

## 15 ~ Be Careful With My Court

### Legitimacy, Public Opinion, and the Chief Justices

SHAWN C. FETTIG AND SARA C. BENESH

On June 28, 2012, the Supreme Court announced its decision in *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services et al.*, upholding the Affordable Care Act by a vote of 5-4. Chief Justice John Roberts read his majority opinion. Almost immediately, political scientists and pundits alike began dissecting the opinion and the reason for Chief Justice Roberts's vote. Public approval of the Court, as noted by the media, was at its lowest levels ever as the Court prepared to hear the case.<sup>1</sup> Many argued that the Court's legitimacy weighed heavily on Roberts as he considered the case, with CBS News reporting that Roberts, as chief justice, "is keenly aware of his leadership role on the court, and he also is sensitive to how the court is perceived by the public."<sup>2</sup> "To be sure," wrote *New York Times* reporter Adam Liptak, "the chief justice considers himself the custodian of the Supreme Court's prestige, authority, and legitimacy, and he is often its voice in major cases."<sup>3</sup> He reprised the role in *King v. Burwell*, the 6-3 decision announced almost exactly one year later upholding the subsidies associated with the health care exchanges.<sup>4</sup> There, Rosen argued, the chief used the case's reason to confer legitimacy. Judicial restraint, Rosen suggests, drove the chief's decision, for "In a polarized age, it is important for the Supreme Court to maintain its institutional legitimacy by deferring to the political branches."<sup>5</sup>

We know that the Court is influenced by public opinion and the Court's decisions are often in line with it.<sup>6</sup> We also know that judicial legitimacy is fairly widespread and relatively stable,<sup>7</sup> and that it is drawn from diffuse

support, a “reservoir of good will,”<sup>8</sup> that is resilient and resistant to significant fluctuation.

Perhaps chief justices believe, though, as Caldeira argues,<sup>9</sup> that a string of unpopular decisions could have a lasting, negative impact on the Court and its ability to render legitimate decisions. Perhaps that drove Chief Justice Roberts’s vote in *Sebelius*, coming as it did after a string of unpopular decisions, and perhaps he had it in mind a year later, in *Burwell*.<sup>10</sup> Chief Justice Charles Evans Hughes seems to have subscribed to this belief.<sup>11</sup> Legitimacy is, of course, uncommonly important to the Court,<sup>12</sup> which is seen as undemocratic and nearly wholly reliant on its legitimacy and on the actions of other government institutions for its power.<sup>13</sup>

The chief justice, while endowed with no significant power over any of the other justices, is the face of the Court, assigns majority opinions when he is in the majority, and “when the Court is divided . . . is in a favorable position to seek unity.”<sup>14</sup> Like other leaders, the chief is endowed with the opportunity to enhance and maintain the image of the Court, and some ability to affect change or direct outcomes.<sup>15</sup> Chiefs, like leaders more generally, vary in the extent to which they can effectively harness their administrative duties<sup>16</sup> and powers and channel them into influence over the Court’s image and its opinion. But many of them do, via task and social leadership.<sup>17</sup>

The scholarship on Court legitimacy and leadership more generally, combined with conventional wisdom, suggests, then, that the chief justice may be interested in the Court’s legitimacy and might take steps to ensure that the prestige of the Court is maximized and maintained. In this chapter, we explore the question of whether or not the chief justice, being the administrative head and the most recognizable justice of the Court, exhibits concern for the legitimacy of the Court and thus evidences some attention to the ways in which the Court’s legitimacy might be preserved (or threatened) via various Court actions. If legitimacy matters to the Court in general and the chief justice in particular, we might expect to find two areas of evidence. First, we would find that in their private correspondence with the chief, the justices of the Supreme Court notice and discuss issues related to the approval of the Court or its decisions. We examine the personal papers of several of the justices to see whether there is any evidence in personal correspondence among the justices for attention to concerns surrounding the Court’s legitimacy. We would also expect, were legitimacy a factor in his decision making, that the chief justice may sometimes vote or behave in ways seemingly at odds with his policy preferences, including in his writing, in his opinion assignments, or in his interactions with other

justices, especially in particularly salient issue areas and especially when Court approval is shaky. We examine key cases, as identified by their potential to damage the Court, in an effort to determine how chiefs may have behaved to maintain institutional legitimacy and prestige. We detail several instances where this idea potentially explains the chief justice's behavior.

### Working Toward Unanimity and Paying Heed to Public Opinion

The Supreme Court, as a whole, tends to respond to shifts in public opinion, such that its decisions reflect changes in it.<sup>18</sup> This sensitivity to public opinion is present even in the absence of any meaningful membership change on the bench. Indeed, historian Michael Klarman argues that “more constitutional law than is commonly supposed reflects this tendency to constitutionalize the consensus and suppress outliers.”<sup>19</sup> *Brown*, he says, was decided only when the Court had at least half of the country behind it.<sup>20</sup> Likewise, the Court did not push hard for full-scale compliance with that decision until the civil rights movement coalesced into strong support for such action. “The justices are too much products of their time and place to launch social revolutions.”<sup>21</sup> Indeed, Durr et al. find that support for the Court erodes when the Court deviates from aggregate public opinion on an issue, and the media's attention to cases in which the Court so deviates may help to explain the historical and recent decreases in Court favorability and confidence.<sup>22</sup>

Additionally, commentary suggests evidence for a concern about legitimacy demonstrated by heavy reliance on precedential case law to justify decisions that are salient to the public or that directly challenge the decision of another branch of government,<sup>23</sup> and an effort toward unanimous decisions when faced with outside threats.<sup>24</sup> Many suspect that part of the Court's legitimacy depends on the extent to which the public believes its decisions are made in accordance with the requirements of the law. Relying on precedent and speaking in legalistic language might enhance perceptions of the neutrality of the decision makers. We know from *Casey* that myth is a powerful force and that the Supreme Court benefits greatly from the myth of certainty in legal decision making.<sup>25</sup> Gibson and Caldeira rely on mythology to explain their positivity bias, noting that the couching of Supreme Court decisions in the symbols of the Court lend legitimacy to the Court's pronouncements.<sup>26</sup> Ulmer, as early as 1973, noted the connection among myth, symbols, and the Court's legitimacy.<sup>27</sup> Danelski speaks of myth when explaining why chief justices are particularly interested in

unanimous decisions.<sup>28</sup> And unanimous decisions seemingly fit into that mythological narrative.

An astute chief may therefore take steps to enhance the Court's image and prestige and may attempt to shape decisions that will be accepted by the public. One means by which he might do so is to attempt to influence his colleagues to suppress separate opinions and instead sign on to unanimous majority opinions, especially when the public may be watching.

Danelski considered each of the chiefs and the extent to which they aimed for and achieved unanimity in furtherance of "the law's myth of certainty" necessary for Court prestige and, ultimately, power.<sup>29</sup> He found some variation across chiefs as to this attribute, but much evidence for its operation. Chief Justice Taft believed that unanimous decisions have greater legitimacy than divided decisions; hence he sought to "mass" his Court, urging his colleagues to "acquiesce in silence," except in cases involving fundamental principles, rather than make public their dissents.<sup>30</sup> Chief Justice Hughes sought unanimity (in *Schechter Poultry Corp. v. United States*<sup>31</sup>) when he knew that the other two branches of government would not be pleased with the Court's decision.<sup>32</sup> Notes in the justice's papers—where the chief justice for instance invites specific Court members to dinners or sends a note of good will to a justice who is ailing or inquires about the well-being of the justice's children—demonstrate social leadership, which may be parlayed into unanimity and hence enhanced legitimacy.

In an interview with Jeffrey Rosen in 2007, Chief Justice John Roberts acknowledged the importance of consensus on the Court as a means of signaling to the public the credibility of its decisions. Roberts, a former clerk of Rehnquist, in a moment of candor also noted that his predecessor had not been as focused on unanimity, but nonetheless did adopt a special concern for legitimacy of the institution once he donned the chief's robes. While Rehnquist did not seek consensus as a means to this legitimacy, he did take care to ensure that he signed on to an opinion as the sixth justice, though rarely as the fifth. According to Roberts, Rehnquist compromised for the "good of the Court," at least when it would not affect the outcome.<sup>33</sup> Two of Chief Justice Earl Warren's biographers note that in presiding over the Supreme Court's landmark decision in *Brown* (1953), Warren was keenly aware of the impact that such a decision would have on the American public and thus painstakingly sought unanimity among the Court's justices to bolster the strength of the decision, as discussed at length below.<sup>34</sup>

Given the research in the field, the chiefs would be right that, at least to some degree, an attempt to gain unanimity in difficult-to-implement deci-

sions is worth the effort. Unanimous decisions over nonunanimous decisions, decisions that command at least a majority of the Court over those that are accompanied only by a plurality, and decisions accompanied only by supportive concurring opinions and not limiting or negative concurrences, are all treated better subsequently.<sup>35</sup> Considering Warren's famous pursuit of unanimity in *Brown* illustrates what it takes for the chief to gain this potentially important consensus.

### *Earl Warren*

Like Hughes before him, Earl Warren believed in the power of public opinion. It makes sense, then, that he would consider it in his actions as chief. Being a skillful politician for most of his career, Warren was familiar with responding to, but also shaping, public perception. Warren's vision of American democracy and what it could accomplish comported well with his impression of the power of public perception and support. In Warren's view, democracy was not threatened by the people, but rather bolstered by it.<sup>36</sup>

As chief, Warren was more insulated from the politics of public opinion, and yet Warren would carry with him the belief in the importance of public opinion over the force of government. "[Warren] knew the pulsebeat of the people and the practical problems of its leaders."<sup>37</sup> He was, therefore, the perfect candidate to join the then-dysfunctional Supreme Court, and President Eisenhower liked his high ideals and common sense.<sup>38</sup> And so he appointed Warren to the seat while Congress was not in session. While at least Frankfurter was unhappy with Eisenhower's choice of a "mere politician," the public approved.<sup>39</sup> "He was a doer. He was an optimist. He was in the American grain. And he looked and sounded the way a chief justice should."<sup>40</sup>

The Court he was joining, however, was "the most severely fractured Supreme Court in history."<sup>41</sup> The Court had heard arguments in *Brown* in the previous term and all indications are that the Court was badly split over it. Justice Frankfurter secured a delay in asking for reargument during the next term in an attempt to achieve unanimity. Over the summer, Chief Justice Fred Vinson suddenly died, opening the vacancy eventually filled by Warren.<sup>42</sup> He took his seat in October of 1953, just before the reargument of *Brown*.

Warren quickly won over his brethren with his hard work, friendliness, and unpretentious manner. After reargument of the case, the new chief justice took a solid but careful stand steeped in morality that at once allayed worries of the other justices and inspired them to come his way. He argued

that segregation could only be justified if one endorsed the inferiority of the African American race. “[His words] went straight to the human tissue at the core of the controversy.”<sup>43</sup>

Warren wanted unanimity with no separate opinions, but could tell at that first conference that he would not get it. He decided, therefore, not to take the customary first vote. Warren, discussing the case later, said, “We decided not to make up our minds on that first conference day, but to talk it over, from week to week, dealing with different aspects of it—in groups, over lunches, in conference. It was too important to hurry it.”<sup>44</sup> The Court’s former clerks in looking back on it highlight that decision not to take an early vote as both unusual and likely very important.<sup>45</sup> These clerks recalled the guarded secrecy of the Court around the decisions and the chief’s frequent discussion over lunch or during walks around the building with the other justices. At the end, Warren posed a clear question to the Court’s final holdout, Justice Reed, with whom Warren had had at least twenty lunches between December and May: “Stan, you’re all by yourself in this now. You’ve got to decide whether it’s really the best thing for the country.”<sup>46</sup> A lone dissent from Reed, a southerner, could have been catastrophic.

Indeed, unanimity was discussed frequently in the Court’s internal correspondence, and the concern the justices harbored over the decision’s implementation came through frequently as well, especially, of course, in consideration of the implementation decree (*Brown II*). All on the Court were paying close attention to likely public perceptions of the Court and the extent to which the opinions of the Court would be well-received. While arguments can be made about the extent to which Warren can claim credit for the Court’s decision in *Brown*, he did not inherit a unanimous Court,<sup>47</sup> and his compatriots gave him the credit. Justice Frankfurter, arguably the most serious competition for the designation of the justice most essential to achieving unanimity, wrote to the Chief to join his opinion in *Brown*, saying,

When—I no longer say “if”—you bring this cargo of unanimity safely to port it will be a memorable day no less in the history of the Nation than in that of the Court. You have, if I may say so, been wisely at the helm throughout this year’s journey of this litigation.

Finis coronat omnia.<sup>48</sup>

And when the decision came down, Frankfurter wrote to Chief Justice Warren again:

This is a day that will live in glory. It's also a great day in the history of the court, and not in the least for the course of deliberation which brought about the result. I congratulate you.<sup>49</sup>

Justice Harold A. Burton and Justice Douglas also wrote to the Chief Justice Warren on May 17, 1954, the day *Brown* was announced, as follows:

Burton:

Today I believe has been a great day for America and the Court. Your opinions in the segregation cases were highly appropriate and were delivered in an appropriate spirit. I suspect these will be the most significant decisions made during my service on the Court. I cherish the privilege of sharing in this.

To you goes the credit for the character of the opinions which produced the all-important unanimity. Congratulations.

Douglas:

I do not think I would change a single word in the memoranda you gave me this morning. The two draft opinions meet my idea exactly. You have done a beautiful job. [Illegible]<sup>50</sup>

Justice Douglas, in extensive interviews with scholar Walter F. Murphy years later, attributed *Brown's* unanimity to Chief Justice Warren. He noted the astuteness of the chief in starting the discussion of the case informally and without a solid vote. Douglas said, "the wisdom of the Chief Justice in not calling for a vote was to avoid views crystallizing too fast and too hard, trying to avoid the drawing of lines, people taking dogmatic positions. It was, I think, real statesmanship on his part."<sup>51</sup> He went on to discuss the "kind of a person that Earl Warren is and was at that time" to explain why the holdouts in *Brown* went along with him. "I think in other words it was the position of Earl Warren, as a very successful politician, governor, public servant before he had come to the Court, standing for this thing, standing for overruling *Plessy v. Ferguson*, rather than any intellectual arguments." The former clerks agree, giving credit to Warren and his political acumen,<sup>52</sup> as do scholars of the decision. Kluger likens the care taken in both the decision in *Brown* and the decree in *Brown II* to a "dexterous use of power available to him and of the circumstances in which to exploit it that had established John Marshall as a judicial statesman and political tactician

of the most formidable sort.”<sup>53</sup> Ulmer posits it as an example of the “possible value of having former political leaders on the Court.”<sup>54</sup> Ulmer goes on: “Given the uncertainties with which some of the other justices were plagued at this time, strong leadership on the question was undoubtedly a key factor in the ultimate solution.”<sup>55</sup> Warren, himself, would later tell of his own feelings about the decision:

The Court was thoroughly conscious of the importance of the decision to be arrived at and the impact it would have on the nation. With this went the realization of the necessity for secrecy in our deliberations and for achieving unity, if possible.<sup>56</sup>

Not many expected the Court to decide the case unanimously, however, and the announcement of the opinion brought barely stifled gasps of surprise from the gallery.<sup>57</sup> The tale the former clerks tell of the announcement of the opinion is worth recounting. The clerks reveal that Justice Reed was working on a draft dissent and Justice Jackson a draft concurrence, but the chief’s opinion ended up, happily, being something with which both could agree. They speak, like Ulmer, of the “great intake of breath” that followed the chief justice’s note that the Court decided “unanimously” (which was not in the written copy from which he was reading)<sup>58</sup> and of then-advocate Thurgood Marshall’s focus on Justice Reed, whom he had heard was drafting a dissent. “He [Thurgood Marshall] came there, said he sat there and watched Justice Reed because he heard this rumor that Justice Reed was writing a dissent. So he wanted to look him in the eye as it came down. And as it came down, he nodded to Justice Reed and Reed nodded back and gave him a big smile and he realized that he had joined it.”<sup>59</sup> Reed’s clerk later recalled a tear on Justice Reed’s cheek during the announcement.<sup>60</sup>

Even after the decision, the justices watched for reaction. Consider, for example, Justice Brennan’s circulation to Chief Justice Warren of the full text of a speech given by Erwin Griswold, then dean of Harvard Law School, to the California Bar Association. The speech was to answer critics of the Court’s desegregation decisions, to defend the Court, but also to provide some thoughts about the Court’s workload and propensity to make constitutional pronouncements. That Justice Brennan cared enough about the speech to pass it along to the chief justice suggests some interest of the Court in the outside perceptions of its institution.

A number of newspaper clippings made their way into the chief justice’s files as well, most of them referred to him by one of the associate justices. Justice Douglas shared an article from a publication called *Peace*

*News*, highlighting an exchange between “a Southerner” and “Mr. Gomillion” in which the former expressed bitterness over the Court’s segregation decisions (saying, “And as far as the Supreme Court is concerned, they can go to hell!”) and the latter (seeming to be some sort of advice columnist) soothed him, saying, “I hope the Supreme Court will not take your suggestion to ‘go to hell.’ To ‘go to hell’ would be cowardly. There is too much work yet to be done in America.”<sup>61</sup>

Overall, the chief was ever cognizant of the impact of the case and of its importance. His clerk recalls a draft he was given and the chief’s direction to expand it into an opinion, but to keep it short and readable and nonlegalistic. “He wanted it to be something that could be understood by the layman, and he said, ‘Something that even could be published on the front page of a newspaper.’”<sup>62</sup> He kept to his firm belief that the opinion be about education and nothing else, even though he knew it would spill over into society more generally, which was categorized by the clerks as eminently good politics.

Earl Warren may well be the poster child for considerations of public reaction to decisions as he navigated the choppy waters of racial segregation to come out with a short, unanimous decision in *Brown*. While arguments abound as to the extent to which *Brown* might be credited for desegregation of schools and other public places,<sup>63</sup> no one doubts the story of a chief justice determined to obtain a unanimous decision in order to avoid outright defiance from certain sections of the country, writing that opinion in easy language, and keeping it brief enough to be printed in the daily newspaper for all to read and understand.<sup>64</sup> Undoubtedly, all these were intrinsic to the decision’s acceptance.

As mentioned above, some social science research demonstrates the disproportionate strength a unanimous decision has on the law and on the public. Our hypothesis, then, is that the chief justice will attempt to obtain unanimity whenever implementation might be difficult, again assuming that under those circumstances, the concern with the Court’s power will be at its highest. One could test this notion more systematically than we have by identifying cases beyond *Brown* in which implementation might be seen as challenging and those in which implementation will likely be easier (perhaps drawing on Hall’s intuition that those rulings able to be implemented directly by the lower courts are more likely to be fully implemented than those that take some outside actor to carry out<sup>65</sup>) and test whether the former are statistically significantly more likely to be unanimous than the latter. One might also draw on Danelski’s task and social leadership conceptualization<sup>66</sup> to ascertain whether unanimity

is more prevalent in chief justiceships characterized as stronger leaders than in others. Finally, one could approach the papers, coding all papers from all justices in all cases for discussions over unanimity to ascertain whether raising the need to decide the case unanimously has systematic characteristics, such as whether unanimity is more often discussed in important versus more routine cases, for example, or in cases able to be implemented judicially versus those that are not. What we have done was to tell a few stories where, for reasons of public reaction and implementation, the Court, pressed by the chief, took pains to decide cases unanimously. Whether chiefs do so systematically or whether chiefs vary systematically in the extent to which they pay attention to coalition size remains open to debate.

### Strategic Consideration of Other Branches

Unanimity is not the only way for the Court to enhance its standing, though. The other branches have some impact on Court legitimacy as well. Several cases suggest a concern by the chief for other institutional actions, most notably when conflicts among the branches arise.

#### *John Marshall*

Chief Justice John Marshall is rightly famous for being the chief justice that created the conditions necessary for the Supreme Court to become a major force in American politics. His decision in *Marbury v. Madison*, which confirmed the power of the Supreme Court to nullify acts of Congress and the president that contravene the constitution, is considered to be the ultimate strategic play. His Court had little power, and he worried that a decision compelling the president to act would be ignored. He decided, therefore, not merely to back down to the administration, but rather to seemingly do so while grabbing much-needed power for his Court. Segal and Spaeth discuss the case, demonstrating the myriad ways in which the chief really reached to be able to hear the case.<sup>67</sup> Epstein and Knight agree that the decision was impressive. After all, “Marshall avoided a potentially devastating clash with President Thomas Jefferson . . . and sent a clear signal to the new president that the Court has a major role to play in American government.”<sup>68</sup> Clearly Marshall understood the consequences of his actions and consciously avoided further angering the current administration. His care paid off as the Court gained more esteem under his tenure than it had before or since.

*Charles Evan Hughes*<sup>69</sup>

From the time Chief Justice Hughes came to the Court, he was a staunch civil libertarian, but until the spring of 1936, he was essentially an economic conservative who usually voted with the Court's conservatives. Then, in May 1936, while the Court was under attack for being too conservative, he changed his views and worked hard to gain the additional vote needed to change the Court's course, presumably in an effort to allay criticism of the Court's obstructionist rulings and end its standoff with President Roosevelt. Hughes targeted Owen Roberts because Roberts was considered the other swing vote on the Court and, of all the other justices, the one most likely to support the liberals.<sup>70</sup> According to a source who claimed to speak from "positive knowledge," Hughes discussed with Owen Roberts the desirability of his "taking a more liberal attitude toward legislation designed to ameliorate the social and economic ills of the country, so as to overcome the conservative bloc and relieve the Court of the pressure of increasing outside criticism."<sup>71</sup> This conversation probably occurred in the summer of 1936 when Hughes and his wife visited the Roberts's Pennsylvania farm.<sup>72</sup>

Owen Roberts eventually obliged, voting with the liberals in *Parrish* to uphold New York's minimum wage statute, the famous "switch in time that saved nine." The chief had garnered a liberal majority to avoid a further face-off with FDR and potential harm to the Court's legitimacy. Indeed, the switch seems more likely to have come from the chief's pressure than from FDR's plan, given that FDR did not announce his court-packing plan until early February, and the discussion between the chief and Roberts took place in December.

Scholars interested in empirically testing this concern with the Court's relationships with other branches have focused on congressional overrides and congressional introductions of measures to curb the Court as well as on judicial review.<sup>73</sup> But what we see in these two examples is the possibility that there is much concern behind the scenes over the Court's legitimacy. We also see that to test a hypothesis about the lengths various chief justices would go to ameliorate concerns about the Court would require a systematic analysis of the papers of the justices (and interviews of justices and contemporaries) to ascertain how much the chief was motivated by a concern with the other branches of government.

### Care with Opinion Assignments

Chiefs may also use the opinion-assignment prerogative in ways that look toward the legitimacy of the Court, something Danelski discussed in his

early work.<sup>74</sup> An example is Chief Justice Stone's assignment in *Smith v. Allwright*,<sup>75</sup> the case that declared that the Democratic Party of Texas acted as a state agency in administering primary elections and hence could not, consistent with the Fourteenth and Fifteenth Amendments, deny the right to vote in the primary election on the sole basis of race. Texas had fought for the right of the Democratic Party to discriminate. Obviously, it would not take kindly to the Court's new decision.

Originally, Stone had assigned the case to Justice Frankfurter, but Justice Jackson questioned the wisdom of Stone's choice. In a letter to Stone, Jackson explained that the assignment "overlooked some of the ugly factors in our nation's life."<sup>76</sup> Since *Smith* negated the "white primary," an opinion by Frankfurter, a Jewish northerner not seen as a friend to the Democratic Party, would exacerbate the sting. Jackson suggested that the decision in *Smith* would be less likely to foment opposition to the Court if it were written by a southern Democrat. Responding to Jackson's concern, Stone reassigned the case to Justice Reed, a Democrat from Kentucky.<sup>77</sup> While an associate justice raised the concern over the likely public reaction to a decision authored by a particular justice, the chief justice, considering potential fall-out, acceded to it.

Edwin McElwain, a former Hughes law clerk, noted that Chief Justice Hughes would often "assign 'liberal' opinions to 'conservative' judges, and vice versa," apparently to enhance public acceptance of the Court's decisions,<sup>78</sup> and Pusey, who interviewed Hughes, concurred.<sup>79</sup> This is reminiscent of psychological research that suggests that people will more often take advice if it is offered by a source acting against that source's bias.<sup>80</sup>

The much more recent *Citizens United*<sup>81</sup> case is arguably another example of strategic assignment aimed at public opinion. According to Toobin, Chief Justice Roberts first moved for reargument in the case in an attempt to avoid a particularly damaging dissent by Justice Souter, and then assigned the opinion to Kennedy rather than writing it himself. Roberts, the thinking goes, could not write this opinion given how strongly he had argued in his confirmation hearings for an umpire-like role for the justices.<sup>82</sup> Indeed, Justice Stevens, in his longest dissent ever, quoted the chief justice's axiom as a lower court judge: "If it is not necessary to decide more, it is necessary not to decide more."<sup>83</sup>

Chief justices do often assign themselves the Court's opinions in the big cases, as Chief Justice Roberts did in *Sebelius*,<sup>84</sup> for two reasons. First, his colleagues expect him to do so. John Hessin Clarke wrote after he left the Court, "The great cases are written, as they should be, by the chief justice."<sup>85</sup> Second, as Frankfurter wrote, an opinion by the chief justice has "extra weight" with the public because "of the importance of the chief

justiceship as a symbol.”<sup>86</sup> While Chief Justice Warren demurred, “Well, gee, the chief justice doesn’t write all of the important decisions,”<sup>87</sup> he did self-assign in *Brown v. Board of Education*, *Miranda v. Arizona*, and *Reynolds v. Sims*. We examine Chief Justices Burger, Rehnquist, and Roberts to illustrate the self-assignment function. This question of self-assignment in important cases has been subjected to empirical analysis, often finding support for the hypothesis that the chief will keep the big cases. Our argument is that the reason for these findings is a concern over legitimacy (avoiding negative public opinion), which is a little harder to directly test.<sup>88</sup>

### *Warren Burger*

Chief Justice Warren Burger, while much maligned as chief justice, arguably considered the Court’s prestige in his self-assignment in *Miller v. California*, garnering a majority of the Court behind a definition of obscenity for the first time in many years. The Court had taken to “Redrupping”<sup>89</sup> obscenity cases—deciding them summarily based on the justices’ viewing of the material at issue and their own idiosyncratic standards—and had failed for many years to provide any sort of guidance to the lower courts, let alone to pornographers about whether or not their conduct was constitutionally protected free speech. Burger assigned himself the task of crafting a regulation that would end the Court’s involvement in this area, an end nearly everyone on the Court wished to see, though the liberals sought that end via complete First Amendment protection while the conservatives sought that end via complete deference to local communities.<sup>90</sup> Burger chose the latter course, removing the Court from the obscenity business, which surely was negatively affecting the Court’s prestige and credibility.

### *William Rehnquist*

Chief Justice William Rehnquist surprised many in the Court’s community when he authored the Court’s decision in *Dickerson v. U.S.*,<sup>91</sup> affirming the constitutional bases for the Court’s decision in *Miranda*, with which Rehnquist clearly disagreed. Many wondered what had driven him to vote this way and to write this opinion, and many of the conjectures are consistent with our story. Bradley and Dery argue that the chief made a decision in opposition to congressional usurpation of Court power, thereby protecting his Court from override by Congress.<sup>92</sup> Greenhouse and Reid noted that to overrule *Miranda* would be to endure negative public opinion given how deeply entrenched the decision was in the fabric

of society.<sup>93</sup> While there is not a unanimous view regarding Rehnquist's motivations in *Dickerson*,<sup>94</sup> the chief justice was potentially using strategic self-assignment to protect his Court, even though the result went against his policy preferences.

### *John Roberts*

Finally, there is reason to believe that Chief Justice Roberts saw the health care cases as a potential turning point for the Court. The timing was precipitous. Since 2000, the Court had issued decisions in a number of cases that received negative scrutiny from both the media and the public. In *Bush v. Gore*,<sup>95</sup> the Court essentially ended the presidential election that had captivated the public and presented the possibility of a constitutional crisis. A *Newsweek* poll conducted in 2001 found that 65 percent of the population believed that politics and partisanship had contributed to the the Court's opinion.<sup>96</sup> Likewise, when the Supreme Court decided *Lawrence v. Texas*,<sup>97</sup> invalidating state sodomy laws and making same-sex activity legally protected, public opinion was mobilized against the Court.<sup>98</sup> In early 2010, the Court issued its ruling in *Citizens United v. Federal Election Commission*,<sup>99</sup> finding that the First Amendment protects independent political expenditures on the part of corporations and unions. A poll conducted by the *Washington Post* immediately following the Court's ruling showed that 80 percent of respondents opposed the Court's decision.

Taken together, these cases—which were decided in a relatively short period of time, were salient, and were in opposition to majority public opinion—may have contributed to a long-term loss of support for the Court. Indeed, Gallup polling shows that at the beginning of 2000, the Court enjoyed 80 percent trust and confidence from the public, but that trust had declined to 63 percent by 2012.<sup>100</sup> Likewise, Pew polling shows that the Court had a 68 percent public favorability rating in 2000, but by 2012 it was 52 percent.<sup>101</sup> In fact, a New York Times/CBS News poll conducted in June of 2012<sup>102</sup> showed that the Court's approval rating was at a historic low, with just 44 percent of respondents approving of the job the Supreme Court was doing.

Roberts appears to be aware of the Court's image as well as of the things the Court does that influence public opinion. When asked about the importance of unanimity of Court decisions in 2007, Roberts told interviewer Jeffrey Rosen that “If the Court in Marshall's era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have. That suggests

that what the Court's been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up. I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn't it is going to lose its credibility and legitimacy as an institution."<sup>103</sup> While he did not achieve a unanimous decision in the health care cases, he did avoid overturning a major piece of legislation that was fairly popular with the public at a point where doing so may have had a detrimental impact on his Court. The media surely thought his motivation was the Court's legitimacy. CBS News suggested that a contrary decision would have cast the Court in a negative light.<sup>104</sup> Toobin noted that the implications of striking the Affordable Care Act in total "weighed on Roberts" and that Roberts had to sacrifice one of his dual goals (his ideological agenda) to meet his other, which was "to preserve the Court's place as a respected final arbiter of the nation's disputes."<sup>105</sup>

## Conclusions

The Chief Justice of the United States, despite being "first among equals," is clearly a leader on the Supreme Court. He is the administrative head of the Court and the most recognizable of the justices. Since the Court relies heavily on public opinion for its legitimacy and strength, it makes sense that the justices might be concerned about its image. There are a number of ways the Court can enhance its prestige, and the chief justice is in a unique position to affect outcomes. The chief can rely on formal duties, such as opinion assignment, to influence decisions and opinions. He can also rely on personality characteristics, such as charisma, to influence how justices vote or whether or not they choose to issue a concurrence or dissent. Effective chiefs, being aware of the Court's legitimacy, have been able to manage both the formal and informal aspects of the position to maintain the Court's influence and bolster public opinion for its decisions. It is perhaps to their credit that the Court has generally been among the governmental institutions most trusted by the American people.

## NOTES

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1. See, e.g., Pew Research Center, "Supreme Court Favorability Reaches New Low," May 1, 2012, available online at <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low/>.
2. CBS News Online, 7/1/2012, <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/>.
3. Adam Liptak, "Roberts Shows Deft Hand as Swing Vote on Health Case," *New York Times*, June 29, 2012.
4. 576 U.S. \_\_\_, 2015, announced June 25, 2015. The chief authored the majority opinion.
5. Jeffrey Rosen, "John Roberts, the Umpire in Chief," *New York Times*, June 27, 2015.
6. Jonathan D. Casper, "The Supreme Court and National Policymaking," *American Political Science Review* 70 (1976); Thomas R. Marshall, *Public Opinion and the Supreme Court* (Boston: Unwin Hyman, 1989); William Mishler and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *American Political Science Review* 87 (1993).
7. James L. Gibson, Gregory A. Caldeira, and Vanessa A. Baird, "On the Legitimacy of National High Courts," *American Political Science Review* 92 (1998).
8. David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965).
9. Gregory A. Caldeira, "Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court," *American Political Science Review* 80 (1986).
10. These arguably include *Bush v. Gore*, *Lawrence v. Texas*, and *Citizens United v. FEC*.
11. Charles Evan Hughes, *The Supreme Court of the United States: Its Foundations, Methods, and Achievements: An Interpretation* (New York: Columbia University Press, 1928), 52–54. The chief describes several cases as "self-inflicted wounds," including *Dred Scott* in 1857; *Knox v. Lee* in 1871; and *Pollock v. Farmers' Loan & Trust Co.* in 1895.
12. Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962); Mishler and Sheehan, "The Supreme Court"; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *New York University Law Review* 73 (1998); Ilya Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory," *Iowa Law Review* 89 (2003).
13. A vast literature considers the legitimacy of the Court and its derivatives. The relationship between specific and diffuse support is the subject of a current debate there. The role of public opinion in decision making is similarly well-studied. See, e.g., Gerald Rosenberg, *Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed. (Chicago: University of Chicago Press, 2008); David Easton, "A Re-Assessment of the Concept of Political Support," *British Journal of Political Science* 5 (1975); James L. Gibson, and Gregory A. Caldeira, "Blacks and the United States Supreme Court: Models of Diffuse Support," *Journal of Politics* 54, no. 4 (1992): 1120–45; Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science* 36 (1992); Brandon L. Bartels and Christopher D. Johnston, "On the Ideological Foundations of Supreme Court Legitimacy in the American Public," *American Journal of Political Science* 57

(2013); James L. Gibson, "Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance," *Law and Society Review* 23 (1989); Jeffrey J. Mondak, "Institutional Legitimacy, Policy Legitimacy, and the Supreme Court," *American Politics Research* 20 (1992); John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes toward American Political Institutions* (Cambridge: Cambridge University Press, 1995).

14. David J. Danelski, "The Influence of the Chief Justice in the Decisional Process," in *Court, Judges, and Politics*, ed. Walter F. Murphy and C. Herman Pritchett (New York: Random House, 1961).

15. See, e.g., Gary Yukl, "An Evaluation of Conceptual Weaknesses in Transformational and Charismatic Leadership Theories," *Leadership Quarterly* 10 (1999); J. G. Hunt, *Leadership: A New Synthesis* (Newbury Park, CA: Sage, 1991); Gary Yukl, *Leadership in Organizations*, 4th ed. (Englewood Cliffs, NJ: Prentice Hall, 1998).

16. These include constructing the calendar, managing Court staff, appointing judges to special tribunals and committees, preparing and delivering the annual Year-End Report on the Federal Judiciary, and, perhaps most importantly, assigning opinions. See Danelski, "Influence of the Chief Justice"; David J. Danelski, *A Supreme Court Justice Is Appointed* (New York: Random House, 1964); Paul J. Wahlbeck, "Strategy and Constraints on Supreme Court Opinion Assignment," *University of Pennsylvania Law Review* 154 (2006); Theodore Ruger, "The Chief Justice and the Institutional Judiciary," *University of Pennsylvania Law Review* 154 (2006); R. M. Stogdill, "Personal Factors Associated with Leadership: A Survey of the Literature," *Journal of Psychology* 25 (1948); R. M. Stogdill, *Handbook of Leadership* (New York: Free Press, 1974); F. L. Strodbeck and R. D. Mann, "Sex Role Differentiation in Jury Deliberations," *Sociometry* 19 (1956); S. Kirkpatrick and E. Locke, "Leadership: Do Traits Matter?" *Academy of Management Executive* 5 (1991); P. Hersey and K. H. Blanchard, "Life Cycle Theory of Leadership." *Training & Development Journal* 23 (1969).

17. Danelski, "Influence of the Chief Justice"; James Thompson and Hal G. Rainey, *Modernizing Human Resource Management in the Federal Government: The IRS Model* (Washington, DC: IBM Center for the Business of Government, 2003).

18. Mishler and Sheehan, "The Supreme Court."

19. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 453.

20. *Ibid.*, 451. In fact, argues Klarman, the Court may have represented public opinion better than the elected branches in this regard.

21. *Ibid.* See also Keith Whittington, "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *American Political Science Review* 99 (2005).

22. Robert H. Durr, Andrew D. Martin, and Christina Wolbrecht, "Ideological Divergence and Public Support for the Supreme Court," *American Journal of Political Science* 44 (2000).

23. Jeremy D. Horowitz, "Legitimacy, Ideology, and the Use of Precedent on the U.S. Supreme Court" (unpublished manuscript, 2012). James H. Fowler and Sangick Jeon, "The Authority of Supreme Court Precedent," *Social Networks* 30 (2008). Indeed, Fowler and Jeon make the case that *stare decisis* itself is a norm that has evolved in order to buttress the Court's legitimacy and thereby its power.

24. Stephen Wasby, Anthony A. D'Amato, and Rosemary Metrailer, *Desegregation from Brown to Alexander: An Exploration of Supreme Court Strategies* (Carbondale: Southern Illinois University Press, 1977). In making this claim, they cite David W. Rohde, "Policy Goals and Opinion Coalitions in the Supreme Court," *Midwest Journal of Political Science* 16 (1972).

25. Gregory A. Casey, "The Supreme Court and Myth: An Empirical Investigation," *Law & Society Review* 8 (1974).

26. James L. Gibson and Gregory A. Caldeira, *Citizens, Courts and Confirmations: Positivity Theory and the Judgments of the American People* (Princeton: Princeton University Press, 2009).

27. S. Sidney Ulmer, "Bricolage and Assorted Thoughts on Working in the Papers of Supreme Court Justices," *Journal of Politics* 35 (1973): 286–310.

28. Danelski, "Influence of the Chief Justice."

29. *Ibid.*, 15.

30. *Ibid.*

31. 295 U.S. 495 (1935).

32. This example also fits in the next section, which considers chief justice attempts to stave off threats by the other branches.

33. Jeffrey Rosen, "Roberts's Rules," *Atlantic Monthly* 499 (2007), <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>, accessed July 3, 2013.

34. Leo Katcher, *Earl Warren: A Political Biography* (New York: McGraw-Hill, 1967); and John D. Weaver, *Warren: The Man, the Court, the Era* (Boston: Little, Brown, 1967).

35. John F. Davis and William L. Reynolds, "Juridical Cripples: Plurality Opinion in the Supreme Court," *Duke Law Journal* 1 (1974): 59–86; Pamela C. Corley, *Concurring Opinion Writing on the United States Supreme Court* (Albany: State University of New York Press, 2010); Thomas G. Hansford and James F. Spriggs, II, *The Politics of Precedent on the U.S. Supreme Court* (Princeton: Princeton University Press, 2008); Stuart Minor Benjamin and Bruce A. Desmarais, "Standing the Test of Time: The Breadth of Majority Coalitions and the Fate of U.S. Supreme Court Precedents," *Journal of Legal Analysis* 4 (2012); Sara C. Benesh and A. Malia Reddick, "Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent," *Journal of Politics* 64 (2002); Bradley C. Canon and Charles A. Johnson, *Judicial Policies: Implementation and Impact*, 2nd ed. (Washington, DC: CQ Press, 1999); but see Jerome Frank, *Law and the Modern Mind* (New York: Bartanoto's, 1930).

36. Henry M. Christman, ed., *The Public Papers of Chief Justice Earl Warren* (New York: Simon & Schuster, 1959).

37. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage, 2004), 663.

38. *Ibid.*

39. *Ibid.*, 664.

40. *Ibid.*

41. Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* (New York: New York University Press, 1983), 73; See also Kluger, *Simple Justice*, 584.

42. Vinson was considered a sure vote for segregation. Upon his death, Frankfurter remarked, "This is the first indication I have ever had that there is a God." Cited in Kluger, *Simple Justice*, 656.
43. *Ibid.*, 680.
44. *Ibid.*, 683.
45. John David Fasset et al., "Supreme Court Law Clerks' Recollections of *Brown v. Board of Education*," *St. John's Law Review* 78 (2004).
46. *Ibid.*, 698. Reed's clerk, George Mickum, is the source for this quote. He recalls Warren as being low-key and empathetic but firm on the need for unanimity.
47. S. Sidney Ulmer, "Earl Warren and the Brown Decision," *Journal of Politics* 33 (1971): 702.
48. Library of Congress, Papers of Chief Justice Earl Warren.
49. *Ibid.*
50. *Ibid.*
51. Transcripts of conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 13, December 17, 1962. Available online at [http://www.princeton.edu/~mudd/finding\\_aids/douglas/](http://www.princeton.edu/~mudd/finding_aids/douglas/), accessed June 2, 2013.
52. Fasset et al., "Supreme Court Law Clerks."
53. Kluger, *Simple Justice*, 707.
54. Ulmer, "Earl Warren and the Brown Decision," 702.
55. *Ibid.*, 689, 693.
56. Earl Warren, *The Memoirs of Earl Warren* (New York: Doubleday, 1977), 282.
57. *Ibid.*
58. Schwartz, *Super Chief*, 104; Kluger, *Simple Justice*, 707.
59. Fasset et al., "Supreme Court Law Clerks."
60. Kluger, *Simple Justice*, 709.
61. Library of Congress, Papers of Chief Justice Earl Warren.
62. Fasset et al., "Supreme Court Law Clerks," 549.
63. Rosenberg, *Hollow Hope*; Kluger, *Simple Justice*.
64. Fasset et al., "Supreme Court Law Clerks."
65. Matthew E. K. Hall, *The Nature of Supreme Court Power* (New York: Cambridge University Press, 2011).
66. Danelski, "Influence of the Chief Justice."
67. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).
68. Lee Epstein and Jack Knight, "The Strategic John Marshall (and Thomas Jefferson)," in *Marbury versus Madison: Documents and Commentary*, ed. Mark A. Graber and Michael Perhac (Washington, DC: CQ Press, 2002).
69. This section is based on David J. Danelski, "Charles Evans Hughes" (unpublished manuscript).
70. See e.g., Drew Noble Lanier, *Of Time and Judicial Behavior: United States Supreme Court Agenda-setting and Decision-making* (Selinsgrove, PA: Susquehanna University Press, 2003); Glendon A. Schubert, *Quantitative Analysis of Judicial Behavior* (Glencoe, IL: Free Press, 1959).
71. Danelski, "The Chief Justice and the Supreme Court," 201, quoting Stephen T. Early, Jr., "James Clark McReynolds and the Judicial Process" (PhD diss., University of Virginia, 1954), 101. Early's source asked that he not be identified, though Danelski opines that the source was likely a Supreme Court clerk.

72. Frances Perkins, FDR's secretary of labor and a close friend of the Roberts, recounts Elizabeth Roberts's story of the Hughes visit in her oral history. Frances Perkins oral history, Columbia University Libraries Oral History Research Office: Notable New Yorkers, "Part VII, 1936–1940, Politics, the Supreme Court, the National Labor Relations Board and the Approach of War," pp. 73–74. Cf. William E. Leuchtenberg, "Charles Evans Hughes: The Center Holds," *North Carolina Law Review* 83 (2005).

73. See, e.g., Tom S. Clark, *The Limits of Judicial Independence* (New York: Oxford University Press, 2011); and Jeffrey A. Segal, Chad Westerland, and Stefanie A. Lindquist, "Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model," *American Journal of Political Science* 55 (2011).

74. David J. Danelski, "Assignment of the Court's Opinion by the Chief Justice," paper presented at the annual Midwest Conference of Political Science, April 24, 1960.

75. 321 U.S. 649 (1944).

76. Quoted in Danelski, "Assignment of the Court's Opinion," 23. See also Danelski, chapter 2, this volume.

77. Danelski, "Assignment of the Court's Opinion," 23.

78. Edwin McElwain, "The Business of the Supreme Court as Conducted by Charles Evans Hughes," *Harvard Law Review* 63 (1949).

79. Merlo J. Pusey, *Charles Evans Hughes*, 2:678–79, quoted in Danelski, "An Exploratory Study of Opinion Assignment by the Chief Justice Revisited," chap. 2 in this volume.

80. See, e.g., Michael H. Birnbaum and Steven E. Stegner, "Source Credibility in Social Judgment: Bias, Expertise, and the Judge's Point of View," *Journal of Personality and Social Psychology* 37 (1979); and, for a political science application, see Charles M. Cameron, Jeffrey A. Segal, and Donald Songer, "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions," *American Political Science Review* 94 (2000).

81. *Citizens United v. FEC*, 558 U.S. 310 (2010).

82. Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (New York: Doubleday, 2012).

83. *Ibid.*, 189.

84. *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_\_ (2012).

85. Danelski, "Assignment of the Court's Opinion," 16.

86. Felix Frankfurter, "'The Administrative Side' of Chief Justice Hughes," *Harvard Law Review* 63 (1949).

87. Quoted in Ulmer, "Earl Warren and the Brown Decision," citing the *New York Times*, July 6, 1968, 42.

88. See Forest Maltzman and Paul J. Wahlbeck, "A Conditional Model of Opinion Assignment on the Supreme Court," *Political Research Quarterly* 57 (2004).

89. "Redrapping" became a popular term for summary reversals of obscenity convictions borne of the Court's 1967 decision *Redrup v. New York*, 386 U.S. 767, wherein the Court held that written material that was neither sold to minors nor forced onto an unwilling public were constitutionally protected.

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

91. 530 U.S. 428 (2000).

92. Craig M. Bradley, "Behind the Dickerson Decision," *Trial* 36 (2000); and George M. Dery, "The Illegitimate Exercise of Raw Judicial Power: The Supreme Court's Turf Battle in *Dickerson v. U.S.*," *Brandeis Law Journal* 40 (2001–2002).

93. Linda Greenhouse, "The Last Days of the Rehnquist Court: The Rewards of Patience and Power," *Arizona Law Review* 45 (2003); and Mitch Reid, "Note, *Dickerson v. U.S.*: Uncovering Miranda's Once Hidden and Esoteric Constitutionality," *Houston Law Review* 38 (2001).

94. Daniel M. Katz, "Institutional Rules, Strategic Behavior, and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on *Dickerson v. U.S.*," *Journal of Law and Politics* 22 (2006), argues it was simply strategic.

95. 531 U.S. 98 (2000).

96. Numerous researchers sought to examine the impact of *Bush v. Gore* on the Court's support and legitimacy, some finding that the Court's reputation had been affected in some way, others finding that the Court suffered no real consequences. All agreed, however, that the Court suffered no long-term damage. See, e.g., Herbert M. Kritzer, "The Impact of *Bush v. Gore* on Public Perceptions and Knowledge of The Supreme Court," *Judicature* 85 (2001); Manoj Mate and Matthew Wright, "The 2000 Presidential Election Controversy," in *Public Opinion and Constitutional Controversy*, ed. Nathaniel Persily, Jack Citrin, and Patrick J. Egan (New York: Oxford University Press, 2008); James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise," *British Journal of Political Science* 33 (2003); and James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "Measuring Attitudes Toward the United States Supreme Court," *American Journal of Political Science* 47 (2003). We see it as entirely reasonable, regardless of the research, for the chief to look with alarm on low levels of public support for the Court's decisions.

97. 539 U.S. 558 (2003).

98. Again, some research found that the Court suffered some short-term loss of public support, but quickly rebounded. Nathaniel Persily, Patrick Egan, and Kevin Wallsten, "Gay Marriage, Public Opinion and the Courts," Public Law Working Paper No. 06-17, University of Pennsylvania Law School, 2006.

99. 558 U.S. 310 (2010).

100. Jeffrey M. Jones. "Supreme Court Approval Rating Dips to 46%," 2011, <http://www.gallup.com/poll/149906/supreme-court-approval-rating-dips.aspx>, accessed July 3, 2013.

101. Pew Polling. "Supreme Court's Favorable Rating Still at Historic Low," 2013, <http://www.people-press.org/files/legacy-pdf/3-25-13%20Supreme%20Court%20Release.pdf>, accessed July 3, 2013.

102. New York Times/CBS News Poll, 2012, [http://www.nytimes.com/interactive/2012/06/08/us/politics/08scotus-poll-documents.html?\\_r=0](http://www.nytimes.com/interactive/2012/06/08/us/politics/08scotus-poll-documents.html?_r=0), accessed July 3, 2013.

103. Rosen, "Roberts's Rules."

104. Jan Crawford, "Roberts Switched Views to Uphold Health Care Law," CBS News, July 1, 2012, [http://www.cbsnews.com/8301-3460\\_162-57464549/roberts-switched-views-to-uphold-health-care-law/?tag=contentMain;contentBody](http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/?tag=contentMain;contentBody), accessed July 3, 2013.

105. Toobin, *The Oath*, 286.