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Eric Berger

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THE RHETORIC OF CONSTITUTIONAL ABSOLUTISM

ERIC BERGER*

ABSTRACT

Though constitutional doctrine is famously unpredictable, Supreme Court Justices often imbue their constitutional opinions with a sense of inevitability. Rather than concede that evidence is sometimes equivocal, Justices insist with great certainty that they have divined the correct answer. This Article examines this rhetoric of constitutional absolutism and its place in our broader popular constitutional

* Associate Professor of Law, University of Nebraska College of Law. I thank Ginger Anders, Bill Araiza, Lynn Branham, Jonathan Burton-Macleod, Andy Coan, Dennis Corgill, Christopher Corts, Anne Duncan, Roy Englert, Joel Goldstein, Mark Kende, Corinna Lain, Sandy Levinson, Jon Michaels, Jack Preis, Steve Willborn, and Omaid Zabih; the participants in faculty workshops at the Marquette University, University of Richmond, St. Louis University, UCLA, and University of Wisconsin law schools; and the participants at the Fourth Annual Loyola Chicago Constitutional Law Colloquium for their very helpful suggestions on earlier drafts and presentations of this project. I also gratefully acknowledge the fabulous research assistance of Nate Clark, Marty Demoret, Lori Hoetger, and Halley Ostergard; the excellent editorial assistance of Nadia Abramson and the other editors of the *William & Mary Law Review*; and the very helpful assistance of Vida Eden. Finally, I thank Pam Hollenhorst and the Institute for Legal Studies at the University of Wisconsin Law School for their generous hospitality during my year at the Institute. A McCollum Grant helped support the writing of this Article. Remaining errors are mine.

discourse. After considering examples of the Justices' rhetorical performances, this Article explores strategic, institutional, and psychological explanations for the phenomenon. It then turns to the rhetoric's implications, weighing its costs and benefits. This Article ultimately argues that the costs outweigh the benefits and proposes a more nuanced, conciliatory constitutional discourse that would acknowledge competing arguments without compromising legal clarity or the rule of law.

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But certainty generally is illusion, and repose is not the destiny of man.

—Oliver Wendell Holmes, Jr.[1]

The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias.

—Learned Hand[2]

The majority's reasoning is faulty. It proves too much. It sets the law upon a slippery slope. It is too clever by half. It is unprecedented. It cannot withstand scrutiny. It will lead to absurd results.... It legislates from the bench. It cannot be taken literally. It seizes upon hard facts to make bad law. It is wrong.

—Kyle Graham[3]

INTRODUCTION

Pick up many a Supreme Court opinion about constitutional law, and you are likely to think that constitutional answers come easy.[4] Justices confidently announce their decisions and bolster their holdings with indisputable evidence.[5] The question might be complex, but there is rarely much doubt as to the correctness of the Court's conclusion—at least until you turn the page and start reading the dissent.[6]

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1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

2. LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (3d ed. 1960).

3. Kyle Graham, *The Ultimate Dissent*, NONCURATLEX.COM (Aug. 19, 2013), http://noncuratlex.com/?p=2054 [http://perma.cc/496L-7M29].

4. *See* Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 59 (2011).

5. *See* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 188-89 (Peter Brooks & Paul Gewirtz eds., 1996).

6. *See* Dan Simon & Nicholas Scurich, *Judicial Overstating*, 88 CHI.-KENT L. REV. 411, 411 (2013).

In fact, notwithstanding some Justices' rhetorical confidence, constitutional law rarely yields certain answers.[7] The Constitution's text is famously underdeterminate; even the new originalists, who swear fealty to the document's original public meaning, concede that in some important cases, the text's meaning will "run out" and not provide an answer.[8] And most constitutional interpreters pay only minimal attention to the text anyway, focusing instead on an accumulation of practices and principles continuously debated through the generations.[9] It is no wonder, then, that the first-year law student finds her head spinning as she tries to grasp the numerous factors that shape constitutional meaning,[10] including, among others, common-law-like precedents,[11] complex constitutional history,[12] structure,[13] morality,[14] and evolving societal norms.[15]

As one might expect, there is great disagreement about whether, when, and how to apply each of these modalities. Constitutional adjudication, then, is more art than science, defying the mechanical application of formal rules.[16] Consequently, even lawyers and professors best acquainted with the Supreme Court's practices often have difficulty predicting constitutional outcomes. Indeed, after the Court does rule, there is often bitter disagreement about whether the decision was correct.[17]

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7. *See, e.g.*, J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1995 (2006) ("Few major constitutional debates are clear-cut propositions.").

8. *See, e.g.*, Lawrence B. Solum, *Semantic Originalism* 19, 109-10 (Ill. Pub. Law & Legal Theory Research Paper Series No. 07-24, 2008), *available at* http://perma.cc/QD7G-F6ZH.

9. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 33-35 (2010) (arguing that in most constitutional decisions, the text plays "at most, a ceremonial role").

10. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991) (describing historical, textual, structural, doctrinal, ethical, and prudential modalities).

11. *See generally* STRAUSS, *supra* note 9, at 33-50.

12. *See generally* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 95-138, 333-38 (2012).

13. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 31 (1969).

14. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-3 (1997).

15. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14-18 (2009); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 117 (2012).

16. *See* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW 4 (2009).

17. *See, e.g.*, SANFORD LEVINSON, CONSTITUTIONAL FAITH 41 (1988) (noting that a Court

Nevertheless, Supreme Court constitutional opinions often pretend that answers are obvious.[18] One might think the Justices would have good reason to resist such rhetorical confidence.[19] After all, they hear the hardest constitutional cases, cases that divide state and lower federal courts and often the Justices themselves.[20] And yet, though the Justices frequently decide prominent constitutional cases by a 5-4 vote, they often couch their constitutional arguments as manifestly "correct," usually over colleagues' strenuous objections.[21] Put differently, Justices sometimes write their opinions as though the score were 100-0, even when in fact it is more like 51-49.[22]

Rhetorical certainty is nothing new in the U.S. legal system. We expect such confidence from lawyers,[23] who have a professional obligation to represent their clients' interests zealously.[24] Of course, good lawyers craft nuanced, sophisticated arguments and even concede points when necessary, but they usually try to marshal the strongest evidence in their favor and destroy their opponents' most important arguments and facts.[25] The Justices, however, are not advocates bound by the same rules, but they often behave like they are, asserting the manifest correctness of their position and the

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ruling cannot "quiet a constitutional debate").

18. *See* Kahan, *supra* note 4, at 59 ("Judicial opinions are notoriously — even comically — unequivocal."); Levinson, *supra* note 5, at 188-89 ("I am always struck when opposing views are airily dismissed as, in one of my favorite judicial phrases, 'without merit.' ").

19. *Cf.* Simon & Scurich, *supra* note 6, at 411 ("How could the seemingly intractable legal questions be resolved so resolutely?").

20. *See* Kahan, *supra* note 4, at 59-60.

21. *See* Levinson, *supra* note 5, at 188-89.

22. A case may be 51-49 in that 100 reasonable judges would split 51-49 on the issue, each believing firmly in the correctness of his vote. It also could be 51-49 in that a judge might only be 51 percent sure that she has reached the correct outcome. *See, e.g.*, Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1188 n.235 (2010) (quoting Justice Brandeis's statement "that the difficulty with this place is that if you're only fifty-five percent convinced of a proposition, you have to act and vote as if you were one hundred percent convinced"). In both instances, the case can fairly be called "difficult," either because it has divided reasonable people of good faith or because complicated evidence points in opposing directions (or often both).

23. *See* Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 153 (2010) (explaining that it is often in lawyers' professional interest to exude confidence).

24. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002).

25. *See* FARBER & SHERRY, *supra* note 16, at 114.

illogic or disingenuousness of the other side.[26] These opinions can be rigorous and even persuasive, and yet in many instances, their self-certainty does not ring true.[27]

This is the first Article to explore the many explanations for and implications of this rhetoric of constitutional absolutism. By "constitutional absolutism," I refer to the contention that a particular constitutional statement is either absolutely true or false (not to a political theory of despotism, which the Constitution, by any sane reading, forbids). Whether in majority, concurring, or dissenting opinions, Justices utilizing this rhetoric insist that a case has only one possible correct constitutional answer, despite substantial evidence supporting different possible outcomes. Justices employing absolutist rhetoric thus often depict a case as easier than it is. They also tend to brush off contrary precedents, arguments, and facts without seriously engaging with them.

Given that various legal realists and other scholars have long contended that law often does not yield certain answers,[28] this persistent rhetorical performance seems strange, especially in Supreme Court constitutional cases. Such cases, after all, tend to be among the most deeply contested cases in our judicial system. Nevertheless, various explanations—strategic, institutional, and psychological—help make sense of it. From a strategic standpoint, absolutist rhetoric reflects the Justices' efforts to legitimize a decision to society.[29] Constitutional law, on the whole, is engaged in a continuing dialectic with a broader, extrajudicial constitutional culture, and the Justices, conscious of this relationship, seek to sell their constitutional vision to the general public.[30] Relatedly, by insisting that the law is clear, the Justices defend their holdings

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26. For an amusing spoof of this tone, see *supra* note 3 and accompanying text.

27. *See* Simon & Scurich, *supra* note 6, at 413.

28. *See* FARBER & SHERRY, *supra* note 16, at 126; JEROME FRANK, LAW AND THE MODERN MIND 5-12 (1930) (attacking the notion that law yields certain answers); KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 73 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (arguing that legal certainty does not exist and attacking opinions dressed up in the "garb of certainty").

29. *Cf.* Simon & Scurich, *supra* note 6, at 424.

30. *See* Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 22 (2008); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

against the countermajoritarian concern that a small number of unelected Justices can impose their will on the country.[31] If the Constitution commands a certain outcome, then judges are not imposing their normative predilections but rather are merely following the law's clear instructions. In this way, absolutist rhetoric can also advance a formalist conception of law that presupposes objective answers to constitutional questions, rather than malleable, judge-made standards.

Other factors also explain the phenomenon. Institutional structures, both inside and outside the judiciary, help shape the Court's practices. Perhaps even more importantly, psychological research suggests that most humans, including judges, are subject to overconfidence and confirmation bias, so that they unconsciously—but confidently—process information to reinforce their preexisting worldviews.[32] The Justices' own past experiences as advocates also help shape their rhetorical choices. Having spent decades perfecting adversarial argumentation, some Justices naturally draft their opinions in the same style.[33]

From these perspectives, we can better understand why the Justices often pretend that constitutional answers are easy, but rather than taking this practice for granted, we should also explore its implications. The rhetoric of constitutional absolutism certainly has costs. For example, absolutist rhetoric signals that a given case's losers are not just wrong, but fundamentally misguided about the country's core principles. Losing litigants, then, are cast as outsiders, alienating them and encouraging them to retort with their own incendiary constitutional rhetoric. This rhetorical cycle not only may contribute to a broader dysfunctional political culture, but it also can ironically undermine the Court's legitimacy. If constitutional losers believe that the Court fails to treat their arguments with respect, they are more likely to dismiss the majority coalition as partisan hacks. Absolutist rhetoric also sends the misleading message that constitutional issues are easy. This misperception may not be a great tragedy, but it perpetuates the

31. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (Yale Univ. Press 2d ed. 1986).

32. *See* Goodman-Delahunty et al., *supra* note 23, at 153; *infra* Part II.C.

33. *See infra* Part II.C.4.

false impression that the Constitution embodies a single set of norms, when in fact it is multi-faceted, containing numerous, sometimes conflicting, values.

Absolutist rhetoric also produces some benefits. The federal judiciary's power to coerce other actors stems not from political accountability but from its authority to say what the law is. One reason why people may accept these judicial pronouncements is that they ostensibly reflect the rule of law. However honest, more equivocal reasoning would suggest that a judicial holding is *not* guided by the rule of law and might thereby undermine a crucial source of the judiciary's authority. Moreover, some cases demand that the Court speak with certainty to encourage societal acceptance. Wavering opinions in *Brown v. Board of Education*[34] or *Loving v. Virginia*,[35] for instance, may have undermined the moral force of those important rulings.

On balance, the costs of absolutist rhetoric likely outweigh its benefits in most cases. Significantly, more conciliatory, humble language could usually achieve many of absolutist rhetoric's benefits without imposing its costs.[36] To be sure, more equivocal language would not have been appropriate in *Brown* or *Loving*, but few cases demand such unanimity and moral conviction. Even *Brown*'s unanimous rejection of segregation was conspicuously devoid of strong rhetoric, in large part because Chief Justice Warren did not want to enflame the opposition's passions any more than necessary.[37]

This Article focuses on Supreme Court rhetoric in *constitutional* cases. Judges undoubtedly overstate their cases in many other tribunals and other kinds of cases,[38] but Supreme Court constitutional decisions raise unique questions. Unlike many other tribunals, the Supreme Court's judgment is final, so its claim to absolutism may be more plausible than other courts'. Moreover, whereas Congress can alter statutes when it dislikes the Court's interpretation,[39] the

34. 347 U.S. 483 (1954).

35. 388 U.S. 1 (1967).

36. *See infra* Part IV.

37. *See* Levinson, *supra* note 5, at 198.

38. *See* Simon & Scurich, *supra* note 6, at 414 (calling judicial overstatement "the predominant, albeit unofficial, mode of judicial reasoning" in America).

39. *See generally* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers:*

Court's constitutional decisions usually persevere unless the Court itself revisits a decision. Furthermore, although the stakes in statutory cases can also be very high, constitutional litigation often has especially high *cultural* stakes.[40] Accordingly, constitutional opinions are part of a broader constitutional conversation about national identity and often attract disproportionate attention from the media and the general public.[41] Finally, the Constitution the Court seeks to expound is less determinate than most statutes and agency regulations, rendering it more open to an array of interpretive methods.[42] Of course, plenty of statutes are also under-determinate, but the Constitution is often even more so.[43] The great irony, then, is that Justices in these cases confidently proclaim easy answers to the most contestable legal questions.

One should not overstate the importance of rhetoric. The substance of the Court's decision usually matters more than its language, and a change in judicial rhetoric will not substantially alter the republic's fate. That said, rhetoric also goes ignored too often, especially given the country's recent poisonous political atmosphere. Attention to tone will not solve all of our problems, but it will make us more conscious of the ways we interact with each other.

Indeed, constitutional rhetoric is a special form of political discourse because the idea of being American is interwoven with constitutional principles.[44] As Professor Sanford Levinson puts it, "Veneration of the Constitution has become a central ... aspect of the American political tradition."[45] The Constitution, indeed, is the

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Statutory Interpretation of Congressional Overrides, 84 NOTRE DAME L. REV. 511 (2009).

40. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1327 (2006) (discussing how developments in constitutional law impact culture). *But see* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2000) (arguing that some "super-statutes" have quasi-constitutional significance).

41. *Cf.* Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, *in* CONTEMPLATING COURTS 352, 352-53, 359 (Lee Epstein ed., 1995) (noting that constitutional cases involving abortion and flag burning received "very prominent" media coverage).

42. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding.").

43. *See* STRAUSS, *supra* note 9, at 7-8.

44. *See* LEVINSON, *supra* note 17, at 7.

45. *Id.* at 11 (internal quotation marks omitted).

"secular religion of the American republic."[46] Just as much theology emanates from a central text or texts, so too does much of our national identity and governmental practices grow out of our constitutional understandings. Also like religion, our constitutional values are sometimes as much a source of strife as unification.[47]

Within our broader national constitutional discussion, the Court's constitutional pronouncements are of special interest. The Supreme Court enjoys a crucial position in declaring constitutional meaning in our democratic system. Perhaps Alexis de Tocqueville overstated the matter when he claimed that most American political questions are ultimately resolved as judicial questions,[48] but today's Court has firmly asserted its prerogative to determine constitutional meaning in a variety of important areas.[49] Popular visions of the Constitution can help shape the content of the law,[50] but it is the prerogative of the judicial department to say what the law is.[51] Because Supreme Court constitutional decisions are often central to this broader national debate about constitutional meaning, they are also at the center of this study.

Part I of this Article opens with a brief discussion of absolutist language in the Constitution itself and then focuses on the Justices' use of absolutist rhetoric in constitutional cases with plausible arguments on either side.[52] Part II considers why the Justices resort

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46. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 24 (1975).

47. *See* LEVINSON, *supra* note 17, at 15-16.

48. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (Henry Reeve trans., Arlington House 1966) (1835) ("Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."); Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485 (2004) (arguing that de Tocqueville was incorrect and that many important early constitutional controversies were not settled by the judiciary).

49. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 435 (2000); Cooper v. Aaron, 358 U.S. 1, 17 (1958).

50. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 107 (2004) (explaining how in popular constitutionalism, "final interpretive authority rests with the people themselves"); Post, *supra* note 30, at 76 ("[T]he Court plainly views constitutional culture as a legitimate and necessary source for the creation of constitutional law ... the beliefs and convictions of that culture importantly shape the content of the Court's understanding.").

51. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is.").

52. This Article is not an empirical study, though one could imagine a variety of related empirical projects exploring, inter alia, how often we encounter such rhetoric in Supreme

to absolutist rhetoric, examining strategic, institutional, and psychological explanations. Part III explores the costs and benefits of this rhetoric, as well as some tensions with other judicial practices. Part IV argues that the costs of absolutist rhetoric usually outweigh the benefits and proposes a more nuanced, conciliatory constitutional dialogue.

I. THE RHETORIC OF CONSTITUTIONAL ABSOLUTISM

A. Absolutist Constitutional Provisions

In one sense, it is no surprise that the Court would speak about the Constitution in absolute terms, because the Constitution itself uses absolutist rhetoric. Constitutions generally may be prone to absolutism, because their job is to lay down broad rules of general applicability, not to resolve the hard cases that arise.[53] The First Amendment, for instance, stipulates that "Congress shall make *no* law ... abridging the freedom of speech."[54] This language is absolutist; by its own terms, it allows no exceptions. Of course, the Free Speech Clause in practice is less absolute, notwithstanding Justice Black's protestations to the contrary.[55] Well-settled Supreme Court doctrine allows for abridgments of certain kinds of speech, such as incitements to violence, fighting words, obscenity, and child

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Court opinions, which Justices use such rhetoric most frequently, which issues most commonly provoke it, whether it has recently become more common, and whether it occurs more often in unanimous or closely divided cases. One might also examine separately different sorts of absolutist rhetoric—disrespectful language, sarcastic language, dismissal of counterarguments, certainty of tone, and so on. *See, e.g.*, Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2D 215, 215-217 (2015) (offering empirical evidence demonstrating that Justice Scalia is the most sarcastic Justice). Each of these approaches would likely yield very interesting insights. That said, while an empirical project could better determine how often and in what ways the Justices use absolutist rhetoric, there is no doubt that such rhetoric exists, and it is this project's aim to examine explanations for and implications of the phenomenon more generally.

53. *See* ARTHUR P. POLEY, THE FEDERAL SYSTEMS OF THE UNITED STATES AND THE BRITISH EMPIRE: THEIR ORIGIN, NATURE, AND DEVELOPMENT 125-30 (1913) (explaining that written constitutions typically lay down fundamental principles).

54. U.S. CONST. amend. I (emphasis added).

55. *See, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 75 (1961) (Black, J., dissenting) ("[T]he First Amendment rights involved here[ ] were unequivocally set out by the Founders in our Bill of Rights in the very plainest of language, and they should not be diluted by 'tests' that obliterate them.").

pornography.[56] A similar disconnect exists between the Contracts Clause and cases construing that provision.[57] These very disconnects between language and doctrine highlight that judges do not always take absolutist language seriously.[58]

Indeed, whereas some foreign constitutions include clauses providing for reasonable limitations on the exercise of individual rights,[59] the U.S. Supreme Court instead has fashioned such limitations itself.[60] Of course, we do accept some clear provisions. For example, the President must be at least thirty-five years old,[61] and each state must have two senators.[62] Nevertheless, as the First Amendment and the Contracts Clause examples demonstrate, a constitutional provision's textual clarity does not always determine the relative importance of text in the interpretation of that provision.

B. Judicial Absolutism

Against this backdrop, it is strange that Justices interpreting the document would insist that its answers are clear, and yet, they often do. Indeed, the practice is largely taken for granted,[63] even though

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56. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982); Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

57. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall ... pass any ... Law impairing the Obligation of Contracts."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447-48 (1934) (holding that a state's suspension of creditors' remedies did not violate the Contracts Clause).

58. One might contend that the language "abridging the freedom of speech" contemplates some limitations on speech that different language—such as "Congress shall make no law abridging speech"—might not. *See* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 118 (1982). The Court, however, has not hooked its free speech doctrine on this textual nuance.

59. *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.) (permitting "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"); S. AFR. CONST. § 36, 1996 (providing for balancing of the right and the nature of the limitation).

60. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited."); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 401 (2008) (arguing that the lack of a limitations clause in the U.S. Constitution has not "resulted in rights being deemed absolute but rather in the judicial implication of limits").

61. *See* U.S. CONST. art. II, § 1, cl. 5.

62. *See id.* art. I, § 3, cl. 1.

63. *See* Stephen A. Siegel, *How Many Critiques Must Historians Write?*, 45 TULSA L. REV. 823, 824 (2010) ("[T]he norms of judicial-opinion writing require judges to assert certainty

many cases that proceed through the litigation process without settling raise difficult questions over which reasonable people can differ.[64] Given that the certiorari process favors issues that have divided the lower courts, Supreme Court cases in particular tend to be challenging. Furthermore, unlike some statutory and administrative cases, constitutional cases usually lack the kind of technical answers about which accomplished lawyers are more likely to agree.[65] To be sure, there are some constitutional cases which most observers would consider "easy,"[66] but even if we can agree in principle on the existence of such cases, it is extraordinarily difficult to offer formal criteria by which to determine what constitutes an "easy" case.[67] Nevertheless, Justices often dismiss opposing constitutional views as "frivolous" or "without merit," despite colorable—even persuasive—arguments to the contrary.[68] Indeed, this practice is hardly confined to unanimous cases; majority and dissenting opinions both summarily reject arguments that another opinion found convincing.[69]

To be clear, an absolutist opinion is not necessarily a bad one. An absolutist opinion typically overstates its claims and fails to give fair hearing to arguments and evidence on the other side, but it can nevertheless be rigorous and coherent. For all its flaws, an absolutist opinion can function well according to its own internal logic.

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about their decisions.").

64. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984) (explaining that cases that fail to settle are most often those "where the dispute is most problematic").

65. *See* Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 67 (2012).

66. *See supra* notes 61-62 and accompanying text.

67. *See* Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 357 (1987).

68. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173, 195 n.82 (2001) ("[T]he flip side of the point that a person viewing the law internally can see arguments as meritorious that others think utterly frivolous is that one can recognize and proclaim arguments as frivolous that others think are entirely meritorious."); Levinson, *supra* note 5, at 189 (noting how often courts airily dismiss opposing views as "without merit").

69. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 375 (1997) (Stevens, J., dissenting) (rejecting the majority's First Amendment argument as "meritless"); Solem v. Helm, 463 U.S. 277, 288-89 n.14 (1983) (rejecting as "meritless" an Eighth Amendment argument advanced by four dissenters); Balkin & Levinson, *supra* note 68, at 195 n.82.

"Absolutism" also is distinct from "civility." Although some judicial rhetoric may occasionally fall below basic standards of decency, constitutional rhetoric can be overconfident without being obnoxious. The judicial opinion is a genre long accustomed to restraint. Perhaps Justice Scalia's caustic flourishes sometimes cross this boundary,[70] but by most accounts, his colleagues usually take it in stride, and the Court remains, more or less, a collegial place.[71] Rhetoric might be simultaneously absolutist and uncivil, and absolutism might lead towards uncivil discourse (and vice versa), but the focus here is judicial opinions, which, while intellectually dismissive of differing views, usually follow the genre's formal conventions.

Though absolutist rhetoric about the Constitution appears in numerous cases, I focus here on five kinds of constitutional cases lacking obvious answers. These include a case relying on originalist arguments to announce a new constitutional right; a case presenting a conflict between constitutional rights; a case overturning precedent; a case identifying a national consensus to justify invalidating a state law; and a case resting upon a highly contested view of crucial legislative facts. Neither the examples nor the categories are exhaustive. Nor are the examples absolutist in identical ways, though in most of them, the authoring Justice over-simplifies the law or the facts, fails to wrestle seriously with counterarguments, and writes as though the outcome is obvious. In short, these cases demonstrate that Justices sometimes adopt the most certain language, even when the answer seems contestable.

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70. *See, e.g.*, Brett Logiurato, *Justice Scalia Used the Term "Argle-Bargle" in a Scathing, Condescending DOMA Rant*, BUSINESS INSIDER (Jun. 26, 2013, 4:25 PM), http://www.businessinsider.com/justice-scalias-doma-dissent-argle-bargle-2013-6 [http://perma.cc/5G5-BR5C] (discussing Justice Scalia's scornful dissent in *United States v. Windsor*).

71. *See* Robyn Hagan Cain, *Justice Kagan Talks Cameras in the Supreme Court, Collegiality*, FINDLAW BLOG (Aug. 5, 2011, 9:05 AM), http://blogs.findlaw.com/supreme_court/2011/08/justice-kagan-talks-cameras-in-the-supreme-court-collegiality.html [http://perma.cc/BAP4-N8RV] (discussing the "warmth and collegiality among the justices"). *But see infra* notes 413-14 and accompanying text (noting that Justice Scalia's sharp rhetoric has reportedly alienated some of his colleagues).

1. Heller*, History, and a New Individual Right*

One would think a case relying on historical sources to announce a previously unrecognized constitutional right might demand caution rather than bluster, but the Court in *District of Columbia v. Heller* defended its holding as though no other outcome were possible.[72] The case considered the constitutionality of the District of Columbia's handgun ban.[73] Challengers argued that the law violated the Second Amendment.[74] The District argued, among other things, that the Second Amendment's right to keep and bear arms extends only to militia service.[75] Although commentators and activists had written extensively about the Second Amendment prior to *Heller*, the Court itself had said very little.[76]

Interestingly, both Justice Scalia's majority opinion and Justice Stevens's dissent engaged in originalist analysis to determine whether the Second Amendment protected the right to bear arms unconnected to militia service.[77] Given the Court's 5-4 split[78] and the complications inherent in originalist inquiries, equivocal opinions would have seemed appropriate. However, even though the majority and dissent understood that history very differently,[79] each insisted that *its* interpretation was manifestly correct.

Indeed, Justices Scalia and Stevens both presented their historical arguments as though the evidence all stacked up clearly on one side. Justice Scalia's majority opinion vigorously rejected the argument that the Second Amendment's prefatory clause—"A well regulated Militia, being necessary to the security of a free

72. 554 U.S. 570 (2008).

73. *Id.* at 573.

74. *Id.* at 575-76.

75. *Id.* at 577.

76. *But see* United States v. Miller, 307 U.S. 174 (1939).

77. *See Heller*, 554 U.S. at 576-605; *id.* at 637, 640-62 (Stevens, J., dissenting).

78. *Id.* at 572 (majority opinion).

79. One potential explanation for the discrepancy is that whereas Justice Scalia was searching for the text's original public meaning, Justice Stevens was more concerned with the purpose underlying the text. *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 957 (2009). However, it is also important to note that the separate opinions were not so methodologically pure. In fact, though Justice Stevens did examine the purposes behind the provision, he also devoted significant attention to evidence of the text's public meaning. *See* Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 338 (2013).

State"—limited the scope of its operative clause—"the right of the people to keep and bear Arms, shall not be infringed."[80] Justice Scalia cited some plausible period sources for this contention,[81] but Justice Stevens in dissent also cited plausible sources for the opposite contention that a provision's prefatory clause "both sets forth the object of the Amendment and informs the meaning of the remainder of its text."[82] Despite complicated evidence on both sides, Justice Scalia never doubted the correctness of his position, announcing categorically that "a prefatory clause does not limit or expand the scope of the operative clause."[83] His language admitted no complication or doubt.

Justice Scalia was similarly confident that the "natural meaning" of the phrase "keep and bear arms" "in no way connotes participation in a structured military organization."[84] The dissent, in fact, identified several eighteenth-century state declarations of rights that used the phrase as a term of art implying "military uses of firearms."[85] The majority nevertheless brushed off these arguments, stating "[t]here is nothing to this."[86] Thus, despite evidentiary complications and contradictions, Justice Scalia's opinion reads as though the case were easy and the dissenters hopelessly misguided. Indeed, his rhetoric did little to hide his disdain, dismissing the dissent's arguments as "worthy of the Mad Hatter"[87] and "[g]rotesque."[88] Of course, none of this is to say that the *Heller* majority necessarily got the case wrong, but rather to point out its absolutist tone in a case which divided both commentators and the Court itself.[89]

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80. U.S. CONST. amend. II.

81. *Heller*, 554 U.S. at 578.

82. *Id.* at 643 (Stevens, J., dissenting).

83. *Id.* at 578 (majority opinion).

84. *Id.* at 584.

85. *See id.* at 642-43 (Stevens, J., dissenting).

86. *Id.* at 591 (majority opinion).

87. *Id.* at 589.

88. *Id.* at 587; *see also* Guinier, *supra* note 30, at 110 (noting that Justice Scalia in *Heller* "speaks frankly, memorably, and with absolute certainty about the very meaning of our democracy").

89. *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 266 (2009) ("If there is a reasonable case for the majority's interpretation of the Second Amendment, there is also a reasonable case for the position taken by the dissenters.").

Justice Stevens's dissenting language is more diplomatic but similarly self-assured. In his view, the Second Amendment's language was directed at an "overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger."[90] The majority's evidence, the dissent contended, "offer[ed] little support for the Court's conclusion,"[91] which created a "dramatic upheaval in the law."[92] Given the majority's "strained and unpersuasive reading" of the relevant evidence,[93] Justice Stevens "could not possibly conclude" that the Second Amendment removed elected officials' ability to regulate guns.[94]

Both sides' strong language belies the fact that the *Heller* holding was rather limited. Indeed, though the Court recognized a right that the dissent would have denied, it also made clear, albeit with no supporting argument, that certain regulations impinging on the right to bear arms would almost certainly be constitutional.[95] Interestingly, then, the Court's absolutist rhetoric masked a rather modest, albeit controversial, holding.

2. Rosenberger *and Conflicting Constitutional Rights*

One might also think that cases presenting colliding constitutional principles are inherently difficult, but, once again, we see Justices on a divided Court taking strong stances. In *Rosenberger v. Rector and Visitors of University of Virginia*, the Court considered the constitutionality of a university practice denying an evangelical Christian student publication the same subsidy for printing costs that it provided to other student publications.[96] The case squarely pitted free speech against Establishment Clause norms. On the one hand, the policy denied the Christian publication the same funding

90. *Heller*, 554 U.S. at 661 (Stevens, J., dissenting).
91. *Id.* at 662.
92. *Id.* at 639.
93. *Id.*
94. *Id.* at 680.
95. *See id.* at 626-28 (majority opinion) (discussing various limitations of the Second Amendment).
96. 515 U.S. 819, 822-23 (1995).

for speech that it provided other student groups,[97] thereby manifesting unconstitutional content and viewpoint discrimination.[98] On the other hand, governmental funding of evangelical publications would violate the longstanding prohibition on the use of "public funds for the direct subsidization of preaching the word."[99]

Rather than candidly acknowledging that the case was difficult precisely because these two important norms collided, both the majority and the dissent treated this like an easy case. In vindicating the publication's free speech claim, Justice Kennedy emphasized that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[100] Viewed solely through the lens of free speech, the University's policy unquestionably discriminated against the religious publication. As for the contention that university funding to an evangelical publication would violate the Establishment Clause, Justice Kennedy found that the "central lesson" of earlier cases was that government programs neutral towards religion would be upheld, and therefore, free speech norms clearly trumped Establishment Clause concerns in such contexts.[101] On Justice Kennedy's reading, then, the free speech violation was egregious and the Establishment Clause issue was virtually nonexistent.

Justice Souter viewed the case entirely differently, focusing on the government aid to religion, which, he emphasized, is "categorically forbidden under the Establishment Clause."[102] Whereas Justice Kennedy had been untroubled by a "neutral" subsidy,[103] Justice Souter insisted that the Establishment Clause's scope was broader, arguing "if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money."[104] To bolster this view, Souter provided a cursory summary of the early history of anti-establishment norms in America, concluding that the First Amendment must have embodied Thomas Jefferson and James Madison's

97. *Id.* at 827.
98. *See id.* at 830-31.
99. *See id.* at 868 (Souter, J., dissenting).
100. *Id.* at 828 (majority opinion).
101. *Id.* at 839.
102. *Id.* at 868 (Souter, J., dissenting).
103. *See id.* at 839 (majority opinion).
104. *Id.* at 868 (Souter, J., dissenting).

opposition to public support for religion.[105] Justice Souter's historical conclusions are plausible, but so are alternative interpretations, especially given that some New England states during the early republic retained state establishments of religion.[106]

Only Justice O'Connor's concurrence acknowledged the difficulty of the case. She emphasized the dueling constitutional norms at stake, writing that "[t]his case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."[107] Whereas the majority and dissent had each dismissed the other's line of reasoning, Justice O'Connor noted that "[w]hen two bedrock principles so conflict, understandably neither can provide the definitive answer."[108] In a thinly veiled critique of her colleagues, O'Connor continued that "[r]eliance on categorical platitudes is unavailing."[109] Whereas the majority and dissent had offered more absolutist readings of the First Amendment, Justice O'Connor insisted that the analysis required something more subtle than a First Amendment master norm. "Resolution," she argued, "instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case."[110]

Justices Kennedy and Souter thus each took a more absolutist approach to the case, but Justice O'Connor emphasized the constitutional tensions. This approach eschewed the rhetorical confidence of the majority and dissent. Instead, it accepted the legitimacy of competing First Amendment norms to focus on the context of the particular case.[111] Nevertheless, the fact that Justice O'Connor wrote only for herself highlights the apparent appeal of absolutism in even the hardest cases.

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105. *Id.* at 868-72.

106. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT 164 (2007).

107. *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Cf.* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 499-500 (2006) (discussing an approach to colliding constitutional doctrines).

3. Citizens United *and Overturning Precedent*

Absolutist rhetoric would also seem unconvincing when the Court overturns precedent. After all, in such instances, the Court is disagreeing not just with lower courts but with itself. Such cases, one would think, would invite a Justice to concede that a question is difficult, but, once again, the Court sometimes uses unequivocal language.

Citizens United v. FEC provides a recent example.[112] In that case, the Court struck down portions of the Bipartisan Campaign Reform Act of 2002 (BCRA), holding that restrictions on independent expenditures by corporations' general treasuries for election-related speech violated the First Amendment.[113] Despite a vigorous four-Justice dissent and the fact that the Court had to overrule both *Austin v. Michigan Chamber of Commerce*[114] and portions of *McConnell v. FEC*,[115] Justice Kennedy, writing for the majority, treated this as an easy case.

Though long and complicated, Justice Kennedy's opinion for the Court boiled down to his conclusion that BCRA enacted a "vast" scheme of "censorship."[116] Proceeding with great confidence, the Court brushed away arguments in favor of upholding the restriction. For example, though the Court in *Austin* had upheld prohibitions on corporations' independent expenditures, Justice Kennedy rejected this precedent as anomalous,[117] largely because the government defended *Austin* on a different ground than the Court had relied upon in that decision.[118] On closer inspection, the Court's justification for ignoring *Austin* seems dubious. Indeed, Justice Kennedy himself was one of the authors of *Planned Parenthood v. Casey*,[119] which upheld *Roe v. Wade*'s[120] core holding in rather absolutist

112. 558 U.S. 310 (2010).

113. *Id.*

114. 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

115. 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310.

116. *Citizens United*, 558 U.S. at 354.

117. *See id.* at 348 ("No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity.").

118. More specifically, whereas *Austin* had rested primarily on an antidistortion rationale, the government sought to uphold BCRA because it helped combat corruption. *See id.* at 363.

119. 505 U.S. 833 (1992).

120. 410 U.S. 113 (1973).

terms,[121] while departing substantially from *Roe*'s rationale.[122] *Casey*'s controversial reaffirmation of *Roe*, however, did not stop Justice Kennedy from finding *Austin*'s precedential value largely "diminished" by the fact that the government sought to defend it with different reasoning.[123]

More importantly, the Court failed to engage seriously with the dissent's concern that Congress has a "compelling constitutional basis" to guard against the appearance of and potential for corruption in local and national elections.[124] Justice Kennedy concluded, without any factual citations, "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,"[125] even though, as the dissent pointed out, Congress had crafted BCRA with a "virtual mountain of research on the corruption that previous legislation had failed to avert."[126] Justice Kennedy further responded that the appearance of corporate influence over governmental policy will not cause the electorate to lose faith in democracy, but, once again, he cited no evidence supporting his view.[127] The Court, in other words, rejected the most important argument in support of the challenged regulation by ignoring reams of contrary evidence and making assertions without evidence to support them.[128]

None of this is to say that the dissent was not also guilty of absolutist rhetoric when it accused the majority of repudiating "common sense."[129] Nor is it to say that the Court did not have legitimate arguments on its side. The majority was correct when it

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121. *See Casey*, 505 U.S. at 867 ("[T]he Court's interpretation of the Constitution call[s] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.").

122. *Id.* at 846, 851-53 (upholding the core of *Roe*'s protection of abortion rights but replacing *Roe*'s privacy justification with a reproductive autonomy and equality rationale).

123. *Citizens United*, 558 U.S. at 363.

124. *See id.* at 394 (Stevens, J., dissenting).

125. *Id.* at 357 (majority opinion).

126. *Id.* at 400 (Stevens, J., dissenting).

127. *See id.* at 360 (majority opinion) ("The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.").

128. *See* Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in* Citizens United v. Federal Election Commission, 42 LOY. U. CHI. L.J. 295, 298 (2011) (noting that Justice Kennedy seemed to believe that the facts were irrelevant to the analysis in *Citizens United*).

129. *See Citizens United*, 550 U.S. at 479 (Stevens, J., dissenting).

contended that the law did "muffle" some speech.[130] It was similarly correct that BCRA targeted political speech, which enjoys special status under the First Amendment.[131] And it also made the legitimate point that the government's interest in campaign finance regulations is undermined, at least in part, by the frequency with which many political contributors circumvent such regulations.[132]

These are powerful points in the majority's favor. Nevertheless, even in articulating these arguments, the Court was prone to overstatement. For example, it asserted that "political speech *must prevail* against laws that would suppress it,"[133] thus seeming to suggest, contrary to longstanding precedent, that even laws narrowly tailored to serve compelling governmental interests would be invalid. Justice Kennedy likely did not mean to go quite so far: he later cited the test for strict scrutiny.[134] His language, however, is symptomatic of an opinion that celebrates a single constitutional principle so vigorously that it myopically ignores competing interests.[135]

A more equivocal opinion could have still asserted the same arguments and come to the same outcome while engaging more seriously with counterarguments. In particular, a less absolutist opinion could have acknowledged the very real problem of corporate influence in our policy-making system.[136] The Court defined "corruption" very narrowly, encompassing only actual quid pro quo exchanges,[137] and thus avoided addressing the larger, persistent

130. *See id.* at 354 (majority opinion) (quoting McConnell v. FEC, 540 U.S. 93, 257 (2003)).

131. *Id.* at 336-41.

132. *Id.* at 364 ("Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws.").

133. *Id.* at 340 (emphasis added).

134. *Id.* (quoting FEC v. Wis. Right to Life, 551 U.S. 449, 464 (2007)) (noting that strict scrutiny permits only laws that are narrowly tailored to serve compelling governmental interests).

135. *See id.* at 339 ("Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process.").

136. *See* Teachout, *supra* note 128, at 297.

137. *See Citizens United*, 558 U.S. at 356-59 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1386 (2013) (arguing that the "main front in the battle over the constitutionality of campaign finance laws" is "defining corruption").

problem of a campaign finance system that grants the very wealthy, including some large corporations, extraordinary and disproportionate access to legislators, thereby (at least arguably) skewing policy to suit their interests.[138] By brushing off the asserted danger that large corporate campaign contributions can effectively purchase favorable policies (without actually meeting the legal definition of quid pro quo corruption), the Court failed to give a fair hearing to the government's argument that the dangers of corruption constituted a compelling governmental interest justifying intrusion into corporate speech rights.[139] In short, the Court acted as though the case were easy, extolling the right at stake in grandiose terms, rejecting inconvenient precedent, and giving short shrift to arguments and evidence that complicated the picture.

4. Graham*, National Consensus, and the Countermajoritarian Problem*

The Court also sometimes uses absolutist rhetoric when it seeks to justify its decision to overturn democratically enacted laws. It sometimes does so by asserting that a national consensus has emerged against a challenged practice, thereby suggesting that the challenged law actually lacks majoritarian support.[140] Given that a national consensus is factually difficult to establish and that challenged practices usually enjoy some democratic support, one might think that the Court should proceed cautiously, especially when the evidence is equivocal. Nevertheless, once again, it often proceeds with great confidence.

This inquiry into the existence of a national consensus arises frequently in Eighth Amendment cases examining whether a particular criminal punishment is "cruel and unusual."[141] For example,

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138. *See, e.g.*, Teachout, *supra* note 128, at 297 (noting that *Citizens United* "suffers from a failure to describe real pressures [on politicians and their staffers], and the way those pressures directly interfere with representative government in devastating ways").

139. The Court also could have reached the same outcome on much narrower grounds. *See Citizens United*, 558 U.S. at 356-61.

140. *See, e.g.*, Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 388-400 (2009) (arguing that the Court engages in state counting in a variety of doctrinal contexts beyond the Eighth Amendment).

141. U.S. CONST. amend. VIII; *see also* Lain, *supra* note 140, at 366-68.

in *Graham v. Florida*, the Court considered an Eighth Amendment challenge to Florida's imposition of a sentence of life in prison without parole for a juvenile found guilty of a non-homicide crime.[142] The Court, per Justice Kennedy, ruled for the petitioner, categorically proclaiming that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[143]

In defending this holding, the Court placed substantial weight on its conclusion that "a national consensus has developed against" the practice.[144] This conclusion, however, was more contestable than the Court made it seem. Indeed, at the time of the Court's decision, thirty-seven states and the District of Columbia *did* permit sentences of life without parole for juvenile non-homicide offenders.[145] The Court tried to minimize the significance of this evidence, contending that "[t]here are measures of consensus other than legislation."[146] However, in previous Eighth Amendment cases, the Court had relied heavily on its survey of state statutes. For example, in *Kennedy v. Louisiana*, Justice Kennedy, again writing for the Court, emphasized that forty-four states had not made child rape a capital offense when he confidently announced that "there is a national consensus against capital punishment for the crime of child rape."[147]

To be sure, the *Graham* majority's survey of actual sentencing practices did suggest that life imprisonment without parole was a relatively rare punishment for juveniles convicted of non-homicide offenses.[148] Moreover, earlier cases did not indicate that state statutes were the only measure of a national consensus.[149] Nevertheless, although *Graham* offered some plausible evidence for its conclusion, it also failed to adequately justify the methodological inconsistencies

142. 560 U.S. 48, 53 (2010).

143. *Id.* at 82.

144. *Id.* at 67 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

145. *See id.* at 62.

146. *Id.*

147. 554 U.S. 407, 423, 434 (2008); *see also* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 15 (2010).

148. *See Graham*, 560 U.S. at 63-67.

149. *See, e.g.*, *Kennedy*, 554 U.S. at 423; Roper v. Simmons, 543 U.S. 551, 566-67 (2005); Atkins v. Virginia, 536 U.S. 304, 315 (2002).

of its approach.[150] It similarly had no answer for the dissent's contention that a rarely imposed punishment reflects consensus that it should be rarely imposed, not that "the punishment is one the Nation abhors."[151] Furthermore, instead of explaining why sentencing practices were more indicative of a national consensus than state statutes, the majority merely asserted that argument as fact.[152] *Graham*, thus, simultaneously adopted a confident tone and failed to wrestle with difficult counterarguments that might have cast doubt on its conclusions.

The Court's partial reliance on the ostensible existence of a national consensus against the challenged sentence may reflect its efforts to mitigate the countermajoritarian problem.[153] After all, if the Court strikes down a practice that is out of step with widely accepted American norms, its action is less obviously countermajoritarian.[154] To this extent, *Graham*'s confident rhetoric may seek to rebut the criticism that the Court should have deferred to the state legislature. Ironically, though, the Court's oversimplified and overconfident national consensus analysis hardly provides assurance that it takes the countermajoritarian concern here seriously.

None of this is to suggest that the dissent was not also guilty of rhetorical excess. For instance, Justice Thomas criticized the Court for "openly claim[ing] the power ... to approve or disapprove of democratic choices in penal policy based on ... the Court's 'independent' perception of how those standards *should* evolve."[155] The dissent was correct, of course, that the majority did not limit its analysis to indications of national consensus but also offered its own moral judgment.[156] However, far from being anomalous, as the dissent suggested, such independent judgment recurs in numerous Eighth Amendment cases.[157] Justice Thomas also faulted the majority for

150. *See* Berger, *supra* note 147, at 15-16.

151. *See Graham*, 560 U.S. at 111 (Thomas, J., dissenting).

152. *See id.* at 67 (majority opinion) ("[T]he many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate.").

153. *See* BICKEL, *supra* note 31, at 16-17.

154. *Cf.* Lain, *supra* note 140, at 369-70 (arguing that the Court counts states in numerous doctrinal settings and that this practice reflects "the Court's majoritarian proclivities").

155. *Id.* at 102 (Thomas, J., dissenting).

156. *See id.*

157. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008); Roper v. Simmons, 543 U.S.

rejecting a sentencing practice that "would not have offended the standards that prevailed at the founding,"[158] even though the Eighth Amendment has long been understood to encompass "evolving standards of decency."[159] As in other cases, then, both the majority and dissent used excessive rhetoric and failed to engage carefully with the other side's best arguments.

5. Shelby County *and Supreme Court Finding of Legislative Facts*

If the Court's idiosyncratic factual understandings played a substantial role in *Citizens United* and *Graham*, they almost single-handedly determined the outcome in *Shelby County v. Holder*.[160] Constitutional law often hinges on the Justices' conceptions of legislative facts—that is, facts that transcend a particular dispute and provide a foundation upon which the Court will form and apply legal rules.[161] *Shelby County* demonstrates how the Justices' different factual presumptions can shape their legal views and how the Justices can offer one-sided factual presentations that fail to do justice to a case's complexity.

Shelby County considered the constitutionality of section 4 of the Voting Rights Act of 1965 (VRA), which provided the "coverage formula" defining "covered jurisdictions" subject to section 5.[162] Under section 5 of the Act, covered jurisdictions must seek federal approval for changes to voting procedures.[163] Section 4's coverage formula, thus, determined which states and localities must clear any change to voter procedures with the federal government.[164]

551, 568-75 (2005).

158. *Graham*, 560 U.S. at 97 (Thomas, J., dissenting).

159. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

160. 133 S. Ct. 2612 (2013).

161. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1998); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1256-57 (2012).

162. *Shelby Cnty.*, 133 S. Ct. at 2612 (discussing the Voting Rights Act of 1965, 42 U.S.C. § 1973b (2012)).

163. *See id.* at 2619-21 (discussing the history of the Voting Rights Act).

164. Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973 (2012), *invalidated by Shelby Cnty.*, 133 S. Ct. 2612.

Congress reauthorized the Act several times, but in both 1982 and 2006, its reauthorizations did not alter the coverage formula.[165] Consequently, most jurisdictions covered in 1975 were also covered in 2013, subject to certain "bail out" provisions.[166] When the U.S. Attorney General objected to voting changes proposed in Shelby County, Alabama, on the grounds that they harmed minority voters,[167] the county, a covered jurisdiction under section 4, sued, challenging the constitutionality of the coverage formula.[168]

The Supreme Court ruled in Shelby County's favor, striking down section 4 in its entirety.[169] In so doing, the Court emphasized that in reauthorizing the VRA in 2006 without updating the coverage formula, Congress imposed extreme burdens on states unjustified by current needs.[170] Whereas federal intrusion into state voting procedures may once have been necessary, the covered jurisdictions' great strides combating racist voting practices obviated such measures today.[171]

The Court's holding thus hinged largely on its understanding of the facts. In covered jurisdictions, Chief Justice Roberts noted, "[v]oter turnout and registration rates [between whites and racial minorities] now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[172] Indeed, the Court continued, African Americans by 2006 were attaining political office "in record numbers,"[173] further indicating that continued federal oversight of covered jurisdictions' election procedures was both unnecessary and unduly intrusive. Congress, however, had reauthorized the coverage provisions "as if nothing had changed."[174]

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165. *Shelby Cnty.*, 133 S. Ct. at 2620-21.

166. *Id.*

167. *See* Joint Appendix at 115a, *Shelby County*, 133 S. Ct. 2612 (No. 12-96), 2012 WL 6952117 (noting that the city had not met "its burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect").

168. *Shelby Cnty.*, 133 S. Ct. at 2621-22.

169. *See id.* at 2631.

170. *Id.* at 2630-31 (asserting that it was irrational for Congress to reauthorize a coverage formula that was based on forty-year-old data, when current statistics reflect "an entirely different story").

171. *See id.* at 2628 ("There is no longer such a disparity.").

172. *Id.* at 2621 (quoting Nw. Austin Mun. Util. Dist. v. Holder, 557 U.S. 193, 202 (2009)).

173. *Id.* at 2628.

174. *Id.* at 2626.

The Court's presentation of these facts is absolutist, framed in simple, declarative sentences as incontestable fact ineluctably leading to a constitutional conclusion. Congress's failure to update the coverage formula, it emphasized, "leaves [the Court] ... with no choice but to declare § 4(b) unconstitutional."[175] Viewed solely through the lens of these facts, the Court's holding seems—at least arguably—reasonable. Why should we permit continued federal interference in state affairs when the mischief Congress sought to remedy has largely dissipated?

The problem, of course, is that the Court's presentation of facts is far more controversial than its tone would suggest. As Justice Ginsburg contended in dissent, the majority's largely sunny view of race relations ignored some crucial facts.[176] Unlike the majority, the dissent emphasized that minority voting patterns were healthy in many covered jurisdictions precisely because the VRA continued to do significant work there.[177] Justice Ginsburg emphasized that the Attorney General had rejected large numbers of proposed changes to voting laws in covered jurisdictions, thus indicating that "barriers to minority voting would quickly resurface were the preclearance remedy eliminated."[178] Far from being unnecessary, the preclearance provision continued to protect minority voters from state and local schemes that would dilute their power.[179] Justice Ginsburg thus rejected the Chief Justice's confident factual analysis with her own absolutist simile: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[180]

The majority and dissent thus used their opinions to proclaim, in no uncertain terms, their particular views of very complicated facts, even though the Supreme Court is institutionally ill-equipped to

175. *Id.* at 2631.

176. *See id.* at 2635-36 (Ginsburg, J., dissenting) (discussing congressional fact-finding during the legislative process that revealed considerable evidence of continuing voter discrimination).

177. *See id.* at 2635.

178. *Id.* at 2634 (citing City of Rome v. United States, 446 U.S. 156, 181 (1980)).

179. *See id.* at 2635-36.

180. See *id.* at 2650 (Ginsburg, J., dissenting).

find facts.[181] Whereas the majority saw the VRA as largely unnecessary in a world without significant race-based voter discrimination, the dissent saw the Act as essential to protect racial minorities in covered jurisdictions from "second-generation barriers" to voting, such as racial gerrymandering, at-large voting, and discriminatory municipal annexation designed to decrease the impact of black votes.[182] Both sides engaged in rhetorical absolutism, trying to paint a one-sided factual portrait, because, significantly, the legal conclusion flowed substantially from the facts.

* * *

Admittedly, plenty of opinions do not reflect this style.[183] Absolutist language, for example, tends to appear less often in cases involving a constitutional decision rule, in which the Court is simply applying accepted principles from previous cases.[184] Moreover, some Justices gravitate away from it, perhaps for strategic reasons, or perhaps simply because of personal style. As a result, some constitutional opinions are not so strongly worded, and some are likely penned with collegiality in mind.[185] Indeed, whereas some Justices, like Justice Scalia, have a more biting style, others, like Justices O'Connor and Breyer, more often adopt a conciliatory tone, perhaps trying to seem moderate and pragmatic in the hopes of persuading a swing Justice, if not in this case, then perhaps in the next one.[186] Nevertheless, though the Justices collectively and individually adopt various tones, absolutist rhetoric features prominently in many constitutional cases.

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181. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 158 (2006) (discussing judges' "limited capacity to generate the needed information"); Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 661-63 (1988) (discussing the physical impossibility of courts examining an increasingly complex government).

182. *Shelby Cnty.*, 133 S. Ct. at 2634-35 (Ginsburg, J., dissenting).

183. Of course, plenty of other opinions not discussed here *do* reflect this style.

184. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

185. *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 280 (2005).

186. *See id.* at 283-87.

II. EXPLANATIONS

No single theory can explain the Justices' rhetorical styles; the calculus differs depending on the particular Justice and case. Nevertheless, explanations for some Justices' use of absolutist rhetoric can be grouped into three general categories: strategic, institutional, and psychological. These explanations can work in tandem or separately, depending on the case and the Justice. Although not every explanation will apply to every case or Justice, collectively they shed much light on the phenomenon.

A. Strategic Explanations

Some absolutist rhetoric is strategic. Justices try to use their opinions to help steer the law in their desired direction, speaking simultaneously to numerous audiences including lower courts, governmental officials, parties, lawyers, law students, law professors, fellow and future Justices, the media, the general public, and more. On this account, Justices and the law clerks who draft some of their opinions adopt an absolutist tone to persuade other actors of the correctness of their constitutional views.

1. Absolutism as Demosprudence

As Dean Robert Post has observed, constitutional law and constitutional culture are "locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture."[187] Because the Justices realize that their constitutional views are more likely to prevail and endure if the public accepts them, they sometimes craft their opinions with the general public in mind.[188] Justices, then, sometimes try to "court the people" to enlist popular support for a particular constitutional vision.[189] In

187. Post, *supra* note 30, at 8.

188. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

189. *See* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 (2009).

this way, as Professor Lani Guinier has observed, Supreme Court opinions can be "demosprudential," engaged in an ongoing, albeit forceful, conversation with the public, encouraging nonjudicial actors to support or oppose the majority's conclusions.[190]

Justices' demosprudential efforts may be especially aggressive in closely divided cases, when they perceive the need to rebut the other side's contentions.[191] After all, when the Court is unanimous, that unanimity itself sends a powerful message to the public about the country's constitutional norms. In such cases, additional rhetorical force may be less necessary. However, when the Justices—and, perhaps more importantly, large segments of society itself—disagree on an important constitutional norm or social structure, a Justice may deem it especially important to phrase her argument as strongly as possible to rebut the other side.[192] Somewhat paradoxically, then, Justices may be more inclined to use absolutist language in those cases where a strong counterargument exists.

Demosprudential absolutism can invoke case-specific arguments or appeal to broader principles about the judicial role.[193] For example, Justices sometimes craft majority opinions to seem restrained and dissents to make the majority seem activist.[194] This kind of demosprudence roots its arguments in deeper notions of judicial legitimacy. A dissent will likely have greater resonance if it can persuade a large audience that the majority opinion exceeded the judiciary's limited role of "calling balls and strikes."[195]

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190. *See* Guinier, *supra* note 30, at 47-49, 57.

191. *See, e.g.*, Guinier, *supra* note 30, at 8-12 (discussing Justice Breyer's powerful oral dissent to *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 707 (2007), challenging the fundamental legal presumptions of the majority opinion in a 5-4 decision).

192. *Cf.* J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2319-20 (1997) (noting that some constitutional cases are "really battles over social status and social structure" with "urgency and deep symbolic meaning").

193. *But see* NATHANIEL PERSILY ET AL., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 9 (2008) ("For the most part, the decisions of the Supreme Court and other courts go unnoticed by the American public.").

194. *See* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2019-21 (2002).

195. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr.) ("Judges are like umpires … and I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

Justices also sometimes aim their demosprudence at specific audiences. Cognizant that the media is a particularly effective intermediary between the Court and the public,[196] Justices sometimes seem to direct portions of their opinion to reporters. Justice Kennedy's majority opinion in *Lawrence v. Texas*, for example, rings with self-certainty, seemingly directed at a broad lay audience.[197] *Lawrence*, which invalidated Texas's criminal prohibition of same-sex sodomy,[198] opens with an ode to liberty directed at the general public:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[199]

Justice Kennedy continues with further language emphasizing that the challenged law violated the equality and dignity of homosexuals,[200] thereby subjecting all homosexuals to a deeply offensive stigma.[201]

Lawrence's language is consciously demosprudential, both invoking and prompting social change. The Court justified its decision partially by detailing changed societal attitudes towards homosexuality,[202] but its celebration of liberty and dignity also likely played some role in helping bring about more momentous changes.[203] Just

196. *See, e.g.*, Franklin & Kosaki, *supra* note 41, at 353 (describing media coverage as a "crucial variable" in shaping public awareness of Supreme Court decisions).

197. 539 U.S. 558 (2003); Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 817 (2003).

198. *Lawrence*, 539 U.S. at 575, 578-79.

199. *Id.* at 562.

200. *Id.* at 567-68 ("[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

201. *Id.* at 575 ("The stigma this criminal statute imposes, moreover, is not trivial.").

202. *Id.* at 573.

203. *See* James W. Soutenborough et al., *Reassessing the Impact of Supreme Court*

over a decade later, same-sex couples enjoy the right to marry in well over thirty states and the District of Columbia.[204]

Indeed, *Lawrence*'s language conveys a powerful narrative of newly recognized civil liberties and cultural tolerance, adopting an absolutist tone that rejects alternative outcomes. Such absolutist language not only highlights the human costs of anti-sodomy laws but also helped the Court confidently overrule *Bowers v. Hardwick*, which had upheld a similar Georgia anti-sodomy statute.[205] Although *Bowers* was incompatible with most Americans' values by 2003,[206] the mere existence of that precedent made *Lawrence* a more difficult case than it otherwise would have been.[207] Justice Kennedy, then, used absolutist rhetoric to persuade the American people that our nation's fundamental constitutional norms *required* overruling existing precedent and striking down the Texas statute.[208] The rhetoric resonated in the mainstream media. For example, *The New York Times* reported on the Court's "sweeping declaration of constitutional liberty" that "effectively apologiz[ed]" for *Bowers*,[209] which had "demean[ed] the lives of homosexual persons."[210]

Justice Scalia used absolutist language in *Heller* to similar demosprudential effect, directing portions of his opinions to gun-rights advocates likely to applaud the decision.[211] For instance, in

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Decisions on Public Opinion: Gay Civil Rights Cases, 59 POL. RES. Q. 419, 419 (2006) ("*Lawrence* ... appears to be playing a central role in shaping the national debate over gay rights and same-sex marriage."); *cf.* William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 877 (2001) ("[L]aw cannot liberalize unless public opinion moves, but public attitudes can be influenced by changes in the law.").

204. *See* David A. Graham, *Gaming Out the End of the Gay-Marriage Fight*, ATLANTIC (Oct. 29, 2014), http://www.theatlantic.com/politics/archive/2014/10/gaming-out-the-end-of-the-gay-marriage-fight/382103 [http://perma.cc/8VQ6-GXN9 ("[A]bout two-thirds of states now have gay marriage, and about two-thirds of American citizens live in those states.").

205. Bowers v. Hardwick, 478 U.S. 186, 190, 196 (1986).

206. *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 73.

207. *See* Berger, *supra* note 197, at 817; Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 436-37 (2005).

208. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

209. Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1.

210. *Id.* (quoting *Lawrence*, 558 U.S. at 575).

211. *See* Guinier, *supra* note 30, at 76 (discussing the widespread media coverage of *Heller*).

addition to depicting the evidence in a one-sided fashion,[212] he emphasized that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[213] Such invocations of "hearth and home" get to the heart of the gun lobby's sacred mission to empower individuals to protect themselves and their families against violent intruders.[214] This kind of language may also indirectly help galvanize political officials, such as state legislators, to see all gun regulations as illegitimate.[215]

Justice Scalia further appealed to gun-rights advocates by reminding his audience that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table.... Undoubtedly some think that the Second Amendment is outmoded .... [B]ut what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct."[216] This language is powerful, but also legally gratuitous.[217] All lawyers and judges know that legislators may not pass laws conflicting with the Constitution. No informed observer thought that the District of Columbia was arguing that it should be permitted to violate the "outmoded" Second Amendment. Rather, the case asked difficult questions about the Second Amendment's meaning and application. To this extent, Justice Scalia offers a celebratory nod to pro-gun advocates, who have long insisted that gun regulations violate their constitutional rights. Indeed, this language may have encouraged some of those advocates to lose sight of that case's limited holding.[218]

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212. *See supra* notes 83-84 and accompanying text.

213. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

214. *See* Reva B. Siegel, Comment, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 239 (2008) ("When Justice Scalia explains that the Second Amendment protects rights of the 'law-abiding, responsible citizens to use arms in defense of hearth and home,' he echoes ... [those] who all claim the Second Amendment protects rights of the 'law-abiding' and invoke the distinction between citizens and criminals to explain the Second Amendment.").

215. *See, e.g.*, *Bills Would Reject Federal Restrictions on Firearms*, UNICAMERAL UPDATE (Mar. 21, 2013), http://update.legislature.ne.gov/?p=10989 [http://perma.cc/6KP2-2VD6] (reporting on proposed bill in the Nebraska Legislature that would deem federal gun regulations unenforceable in Nebraska).

216. *Heller*, 554 U.S. at 636.

217. *Cf.* Boumediene v. Bush, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (contending that the majority opinion "will almost certainly cause more Americans to be killed").

218. *See infra* notes 364-68 and accompanying text.

2. Absolutism as Persuasion of Colleagues

In addition to persuading the public, the Justices naturally hope to persuade each other. Presumably, this is true in any case, but especially so in cases in which a changed vote would alter the outcome. Many scholars have noted that Justices communicate with each other primarily in conference and through their written opinions and questions at oral argument.[219] Given these limited opportunities for interaction, the Justices may draft opinions to try to win votes for their position.

However, while this explanation may sometimes apply, it often does not. For one, the Justices often do not change their vote after the initial conference,[220] so from a strategic point of view, it would be strange if they crafted their opinions primarily to prompt an unlikely switch. Probably more importantly, a Justice trying to persuade a colleague might prefer more moderate, concessionary rhetoric to emphasize the modesty of the majority opinion. Of course, the relative persuasiveness of a given opinion depends on the issue and the Justices involved, but swing Justices are often undecided because they recognize the strength of the arguments on each side. To this extent, a more measured tone may often be a more effective way to persuade the Justice who considers a case genuinely difficult. Indeed, research indicates that overstatement is rarely persuasive,[221] and Justices authoring opinions in close cases, perhaps intuiting this conclusion, sometimes compromise their reasoning to try to garner a majority.[222]

From this perspective, absolutist rhetoric may be a sounder strategy in dissents, where a Justice can present her own views without worrying about holding together a fragile coalition of

219. *E.g.*, Stephen L. Wasby et al., *The Functions of Oral Argument in the U.S. Supreme Court,* 62 Q. J. SPEECH 410, 418-19 (1976).

220. *See* Friedman, *supra* note 185, at 286. *But see* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9 (1998) (stating that Justices switch their votes, make changes in opinions, or join writings that do not necessarily reflect their sincere preferences in more than half of argued cases).

221. *See* Simon & Scurich, *supra* note 6, at 429.

222. *See* EPSTEIN & KNIGHT, *supra* note 220, at 9-11. Some Justices may also write opinions to try to appease the losing side with moderating language. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2690 (2013) (emphasizing states' rights in a decision striking down the federal Defense of Marriage Act); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (indicating that affirmative action is not categorically unconstitutional).

colleagues.[223] Indeed, the dissenter's absolutism, though more counterintuitive, may be less misleading in that the dissenter is obviously not speaking for the Court. The dissent's absolutism, then, will never be confused with the law today, but it aspires to change the law tomorrow.

Thus, even if absolutist language only infrequently changes the minds of current swing Justices, it can influence future Justices, thereby appealing, as Chief Justice Hughes put it, to the "intelligence of a future day."[224] This influence can be relatively direct, such as when a lawyer or law student latches onto language she finds particularly persuasive and subsequently ascends to the Supreme Court. It can also occur less directly, such as when the language gets adopted by popular movements and ultimately helps shape the discourse surrounding a particular legal issue.[225] In all events, Justices realize that tomorrow's Court may revisit today's judgment, and they may choose language hoping to persuade those future Justices.

3. Absolutism as Rule of Law

The Justices may also sometimes use rhetorical absolutism to enhance the rule of law by imbuing their opinions with a sense of inevitability.[226] Even in cases with strong arguments on each side, Justices may fear that equivocal reasoning would expose "the terrifying arbitrariness that underlies much of the legal system."[227] By insisting in absolutist terms that the Constitution unequivocally demands a particular outcome, a Justice presents the law as clear and objective.

Absolutist rhetoric thus implies that the Justices' own policy preferences have nothing to do with their decisions.[228] It, therefore, helps justify an unelected judiciary's exercise of power over the

223. *See* Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42 (noting the pleasure of writing an opinion for oneself that addresses "precisely the degree of quibble, or foreboding, or disbelief, or indignation" that one thinks is justified).

224. CHARLES EVAN HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).

225. *Cf. infra* notes 397-400 and accompanying text.

226. *See* Robert Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 206-07 (1990).

227. Levinson, *supra* note 5, at 189.

228. *See* Chemerinsky, *supra* note 194, at 2010.

political branches because that exercise of power merely reflects enforcement of the land's highest law. In this way, absolutist rhetoric can sometimes mollify Justices' anxiety about the Court's countermajoritarian function.[229] Similarly, the Court, as in *Graham*, may use absolutist rhetoric to assert the existence of a national consensus, thus ostensibly mitigating the countermajoritarian problem that arises when it invalidates a democratically enacted statute.[230] Whether these rhetorical strategies effectively reinforce judicial legitimacy is, of course, another question, but some Justices may think that they do, or, at least, may feel like they need to pretend that they do.

Justices similarly may rest constitutional judgments on absolutist factual statements, thereby suggesting that their legal views hinge on empirical facts, not normative values.[231] In *Shelby County*, for instance, the Court rested its holding on the "fact" that race-based voter discrimination was largely a thing of the past.[232] Of course, the four dissenters viewed those facts very differently, but the majority may have thought that its reliance on "facts" insulated it from criticisms that it was unfairly biased against the Voting Rights Act or minority voters.

Justices may also think that strongly worded opinions can reinforce the rule of law by providing better guidance to lower courts, litigants, and other governmental actors, all of whom must follow Supreme Court precedent. This explanation is ultimately unconvincing, because it confuses the clarity of a holding with the rhetoric justifying that holding. A holding may be emphatically defended but imprecisely stated. Alternatively, a court may concede that a case is close while still issuing a clear, easily applied holding. Nevertheless, some Justices, cognizant that lower courts must follow their ruling, may confuse the two. Moreover, even if they do not, Justices may believe that lower courts may be reluctant to extend an equivocal opinion to similar cases if they fear that the Court itself does not fully believe in its decision.[233]

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229. *See* BICKEL, *supra* note 31, at 16-17.

230. *See supra* Part I.B.4.

231. *See* Kahan, *supra* note 4, at 35.

232. *See supra* notes 172-74 and accompanying text.

233. *Cf.* Mark Tushnet, *Introduction* to I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES, at xiii (Mark Tushnet ed., 2008).

4. Absolutism as Formalism

Absolutism can also be part of a related rhetorical strategy to present the law generally as orderly, rule-based, and objective, thereby further enhancing the rule of law.[234] Under this approach, absolutism not only tries to convey the inevitability of a particular decision but also facilitates a broader project to imbue the law with clear rules, thereby decreasing judicial discretion and appealing to the autonomy of constitutional law to justify the Court's constraint of the political branches.[235] This presumption of clear answers implies that legal interpretation is formalistic—that is, that the law, including the Constitution, provides observable rules unconnected to a judge's own value system.[236]

Justice Scalia is probably the Justice whose absolutist rhetoric most often reflects such formalism. Justice Scalia often views the law formalistically, seeing obvious answers where others see ambiguities.[237] He prefers rules to standards, because rules provide stricter guidance to future courts.[238] Standards, by contrast, are more malleable and thus increase judicial discretion.[239]

To this extent, some absolutist rhetoric may reflect not merely a rhetorical flourish to support a particular outcome but instead a more fundamental insistence that constitutional interpretation

234. *Cf.* MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 4 (2013).

235. *See* Post, *supra* note 30, at 11.

236. *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 169-70 (2006).

237. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 114-15 (1992) ("Scalia is ... optimistic about the possibility that judges can rationalize the chaotic jumble of twentieth-century constitutional precedents and reorder constitutional law around clear interpretive and operative rules."); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997)) ("Justice Scalia is the clearest and most self-conscious expositor of democratic formalism in the long history of American law.").

238. *See* Sullivan, *supra* note 237, at 58-59, 65.

239. *See* United States v. Mead Corp., 533 U.S. 218, 245 (2001) (Scalia, J., dissenting) (criticizing the majority for entertaining a "grab bag" of factors); Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J.) (plurality opinion) ("[A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175-76 (1989); Sullivan, *supra* note 237, at 57-59.

ought to proceed with clear rules.[240] For Justice Scalia, the law has and should have a rigorous and rigid structure.[241] This intellectual edifice is an impressive construct, but it is also inflexible insofar as it cannot conceive of provisions meaning something different from (Justice Scalia's idea of) the provision's original conception. This is a vision of law that has difficulty admitting doubt because the entire structure rests upon an intricate architecture. Consequently, contrary evidence must be contradicted or explained away so as not to undermine the structure's foundation.

By contrast, other Justices with a more pragmatic outlook are probably less likely to embrace absolutism because they tend to see law less objectively. A pragmatist like Justice Breyer, for instance, is more likely to acknowledge constitutional indeterminacy.[242] For example, in his dissent in *Printz v. United States*, Justice Breyer noted that "the Constitution itself is silent on the matter" of federal assignment of responsibilities to state officials, thus removing the need or reason "to find in the Constitution an absolute principle."[243] Whereas the absolutist insists on unyielding principles to resolve cases, the pragmatist more willingly accepts that constitutional questions can be difficult, ambiguous, and context-laden.

In constitutional interpretation, formalists sometimes gravitate towards originalism.[244] Though there are several variants of origin-

240. Of course, one might view formalism as itself part of the judicial opinion's rhetorical performance, in which case, it, like absolutism, is merely another rhetorical tool. *See* Ferguson, *supra* note 226, at 208.

241. A former student of Justice Scalia's recounted that then-Professor Scalia opened his Contracts class by saying, "Contracts law is like a puzzle. Each class you will get another piece, and at the end of the course, they will fit together to make a beautiful picture." *See* E-mail from Lynn Branham, Visiting Professor, St. Louis Univ. Sch. of Law, to author (Jan. 16, 2014, 12:51 CST) (on file with author).

242. *See, e.g.*, Linda Greenhouse, *The Supreme Court: Indecency; High Court Splits on Indecency Law Covering Cable TV*, N.Y. TIMES, Jun. 29, 1996, at A1 (describing Justice Breyer's free speech opinion in *Denver Area Consortium v. FCC* as "tentative, almost apologetic").

243. 521 U.S. 898, 978 (1997) (Breyer, J., dissenting).

244. *See* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 186-88 (2005) (noting that originalism does not always lead to formalism but does in the jurisprudence of Justice Scalia); Michael S. Greve, *The Originalism That Was, and the One That Will Be*, 25 YALE J.L. & HUMAN. 101, 108 (2013) ("[O]riginalism was self-consciously and deliberately formulated as a ... *democratic* formalism.").

alism,[245] many originalists believe that the Constitution's meaning should be determined by identifying "meanings that are conventional given relevant linguistic practices" at the time of ratification.[246] Those meanings are "facts determined by the evidence,"[247] and, consequently, can be presented in an ostensibly objective light. Judge Bork's view that "[a]ll that counts is how the words used in the Constitution would have been understood at the time" reflects the formalist's optimism that a clear, objective meaning can be located.[248]

Interestingly, the originalist's interpretation of the evidence not only determines the outcome of a given case but also purports to lock in a constitutional provision's meaning forever. By confidently asserting a provision's original meaning, absolutist rhetoric camouflages the boldness of relying on contestable or obscure historical facts to forever set constitutional meaning.[249] Absolutist rhetoric, then, can be a strategy that both asserts a particular provision's original meaning and reminds future courts that that original meaning, once identified, ought not be disrupted.

Predictably, the divide between formalists and originalists, on the one hand, and pragmatists and living constitutionalists, on the other, sometimes reflects political differences. Though there are obviously important exceptions, conservatives are more likely than liberals to gravitate towards originalism and formalism.[250] Perhaps this interpretive preference is outcome-driven: conservatives favor originalism because they think it is more likely to yield outcomes they like, and liberals oppose it for the same reason.[251] But differing attitudes towards originalism may also reflect disagreement about the notion of legal objectivity. Whereas liberals tend to see the Constitution and other legal texts as underdeterminate, conservatives

245. *See, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009).

246. Solum, *supra* note 8, at 35.

247. *Id.* at 36.

248. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990).

249. *See* Berger, *supra* note 79, at 347-56, 358-60 (arguing that in many instances, the historical and linguistic evidence is too complicated to allow the judge to identify a single original meaning).

250. *See* Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 374 (2011).

251. *See id.* at 360 ("It should come as little surprise that originalists share the characteristics traditionally associated with political conservatives.").

are more likely to identify objective definitions that fix constitutional meaning.[252] On this account, absolutism helps safeguard a formalist conception of the rule of law, because it insists on objective meanings (originalist or otherwise), thereby ostensibly preventing judges from fashioning legal rules out of their own normative commitments.[253]

B. Institutional Explanations

1. The Politics of the Judicial System

Another set of explanations for the Justices' absolutist rhetoric is institutional, rooted in various political and judicial structures and practices. To begin, the country's broader political landscape helps shape the judiciary. Though judges are removed from everyday politics, in some senses, politics does shape their behavior.[254] Perhaps most importantly, ideological considerations play a prominent role in judicial appointments, especially at the Supreme Court level.[255] Though the Justices are subsequently insulated from direct political pressure insofar as they enjoy salary protection and life tenure,[256] the politicized nature of the judicial appointments process determines who ascends to the Court.[257] In recent years, the

252. Of course, liberals also can utilize the rhetoric of constitutional absolutism. For example, some of Justice Ginsburg's dissents ring with the certainty of a majority opinion. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2636-37 (2013) (Ginsburg, J., dissenting); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part, concurring in the judgement, and dissenting in part).

253. *See* Greene et al., *supra* note 250, at 387.

254. *See generally* Brian Z. Tamanaha, *The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not Partisanship*, 61 EMORY L.J. 759, 774 (2012) (discussing how judges are informed by their political orientation when the law points to several correct answers).

255. *Id.* at 772.

256. *See* U.S. CONST. art. III, § 1.

257. *See, e.g.*, Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1071 (1999) ("Given the Court's key role in setting public policy, the president will want a Court that shares his ideology and thus will nominate someone who will bring the Court closer to his preferences."); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 40-44 (2006), http://www.yalelawjournal.org/forum/questioning-justice-law-and-politics-in-judicial-confirmation-hearings [http://perma.cc/ZA7K-V4EE] (discussing the political nature of judicial confirmation hearings).

confirmation process has become especially partisan.[258] Whereas some mid-twentieth-century Justices, like Chief Justice Stone and Justices Brennan and Powell, were nominated by a President of an opposing party,[259] it is almost unthinkable that a President today would knowingly select a Justice with a different party affiliation. To some extent, this shift is because the two major political parties are far more ideologically distinct than they were in the mid-twentieth century,[260] but it is also because ideology today plays a much more prominent role in the appointments process.[261]

In all events, presidents try to select confirmable Justices who reflect their own values. Although some Justices end up disappointing the President who appointed them, most Justices are carefully vetted and share ideologies that are consistent with many of the appointing President's general views. Through written opinions, these Justices can articulate and sometimes entrench the view of the law that helped get them their job in the first place. Justices, of course, can also express their views in other ways, such as speeches at well-publicized events organized by groups like the Federalist Society and American Constitution Society. Judicial opinions, however, remain the best way for Justices to make their mark on the law and society.

2. The Court's Internal Culture

The Court's own institutional practices also help explain absolutist rhetoric. Although majority opinions speak for the Court, the Court's internal operations reflect and encourage each Justice to speak for herself. Justice Powell once described the Court as nine small independent law firms, which collectively create a competitive, entrepreneurial culture.[262] Justices apparently rarely discuss cases in person with each other outside conference.[263] They also rarely collaborate on the written product. Of course, Justices

258. *See* FARBER & SHERRY, *supra* note 16, at 116-17.

259. *See* Karlan, *supra* note 65, at 66.

260. *E.g.*, ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY, at ix (2010).

261. *E.g.*, FARBER & SHERRY, *supra* note 16, at 117.

262. *See* Lewis F. Powell, Jr., *What the Justices Are Saying*, 62 A.B.A. J. 1454, 1454 (1976).

263. *See* James F. Spriggs II et al., *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485, 486 (1999).

frequently suggest that an authoring colleague change his reasoning.[264] However, unlike, say, lawyers collectively drafting a brief, it is commonly understood that the Justices' suggestions are intended not to improve the quality of the team's final product but rather to refine a legal point so that it is substantively palatable enough to join.[265] An opinion for the Court speaks for the institution, but it usually is authored by a single Justice, not a committee of the majority.

Equally importantly, unlike some other legal systems, the U.S. legal system permits disagreement among judges. By contrast, some European countries make it a crime for a judge to publish a dissent or even make known that she disagreed with the majority decision.[266] The justices on the South African Constitutional Court take a middle ground approach, allowing dissents but meeting numerous times to try to find common ground when disagreement persists.[267] Because the U.S. Supreme Court permits and tacitly encourages separate opinions, the Court acknowledges that disagreements about the law's content are a natural part of the business of American judging.

The irony is that by permitting internal disagreements, the Court fosters a sense of independence, which encourages each Justice to insist that his view of the law is uniquely correct. This sense of independence is especially powerful in contemporary times. While Chief Justice Marshall persuaded his colleagues that the Court should abandon its practice of seriatim opinions and speak with a single voice,[268] Justices started to dissent at increased rates,

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264. *Id.* at 485-86 ("This institutional rule therefore provides incentives for Justices to bargain with the majority opinion author and for the author to sometimes accommodate their concerns.").

265. *See* Chris W. Bonneau et al., *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J. POL. SCI. 890, 892 (2007) (describing how Justices making suggestions to an opinion draft do not do so to create an "ideal" opinion but rather to suggest changes to legal points).

266. *See* TUSHNET, *supra* note 233, at xiii.

267. *See* MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 47 (2009) (citing Justice Goldstone).

268. *See* EPSTEIN & KNIGHT, *supra* note 220, at 118.

starting in the 1930s and accelerating in the 1950s.[269] This trend continues still today.[270]

The increase of separate opinions has helped the absolutist tone flourish, even as their very existence belies the notion that those cases have obvious answers. This rise of separate opinions perpetuates each Justice's sense of independence and willingness to express individual views more often and forcefully, sometimes with a recognizable writing style, which, intentionally or not, may be prone to absolutism. Justice Scalia's opinions, for instance, sometimes sarcastically brush off opposing views, refusing to engage seriously and respectfully with their strongest arguments.[271] Justice Kennedy sometimes adopts a grandiose style that celebrates his preferred constitutional values at a broad level of generality so as to make a case seem easier than it really is.[272]

The rise of judicial independence also likely discourages Justices authoring majority opinions from fully exploring counterarguments. Separate opinions are so common that Justices may sometimes omit discussion of contrary arguments, because they believe another Justice will or should make her own case herself. Obviously, Justices sometimes must moderate their views to hold together a

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269. *See, e.g.*, Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1067 (1988); *see also* EPSTEIN & KNIGHT, *supra* note 220, at 24.

270. *See* EPSTEIN & KNIGHT, *supra* note 220, at 24.

271. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting) (arguing that the majority opinion "has no foundation in American constitutional law, and barely pretends to"); Webster v. Reprod. Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., concurring in part and concurring in the judgment) (denigrating the majority opinion as preserving "a chaos that is evident to anyone who can read and count"); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 399 (2000) ("No Justice in Supreme Court history has consistently written with the sarcasm of Justice Scalia."); Hasen, *supra* note 52, at 1.

272. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1827 (2014) ("Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define."); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."); Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221, 246 (2005) (describing Justice Kennedy's style as "grandiose"); Edward Lazarus, *Kennedy Center: The Court's New Swing Vote*, NEW REPUBLIC, Nov. 14, 2005, at 16 ("Kennedy's opinions often feature grand statements of principle."). *But see* Boumediene v. Bush, 553 U.S. 723, 752 (2008) (Kennedy, J.) (noting "reasons to doubt" that the "historical record ... yields a definite answer to the questions before us").

majority coalition,[273] but their collective sense of independence helps perpetuate rhetorical absolutism.

In addition to fostering judicial independence, this culture may also result in a collective action problem. Even a Justice disinclined to write an absolutist opinion might fear that an equivocal opinion would look weak in comparison to an absolutist opinion on the other side. Indeed, there likely is something to this concern. Readers sensing that one side is more confident than the other may tend to assume that the more confident side must be correct. Justices, then, may sometimes write absolutist opinions because they fear that the other side will.

Relatedly, because it is generally understood that opinions reflect a particular chamber's work product, some Justices may be willing to sign onto opinions, including absolutist opinions, even if they would not have written the opinion the same way themselves. A Justice, of course, will not join an opinion with which she fundamentally disagrees, but she may sign one if she agrees with the general reasoning, even if she would not have phrased her arguments as strenuously. As Professor Cass Sunstein has noted, many people who lack firm convictions end up believing what other relevant people believe, and judges are not immune to these cascade effects.[274] A judge inclined to agree with certain colleagues as a general matter on particular issues, then, may become convinced that an absolutist opinion is correct enough to join. The judge who feels especially strongly about an issue, by contrast, may be more likely to draft a separate absolutist opinion than join a more moderate one.

Absolutist rhetoric has long been a feature of some Supreme Court constitutional opinions,[275] but it is worth noting that some commentators have noticed a rise in disrespectful Supreme Court rhetoric in recent years.[276] If this perception is correct, the more

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273. *See* Cass R. Sunstein, *Incompletely Theorized Arguments in Constitutional Law*, 74 SOC. RES. 1, 2 (2007).

274. *See* Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71, 83 (2000); *see also* Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158, 167-82 (1999).

275. *See generally* McCulloch v. Maryland, 14 U.S. (4 Wheat.) 316 (1819) (suggesting that the question of Congress's power to create a national bank was constitutionally easy).

276. *See, e.g.*, FARBER & SHERRY, *supra* note 16, at 92; Chemerinsky, *supra* note 194, at

politicized appointments process and the rise of separate opinions may help explain the change. The Court's shrinking docket may also play a role, as it gives the Justices more time to hone "rhetorical flourishes."[277] Justices today may also be relying on law clerks more heavily.[278] Although extremely talented, clerks' legal experiences are usually limited, and they may compensate by drafting opinions to sound confident.[279] Collectively, then, these shifts in the Court's institutional culture may help explain the apparent rise of absolutist rhetoric.

3. Dispute Resolution and the Institutional Role of Lawyers' Arguments

A final institutional explanation behind absolutist rhetoric is that lawyers' briefs and oral arguments frame cases for the Court, and the Justices, like all judges, may rely on the lawyers' arguments to shape their own opinions. On this account, the Court's primary institutional role is to resolve disputes between the parties before it,[280] and the parties' framing of these issues necessarily shapes the resolution of those disputes. Lawyers, of course, sometimes frame their arguments in absolutist terms to maximize their briefs' persuasive power,[281] so it is inevitable that judges picking sides would sometimes latch onto the absolutist arguments that persuaded them in a particular case.[282]

2021 (noting that the Justices in recent years seem "far more willing to use a 'poison pen'").

277. *See* FARBER & SHERRY, *supra* note 16, at 120.

278. *See* Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95, 107 (2012).

279. *See* Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1308 (2011).

280. *See, e.g.*, Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012) (discussing "the dispute resolution model and the law declaration model" as two adjudicatory models competing for the Court's affection).

281. *See, e.g.*, Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQ. L. REV. 3, 6 (2013) ("The lawyer's task was to try to persuade the judge that, properly interpreted, the authoritative materials yielded the answer to the legal question posed by the case that favored the lawyer's client."); Irving Younger, *Symptoms of Bad Writing*, 72 A.B.A. J. 113 (1986) (identifying the "solemn overstatement that many lawyers seem to think is the way to argue a case").

282. *See* RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 21-22 (2007) (noting that judges "sometimes insert into their opinions, without attribution, verbatim passages from lawyers' briefs"); Moses Lasky, *Observing Appellate Opinions From Below the Bench*, 49

To give just one example, Justice Scalia's opinion in *Heller* tracked the respondent's brief's absolutist arguments on some important points in that case. Respondent contended with great certainly that "the Second Amendment's preamble cannot limit, transform, or negate its operative rights-securing text."[283] The majority opinion concluded identically, writing, "apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."[284] Similarly, just as the respondent's brief concluded that the historical evidence definitively proved that the phrase "keep and bear arms" did not have an "exclusively military connotation,"[285] so too did the majority opinion announce an identical conclusion.[286] Of course, there is nothing wrong with a judicial opinion coming to the same conclusion as a legal brief, and Justice Scalia certainly had strong evidence on his side for these propositions. It is also understandable that the respondent's brief did not identify contrary evidence; that was the petitioner's job. What is striking, however, is that the Court, like the respondent, also depicted the evidence as entirely one-sided, even though, as the dissent demonstrated, there was important contrary evidence.[287]

Of course, lawyers' arguments only explain so much. Though the Court often does accept the parties' framing of a dispute, it also often injects its own interests into a case, shaping the contours of a decision as it sees fit. Indeed, with increased frequency, the Court has asserted its prerogative to set its own agenda, regardless of the litigants' wishes.[288] Moreover, with the rise of the Internet, the Court often performs its own in-house research, thus further freeing it from lower court factual findings and the parties' own assertions.[289] To be sure, the lawyers' briefs still matter a great deal,

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CALIF. L. REV. 831, 831-32 (1961) (noting that some judges' opinions consist "of reassembled segments clipped from the prevailing briefs").

283. Respondent's Brief at 2, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 336304.

284. *See Heller*, 554 U.S. at 578.

285. *See* Respondent's Brief, *supra* note 283, at 33-37 (surveying evidence to conclude that the phrase "bear arms" was not limited to the military but included self-defense and killing game).

286. *See Heller*, 554 U.S. at 581-92.

287. *See id.*, 554 U.S. at 642-43 (Stevens, J., dissenting).

288. Monaghan, *supra* note 280, at 669.

289. *See* Larsen, *supra* note 161, at 1271-77 (arguing that Supreme Court "in-house" factual finding is prevalent).

but given that the Court sometimes reframes a case itself,[290] its use of absolutist rhetoric cannot be fairly traced just to the arguments of the lawyers before it.

C. Psychological Explanations

Psychological explanations also shed light on the Justices' choice of language less as strategic judgments, and more as a manifestation of less conscious phenomena to which most people, including judges, are subject. Like the explanations more generally, these psychological phenomena can be interrelated but, for ease of presentation, I discuss them separately.

1. Confirmation Bias and Cultural Cognition

Like other people, the Justices are subject to the "unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs."[291] Professor Dan Kahan has explored this phenomenon of motivated reasoning with particular attention to cultural cognition, which "refers to the tendency of individuals to conform their perceptions of ... policy-consequential facts to their cultural worldviews."[292] Professor Kahan argues persuasively that individuals are likely to seek out information that supports positions they normatively favor.[293] They similarly seek out information bolstering viewpoints associated with groups with which they identify.[294] Many

290. In *Citizens United v. FEC*, for instance, the Court declined invitations to decide the case on narrower grounds and instead went out of its way to issue a broad First Amendment holding. 550 U.S. 310, 322-29 (2010) (arguing that the case should not be resolved on the narrow grounds presented by the parties); Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 489 (noting that *Citizens United* "eschewed the [available] narrow grounds of decision … even those suggested by Citizens United itself, and actually ordered the parties to file briefs on the much broader and more controversial question of whether *Austin* and *McConnell* should be overruled"); *cf.* Monaghan, *supra* note 280, at 668-69 (noting that the Court recently has "in significant measure" embraced a "law declaration model" of adjudication rather than a "dispute-resolution model").

291. Kahan, *supra* note 4, at 19.

292. *Id.* at 23.

293. *See id.* at 20.

294. *See* Matthew J. Hornsey, *Linking Superiority Bias in the Interpersonal and Intergroup Domains,* 143 J. SOC. PSYCHOL. 479, 488 (2003) (arguing that social identity theorists claim

people are then likely to credit or dismiss evidence selectively based on congeniality to personal and group identity.[295]

Psychological research into this phenomenon further suggests that confirmation bias shapes people's evaluation of evidence, so that it bolsters preexisting normative preferences, beliefs, and expectations.[296] Rather than concede that evidence is complicated and contradictory, people seek cognitive coherence.[297] They therefore try to avoid "persistent uncertainty" and often "adjust their assessments of more equivocal pieces of evidence to match their assessment of more compelling ones."[298] As Francis Bacon noted centuries ago, "The human understanding, when any proposition has been once laid down ... forces everything else to add fresh support and confirmation."[299] Thus, people unconsciously adjust their assessment of equivocal pieces of evidence to match their preexisting worldview and therefore tend to think that answers come easily, because the evidence all points in one direction.[300]

Although judges sometimes do better than lay people at resisting certain cognitive biases, research suggests that they are not immune from them.[301] Indeed, Justices deciding constitutional cases

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that the value that people attach to their group memberships has direct implications for their self-concept); Mark Schaller, *Social Categorization and the Formation of Group Stereotypes Further Evidence for Biased Information Processing in the Perception of Group-Behavior Correlations*, 21 EUR. J. SOC. PSYCHOL. 25, 25-26 (1991).

295. *See* Kahan, *supra* note 4, at 20; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629 (2000) ("Perhaps the Justices of the Supreme Court, like the rest of us, care about their reputation, care about the esteem in which they are held by certain reference groups, and care enough such that, at the margin or even far from the margin, they seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups.").

296. *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

297. *See* Simon & Scurich, *supra* note 6, at 421-23.

298. Kahan, *supra* note 4, at 60; *see* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 512-13 (2004).

299. FRANCIS BACON, NOVUM ORGANUM 23 (Joseph Devey ed., P.F. Collier & Son 1902) (1620).

300. *See* Nickerson, *supra* note 296, at 175 ("[C]onfirmation bias connotes a less explicit, less consciously one-sided case-building process.").

301. *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007); Dan M. Kahan, *"Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 419 (2009); Paul M. Secunda, *Cultural Cognition Insights into Judicial Decisionmaking in Employee Benefits Cases*, 3 AM. U. LAB. & EMP. L. F. 1, 8 (2013).

face professional pressures that may make them especially prone to motivated reasoning. Evidence of constitutional meaning can be complicated and conflicting, but, unlike scholars, Justices do not have the luxury of emphasizing these tensions.[302] They instead must decide cases and justify their decisions.

Moreover, because constitutional cases can present numerous kinds of arguments pointing in different directions, Justices may sometimes be prone to relying on intuition rather than judgment to simplify their decision-making process. Intuitive judgments typically are "automatic, heuristic-based, and relatively undemanding of computational capacity."[303] Intuition can be surprisingly accurate,[304] but sometimes good judgment requires the decision maker to override that intuition with more deductive, deliberate decision making. Judges, however, do not always rigorously check the correctness of their intuitions, and, even if they do, that deliberation is often colored by the initial intuition.[305] Indeed, as Daniel Kahneman and Amos Tversky have argued, because judges have confidence in their preexisting views and intuitions, they also are likely to overestimate the consistency of data supporting those views and to derive too much confidence from them.[306] Like other people, then, judges may be prone to process information to support their preferred outcome.[307]

Cultural cognition biases, thus, help shape Justices' approaches to constitutional decision making. As we have already seen, whereas Justice Scalia interpreted the historical evidence in *Heller* in favor of an individual right to bear arms unconnected to militia service, Justice Stevens read the evidence to support an opposite conclusion.[308] As other commentators have noted, it is probably no

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302. *See* Berger, *supra* note 79, at 366-67.

303. *See* Guthrie et al., *supra* note 301, at 7 (distinguishing "intuition" and "deduction"); Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436-38 (Thomas Gilovich et al. eds., 2002).

304. *See* Guthrie et al., *supra* note 301, at 30 ("Intuitive judgments are often quite accurate.").

305. *See id.* at 8-9.

306. DANIEL KAHNEMAN & AMOS TVERSKY, INTUITIVE PREDICTION: BIASES AND CORRECTIVE PROCEDURES 4-5 (1977).

307. *See generally* Elliott Aronson, *The Power of Self-Persuasion*, 54 AM. PSYCHOLOGIST 875, 876 (1999).

308. *See supra* Part I.B.1.

coincidence that in a case with difficult, conflicting evidence, the Justices usually considered conservative voted in favor of gun rights, whereas the Justices usually considered liberal voted against them.[309] As Justice Holmes once put it, "One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point."[310]

These cognitive biases apply not just to the factors that shape legal determinations—for example, the meaning of the Second Amendment—but also the factual landscape to which law is applied—for example, the existence of voting practices discriminating against racial minorities. As Kahan points out, Justices sometimes resort to supposedly empirical fact-finding for strategic reasons to pretend that the facts, rather than norms, guide decision-making.[311] In *Shelby County*, for instance, the majority based its decision on the deeply contested factual conclusion that race-based voter discrimination has been mostly eradicated.[312] Although this effort to root contentious decisions in facts rather than norms may partially reflect an effort to avoid denigrating the losing group's constitutional vision,[313] it can also hide the extent to which norms shape the Justices' factual conclusions.

Cultural cognition, thus, helps explain absolutist rhetoric, because it helps show how Justices, mostly unwittingly, might sort through conflicting evidence to confirm rather than complicate their preexisting worldviews.[314] Having sorted through the evidence in this way, a Justice then may believe that a case is easy. On this account, absolutism reflects not so much a rhetorical strategy as a

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309. *See* Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 480 (2004) (discussing the Court's ideological divide and the Second Amendment); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 641-42 (1989) (noting that conservatives and liberals understand the Second Amendment very differently); Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. 79, 79 (2010) ("Supreme Court Justices frequently divide on questions of original meaning, and the divisions have a way of mapping what we might suspect are the Justices' leanings about the merits of cases irrespective of originalist considerations.").

310. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (quoting Justice Holmes).

311. Kahan, *supra* note 4, at 35.

312. *See supra* Part I.B.5.

313. Kahan, *supra* note 4, at 35.

314. *See* Simon & Scurich, *supra* note 6, at 423 (arguing that most decision makers are unaware of their propensity for coherence-based reasoning).

Justice's "hermeneutical circle" in which she interprets new evidence in accordance with her own intuitive sense of the world, which is simultaneously reinforced by her interpretation of the new evidence.[315] Justices, then, may discuss constitutional cases as though they are easy because they consider the evidence in a manner that makes cases seem easier than they really are.

2. Self-Certainty and Overconfidence

Another psychological explanation for absolutist rhetoric is that the Justices simply believe they are correct and use opinions to express candidly their views of the law. Given the Justices' exceptional pedigrees and deep experience in interpreting and applying legal texts, it is no wonder they would have confidence in their conclusions. Absolutist rhetoric, then, may reflect a Justice's self-confidence and her related frustration that her colleagues were not clear-headed enough to see the right answer.

This judicial self-certainty might be understood as a kind of overconfidence bias.[316] Psychological research in judgment and decision making shows that many people display a tendency for overconfidence,[317] overestimating the correctness of their estimates in answering moderate to difficult questions.[318] Similarly, many people are prone to a superiority bias, overestimating their abilities relative to others.[319]

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315. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351-52 (1990) (explaining the "hermeneutical circle" idea that no interpretive thread can be viewed in isolation so that each interpretive thread will be evaluated in relation to other threads).

316. Conversely, this self-certainty may also compensate for insecurity. While the Justices are certainly all very talented, they are usually generalists who must announce binding judgments about issues with which they lack expertise. In this way, absolutist rhetoric, somewhat paradoxically, may reflect both judicial overconfidence and insecurity.

317. Goodman-Delahunty et al., *supra* note 23, at 137.

318. *See* Daniel P. Forbes, *Are Some Entrepreneurs More Overconfident than Others?*, 20 J. BUS. VENTURING 623, 624 (2005) (describing the overconfidence bias).

319. *See* Mark D. Alicke, *Global Self-Evaluation as Determined by the Desirability and Controllability of Trait Adjectives*, 49 J. PERSONALITY & SOC. PSYCHOL. 1621, 1624, 1626 (1985) (presenting research findings that study participants perceived themselves to be characterized by more desireable character traits than the average person); Hornsey, *supra* note 294, at 479.

Judges are hardly immune to these heuristic biases.[320] Psychological research has demonstrated that lawyers, as a class, are especially prone to overconfidence biases,[321] often predicting with great certainty the likely outcome of litigation only to have future events prove them incorrect.[322] This penchant for overconfidence may be related to the fact that lawyers have a keener interest in and greater control over the outcome of their predictions than do other professionals, such as, for instance, meterologists.[323]

While Supreme Court Justices' work obviously differs from that of other lawyers, the Justices' long experiences as lawyers may make them prone to the same kind of overconfidence. Indeed, having reached the pinnacle of their profession, each Justice has especially good reason to consider himself a superior lawyer, thereby further boosting his confidence. Moreover, while lawyers enjoy some control over the outcomes of their cases, Supreme Court Justices often enjoy far more; by persuading a handful of colleagues, they can shape outcomes to coincide with their views and thereby bind the rest of the country. Additionally, male lawyers are particularly susceptible to overconfidence.[324] Two-thirds of the current Justices are male (and, of course, the vast majority of Justices through our history have also been men), so it is possible that the Court's historical gender demographics have bent the institution towards overconfidence.[325]

This point should not be overstated. Good lawyers are probably less prone to overconfidence than average or bad lawyers. Good lawyers, after all, more accurately predict the outcome of litigation than other lawyers;[326] that ability to predict outcomes accurately helps explain their professional success.[327] Most Supreme Court

320. *See* Guthrie et al., *supra* note 301, at 28.

321. *See* Goodman-Delahunty et al., *supra* note 23, at 153.

322. *See id.*

323. *Id.* at 150.

324. *Id.* at 149.

325. Assuming that the psychological research is accurate and that the Court's gender balance eventually evens out, one wonders whether we might notice changed rhetoric over time.

326. By contrast, accurate predictions seem less important to the success of a law professor. A substantial portion of the academic role, after all, is to offer insightful critiques about the Court's decisions rather than to counsel clients on how the Court is likely to act.

327. *See* KAHNEMAN & TVERSKY, *supra* note 306, at 20 ("It appears that overconfidence does not occur when the expert has considerable information about the conditional distribution of

Justices, of course, were once excellent lawyers. From this perspective, the Justices should be less susceptible to this cognitive bias than other lawyers.

Nevertheless, Justices may transfer their deserved confidence in their professional abilities into a false confidence that they can determine "correct" constitutional outcomes more accurately than their colleagues.[328] Predicting the outcome of a case before a particular court is not the same thing as announcing the answer to a constitutional problem. The former can be empirically tested; the latter cannot be. A future Court may someday revisit even a unanimous Supreme Court constitutional decision. Indeed, the very fact that some Justices think there is an objectively "correct" answer is, to some extent, symptomatic of overconfidence, because it pretends that there is an objective answer to an inquiry with many components, some normative. Moreover, though the Justices' past success may give them confidence in their own legal judgments, that confidence may desensitize them to the talents of their colleagues, who are similarly accomplished. Although a Justice's sense of superiority over the average lawyer is usually deserved, his sense of superiority over his colleagues is likely far less deserved.

3. The Psychology of the Opinion-Writing Process

The psychology of the opinion-writing process may also help explain absolutist rhetoric. Sometimes the writing process can help convince the author of the manifest correctness of the position she asserts.[329] This is likely especially true for argumentative prose, like

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the outcomes"); Goodman-Delahunty et al., *supra* note 23, at 134.

328. Indeed, in some cases, Justices on both sides of an issue will go out of their way to contend that the other side badly misunderstood the law and facts. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735-36 (2007) (plurality opinion) (arguing that Justice Breyer's dissent "selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today's decision"); *id.* at 803 (Breyer, J., dissenting) ("The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion.").

329. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1314-15 (2008).

a judicial opinion, in which the writer's primary objective is to support a given thesis.

The Court itself is aware of this phenomenon.[330] The assigning Justice recognizes that an authoring Justice can convince herself during the drafting process, and consequently sometimes assigns an opinion to a swing Justice in the hopes of holding together a fragile majority.[331] The Court, thus, has noticed the phenomenon psychologists call "self-generated persuasion," in which a person generating a message ends up believing the message more than she previously had.[332]

The writing process, indeed, can involve not just the articulation of thought, but also the "transformation of thought."[333] Occasionally, a Justice realizes that an opinion "will not write" and changes his vote or legal rationale.[334] Sometimes, however, Justices conceal the parts of the opinion that "will not write" and overemphasize the parts of the opinion that *will* write.[335] As Professor Chad Oldfather explains, the writing process sometimes encourages writers to overemphasize the verbalizable aspect of an explanation, producing arguments that sound more ironclad than they really are.[336]

To this extent, the writing process sometimes subconsciously leads a writer towards rhetorical absolutism as she tries to defend an outcome as persuasively as possible.[337] In trying to explain why the arguments on one side of the ledger are more powerful than those on the other, the writer sometimes finds it rhetorically easier to reject one line of arguments entirely. It is pithier to dismiss a counterargument categorically than to acknowledge its merit but explain why, on balance, it should not prevail in a given context. It also often sounds more persuasive. Thus, the writing process sometimes blinds the writer to alternative arguments and commits her

330. *See* EPSTEIN & KNIGHT, *supra* note 220, at 126-27.

331. *See id.*

332. *See, e.g.*, Pablo Briñol et al., *Self-Generated Persuasion: Effects of the Target and Direction of Arguments*, 102 J. PERSONALITY & SOC. PSYCHOL. 925, 925 (2012) ("In general, whenever people engage in active construction and/or delivery of a persuasive message, it can lead to attitude change in the transmitter.").

333. *See* Oldfather, *supra* note 329, at 1306, 1315.

334. *Id.* at 1321, 1332.

335. *See id.* at 1332 (discussing verbal overshadowing).

336. *See id.*

337. *See* CARL BEREITER & MARLENE SCARDAMALIA, THE PSYCHOLOGY OF WRITTEN COMPOSITION 302 (1987); Oldfather, *supra* note 329, at 1308.

more fully to the line of reasoning upon which she has embarked.[338] The writing process, then, can be a journey not only of discovery but also of self-deception, sometimes exaggerating the relative persuasiveness of one line of argument while simultaneously down playing the force of arguments supporting the opposite outcome.[339]

The writing process also forces the author to winnow down her key points.[340] It would be impossible (and unwise) for judges to include every relevant point in an opinion. A Justice, then, must make decisions about which arguments and facts to include. For example, the judicial opinion must set forth a factual background that boils down a complicated record into a concise, cohesive narrative.[341] This process necessarily requires a series of simplifications; a written appellate opinion simply cannot capture a case's complete record, which in turn cannot fully comprehend the actual world's rich complexity.[342] Moreover, an authoring judge must present the factual narrative so as to highlight those facts upon which the decision's legal holding rests.

The opinion-writing process, then, requires simplifications that either deliberately or inadvertently can facilitate absolutism's one-sided worldview. The judge cannot depict the world from all possible angles, so she must ignore arguments and facts that would needlessly clutter the opinion. But the decision about what to leave out often involves value judgments. Some facts are plainly extraneous, but some facts that seem extraneous to the majority may be critical to the dissent.[343] A judge hoping to write a concise opinion may end up writing an absolutist one if she shortchanges points that are crucial to the other side, or if she insists that her necessarily simplified representation of the law or facts is indisputably correct.

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338. *See* Oldfather, *supra* note 329, at 1314-15.

339. *See* Kahan, *supra* note 4, at 57.

340. *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 157 (2005); Oldfather, *supra* note 329, at 1335.

341. *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 150 (2002) (arguing that in *Palsgraf v. Long Island Railroad*, Justice Cardozo depicted a very complicated event as "a statement of clarity, symmetry, simplicity").

342. *See* Ferguson, *supra* note 226, at 211 ("The judicial opinion then appropriates, molds, and condenses that transcript in a far more cohesive narrative of judgment, one that gives the possibility of final interpretation by turning original event into a legal incident for judgment.").

343. *See supra* Part I.B.5.

4. The Justice as Advocate

A final critical factor shaping judicial rhetoric is that most American judges are used to thinking and writing like advocates. The advocate-turned-judge has great practice building a convincing case and tearing down opposing arguments. Most judges, including Supreme Court Justices, have spent large portions of their professional careers as lawyers and are accustomed to thinking along adversarial lines. Indeed, starting in law school, the adversarial style is so ingrained in the lawyer's psyche that even the attorney who has not spent most of her career litigating often writes like an advocate.[344] Judges, like most lawyers, then, have perfected the art of making arguments and defeating opposing arguments; drafting opinions in another style is psychologically very hard for them, especially when colleagues advance contrary arguments inviting rebuttal.[345]

In an adversarial system, it is entirely appropriate that lawyers argue their side as strongly as they can while simultaneously trying to rebut the opposing side. Indeed, the *Model Rules of Professional Conduct* require lawyers to represent their side "zealously."[346] Towards this end, lawyers understandably feel the need to press their arguments with great confidence.[347]

Justices, of course, no longer represent clients. However, when people have written and thought in this adversarial style for decades, transitioning to another form of thinking and writing is often hard, especially when the status quo is for judges to write very much in the same style as lawyers.[348] Because lawyers have often

344. *See* Erik Luna & Marianne Wade, *Prosecutors As Judges*, 67 WASH. & LEE L. REV. 1413, 1503-10 (2010) (discussing the "extreme adversarialism" of the American legal system); Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 5 (1992) (describing the adversarial nature of the U.S. legal curriculum).

345. *See* Berger, *supra* note 79, at 366; *supra* notes 184-86 and accompanying text.

346. MODEL RULES OF PROF'L CONDUCT pmbl. (2013).

347. *See* Goodman-Delahunty et al., *supra* note 23, at 136.

348. *See* Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 85 (1998) ("Repeated exposure to adversaries' arguments, set up as opposing poles, establish a habit of mind for judges who in turn write opinions as though they present a preordained correct answer, which embraces by necessity only one position or viewpoint."); Posner, *supra* note 281, at 6 ("A lawyer is a practicing lawyer one day, and a judge the next. There is no transition, no (or very little) training for the new career, and so it is natural for the lawyer newly appointed a judge to continue with as little

been trained to eschew doubt, many lawyers may see judicial doubt not as a reflection of intellectual honesty but rather as an admission that a judge is deciding based on personal values.[349] We should not be surprised, then, to find that the Justices' opinions read a lot like lawyers' briefs—emphasizing their strongest points, trying to conceal or explain away their weakest points, and dismissing counterarguments.[350] Some judges may consciously choose this rhetorical style, but many may simply fall into it because they have been doing it for decades.[351]

III. IMPLICATIONS

A. Costs

1. The Politics of Cultural Disdain

The Supreme Court's constitutional opinions obviously matter insofar as they shape constitutional doctrine, but they also play an important role in a broader national constitutional discussion. Although most Americans swear fealty to the Constitution as our civic religion,[352] they disagree strenuously about what it means. Indeed, the country's collective view of its founding document is emphatically pluralistic, embracing numerous values, some in sharp tension with each other.[353] These differences reflect not just political disagreement about single issues but deeper discord over our

change as possible his accustomed approach.").

349. *See* Kahan, *supra* note 4, at 60.

350. *See* Berger, *supra* note 79, at 366.

351. By contrast, in some countries, judges are career judges, not former lawyers who have "lateraled" into judicial positions. *See* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 84 (2d ed. 1999). Although there are undoubtedly great advantages to having the bench consist of accomplished lawyers, such judges also bring with them the bar's professional biases and rhetorical conventions. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 103-04 (3d ed. 2007) (noting that in some countries, high court judges will have served their entire career as judges and, never having practiced, "will see the law solely from the judge's point of view"); John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 93-100 (2006) (discussing lay judges); Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1586-91 (2007).

352. *See* LEVINSON, *supra* note 17, at 10, 17.

353. *See id.* at 17.

national identity.[354] The tone of the Court's treatment of these sensitive issues thus affects important discourse about the very nature of American democracy.

In light of these high stakes, absolutist constitutional rhetoric runs the risk of unduly alienating litigation losers, sending the message that they are cultural outsiders whose understandings of our nation's core values are fundamentally incorrect.[355] To be sure, defeated litigants naturally will be disappointed. That said, many decisions are context-specific,[356] deciding a constitutional question only in the narrow confines of the factual scenario presented. An opinion's rhetoric can therefore help determine whether interest groups supporting losing litigants feel mild disappointment, bitter alienation, or something in between.[357]

Indeed, a decision's cultural ramifications extend far beyond the legal community. Interest groups and the (often partisan) media report decisions to the broader citizenry, who in turn, fiercely debate the decision's wisdom. While the general public usually focuses on a case's outcome, the opinion's language signals the Court's level of respect for the competing values at issue. When an opinion dismissively rejects the norms on one side of the constitutional ledger, the Court appears indifferent to the harms its opinion may inflict on the losing side.[358] It may, indeed, even sometimes indicate that the harm is deserved.[359] Although losing litigants inevitably experience some sense of loss, as Professor Emily Calhoun argues, those harms

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354. *See id.* at 9-17.

355. *See* EMILY M. CALHOUN, LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT 3 (2011) (arguing that if the Justices do not ameliorate harm, constitutional losers experience injustice that adds fuel to their deeply felt personal outrage).

356. *See* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996) (discussing the role of context in judicial minimalism).

357. *See* Timothy P. O'Neill, *Law and "The Argumentative Theory,"* 90 OR. L. REV. 837, 848 (2012) ("When a judicial opinion—especially a U.S. Supreme Court majority opinion in a five-to-four case—is couched in completely unequivocal language, its message to the other side is: 'You're wrong. And, by the way, you are stupid and perhaps dishonest, too.'").

358. *Cf.* JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 153-54 (1979) ("It is a propensity of professionals in the legal process to dehumanize by legal concepts those whom the law affects harshly."); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.").

359. CALHOUN, *supra* note 355, at 8.

might be magnified when the Court disrespects their basic positions.[360]

Absolutist rhetoric can also distort an ongoing constitutional debate.[361] For example, as noted above, though *Heller* announced that certain gun regulations would likely be constitutional,[362] popular discussion of the Second Amendment, latching onto the opinion's strong rhetoric, often assumes that *any* regulation of firearms is unconstitutional. For example, local sheriffs, citing an absolutist Second Amendment, announced recently that they would not enforce certain state gun laws,[363] because, as one sheriff explained, "[i]n my oath it says I'll uphold the U.S. Constitution."[364] Similarly, *Guns & Ammo* magazine recently dismissed a pro-gun columnist for having the audacity to remind readers that constitutional rights are never absolute.[365] Rather than examining the constitutional merits of various hypothetical regulations, the magazine's editors insisted that *no* such regulation was constitutional and that all attempts to regulate firearms reflected "powerful forces in this country who will do anything to destroy the Second Amendment."[366] Of course, *Heller* did not cause these attitudes; the National Rifle Association (NRA) vigorously advocated for absolute gun rights long before that decision. But Justice Scalia's rhetoric in *Heller* provided further grist for the NRA's mill.[367] To this extent, absolutist language, even if tempered by a nuanced holding, can become amplified as interest groups disseminate it to the public.

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360. *See id.* at 24 (arguing that it is not unreasonable "for constitutional losers to expect Justices to write opinions that manifest a respect for the equal moral and political agency of losers").

361. *Cf.* Guinier, *supra* note 30, at 60 ("[T]he beliefs and values of nonjudicial actors are influenced by the judiciary's internal perspective on the meaning of law.").

362. District of Columbia v. Heller, 554 U.S. 570 (2008).

363. *See* Erica Goode, *Sheriffs Refuse to Enforce Laws on Gun Control*, N.Y. TIMES, Dec. 16, 2013, at A1.

364. *Id.* at A17.

365. Ravi Somaiya, *Banished for Questioning the Gospel of Guns*, N.Y. TIMES, Jan. 5, 2014, at A1.

366. *Id.*

367. *See* Nancy Smith, *Sen. Dianne Feinstein's Gun-Control Firebomb,* SUNSHINE STATE NEWS (Jan. 7, 2013, 3:55AM), http://www.sunshinestatenews.com/story/sen-dianne-feinsteins-gun-control-firebomb [http://perma.cc/K8TF-4JMB] (summarizing the view that gun regulations violate *Heller*).

A plausible effect of absolutist rhetoric, then, is that it may sometimes help cut off deeper debate.[368] Opinions that entirely reject one side's constitutional vision can simultaneously alienate opponents and dull the critical sensibilities of supporters.[369] In both cases, they deepen the potential for political discord.[370] When partisan ideologues can cite Supreme Court language to brandish their contempt for their opponents, the ensuing conversation is less likely to include careful discussion. Democracy usually works better when debate is careful and informed.[371] Rather than encouraging depth, absolutist rhetoric encourages people to recast arguments to render them either congenial or not to their views, refusing to acknowledge the law's complexities and internal tensions.

This phenomenon can extend also to the Court's absolutist factual statements, which contribute to the related problem of balkanized knowledge and understanding.[372] The majority and dissenting opinions in *Shelby County* painted fundamentally different portraits of racial discrimination and voting rights in the predominantly southern jurisdictions covered under section 4 of the VRA.[373] Such one-sided depictions of the world both reflect and perpetuate the problem of balkanized knowledge in which different groups' factual beliefs are governed substantially by their ideological views.[374]

Partially as a result of these deep epistemological differences, conservatives and liberals do not just disagree on questions of constitutional application; they "know" different things about the document's fundamental "truths."[375] Sympathetic audiences, then, are more likely to assume their normative preferences are "strong

368. *See* Kahan, *supra* note 4, at 21.

369. *Id.*

370. *See, e.g.*, *id.* at 61 (arguing that pronouncements of certitude can deepen group-based conflict); David A. Strauss, *Principle and its Perils*, 64 U. CHI. L. REV. 373, 386 (1997) (reviewing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996)).

371. KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT 245 (2008).

372. *See* CASS SUNSTEIN, REPUBLIC.COM 53-54 (2001) (arguing that the Internet helps insulate audiences from more diverse viewpoints).

373. *See supra* Part I.B.5.

374. *See* SUNSTEIN, *supra* note 372, at 57 ("[W]hen options are so plentiful, many people will take the opportunity to listen to those points of view that they find most agreeable.").

375. *Cf.* JAMIESON & CAPPELLA, *supra* note 371, at 191.

[a]s proofs of holy writ"[376] when Justices they admire vindicate those preferences with great confidence.[377] Indeed, given that many Americans stick to news sources confirming their preexisting political inclinations,[378] it is unsurprising that the Justices' absolutism would be transmitted to people hungry for evidence that bolsters their own one-sided attitudes. This phenomenon, thus, might further balkanize groups whose visions of our basic political structure grow still farther apart.[379] As Professors Simon and Scurich put it, "judicial one-sidedness pushes the opposing parties further apart ... entrench[ing] the boundaries that separate people ... [and] solidif[ying] parochialism."[380]

This all may contribute to a culture of political disdain.[381] Extreme rhetoric can slide into hyper-partisan rage, in which audiences angrily condemn political opponents.[382] The opposing side is not simply wrong, but disingenuous, stupid, unpatriotic, and even morally repugnant. Of course, some absolutist rhetoric is more polite than others, but the high stakes of constitutional controversies often provoke strong responses. The result can be a vicious circle of disrespect that transcends ordinary democratic disagreement. To this extent, rhetorical excess is self-perpetuating, with each side angrily denouncing the other.

This poisonous political culture can interfere with sensible governance.[383] People who accept an absolutist view of the Constitution are more likely to see the Constitution as an ideological battleground, rendering compromise politically impossible.[384] After all, if the other side has committed heresy by desecrating the country's secular religion, then compromising with opponents would be akin to a covenant with the devil. One-time allies who depart from the acceptable agenda are therefore iconoclasts. For example, after the

376. WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE act 3, sc. 3, ll.

377. *See* Kahan, *supra* note 4, at 21.

378. *See id.*

379. See SUNSTEIN, *supra* note 372, at 59-60.

380. Simon & Scurich, *supra* note 6, at 421.

381. *See generally* MORRIS P. FIORINA ET AL., CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA 1-7 (3d ed. 2006) (discussing contemporary political observers' characterization of Americans as deeply politically divided); SUSAN HERBST, RUDE DEMOCRACY: CIVILITY AND INCIVILITY IN AMERICAN POLITICS 1-3 (2010).

382. *See* JAMIESON & CAPPELLA, *supra* note 371, at 246.

383. *Id.* at 246-47.

384. *See id.* at 246.

Supreme Court upheld much of the Patient Protection and Affordable Care Act (ACA), Glenn Beck made a t-shirt with the word "coward" under an image of Chief Justice Roberts.[385]

In light of the prevailing "political outrage carnival,"[386] it is easy to see why Congress in recent years has been mostly paralyzed. Our Constitution requires bicameralism and presentment for legislation to become law,[387] and those constitutional requirements, combined with other vetogates, such as the Senate filibuster, make it difficult to pass legislation even in eras of relative political calm.[388] Popular absolutist rhetoric makes it still harder to achieve any kind of meaningful compromise, because politicians and their constituents on both sides are convinced that the other side fundamentally misunderstands America's constitutional foundations.[389] The result is a policy-making logjam and a Congress that now routinely neglects crucial matters like the budget and the debt ceiling.[390] Of course, many other factors contribute to our current political dysfunction,[391] but rhetoric that discourages all political cooperation surely plays some role.[392]

The Court's absolutist rhetoric thus plausibly contributes, albeit modestly, to a culture in which political enemies treat Court decisions like "the spoils of war"[393] and wield the Constitution as a

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385. *See Glenn Beck Sells T-Shirts Calling Justice Roberts "Coward*,*"* HUFFINGTON POST (June 29, 2012, 2:41 PM), http://www.huffingtonpost.com/2012/06/29/glenn-beck-sells-t-shirts_n_1638229.html [http://perma.cc/RS4G-RJAB].

386. Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 388 (2012).

387. *See* U.S. CONST. art. I, § 7, cl. 2. The exception, of course, is when Congress overrides a presidential veto.

388. *See* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1448 (2008).

389. *See* JAMIESON & CAPPELLA, *supra* note 371, at 246.

390. Massaro & Stryker, *supra* note 386, at 388.

391. *See, e.g.*, NOLAN MCCARTY ET AL., POLARIZED AMERICA 11 (2006) (describing empirical evidence that politicians have become increasingly polarized along ideological lines); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 287-324 (2011) (examining causes of hyperpolarized democracy in America).

392. *See generally* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 63 (2012) (discussing the pernicious influence of "the bombastic and blustering figures in the political culture").

393. CALHOUN, *supra* note 355, at 108.

clumsy weapon in political debate. Of course, social reactions to Supreme Court constitutional decisions depend on the particulars, and losing groups likely will dispute the Court's decisions regardless of its rhetorical tone. But the Court's tone, nonetheless, indicates its degree of respect for a particular conception of America and therefore can help color the terms of future discourse.[394] It also can model the terms of future debate. Indeed, a sarcastic, dismissive opinion can indicate to law students—tomorrow's future lawyers and leaders—that such rhetoric is appropriate in formal legal settings.[395]

It is important not to overstate the point. The Court's role in contemporary political dysfunction is modest, and the role of its rhetoric, as distinct from its holdings, is likely even smaller. Elected public officials and media pundits play a much bigger role in shaping the country's political culture and discourse.[396] Moreover, the street here runs two ways; just as the Court's rhetoric can modestly shape popular discourse, so too can popular constitutionalism seep into judicial rulings.[397] For example, Tea Party and broader conservative hostility to the ACA may well have helped shape judicial attitudes towards the constitutional challenge. When groups initially challenged the ACA's individual mandate on Commerce Clause grounds, many observers considered the argument frivolous.[398] As conservative and libertarian activists pressed their arguments, however, the constitutional argument against the mandate began to filter into the legal and cultural mainstream.[399] The vigor of the popular movement may have helped persuade the public and some judges that a Commerce Clause challenge originally perceived to be "off the wall" might in fact be correct.[400] Nevertheless,

394. *See id.* at 8-9.

395. Chemerinsky, *supra* note 194, at 2022.

396. *See* FIORINA ET AL., *supra* note 381, at 1-10 (discussing contemporary political observers' characterization of Americans as deeply politically divided).

397. *See* FRIEDMAN, *supra* note 15, at 367-68 (arguing that when the Court declares unconstitutional actions of other branches, they often reflect the will of the people); Lain, *supra* note 15, at 117 (arguing that sometimes the Supreme Court is better at responding to widespread changing attitudes than the political branches); Post, *supra* note 30, at 8.

398. *See* Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325, 331 (2013) (noting that the challenge initially seemed "off the wall").

399. *Id.* at 331-34.

400. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585-91 (2012); Blackman, *supra* note 398, at 333-34.

though constitutional culture surely sometimes helps shape constitutional law, so too can the Court's rhetoric color our broader national political dialogue, sometimes for the worse.

2. Judicial Legitimacy

Even though the Court may sometimes use absolutist constitutional rhetoric to bolster the rule of law,[401] that same rhetoric can also undermine its own institutional legitimacy. National perceptions of the Supreme Court are not favorable. According to recent polls, the Supreme Court's approval rating in 2012 fell to 50 percent, and 82 percent of Americans believe that the Justices decide cases based on their personal views.[402]

Public perception is not wholly mistaken. Political scientists have developed a sophisticated attitudinal model demonstrating that political preferences matter in judicial decision making.[403] But it is one thing for Justices to vote with their political preferences in a close case with compelling legal arguments on both sides. It is something quite different for them to ignore clear law in straightforward cases, and the evidence showing that Justices do this is far weaker.[404] To the contrary, the Justices' own norms and ideologies are most likely to sway their decisions when things are unclear—when there are legal gaps to fill or complicated factual landscapes to assess.[405]

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401. *See supra* Part II.A.3.

402. *See, e.g.*, Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, *in* WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 306, 308 (Charles Gardner Geyh ed., 2011); B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment,"* 91 TEX. L. REV. 1815, 1816 (2013).

403. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 433 (2002) ("The fact remains that the ideology of the Justices drives their decisions."); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) (synthesizing studies measuring the connection between judicial ideology and behavior).

404. *See, e.g.*, FARBER & SHERRY, *supra* note 16, at 4 ("[T]here is a space between ironclad logic and unrestrained discretion.").

405. *See* Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 530 (2013); Tamanaha, *supra* note 254, at 774.

Ordinary citizens, however, usually do not make these distinctions.[406] Partisan talking heads, unsurprisingly, contribute to the problem, overstating the role of ideology in judicial decision making.[407] The Court itself, however, also deserves some blame. Indeed, the Justices help sow cynicism about their own institution when they insist that 5-4 cases have clear answers and that dissenting arguments are "worthy of the Mad Hatter."[408] It is easier for the lay person to see judicial decisions as unduly political if the Justices punctuate their internal disagreements by characterizing the law as objective and each other as mad.[409]

Absolutist rhetoric, in fact, abandons important judicial principles. Judges should explain their opinions with "reasoned elaboration"[410] and be willing to entertain new ideas and subject favored views to careful scrutiny.[411] When Justices use absolutist rhetoric, they at least appear to have abandoned that commitment to neutrality and care. Similarly, when a Justice's explanation fails to give competing arguments fair treatment, that explanation, no matter how otherwise rigorous, will seem less persuasive to many fair-minded, critical readers. While only a small percentage of the population reads Supreme Court decisions closely, some of those readers share their unfavorable reactions in blogs and news reports. Consequently, a judicial culture that consistently denigrates the other side can undermine the public's faith in a fair-minded, impartial judiciary. To this extent, Justices' overzealous use of absolutist rhetoric may reflect too great a willingness to win the

406. *See* William J. Daniels, *The Supreme Court and Its Publics*, 37 ALB. L. REV. 632, 636-38 (1972) (describing the breadth and depth of the general public's knowledge about Supreme Court decisions and concluding that the public is not very knowledgeable about the Supreme Court).

407. *See, e.g.*, MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 10 (2005) ("[J]udges have abused their constitutional mandate by imposing their personal prejudices and beliefs on the rest of society."); MARK W. SMITH, DISROBED: THE NEW BATTLE PLAN TO BREAK THE LEFT'S STRANGLEHOLD ON THE COURTS 11 (2006) ("Judges ... function as politicians wearing black robes.").

408. *See* District of Columbia v. Heller, 554 U.S. 570, 589 (2008).

409. *See, e.g.*, LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 7 (2012) ("[W]e are asked by each side to believe that its disinterested reading leads to this result, while the other side's manipulation of text and history amounts to a cynical, politically motivated effort to distort the Constitution's true meaning.").

410. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 143-52 (William N. Eskridge & Philip P. Frickey eds., 1994).

411. FARBER & SHERRY, *supra* note 16, at 91.

battle over a particular case without larger regard for the war over the Court's institutional legitimacy.

Absolutist rhetoric also may diminish the Court's collegiality, which in turn may marginally affect the public's opinion of it. The Court probably functions more collegially than most American governmental institutions,[412] but absolutist rhetoric may sour relationships between the Justices. Justice Scalia's acerbic style, in particular, has reportedly alienated Justices O'Connor and Kennedy.[413] Although most members of the public do not pay close attention to these interpersonal politics, diminished collegiality and disrespectful opinions can give the general impression of a divided institution, which, in turn, can undermine the public's confidence.[414]

Finally, some actors may be inclined to disregard absolutist opinions. After all, because absolutist opinions generally overstate their supporting reasoning, the Court in future cases may not take them seriously.[415] Additionally, absolutist dissents may imply that lower courts should not be too stringent in applying or extending a majority opinion.[416] Similarly, street-level bureaucrats sometimes misunderstand absolutist majority opinions as permitting them to ignore otherwise applicable laws so as not to violate constitutional norms.[417] Moreover, even when lower courts and executive officials wish to follow precedent faithfully, they may have difficulty identifying the portions of an absolutist opinion that constitute its core holding as distinct from rhetorical embellishment. Thus, absolutism's implicit message that the Court is just applying the

412. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. Oct. 14, 2013, at 27, *available at* http://perma.cc/3KWY-7Z6S (discussing Supreme Court collegiality).

413. *See* Aaron Epstein, *The Interpreter and the Establishment Clause*, *in* A YEAR IN THE LIFE OF THE SUPREME COURT 126, 136 (Rodney A. Smolla ed., 1995) (noting that Justice Anthony Kennedy disliked Justice Scalia's acerbic rhetoric); William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601, 1603 (2012) (noting that Justice Scalia's style is "said to have fairly seriously alienated Justice O'Connor").

414. *Cf.* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986) ("[C]ollegiality *is* important.").

415. Simon & Scurich, *supra* note 6, at 419.

416. Tushnet, *supra* note 233, at xiii.

417. *See, e.g.*, Goode, *supra* note 363, at A1 (discussing local sheriffs opting not to follow state gun control laws due to Second Amendment concerns). *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980) (discussing how public service workers have and employ considerable discretion in implementing public programs).

law may ironically undermine both the rule of law and the Court's own legitimacy.

3. Constitutional Misconceptions

Another potential cost of constitutional absolutism is that it pretends that constitutional answers come more easily than they do. In this regard, absolutist rhetoric perpetuates misconceptions about the nature of constitutional law and judicial constitutional decision making. Even if one prefers legal formalism in which clear rules point towards correct answers, many Justices on the Court do not understand constitutional adjudication in such terms.[418] Justice Holmes may have somewhat overstated the matter when he asserted that "the life of the law has not been logic: it has been experience,"[419] but he was certainly correct that logic alone does not forge the law's path.[420] Absolutist opinions' conceit that their conclusions merely reflect the law's mandate misrepresents the role that less tangible factors, like experience, play in shaping the law. Furthermore, the very diversity of the Justices' own approaches to constitutional interpretation necessarily renders constitutional law unpredictable.

Rhetorical absolutism, then, likely perpetuates the misconception of a monistic Constitution that contains easy and obvious answers.[421] Unlike many statutes, the Constitution's text is old and underdeterminate. Unlike some foreign constitutions, it also lacks interpretive instructions.[422] Constitutional history and precedent are both rich and complicated. Moreover, the modalities of constitutional decision making are numerous, drawing on text, structure,

418. *See* Sullivan, *supra* note 237, at 26.

419. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Mark DeWolf Howe ed., Harvard Univ. Press 1963) (1881); *see* FARBER & SHERRY, *supra* note 16, at 4-5 (arguing that both logic and experience shape the law).

420. *See* FARBER & SHERRY, *supra* note 16, at 4 (noting that it is "fruitless" to try to eliminate the middle ground between logic and discretion in constitutional decision making).

421. This is not to say that there are never straightforward constitutional answers. For instance, the President must be at least thirty-five years old. *See* U.S. CONST. art. II, § 1, cl. 5.

422. For example, section 39 of the South African Constitution provides instructions on how courts should interpret the Bill of Rights provisions of that Constitution. *See* S. AFR. CONST., 1996 § 39; KENDE, *supra* note 267, at 8 (discussing the South African Constitution's interpretive instructions).

history, precedent, policy, and more.[423] Given that constitutional decision making can be approached from so many directions—each complicated—answers to many constitutional cases do not come easily.[424]

Some constitutional cases also present conflicts between constitutional principles, thus pitting not a right against a wrong, but a right against a right.[425] Justice Souter may have dismissed competing arguments too quickly in *Rosenberger*,[426] but he articulated this point powerfully in a commencement address at Harvard:

> Not even [the Constitution's] most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day .... [These] tensions ... are the ... creatures of our aspirations: to value liberty, as well as order, and fairness and equality, as well as liberty. And the very opportunity for conflict between one high value and another reflects our confidence that a way may be found to resolve it when a conflict arises. That is why the simplistic view of the Constitution devalues our aspirations, and attacks that ... confidence.[427]

Indeed, the absolutist view of the Constitution is contrary to the document's spirit and history.[428] The Framers themselves agreed on very little, and ended up creating a document that satisfied no one

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423. *See* BOBBITT, *supra* note 10, at 12-13, 22.

424. *Cf. id.* at 11-22 (discussing the different ways of analyzing constitutional questions and the results of each).

425. *Cf.* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 5 (rev. ed. 2001) ("I must constantly choose among competing and apparently incommensurable goods and that circumstances may force me to a position in which I cannot help being false to something or doing some wrong.").

426. *See supra* notes 102-06 and accompanying text.

427. Justice David H. Souter, Commencement Address at Harvard University (May 27, 2010), *in* HARVARD GAZETTE, http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ [http://perma.cc/4PWN-UXDB].

428. *Cf. id.* ("[T]he Constitution is no simple contract, not because it uses a certain amount of open-ended language that a contract draftsman would try to avoid, but because its language grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once.").

entirely,[429] punting many important issues to future generations.[430] It was generally understood that the document's meaning would have to be "liquidated" through the generations.[431] Above all else, the story of 1787 is the story of statesmen who compromised, putting aside deep ideological differences to craft an imperfect but pragmatic Constitution that they hoped would save their young country.[432] This history, of course, is not decisive in any constitutional conflict today, but it does belie the notion that the answers should come easily. To the extent constitutional absolutists would have us believe otherwise, they distort the very tradition they purport to revere.

4. Misplaced Piety

Finally, absolutist rhetoric can encourage unthinking respect for the Constitution.[433] Many people fill the Constitution with their own content. When an individual favoring a particular outcome sees a Justice arguing strenuously in favor of that same outcome, she is more likely to latch onto those arguments rather than seek a second opinion. Many Americans revere the Constitution, but it is often a sound-bite Constitution containing fragments of meaning used to support a single-minded, partisan goal.

The Constitution may underpin our civic religion, but thoughtless piety is a shaky foundation upon which to rest the nation's faith.[434] Although the Constitution's advantages may well outweigh its

429. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 158-65 (2d ed. 2005).

430. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws,* 104 YALE L.J. 541, 567 (1994).

431. *See* THE FEDERALIST NO. 37, at 179, 182 (James Madison) (Ian Shapiro ed., 2009) ("All new laws ... are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

432. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 472 (2010); DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING 14-15 (2d ed. 2013) ("Political calculation, negotiation, and compromise inevitably shaped the document that evolved at the Convention."); Adrian Vermeule, *The Constitutional Law of Congressional Procedure,* 71 U. CHI. L. REV. 361, 364 (2004) (describing the Framers' underlying principle as "pragmatic").

433. *See* LEVINSON, *supra* note 17, at 54.

434. *See id.* at 4.

disadvantages, it is far from a perfect document.[435] Certainly, its original conception was deeply flawed, as abolitionists like William Lloyd Garrison emphasized when they publicly burned the document, denouncing it as a "covenant with death."[436] Although no provision surviving today is morally despicable like the original pro-slavery provisions, reasonable people of good faith question the wisdom of other provisions, including, among others, the undemocratic nature of the Senate;[437] the ambiguity of the Article II executive powers;[438] the electoral college system;[439] and the difficulty of formal amendments under Article V.[440] Moreover, given recent political standoffs over the budget and debt ceiling, reasonable people may wonder whether the numerous obstacles to legislation are wise.[441]

Amending these or other constitutional provisions would be extremely difficult,[442] but as Professor Levinson has argued, merely having a conversation about our Constitution's strengths and weaknesses would be a valuable national exercise.[443] Indeed, even if the Constitution emerged unchanged, such attention could force Congress to reconsider the wisdom of legislative vetogates enacted by congressional rule.[444] In other words, we may not be able to

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435. *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 20-21 (2006); Souter, *supra* note 427.

436. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 120 (1988).

437. *See* LEVINSON, *supra* note 435, at 108 (describing congressional gridlock that blocks the effective making of public policy).

438. *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs,* 102 MICH. L. REV. 545, 553 (2004) (describing the textual uncertainty in the Article II grant of powers to the executive).

439. Joy McAfee, *2001: Should the College Electors Finally Graduate? The Electoral College: An American Compromise From its Inception to Election 2000*, 32 CUMB. L. REV. 643, 644-45 (2002) (summarizing arguments against the electoral college method of electing the president).

440. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (proposing a new amendment process).

441. *See* LEVINSON, *supra* note 435, at 108.

442. *See* Akhil Reed Amar & Sanford Levinson, *What Do We Talk About When We Talk About the Constitution?*, 91 TEX. L. REV. 1119, 1133, 1138 (2013) (reviewing AKHIL REED AMAR, AMERICAN'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012); SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012)).

443. LEVINSON, *supra* note 435, at 178-80.

444. *See id.* at 180.

change the Constitution itself, but we may reconsider related features of our system.

Of course, such a discussion could also identify the Constitution's many virtues and the stability resulting from its long endurance. For instance, even though this country's political gridlock can be very damaging, it is not clear that parliamentary systems, which generally can respond more quickly to problems, have dealt any better with the recent global financial crisis. Moreover, as Professor Akhil Amar puts it, although foreign parliamentary systems typically have less gridlock, they have "offsetting pathologies," such as permitting plurality parties without a national mandate to effect major change.[445] Consequently, policy can shift quite dramatically sometimes as the result of a single election with low turnout.[446]

It is important, then, to realize that our system has both advantages and disadvantages. But Americans rarely discuss the relative merits of their political system because it is heretical to suggest that the Constitution is anything short of perfect. In short, the nation has succumbed to the mindless piety that Thomas Jefferson lamented when he observed in his contemporaries a "sanctimonious reverence" for the Constitution and its Framers.[447]

The great irony is that excessive constitutional piety can also be seen as a sign of disrespect. If most people revere the Constitution because they believe it protects their own political commitments, then as a nation, we consider it easily manipulated. Of course, to the extent that many constitutional questions are open to debate, this view has some truth in it, but it is likely not the vision of the Constitution that many Americans think they are venerating. Perhaps this flexibility is precisely why the Constitution endures and deserves celebration, but this point is hardly explicit in most of our national constitutional conversation. Admittedly, misplaced piety is not a grave threat to the republic. Nevertheless, this piety also speaks to a faith that has yet to deepen through self-questioning.

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445. Amar & Levinson, *supra* note 442, at 1132.

446. *See id.*

447. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 367 (1996) (quoting Thomas Jefferson).

B. Benefits

1. Legal Stability and the Rule of Law

The rhetoric of constitutional absolutism also offers benefits.[448] Most obviously, strong rhetoric announces judicial decisions with confidence, presenting a solid foundation upon which to build a legal doctrine and bind society. The Supreme Court lacks direct democratic accountability, but it can persuade the political branches and citizens to obey its orders by insisting on the requirements of the rule of law. Absolutist rhetoric, thus, reflects some Justices' belief that the law needs to speak forcefully if unelected judges are to assert their authority over more democratically accountable governmental officials.[449] Were the Court to concede legal uncertainty, it would risk undermining that authority.

Relatedly, absolutist rhetoric implicitly promises legal clarity and stability. Whereas more equivocal opinions might cause some to wonder whether the law might change, absolutist rhetoric can help foster consistency, another important component of the rule of law.[450] After all, it should be possible to foresee "with fair certainty" how the government will use its coercive power in various circumstances,[451] and absolutist rhetoric implies that constitutional rules will not change. By contrast, a Court that does not sound like it believes in its own rulings will not foster such confidence.

Such legal clarity is important generally, but it is especially important in certain kinds of prominent, morally charged constitutional cases. Perhaps the best example is *Brown v. Board of*

448. These benefits overlap somewhat with the strategic explanations discussed previously. *See supra* Part II.A.

449. *See* Post, *supra* note 30, at 11 ("Judges and lawyers will continue to appeal to the autonomy of constitutional law ... precisely to the extent that they believe that an independent and determinative constitutional law is the necessary foundation for judicial authority to constrain democratic legislation.").

450. *See* LON L. FULLER, THE MORALITY OF LAW 63 (2d ed. 1969) ("[C]larity represents one of the most essential ingredients of legality."); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944) ("[G]overnment in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.").

451. HAYEK, *supra* note 450, at 72.

Education, which, of course, invalidated school segregation.[452] Though accepted today as constitutional gospel, *Brown* was very controversial in its day, especially in the segregated South.[453] *Brown* may have failed in the short term to desegregate many southern public schools,[454] but its symbolic importance was tremendous.[455] Though *Brown* said very little and did not condemn the immorality of segregation so much as emphasize its adverse consequences,[456] the Court's decision was firm and unanimous, thus ushering in a new era of equal protection law.[457] Had the Court in *Brown* spoken more equivocally of the constitutional norms involved, the South could have emphasized the decision's uncertain tone, thereby undermining its symbolic power.[458] On this account, confident language can help send a powerful message to the entire country about important constitutional and moral norms.

Absolutist opinions also more easily achieve internal coherence. A concession in *Heller* that the historical and textual evidence was collectively ambiguous would have partially undermined the legitimacy of the Second Amendment right. After all, given the Court's originalist analysis, the right emanated directly from such evidence.[459] *Graham*, too, would have been harder to write had the Court conceded its inconsistent methodologies for determining a national consensus.[460] Similarly, *Shelby County*'s decision to strike

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452. 347 U.S. 483, 494-95 (1954).

453. *See* Ashley Doty, *The Legacy of* Brown v. Board of Education, 4 LAW & SOC'Y J. U.C. SANTA BARBARA 111, 115 (2005) (explaining that after *Brown* judges were "subject to intimidation and threats to the safety of themselves and their families" if they ruled against segregation).

454. *See* MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 157 (2007) (discussing *Brown*'s initial ineffectiveness in desegregating the South); J. W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 93 (1961) (discussing the ineffective implementation of *Brown*); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 50 (1991) (showing how slowly schools integrated).

455. *See* KLARMAN, *supra* note 454, at 160.

456. *Brown*, 347 U.S. at 494.

457. Following *Brown*, the Supreme Court invalidated segregation in numerous other contexts. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (holding bus segregation unconstitutional); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (enjoining segregation on public beaches and in bathhouses).

458. *See* Chemerinsky, *supra* note 194, at 2033-34.

459. *See supra* note 83 and accompanying text.

460. *See supra* Part I.B.4.

down the preclearance coverage formula would have been harder to justify had the majority tempered its story of racial progress with examples of continued voter discrimination.[461] And *Citizens United* would have read very differently had the majority actually engaged with evidence demonstrating that powerful corporations enthusiastically spend money to curry favor with dependent political candidates who, once elected, support legislation friendly to those corporations.[462] Perhaps the Court would have still found that the corporations' free speech interests should prevail, but the Court would have had more difficulty rejecting the contention that the BCRA provisions at issue furthered a compelling governmental interest. Equivocal opinions, then, can be harder to write and less internally coherent.

Although it is important not to confuse tone with content, more moderately toned opinions may gravitate towards narrow holdings that leave a great deal open for future cases to resolve. There are certainly benefits to leaving issues undecided,[463] but courts that do so often fail to provide guidance to lower courts.[464] Justice O'Connor's *Rosenberger* concurrence intelligently recognized the competing values at issue in that case but provided minimal guidance on how to resolve the doctrinal collision.[465] In theory, it is possible to imagine a conciliatory opinion that acknowledges the strong arguments on both sides of a question while simultaneously laying down a clear rule that can be applied easily in future cases. In practice, such an opinion is much harder to write.

2. Civic Engagement

Absolutist rhetoric can also help promote civic engagement with constitutional issues by clarifying the fundamental grounds of constitutional dispute. Cultural intermediaries, in turn, can more easily transmit these clearer legal visions to the general public. Whereas

461. *See supra* Part I.B.5.

462. *See* Teachout, *supra* note 128, at 318-22 (discussing the kind of "material description" that was "missing" in *Citizens United* and may have made a "great deal of difference"); *supra* note 126 and accompanying text.

463. *See* Sunstein, *supra* note 356, at 7-9 (discussing the benefits of judicial minimalism).

464. *See* Wilkinson, *supra* note 7, at 1989.

465. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

more compromising opinions, with their careful parsing of doctrinal intricacies and factual distinctions, can confuse and bore the general public, absolutist opinions engage their audience with a stronger sense of constitutional battle lines.[466]

Like religious sects skirmishing over whose faith is more authentic, jurists and others wielding absolutist rhetoric likely speak more to the faithful than to their opponents.[467] Justices probably understand that strong language will rarely convert an opponent. However, such rhetoric can help inspire loyalty from the committed, thus helping to galvanize ideological allies.

In that way, absolutist opinions can mobilize the public and encourage non-lawyers to articulate their own constitutional visions. Such opinions arm citizens with points to argue their side more effectively.[468] Far from alienating members of the public, this kind of rhetoric might in fact encourage constitutional debate and eventually spawn new constitutional understandings.[469] Indeed, though some people may be turned off by strong rhetoric, it may actually increase popular political engagement.[470] In the nineteenth century, for instance, when newspapers were often "organs" of political parties,[471] voting rates were high by contemporary standards.[472] Similarly, U.S. politics are highly polarized today, and yet voter turnout in the past two presidential elections has been comparatively high.[473] Strong rhetoric, whatever its drawbacks, then, may

466. *Cf.* Guinier, *supra* note 30, at 117 (arguing that minority viewpoints can gain support when dissents speak to a nonlegal public in language ordinary people can understand).

467. *See generally* Gregory Brazeal, Constitutional Fundamentalism 6 (Jan. 9, 2015) (unpublished manuscript), *available at* http://perma.cc/YM7R-LFMX (comparing constitutional fundamentalists to religious fundamentalists).

468. *Cf.* JAMIESON & CAPPELLA, *supra* note 371, at 243-44 (discussing the positive effects of one-sided conservative media on its audience).

469. Siegel, *supra* note 40, at 1329 ("Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution.").

470. *See* ABRAMOWITZ, *supra* note 260, at 18-19 (arguing that the American public's interest in politics has increased as the Democratic and Republican parties have become increasingly polarized along ideological lines).

471. *See* HOWE, *supra* note 106, at 228.

472. *See* JAMIESON & CAPPELLA, *supra* note 371, at 242.

473. *See* Alex Bryson et al., *Workplace Voice and Civic Engagement: What Theory and Data Tell Us About Unions and Their Relationship to the Democratic Process*, 50 OSGOODE HALL L.J. 965, 966 n.1 (2013).

help inspire democratic engagement over the country's first principles.[474]

C. Other Implications and Tensions

Absolutist rhetoric carries other implications that are not so easily categorized as costs or benefits. In particular, absolutist rhetoric can both advance and obstruct other values that the Court sometimes champions: judicial supremacy, minimalism, indeterminacy, and candor. Reasonable people can debate whether these are worthy goals for the judiciary, but absolutist rhetoric's tension with each of them suggests, unsurprisingly, that the Court's commitment to each of these values is case-specific and contingent on other factors.

1. The Tension Between Judicial Supremacy and Popular Constitutionalism

The rhetoric of constitutional absolutism implies judicial supremacy. By insisting that a particular constitutional answer is manifestly correct, the Justices suggest that their interpretation is definitive and binding.[475] In this way, absolutist rhetoric seeks to shut down debate about certain constitutional topics. However, as noted above, absolutist rhetoric also engages the general public and thereby spurs popular constitutionalism, which can, in turn, help shape the Court's future views.[476] The Court's rhetorical absolutism thus may undermine the very judicial supremacy towards which it gestures.

Rhetorical absolutism ostensibly resists the role of non-judicial actors insofar as it insists on the correctness of the authoring Justice's views of constitutional law. It suggests, for example, that the executive implementing the laws must defer to judicial constitutional constructions. Rather than viewing judicial opinions as mere explanations that may predict future judicial behavior, absolutist

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474. *Cf.* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 12 (1996) (describing a method of deliberation that will encourage more participation in democracy).

475. *Cf.* Dickerson v. United States, 530 U.S. 428, 432 (2000) (indicating that constitutional decisions by the Supreme Court may not be overruled by acts of Congress).

476. *See* ABRAMOWITZ, *supra* note 260, at 18-19 (discussing the high level of political involvement by Americans even in a hyperpolarized political society).

opinions insist more vigorously, albeit implicitly, that judicial constitutional constructions are binding not just in the instant case but in future cases as well.[477] Under this view, the other branches need not bother to offer their own interpretations.[478]

Although absolutism reflects the Court's effort to retain its hegemony over constitutional meaning, it can also help trigger a popular reaction that may, in time, force the Court to reconsider.[479] Indeed, the Court that announces its opinions as an authoritative law-giver may be more likely to exacerbate social tensions, thereby threatening its long-term institutional reputation.[480] Even though the public theoretically can read any opinion, absolutist opinions carry on more direct conversations with the public and therefore are more likely to garner attention. Dean Post has observed that the membrane between constitutional law and culture is often "highly porous," so constitutional law is infused with constitutional beliefs and values of non-judicial actors.[481] In seeking to tighten its grip on constitutional meaning, the Court's constitutional absolutism may sometimes make this membrane even more porous.

Interestingly, the Court sometimes uses rhetorical absolutism to conceal this very phenomenon. For example, though *Heller* is couched as an originalist opinion,[482] it also can be understood as the triumph of the popular gun rights movement.[483] As Professor Reva Siegel has argued, *Heller* tracked the NRA's efforts to shape public understanding about the Second Amendment, demonstrating "how constitutional politics can guide and discipline judicial review."[484] Justice Scalia, of course, framed his discussion of the Second Amendment's original public meaning in absolutist terms, thereby signaling that he was guided solely by the text's meaning in 1791.[485]

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477. *See* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 75-76 (1993).

478. *See id.* at 75.

479. *Cf.* Berger, *supra* note 197, at 817 (explaining how the *Lawrence v. Texas* decision left some questions open to public discourse).

480. *See* Merrill, *supra* note 477, at 76; *cf.* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 193 (1992) (discussing the effect of *Dred Scott v. Sandford* on the American public).

481. Post, *supra* note 30, at 41.

482. *See supra* note 77.

483. *See* Siegel, *supra* note 214, at 192.

484. *Id.* at 243.

485. *See* District of Columbia v. Heller, 554 U.S. 570, 581 (2008); *supra* notes 80-89 and accompanying text.

However, as Professor Siegel contends, contemporary politics likely also shaped the Court's understanding of the relevant history and language.[486]

2. The Tension Between Absolutism and Minimalism

Absolutism may also sometimes conflict with the practice of judicial minimalism. As Professor Sunstein has explained, the Justices sometimes say no more than they must to resolve the instant dispute, because it is often easier to agree on an outcome than the underlying reasoning or future applications.[487] Thus, they often leave important issues undecided.[488] Relatedly, Justices often provide low- or mid-level justifications for their constitutional decisions, eschewing grand theories.[489] Minimalism, then, is a recurrent, though not constant, feature of the Court's jurisprudence.[490]

Absolutist rhetoric belies these more cautious judicial practices. On the one hand, many Justices recognize the value of moving incrementally, deciding no more than necessary in each case.[491] On the other hand, the Justices sometimes go out of their way to reject competing theories of law.[492] To be sure, the scope of a holding and the rhetorical tone announcing that decision are distinct concepts, but one might think that an incremental, Burkean Court might also resist aggressive pronouncements about constitutional meaning.[493] And yet the same Court that proceeds cautiously in many a case also often announces its holdings with great rhetorical force. Of

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486. Siegel, *supra* note 214, at 201.

487. Sunstein, *supra* note 356, at 15.

488. Colin Starger, *The Virtue of Obscurity*, 59 VILL. L. REV. TOLLE LEGE 17, 18 (2013), http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/10/Starger_Final.pdf [http://perma.cc/9AUZ-CEDJ] ("Sometimes respect for etiquette counsels that the Court should dance around a little before declaring: 'The Constitution does not allow this.'"); Sunstein, *supra* note 356, at 6 ("Frequently judges decide no more than they have to decide. They leave things open.").

489. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 101 (1996).

490. *See* Sunstein, *supra* note 356, at 14-16.

491. *Id.* at 15 ("Minimalists try to decide cases rather than to set down broad rules; they ask that decisions be narrow rather than wide. They decide the case at hand; they do not decide other cases too unless they are forced to do so.").

492. *Id.*

493. *Cf.* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) (defining Burkean minimalism as requiring constitutional principles to be established in an incremental manner and with reference to long-standing practice).

course, the explanation for these tensions likely lies in the particularities of the case and the Justices involved, but the very tensions suggest that minimalism, although important, competes against other values the Court likewise tries to uphold.[494]

3. The Tension Between Absolutism and Judicial Findings of Indeterminacy

Ironically, though the Justices often pretend that constitutional law is clearer than it is, they also sometimes highlight legal indeterminacy. In certain areas of law, the availability of a judicial remedy requires a finding that the law be "clearly established." The Court in such cases often refuses to grant relief on the grounds that pre-existing law was not sufficiently clear. In the qualified immunity context, for example, the Court has held that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known."[495] Though the Court has said that a case precisely on point is not necessary to create "clearly established law,"[496] it nevertheless sometimes emphasizes the indeterminacy arising from the absence of cases on point to dismiss cases on qualified immunity grounds.[497] A similar phenomenon exists in the context of the Antiterrorism and Effective Death Penalty Act of 1996, which likewise instructs that a federal court may overturn a state court's habeas denial only if it was contrary to "clearly established Federal law."[498]

Thus, in both the qualified immunity and habeas contexts, the Court frequently invokes the lack of legal clarity to deny judicial relief.[499] However otherwise justifiable, this practice once again

494. *See* Sunstein, *supra* note 356, at 15-17.

495. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

496. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002).

497. *See, e.g.*, Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2083 (2011) ("At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional."); Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam) (noting that none of the relevant precedent "squarely governs the case here").

498. *See* 28 U.S.C. § 2254(d)(1) (2012); Burt v. Titlow, 134 S. Ct. 10, 15 (2013).

499. *See, e.g.*, Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1157-58

demonstrates that the Court's absolutist rhetoric sits in tension with other judicial practices. Indeed, the litigant denied § 1983 or habeas relief on the grounds that the asserted legal violation was not clearly enough established may be astonished to learn how clear many Justices seem to find other cases.

4. The Paradoxical Overabundance and Dearth of Candor

Finally, rhetorical absolutism reveals a paradoxical overabundance and dearth of candor. Many critics believe "[a] judge's written opinions should fairly reflect her actual reasoning."[500] Transparency allows external evaluation of judicial opinions, which in turn may make judges more cautious, thereby helping to "rein[ ] in judicial discretion."[501] By contrast, "a lack of candor transforms the rule of law into the rule of men by allowing judges to reach their preferred results without confronting" contrary legal evidence.[502]

In some respects, absolutism reflects judicial candor. Justice Scalia's absolutism in *Heller* likely reflects his own self-certainty as much as it reflects a conscious rhetorical strategy.[503] On this account, Justice Scalia's opinion is just proclaiming the view of law that he genuinely believes.[504]

In another sense, however, this kind of opinion can reflect an absence of candor. However certain Justice Scalia may have been in *Heller* that he understood the evidence correctly, he was also well

(2005) (arguing that many qualified immunity cases search for "clearly established" statements of blackletter law though substantive constitutional tort cases proceed along a common law mode that "does not naturally generate the types of holdings likely to be considered 'clearly established' "); Stephen I. Vladeck, *AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 596 (2009) (noting "[m]ore than a dozen" cases in which "the Supreme Court has reversed an appellate court's decision granting post-conviction habeas relief to a state prisoner: not because it concluded that the state court had acted *correctly*, but because the state court's error was neither contrary to, nor an unreasonable application of, clearly established federal law.").

500. *See* FARBER & SHERRY, *supra* note 16, at 97; *see also* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987) ("[T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions.").

501. *See* FARBER & SHERRY, *supra* note 16, at 98.

502. *Id.*

503. *See id.* at 103 (noting that Justice Scalia's opinions often seem to be "candid expressions of his views").

504. *See* Kelley, *supra* note 413, at 1604 (arguing that Scalia has, throughout his career as a Justice, pursued "intellectual integrity, a consistent jurisprudence").

aware that the four-Justice dissent had at least some plausible arguments. In this sense, his absolutist rhetoric reflects a willful refusal to engage with the other side's argument fairly and seriously.[505] The same could be said of the absolutist opinions in *Rosenberger*, *Citizens United*, *Graham*, and *Shelby County*, as well as several of the dissents in those cases.[506]

Absolutist rhetoric, indeed, may help Justices mask the extent to which subjective values color their interpretations of equivocal evidence.[507] Given that the *Heller* vote broke down along predictable ideological lines, reasonable observers might think that the Justices' own values shaped their interpretations of the relevant evidence.[508] By pretending that the evidence commanded a particular constitutional result, absolutism helps Justices conceal these value choices—to their audience and perhaps also to themselves.[509] Although candid in one sense, absolutist rhetoric's tunnel-visioned view of the evidence is, in another sense, a sort of self-deception.

IV. THE MERITS OF APORETIC ENGAGEMENT

Though a plausible case can be made either way, absolutist rhetoric's costs likely outweigh its benefits, at least in most cases. To be sure, more equivocal language would not have been appropriate in *Brown* and *Loving*, but especially in a post-civil-rights era, few cases demand such unanimity and moral conviction. Indeed, unlike those cases, many constitutional cases today are difficult precisely because reasonable people can disagree on the constitutional and ethical principles.[510] Of course, some reasonable people questioned whether the desegregation cases in their day rested on neutral constitutional principles.[511] Nevertheless, the Justices

505. *See, e.g.*, Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) ("[T]he Court's reasoning is at critical points so defective—and in some respects so transparently nonoriginalist—that *Heller* should be seen as an embarrassment for those who joined the majority opinion.").

506. *See supra* Part I.B.

507. *See* Chemerinsky, *supra* note 194, at 2014.

508. *See supra* note 296-307 and accompanying text.

509. *See* Chemerinsky, *supra* note 194, at 2014.

510. *See id.* at 2010.

511. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959).

unanimously agreed in *Brown* and *Loving*, and those decisions are universally regarded as correct years later.[512] Few significant constitutional cases today command that kind of judicial unanimity, and it is hard to imagine the court of public opinion coming to any consensus about the cases examined in Part I of this Article within the next half century.[513]

Indeed, it is also important to remember that even though *Brown* did not admit doubt, it also did not say very much. Chief Justice Warren insisted that the opinion be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."[514] *Brown*, then, contained only some of the hallmarks of absolutist rhetoric. On the one hand, it admitted no doubt, deliberately steering away from serious engagement with counterarguments, contrary precedent, and potential objections to its own controversial social science claims.[515] In that sense, it was absolutist. On the other hand, the Court avoided strident language and, even after two opinions, was notoriously unclear about what it required.[516] From that perspective, *Brown* was a cautious political document designed "not to antagonize needlessly the editorial writers of the great Southern newspapers, who would have to translate the decision for their readers, and the politicians, who would presumably have to take the lead in advising compliance with the decision."[517] *Brown*'s tone, while unequivocal, still ought not be mistaken for full-blown absolutism.

In all events, *Brown* and *Loving* are hardly ordinary, and in less momentous cases, many of absolutist rhetoric's benefits usually can be achieved with more modest language. For one, even if the Court were to use more equivocal language, it could still issue clear, binding holdings. Even more importantly, it is doubtful that

512. *See* Doty, *supra* note 453, at 111.

513. I suspect gay rights cases like *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Lawrence v. Texas*, 539 U.S. 558 (2003), eventually will be widely recognized as correct in their outcomes, if not in all of their reasoning. That said, at the moment of decision, both garnered at least three dissents—four in the case of *Windsor*—and thus divided the Court far more than *Brown* or *Loving* did.

514. JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 58 (1992) (quoting Chief Justice Warren).

515. *See* Chemerinsky, *supra* note 194, at 2033-34.

516. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (requiring public schools to desegregate "with all deliberate speed").

517. Levinson, *supra* note 5, at 198.

absolutist rhetoric actually furthers the rule of law. Given the under-determinacy of constitutional text and the unpredictability of constitutional doctrine, the formalist's conceit that there exists a "correct" answer seems overstated in most constitutional cases that reach the Supreme Court. Whatever formalism's theoretical benefits, as a descriptive matter, constitutional law's evolution cannot be explained in formalist terms.[518]

And yet, despite constitutional doctrine's erratic twists and turns,[519] Americans take the Court's decisions seriously. They may condemn particular rulings, but twenty-first-century Americans rarely flout them.[520] Given doctrinal unpredictability, it is unlikely that parties, lower courts, and government officials abide by the Court's constitutional pronouncements because they believe the Court has somehow divined the objective constitutional truth. On the contrary, people follow these rulings because they accept the Court's role within our separation-of-powers system to say what the law is,[521] so long as its answers fall within a range of plausible outcomes.[522] Accordingly, absolutist rhetoric's presumption of objectivity is more likely to undermine, rather than foster, faith in an impartial judiciary.[523]

It may be hard to imagine the Justices rejecting the practice of rhetorical absolutism altogether, especially in light of the fact that it is difficult to mitigate, and virtually impossible to eliminate, the various institutional and psychological pressures contributing to the phenomenon.[524] That said, Justices could pay more attention to these issues, and the Presidents who appoint them could seek

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518. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 28-31 (2000) (rejecting formalism).

519. *See* ERIC J. SEGALL, SUPREME MYTHS, at xvi (2012).

520. *See, e.g.*, Richard E. Welch III, *"They Will Not Open Their Ears": Should We Listen to the Supreme Court and Should the Court Listen to Us*, 47 NEW ENG. L. REV. 93, 94 (2012) ("American society now unquestionably obeys most any Supreme Court ruling.").

521. *See* Dickerson v. United States, 530 U.S. 428, 435 (2000); Cooper v. Aaron, 358 U.S. 1, 17 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

522. *See* FARBER & SHERRY, *supra* note 16, at 49; STRAUSS, *supra* note 9, at 39.

523. *See* SEGALL, *supra* note 519, at xvi.

524. *Cf.* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System* 2-3 (Univ. Of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 422, 2013), *available at* http://perma.cc/YE3B-5EW8 (arguing that many public law theorists' optimistic, public-spirited solutions are unrealistic antidotes to their "pessimistic accounts of the ambitious, partisan or self-interested motives of relevant actors in the legal system").

judges whose professional records resist absolutism and admit more intellectual humility.[525] Indeed, while the phenomenon of absolutist rhetoric is pervasive, it should not be difficult for Justices to adjust their language modestly to acknowledge competing constitutional values and model a more conciliatory constitutional discourse. Justices also might think more carefully about *when* strong rhetoric is most appropriate. Absolutist language has a place for condemning dangerous or demonstrably incorrect ideas. However, like the boy who cried wolf, some Justices today use it so freely that it no longer carries much rhetorical force.

One alternative to absolutist rhetoric, as Professor Kahan argues, would be "the cultivation of judicial idioms of *aporia*."[526] "Aporia" refers to a mode of argumentative engagement that acknowledges complexity and competing evidence.[527] Aporetic engagement need not preclude a definitive resolution of a case, but rather treats as false a resolution that purports to be unproblematic.[528] Under this approach, Justices could admit the difficulty of a case or the legitimacy of the losing side's constitutional values without compromising the clarity of their holding. Indeed, constitutional litigation often presents "tragic choices," in that there are no unequivocally good or evil outcomes but instead competing stakeholders with colorable constitutional arguments.[529] By openly acknowledging the tragic nature of a case, the Court can show greater respect to the constitutional loser, thereby somewhat mitigating the cultural alienation of defeat.

Several modest steps could help the Justices improve their engagement with the losing side. First, the Justices could strive for greater humility in their opinions, conceding that the evidence is often equivocal.[530] Second, and relatedly, the Justices could more overtly recognize that their tragic choices will harm some group while articulating the portions of that group's constitutional vision

525. *See* FARBER & SHERRY, *supra* note 16, at 118.

526. Kahan, *supra* note 4, at 62.

527. *See id.* at 62-63.

528. *See id.* at 63.

529. *See* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17-23 (1978) (discussing "tragic choices" between deeply held conflicting values); *see also* CALHOUN, *supra* note 355, at 59; DEGIROLAMI, *supra* note 234, at 59-78 (discussing the clash of values of religious liberty).

530. *See* CALHOUN, *supra* note 355, at 71.

that remain legitimate or open for debate.[531] Third, the Court could abandon the convention of relying on the dissent to explain the losing side's interests and arguments.[532] Fourth, the Court could more candidly acknowledge the levels on which its determinations are debatable and the levels on which they are not.[533] Fifth, the Justices could do a better job treating each other as reasonable, intelligent people acting in good faith. Even when a Justice is certain he is correct, the fact that some of his colleagues see things differently should encourage him to consider whether the case may in fact be closer than he presumes.

In addition to moderating the tone of judicial opinions, aporetic engagement may also challenge Justices to reconsider the assumptions driving their own decision making. As noted above, when Justices vehemently disagree with each other in cases that seem close, it is often because they understand the law and facts entirely differently. These assumptions are often driven by a Justice's own personal experiences, ideological allegiances, and group identities.[534] Although it would be unrealistic to expect Justices to abandon their worldviews, they could more consciously engage with the different factors shaping their outlooks. As Professor Paul Secunda argues, "the practices of humility and writing opinions in an aporetic manner encourage judges to self-reflect on how culturally motivated cognition may color their view of legally consequential facts and, thereafter, avoid basing decisions on those biases."[535] Aporetic engagement, then, can help further important judicial qualities of "open-mindedness, intellectual humility, and group deliberation."[536]

Such a rhetorical shift would help mitigate some of absolutism's costs. It would likely produce opinions offering a more thorough account of constitutional decision making, candidly assessing the kinds of evidence that go into a constitutional judgment. Rather than dismissively rejecting certain lines of argument, such an approach would explain why certain arguments were more persuasive

531. *See* CALABRESI & BOBBITT, *supra* note 529, at 17-23; DEGIROLAMI, *supra* note 234, at 59-78.

532. *See* CALHOUN, *supra* note 355, at 70.

533. *See* Ferguson, *supra* note 226, at 219.

534. *See supra* Part II.C.1.

535. Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 389-90 (2012).

536. *See* FARBER & SHERRY, *supra* note 16, at 96 (discussing important judicial qualities).

in a particular context.[537] In this sense, Justices could more completely convey the extent to which constitutional decision making involves "wickedly complex problem[s], fraught with empirical uncertainty."[538]

A rhetorical shift along these lines might actually help improve the public's opinion of the judiciary. Recent psychological research indicates that people tend to object less to judicial decisions that acknowledge that each side has some persuasive arguments.[539] It similarly suggests that "aporetic reasoning substantially reduce[s] disagreement with the court's decision."[540] Research in this area is ongoing, but the studies so far suggest that, far from undermining the Court's legitimacy, a more candid acknowledgment of cases' inherent difficulties could, in fact, enhance it.[541]

Finally, this shift could, as Jürgen Habermas theorizes, help law "satisfy the precarious conditions of a social integration that ultimately takes place through the achievements of mutual understanding."[542] We typically think of the legislative process as helping "citizens *reach an understanding* about the rules for their living together."[543] But courts can play a role in that didactic process, too, particularly if they conceive of themselves not only as the arbiters of disputes but more generally as custodians of a rich, diverse constitutional heritage.[544] Of course, this process will not work perfectly in every case, but a rhetorical shift could help the Court use language better to encourage a societal "mutual understanding" without coercion.[545] As Judge Learned Hand once put it, "The spirit

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537. *See* Hill, *supra* note 402, at 1819.

538. Strauss, *supra* note 370, at 386.

539. *See* Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision-Making*, 8 J. EMPIRICAL LEGAL STUD. 709 (2011) (summarizing psychological research indicating that people tend to find judicial opinions more acceptable when they were accompanied by a "more equivocal and nuanced form of reasoning").

540. Robert R. Robinson, *It's How You Say It: Ameliorating Motivated Reactions to Judicial Rulings Using Aporetic Reasoning* 24-25 (Jul. 21, 2014) (unpublished manuscript), *available at* http://perma.cc/4EWM-TSK9.

541. *See id.* at 25.

542. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 83 (William Rehg trans., 2d ed. 1996).

543. *Id.* at 84.

544. *See* CALHOUN, *supra* note 355, at 99-101 (discussing Habermas's theory and judicial review).

545. *See* HABERMAS, *supra* note 542, at 103.

of liberty is the spirit which is not too sure that it is right"; rather than seeking to coerce fellow citizens, it "seeks to understand the minds of other men and women."[546]

CONCLUSION

Early in his Supreme Court tenure, Justice Blackmun circulated an equivocal opinion to his colleagues and received a rebuke from a senior colleague. Justice Blackmun's opinions sometimes had an unusual "on-the-one-hand, on-the-other-hand" kind of quality,[547] and Justice Black, for one, did not approve. "Always go for the jugular," Black instructed Blackmun.[548] "Never agonize in an opinion. Make it sound as though it's just as clear as crystal."[549] Justice Blackmun had honestly tried to weigh the competing arguments in the case, but Justice Black wanted the opposite.

One can understand why Justice Black advised his junior colleague not to voice his doubts. As the highest court in the land, the Supreme Court must inspire compliance by both private and public actors.[550] And there are instances, such as the desegregation cases, when confident opinions are appropriate.[551] But this rhetorical certainty is the norm in many constitutional cases, including some when the only obvious thing is that there is no obvious answer.[552]

None of this is to say that Justices should not articulate their constitutional views honestly and forcefully. It is natural that the Justices would do so with vigor, and it is often advantageous to do so in a democratic society.[553] But the rhetoric of constitutional absolutism has costs, and it is not clear that our adversarial legal system or spirited public discourse would suffer if the Justices sometimes acknowledged that opposing arguments are rooted in

546. *See* HAND, *supra* note 2, at 190.

547. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 213-16 (1979) (Blackmun, J., concurring) (acknowledging the strength of some of the dissent's arguments but explaining why he voted with the majority anyway); Sanford Levinson, *United States: Assessing* Heller, 7 INT'L J. CONST. L. 316, 327 (2009) (noting that Justice Blackmun, unlike most Justices, sometimes confessed in print how close he was to deciding a case the other way).

548. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 60 (2005).

549. *Id.*

550. *See supra* note 520 and accompanying text.

551. *See supra* notes 452-58 and accompanying text.

552. *See* Chemerinsky, *supra* note 194, at 2012.

553. *See supra* Part III.B.

real constitutional norms backed up by text, history, precedent, and the like.

Indeed, it is quite remarkable that most actors in our political system ignore the possibility of a more compromising constitutional discourse that does greater justice to the Constitution's complexity and contradictions. Legal realists and others have contended for generations that law is not discovered through the mechanical application of rules but rather reflects the judges' own belief system. Psychological and attitudinal political science research suggests that this insight may be correct, and polls measuring popular attitudes towards the judiciary further indicate that the general public has largely accepted this neo-realist view.[554] Nevertheless, both the Court and the public perpetuate the conceit that most cases have clear, objective constitutional answers just waiting to be found.

Of course, it would be difficult to change the culture of constitutional rhetoric, and any such change would not drastically alter the nation's destiny. But we invoke the Constitution so often that we seem no longer to hear how we actually discuss it. It is time we start listening.

554. *See supra* note 402-03 and accompanying text.