2018), <https://www.heritage.org/courts/commentary/judge-player-or-umpire> (“Judge Brett Kavanaugh has embraced the parallel between a judge and an umpire. In [a] March 2015 speech at Catholic University School of Law, for example, he outlined ten principles by which a ‘good judge’ is like an umpire. ‘To be an umpire as a judge,’ he said, ‘means to follow the law and not to make or re-make the law—and to be impartial in how we go about doing that.’”).

75. See Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911, 931–32 (2018); see also Roberts: ‘My Job is to Call Balls and Strikes and Not to Pitch or Bat’, CNN (Sept. 12, 2005 4:58 PM), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/> (noting that before becoming Chief Justice, John Roberts famously declared that as a judge his job was to call the balls and strikes, not to pitch or bat).

76. See Iuliano, *supra* note 75, at 931–34.

77. See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L. J. POCKET PART 38, 39 (2006).

unsatisfied with Congress or a President, they can do something about it.⁷⁸ Citizens regularly vote politicians or political parties out of power when they are dissatisfied—this is not possible with Supreme Court Justices.⁷⁹ So long as a Justice serves with good behavior—which is to say, is not impeached—they will remain on the High Court.⁸⁰ In the history of the Court, only one Justice has ever faced impeachment, and that was in 1805.⁸¹

The need for life tenure is well-explained in Alexander Hamilton's *Federalist Paper No. 78*.⁸² Hamilton asserts that in order for the judiciary to be independent of pressure from the executive and legislative branches or the passions of the majority in a given moment, its Justices must be life-tenured and removable only if they fail to meet the good behavior standard.⁸³ The judiciary's independence is a necessary provision to ensure that the will of the people, as expressed in the Constitution, is fulfilled.⁸⁴ However, the fact that the people, who are superior to all branches of government,⁸⁵ have the final word is critical to this arrangement. With respect to Supreme Court Justices, that final word cannot be exercised through the traditional method of voting.⁸⁶ Rather, that final word must be exercised by alteration of the Constitution.⁸⁷

With regard to the Constitution, if the people are dissatisfied with a particular interpretation by the Supreme Court, they can vote to amend the document.⁸⁸

78. See *House of Representatives*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/House_of_Representatives_vrd.htm (last visited Sep. 10, 2020) (explaining that Representatives serve for two-year terms, after which they must seek re-election); *Senators*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Senators_vrd.htm (last visited Sep. 10, 2020) (explaining that Senators serve for six-year terms, after which they must seek re-election); Tom Murse, *How Many Years a President Can Serve in the White House*, THOUGHTCO, <https://www.thoughtco.com/why-presidents-only-serve-two-terms-3367979> (last updated Aug. 12, 2019) (explaining that Presidents serve for four-year terms, and may only be elected twice).

79. See Post & Siegel, *supra* note 77, at 39.

80. See, e.g., *Samuel Chase Impeached*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/samuel-chase-impeached> (last visited Sep. 10, 2020) (explaining that Samuel Chase was the only Supreme Court Justice to be indicted but was acquitted because the charges against him were political in nature).

81. See *id.*

82. See THE FEDERALIST NO. 78, *supra* note 3, at 463–65 (Alexander Hamilton).

83. See *id.*

84. See *id.* at 469–70.

85. See *id.* at 466–67.

86. Post & Siegel, *supra* note 77, at 39 (suggesting that the demands of democracy are fulfilled through the Senate confirmation process).

87. See THE FEDERALIST NO. 78, *supra* note 3, at 468–69 (Alexander Hamilton); see also Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952) (arguing that democratic principles are realized through the provisions for amending the Constitution).

88. See U.S. CONST. art. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds

For example, in *Griswold v. Connecticut*,⁸⁹ the Court ruled that the Constitution contains a right to privacy that is inferred based on the penumbras and emanations of several amendments to the Constitution.⁹⁰ In *Roe v. Wade*, the Court further concluded the right of privacy includes a woman's right to choose whether to continue with a pregnancy or not.⁹¹ This interpretation has been met with significant resistance.⁹² The people have the option to change the Constitution to either extend protection to unborn children or to explicitly recognize a right to privacy that does not include abortion.⁹³ However, if the Court does not provide a truthful basis upon which it has concluded a law is contrary to the Constitution, the people may be prevented from having their final say.

At least two arguments might be raised against the above assertion. First, the Supreme Court's audience does not really concern itself with the undemocratic aspect of the Court.⁹⁴ Second, amending the Constitution is such a rare event and is so difficult to achieve, that it is not a valid option and thus serves as a false reason to claim the Court's audience expects honesty in a Justice's opinion.⁹⁵

To the first argument, it could be claimed its major premise is flawed. The undemocratic nature of the Court has been a significant concern to the public at various times in American history.⁹⁶ The Court's uniquely unaccountable

of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id.

89. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

90. *See id.* at 484 (explaining that the guarantees protected by the First, Third, Fourth, Fifth, and Ninth Amendments "create zones of privacy" implicitly protected by the Constitution).

91. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

92. *See, e.g.,* Ashley Parker, *40 Years After Roe v. Wade, Thousands March to Oppose Abortion*, N.Y. TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/26/us/politics/40-years-after-roe-v-wade-thousands-march-to-oppose-abortion.html>.

93. *See* U.S. CONST. art. V.

94. *But see* George Mace, *The Antidemocratic Character of Judicial Review*, 60 CAL. L. REV. 1140, 1141 (1972) (noting the public sees a contradiction with the court's unelected structure and democracy).

95. *See Constitutional Amendment Process*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/federal-register/constitution> (last visited Sep. 10, 2020) (explaining the lengthy, multi-step process to pass an amendment to the Constitution).

96. *See, e.g.,* Mace, *supra* note 94, at 1141 (noting that many believe "judicial review is not consistent with the spirit and form of democratic government").

position was a matter of debate in the Federalist and Anti-federalist Papers.⁹⁷ Andrew Jackson was reelected in 1832, despite challenging the Supreme Court's supremacy in constitutional interpretation.⁹⁸ He claimed that as the true representative of the people, he had equal authority with the Supreme Court to interpret the Constitution, and suggested he was not bound by the Court's interpretations.⁹⁹ President Franklin D. Roosevelt famously considered altering the composition of the Supreme Court because it failed to affirm components of his New Deal platform.¹⁰⁰ More recently, controversies involving public school education and abortion have caused commentators to criticize the Court's undemocratic nature.¹⁰¹

As discussed above, Hamilton's argument in favor of an independent judiciary turns in part on the idea that the public has the least to fear from a Court that "has no influence over either the sword or the purse."¹⁰² However, being the least dangerous branch does not mean the Court poses no danger. In order for the people to counter the danger that the Court poses, the people must have, and therefore expect, honest judicial opinions.

A second argument might assert that because there is practically no recourse for the public to alter Supreme Court opinions interpreting the Constitution, the reasons provided by the Court and its Justices are of little import. This argument turns on the difficulty involved in amending the Constitution.¹⁰³ Of course difficult recourse is not the same as no recourse. In fact, several Constitutional

97. Brutus, *Essay XV*, in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 304, 304–08 (Ralph Ketcham ed., 1986) (1788); THE FEDERALIST NO. 78, *supra* note 3, at 469–70 (Alexander Hamilton); *From Thomas Jefferson to Edward Livingston*, 25 *March 1825*, U. VA. PRESS, <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-5077> (last visited Sep. 10, 2020) (explaining that the Supreme Court was "at first considered...the most harmless and helpless of all [the government's] organs" but has developed to the point of "sapping and mining...the foundations of the [C]onstitution...").

98. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 549 (2002); John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 550–51 (2008). In an address to Congress, President Jackson stated: "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve." Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson, III ed., 2d ed. 1911).

99. Yoo, *supra* note 98, at 548–52.

100. William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/>.

101. See, e.g., Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1022 (1992).

102. THE FEDERALIST NO. 78, *supra* note 3, at 465 (Alexander Hamilton).

103. Erwin Chemerinsky, *Amending The Constitution*, 96 MICH. L. REV. 1561, 1565 (1998). See Fallon, *Legitimacy and the Constitution*, *supra* note 67, at 1807–08.

amendments can be traced to a precipitating Supreme Court decision.¹⁰⁴ For example, the Twenty-Sixth Amendment, ratified in 1971, was at least partially a response to the Supreme Court's decision in *Oregon v. Mitchell*.¹⁰⁵ Even more recently, efforts have been made to amend the Constitution in response to Supreme Court decisions regarding abortion rights and flag burning.¹⁰⁶ Truthful Supreme Court opinions are important for the public to determine if an amendment to the Constitution is the appropriate course to follow.

C. Procedural Justice, Legitimacy, and Truthfulness

Legitimacy has always been a concern of the Supreme Court.¹⁰⁷ This concern has only deepened with time.¹⁰⁸ Recent scholarship supports the intuitive connection between the Court's legitimacy and the public's perception of the honesty and character of the Court as reflected in its opinions.¹⁰⁹

Beginning in the mid-1970s, scholars focusing on the intersection between the law and psychology published the influential book *Procedural Justice: A Psychological Analysis*.¹¹⁰ In *Procedural Justice*, Professors Thibaut and

104. Chemerinsky, *supra* note 2, at 1230 n.155.

105. *Oregon v. Mitchell*, 400 U.S. 112, 134–35 (1970); *see also* Chemerinsky, *supra* note 2, at 1230 n.155.

106. Lawrence K. Furbish, *Constitutional Amendments to Reverse Supreme Court Decisions*, CONNECTICUT GENERAL ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH (Sept. 25, 1996), <http://search.cga.state.ct.us/dlps96/Rpt/htm/96-R-1042.htm>. Since the Supreme Court decided *Roe v. Wade*, there have been numerous efforts to amend the Constitution to authorize states or the federal government to regulate abortions. *Id.* One proposal that would reverse *Roe v. Wade*, the Hatch-Eagleton proposal, actually made it to a Senate vote. Steven V. Roberts, *Full Senate Gets Abortion Measure*, N.Y. TIMES, Apr. 20, 1983, at A12. The Flag Desecration Amendments, which have been voted on twice by Congress, once in 1995 and again in 2006, were in response to the Supreme Court decisions *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990). *See* Marni Goldberg, *Flag Desecration Amendment Fails*, CHI. TRIB. (June 28, 2006), http://articles.chicagotribune.com/2006-06-28/news/0606280130_1_american-flag-28th-amendment-senate-on-tuesday-night; Robin Toner, *Flag-Burning Amendment Fails in Senate, but Margin Narrows*, N.Y. TIMES, Dec. 13, 1995, at A1.

107. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 22 (2010). There, Justice Breyer states:

Although *Marbury* gave the Court the power to refuse to apply an act of Congress on the ground that it violated the Constitution, the Court did not again exercise that power until its decision in the *Dred Scott* case more than fifty years later. This hesitancy to find a federal statute unconstitutional, like Marshall's strategic view of *Marbury*, suggests a Court deeply uncertain as to whether the president, the Congress, or the public itself would accept the Court's views about the Constitution.

Id.

108. Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 206, 207 (2012). Farganis notes that the United States Supreme Court mentioned concerns over institutional legitimacy only nine times before *Brown v. Board of Education* and seventy-one times between 1954 and 2009. *Id.*

109. *See id.* at 213.

110. *See* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

Walker examine how individuals and groups in the United States resolve conflicts.¹¹¹

Professor Tom Tyler, and others, have expanded Professors Thibaut and Walker's work by examining the impact of procedural justice on public perceptions of institutional legitimacy.¹¹² Professor Tyler has presented a body of scholarly work that supports the conclusion that institutional legitimacy is enhanced by perceptions of procedural justice.¹¹³ Honesty, or at least perceived honesty, is one of the attributes recognized by Professor Tyler's research as leading citizens to see authority as fair.¹¹⁴ Thus, honesty is a component of procedural justice, and procedural justice is important to institutional legitimacy.¹¹⁵

Professors Tyler and Yuen Huo have also identified a related psychological factor that impacts individual perceptions of institutional legitimacy called motive-based trust.¹¹⁶ Motive-based trust relates to the public's confidence in the character of legal authority as inferred by "the actions" of that authority.¹¹⁷ Thus, the public's perception that the actions of the Court reflect good character also impacts the Court's legitimacy. Consistent with Professors Tyler and Huo's work is the research of Professor Dion Farganis.¹¹⁸ Professor Farganis investigated and found evidence that the manner in which the Justices write their opinions impacts the public's perception of the Court's institutional legitimacy.¹¹⁹

In addition to empirical research connecting the Court's perceived legitimacy to the apparent trustworthiness of its opinions, members of the Court have recognized this connection.¹²⁰ Justices on the Court have repeatedly commented on the importance of the public's perception of its legitimacy.¹²¹ One famous example is included as part of the Court's plurality opinion in *Planned*

111. *Id.* at 1.

112. See TYLER & HUO, *supra* note 65, at 7–18 (discussing the impact of procedural justice on public perceptions of institutional legitimacy and arguing that people obey the law when they view the enforcement agency and the promulgation process as legitimate).

113. See generally *id.*

114. *Id.* at 7.

115. *Id.*

116. *Id.* at 58.

117. *Id.* at 61–67.

118. Compare *id.* with Farganis, *supra* note 108, at 207–14.

119. Farganis, *supra* note 108, at 206. Professor Farganis concluded that "the message from the results of this study is clear: reasons matter, but not as much as some might think. Therefore, Justices who trim their rhetorical sails because they are concerned about public backlash may sometimes do this unnecessarily. Loyalty to the Court, while not entirely static, runs deep. Why the Justices seem to be unaware of this remains something of a mystery." *Id.* at 214.

120. *Id.* at 208 ("Justice Samuel Alito opined during his Supreme Court confirmation hearing, '[T]he legitimacy of the Court would be undermined in any case if the Court made a decision based on its perception of public opinion.'") (citation omitted).

121. *Id.* at 207.

Parenthood v. Casey.¹²² Justices O'Connor, Kennedy, and Souter (joined in part by Justices Blackmun and Stevens) jointly wrote the opinion of the Court which stated, "The Court's power lies...in its legitimacy..."¹²³

Social psychology has found empirical support for the intuitive statement that judicial opinions demonstrating good character and honesty contribute to a perception of legitimacy.¹²⁴ Further, the Court's perceived legitimacy is, according to members of the Court, the primary source from which the Court derives its power.¹²⁵

It could be argued that trust and honesty are distinct concepts and one does not necessarily require the other. Thus, the Court could retain its legitimacy so long as it is trusted, even if it is understood that, from time to time, Justices will bend the truth. Virtually no one lives by a rule of complete and total honesty and yet each of us trusts others.¹²⁶ Thus, we already trust people who we know are not always honest. In fact, in some circumstances, we are likely to trust individuals more for their well-intended dishonesty.¹²⁷ Further, honesty, as a stand-alone factor, is actually only a small part of procedural justice—a sub factor of a sub factor. Honesty is also a small part of motive-based trust.¹²⁸ It could be argued that the real emphasis in motive-based trust, as it relates to the Court, is on a belief that the Justices have a virtuous motive.

A possible counter to the above argument is that, even though honesty and trust can be distinct factors, they nonetheless impact one another.¹²⁹ Examples where we might still trust an individual who has made a false statement usually involve a person with whom we have a personal relationship.¹³⁰ In that circumstance trust is based on a confidence that the person has our best interest at heart—thus a friend. In circumstances where a Justice of the Supreme Court is explaining why a law is or is not Constitutional, trust is intimately linked to honesty, as other foundations for that trust are limited.

Finally, it is easy to imagine circumstances where a person of character would be untruthful. Imagine a friend who is the victim of domestic violence coming to your home and asking for help. A few minutes after letting your friend into your home their abuser shows up and asks where the victim is. There seems little doubt that lying to the abuser would be both prudent and reflect good character. However, the motive of a Justice for being untruthful is much more

122. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

123. *Id.*

124. TYLER & HUO, *supra* note 65, at 62–68.

125. Farganis, *supra* note 108, at 208.

126. THOMAS E. HILL JR., *THE BLACKWELL GUIDE TO KANT'S ETHICS* 238 (2009). "Lying. Some of Kant's conclusions on the topic are infamously extreme" as Kant's philosophy forbids all lying. *Id.*

127. MARTIN JAY, *THE VIRTUES OF MENDACITY: ON LYING IN POLITICS* 31 (2010).

128. TYLER & HUO, *supra* note 65, at 62–64.

129. JAY, *supra* note 127, at 32.

130. *Id.* at 31.

difficult to discern. Among the various reasons why a Justice might be untruthful, there are just as many negative character-based reasons as positive ones. Greed, arrogance, political gain—all could conceivably be motives. The founders appear to have generally accepted the need for a separation of branches as a means to prevent the consolidation of power and a downward slide to tyranny.¹³¹ Is it not just as likely that the public would perceive dishonest Justices as seeking to enhance the Court's power, as opposed to a positive character-based reason?

D. *The Moral Lie*

The final subcomponent of this Section regarding audience expectation and the Supreme Court focuses on the rich debate surrounding judicial candor and when, if ever, a Justice may lie. Several scholars have written on judicial candor from a legal, ethical, moral, and practical perspective.¹³² As part of that discussion, some have suggested that it may be permissible for a judge to be untruthful.¹³³ The most common position is that in exceedingly rare circumstances, a judge may deviate from the standards of judicial candor when morality demands an untruthful opinion.¹³⁴ Although the focus of this Essay is on the need for apparent honesty in Supreme Court opinions as a tool of persuasion, I feel compelled to discuss the issue of moral lies because it clarifies my theory of apparent honesty.

Several well-respected scholars have offered principled arguments in favor of the moral lie exception. Professor Richard Fallon has written two articles that touch on the subject.¹³⁵ The first article discusses the various forms of legitimacy that are related to the United States Supreme Court.¹³⁶ The forms of legitimacy Professor Fallon identifies are moral, legal, and sociological.¹³⁷ Professor Fallon explains his belief that a Supreme Court decision can be morally legitimate and legally illegitimate.¹³⁸ Professor Fallon's other article¹³⁹ is a deep dive into the nuances of judicial candor—noting that judicial candor is best understood as running along a spectrum with ideal candor at one end and

131. THE FEDERALIST NO. 47, *supra* note 3, at 298 (James Madison) (“The accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”); *see also* Charles Kesler, *What Separation of Powers Means for Constitutional Government*, HERITAGE FOUND. (Dec. 17, 2007), <http://www.heritage.org/political-process/report/what-separation-powers-means-constitutional-government>.

132. *See supra* note 2.

133. Fallon, *A Theory of Judicial Candor*, *supra* note 67, at 2312.

134. *Id.* at 2310–11, 2315–17.

135. *Id.* at 2311; Fallon, *Legitimacy and the Constitution*, *supra* note 67, 1834–37.

136. Fallon, *Legitimacy and the Constitution*, *supra* note 67, 1834–37.

137. *Id.* at 1790.

138. *Id.* at 1834, 1837.

139. Fallon, *A Theory of Judicial Candor*, *supra* note 67.

minimally obligatory candor at the other.¹⁴⁰ Professor Fallon presents a clear and persuasive argument favoring judicial candor but allows for the possibility of exceedingly rare circumstances where, on moral grounds, the obligation to candor may yield.¹⁴¹ Professor David Shapiro, in his influential article, *In Defense of Judicial Candor*, also accepted that there might be an obligation to lie in the extremely rare circumstance where there is a “conflict between legal and moral right.”¹⁴² Professor Idleman’s *A Prudential Theory of Judicial Candor* discusses several reasons for deviating from the pro-candor rule, including moral necessity.¹⁴³ Other authors like Professor Ronald Dworkin have written that when a conflict arises where doing what is legally correct is morally wrong, a judge is permitted to lie.¹⁴⁴

It is easy to see how the moral lie argument is appealing. Professor Fallon describes the following:

Real examples may include criminal cases involving African American defendants, some subject to the death penalty, that came to the Supreme Court from what the Justices reasonably could have supposed to be racially biased state courts during the Jim Crow era. In a number of these cases, the state courts invoked state law grounds—which, as a technical matter, would ordinarily lie beyond the capacity of the Supreme Court to review—to refuse even to adjudicate the claims of federal right that the defendants presented.¹⁴⁵

When examining such cases like *Brown v. Mississippi*,¹⁴⁶ where the governmental injustice is appalling, the Court’s action is wholly correct. Further, it is easy to imagine that if Justices of the Supreme Court had only done what was morally right, decisions like *Dred Scott*,¹⁴⁷ *Plessy*,¹⁴⁸ and *Korematsu*¹⁴⁹ would have never been written. What is more difficult to understand is why Justices should cloak their moral decisions in a deceptive shroud of false reasoning. If justice can be achieved by a lie, can it not also be achieved through the truth?

It is possible that there is really no disagreement between my position and authors describing a moral lie. The various authors discussing the exceptional

140. *Id.* at 2269.

141. *Id.* at 2311, 2317.

142. Shapiro, *In Defense of Judicial Candor*, *supra* note 1, at 749; *see also* Idleman, *supra* note 1, at 1375–76.

143. Idleman, *supra* note 1, at 1381–87.

144. Shapiro, *In Defense of Judicial Candor*, *supra* note 1, at 749. The example Professor Dworkin provides is a law that punishes based on race alone with no legal basis to deny the law’s application. *Id.*

145. Fallon, *A Theory of Judicial Candor*, *supra* note 67, at 2309.

146. *Brown v. Mississippi*, 297 U.S. 278 (1936).

147. *Scott v. Stanford*, 60 U.S. 393 (1857).

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

149. *Korematsu v. United States*, 323 U.S. 214 (1944).

circumstance of a moral lie may really only be describing the circumstance where a judge or justice does not have a clearly established legal foundation to support their exercise of power. Thus, if a Justice must exercise power where they traditionally would not have power, the exercise of that power is a form of a lie. I would not consider this to be a lie unless the justice or judge claimed a power they did not believe existed.¹⁵⁰ Thus, a Justice could explain that although the Court traditionally would not have the power to resolve the issue at hand, under the extraordinary circumstances of the particular case it does have the power.

It could be argued that the moral lie justification is more appropriately applied to judges rather than Justices.¹⁵¹ Obviously if a trial judge or intermediate appellate judge encounters a situation where the legally correct action is at odds with morality and the judge does the morally right thing and states it, that action can be appealed.¹⁵² This problem is not present when the opinion is issued by a Supreme Court Justice. No appellate body exists beyond the Supreme Court, and absent a refusal on the part of the Executive or state governments to follow the Court's judgment, the decision would have the same effect whether the rationale offered was honest or not. Thus, a Supreme Court Justice has even less justification for a moral lie than a trial or intermediate judge.

Some have suggested that the moral lie is necessary to defend aspects of the legitimacy of the Court while also vindicating the values at play in a particular case.¹⁵³ However, it could be argued that such an approach actually endangers the Court's legitimacy in situations where the public perceives that the Court exceeded its authority, and lied about it. Moreover, difficult questions that exist at the intersection between law and morality would seem to be exactly the sort of occasion where honesty would be most critical. Although Justices on the Supreme Court can rightly claim a unique and expert skill when addressing questions of law, they have no greater entitlement to resolving questions of morality than any other citizen. If the Justices of the Court were to encounter a situation where morality and not the law were dictating the outcome of the case, their obligation to sincere candor is heightened, not diminished.

150. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 13 (1978) (defining a lie as "any intentionally deceptive message which is stated.").

151. See generally Shapiro, *Judges as Liars*, *supra* note 1; Idleman, *supra* note 1.

152. See The Editorial Board, *Outrageous Sentences for Marijuana*, N.Y. TIMES (Apr. 14, 2016), <https://www.nytimes.com/2016/04/14/opinion/outrageous-sentences-for-marijuana.html>. In the area of mandatory sentencing, it is easy to imagine a situation where a legally correct outcome is immoral. For example, in July of 2011 a seventy-five year-old man was sentenced to life without the possibility of parole for growing personal use marijuana. *Id.* His sentence was dictated by an Alabama mandatory sentencing law that required the sentence in cases where the defendant had a prior conviction for certain violent crimes. *Id.* The defendant had a two-decade old prior conviction for armed robbery. *Id.* It is relevant to this discussion that after sentencing the defendant, the judge specifically stated that the sentence required by law was unjust. *Id.*

153. Fallon, *Legitimacy and the Constitution*, *supra* note 67, at 1836.

In recent years, two Supreme Court opinions have rejected the idea that the Justices of the Court are permitted to impose their sense of morality through their decisions.¹⁵⁴ In *Casey*, the Court stated, “Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.”¹⁵⁵ Justice Kennedy writing for the majority in *Lawrence v. Texas* addressing an anti-sodomy law cited to *Casey* and wrote, “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”¹⁵⁶ These opinions seem to foreclose the argument that a Justice should be permitted to lie on moral grounds.

I agree there may be occasions where the demands of morality are in conflict with the law and Justices on the Supreme Court feel compelled to act in conformity with morality. I am not convinced that such actions will require dishonesty.

III. Credibility Choke Points

Even when Justices strive to provide honest, practical, and competent opinions they may face accusations that they have not been candid. Justice Owen Roberts was reportedly deeply hurt by the rumor that he had switched his vote in the 1937 case of *West Coast Hotel v. Parrish*¹⁵⁷ for political rather than judicial reasons.¹⁵⁸ For decades since, it has been debated whether Roberts switched his vote due to external political pressure or an internal jurisprudential shift in his beliefs.¹⁵⁹ I suggest part of this debate was exacerbated by the fact that Justice Roberts failed to negotiate two of at least three common credibility choke points.

Credibility choke points, as I call them, are points in judicial opinions, particularly Supreme Court opinions, where there is a heightened danger of appearing untruthful. These are opinions or passages in opinions, where the danger of appearing dishonest is high, and so special care needs to be taken to assure readers that the Justice is being candid and sincere. I suggest at least three choke points: questions involving stare decisis, highly politicized cases, and confronting changes in a Justice’s past opinions. Although I will be addressing each of these choke points separately, it is not uncommon for a Justice to face several choke points in a single opinion.

154. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Planned Parenthood v. Casey*, 505 U.S. 833, 849–50 (1992).

155. *Casey*, 505 U.S. at 850.

156. *Lawrence*, 539 U.S. at 571.

157. *See generally* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

158. PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 39 (1982).

159. *Id.* at 39–40.

A. *Stare Decisis: What Does that Case Really Say?*

One of the most common allegations directed against controversial opinions is that the author has violated the doctrine of stare decisis.¹⁶⁰ This allegation can occur because critics believe the author of an opinion has refused to follow precedent, has misread (purposely or not) the precedent, or has misapplied the precedent.

Stare decisis is a short-hand method of capturing the idea contained in the longer Latin phrase “stare decisis et non quieta movere,” which translates to “stand by the decision and do not disturb what is settled.”¹⁶¹ The doctrine of stare decisis is one of the theories of judicial interpretation upon which judges across the jurisprudential spectrum can generally agree.¹⁶² Justices with as wide and varied judicial philosophies as Justice Antonin Scalia¹⁶³ and Justice Ruth Bader Ginsburg¹⁶⁴ agree that stare decisis is an important doctrine, and it is common for Justices to claim that stare decisis supports the outcome they advocate.¹⁶⁵ It is particularly interesting when both sides argue theirs is the position that is true to the doctrine of stare decisis.¹⁶⁶ Despite claims that stare decisis supports an opinion, some of these arguments just do not appear fully honest when subjected to close scrutiny. When these accounts fall apart, it often leaves the appearance of a dishonest assessment of the prior case law. I have chosen to address two majority opinions where the Justices’ approach to stare decisis has been called into question. These cases are *Dickerson v. United States*¹⁶⁷ and *Arizona v. Gant*.¹⁶⁸

I. *Dickerson v. United States: Confronting the Miranda Paradox*¹⁶⁹

Dickerson v. United States has the distinct air of a decision where, over time, the Supreme Court backed itself into an untenable position that endangered the

160. Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE. L. REV. 411, 412–14 (2010).

161. Edward D. Re, *Stare Decisis and the Judicial Process*, 22 THE CATH. LAW. 38, 38 (1976).

162. Kozel, *supra* note 160, at 412.

163. ANTONIN SCALIA & BRYAN A. GARDNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 411–12 (2012).

164. Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg’s Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 657–60 (1998).

165. SCALIA & GARDNER, *supra* note 163, at 413–14.

166. An example of such a disagreement can be seen in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). There, Justice Ginsburg, writing for the majority, and Justice Thomas, writing in dissent, both cited *Illinois v. Caballes*, 543 U.S. 405 (2005) to support their resolution of the case. See *Rodriguez*, 135 S. Ct. at 1612, 1617.

167. See generally *Dickerson v. United States*, 530 U.S. 428 (2000).

168. See generally *Arizona v. Gant*, 556 U.S. 332 (2009).

169. *Dickerson*, 530 U.S. at 437–40. The *Miranda* Paradox resulted from the *Miranda v. Arizona*, 384 U.S. 436 (1966) decision and subsequent cases, which determined the requirements

Miranda line of cases. As a result, Chief Justice Rehnquist, who was the author of two of the opinions that created the problem, ironically wrote the opinion that saved the *Miranda* doctrine.

Dickerson v. United States brought to a head a clash between the Supreme Court and Congress that had been brewing for over thirty years.¹⁷⁰ Prior to *Dickerson*, in 1966, the Supreme Court decided *Miranda v. Arizona*, where the Court announced that police officers must advise suspects of certain rights when being questioned in police dominated custodial settings.¹⁷¹ *Miranda* rights, as they came to be called, are now well known by the public based, at least in part, on depictions in popular television and movies. At the time of the decision, many argued that the Court had overstepped and in an effort to legislatively overturn *Miranda*, Congress passed 18 U.S.C. § 3501(a), which states, “[A] confession...shall be admissible in evidence if it is voluntarily given.”¹⁷²

Despite Congress’s actions, it seemed that *Miranda* would go undisturbed, as the decision itself was generally understood to conclude that the Fifth Amendment of the Constitution demanded *Miranda* warnings, thus placing the matter beyond Congress’s control.¹⁷³ Despite what seemed like a clear constitutional rule, the Supreme Court in the 1970’s began chipping away at the intellectual underpinnings of the *Miranda* case. In decisions like *Michigan v. Tucker*,¹⁷⁴ *New York v. Quarles*,¹⁷⁵ and *Oregon v. Elstad*,¹⁷⁶ a majority of the Supreme Court referred to the requirement to give *Miranda* warnings as a prophylactic rule.¹⁷⁷ Thus, in each of these decisions, the Court found an officer could violate the holding in *Miranda* by failing to give the prescribed warnings before conducting a police-dominated custodial interrogation, without violating the Fifth Amendment.¹⁷⁸ These decisions set up the controversy in *Dickerson*: if failing to give *Miranda* warnings did not violate the Fifth Amendment and thus the Constitution, how was the Court able to apply the rule to the states and ignore Congress’s action?¹⁷⁹

established in *Miranda* were prophylactic yet not constitutional. *Dickerson*, 530 U.S. at 437–40. Nonetheless, the majority found that *Miranda* still applied to the states. *Id.* at 438.

170. See *Dickerson*, 530 U.S. at 435–44 (determining the constitutionality of 18 U.S.C. § 3501).

171. *Miranda*, 384 U.S. at 478–79.

172. 18 U.S.C. § 3501(a) (2000).

173. *Miranda*, 384 U.S. at 467–68.

174. *Michigan v. Tucker*, 417 U.S. 433 (1974).

175. *New York v. Quarles*, 467 U.S. 649 (1984).

176. *Oregon v. Elstad*, 470 U.S. 298 (1985).

177. *Elstad*, 470 U.S. at 309; *Quarles*, 467 U.S. at 653; *Tucker*, 417 U.S. at 445–46.

178. *Elstad*, 470 U.S. at 318; *Quarles*, 467 U.S. at 657; *Tucker*, 417 U.S. at 450. It is worth noting that in *Tucker* the questioning of the suspect occurred before *Miranda* was decided. However the discussion in *Tucker* laid the groundwork for later decisions where the failure to provide *Miranda* warnings occurred after the *Miranda* decision.

179. *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that *Miranda* was a constitutional decision and thus could not be overruled by act of Congress).

Dickerson contained the right mix of facts and circumstances to bring the various *Miranda* based decisions and 18 U.S.C. § 3501(a) into clear conflict. In *Dickerson*, after a bank robbery, an eye witness told the FBI the license number of the getaway car.¹⁸⁰ The car was registered to the defendant.¹⁸¹ The FBI asked the defendant to come into a field office for an interview, which he did.¹⁸² During the interview, agents secured a search warrant and told Mr. Dickerson they were about to search his apartment.¹⁸³ Mr. Dickerson then made a statement while in FBI custody without receiving *Miranda* warnings.¹⁸⁴ After being indicted, Mr. Dickerson's lawyer sought to suppress the statement as being taken in violation of the defendant's *Miranda* rights.¹⁸⁵ The trial court ruled that the statement was inadmissible but the evidence that had been derived from the unwarned statement was admissible because the statement was voluntarily given.¹⁸⁶ As a result of the trial court's ruling, the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.¹⁸⁷ The Fourth Circuit agreed with the factual findings of the lower court but still reversed.¹⁸⁸ The Fourth Circuit held that because Dickerson's confession was voluntary it was admissible according to 18 U.S.C. § 3501.¹⁸⁹ The Circuit Court stated that 18 U.S.C. § 3501 and not *Miranda*, "govern[ed] the admissibility of [all] confessions in federal court" (in-custody or not).¹⁹⁰

Chief Justice Rehnquist, writing for the majority, observed, "This case...turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."¹⁹¹ He went on to cite two primary arguments for why *Miranda* was a constitutional decision. First, the only way that the *Miranda* Court could apply its decision to the states would be if the decision was a constitutional interpretation.¹⁹² Second, the *Miranda* Court clearly stated the opinion was a constitutional decision.¹⁹³ Chief Justice Rehnquist went on to address some of the counter arguments to the majority's opinion.

Although Chief Justice Rehnquist responded to several of the arguments against the majority opinion, he failed actually to respond to the central question

180. *United States v. Dickerson*, 166 F.3d 667, 673 (4th Cir. 1999).

181. *Id.*

182. *Id.*

183. *Id.* at 674.

184. *Dickerson*, 530 U.S. at 432.

185. *Id.*

186. *Dickerson*, 166 F.3d at 676.

187. *Dickerson*, 530 U.S. at 432.

188. *Id.*

189. *Dickerson*, 166 F.3d at 671.

190. *Id.*

191. *Dickerson*, 530 U.S. at 437.

192. *Id.* at 438.

193. *Id.* at 439-40.

of the case. The Chief Justice claims that “[t]he Court of Appeals also relied on the fact that we have, after our *Miranda* decision, made exceptions from its rule in cases such as *New York v. Quarles*, 467 U.S. 649... (1984), and *Harris v. New York*, 401 U.S. 222... (1971).”¹⁹⁴ In response, the majority states, “These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable.”¹⁹⁵ Next, the Chief Justice states, “The Court of Appeals also noted that in *Oregon v. Elstad*, 470 U.S. 298... (1985), we stated that ‘[t]he *Miranda* exclusionary rule... serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.’”¹⁹⁶ In response to this point, the majority explains that the Court’s refusal to extend the Fourth Amendment fruit of the poisonous tree doctrine to *Miranda* violations does not establish that *Miranda* was not a constitutional rule.¹⁹⁷ Finally, Chief Justice Rehnquist frames Justice Scalia’s dissent as arguing “that it is judicial overreaching for this Court to hold § 3501 unconstitutional unless we hold that the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements.”¹⁹⁸ In response to the argument thus framed, the Chief Justice states, “[W]e need not go farther than *Miranda* to decide this case.”¹⁹⁹

Chief Justice Rehnquist finishes the majority opinion by asserting that stare decisis weighed heavily in favor of maintaining the *Miranda* warnings as they had become part of police procedure throughout the country.²⁰⁰ There is some irony in Justice Rehnquist’s appeal to stare decisis. *Michigan v. Tucker*, authored by Justice Rehnquist, is the first case in which a majority of the Supreme Court substantially relied on the assertion that *Miranda* warnings were “prophylactic” to resolve the admissibility of a defendant’s statement.²⁰¹ Thus, it was *Michigan v. Tucker* that arguably violated the doctrine of stare decisis, and then later opinions that perpetuated the break begun in *Tucker*. Justice Douglas dissented in *Tucker* noting, “The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the ‘requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege,’ ... and without so holding we would have been powerless to reverse *Miranda*’s conviction.”²⁰² Thus, Justice Douglas asserted the majority in *Tucker* failed to follow the doctrine established in *Miranda* (and thereby violated stare decisis), and Justice Douglas pointed out the theoretical challenge to the *Miranda* prophylactic rule that would ultimately lead to the *Dickerson*

194. *Id.* at 441.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 442.

199. *Id.*

200. *Id.* at 443.

201. *Michigan v. Tucker*, 417 U.S. 433, 445–46 (1974).

202. *Id.* at 462–63 (citation omitted).

opinion. Despite the arguable logical impossibility of the Court's post-*Tucker/Miranda* jurisprudence, by the time the Court ultimately confronted the issue, the *Dickerson* majority concluded that the *Miranda* decision was too ingrained in American legal culture to be abandoned.²⁰³

It seems difficult to deny that *Miranda* warnings had become part of American legal culture, but had the exceptions? Would it have not been more consistent with stare decisis to recognize that the *Miranda* decision, as it was written before *Tucker*, was deserving of greater precedential value? Instead, the Court arguably maintained a paradoxical rule where there can be a violation of a constitutional rule that does not violate the Constitution.

2. *Arizona v. Gant: Preservation of Precedent in Name Only*²⁰⁴

Arizona v. Gant dealt with the difficult question of how the search incident to a lawful arrest doctrine should be applied to recent occupants of a vehicle. The Court had been attempting to resolve this issue for over twenty years prior to the *Gant* decision. First in *New York v. Belton*²⁰⁵ and then again in *Thornton v. United States*,²⁰⁶ the Court issued opinions with a bright-line rule. The general understanding of the *Belton/Thornton* rule was that officers were permitted, as an incident to a lawful arrest of a recent occupant of a vehicle, to search the passenger compartment of the vehicle.²⁰⁷ This rule did not require individualized suspicion beyond the probable cause necessary for the arrest, and it was justified by the need to ensure officer safety and to prevent the destruction or concealment of evidence.²⁰⁸ The facts of the *Belton* and *Thornton* cases are important to analyzing how the majority opinion, written by Justice Stevens, addresses stare decisis in *Gant*.

In *Belton*, an officer pulled a car over for speeding and discovered four men inside.²⁰⁹ The officer observed that none of the men were on the registration of the car, and there was the smell of burnt marijuana coming from the car.²¹⁰ The officer ordered the men out of the car and placed them under arrest.²¹¹ The men were not handcuffed or placed in a police vehicle, but instead were required to

203. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

204. *Arizona v. Gant*, 556 U.S. 332 (2009).

205. *New York v. Belton*, 453 U.S. 454 (1981).

206. *Thornton v. United States*, 541 U.S. 615 (2004).

207. *Belton*, 453 U.S. at 460 (“[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”); see also *Thornton*, 541 U.S. at 622–23 (reinforcing the core of the *Belton* holding and made it clear *Belton* applied even when the police effectuate an arrest after a recent occupant of a vehicle has exited the vehicle and is under arrest at the time of the search).

208. *Thornton*, 541 U.S. at 622–23.

209. *Belton*, 453 U.S. at 455.

210. *Id.* at 455–56.

211. *Id.* at 456.

sit in the median of the highway.²¹² The officer searched the passenger compartment of the vehicle and discovered the defendant's leather coat and drugs in one of its pockets.²¹³ The Supreme Court concluded that a bright and clear rule was necessary.²¹⁴ Thus, the Court ruled the search was permissible as an incident to arrest. The majority went further and stated, "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."²¹⁵ Although Justice Stevens concurred in the *Belton* judgment, he wrote very little to explain his position.²¹⁶

In *Thornton*, an officer's suspicions were aroused when the defendant sought to avoid driving his car near the officer.²¹⁷ The officer ran the defendant's license plate and discovered the license plate did not match the defendant's vehicle.²¹⁸ Next, the officer followed the defendant and observed him pull into a parking lot and get out of his car.²¹⁹ The officer drove up behind the defendant's car, got out of his vehicle, and accosted the defendant.²²⁰ The officer asked the defendant if he could pat him down, and the defendant agreed.²²¹ When the officer felt a bulge in the defendant's clothing, the officer asked if the defendant was carrying any illegal drugs on his person, and the defendant said yes.²²² The officer secured the drugs, arrested the defendant, placed him in the back of the police car, and conducted a search of the defendant's vehicle.²²³ The search revealed a gun.²²⁴ Thornton was prosecuted for possession of narcotics with the intent to distribute, possession of a firearm in furtherance of drug trafficking, and being a felon in possession of the firearm.²²⁵ The defendant sought to suppress the gun, claiming a violation of the Fourth Amendment.²²⁶ The trial court denied the motion, relying on *Belton*, and the Fourth Circuit upheld the finding.²²⁷ The Supreme Court granted certiorari and affirmed the

212. *Id.*

213. *Id.*

214. *Id.* at 459–60.

215. *Id.* at 460.

216. *Id.* at 463 (Stevens, J., concurring).

217. *Thornton v. United States*, 541 U.S. 615, 617 (2004).

218. *Id.* at 618.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 618–19.

227. *Id.*

lower court's holding.²²⁸ Justice Stevens dissented in *Thornton*, asserting that the expansion of the *Belton* rule was unnecessary and unjustified.²²⁹

In *Gant*, police arrested the defendant for driving on a suspended license.²³⁰ After arresting him, police placed Mr. Gant in handcuffs and put him in the back seat of a police car.²³¹ Next, police conducted a search of the passenger compartment of Mr. Gant's car where they found cocaine and a gun.²³² Mr. Gant was charged with driving on a suspended license and possession of drug paraphernalia and a narcotic drug for sale.²³³ Mr. Gant challenged the search on Fourth Amendment grounds.²³⁴ The trial court denied Mr. Gant's challenge but the Arizona appellate court and Arizona Supreme Court disagreed.²³⁵ According to the Arizona Supreme Court, the police violated Mr. Gant's Fourth Amendment rights.²³⁶ The court found that the search incident to arrest doctrine did not apply in this instance because at the time of the search, Mr. Gant was no longer able to access the passenger compartment and so it was no longer a search incident to arrest.²³⁷

Justice Stevens, writing for a five-Justice majority, crafted a new approach to searches incident to the arrest of a recent occupant of a vehicle. Under this new approach, an officer can search a vehicle incident to a recent occupant's arrest under two circumstances: (1) if the arrestee is within reaching distance of the passenger compartment at the time of the search, or (2) if there is reason to believe evidence of the crime of arrest can be found in the vehicle.²³⁸ Applying this approach, the majority concluded that Mr. Gant was not within reaching distance of the passenger compartment of the car at the time of the search because he was handcuffed in the back of a locked police car. Nor was there reason to believe evidence of the crime Gant was arrested for, driving on a suspended license, would be found in the car.²³⁹

Although many believed *Gant* overruled *Belton* and *Thornton*, Justice Stevens insisted that it did not.²⁴⁰ In his opinion, Justice Stevens asserts that the facts of

228. *Id.* at 619.

229. *Id.* at 633–34 (Stevens, J., dissenting) (citing to and referencing *New York v. Belton*, 453 U.S. 454 (1981)).

230. *Arizona v. Gant*, 556 U.S. 332, 336 (2009).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 337.

236. *Id.*

237. *Id.* at 344–46.

238. *Id.* at 351.

239. *Id.*

240. *Id.* at 348–49 (citing to and referencing *New York v. Belton*, 453 U.S. 454 (1981) and *Thornton v. United States*, 541 U.S. 615 (2004)).

Gant are clearly distinguishable from *Belton* or *Thornton*.²⁴¹ Regarding *Belton*, the defendants were arrested but not handcuffed or in a police vehicle, and there was only one officer and four suspects.²⁴² Justice Stevens distinguishes *Thornton* by stating nothing more than “the petitioner [in *Thornton*] was arrested for a drug offense.”²⁴³ He also wrote, “We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice.”²⁴⁴

Five Justices on the Court disagreed with the majority regarding whether *Gant* substantially overruled the *Belton/Thornton* rule.²⁴⁵ The conclusion that *Gant* overruled the *Belton/Thornton* rule seems strong. First, the *Belton/Thornton* rule, where an officer is always able to search the passenger compartment of the vehicle of a recently arrested occupant, had been so widely accepted that it was being taught at police academies.²⁴⁶ Also, numerous lower courts had interpreted *Belton* and *Thornton* this way. Even the Arizona Supreme Court stated, “We are aware that most other courts presented with similar factual situations have found *Belton* and *Thornton* dispositive of the question whether a search like the one at issue was incident to arrest.”²⁴⁷ Finally, the facts in the *Thornton* case were strikingly similar to the *Gant* case, at least with regard to when the search was conducted by the officers.

It is unclear from Justice Stevens’ opinion why he shied away from the conclusion that *Gant* overruled *Belton* and *Thornton*.²⁴⁸ Given that Justice Stevens dissented in *Thornton* and only concurred in *Belton*, he seems to have disagreed with the *Belton/Thornton* approach from the beginning. Further, a strong argument exists that Justice Stevens’ opinion is far more in line with the Court’s broader doctrine dealing with searches incident to arrest. In fact, much of the criticism of the *Belton/Thornton* cases asserted that the Court’s approach had strayed from the doctrinal underpinnings of the search incident to an arrest rule. Justice Scalia noted that such an approach imagines a “mythical arrestee ‘possessed of the skill of Houdini and the strength of Hercules.’”²⁴⁹

The confusion over why Justice Stevens insisted that *Gant* did not overrule *Belton* and *Thornton* is deepened by his response to Justice Alito’s dissent. Justice Stevens begins by stating that *stare decisis* is not a reason to continue to

241. *Id.* at 348 (citing to and referencing *New York v. Belton*, 453 U.S. 454 (1981) and *Thornton v. United States*, 541 U.S. 615 (2004)).

242. *Id.* at 348 (citing *New York v. Belton*, 453 U.S. 454 (1981)).

243. *Id.* at 348–49 (referencing *Thornton v. United States*, 541 U.S. 615 (2004)).

244. *Id.* at 348.

245. *Id.* at 351–54 (Scalia, J. concurring); *id.* at 354–58 (Breyer, J., dissenting).

246. *Id.* at 349.

247. *State v. Gant*, 162 P.3d 640, 645 (2007).

248. Colin Miller, *Stranger than Dictum: Why Arizona v. Gant Compels the Conclusion that Suspicionless Buie Searches Incident to Lawful Arrests are Unconstitutional*, 62 BAYLOR L. REV. 1, 38 (2010).

249. *Thornton v. United States*, 541 U.S. 615, 626 (2004) (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)).

permit a police practice that violates the Constitution.²⁵⁰ This argument only makes sense if *Belton* and *Thornton* were unconstitutional and were now being overruled. Next, Justice Stevens claims that overruling *Belton* and *Thornton* is unnecessary because the two cases are easily distinguished from *Gant*.²⁵¹ Although *Belton* does contain a number of important factual distinctions from *Gant*, *Thornton* does not. In fact, Justice Stevens says nothing more to distinguish *Thornton* from *Gant* than the defendant in *Thornton* was arrested for a drug charge. This distinction is the weakest portion of Justice Stevens' opinion.

Readers are left to wonder why Justice Stevens refused to just write that the Court was overruling the *Belton/Thornton* rule. At least two authors have accused the majority opinion of being "disingenuous[.]"²⁵² A number of possibilities exist besides dishonesty. Perhaps Justice Stevens was concerned about the second and third order effects such a wholesale action might have such that the doctrine in *Gant* would inadvertently impact other aspects of the search incident to arrest doctrine. Perhaps Justice Stevens was persuaded by the Arizona Supreme Court's argument that although the facts in the *Thornton* case were similar to the *Gant* case, the legal question the Court resolved in *Thornton* was not similar. The Arizona Supreme Court argued that the *Thornton* decision only resolved whether the search incident to arrest doctrine dealing with automobiles could be applied where the police encounter began after the suspect exited the vehicle.²⁵³ Justice Stevens' election to not explain more clearly why the *Gant* decision was not overruling *Belton* or at least *Thornton*, raises unnecessary questions about an opinion which appears to be a return to a more sound approach.

*B. Political Cases: The Kobayashi Maru*²⁵⁴

When the Supreme Court confronts a highly politicized case, it can seem like a no-win situation for the Justices. Recent decisions like *Bush v. Gore* and the two decisions surrounding the Affordable Care Act seem to demonstrate this as fact.²⁵⁵ Critical to the Court's credibility is the perception that it is a neutral,

250. *Gant*, 556 U.S. at 348.

251. *Id.* at 348.

252. Andrew Fois & Lauren Simmons, *Thomas Jefferson's Carriage: Arizona v. Gant's Assault on the Belton Doctrine*, 5 CRIM. L. BRIEF 4, 21 (2009).

253. *Gant*, 556 U.S. at 335–36.

254. Janet Stemwedel, *The Philosophy of Star Trek: The Kobayashi Maru, No-Win Scenarios, And Ethical Leadership*, FORBES (August 23, 2015 10:15 AM), <https://www.forbes.com/sites/janetstemwedel/2015/08/23/the-philosophy-of-star-trek-the-kobayashi-maru-no-win-scenarios-and-ethical-leadership/#30f032535f48> (explaining that Kobayashi Maru is a training exercise in the fictional Star Trek universe designed to test the character of Starfleet Academy cadets in a no-win scenario).

255. See generally *King v. Burwell*, 135 S. Ct. 2480 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Bush v. Gore*, 531 U.S. 98 (2000).

non-political branch of government.²⁵⁶ It is clear that the Justices on the Court believe the public's perception of political neutrality is important.²⁵⁷ Nowhere is that perception more challenged than when the Court must decide a highly publicized political question. One recent example of such a case is *Bush v. Gore*.²⁵⁸

I. *Bush v. Gore: Deciding the Presidency*

Never before had the United States Supreme Court effectively resolved a presidential election.²⁵⁹ It is difficult to imagine a more politicized decision of the Court. Making matters more challenging was the fact that the case involved a nuanced interpretation of state voting statutes and detailed factual questions like whether an indented ballot should count as a cast vote or if the voter must actually perforate the ballot.²⁶⁰ Additionally, the Court and the state of Florida were facing what seemed like an iron clad deadline.²⁶¹ The country held its breath and waited for an outcome—of course the decision is well known. The Florida recount was stopped, and George W. Bush became President.²⁶²

Before the dust settled on the Supreme Court's opinion, a new vote count began, but this count only involved nine ballots. The most controversial part of the *Bush v. Gore* decision was a 5–4 per curiam opinion.²⁶³ The five Justices in the majority were Chief Justice Rehnquist, Justice Thomas, Justice Scalia, Justice Kennedy, and Justice O'Connor.²⁶⁴ All five members of the majority who paved the way for the Republican nominee to become the President had also been appointed by Republican presidents.²⁶⁵

Given the split of the Court and the highly political nature of the controversy, special care was needed in explaining the majority opinion. Unfortunately, many perceived the explanation as lacking.²⁶⁶ The per curiam opinion explained, "The recount process, in its features here described, is inconsistent

256. Carson Holloway, *John Roberts: A Political Judge?*, HERITAGE FOUND. (July 2, 2019), <https://www.heritage.org/node/14335069/print-display>.

257. *Bush*, 531 U.S. at 111; Iuliano, *supra* note 75, at 917.

258. *Bush*, 531 U.S. at 111.

259. Peter M. Shane, *Policy at the Intersection of Law and Politics: Panel One: When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups"*, 12 CORNELL J. L. & PUB. POL'Y 503, 536 (2003).

260. *Bush*, 531 U.S. at 103–06.

261. *Id.* at 122 (Rehnquist, C.J., concurring).

262. *Id.* at 100–01, 110–11.

263. *Id.* at 100.

264. *Id.* at 99.

265. See Jess Bravin et al., *Bush v. Gore Has Personal Angle for Some Supreme Court Justices*, WALL ST. J. (Dec. 12, 2000 12:08 AM), <https://www.wsj.com/articles/SB976572470116168521>.

266. *Bush*, 531 U.S. at 128–29 (Stevens, J., dissenting); RONALD DWORKIN, A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY 9 (2002).

with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.²⁶⁷ Based on the above findings, the majority concluded that the current procedure violated the Equal Protection Clause of the Fourteenth Amendment.²⁶⁸ This conclusion was not overwhelmingly controversial. Seven of the Justices on the Court believed the recount procedures were inconsistent with Equal Protection.²⁶⁹

The most controversial aspect of the opinion was the decision to stop the recount rather than remanding the case to the Florida State Supreme Court with instructions to correct the procedures.²⁷⁰ The question of whether the state of Florida could reorder its recount procedures in time to meet state and federal statutory deadlines for certifying election results was in doubt.²⁷¹ However, not permitting Florida to try gave the per curiam decision the air of corruption.²⁷²

Additionally, the majority opinion did little to refute the arguments presented by the four dissenting Justices who each wrote opinions.²⁷³ The dissenting Justices claimed that the majority failed to give the usual deference to the Florida State Supreme Court in matters involving the interpretation of Florida law.²⁷⁴ Also, it was asserted that the majority should not have stopped earlier efforts to conduct a recount, nor should it stop potential future efforts.²⁷⁵ Finally, the majority was alleged to have abandoned its usual restraint, particularly in matters involving political questions.²⁷⁶

In response to the dissenting opinions, the majority dedicated approximately two paragraphs. The paragraphs stated:

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See *post*, at 134 (SOUTER, J., dissenting); *post*, at 145-146 (BREYER, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, JUSTICE BREYER'S proposed remedy-remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida

267. *Bush*, 531 U.S. at 109.

268. *Id.* at 103.

269. *Id.* at 111.

270. See Laurence H. Tribe, Comment, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall Of Mirrors*, 115 HARV. L. REV. 170, 175-77 (2001).

271. *Bush*, 531 U.S. at 109-10.

272. ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 174 (2001).

273. See generally *Bush*, 531 U.S. at 100-11, 123-58.

274. *Id.* at 123-24, 127-28 (Stevens, J., dissenting); *id.* at 135-36 (Ginsburg, J., dissenting).

275. *Id.* at 129 (Stevens, J., dissenting).

276. *Id.* at 153 (Breyer, J., dissenting).

Election Code, and hence could not be part of an “appropriate” order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.²⁷⁷

Despite lengthy dissenting opinions, the majority elected to offer little response to the criticism.

Given the composition of the majority, the Justices must have anticipated the reaction to their opinion.²⁷⁸ Although the majority explained the strongest part of its argument clearly—how the current Florida recount rules violated Equal Protection—it did little to explain why it did not give the state of Florida a chance to try and correct the deficiency.²⁷⁹ Further, the majority offered little response to the more elaborate arguments presented by the dissenting Justices, thereby leaving the potential impression that the majority had no adequate reply. The weakness in the majority opinion is made more apparent by the relative strength of the three-Justice concurrence.²⁸⁰ The concurrence dedicates more energy to responding to the dissents and is viewed by some as more persuasive.²⁸¹

Political cases demand a particular sensitivity by the Court to the public’s concern regarding its status as a neutral non-political body.²⁸² This need is all the greater given the continuing politicization of the appointment process—making the Justices on the Court appear more and more like political figures. Given this backdrop, more explanation in a political case is preferred to less. The public needs a thorough explanation of why the majority is correct, and clear reasoning that provides some assurance that facts and law, rather than politics, dictated the outcome. Further, a full confrontation of dissenting opinions is necessary to dispel the potential appearance that the majority did not respond because it could not.

277. *Id.* at 111.

278. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 616 (2002).

279. *See Bush*, 531 U.S. at 110.

280. *See id.* at 111–22 (Rehnquist, J., with whom Scalia, J., and Thomas, J. join, concurring).

281. DWORKIN, *supra* note 266, at 16–17.

282. *See* Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 155 (2013).

C. *When Minds Change*

The philosopher and author C.S. Lewis once explained that sometimes the shortest path to a destination is backward.²⁸³ This seemingly counterintuitive statement applies when a traveler discovers they have gone in the wrong direction. So too with courts and judges. However, unlike a traveler who has to very visibly and obviously change directions, judges and courts sometimes seem to try and change direction without declaring the old path was wrong. Although a written “about face” might not be as obvious as a traveler turning around and walking back the way they came, it is sometimes nearly as obvious. However, when Justices of the Supreme Court change jurisprudential directions or seek to change the Court’s direction, particularly when it comes to positions they themselves have taken in the past, an explanation is necessary if they are not to appear dishonest. Below are two cases to illustrate this point. The first focuses on what is likely the most well-known apparent “switch” in Supreme Court history: Justice Owen Roberts’ decision to join the majority opinion in *West Coast Hotel Co. v. Parrish*,²⁸⁴ and a lesser known opinion from Justice Stevens in *Illinois v. Caballes*.²⁸⁵ Both opinions demonstrate an apparent change in position without an explanation.

I. *West Coast Hotel v. Parrish: A Historic Switch*

Dubbed “the switch in time that saved the nine,”²⁸⁶ *West Coast Hotel Co. v. Parrish* remains controversial today, more than eighty years after the decision was published. Some claim Justice Roberts’ vote was merely the result of an evolving view toward the Due Process Clause and the Commerce Clause.²⁸⁷ Others assert Justice Roberts’ earlier votes were influenced by his own aspirations to the Republican Party’s nomination to the presidency in 1936—and after that possibility closed—his vote changed.²⁸⁸ Others still suggest that factors outside the Court, including mounting public pressure, had an

283. C.S. LEWIS, *MERE CHRISTIANITY* 22 (rev. ed. 1958).

[P]rogress means getting nearer to the place where you want to be, and if you have taken a wrong turn, then to go forward does not get you any nearer. If you are on the wrong road, progress means doing an about-turn and walking back to the right road; and in that case the man who turns back soonest is the most progressive man.

Id.

284. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

285. *Illinois v. Caballes*, 543 U.S. 405 (2005).

286. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 390 (17th ed. 1991) (stating “Some viewed Justice Roberts’s vote in *West Coast Hotel* as ‘the switch in time that saved the Nine’ from the Court-packing plan...”).

287. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 45–46 (1998).

288. Brian T. Goldman, *The Switch in Time that Saved Nine: A Study of Justice Owen Roberts’s Vote in West Coast Hotel Co. v. Parrish*, C. UNDERGRADUATE RES. ELEC. J. 1, 51–52, 80–94 (2012).

influence.²⁸⁹ The fact that this debate continues demonstrates that there was a need for an explanation.

The *Parrish* case came on the heels of a tumultuous period in the Court's history. Beginning in 1935 and continuing into 1936, the Court struck down significant elements of Franklin D. Roosevelt's New Deal, prompting one columnist to quip that the Court's New Deal jurisprudence resembled the end of a Shakespearian tragedy.²⁹⁰

One of the Justices who appeared to vote consistently (albeit not unerringly) against the New Deal programs was Justice Owen Roberts.²⁹¹ In 1936, the Court decided the case of *Morehead v. New York*.²⁹² In *Morehead*, the Court upheld a lower court ruling that New York's minimum wage law affecting women was unconstitutional because it violated the Fourteenth Amendment's Due Process Clause.²⁹³ Through *Morehead*, the Court upheld an earlier decision regarding the constitutionality of minimum wage laws, *Adkins v. Children's Hospital*.²⁹⁴ Justice Roberts voted with the majority in *Morehead*, invalidating the minimum wage law in New York.²⁹⁵ In 1937, the Court decided *Parrish*, which upheld a minimum wage statute directed at women.²⁹⁶ Justice Roberts joined the majority.²⁹⁷ Thus, the switch occurred.

Because Justice Roberts did not write an opinion in *Morehead* or *Parrish*, we do not have his written opinion explaining why he changed his vote. Additionally, after retiring, Justice Roberts destroyed his legal notes.²⁹⁸ In a 1955 law review tribute to the recently deceased Justice Roberts, Justice Frankfurter published the contents of a memorandum from Justice Roberts explaining his change of position.²⁹⁹ In the 1945 memorandum, Justice Roberts asserted that the Court in *Morehead* was not asked to reconsider the earlier *Adkins* precedent.³⁰⁰ Thus, the Court was only asked to decide if the *Morehead* and *Adkins* cases could be distinguished, and, if so, to what effect.³⁰¹ Justice Roberts felt the cases could not be distinguished and so voted to uphold the lower

289. David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 75–77, 138 (1998).

290. *FDR's Losing Battle to Pack The Supreme Court*, NPR (Apr. 13, 2010 12:00 PM), <https://www.npr.org/templates/story/story.php?storyId=125789097>. NPR interviewed Jeff Shesol, author of the book *Supreme Power: Franklin Roosevelt v. the Supreme Court*, written in 2010. *Id.*

291. See Pepper, *supra* note 289, at 73–74.

292. *Morehead v. New York*, 298 U.S. 587 (1936).

293. *Id.* at 617–18.

294. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); see *Morehead*, 298 U.S. at 609.

295. Barry Cushman, *Inside the "Constitutional Revolution" of 1937*, 2016 SUP. CT. REV. 367, 370 (2016); Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955).

296. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

297. Cushman, *supra* note 295, at 370.

298. Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 647 (1994).

299. See Frankfurter, *supra* note 295, at 314–15.

300. *Id.* at 314.

301. *Id.*

court's ruling striking down the minimum wage law.³⁰² According to Justice Roberts, his vote changed in *Parrish* because the Court was asked to reconsider *Adkins*, which he believed was wrongly decided.³⁰³

Scholars have debated Justice Roberts' explanation. Some have claimed his explanation makes sense and is consistent with his behavior as a jurist.³⁰⁴ Others have argued that Justice Frankfurter's initial reaction to Justice Roberts' switch was accurate—pure politics.³⁰⁵ At least one author has challenged whether Justice Roberts even wrote the memorandum to Justice Frankfurter.³⁰⁶

Regardless of why Justice Roberts voted as he did in *Morehead* and *Parrish*—a reason was needed. *Parrish* was a dramatic turning point for the Court. After *Parrish*, there was a steady flow of economic legislation that was held constitutional, which before *Parrish*, would likely have been struck down.³⁰⁷ Justice Roberts' vote was widely believed to be in response to President Roosevelt's proposal to enlarge the Supreme Court in order to include more liberal voices.³⁰⁸ Justice Frankfurter rejected this argument claiming that Justice Roberts' vote in *W.H.H. Chamberlin, Inc. v. Andrews* (which predated President Roosevelt's announcement regarding expanding the Supreme Court) clearly foreshadowed Roberts' vote in *Parrish*.³⁰⁹ Other scholars have concurred with Justice Frankfurter, asserting that Justice Roberts cast his decisive vote in conference, six weeks before President Roosevelt announced his intention to expand the Supreme Court.³¹⁰ However, when no reason is given, speculation will go where it will.

2. *Caballes v. Illinois: Binary Searches and Intimate Details*

In 2001, the Supreme Court decided *Kyllo v. United States*.³¹¹ In *Kyllo*, the Court confronted the question of how to apply the Fourth Amendment to an investigative technique the founders could not have imagined.³¹² In this case, government agents suspected the defendant of using his home to grow marijuana.³¹³ As part of their investigation, the officers scanned Mr. Kyllo's home with a thermal imaging device capable of showing the amount of heat

302. *Id.*

303. *Id.* at 315.

304. See Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV 95, 144 (1999).

305. Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 623 (1994).

306. *Id.* at 645–51.

307. See Cushman, *supra* note 304, at 144–45.

308. Ariens, *supra* note 305, at 631–32.

309. See *id.* at 635–36.

310. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 45 (1998).

311. *Kyllo v. United States*, 533 U.S. 27 (2001).

312. See *id.* at 29.

313. *Id.*

escaping from the house relative to others in the neighborhood.³¹⁴ The agents were able to see that Mr. Kyllo's garage and parts of his home were much hotter than other homes in the area, suggesting that Mr. Kyllo was using heat lamps in those parts of the house.³¹⁵ Law enforcement used this and other information to secure a search warrant.³¹⁶ The subsequent search revealed approximately 100 marijuana plants.³¹⁷ Mr. Kyllo objected at trial to the use of the thermal scanning device on Fourth Amendment grounds.³¹⁸ His motion to suppress was denied, and he was convicted.³¹⁹ The case eventually made it to the Supreme Court where Justice Scalia, writing for the majority, concluded that the use of the thermal scanning device in order to obtain a warrant was unconstitutional.³²⁰

In his majority opinion, Justice Scalia articulated a rule for countering the encroachment of technology on Fourth Amendment privacy.³²¹ The new rule established that a Fourth Amendment search occurs when police use sense enhancing technology to gather information about a constitutionally protected area that could not have otherwise been secured without a physical trespass.³²²

Kyllo was a 5–4 decision with Justice Stevens writing a vigorous dissent.³²³ Among his objections to the majority's opinion was that the Court's new rule would limit the impact of the contraband exception to the Fourth Amendment, or the binary search doctrine.³²⁴ Under this doctrine any investigative technique that only reveals the presence or absence of contraband is not a search within the meaning of the Fourth Amendment because it does not reveal anything in which an individual would have a legitimate privacy interest.³²⁵ Justice Stevens stated:

It is clear, however, that the category of "sense-enhancing technology" covered by the new rule...is far too broad. It would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *United States v. Place*, 462 U.S. 696, 707... (1983), we held that a dog sniff that "discloses only the presence or absence of narcotics" does "not constitute a 'search' within the meaning of the *Fourth Amendment*," and it must follow that sense-enhancing equipment that identifies nothing but illegal activity

314. *Id.* at 29–30.

315. *Id.* at 30.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 40 (remanding the case to determine the validity of the search warrant absent the use of heat lamps).

321. *Id.*

322. *Id.* at 34–35.

323. *Id.* at 41 (Stevens, J., dissenting).

324. *Id.* at 47–48 (Stevens J., dissenting).

325. *Id.*

is not a search either. Nevertheless, the use of such a device would be unconstitutional under the Court's rule....³²⁶

Approximately four years later, the Court issued its next case dealing with the dog sniffs, *Illinois v. Caballes*.³²⁷ In *Caballes*, a police officer pulled a car over for speeding.³²⁸ During the time it took the officer to process the ticket, another officer arrived with a narcotics dog.³²⁹ The officers walked the dog around Mr. Caballes' car, and the dog alerted to the presence of drugs.³³⁰ A subsequent search revealed illegal drugs, and the defendant was arrested.³³¹ At trial, the defense brought a motion to suppress the evidence found as a result of the dog sniff, claiming the dog sniff was an illegal search.³³²

Justice Stevens, writing for a majority of the Court, found the dog sniff was not a search.³³³ Further, so long as the use of the narcotics dog did not detain the defendant any longer than would have occurred as a result of issuing a ticket, no Fourth Amendment violation would occur.³³⁴ This finding was all that was necessary to answer the question before the Court, but Justice Stevens continued. In the second to last paragraph of his majority opinion, Justice Stevens explained:

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27...(2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as “at what hour each night the lady of the house takes her daily sauna and bath.”³³⁵

Justice Stevens' description of the impact of *Kyllo* on the binary search doctrine appeared to have made a 180-degree turn between his dissent in 2001 and his majority opinion in 2005.³³⁶ In 2001, the *Kyllo* majority opinion was too broad because it prevented the use of mechanical devices that only detect contraband.³³⁷ In 2005, the *Kyllo* decision only reached searches that could reveal lawful activity in the home.³³⁸

326. *Id.*

327. *Illinois v. Caballes*, 543 U.S. 405, 406 (2005).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 407.

333. *Id.* at 409.

334. *Id.* at 407–08.

335. *Id.* at 409–10.

336. Compare *Kyllo v. United States*, 533 U.S. 27, 47–48 (2001) (Stevens, J., dissenting), with *Caballes*, 543 U.S. at 409–10.

337. *Kyllo*, 533 U.S. at 47–48 (Stevens, J., dissenting).

338. *Caballes*, 543 U.S. at 409–10.

A reading of Justice Scalia's majority opinion in *Kyllo* and Justice Stevens' dissent make it appear that the *Caballes* description of *Kyllo* is not accurate. Justice Stevens appears to recast *Kyllo* as only reaching searches that reveal "intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.'"³³⁹ Such a recasting without further explanation simply does not withstand review. Justice Scalia's majority opinion did not draw a distinction between intimate and non-intimate details in the home.³⁴⁰ Justice Scalia explained that making such a distinction would be both wrong and impracticable. The reason such a distinction would be wrong is because "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."³⁴¹ Thus, the *Kyllo* decision was not linked to a distinction between intimate and non-intimate details or questions of daily sauna use.

Was Justice Stevens dishonest in the second to last paragraph of *Caballes*? Possibly, but there is an obvious other possible explanation: he changed his mind. Moreover, Justice Scalia might also have changed his mind. During oral argument in *Caballes*, Justice Scalia asked:

Why...are you sure that *Kyllo*...would have come out the same way if the only thing...that the imaging could pick out is not any of the other private activities in the home, but the only thing it could possibly discern is a dead body with a knife through the heart? Are you sure the case would have come out the same way? I'm not at all sure.³⁴²

Although divining a Justice's position by the questions they ask at oral argument is potentially unwise—this statement could have signaled a change or clarification of Justice Scalia's view.³⁴³

If Justice Stevens arrived at a different conclusion in *Caballes* than *Kyllo*, then an explanation was in order. It did not need to be long—it could have simply been a footnote—but changes in views, especially as dramatic as that in *Caballes*, need an explanation or face the inference that one of the opinions was untruthful.

D. Responding to Choke Points

In each of the above examples, I have suggested ways that the Justices may have been able to enhance the apparent honesty of their opinions. As I provide these suggestions, it is with one of President Theodore Roosevelt's famous quotes in mind, "It is not the critic that counts...[t]he credit belongs to

339. *Id.*

340. *Kyllo*, 533 U.S. at 37–39.

341. *Id.* at 37.

342. Transcript of Oral Argument at 9, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923).

343. Compare Transcript of Oral Argument, *supra* note 342, at 9, with *Florida v. Jardines*, 569 U.S. 1, 11–12 (2013) (refusing to rely on *Kyllo* to decide the case, which could have been due to a continuing belief in the contraband exception or an unwillingness to disturb a precedent unnecessarily).

the...[person] who is actually in the arena."³⁴⁴ My discussion of credibility choke points and methods of enhancing apparent honesty is undertaken with an awareness of the enormous challenge facing Supreme Court Justices. I am further aware of the ease of critique when given an abundance of time and the thoughtful examination of each Supreme Court opinion by hundreds of legal experts and scholars. My suggestions seek only to offer approaches to consider when issuing opinions. With all that said, I suggest three methods of enhancing apparent honesty: refutation of the strongest counter arguments, distinguishing doctrinal application, and explanation of changing positions.

1. *Refutation*

Refutation is a core element of persuasive communication and is frequently a part of Supreme Court opinions. The refutation is necessary for an audience to understand why the author of an opinion is unpersuaded by counter arguments. In some cases, Justices engage in refutation but fail to respond to a central counter argument. In these instances, a reader's perception could be that the author of the opinion did not refute the counter position because they have no reply. This in turn can leave the impression that the author of the opinion is merely seeking an outcome and is writing whatever they feel is necessary to achieve that end. An example of this failure to refute can arguably be seen in Chief Justice Rehnquist's majority opinion in *Dickerson*.

The central counter-argument to the *Dickerson* majority opinion was that there cannot be a constitutional rule whose violation does not violate the Constitution.³⁴⁵ Thus, either *Miranda* was not a constitutional rule and § 3501 should be effective, or *Miranda* was/is a constitutional decision, and the cases describing the *Miranda* warnings as prophylactic were in error. In essence, Justice Douglas made this argument in his dissent to *Michigan v. Tucker*.³⁴⁶ This argument was central to the Fourth Circuit's conclusion that *Miranda* had been effectively overruled by § 3501 and to Justice Scalia's dissent. Nowhere in Chief Justice Rehnquist's opinion does he explain how this contradiction is resolved.

2. *Distinguishing Doctrinal Application*

Distinguishing doctrinal application requires a Justice to examine their own perspectives on a particular doctrine and how they have articulated that approach in the past. Justices' opinions are generally more credible when they present a coherent judicial philosophy, at least with regard to particular doctrines. When Justices stray from their stated approach, it often leads to allegations of outcome-directed opinion writing. Justice Scalia, perhaps the most well-known

344. *Theodore Roosevelt's: Citizenship in a Republic, The Man in the Arena*, LEADERSHIP NOW (Apr. 23, 2010), <https://www.leadershipnow.com/tr-citizenship.html>.

345. See *Dickerson v. United States*, 530 U.S. 428, 445–46 (2000) (Scalia, J., dissenting).

346. *Michigan v. Tucker*, 417 U.S. 433, 462–63 (1974) (Douglas, J., dissenting).

advocate of the originalist approach to constitutional interpretation, was frequently accused of failing to apply that interpretative approach evenly.³⁴⁷ When a Justice uses a particular theory of constitutional interpretation in one way in a case and then ignores that theory in a different case or applies the theory differently, the apparent honesty of the opinion is reduced.

One of the challenges to the majority opinion in *Bush v. Gore* was that several of the Justices (Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas) had voting histories that seemed inconsistent with the majority opinion.³⁴⁸ Thus, giving the appearance that these Justices voted as they did to achieve an end without really believing it was the proper vehicle. Arguably, this perception was reinforced by the per curiam's effort to limit the precedential impact of its opinion by stating, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."³⁴⁹ This, coupled with other aspects of the decision, led to some of the most damning criticism of a Supreme Court decision in recent history.

Chief Justice Rehnquist has also been criticized for his fluid views regarding stare decisis.³⁵⁰ One scholar asserted that the Chief Justice's opinions in *Dickerson* and *Casey* "lack[ed] a principled distinction to be drawn between his opinions" regarding stare decisis.³⁵¹ That scholar goes on to conclude, "[T]he distinction drawn [between the two cases] is not jurisprudential, but ideological."³⁵²

In each of the above cases, it is likely that the Justices involved would have had an explanation for why they applied the particular legal doctrines differently from one case to another. However, because no explanation is provided, the Court's audience is left to speculate. Those members of the Court's audience who are unhappy with the outcome are more likely to conclude the Justices are not being entirely honest.

3. *Explaining Apparent Changes in Jurisprudential Direction*

Apparent changes in jurisprudential direction do not necessarily mean a Justice has changed his or her opinion, only that it appears as if the Justice has

347. See, e.g., Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1497 (2008); Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 89, 107–08 (2010).

348. Elspeth Reeve, *Just How Bad Was Bush v. Gore?*, ATLANTIC (Nov. 29, 2010), <https://www.theatlantic.com/politics/archive/2010/11/just-how-bad-was-bush-v-gore/343247/>.

349. *Bush v. Gore*, 531 U.S. 98, 109 (2000); RONALD DWORKIN, A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY 10 (2002).

350. William S. Consovoy, *The Rehnquist Court and the End of Constitutional State Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 94 (2002).

351. *Id.* at 95.

352. *Id.*

changed direction. After the *Parrish* decision, Justice Roberts asserted that he had not changed his opinion from the *Morehead* decision.³⁵³ Rather, he claimed that because the questions asked were different, his answers were different. In other circumstances, like Justice Stevens' opinions in *Kyllo* and *Caballes*, where there is no explanation available, it seems more likely that the Justice changed his mind.

An example of a Justice providing an explanation of an apparent change in jurisprudential direction can be seen in one of Justice Scalia's opinions. In his concurring opinion in *Arizona v. Gant*, Justice Scalia acknowledged his apparent jurisprudential change and why it was occurring.

In *Gant*, which was described above, Justice Scalia joined the majority but also authored a concurring opinion. In the majority opinion, Justice Stevens stated that a search incident to the lawful arrest of a recent occupant of a vehicle could occur in two circumstances: first, if the arrestee was within grabbing distance of the passenger compartment; and second, if there was a reasonable basis for believing evidence of the crime the suspect was arrested for could be found in the passenger compartment.³⁵⁴ Justice Scalia's concurring opinion explained why he had joined the majority despite having written in an earlier decision, *United States v. Thornton*, that the grabbing distance justification for the search of a vehicle incident to arrest was likely unreasonable.³⁵⁵ Justice Scalia explained that he joined the majority because a 4–1–4 opinion in an area that demanded clarity was unacceptable.³⁵⁶ Thus, he joined the majority in this instance because to do otherwise would create confusion in police practice.

IV. CONCLUSION

In an interview in 2010, Justice Scalia stated, "The only article in faith that plays any part in my judging is the commandment, Thou Shalt Not Lie."³⁵⁷ This is likely a commandment to which every Supreme Court Justice who has worn the robes would subscribe. However, in the context of Supreme Court opinions, I suggest more is needed. Not only must the Justice be honest, but they must be apparently honest.

We ask a great deal of the Justices of the Supreme Court. We expect the wisdom of Solomon and the logic of Plato. We bring to the Court our most difficult legal questions and social issues. The Court is asked to resolve these disputes, set rules to govern future disputes, balance a wide variety of interests and social needs, and then persuade its audience that the decision is correct. The

353. See Frankfurter, *supra* note 295, at 314–15.

354. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

355. *Id.* at 351–54 (Scalia, J., concurring).

356. *Id.* at 354 (Scalia, J., concurring).

357. David Gibson, *Justice Scalia: 'No Such Thing as a Catholic Judge'*, COMMONWEAL MAG. (Nov. 4, 2010), <https://www.commonwealmagazine.org/justice-scalia-no-such-thing-catholic-judge>.

Court, as an institution, relies heavily on the persuasive force of its opinions, and apparent honesty is critical to that persuasive force. Thus, not only must dishonesty be rejected, but even the appearance of dishonesty must be avoided. Politically charged cases, changes in a Justice's thinking on an issue, and the treatment of precedent, all present the potential for appearing untruthful. By approaching these situations with special care and refuting counter arguments, distinguishing cases, and explaining apparent jurisprudential changes, Justices can enhance the apparent honesty of their opinions.