I Respectfully Dissent
Linking Judicial Voting Behavior, Media Coverage, and Public Responses in the Study of U.S. Supreme Court Decisions

by

Michael A. Zilis

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Doctoral Committee:
Professor Nancy Burns, Chair
Associate Professor Ted Brader
Professor Phoebe C. Ellsworth
Professor Charles R. Shipan

To my parents,

to Molly,

and to Katrina.

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Table of Contents

List of Tables

List of Figures

List of Appendices

Abstract

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This dissertation is a study of what happens after the Supreme Court rules. It begins by identifying a critical feature absent from existing studies of judicial policy legitimation: the information conveyed by the press to the public. The dissertation combines disparate research, theory, and the use of multiple methods to answer important questions about Supreme Court influence.

I develop Dissensus Dynamics Theory to explain how characteristics of judicial decisions impact media coverage. The model shows that voting outcomes on the Supreme Court play the most important role in shaping how the press portrays legal controversies. The central place of voting outcomes comes from their value to journalists who must characterize judicial decisions while subject to considerable constraints. In cases where dissent and division on the bench is high, news organizations portray rulings in negative terms, drawing on frames raised by dissenting justices and by critics of the Court.

To explore Dissensus Dynamics Theory more rigorously, I employ a diverse range of tests, with each providing unique insight. A case study of property rights coverage demonstrates the direct and indirect impacts of dissenting votes on coverage. I show that dissent encourages the press to seek out critics of a ruling, but also to highlight resonant legal arguments and evocative language from dissenting opinions. As such, dissent leads to media portrayals of property rights law that emphasize multiple, competing perspectives in place of frames more deferential to the Court.

I examine Dissensus Dynamics Theory further by coupling content analysis data with statistical tests. I find evidence that judicial dissensus increases the prevalence of negative frames in newspaper and cable news accounts of decisions. Dissensus also increases the

prevalence of aggressive rhetoric in cable news coverage. And ideological diversity in majority coalitions affects coverage under certain conditions. These results hold even when taking into account the most powerful alternative explanations to Dissensus Dynamics Theory.

In the final chapters, I demonstrate why media coverage matters. Experimental evidence shows that negative frames limit support for Supreme Court rulings, even as subjects continue to view the institution favorably. These findings bridge what have been, until now, disparate lines of inquiry involving law and politics, political communication, and public opinion. They suggest new avenues for future research on judicial decision-making. And ultimately, the dissertation provides strong evidence that voting outcomes play a central role in how the popular understanding of Supreme Court rulings takes shape.

CHAPTER 1
Introduction

Interest in the United States Supreme Court has perhaps never been higher than it was on June 28, 2012. On the final day of its term, the Court was prepared to announce its decisions in a series of cases that would determine the fate of the Patient Protection and Affordable Care Act (PPACA), more commonly known as Obamacare. Healthcare reform had generated substantial controversy since at least 2009, when Congress began debate on a series of related bills. Disagreements lingered long after President Barack Obama signed the PPACA into law on March 23, 2010. Challenges to the law worked through the judicial system quickly, before most of its provisions could take effect. In November 2011, the Supreme Court granted certiorari to three cases involving it. The Court allocated an unprecedented three days in March 2012 for oral arguments in these cases, at which point it became clear that five justices had serious reservations about the constitutionality of the PPACA.

Two factors conspired to heighten interest in the decision. The Court's deliberation generated a substantial amount of drama, since the notoriously secretive institution had given few hints as to how it would rule. Indeed, most observers expected the fate of the law to hinge on the vote of a single justice (most likely Anthony Kennedy, who often sided with the majority in high profile cases). The decision would be announced on the final day of the Court's term. At the same time, the consequences of the Court's decision were monumental: in all likelihood, the Court would choose to make a determination on the fate of the law. For opponents of Obamacare, the ruling represented the final chance to kill a law they had denounced yet failed to defeat for years. For supporters, the ruling would either consolidate their victories or thwart what had been decades of agitation in favor of a national healthcare law. If the Court struck down the law, there was little chance the Congress could pass a constitutional piece of healthcare legislation in the near future, if ever.

On the morning of June 28, the Court filled with observers. Outside, thousands of activists talked, chanted, and stewed. Major media outlets had focused on the litigation for months, with coverage peaking in recent weeks. Reporters waited inside the Courtroom and on the Courthouse steps. Cable news offered live, uninterrupted coverage (and speculation) throughout the morning. One of the leading websites for judicial news – scotusblog.com – reported 1000 page views per second, 866,000 readers on its live blog, and 5.3 million hits during the day.[1] On June 29, national newspapers followed up with front page reporting and analysis. Coverage of the ruling continued to saturate the news long after it was announced.

In a landmark decision, the Supreme Court upheld most major provisions of the PPACA including its most controversial piece – the "individual mandate" that all Americans purchase healthcare. Surprising observers, the Court found the mandate beyond the scope of Congress's power to regulate interstate commerce, but a permissible exercise of its power to levy taxes (*National Federation of Independent Business v. Sebelius*). Chief Justice John Roberts wrote the majority opinion, joined by a coalition of four justices with whom he rarely aligned. The Court's ruling paved the way for Obamacare to take effect, another step in the remaking of healthcare law in the United States.

Responses to the Obamacare Ruling

How did Americans respond to one of the most important Supreme Court decisions in modern history? Any full examination of this question must weigh a number of factors that come to bear on attitudes, which I define as evaluations of social and political issues (see Eagly and Chaiken 1993, Eagly et al. 1999). These might include traditional ingredients of opinion formation like predispositions (partisanship and ideology chief among them), group-based reasoning, and issue specifics (Zaller 1992, Converse 1964, Campbell et al. 1960). Many of these ingredients point to a static response, since the Supreme Court's decision changed little information people possessed about the law itself. Indeed, Americans had been exposed to a wealth of information about Obamacare since its proposal, making it among the most high profile pieces of legislation ever adopted. But Americans reserve a special place for the Supreme Court in their understanding of politics. To the extent that they see the Court as legitimate,

[1] "Live Blog of the Healthcare Decision." June 28, 2012. http://www.scotusblog.com/2012/06/live-blog-of-the-health-care-decision-sponsored-by-bloomberg-law/.

credible, and nonpartisan, Americans defer to its judgment (Caldeira and Gibson 1992). Scholars suggest that the Court may legitimate policies – increasing support for them – with its rulings (Mondak 1994; Gibson, Caldeira, and Spence 2005; Woodson, Gibson, and Lodge 2011). This effect would be dynamic, causing opponents of Obamacare to newly accept and possibly support the legislation. Little evidence exists that Americans changed their views about healthcare law so dramatically (Blumenthal 2012).

But it is incomplete to suggest that attitudes towards the Obamacare ruling result from pre-decision attitudes and views about the Supreme Court alone. In fact, to make sense of the decision and the law, Americans paid careful attention to another actor in this process – the news media. The ruling received unprecedented coverage, which offered numerous and multi-faceted considerations. Consider a few common themes that animated this coverage.

First, the press highlighted the Court's finding that the PPACA represented little more than Congress's exercise of its power to tax (Levs 2012, Mears and Cohen 2012, Cuccinelli 2012).[2] According to Robert's opinion, "It is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax." A *Los Angeles Times* headline read, "Supreme Court Upholds Healthcare Law as Tax Measure." CNN simplified the ruling with the headline, "Supreme Court: Mandate Penalty is a Tax."[3] Many accounts explained in considerable detail Robert's reasoning, which rejected the argument that the law compelled individuals to purchase a commodity – healthcare – against their will. The media framed the decision as one that saw a more limited role for Congress: to levy a small tax on those who did not purchase healthcare, without making their actions criminal.

Second, the press noted the vehement objections of the four dissenting justices on the Court to the ruling. It made clear that, given the opportunity, these justices would have struck down the entirety of the PPACA. The press highlighted the dissenters' finding that Congress

[2] Levs, Josh. "What the Supreme Court Ruled on Healthcare 'Tax.'" July 5, 2012. http://edition.cnn.com/2012/07/05/politics/scotus-health-care-tax/index.html. Mears, Bill and Tom Cohen. "Emotions High After Supreme Court Upholds Health Care Law." June 29, 2012. http://edition.cnn.com/2012/06/28/politics/supreme-court-health-ruling/index.html. Cuccinelli, Kenneth T. "Victory in Defeat." *National Review*. June 29, 2012.

[3] Sahadi, Jeanne. "Supreme Court: Mandate Penalty is Tax." June 28, 2012. http://money.cnn.com/2012/06/28/pf/taxes/health_reform_new_taxes/index.htm. Savage, David G. "Supreme Court Upholds Healthcare Law as Tax Measure." *Los Angeles Times*. June 29, 2012.

intended to regulate commerce in healthcare, which was beyond the scope of its constitutional power (and on this point, John Roberts agreed). According to the dissenters, however, it was erroneous to construe the PPACA as a tax measure.

Third, the press highlighted the surprise outcome, which saw the reliably conservative John Roberts break with the other conservatives on the Court to uphold the law. According to the *New York Times*, the case featured the first vote to unite Roberts, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan against their four conservative colleagues. Some reports even suggested Roberts changed his vote, deciding only in the days before the decision to uphold Obamacare.[4]

Did such coverage make a difference in how Americans viewed the decision? One may think about these press themes in terms of how they exert pressure on popular opinion about the ruling. The first – the majority reasoning – has a legitimating effect, potentially increasing support for the ruling and the law. It has the dual impact of making salient an argument in favor of the healthcare law – that it endorses a tax, not a wholesale government intrusion into the lives of Americans – to observers while also imparting the imprimatur of Court approval on the law. The second – the dissenting counterargument – casts doubt on the majority's reasoning and reinforces negative attitudes towards the law. The third – the voting coalition narrative – may, in this case, buttress the Court's reputation as a non-partisan institution whose members put aside ideological predispositions when analyzing law.

In even the most high profile rulings, when American attentiveness to the Court is high, it is rare for citizens to read judicial opinions directly. Rather, they depend on the press to characterize rulings for them (Davis 1994, Franklin and Kosaki 1995). The frames that the media employs – using the language of the majority voting coalition, explaining the objections of dissenters, depicting the Court as non-partisan – may affect popular opinion in meaningful ways. Indeed, they may exert the most important influence on public understanding of the law.

But despite the fact that a wealth of research considers how public opinion reacts to Supreme Court actions, scholars have very little sense about how the press covers the institution. In fact, in many studies of the Court and opinion, the press is all but invisible. And when experimental research acknowledges that the press may matter, it commonly does so by

[4] "Siding with the Liberal Wing." *New York Times*. June 29, 2012. Crawford, Jan. "Roberts Switched Views to Uphold Healthcare Law." July 1, 2012. http://www.cbsnews.com/8301-3460_162-57464549 /roberts-switched-views-to-uphold-health-care-law.

presenting stylized news reports to subjects with the intention of communicating, simply, that the Court has ruled on an issue. As the Obamacare case shows, however, media reports are rarely this straightforward. But of how coverage takes shape, and how it may affect our understanding of popular opinion and the Supreme Court, we have little idea.

Overview and Argument

In this dissertation, I explore the content of press coverage surrounding Supreme Court rulings. My research follows in the tradition of sociolegal studies, which commonly trace the stature of specific laws in American society, and also in a new line of public opinion research that explores the effect of judicial decisions on attitudes. My approach differs from these lines of research, however, by viewing a Court ruling as one piece of the puzzle: an event that sets in motion a response from the media. I suggest that the popular understanding of the law has its roots in the ways in which the press interprets and portrays judicial decisions. These interpretations and portrayals are at once case specific and generalizeable. In the case of the Obamacare decision, the specifics included a unique clash, drawn largely along partisan lines, between a sitting president and an entrenched opposition, adjudicated by a divided Court, to determine the fate of one of the most contentious political issues in recent decades. At the same time, judicial decisions also lend themselves to systematic coverage in the press, since the procedures, traditions, and membership of the Supreme Court are a remarkably stable piece of American politics (Davis 1994).

This dissertation is one of the first systematic studies to link Supreme Court decisions, press coverage, and public opinion. By taking seriously the role played by the media in this process, I uncover a systematic bias in existing research, which largely neglects the press. My findings are some of the first to demonstrate the powerful effects of judicial voting decisions on the popular portrayals of Supreme Court rulings. They have implications for a diverse range of fields, including studies of political communication, accounts of public opinion, and models of judicial voting behavior.

The dissertation proceeds as follows. In Chapter 2, I review the literature on the popular importance of Supreme Court decisions. Almost all of this literature treats judicial rulings as a simple event communicated directly to the public. I explore some of the shortcomings of this approach and contrast it with the multiple method approach I employ. In Chapter 3, I describe

Dissensus Dynamics Theory. I argue that *the content of media reports takes shape in response to the characteristics of judicial decisions, most notably the voting outcomes on the Supreme Court*.

In Chapter 4, I provide the first test of Dissensus Dynamics Theory, using a case study of two takings law decisions: *Lingle v. Chevron, Inc.* (2005) and *Kelo v. City of New London* (2005). I use a most-similar design, demonstrating that despite the substantive similarities of the rulings, differences in their voting outcomes lead to distinct media coverage of them. The cases provide evidence that press coverage not only follows from votes but also from the arguments raised by the majority and dissenting coalitions in their written opinions. In Chapter 5, I offer a more general test of Dissensus Dynamics Theory, looking at the way in which national newspapers report on important Supreme Court decisions. I find evidence that the press portrays dissensual rulings in more unfavorable terms than consensual ones. I also show that press coverage responds to the makeup of the Court's voting coalitions, with dissensual and ideologically divided rulings receiving the most negative coverage. Chapter 6 offers a further test of Dissensus Dynamics Theory, focusing on cable news reports. Much like newspapers, cable news outlets respond to votes on the Supreme Court. In particular, dissensual decisions engender incivility and negativity in broadcast news reports.

In Chapter 7, I explore the impact of Court coverage on public opinion with an experimental study. I demonstrate that people's opinions about legal controversies change in response to the frames highlighted by the media. This holds even after people are made aware of a Court ruling on the controversy. I suggest that the media environment circumscribes the power of the Supreme Court to legitimate controversial policies. I conclude by exploring the implications of these findings for research involving judicial politics, political communication, and public opinion.

Throughout the dissertation, I argue that the shortcomings of existing research on the Supreme Court necessitate a careful examination of how the press covers the institution. I show that the constraints of the newsroom cause reporters to shape their coverage in response to voting signals offered by the Court, which in turn has important consequences for how scholars understand the institution's influence.

CHAPTER 2

Institutional Legitimacy and Public Reactions to Supreme Court Decisions: A Review of the Literature

This dissertation begins with a simple question: What is the popular impact of high profile Supreme Court decisions? Most studies that have attempted to answer this question focus on the attitudes of Americans towards judicial rulings. I review that literature here.

I begin by exploring the basis of Supreme Court legitimacy. According to many scholars, this legitimacy enables the institution to create consensus and engender support for the policies it endorses – a process called policy legitimation. Other research demonstrates important limits on legitimation by investigating the conditions under which the Court is most persuasive. But the policy legitimation hypothesis fails spectacularly at times, since a number of rulings generate backlash after the Court releases them.

After taking stock of this contradiction, I argue that simple models of opinion reaction to Supreme Court decisions leave out an essential piece of the story: the role played by the news media in translating decisions to the public. By neglecting the news media, I suggest, existing research is systematically biased in favor of uncovering legitimation effects. And at the same time, it is unprepared to offer any explanations about what may drive backlash. I close with an argument for bringing the media into the study of the Supreme Court and the consequences this choice may have for our understanding of opinion reactions to rulings.

Institutional Legitimacy

How do Americans view the Supreme Court? Might the Supreme Court, as a credible source with a well of diffuse support, use its decisions to increase public approval of controversial policies (Mondak 1990, 1994)? One landmark study uses the image of the institution as a "republican schoolmaster," exploring whether it can instruct the public in a

manner that is "gentle but effective" (Franklin and Kosaki 1989, 781). Others consider the possibility that the Court decisions increase policy compliance (Johnson 1967), policy acceptance (Gibson, Caldeira, and Spence 2005; Woodson, Gibson, and Lodge 2011), and popular support for controversial positions. Given the standing of the Supreme Court in American politics, it is not surprising that many view the bench as having a unique ability to resolve political disagreements. Indeed, Americans hold the Supreme Court in relatively high esteem compared with the other branches of government.

The Basis of Diffuse Support

Favorable attitudes towards the Supreme Court arise out of perceptions of procedural fairness, which people value in legal disputes (Tyler 2006, Tyler 1990, Baird and Gangl 2006). People express steady support for courts when judges employ unbiased decision-making procedures. By and large, Americans believe the Supreme Court uses principled decision-making to resolve disputes, making it one of the most legitimate judicial institutions in the world (Woodson, Gibson, and Lodge 2011).

Popular views about courts take shape early in life, as people learn about the role and responsibilities of judges in the American court system. According to *Federalist No. 78*, "There is no position which depends on clearer principles … To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every case that comes before them." Judges implement these principles with the goal of ensuring public deference and compliance (Davis 1994). The Supreme Court carefully manages its public image by highlighting the majesty and dignity of judicial proceedings. Depictions of the Court rely on symbolic language and imagery. Among the most important visual symbols are pictures of judges in robes, gavels, the Lady Justice, and the Supreme Court building itself, which help to emphasize the distinctiveness of the institution (Woodson, Gibson, and Lodge 2011; Brigham 1987).

The justices use language to emphasize the unbiased application of law; indeed, even some of the most notorious Supreme Court decisions frame their outcomes as a matter of legal principle. In *Plessy v. Ferguson* (1896), which upheld segregation by race, the Court begins with an innocuous characterization of its work: "This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana." Similarly, the Court emphasized that its

decision *National Federation of Independent Business v. Sebelius* was a legal, not a political one. At times, the justices seek unanimity to further legitimize rulings, though this practice has declined in recent decades (Epstein, Segal, and Spaeth 2001). John Roberts, in his Senate confirmation hearings, reinforced the image of justices as principled decision makers, arguing, "Judges are like umpires. Umpires don't make the rules; they apply them."[5]

The ideal of mechanical jurisprudence – that judges apply simple legal principles in an unbiased fashion to arrive at the correct decision – is, of course, a myth. The attitudinal model of judicial decision-making sees rulings as influenced by the personal preferences of judges (Segal 1997, Segal and Spaeth 2002). Others scholars contend that judges act strategically to achieve their most preferred policy outcomes (Harvey and Friedman 2006, Clark 2009). And recent research suggests that both ideological and legal principles shape court rulings (Bailey and Maltzman 2008). But the American belief in procedural fairness is not simplistic. People believe judges can exercise discretion yet adhere to legal principles in their decision-making (Gibson and Caldeira 2011). Most Americans agree that judges use discretion to apply the Constitution to modern problems and that their personal beliefs play a role. Yet Americans tend to view judicial actions as principled, if not mechanical.

What might undercut the symbolism and perceptions of procedural fairness integral to the popular legitimacy of the Supreme Court? Three of the most likely explanations fall short. There is little evidence that political sophisticates view the Court as ignoring legal principles in its decision-making. In fact, political awareness *increases* support for the Supreme Court due to the exposure that sophisticates have to legitimating symbols (Caldeira and Gibson 1992). Similarly, some have suggested that the spectacle of confirmation hearings can undermine the image cultivated by the Court (Davis 1994) but more recent evidence suggests that exposure to them increases the institution's legitimacy under certain conditions (Gibson and Caldeira 2009a, 2009b). Finally, there is conflicting evidence as to whether the Court damages its legitimacy by becoming involved in political controversies and releasing unpopular decisions. Grosskopf and Mondak (1998) suggest that *Texas v. Johnson*, which preserved the constitutional right to burn the flag, substantially damaged confidence in the Court, the result of a negativity bias whereby people assign asymmetric penalties to the institution depending on their views of its decisions.

[5] Cillizza, Chris. "John Roberts, Umpire." June 28, 2012.
http://www.washingtonpost.com/blogs/the-fix/post/john-roberts-umpire/2012/06/28/gJQAx5ZM9V_blog.html

Other evidence, however, suggests that positivity bias exists: the effect of exposure to any news about the Court means that popular decisions increase diffuse support for the institution but similar decreases in legitimacy do not follow unpopular rulings (Gibson, Caldeira, and Baird 1998; Gibson and Caldeira 2009a). Gibson, Caldeira, and Spence (2003) show that in one of the most controversial and politicized decisions of all-time – *Bush v. Gore* – agreement with the outcome had little impact on how people viewed the Supreme Court. They argue that the Court may only damage its legitimacy by issuing a series of high profile and unpopular decisions in succession.

Diffuse support for the courts in America, then, arises out of the popular understanding of judicial responsibilities and the belief that judges exhibit a commitment to procedural fairness. These beliefs are reinforced by the language, symbolism, and imagery surrounding the courts. Americans view the Supreme Court favorably compared to other institutions and these attitudes remain quite durable.

The Nature of Supreme Court Legitimacy

Easton (1965) defines legitimacy, also known as diffuse support, as "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants" (1965, 273). As such, the concept involves a more stable set of attitudes than those measured with items about "support" or "approval" of an institution. Other research characterizes legitimacy as loyalty towards an institution, since short-term outcomes have little effect on longstanding support for it (Gibson, Caldeira, and Spence 2005; Gibson, Caldeira, and Baird 1998). When the Court releases decisions, its legitimacy may also be considered a form of source credibility that enables it to influence popular attitudes (Mondak 1990, 1992, 1994, Bartels and Mutz 2009, Egan and Citrin 2009).

Scholars employ a number of measures to evaluate institutional legitimacy, but the standard is a six- (or sometimes four-) item scale developed by Gibson and colleagues. The *institutional legitimacy* scale is specific to the Supreme Court, with items about its proper jurisdiction, the fairness of its decision-making, and the decision-making procedures it employs. They include:

- If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether.
- The right of the Supreme Court to decide certain types of controversial issues should be reduced.
- The Supreme Court can usually be trusted to make decisions that are right for the country as a whole.
- The decisions of the U.S. Supreme Court favor some groups more than others.
- The U.S. Supreme Court gets too mixed up in politics.
- The U.S. Supreme Court should have the right to say what the Constitution means, even when the majority of people disagree with the Court's decision.

Because the Supreme Court lacks the power to enforce decisions, it relies on its legitimacy to ensure their implementation. And in a number of political controversies, judicial legitimacy has proven essential. For instance, despite decision specific disapproval of the Court during the 1930s, Franklin Roosevelt's plan to add justices was rejected as a politicized attack on the judiciary (Shesol 2010, Caldeira 1987). And *Bush v. Gore* settled a political and constitutional controversy with little long-term cost to the Court's reputation (Gibson, Caldeira, and Spence 2003). The legitimacy of the institution remains relatively high.

Judicial legitimacy matters not just because it serves to safeguard Court jurisdiction and ensure the implementation of decisions, but also because it may sway public opinion about policies the Court endorses.

Legitimacy Theory and Policy Legitimation

According to the policy legitimation hypothesis, Supreme Court decisions persuade the public to support the specific policies it endorses. The Court, by issuing a decision that upholds a controversial policy as constitutional, confers the legitimacy of the institution on the policy itself. Attitudes towards the policy become more favorable along a number of dimensions: people express higher levels of acceptance for the policy, greater willingness to comply with it, and, most importantly, more support for it. I define policy legitimation as a short-term increase in support, along a variety of dimensions, for a policy endorsed by the Supreme Court. This increase in support occurs as a result of symbolic legitimation – the association between the

institution and the policy (Mondak 1994, Bartels and Mutz 2009). American support for Court endorsed policies, then, arises out of a link between perceptions of procedural fairness, the institution itself, and its decisions.

But while the theory of policy legitimation is well developed, testing it proves difficult. Scholars have yet to agree on how to define legitimation. Does it consist of acquiescence to decisions? Does it alter compliance with laws? Does it alter support for the policy as well? Each definition has distinct consequences for our understanding of Court persuasiveness (Woodson, Gibson, and Lodge 2011). Another difficulty is practical: tests of opinion change demand pre- and post-decision data on public opinion. But the erratic timing of rulings makes such data scarce (Marshall 1989). For these reasons, experimental settings saturate the study of policy legitimation, giving scholars control over measurement intervals and information environment.

A number of experimental studies provide evidence of legitimation effects. Scholars demonstrate the Court's ability to increase policy support in cases involving censorship (Mondak 1992, 1994), search and seizure (Mondak 1992, 1994), educational policy (Mondak 1994), abortion (Zink, Spriggs, and Scott 2009), school prayer (Zink, Spriggs, and Scott 2009), affirmative action (Bartels and Mutz 2009), flag burning (Bartels and Mutz 2009), bankruptcy law (Zink, Spriggs, and Scott 2009), taxation (Mondak 1992), campaign law (Mondak 1992), electoral disputes (Gibson, Caldeira, and Spence 2005), and funding for the arts (Hoekstra 1995). Some survey data provides additional evidence of legitimation. For instance, Franklin and Kosaki (1989), in a landmark study, show that *Roe v. Wade* helped to legitimate abortions for health-related purposes, even as many Americans expressed deep reservations about the decision. In other cases, policy support develops over a long period of time, as the public gradually becomes more comfortable with the consequences of rulings (Murakami 2008; Egan, Persily, and Wallsten 2008). By and large, though, support for the policy legitmation hypothesis comes from laboratory studies that facilitate control of source, message, and measurement.

Limits on Legitimation

In spite of evidence that demonstrates Supreme Court persuasiveness, "no single hypothesis provides a universally applicable explanation for how and when courts affect public opinion" (Persily 2008, 8). Popular reactions to Court rulings vary considerably. In many cases,

the public does not express immediate approval of rulings, but rather reacts with indifference. Over time, the public may express more support for controversial decisions, as it did in the case of *Brown v. Board of Education* (Murakami 2008). Other decisions lead to divergent responses from various segments of the public. The power of the Supreme Court to persuade is moderated by a range of factors, which I review below.

Salience

The most significant factor that shapes the public response to judicial rulings is their salience. The vast majority of Supreme Court decisions receive minimal attention from the press. From 1946-1995, only about 15% of all rulings received a front-page mention in the *New York Times*, despite the fact that the paper offers some of the most comprehensive coverage of the institution (Epstein and Segal 2000). These decisions are among the only ones to reach the less attentive portion of the public (Berkson 1978) and, as such, the only ones capable of generating widespread policy legitimation (Murphy and Tanenhaus 1968). A number of Court rulings fail to persuade the public because most people remain unaware of them (Marshall 1989, Franklin and Kosaki 1995). Even when Americans become aware of rulings, they must accurately interpret their outcomes for legitimation to occur (Murphy and Tanenhaus 1968).

Because salience plays an integral role in shaping public responses, experimental studies struggle to estimate accurately the prevalence and extent of policy legitimation. Most of the evidence in favor of the policy legitimation hypothesis inflates the salience of Court actions by tasking subjects with reading about decisions (Hoekstra 1995, Mondak 1990, Bartels and Mutz 2009; Zink, Spriggs, and Scott 2009). In actuality, the majority of judicial decisions pass with little notice from average Americans, stripping the Court of its power to persuade.

Pre-Existing Opinion and Interpretive Context

When Americans learn about Court rulings, pre-existing opinions further moderate their reactions. The Court may do little to persuade strong opponents of a policy (though the institution may increase policy acceptance and acquiescence; Gibson, Caldeira, and Spence 2005). Consider the case of *Bush v. Gore*, which did little to increase support for George W. Bush's Electoral College victory among Democrats (though it did legitimize his election, effectively ending the legal controversy; Gibson, Caldeira, and Spence 2003).

The Court similarly lacks the power to legitimate policies when facing a polarized public. Franklin and Kosaki (1989) demonstrate how the interpretative context through which people come to understand rulings – which takes shape in response to discussions with others – alters opinion responses. For instance, because Catholics largely disapprove of discretionary abortions, Catholic opinion about *Roe v. Wade* developed in reaction to their social environment, causing individual reactions to move toward the group position (and away from the Court). The authors offer the structural response hypothesis, which suggests the existence of multiple opinion reactions to any Court ruling. According to the authors, "Members of microenvironments are positively affected by the group norms. Thus the effect of group interaction is to increase agreement with the modal response within the immediate social environment. When between-group variance is high, we would expect group members to move in opposite directions, leading to polarization. When between-group variance is low, then more uniform shifts in the population are the likely result" (Franklin and Kosaki 1989, 763; see also Stoutenborough, Haider-Markel, Allen 2006). The structural response hypothesis helps to account for divergent reactions to judicial decisions across not only microenvironments but also partisan contexts and media environments.

Sequence

The order in which the Court releases rulings on a given issue impacts public responses as well. Johnson and Martin's (1998) conditional response hypothesis posits that only initial rulings on salient political controversies have the power to engender attitude change. Because these rulings help individuals to fully elaborate relevant attitudes, their opinions remain stable even after subsequent Court rulings (Chaiken 1980, Petty and Cacioppo 1981). More recent research draws on the Receive-Accept-Sample model (Zaller 1992, Zaller and Feldman 1992) to refine the conditional response hypothesis (Brickman and Peterson 2006).

Decision Characteristics

Finally, research suggests that a variety of decision-specific factors impact public opinion about judicial rulings. In accordance with their demand for procedural fairness, Americans view rulings more favorably when the justices eschew political bargaining and uphold existing law (Baird and Gangl 2006, Caldeira 1986). They express more approval for rulings when the Court

makes strong persuasive arguments (Mondak 1990, 1994). They are more likely to approve of unanimous decisions that uphold precedent (Zink, Spriggs, and Scott 2009). And the connection of rulings to legal principles similarly affects the likelihood of popular acceptance and acquiescence (Gibson, Caldeira, and Spence 2005).

The idiosyncratic characteristics of decisions also affect their public reception. No simple model of opinion response fully characterizes the reactions to *Roe v. Wade*, where people evaluated not only the policy outcome but also the facts of the case, the identities of the parties, the identities of the justices themselves, and the arguments they raised. The majority's opinion, for instance, which protected abortion under the right to privacy found in the Constitution's "penumbras and emanations," has come under attack, undermining the persuasiveness of the decision (Sirico 2010). Might Americans have expressed more support for a decision framed in different terms? And because many cases that come before the Court are the result of concerted efforts to win public and judicial support through the strategic use of claimants, popular approval of rulings may increase when the Court sides with sympathetic parties (Carpenter 2012; Nadler, Diamond, and Patton 2008; Carrubba et al. 2012).

All told, these findings demonstrate the limits of policy legitimation. The Supreme Court's ability to persuade is constrained, first and foremost, by the extent to which Americans are aware of its decisions. But even in the most high profile cases, pre-existing attitudes, interpretive lenses, and decision characteristics moderate the effects of rulings on public opinion. The Court's legitimacy, it seems, confers it only a circumscribed power to persuade.

The Backlash Puzzle

No existing theories of public response account for one type of reaction to Supreme Court decisions: backlash, which I define as a short-term *decrease* in support for a policy after the Court endorses it. People may become more supportive of a policy after a judicial ruling (the policy legitimation hypothesis), they may react based on social group norms (structural response), they may react only to certain rulings (conditional response), or they may fail to react at all when they have little knowledge of a ruling (null response). But research fails to account for why the endorsement of a high credibility institution may dampen support for a policy. And yet, a number of Supreme Court decisions exhibit signs of public backlash.

For instance, Lerman (2008) demonstrates that a series of Court rulings (beginning with *Miranda v. Arizona*) had a negative effect on support for the rights of the accused. Similarly, public support for capital punishment increased after the Court struck down the death penalty as unconstitutional in *Furman v. Georgia* (Hanley 2008). A series of rulings that upheld affirmative action programs did little to stem popular disapproval for race-based preferences (Le and Citrin 2008). Court decisions that gave legal status to same-sex partners and overturned sodomy laws halted increases in popular support for gay rights (Egan et al. 2008). *Texas v. Johnson*, which upheld First Amendment protections for flag burning, inflamed popular sentiment (Hansen 2008). And the Supreme Court's ruling in *Kelo v. New London* led to public backlash because Americans viewed its interpretation of eminent domain as a violation of property rights (Nadler, Diamond, and Patton 2008; Baron 2007).[6]

Existing accounts of legitimation do not anticipate negative opinion responses to high profile Supreme Court rulings. Indeed, there are few reasons to expect low levels of support for the policies endorsed by a legitimate institution like the Court. Scholars have suggested, but never tested, two possible explanations. Egan and Citrin (2009) speculate that backlash arises from one-sided elite debate following a judicial ruling, where supportive elites remain silent while those in opposition control the public discourse. Franklin and Kosaki (1989) suggest that contextual effects may decrease support for rulings when the public uniformly opposes a policy before the Court endorses it.

Nonetheless, the prevalence of negative responses to high profile judicial rulings presents a puzzle for scholars. The literature on institutional legitimacy and policy legitimation is unable to account for backlash. In the following pages, I offer a critical review of this literature, demonstrating how its shortcomings – which include a reliance on laboratory settings and a failure to fully explicate the process by which the public learns about rulings – inhibit it from explaining the range of popular responses to Supreme Court rulings.

[6] In some of these studies, evidence of backlash is incomplete because comparable pre- and post-decision opinion data does not exist. Nonetheless, the public viewed Court decisions in largely unfavorable terms in each case listed here.

The Shortcomings of Research on Policy Legitimation

The Supreme Court, which Americans value for its commitment to procedural fairness, maintains a measure of diffuse support, yet only sometimes legitimates policies. What accounts for the divergent portraits of Court persuasiveness in the literature?

First, the various measurements the literature employs affect the conclusions it draws. Scholars define policy legitimation differently across studies. In some cases, they look at the Supreme Court's ability to increase *acceptance and acquiescence* (Gibson, Caldeira, and Spence 2005). At other times they focus on *compliance* with decisions (Johnson 1967). Many more studies examine *support* for policies that Supreme Court endorses (Hoekstra 1995, Franklin and Kosaki 1989, Johnson and Martin 1998, Bartels and Mutz 2009). When these measures are unavailable, scholars rely on items that focus on the extent to which Americans *agree* with specific decisions (which eliminates the possibility of measuring pre-decision attitudes). As such, one must take care when comparing Court persuasiveness across studies that employ different measures of legitimation.[7]

Furthermore, a full test of the policy legitimation hypothesis demands pre- and post-decision measurements of opinion. Scholars deal with data shortcomings in a number of ways. When only post-decision surveys are available, some studies explore the *general tenor* of attitudes to infer whether people view rulings in favorable terms (i.e., Nadler, Diamond, and Patton 2008). Franklin and Kosaki (1989) use another approach, controlling for the effects of rulings by dividing survey respondents into groups that are aware of the decision in *Roe v. Wade* (the treatment group) and those that are not (the control group). This technique allows them to make inferences about the impact of the ruling, but only across groups that have different levels of political awareness. They cannot estimate the effect of *Roe v. Wade* on American opinion as a whole. When pre- and post-decision opinion data is available, scholars explore how the Court may influence attitude *change* (i.e., Marshall 1989). The shortcomings of this approach lay both in lack of control (since any event that transpires between pre- and post-surveys can cause attitude shifts) and lack of uniformity (since there exists neither standard nor acceptable intervals at which to measure opinion surrounding a ruling).

[7] In chapter 7, I develop a way to deal with questions about how to measure support for rulings. I create a *decision approval* scale with multiple items (support, approval, etc.).

Most studies, however, deal with measurement issues by using an experimental approach, which allows control over the pre- and post-decision measures of opinion. But the use of laboratory settings contributes to another major problem plaguing the study of Court persuasiveness: a troubling methodological divide in conclusions. According to one study, "With few exceptions, experimental work finds much stronger effects of exposure to Supreme Court decisions than do observational studies" (Egan and Citrin, 2009, 7; see also Clawson, Kegler, and Waltenburg 2001). Most evidence for the policy legitimation hypothesis comes from laboratory studies that maximize control (but see Baas and Thomas 1984), while most evidence that finds constraints on the Court ability to persuade comes from survey data that emphasizes external validity. Little work aims to reconcile the divide between these methods (see Table 2.1). Nonetheless, we may attribute experimental evidence in favor of policy legitimation to two factors.

To begin with, experimental studies artificially raise awareness of Supreme Court decisions. Most Americans express little interest in and knowledge about the vast majority of Court rulings (Marshall 1989) but experimental settings task subjects with reading about them nonetheless. Scholars have seldom sought more externally valid approaches such as embedding ruling descriptions in a larger news environment (but see Zink, Spriggs, and Scott 2009); as such, experiments depict policy legitimation as prevalent. By tasking subjects with reading directly about rulings, experimental studies also obscure important differences in salience across issue domains. The news media affords the most coverage to rulings involving the First Amendment, civil rights, and the right to privacy (Davis 1987, Blake and Hacker 2010); experimental studies, on the other hand, explore the Court's persuasiveness across a range of issues – including search and seizure, educational policy, taxation, election law, bankruptcy law, and funding for the arts (Mondak 1992; 1994; Hoekstra 1995; Zink, Spriggs, and Scott 2009). Evidence of Court persuasion in these cases provides little information about legitimation in cases where public attitudes have crystallized.

More importantly, literature on policy legitimation neglects entirely the role the media plays in translating decisions to the public. In experimental settings, subjects typically read a brief description of a ruling or a stylized news report on it. These materials serve to inform subjects about the content of a decision, but they do little to convey the complexity of information and diversity of perspective that commonly characterizes press coverage. A handful

of studies on media coverage of the Court focus on the prevalence and accuracy of coverage but make few links between the press and popular reactions to specific rulings (Slotnick and Segal 1998, Slotnick 1993, Brickman and Bragg 2007, Davis 2011, Davis 1994, Newland 1964).

Table 2.1 Literature on Supreme Court Persuasion

Study	Method	Court Influence
Baas and Thomas 1984	Experimental	Null effects
Mondak 1990	Experimental	Legitimation
Mondak 1992	Experimental	Legitimation
Mondak 1994	Experimental	Legitimation
Hoekstra 1995	Experimental	Legitimation
Baird and Gangl 2006	Experimental	Constrained legitimation
Zink, Spriggs, and Scott 2009	Experimental	Constrained legitimation
Bartels and Mutz 2009	Survey experiment	Legitimation
Franklin and Kosaki 1989	Survey	Constrained legitimation
Marshall 1989	Survey	Null effects
Rosenberg 1995	Survey	Null effects
Johnson and Martin 1998	Survey	Constrained legitimation
Brickman and Peterson 2006	Survey	Constrained legitimation
Stoutenborough, Haider-Markel, Allen 2006	Survey	Constrained legitimation
Murakami 2008	Survey	Null effects
Lerman 2008	Survey	Backlash
Gash and Gonzales 2008	Survey	Backlash
Luks and Salamone 2008	Survey	Null effects
Hanley 2008	Survey	Backlash
Mayeri et al. 2008	Survey	Null effects
Le and Citrin 2008	Survey	Backlash
Hanson 2008	Survey	Backlash
Mullin 2008	Survey	Null effects
Egan et al. 2008	Survey	Backlash
Green and Jarvis 2008	Survey	Null effects
Nadler, Diamond, and Patton 2008	Survey	Backlash
Goux, Egan, and Citrin 2008	Survey	Null effects
Mate and Wright 2008	Survey	Constrained legitimation

Why might we care about the content of Supreme Court media coverage? Why might coverage change our understanding about policy legitimation? The reasons are threefold. First, the vast majority of information Americans learn about Supreme Court decisions comes from the news media. Unlike a president – who speaks directly to the American people on occasion with primetime television addresses, campaign events and advertisements, and a State of the Union message – Supreme Court justices maintain a low public profile. And though justices are increasingly "going public" to fulfill personal objectives (Davis 2011), the Court itself offers no formal justifications for its decisions beyond those found in its written opinions. Furthermore, these written opinions, which represent the public's only direct access to rulings, rely heavily on legal analysis. Most Americans lack the time, interest, and legal expertise required to make sense of them. They instead look to major media outlets, which aim to interpret decisions in an accurate, simple, and entertaining manner. Second, there is some evidence that the content of media coverage alters attitudes towards Court decisions. In a carefully designed experiment, Clawson and Waltenburg (2003) show that media effects influence attitudes towards the Court's ruling in *Adarand v. Pena*. In this case, framing the affirmative action decision as one that reinforced the principle of equal treatment increases support for it among white respondents, while framing it as a dramatic setback for African Americans does not. The results suggest that *the persuasiveness of a Court endorsement depends on its media contextualization*. And third, there are reasons to expect experimental treatments and actual media coverage of Court rulings to differ systematically. Unlike in laboratory settings, real world press coverage of judicial decisions focuses on a narrow range of newsworthy controversies; offers detail, complexity, and multiple perspectives; and includes abundant criticism of the Court.

Because existing theories of policy legitimation ignore press coverage, their conclusions diverge. Studies that verify Supreme Court influence fail to consider how the unfavorable media coverage might circumscribe legitimation. Studies that find evidence of backlash struggle to offer a systematic account of its causes, instead relying on case specific explanations. At various times, this work suggests that backlash may arise from the violation of sacred American values (Hanson 2008), the failure of the Court to engage with popular sentiment in its opinions (Baron 2007), or the identities of particularly sympathetic victims (Nadler, Diamond, and Patton 2008).

The Approach of This Study

In this dissertation, I use a multiple-method approach to explore popular understanding of judicial decisions. I focus on the media in detail. What determines how the press chooses to cover decisions? How do reporters frame rulings? What consequences might this have for the Court, and for our understanding of policy legitimation?

By bringing the press back into the study of the Supreme Court decisions, we can better understand the panoply of responses to its decisions. We also gain insight into the ways in which the existing literature fails to adequately characterize the process leading to popular responses. These responses depend not only on the symbolic association of the institution with a policy – moderated by pre-existing attitudes, interpretative contexts, and features of decisions – but also on the information communicated to the public about these decisions. As the media environment becomes more favorable towards the Court – highlighting the basis of its legitimacy, emphasizing its adherence to law and commitment to procedural fairness, explaining its decision-making rationale, and giving voice to supporters – its decisions become more likely to legitimate policies.

In the following chapter, I present an account of how the press covers the Supreme Court. I offer an explanation of how decision specific coverage takes shape across a wide range of cases in response to voting outcomes on the Court.

CHAPTER 3

Dissensus Dynamics Theory:
An Account of Decision Coverage

Media coverage of the U.S. Supreme Court takes shape in an environment of institutional constraints. News organizations focus on a handful of high profile rulings each year, aiming to draw public interest while also providing simple yet accurate information about legal affairs. These demands challenge journalists who cover the Court, all the more so because the institution does little to makes its actions transparent. As a result the press relies on the voting signals sent by the justices to guide its coverage of rulings.

In the following pages, I describe a theory of Supreme Court journalism, based on the observation that institutional constraints on the Court beat and in the newsroom lead to distinctions in decision coverage depending on the size and makeup of majority voting coalitions. I show how this theory extends our understanding of elite-driven accounts of political communication, while demonstrating important differences in how the press reports on the Court versus other political actors.

On the Supreme Court Beat

The Supreme Court choreographs a complex strategy for dealing with the press. The Court carefully guards its legitimacy – the relative high levels of diffuse support Americans express for it – by emphasizing the legal and symbolic basis of judicial authority (Caldeira and Gibson 1992; Woodson, Gibson, and Lodge 2011; Johnson 1967). It highlights the institution's majesty and dignity, which it conveys "through the nature of the physical setting, the usage of ritual, and the style of communication" (Davis 1994, 12; Brigham 1987).

But the Court eschews more aggressive public relations strategies.[8] It makes minimal effort to simplify or frame its rulings for public discussion. It offers little transparency in its decision-making. It has long resisted cameras in the Courtroom. Perhaps this is for the best, as Americans may recoil at the behavior of the justices (their visceral disagreements with one another, for instance, or the sight of Justice Clarence Thomas napping during oral arguments). So the Court pays minimal attention to media demands, at best. According to Linda Greenhouse, who spent two decades covering the High Court for the *New York Times*, the institution "is quite blithely oblivious to the needs of those who convey its work to the outside world" (Greenhouse 1996).

In fact, a review of the procedures used by the Supreme Court makes clear how little concern the institution has about packaging its work for media consumption. Each year, the Court receives over 8000 case petitions, yet it only decides to hear about 80 of these per term (Carpenter 2012). To hear a case, at least four justices must vote to issue a writ of certiorari, though these votes remain private. Thus, the Court simply neglects to grant certiorari without explanation in the vast majority of cases it considers.

The justices typically set aside a portion of one day to hear oral arguments in each case on the docket. At any point thereafter, the Court can announce its ruling in the case (and only in recent decades did the Court begin to schedule announcement days on its calendar; Davis 1994). On the morning of the announcement, the Court distributes written opinions through its Public Information Office and, in recent years, on its official website supremecourt.gov. Along with these formal opinions comes a case syllabus, prepared by the Reporter of Decisions at the Court. This syllabus is not formal law, but rather intended to summarize the main holdings of the Court,[9] drawing directly from the written opinions. Upon release of a decision, one justice verbally summarizes the holding and, on rare occasions, other justices may speak, offering dissenting opinions (Witt 1990). Because the Court building has seats for only 250 observers, many activists and reporters are forced to wait outside the Courthouse to hear the first news about significant decisions.

The justices of the Supreme Court take no questions and offer few clarifications about their opinions (though they may illuminate their thinking when they choose to speak, either in

[8] The justices themselves, however, pay careful attention to their public images (Davis 2011).
[9] Throughout this dissertation, I follow standard practice in using "the Court" to refer the majority coalition when discussing a particular ruling.

oral arguments, when announcing a ruling, or when they make outside appearances). They do little to simplify the complex legal analysis contained in their writing (Ginsburg 1995). They have never allowed cameras inside the Courtroom, though an archive of audio recordings exists at oyez.org. And the Public Information Office, created in 1935 to institutionalize relations with the press, provides minimal content to the media beyond that produced by the jurists. Unlike other press offices, it makes no effort to frame stories about the Court or its rulings, instead accommodating the media only to the extent that it benefits the institution's image. According to a former public information officer for the Court, "We're not spin doctors, as it were. It is a very different office from the other two branches" (Davis 1994, 47).

Because the Court "speaks once and is silent" (Newland 1964), reporters face a unique and challenging environment. The resources necessary to offer year-round coverage of the institution are considerable, both for journalists and news organizations as a whole. Full-time Court reporters must be well versed in legal affairs (Hess 1981). Some, but not all, journalists who cover the Court receive a coveted media credential, granting them access to a seat in the Courtroom for oral arguments and decision announcements. Their training often includes journalism and law school, coupled with years of experience in the field (though reporters disagree as to whether a law degree aids them in covering the Court; Davis 1994, 67). A news outlet must be able to devote a full-time member of it staff to report on an institution that releases a small number of rulings each year, only a handful of which will generate public interest. For these reasons, leading national news organizations offer most of the original reporting on the Court (*The New York Times*, *Washington Post*, ABC, NBC, CBS, CNN, Fox News, MSNBC, and National Public Radio, etc.).

Reporters focus most of their coverage on the cases that reach the Court's docket (Slotnick and Segal 1998). To shape this coverage, they typically familiarize themselves with the background of the cases to which the Court grants cert (Greenhouse 1996). Such background includes the case history, factual circumstances, legal controversies, and political implications. The case history encompasses the process by which the case makes its way through the judicial system until the High Court grants cert. Factual circumstances of the case involve the scenario that gives rise to the legal challenge before the Court. The legal controversy is among the most important and complex matters with which reporters have to deal. It includes the legal matters highlighted by the cert petition, which commonly involve a conflict between the language or

application of a law and the Constitution. Finally, journalists also familiarize themselves with the political implications of a dispute, as many cases draw public attention for their political consequences more than their legal ones.

To understand the extent of background knowledge necessary for journalists on the Supreme Court beat, take the Affordable Care Act case as an example. The case history began with a challenge joined by 26 states and the National Federation of Independent Business to the PPACA's constitutionality. The Federal District Court for the Northern District of Florida found the law's individual mandate to be an unconstitutional exercise of federal power. The Court of Appeals for the Eleventh Circuit upheld this ruling on appeal, but found that the mandate could be severed from the rest of the PPACA, allowing it the remainder of the law to stand. After this, the Court agreed to hear an appeal of the Eleventh Circuit's decision – *National Federation of Independent Business v. Sebelius*. The factual circumstances of the case were straightforward – the states challenged the major portion of the PPACA (the individual mandate), which had not yet taken effect. In this case, the Court allowed the challenge to proceed, but in some cases the Court finds that plaintiffs do not have legal standing to challenge a law (Roberts 1992). The central legal dispute in *NFIB v. Sebelius* involved whether the national healthcare mandate exceeded the scope of Congress's powers to regulate interstate commerce or to levy taxes. Finally, the case's political significance was well known and monumental; indeed, many more Americans were likely interested in the political battle over national healthcare than in the Court's interpretation of the Commerce Clause. News organizations covered all of these aspects of the Affordable Care Act case to provide a full and accurate portrait to their audience.

All told, journalists covering the Supreme Court face a complex environment (Greenhouse 1996). They must bring expertise to bear on controversies with a variety of dimensions. They must familiarize themselves with case specifics as well as history, law, and politics. And they must do so subject to the restrictive media standards developed by the Court itself (Witt 1990).

Constraints in the Newsroom

The journalistic pressures placed on Supreme Court reporters are just as great as the expertise required of them. Coverage of the Supreme Court must meet a variety of professional objectives. It must be simple, accurate and timely while meeting the criteria of newsworthiness

by generating drama and emphasizing conflict (Davis 1994, Gans 1979). I review each of these constraints below.

Simplicity

According to a veteran Supreme Court journalist, "A judge may take three pages to discuss a minute point of law, while a reporter may have three sentences to explain the meaning and impact of the entire decision" (Knoche 1987, 268). Indeed, the need for simplicity presents a particular challenge for journalists who cover the Supreme Court, whose rulings delve into legal minutiae. The news audience has little pre-existing knowledge of the legal and constitutional issues at stake in a given case, meaning that coverage must not only explain an outcome but also the background necessary to understand it (Greenhouse 1996).

Consider one of the landmark holdings of the 20th century, *Roe v. Wade*, where the Supreme Court struck down bans on abortion as incompatible with the Constitution. To provide Americans with an accurate account of the decision, the press had to explain the majority's reasoning, which was based on a complex legal analysis. Though the Constitution does not explicitly mention abortion, the Court found that abortion was protected as part of the fundamental right to privacy enjoyed by all Americans. But the right to privacy itself does not receive explicit mention in the Constitution, either. Rather, the Court reasoned that the right to privacy is ensconced in the document in multiple places, including in "penumbras" and "emanations" found in the First, Fourth, and Fifth Amendments protecting private associations, security of person and property, and a zone of privacy from self-incrimination, respectively (*Griswold v. Connecticut* (1965)). At the same time, the Court ruled that the state has two legitimate interests in regulating abortion: protecting prenatal life and a woman's health. Because the Court found that the balance of these interests with the right to privacy changes throughout a pregnancy, it used a trimester system to determine the restrictions that can constitutionally be placed on abortions (*Roe v. Wade* (1973)).

The case is an extraordinarily complex one from a legal perspective, and yet reporters faced the daunting task of simplifying its outcome for the millions of average Americans who took an interest in it. Reporters also had to simplify a range of other information in their coverage, including the facts of the case and its implications for ordinary Americans and the American political system.

But even less complex cases require a great deal of simplification in the news. Every case that reaches the Court has a dense history behind it (e.g., Carpenter 2012). Because every ruling requires that the press provide some historical context to understand it, and because every ruling may be framed along both political and legal dimensions, the need for simplicity places acute demands on Supreme Court reporters (Goldstein 2012).

Accuracy

Court reporters could more easily simplify judicial rulings if they did not need to achieve accuracy. For instance, a simpler portrait of the holding in *Roe v. Wade* would note that the Constitution protects a "right to abortion." While easy to understand, this account makes two mistakes: it confuses a right to abortion, which is not an explicit part of the Constitution, with the implicit right to privacy, which is, and it implies that the right to abortion is absolute (as we have seen, the Court found that the right to privacy must be balanced against state interests in regulating abortion for the health of the mother and life of the fetus). In complex scenarios like this, simplicity and accuracy can be at odds; indeed, there are numerous examples of the media's errors in reporting on judicial decisions (Greenhouse 1996, Goldstein 2012, Newland 1964). The media commonly mischaracterizes the legal meaning of Court actions by, for instance, reporting cert denials (the refusal to hear a case) as decisions on the merits (rendering a judgment about a case's outcome; Slotnick and Segal 1998).

But news organizations strive for and often achieve accuracy in their coverage. They do so by relying first and foremost on the expertise of reporters with experience and legal training (Hess 1981, Davis 1994). These reporters familiarize themselves with the facts of a case, arguments made, and potential decisions before the Court releases its ruling (Sherman 1988). In so doing, they are well prepared to make sense of it.

The coverage of the Obamacare decision from scotusblog.com, a leading website for judicial reporting, provides an example of the care that many news organizations take to report on decisions in simple and accurate terms. The website's publisher describes the strategy for reporting in a timely and correct manner on the ruling:

> Today, our entire team will work together in person, including Lyle [Denniston], who is the most experienced member of the press corps, having covered the Court for more than five decades, and who has written about the case with incredible depth; and four lawyers

> who have collectively argued thirty-four Supreme Court cases and taught Supreme Court litigation at Harvard and Stanford for more than twenty years.
>
> And nothing will to go onto the Live Blog about the Court's ruling until I say I agree with it. If we make a mistake, I will be personally responsible….
>
> Within a few seconds of getting the opinion, I realize from reading the syllabus – and announce into the conference call – that the government has lost the Commerce Clause argument, but that there is much more going on that is going to require careful study….
>
> It takes me almost one minute exactly to analyze the decision. After about twenty seconds, I am almost certain that the government has won under the tax power. But I worry the opinion itself would have important nuance or qualification. So I read all the first sentences of each paragraph in the critical part of the opinion announcing the tax holding. It is clear that although the Court has rejected the government's Commerce Clause argument, it has upheld the mandate without qualification.
>
> I turn to Lyle – who has been focusing on the Commerce Clause section of the syllabus on his copy, but also skimmed the tax power discussion in the syllabus – and say, "They win under the taxing power." Lyle responds, "Yes." Kevin Russell has gotten a third copy of the opinion from an NBC runner; he agrees. (Lyle then turns immediately to writing the overwhelming majority of our team's analysis of the case, as he has throughout.)
>
> I dictate to [SCOTUSblog editor Amy Howe]: She repeats it to me to confirm, and publishes the update announcing the decision to our readers. (Goldstein 2012)

The account hints at the various demands placed on news organizations when the Court releases a landmark decision. The early stages of reporting – providing the first summary of the ruling minutes after it is released – focus on speed, simplicity, and accuracy. But despite the demand for the former two, many media outlets strive for the latter as well. In the case of Obamacare, SCOTUSblog (and other organizations) used a team of experienced reporters to parse the decision and confirm their analysis.[10] In cases where the demand for information is less immediate, news outlets might rely on the analysis of a single experienced reporter to interpret a ruling.

[10] Nonetheless, the demand for timely coverage in this case was so great that CNN and Fox News initially reported, incorrectly, that the Court had struck down the Affordable Care Act.

Timeliness

The need for fast and accurate reporting on High Court rulings is an ever-present worry for reporters. On decision days, the justices announce their rulings beginning at 10am eastern standard time. This gives print reporters approximately one half of one day to file their reports for the next morning's paper. In this time, the reporters must organize their pre-existing information on the case, interpret the ruling and the opinions of dissenting justices, speak with legal experts to clarify and expand on their interpretations, and seek out other interested parties for their reactions (Greenhouse 1996). They must then craft a story worthy of publication.

In recent years, the time demands have become much more acute. 24-hour cable news channels often broadcast their first reports within minutes of a decision announcement. The internet can yield its first headlines in under a minute. In the Affordable Care Act case, CNN and Fox News put up banner headlines announcing the outcome about 50 seconds after its release. Other organizations followed suit within a minute. Unfortunately, CNN and Fox News filed erroneous reports, suggesting that the Court had invalidated the PPACA. Their mistakes stemmed from an incomplete reading of the decision: while its first few pages described the law as an unconstitutional exercise of Commerce Clause powers, its later pages declared the law constitutional since it imposed a tax. Again, the complexity of judicial decisions, coupled with the media's need for timely reporting, created this situation.

But even in less monumental cases, reporters face the challenge of portraying the work of the justices in simple and accurate terms within a few hours, or minutes, of their decisions (Davis 1994).

Drama

The goal of newsworthiness also informs the work of Supreme Court reporters (Katsch 1983, Davis 1994). So coverage must create drama that draws attention from potential readers, viewers, or listeners. Indeed, most news organizations see attracting an audience as a central goal (Gans 1979). Depending on the case, journalists may develop drama by highlighting human-interest stories, reactions to a ruling, or tension on the Court itself.

Reporters often draw human-interest stories from the facts of the case (Slotnick 1991). For instance, much of the coverage of *Atwater v. Lago Vista* (2001) focused on the legal violation that gave rise to the case – the failure of a woman to wear a seatbelt in her car, leading

to her arrest as her two children watched from the backseat. These circumstances allowed the media to describe prohibitions against unreasonable searches and seizures. Similarly, the press focused on ordinary homeowners in its coverage of an eminent domain case, *Kelo v. New London* (2005). *USA Today* described the plaintiff's view that "protecting her Victorian dream house from the urban renewal bulldozer was always going to be an uphill fight." CNN aired an interview in which the guest described the stakes of the case, noting, "The house, you know, is not a commodity to my father. My father came over from Italy in 1962 and, you know, land to him means that he's rich and that he's got all the gold in the world. You take that away from him, and you know, he has nothing."[11] Such interviews provide the necessary drama to keep viewers interested, while at the same time making plain the stakes surrounding the work of the Supreme Court.

Similarly, reporters may focus on reactions to rulings to create drama. In many cases, interested parties serve as compelling sources. A range of coverage involving the healthcare decision emphasized the reactions of President Obama and other politicians. Other reports looked to activists that had an interest in the case. The *Washington Post*, for instance, posted a story entitled, "Health-care Ruling Reactions from the Supreme Court Steps."[12] At other times, reactions provide dramatic visual cues. For this reason, CNN reported live from the University of Michigan in 2003, when the Court upheld a portion of the school's race conscious admission policy. In the background, students marched and chanted in support of the ruling.[13]

Finally, most cases provide some measure of intrigue from the Court itself. This begins with oral arguments and continues with the tension in the days leading up to a decision announcement. In many cases, disagreements among the justices also lend drama to a decision. On rare occasions, the reading of oral dissents from the bench produces unscripted moments of anger even after the release of a ruling (Toobin 2012).

[11] "Ruling Leaves Door Open to Abuse." *USA Today*. June 24, 2005. O'Brien, Don and Kathleen Koch. *CNN Newsroom*. December 10, 2007.
[12] Chavar, A.J. "Health-care Ruling Reactions from the Supreme Court Steps." June 28, 2012. http://www.washingtonpost.com/politics/health-care-ruling-reactions-from-the-supreme-court-steps/2012/06/28/gJQA9kuJ9V_video.html.
[13] Flock, Jeff. *News from CNN*. CNN. June 23, 2003.

Conflict

Finally, reporters face the challenge of emphasizing conflict in their coverage of the Court. Doing so helps to create a dramatic narrative while following institutionalized practice of highlighting multiple perspectives. Because each case involves, at its essence, a dispute between two or more parties, the opportunities to portray conflict are ample. Reports may focus on the disagreements between the petitioners and respondents in a case, between their legal teams, or between various amicus curiae who have taken sides before the Court. Many cases also engender disputes outside the Courthouse building, between interest groups, activists, and politicians. And journalists can further highlight conflicts within the legal profession, either between lower courts that have disagreed about the case or the Supreme Court justices themselves.

Once again, the Obamacare case, given its high stakes, allowed the media to portray all manner of conflict. This included disputes between the federal government and the states, President Barack Obama and Republicans, hospitals and insurance companies, and appeals courts and the Supreme Court. Some headlines on the case made plain such conflict: "Conservatives Turn on Roberts," "Decision on Obamacare Fuels Obama-Romney Presidential Campaign," "Corporate Winners, Losers Under Healthcare Ruling."[14]

More dramatically, a number of news organizations explored the conflicts between the justices, manifest by the splintering of the Court's conservative wing with John Robert's decision to write for the majority. As one story noted, Roberts "originally sided with the four justices who thought the individual mandate was unconstitutional, then changed his mind and wrote the majority opinion for the liberals who wanted the law to stand. And even as he signaled he was siding with the left side of the bench, the justice who was thought to be the swing vote, Anthony Kennedy, lobbied Roberts intensely but to no avail."[15] The vote switch had everything that Court reporters desire: a simple and accurate way to frame the case outcome in a manner that emphasized drama and conflict.

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[14] Goodwin, Liz. "Conservatives Turn on Roberts, Supreme Court After Health Care Ruling." July 16, 2012. http://news.yahoo.com/blogs/ticket/conservatives-turn-roberts-supreme-court-health-care-ruling-184226194.html. Miller, S.A. "Supreme Court Decision on Obamacare Fuels Obama-Romney Campaign." *New York Post*. June 29, 2012. Krauskopf, Lewis. "Corporate Winners, Losers Under Supreme Court Healthcare Ruling." June 29, 2012. http://www.insurancejournal.com/news/national/2012/06/29/253680.htm.

[15] Negrin, Matt. "Chief Justice John Roberts' Switch on 'Obamacare' Health Care Ruling Signals a Leaky Supreme Court." July 2, 2012. http://abcnews.go.com/Politics/OTUS/chief-justice-john-robertss-switch-obamacare-health-care/story?id=16698557.

One longtime reporter, taking stock of how the press covers the Court, views conflict as central. "The overwhelming impression that journalism about the Court – including my own – probably conveyed to the casual reader was of an institution locked in mortal combat, where sheer numbers rather than force of argument or legal reasoning determined the result" (Greenhouse 1996, 1551-1552).

The Theory of Dissensus Dynamics

Unique challenges face news organizations and reporters who cover the U.S. Supreme Court. Chief among these are the need to present complex judicial decisions to the public speedily, in a newsworthy manner. The Court itself does little to aid journalists in meeting these objectives. The institution does not frame its decisions for public consumption, it does not clarify them upon their release, and it does not even provide notice as to when it will rule.

To understand how media organizations shape coverage of judicial rulings in this unique environment, I develop Dissensus Dynamics Theory, described below. The theory is based on a simple premise: *given considerable constraints, news organizations rely on straightforward and readily available pieces of information that allow them to balance a range of objectives in their portrayals of Supreme Court rulings*. These objectives include achieving accuracy and simplicity while emphasizing drama and conflict.

It is important to note that Dissensus Dynamics Theory is not an account of salience. It does not explain what makes the press more attentive to some decisions than others (though other research examines very question; see Franklin, Kosaki, and Kritzer 1993; Franklin and Kosaki 1995; Spill and Oxley 2003; Davis 1994). Here I am interested in exploring the *content* of coverage. Given that the press pays attention to a Supreme Court decision, what determines the nature of its coverage?

The Scope of the Theory

Dissensus Dynamics Theory focuses on the content of coverage of high profile Supreme Court rulings from leading national news organizations. There are a few reasons for the model's design. First, I explore decision-centered coverage since the justices' main responsibility is to resolve legal disputes with their rulings. The study of rulings grounds the work of the Supreme Court in specific legal and political controversies. But not all rulings receive equal attention.

Most press coverage focuses on a handful of high stakes cases each year, which reach both attentive and less attentive audiences (Berkson 1978, Greenhouse 1996). These cases, along with Supreme Court confirmation hearings, constitute the main source of popular knowledge about the Court (Gibson and Caldeira 2009a). Dissensus Dynamics Theory further concentrates on national press organizations because these are the most visible and influential sources of judicial reporting. The training of the reporters at these institutions, coupled with the resources at their disposal, allows them to offer some of the most comprehensive accounts of judicial branch action (Davis 1994). Their reports not only reach a large number of interested Americans, but also powerfully affect subsequent coverage. Indeed, many smaller news organizations that lack Court reporters republish the work of these major media outlets. Furthermore, I expect (and test) that similar factors influence the content of reporting across leading national news outlets since they operate with analogous goals and under comparable constraints as they cover the Court.

Exploring Dissensus Dynamics Theory fully (across a wide range of high profile rulings) requires generalizeable hypotheses, portable measures, and a broad sample. These things are rare in the sociolegal literature, where most studies focus on a single case or a narrow area of the law. And indeed, it is easy to envision how an inquiry into press coverage may analyze the Affordable Care Act case alone (i.e., tracing the various frames used to describe the ruling, outlining the legal arguments discussed, cataloguing statements of praise and criticism from interested parties, accounting for the balance of partisan sources used by the press). But reporters on the Supreme Court beat confirm the systematic nature of their coverage. According to one journalist, the development of the initial report on a decision proceeds as follows:

> It's almost a formula story: Supreme Court upheld, struck down, did x, y, z. Then I try to give a sense of the vote and perhaps implications. This would include a quote from the majority, a little background of the case, a quote from the dissent, and then more background. It's not real hard to do. It's almost like a science. (Davis 1994, 83)

The question then becomes how to catalogue a diverse range of reporting, touching on a variety of legal controversies, according to a portable standard of coverage content. To speak more generally about a range of judicial decisions, I focus on the tenor of published reports. I expect that coverage of a high profile Court ruling can vary from favorable to unfavorable depending on the frames it employs, arguments it raises, sources it quotes, and tone it evinces.

To be sure, a broad conceptualization such as this has its shortcomings, particularly in its loss of issue specific detail.[16] But the comparative value of a cross-case concept far outweighs these shortcomings since the determinants of coverage are likely operate across cases and because very few existing studies have attempted to explore these determinants.

In the following chapters and in Appendices A and B, I discuss the *decision support* measure of coverage content – which captures the degree of favorable coverage afforded any single decision – more fully. But first, I offer an account of the factors that influence the content of decision coverage.

Shaping Coverage of Supreme Court Decisions

What factors determine the extent of favorable coverage afforded to a Supreme Court ruling? Recall again the premise of Dissensus Dynamics Theory: *given considerable constraints, news organizations rely on straightforward and readily available pieces of information that allow them to balance a range of objectives in their portrayals of Supreme Court rulings*. The information from which news outlets can draw includes information released by the Court (case syllabus, written opinions, oral summaries, voting outcome) and materials provided by outside sources (statements from lawyers and scholars, issue activists, parties to the case, politicians, and other interested observers). But outside source material only becomes valuable for media outlets after they have an understanding of a decision, which requires them to rely on information provided by the Court first and foremost. As experienced legal reporters begin to make sense of a ruling, they then call on sources for further context, interpretation, and reaction. Indeed, Court reporters attest that they first consult the written work of the justices after its release (Slotnick and Segal 1998, Davis 1994).

The information released by the Supreme Court is thus the most important for media coverage of rulings. But each piece of this information has a distinct value. First, consider the written opinions. In these pages, the justices lay out the entirety of their legal analyses. The majority opinion represents controlling law. In it, the justices review the facts of the case, the legal controversies it involves, their views of the relevant laws, and their holdings in the case. The opinion often uses footnotes heavily, referencing other cases that come to bear on the

[16] In Chapter 4 and Appendix B, I explore the relationships between issue-specific coverage and the more broad measure of favorable content.

decision. The majority opinion can vary considerably in length, from a few words (i.e., *Claiborne v. U.S.* 2007) to dozens of pages (*Roe v. Wade* 1973). Other justices often file concurring or dissenting opinions of their own. These opinions perform similar functions to the majority opinion – analyzing the case, making a determination about the law, responding to other arguments – but they do not represent controlling law.

Reporters may draw the most comprehensive and accurate portrayal of a ruling from its written opinions. These opinions also help capture specific points of conflict between the justices where they exist. But they are particularly poor at providing a simple, dramatic, and rapidly interpretable account of a decision. Even reporters with extensive legal training may find it impossible to quickly read and accurately summarize entire written opinions (Greenhouse 1996). This task is made all the more complex by the fact that a single opinion may constitute the holding of different coalitions of justices at different points. A Supreme Court judge may choose to join some parts of one opinion (like that issued by the majority) and other parts of another (i.e., the dissenting opinion). She may also file her own concurrence or dissent, in addition to joining parts of other opinions. In the Obamacare ruling, the opinion of the Court included four parts, all written by Chief Justice John Roberts but signed by various coalitions (four justices joined parts I, II, and III-C; two joined part IV; and none joined parts III-A, III-B, and III-D). Additionally, Justice Ruth Bader Ginsburg filed an opinion, concurring in part with Roberts and dissenting in part, joined by Justice Elena Kagan in its entirety and by two other justices in part. Four justices signed a dissenting opinion and Justice Clarence Thomas added his own dissent.

The reporting of CNN and Fox News on the PPACA makes plain another risk of relying on written opinions: the loss of accuracy. Erroneous reports based on written opinions are most likely to be filed when journalists do not have the expertise to interpret them and when time pressures are great. As such, the language of written opinions exerts a relatively small effect on the favorable coverage a decision garners.

Similarly, oral summaries provided in the Courtroom on decision day provide little value to journalists, who must be present and take accurate notes. In most cases, these summaries are not particularly newsworthy either, since cameras are not allowed to capture the scene, disagreements are rare (except when a justice reads an oral dissent), and the justices offer little information beyond what can be found in their written opinions.

The most simple, accurate, and easy to understand pieces of information available to reports on the Supreme Court beat are the case syllabus and voting outcome (Davis 1994). But the case syllabus only presents text from the Court's opinion (and not the dissents), so what it gains in simplicity it loses in its ability to capture conflict. Reporters cannot accurately portray disputes on the Court from the case syllabus alone. On the other hand, the final voting outcome in a case provides a straightforward indicator of conflict – the size of the majority and dissenting coalitions.

In any given case, the voting outcome provides a wealth of information about the diversity of opinion surrounding a decision. A unanimously decided case sends a strong signal to reporters that the legal and political principles at hand are without controversy, so much so that nine ideologically-diverse Court justices reach agreement about them (see Epstein, Segal, and Spaeth 2001). In these cases, the balance of coverage characteristics is weighted heavily towards simplicity and accuracy. Reporters are unlikely to search widely for critics of such decisions because of the strong judicial indication that they are uncontroversial. Journalists themselves may further be leery of criticizing such rulings given the justices' expertise in constitutional law. Five-to-four rulings, on the other hand, provide a clear indication that the Court's decision is controversial, contested, and potentially incorrect. In these cases, the balance of coverage characteristics is weighted more heavily towards drama and conflict. Indeed, if the justices themselves – whose analysis is purportedly based on a careful interpretation of the law alone – cannot reach agreement, it is likely that many other political partisans will have strong reasons for disagreeing with the Court. In these cases, judicial dissent should have the effect of limiting the favorable press coverage afforded a ruling.

As such, Dissensus Dynamics Theory suggests that the most influential factor that shapes coverage of rulings is that which provides a framework for capturing drama and conflict where possible, in a simple, accurate, and timely matter: judicial voting outcomes. Reporters will use frames that reflect positively on a ruling when the justices signal their agreement about the legal principles at stake with large majority voting coalitions. And decisions that engender dissent on the Court will similarly lead reporters to frame them in an unfavorable light.

> *Dissent Hypothesis – As the number of dissenters increases, Court rulings will garner less favorable media coverage.*

The Dissent Hypothesis echoes Greenhouse's argument that "sheer numbers" guide the media portrait of conflict on the Court (1996). It is not, however, only the size of dissenting coalitions to which the press likely pays attention. Most journalists familiar with the Court can readily identify justices by their ideological predilections. For many years, the press tagged Justice John Paul Stevens as the Court's most liberal jurist, and Justice Antonin Scalia has earned a reputation as its conservative leader. Similarly, the press often divides the Court between its liberal and conservative wings, with one or two justices considered swing votes (a role currently occupied by Justice Anthony Kennedy). Because of the judges' well-known ideological preferences, they send another signal with their votes: the ideological controversy that may surround a case.

Consider two hypothetical decisions, both decided by five-four votes. In the first, a broad coalition of the Court's two most liberal members and three moderate conservatives vote in the majority. In the second, the Court's five most conservative members vote disagree with its four more liberal justices. The "ideologically diverse" decision indicates to the press that, while controversy exists about the ruling, it is rooted in neither partisan nor ideological disputes. But the "ideological divided" decision suggests the presence of both legal and political controversy. The press may highlight criticism of it from not only unsympathetic law professors but also from liberal Democrats and interest groups that disagree with it.

Recall again the Affordable Care Act decision, whose majority opinion was written by the normally conservative Chief Justice John Roberts and signed by four liberal justices. The 5-4 vote demonstrated clearly the presence of legal and perhaps political controversy (though the case would have received a wealth of critical attention regardless), but the ideologically-diverse majority coalition likely insulated the Court from some of the most vehement criticism (see Chapter 1). Elites found it more difficult to attack the opinion as an example of liberal bias when a conservative justice (who had been appointed by a Republican president) penned it. Indeed, after the ruling a large amount of press coverage centered on a resurgent Republican push to repeal the law rather than to denounce the decision.

> *Ideological Diversity Hypothesis – As the Court's majority coalition becomes more ideologically-diverse, a ruling will garner more favorable media coverage.*

The Dissent and Ideological Diversity Hypotheses provide the basis for Dissensus Dynamics Theory, linking the demands of Supreme Court journalism with the most powerful tool that the press can use to make sense of ruling: the votes of the justices themselves. The theory suggests that these votes will have the strongest influence on the framing of judicial decisions because they provide a path for the media to emphasize drama and conflict in a simple, accurate, and timely manner. Simply put, Court rulings that bring together large and ideologically-diverse coalitions will receive more positive depictions than those with a small and narrow majority.

Though no scholarship offers a comprehensive account of how the press covers a cross-section of Supreme Court rulings, other studies provide some support for the basic tenets of Dissensus Dynamics Theory. Veteran journalists suggest that, to the extent they adhere to consistent procedures in reporting on judicial branch decisions, they reference voting outcomes and draw from the majority and dissenting opinions where available (Davis 1994, Greenhouse 1996).

More importantly, the political communication literature demonstrates the central role that political elites (like the justices) play in framing issues in the media. *Indexing* theory suggests that elites define the range of perspectives presented by the media (Bennett 1990; 2007; Bennett, Lawrence, and Livingston 2006; Bennett and Livingston 2003). According to Bennett, "Mass media news professionals, from the boardroom to the beat, tend to 'index' the range of voices and viewpoints in both news and editorials according to the range of views expressed in mainstream government debate about a given topic" (1990, 106). In a similar vein, Entman's *cascading activation* model explores the activation and spread of frames from high level elites to other elites, the news media, and the public (2003, 2004). The model provides explanations about "how thoroughly the thoughts and feelings that support a frame extend down from the White House through the rest of the system – and who thus wins the framing contest and gains the upper hand political" (Entman 2004, 9). But it also speaks indirectly to the role that judicial elites may play in framing struggles over legal affairs.

Indeed, research on framing suggests that elites control the framing environment most effectively when they enjoy high status (e.g., White House sources in foreign policy conflicts) and when they espouse unified and culturally congruent framing perspectives. How do these insights inform our understanding of journalism at the Supreme Court? Consider, first, that in

the realm of legal affairs, the justices occupy the highest place in the American political system. As members of an "official decision circle" (Bennett 2006, 468) with a high degree of credibility (Bartels and Mutz 2009, Druckman 2001), Supreme Court justices will exert powerful influence on the media's coverage of law and politics. At the same time, the range of perspectives espoused by the justices also affects press coverage. The Court can most effectively frame legal decisions when it endorses a unified perspective with large and ideologically-diverse majority coalitions.

Dissensus Dynamics Theory, then, follows from a tradition of political communication research that sees high-level elites as the most influential source of frames for the press. But it also recognizes the constraints facing journalists who operate in the singular environment the Court fosters. These journalists rely, first and foremost, on judicial voting outcomes to guide their coverage of High Court rulings.

Alternative Hypotheses

Dissensus Dynamics Theory views elite disagreement, as expressed through the votes of the justices, as the most important factor to influence coverage across a range of rulings. But alternative explanations for decision coverage exist. I explore four of the most powerful alternative explanations below, discussing why they lack the explanatory value of Dissensus Dynamics Theory.

Alternative Explanation #1: Non-Judicial Elites Influence Coverage

Does the press shape its coverage of Supreme Court rulings in response to other elites besides the justices? There are a number of reasons to expect it might. To begin with, existing research shows the influence of executive branch sources on coverage (Bennett 1990, Entman 2004). Given the visibility of a sitting president, he is certain to have an impact on coverage of the Supreme Court when he expresses strong opinions. Furthermore, by highlighting the views of other politicians, the press may focus on inter-branch conflict to enliven its reporting. And political opinion on High Court actions gives the media an opportunity to use partisan frames that make coverage easier to understand and more dramatic for their audiences.

On the other hand, there is evidence that the press pays attention to the relative status of its sources. According to one study, "The spread of frames is stratified; some actors have more

power than other to push ideas along to the news and then to the public" (Entman 2004, 9). While presidents may enjoy the highest status in foreign policy debates, the Supreme Court is seen as the ultimate arbiter of legal conflict (Gibson, Caldeira, and Spence 2003). We would expect the justices to exert the most powerful influence relative to other elites (including the president) in shaping how the press coverage Court rulings.

But elites outside the judicial branch are unlikely to affect coverage for an even more important reason: they have limited incentives to disagree with the justices. The judiciary maintains a wealth of support and strong institutional legitimacy (Gibson and Caldeira 2009a; Gibson and Caldeira 2009b; Gibson, Caldeira, and Spence 2003). Americans strongly dislike outright attacks on the Court (Shesol 2010, Caldeira 1987). So political elites, who are often unwilling to the pay costs associated with attacking the judiciary, instead choose to express support for decisions with which they agree and remain mostly silent when they disagree. For this reason, unanimous rulings receive favorable coverage not only because the justices set the terms of debate for the media, but also because they make partisan elites reluctant to attack the Court.[17]

Even in closely divided decisions, elites have limited incentives to launch outright attacks on the Court. Their criticisms do not have any direct effect on the law in the United States and even the president – who has the authority to disobey judicial decisions – risks his reputation in doing so. Most Americans strongly dislike strident attacks on the Court, even when they disagree with its decisions.

The Obamacare ruling provides an example of elite reluctance to criticize the Court. The presence of four dissenters allowed Republican elites some measure of cover to denounce the ruling, relying on the dissenting opinions. The presence of dissenters also enabled Republicans to denigrate Roberts's vote "switch" (which may have received less attention if the ruling were not decided by a 5-4 vote). But few Republican elites showed a willingness to excoriate the decision, despite their antipathy to it. In a press conference after the ruling was announced, presidential candidate Mitt Romney did little to attack the Court or its decision, but rather focused more broadly on the negative aspects of the Affordable Care Act and the need for its repeal. The *New York Times* covered Romney's response in detail: "Mitt Romney declared

[17] Furthermore, the attitudinal model of judicial behavior implies that a unanimous Court is unlikely to adopt a policy so far from the ideological mainstream that it would warrant strong criticism (Segal 1997, Segal and Spaeth 2002).

Thursday that he would 'act to repeal Obamacare' if he was elected president, saying that he agreed with the dissenting justices in the Supreme Court ruling on Thursday… Mr. Romney might have been hoping for a different Court decision, but his campaign staff was not complaining."[18]

The measured response of many elites even in this most emotional of cases demonstrates the power that the Supreme Court has to set the terms of public debate about its rulings. Other elites are simply unwilling to attack many decisions outright and aggressively, meaning that the elites most responsible for shaping their coverage are the justices themselves.

Alternative Hypothesis #2: Political Context Matters

But perhaps the tenor of decision coverage changes depending on the political circumstances at the time. The press may, for instance, frame decisions in more conflictual terms when the Court seems out of step with other political actors (regardless of whether these elites express their disagreement with the Court). For instance, the media may scrutinize more carefully a liberal outcome, agreed upon by a liberal judicial majority, when Americans have elected a conservative president and Congress. This scenario makes the frame of ideological conflict readily available to reporters. Or consider the example of Obamacare again. The political context explanation in this case would suggest unfavorable coverage of the ruling stems from the ability of the media to frame it as an anathema to the Republican-controlled House of Representatives.

But the political context explanation falls short on three counts. First, it flies in the face of existing research that shows that journalists rely on elite sources to shape their coverage (Bennett 1990). Without partisan elites willing to criticize the Court, it is unlikely that the media could successfully employ partisan conflict frames in their coverage. Indeed, the most powerful elites sources available to the press are the voices of the justices themselves. The explanation also demands much of journalists, who would face the task of making inferences about the ideological characteristics of a ruling, a Court majority, and other politicians without the benefit of elite sources. Given the complex nature of legal decisions, it is difficult to characterize them along an ideological spectrum, particularly for reporters who face considerable constraints

[18] Shear, Michael D. and Ashley Parker. "Romney Says He Will 'Repeal Obamacare' if Elected." June 28, 2012. http://thecaucus.blogs.nytimes.com/2012/06/28/romney-says-he-will-repeal-obamacare-if-elected/.

(Greenhouse 1996). According to Dissensus Dynamics Theory, the best avenue for characterizing decisions involves reference to the voting coalitions formed by the justices. And finally, the existence of ideological conflict between the Court and prevailing political mood is unlikely absent division amongst the justices themselves. How would journalists frame conflict between a unanimous Court and conservative politicians, when any unanimous decision includes the votes of the most conservative jurists? Once again, journalists are more likely to rely on the voting signals sent by the justices themselves than on their interpretations of the political environment.

Alternative Hypothesis #3: Issue Area Matters

Another explanation for the nature of decision coverage revolves around the issues before the Court. Are not certain rulings likely to invite challenge if they violate longstanding cultural values about a policy area (Entman 2004, 14)? Are not some controversial political matters – like the case of Obamacare, or other rulings involving abortion rights or the death penalty – likely to generate unfavorable coverage when taken up by the Court, no matter the specifics of its rulings? Indeed, research shows that the media's attentiveness to Court rulings varies dramatically depending upon the issue at hand. Cases involving social policy, civil rights and liberties, criminal justice, and First Amendment law receive outsized attention in the press (Davis 1987, O'Callaghan and Dukes 1992, Blake and Hacker 2010, Slotnick and Segal 1998, Hall 2009, Katsch 1983). All of this suggests that news outlets might cover rulings differently depending on the issues they involve.

Consider a case involving the death penalty before the Court. The issue is among the most controversial in American politics today, defined by polarized and durable attitudes and, more importantly, committed activists on both sides of the debate (Hanson 2008). Any ruling involving the issue is likely to draw the attention of these activists, some of whom will disagree with the Court. One might hypothesize that, for these reasons, coverage of any decision involving a controversial issue like the death penalty will present it in a more unfavorable light than one involving an uncontroversial issue, all else equal.

Nonetheless, press coverage should remain dependent on judicial votes, even once we control for issue specifics. The Supreme Court's handling of some of the most fraught political controversies (abortion, gun control, et cetera) is unlikely to generate substantial negative press

absent the presence of judicial dissent. Reasons why are plentiful. Most importantly, the press must rely on elite sources to bring conflict to life. If high profile elites lack the motivation to criticize the Court about decisions involving sensitive issues, coverage will also strike a deferential posture towards the Court.

The justices use consensual decisions to temper criticism in other ways as well (Epstein, Segal, and Spaeth 2001). In achieving unanimity or near-unanimity, they raise the costs for critics by depriving them of the ability to side with some (dissenting) justices and use their analysis against the majority. Consensual decisions further reduce controversy and criticism because, in attracting the votes of many justices, they are more likely to be narrowly-tailored and carefully delineated. This form of judicial restraint throws into question the simple analysis that a decision may be controversial because of the issue it involves, and not its substance. Supreme Court justices have a great deal of discretion at their disposal: which cases to hear, which legal challenges to consider, which constitutional remedies to prescribe and proscribe. For any given issue, the justices may shape a ruling in a manner that attracts varying degrees of support. For instance, though the Court decided 78 cases involving the death penalty between the 1981 and 2007 terms (Spaeth 2010), only a handful of these received substantial attention and criticism in the mainstream media. For reporters who cover the Court, then, the concept of inherent controversy in a case is less efficacious than whether the justices make controversy apparent with their votes.

Alternative Hypothesis #4: Decision Characteristics Influence Coverage

If news organizations cannot cover elite conflict over Supreme Court rulings absent elite sources, perhaps they can simplify the equation by providing distinct coverage depending on the characteristics of the decisions themselves. The media might exhibit more deference to the Court when the chief justice pens a decision, offering it more favorable coverage. It might report more positively on rulings that uphold existing laws and respect precedent (in turn avoiding the dreaded label of judicial activism; see Kmiec 2004, Green and Jarvis 2008). Or it might frame decisions that have a particular ideological bent in a positive light. For instance, the press may be particularly sympathetic to rulings decided by liberal majority coalitions, which may speak more readily about the types of newsworthy modern-day implications that reporters covet.

Each of these explanations is, on its own, plausible. Each demands only a limited amount of knowledge and offers a pre-existing framing structure for reporters, and each may present a compelling storyline for the audience. At the same time, the explanations all require elite sources to speak about decision characteristics. Reporters may indeed structure their coverage around both the voting outcome in a case and specific features of a decision, affording more positive stories to rulings reached by large majority coalitions and respecting existing precedent, for instance. But, in accordance with Dissensus Dynamics Theory, the press still relies, first and foremost, on the criticism of dissenting justices to frame certain types of rulings in a negative light.

Summary

Coverage of high profile Supreme Court decisions plays an important part in shaping popular understanding about the law, the judicial branch, and political controversies. But despite the unique constraints that impact Supreme Court journalism, scholars know little about how coverage of rulings takes shape.

To remedy these shortcomings, Dissensus Dynamics Theory explains the content of coverage across a variety of cases as a consequence of voting outcomes on the Court. Because news outlets face time pressures as well as the need to report in simple, accurate, and dramatic terms on rulings, they rely on the informative signal of judicial votes to guide their coverage. When the divisions between the justices become sharp, they express them with dissensual decisions, which in turn causes the press to highlight elite disagreement. As a result, dissensual decisions receive more unfavorable portrayals than those decided by large judicial majorities. Because of press reliance on elites' voices, the influence of judicial votes has the most powerful impact on the content of coverage, even once we account for the opinions of other political actors, the characteristics of decisions, and the issues under consideration.

In the following chapters, I offer a series of tests to explore Dissensus Dynamics Theory and its implications. In Chapters 5 and 6, I review evidence for the major prediction of the model – that media framing of rulings follows from voting outcomes on the Court. I use a random sample of high profile rulings released between 1980 and 2008. For each decision, I analyze the content of national newspaper and cable news coverage to measure the extent to which it is framed in favorable terms (the *decision support* scale).

But first, I test, refine, and expand Dissensus Dynamics Theory in Chapter 4. I use a most-similar case study of two eminent domain rulings. The design allows me to explore how media coverage of this area of law changed from the spring of 2005 (before either ruling) to the summer (after both had been announced). I track the frames the national press uses to discuss the issue and the influence of the Court's rulings on these frames. I find evidence that coverage of eminent domain confirms some of the predictions of Dissensus Dynamics Theory, as the media discussion of the issue and the Court becomes more critical following the dissensual and ideologically-divided outcome in *Kelo v. City of New London*.

Chapter 4

"All Private Property is Now Vulnerable":
A Case Study of Consensus and Dissent in Two Supreme Court Eminent Domain Rulings

At the end of its 2004-2005 term, the Supreme Court redefined takings law in the United States. First, in May, it substantially broadened the power of the government to seize private property even if the seizure did not advance legitimate government interests (*Lingle v. Chevron U.S.A. Inc.*). One month later, the Court expanded the takings power by permitting the seizure of private property for the purposes of private economic development (*Kelo v. City of New London*). The *Washington Post* admired the former decision for its candidness and restraint. Yet it argued that the latter was unjust though ultimately correct.[19] Other media outlets would not be so forgiving in their coverage of *Kelo*.

In the following chapter, I explore Dissensus Dynamics Theory through a case study of these two eminent domain rulings. I show how the newsworthy features of *Kelo* raised the salience of government takings during this time frame. I demonstrate that the press's portrait of property rights shifted dramatically between April and July. But more importantly, I show how *different voting outcomes in the cases strongly influenced their coverage*. The unanimously-decided *Lingle* did little to disturb vague media narratives about the invulnerability of American property rights, even as it rendered these narratives hollow. But the 5-4 outcome in *Kelo* had both direct and indirect effects on coverage. Internal disagreements on the Court caused the press to call into question the wisdom of the decision and raise alarms about property rights in the United States. Dissenting justices most effectively influenced media coverage when they employed evocative language to describe the ramifications of the decision. At the same time,

[19] "Judicial Takings and Givings." *Washington Post*. May 29, 2005. "Eminent Latitude." *Washington Post*. June 24, 2005.

though, the presence of judicial disagreement caused reporters to highlight other critics of the ruling, from high-ranking members of Congress to ordinary homeowners.

The results provide evidence for the basic tenet of Dissensus Dynamics Theory: that the press fashioned its coverage of eminent domain rulings in response to the level of internal disagreement among the justices themselves. But they also add to our understanding of the model, demonstrating how coverage of a legal controversy changes over time and how the effects of judicial dissensus are idiosyncratic, as the press highlights only the most newsworthy frames espoused by Supreme Court justices.

The Case Study Approach

Case studies allow researchers to identify causal mechanisms and clarify concepts and measures in a manner not afforded by large *N* research (Gerring 2007, Mahoney 2000). Case studies further allow the generation and evaluation of key hypotheses when done with care. In this chapter, I appraise how the national press frames Supreme Court rulings through a case study of property rights law. I expect that Court voting coalitions influence the content of press reports, with more dissensual and ideologically-narrow rulings garnering unsupportive coverage. While exploring this hypothesis, I intend to provide a more robust portrait of press coverage. What frames does the media use to characterize Supreme Court decisions? What influence do written opinions have on coverage? How do decisions change the coverage of an issue over time? What other mechanisms translate rulings into press reports?

To answer these questions, I use a most-similar design. This approach enables the researcher to isolate an explanatory variable while controlling for other confounding factors in the cases under investigation (Gerring 2007, Seawright and Gerring 2008). Ideally, a most-similar design would control for the following case features, listed in order of importance: issue under consideration, substance of decision, ideological direction of decision, time period, legal significance of decision, Court membership, political climate, and involvement of other political actors. At the same time, the cases selected should differ in the Court voting coalitions – one consensual, the other dissensual and ideologically-divided.

Two important property rights cases meet the criteria laid out above quite well. In *Lingle v. Chevron* and *Kelo v. New London*, the Court dealt with the ability of government to "take" property from private parties, in accordance with the Fifth Amendment of the Constitution. The

cases were decided exactly one month apart, in 2005, with the Court offering a broad interpretation of government power in both. Many scholars consider *Lingle* and *Kelo* to be among the most significant property rights rulings in decades (Baron 2007; Nadler, Diamond, and Patton 2008). But despite these similarities, the justices themselves diverged in their interpretations of the cases, splitting 5-4 in *Kelo* while reaching a unanimous agreement in *Lingle*.

In the following pages, I trace the history of *Lingle* and *Kelo*, exploring their important similarities, differences, and how well they fit the most-similar case comparison criteria.

The History of *Lingle* and *Kelo*

On Tuesday, February 22, 2005, the Supreme Court heard arguments in two cases that would soon form a major part of its takings jurisprudence. Both cases dealt with the Fifth Amendment's Takings Clause, which provides, "…nor shall private property be taken for public use, without just compensation." The Court has traditionally interpreted this clause to give the government wide latitude in seizing property for public use and to require the government to pay fair market value for such property (Dana 2006, Sax 2005, Sterk 2006, *Berman v. Parker*).

In *Lingle v. Chevron U.S.A Inc.*, the Court was adjudicating a dispute on appeal from the U.S. Court of Appeals for the Ninth Circuit. The case involved a challenge to a law enacted in the state of Hawaii in 1997 to curb high prices on gasoline. The law placed a limit on the amount of rent that oil companies could charge to lease their service stations. The gasoline refiner Chevron U.S.A. challenged the act as an unconstitutional regulatory taking of property,[20] and two lower courts sided with Chevron, finding that the Hawaii law did not "substantially advance a legitimate state interest." The Supreme Court heard arguments as to whether the "substantially advance" test, which it had applied in earlier property rights decisions, was an appropriate one for evaluating regulatory takings.

On May 23, 2005, the Court released a unanimous verdict, written by Justice Sandra Day O'Connor, that struck down the "substantially advance" formula. In finding that earlier applications of the formula were unclear, the justices ruled that courts should not evaluate the purpose of regulations to determine whether they constitute a compensable taking. Though the

[20] A "regulatory taking" does not involve the physical taking of property but rather occurs when government restrictions become so onerous as to have similar consequences to a physical taking.

Supreme Court remanded the case for further consideration, the decision debilitated Chevron's challenge to the rent-control act. *Lingle v. Chevron* substantially broadened government power to regulate property and conduct takings without having to demonstrate a "legitimate" interest in doing so (Baron 2007, Barros 2006, Merrill 2010).

Similarly, the Court offered a broad interpretation of government power under the Takings Clause in *Kelo v. New London*. At issue in the case was an economic development plan approved by the city of New London, Connecticut to deal with its financial distress. The plan capitalized on the arrival of the pharmaceutical giant Pfizer to the area by creating space for a hotel, restaurants, retail outlets, and offices, among other things. The city intended to use its eminent domain power to acquire land from homeowners who were unwilling to sell it, providing them with compensation for their property. Two of these homeowners, Susette Kelo and Wilhelmina Dery, challenged the city's use of eminent domain as a violation of the "public use" requirement in the Fifth Amendment.

On June 23, 2005, the Court ruled against the plaintiffs, finding that New London's economic development plan did indeed serve a "public purpose." Writing for the majority, Justice John Paul Stevens noted that public benefits of the economic development plan fulfilled the public use requirement. Furthermore, he emphasized deference to the New London legislature, affirming an expansive government power to employ eminent domain where lawmakers deem appropriate (so long as they provide compensation for seized property).

Four justices raised strong objections to the decision. One dissenting opinion, written by O'Connor and signed by Justices William Rehnquist, Antonin Scalia, and Clarence Thomas, charged the majority with abandoning a "long-held, basic limitation on government power." They argued that economic development projects served a private purpose, not public use. Ominously, they warned, "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner" (*Kelo v. New London*, O'Connor dissenting). In a separate dissent, Thomas offered a textual analysis of the Fifth Amendment to show that the majority had misinterpreted it. He further suggested that the decision would give new power to wealthy interests at the expense of minorities and the poor (*Kelo v. New London*, Thomas dissenting).

To make meaningful inferences about the effect of judicial votes in these two cases, one must be confident that *Lingle* and *Kelo* are similar in many of their other characteristics. Table 4.1 catalogues the most important features of the cases, which I discuss in further detail below.

Table 4.1 Comparison of Two Takings Clause Rulings

	Lingle v. Chevron	*Kelo v. New London, CT*
Issue	Fifth Amendment; regulatory takings	Fifth Amendment; eminent domain
Substance of decision	Prescribes a new test to evaluate regulatory takings	Clarifies the meaning of "public use"
Direction of decision	Substantially broadens government takings power	Possibly broadens government eminent domain power
Legal significance	New test	New application
Time period	Hearing: February 2005 Decision: May 2005	Hearing: February 2005 Decision: June 2005
Court membership	Rehnquist court	Rehnquist court
Political climate	Unified Republican government	Unified Republican government
Perceived victim / losing party	Corporations / oil companies	Homeowners
Voting outcome	9-0	5-4

Most Similar Features

Lingle and *Kelo* are among the small number of cases decided by the U.S. Supreme Court that concern with the Takings Clause of the Fifth Amendment. Though the circumstances and details surrounding each case differ, they typically involve the government's ability to curtail or eliminate private property rights for public goals. Indeed, a wide range of legal scholarship acknowledges the similarities between *Lingle* and *Kelo*, considering their joint implications for takings law in the United States (Baron 2007; Barros 2006; Wroth 2005; Breau 2006; Fletcher 2006; Ely 2004; Nadler, Diamond, and Patton 2008).

Nonetheless, the cases deal with different aspects of takings: *Kelo* with the physical seizure of private property known as eminent domain and *Lingle* with regulatory takings (whether a legal regulation is so onerous as to constitute a compensable taking of property;

Baron 2007). This distinction has little legal or practical significance; according to O'Connor, regulatory takings and eminent domain appropriations are "functionally equivalent" (*Lingle v. Chevron*, 539; see also Kent 2011). Both regulatory takings and eminent domain decisions adjudicate whether the Takings Clause of the Fifth Amendment permits specific invasions of private property rights.

The Supreme Court's rulings in *Lingle* and *Kelo* reinforce the parallels between the regulatory takings and eminent domain questions. In the most reductive terms, *Lingle* remanded the dispute over Hawaii's rent control act to a lower court while making it more difficult for challenges to the act to succeed. *Kelo* allowed the use of eminent domain for economic development to proceed in New London and other cities. Both cases offered a similarly broad interpretation of the government's power under the Fifth Amendment (Fletcher 2006, Ely 2004). They rendered it significantly more difficult for property owners – whether companies or individuals – to successfully block government takings. Indeed, scholars have viewed *Lingle* as noteworthy for eliminating the due process "substantially advances" test, affording government more latitude and requiring less justification for takings (Baron 2007, Barros 2006). Others view *Kelo* as redefining "public use" to similar ends (*Kelo v. New London*, O'Connor dissenting, Thomas dissenting; Kanner 2006).

The temporal proximity of the *Lingle* and *Kelo* decisions further underscores their similarities. Argued on the same day, the cases were decided exactly one month apart, near the end of the Court's 2004-2005 term. The same nine justices heard oral arguments and voted in each case, ensuring that the different press reactions to each cannot be attributed to views about the Court's membership itself. Similarly, the makeup of the other branches of government remained constant between the two cases, with Republicans controlling both houses of Congress and the presidency. Most importantly, the minimal time span between the *Lingle* and *Kelo* decisions ensures that the popular understanding of property rights remained largely identical. Between May 23 and June 23, there were no major shifts in the way in which the media or public discussed property rights in the United States and no other major controversies involving the Takings Clause.

These broad similarities make *Lingle* and *Kelo* strong candidates for a most-similar case study design, allowing us to rule out the alternative explanations that differences in the content of coverage stem from distinctions in their issue area, legal significance, or political context.

Distinctions and Other Accounts of Differences in Coverage

One of the most important distinctions between *Lingle* and *Kelo* involves their voting outcome (the explanatory variable in Dissensus Dynamics Theory).[21] In the following pages, I will make the case that the voting outcome on the Court is responsible for many of the major differences in the coverage of *Lingle* and *Kelo*, but I will also disentangle why and how voting outcomes matter. I suggest that variations in majority coalition size are largely responsible for distinctions in the coverage of *Lingle* and *Kelo*, while the ideological predilections of the justices mattered minimally.

One other important difference between *Lingle* and *Kelo* complicates the analysis of their press coverage: the identity of the losing party (Nadler, Diamond, and Patton 2008; Baron 2007). The Chevron corporation, a major oil refiner, was unlikely to elicit sympathy from either the press or the public after the Supreme Court ruled against it in *Lingle*. On the other hand, plaintiffs Susette Kelo and Wilhelmina Dery made ideal protagonists as humble homeowners seeking to defend their property from the invasion of the New London municipal government. As Nadler, Diamond, and Patton (2008) argue, human-interest stories played a large part in the public's revulsion to the *Kelo* ruling.

It is imperative that any study of the divergent press reactions to *Lingle* and *Kelo* account for how much can be attributed to the judicial voting coalitions and how much to their perceived victims. One way to do so involves entertaining two counterfactuals. First, how would press coverage of *Kelo* have changed if the plaintiffs elicited less sympathy? On the one hand, it is likely that some of the human-interest coverage of the case would have evaporated. And public antipathy would have diminished to the extent that Americans did not view the ruling as violating the property rights of sympathetic claimants (Nadler, Diamond, and Patton 2008; see also the discussion of culturally congruent frames in Entman 2004). But a number of stories involving *Kelo* framed the case as one that had little to do with its victims and more to do with its legal shortcomings. These frames, raised by O'Connor and others in their dissenting opinions, would have remained.

[21] One may question why the voting outcomes differed so dramatically in the cases if they were otherwise similar. Recent scholarship suggests that the justices have preferences not only about resolving the legal issues in a case but in resolving a concrete dispute between parties (Carrubba et al. 2012). For this reason, we may speculate that the justices were more reluctant to rule against the New London homeowners than they were against Chevron (and, at any rate, the Court's decision to remand in *Lingle* allowed it avoid ruling against Chevron directly).

Second, one might ask, had *Kelo* been decided by a unanimous vote, how would this have changed its press coverage? To answer this, consider that the Supreme Court's eminent domain jurisprudence, which covered twelve cases as of 2005, has featured a variety of petitioners. Almost all of these cases have passed without substantial negative attention in the press and almost all of them were decided by consensual votes on the Court (Sax 2005). For instance, the unanimous ruling in *Hawaii Housing Authority v. Midkiff* (1984) upheld the state's plan to seize property from individuals who held large swaths of land and transfer it to others. In *Berman v. Parker* (1954), the Court upheld, by a vote of 8-0, the use of eminent domain on an entire blighted neighborhood in Washington, D.C. In these cases – where the Court ruled against a wide range of claimants – unanimity protected the institution from press backlash.

In the follow pages, I will make the case that the negative frames used by the news to characterize *Kelo* can be traced in large part to its status as the only 5-4 ruling in Takings Clause jurisprudence at the Court. I explain how two otherwise similar takings cases, decided just one month apart, garnered very different treatment in the press as a result of their voting outcomes.

Study Design

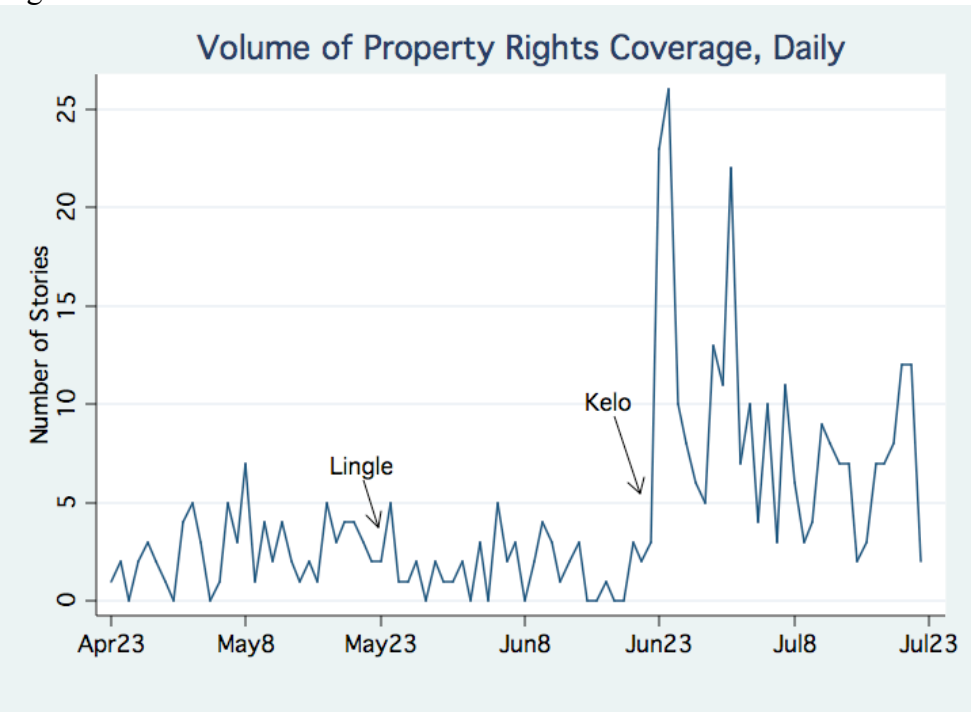
The mainstream news media affords limited coverage to property rights as a general rule. But as we will see, the Supreme Court's decision in *Kelo v. New London* triggered a spike in attention, as news outlets discussed eminent domain with regularity. Why did *Kelo* lead to such different reactions than *Lingle*? How did media discussions of property rights evolve from the spring of 2005, before these decisions, to the summer? What frames did the press highlight? How did it portray the Court's rulings?

To answer these questions, I gather coverage of the property rights issue from ten leading media organizations. I use stories from the *New York Times*, *Washington Post*, *Washington Times*, *USA Today*, CNN, Fox News, MSNBC, *Newsweek*, the *National Review*, and National Public Radio. These sources vary in both ideological orientation and medium (newspaper, cable news, magazine, and public radio). Nonetheless, because each source offers original reporting on the Supreme Court, I expect the factors and constraints influencing their coverage to be similar (see Chapter 3). I conduct Lexis-Nexis keyword searches for any of the following terms: "private property," "eminent domain," "fifth amendment," "takings clause," "lingle," or "kelo."

There are 394 news articles and segments that mention one or more of these terms between April 23 and July 22, 2005.[22]

To analyze the effects of the Supreme Court's takings jurisprudence on coverage of property rights, I divide the coverage period into three phases: Phase 1 pre-*Lingle* (April 23-May 22), Phase 2 post-*Lingle*, pre-*Kelo* (May 23-June 22), and Phase 3 post-*Kelo* (June 23-July 22). Figure 4.1, which plots the number of property rights stories on a daily basis, makes clear the importance of *Kelo* in raising the salience of the issue.

Figure 4.1



[22] All sources offer substantial coverage of property rights, except *Newsweek*. By source, the number of articles / segments: *New York Times* 71, *Washington Post* 83, *Washington Times* 51, *USA Today* 19, CNN 61, Fox News 25, MSNBC 30, *Newsweek* 0, *National Review* 17, and NPR 37.

Figure 4.2

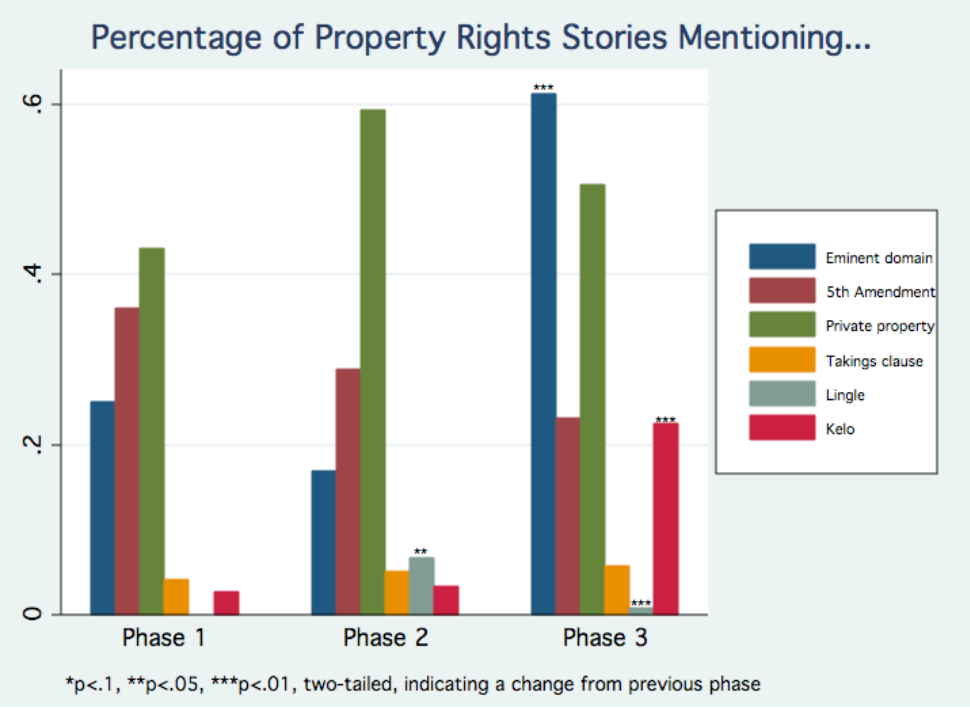
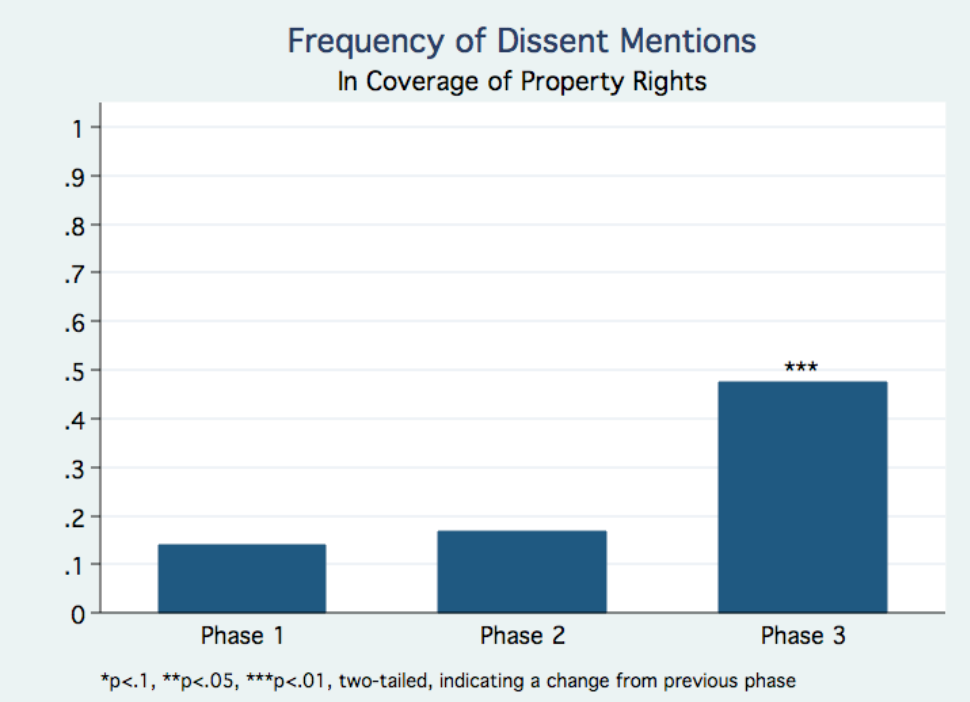


Figure 4.3



One observable implication of Dissensus Dynamics Theory is that the press will frame an issue in different terms depending on whether a relevant Court ruling is consensual. We would expect the media to employ distinct frames to characterize property rights after *Lingle* than it does after *Kelo*. And indeed, each decision has a distinct effect on the media's characterization of the issue (see Figure 4.2). Stories discussing the Fifth Amendment decline from 36 percent of all property rights news in Phase 1 to 29% in Phase 2 and then to 23% in Phase 3. On the other hand, the post-*Kelo* world becomes one in which the eminent domain frame defines the issue (over three-fifths of stories include its mention). Not surprisingly, the Court's announcement of decisions also changes the shape of coverage, with discussions of *Lingle* peaking in Phase 2 (7% of stories) and those of *Kelo* in Phase 3 (22% of stories).

Given the considerable similarities between *Lingle* and *Kelo*, why might press coverage of government takings have changed so dramatically from April to July 2005? Recall that two major differences in the cases involve their perceived victims and voting outcomes. We can explore the salience of these features as expressed by the content of media coverage across the three phases. To do so, I conduct searches for mentions of "dissent" and indicators of victims in property rights struggles. I use the Supreme Court's written opinions in *Lingle* and *Kelo* as a guide for how victimhood may be framed, focusing on invasions or intrusions of personal property, as well as mentions of vulnerable populations like the poor, the weak, and minorities.[23] As a percentage of all property rights coverage, mentions of victims occur *least frequently* in Phase 3, after *Kelo* limits the rights of homeowners to fight eminent domain. At the same time, mentions of judicial dissent alongside discussions of property rights spike in Phase 3, as Figure 4.3 indicates.

The media's apparent attentiveness to judicial dissensus following the *Kelo* decision does not verify that the dissenters' arguments dominated coverage. Nor does it explain why the case drew so much notice. But it does indicate that the press pays attention to dissent on the Court. Between the end of May and the end of June, the media's coverage of property rights expanded dramatically, with discussion of the Fifth Amendment receding and that of eminent domain

[23] In *Lingle*, the Court makes no mention of the "victims" of its ruling. In *Kelo*, the majority and minority struggle over the impact of its decisions on blighted areas. More importantly, Thomas's dissenting opinion expresses worries about the impact of the ruling. It mentions the poor, weak, blacks and other minorities and warns against the invasion of "traditional" property rights (*Kelo v. New London* 2005, Thomas dissenting, 14). Based on an analysis of these opinions, I use the following search terms to denote victimization in the press: "victim", "invas", "invad", "intru", "poor", "weak", "black", "minor".

swelling. Against the backdrop of this significant change, Americans were also learning more frequently about judicial disagreements surrounding property rights.

Content of Coverage

A number of explanations may account for how judicial dissensus sets apart coverage of *Lingle* and *Kelo*. One account suggests that the cases receive identical portrayals, but that dissensus raises the salience of *Kelo* alone. This account runs contrary to the predictions of Dissensus Dynamics Theory. And as we have already seen, it is also inaccurate, for *the substance of property rights discussions changes alongside the volume of its coverage across the three phases*. Another explanation is that the relationship between press coverage and judicial dissensus is, in this case, spurious. There is little evidence for this explanation, given the fact that the Supreme Court decided by large majorities other property rights issues in its recent history, none of which led to a dramatic reversal in press coverage. *Lingle* and *Kelo* themselves differ minimally in the nature and direction of their decisions, occur within the same time frame and political climate, and yet vary dramatically in their media treatment. A third explanation sees judicial dissensus as an important signal that only indirectly influences press coverage of an issue. In this scenario, consensual and dissensual decisions trigger different types of coverage, but the Court's opinions do little to shape the content of this coverage. In the case of *Kelo*, the specific arguments raised by O'Connor and other dissenters would be much less relevant than the fact that they dissented in the first place. Finally, another explanation suggests that the press draws directly on the frames and arguments supplied by dissenters when shaping its coverage. For instance, media outlets may choose to highlight criticisms of the majority's definition of "public purpose" in *Kelo* precisely because the dissenters offer this argument.

In the following pages, I will make the case that dissent in *Kelo* exerts both a direct and an indirect effect on coverage of property rights. The frames used by the dissenters have some effect on the content of media coverage, but their impact is idiosyncratic. O'Connor's warning about the vulnerability of property rights in the wake of *Kelo* strongly influences coverage. Other frames track closely the debate between the majority and dissent, but some do not. For instance, Thomas raises two key considerations – an originalist interpretation of the Constitution and the effects of eminent domain on minorities and the poor – but only the latter gains traction in the media.

Based on this evidence, I argue that *the specific frames used in written opinions gain traction to the extent that they help the press craft simple yet dramatic coverage*. So while the voting outcome in *Kelo* allowed the press to offer a variety of counter-frames to rebut the Court majority, it only drew on the most newsworthy arguments raised by the dissenters.

Phase 1: Pre-*Lingle*

Prior to *Lingle*, the national press offers a steady but small stream of property rights coverage. The coverage ranges from detailed examinations of eminent domain to appeals regarding property rights to reports on property law and courts; from invocations of American values to unrelated discussions of the Fifth Amendment.[24] The modal story gives only passing mention to a vague notion of private property, with little discussion of the concept. A *Washington Post* story from May 20 is typical. The article discusses federal efforts to reshape the Endangered Species Act, noting a need to balance private property rights with habitat protection.[25] A May 6 segment on Fox News illustrates even more clearly the offhand references to private property that occur in the pre-*Lingle* phase, with a guest on *The Big Story* joking that "there's no controversy about Marxism, except for the sticky bit about no private property."[26] News coverage often reinforces the assumption that private property rights are sacrosanct. According to Fox News host Bill O'Reilly, "seizing private property after an American dies is simply socialism."[27]

Such straightforward invocations of property values make up a large portion of pre-*Lingle* coverage. Nearly half of all articles in this phase talk about private property and the average story includes 13 related words (i.e., "home", "right", "own"). The frequency of private property discussions here is not out of the ordinary, however, as this frame dominates coverage even after the Supreme Court's rulings in *Lingle* and *Kelo*. It is more notable, in fact, that the press does little to flesh out its portrait of property rights in more detailed terms.

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[24] Applebome, Peter. "Clear the Way, Fellows. The Yellow Brick Road is Coming Through." *New York Times*. May 8, 2005. "Defending the Neighborhood" *Washington Post*. May 7, 2005. Downey, Kirstin. "Revitalization Projects Hinge on Eminent Domain Lawsuit." *Washington Post*. May 21, 2005. Rahn, Richard W. "A Run on the World Bank." *Washington Times*. June 3, 2005. Kasindorf, Martin. "Jackson Defense Strategy: 'A Lot of Witnesses.'" *USA Today*. May 2, 2005.
[25] Eilperin, Juliet. "Legislators Working to Reshape Endangered Species Act." *Washington Post*. May 20, 2005.
[26] Gibson, John. *The Big Story with John Gibson*. Fox News. May 6, 2005.
[27] O'Reilly, Bill. *The O'Reilly Factor*. Fox News. April 29, 2005.

Two other important frames play a large part in Phase 1 coverage. Discussions of eminent domain and the Fifth Amendment take place with regularity. Both topics come up more frequently than in the post-*Lingle* phase (though *Kelo* returns the issue of eminent domain back to the media's gaze). Most of the coverage of the Fifth Amendment, however, has little to do with property rights and more to do with the Michael Jackson child molestation trial during this time period (cable news, in particular, paid careful attention to the witnesses' frequent invocations of the right against self-incrimination).

Eminent domain is another matter. News organizations publish 18 stories on the topic that deal with a range of projects and controversies. Most of these stories are impressively detailed. The *Washington Post* offers a portrait of the *Kelo* case.[28] Other articles focus on projects using eminent domain in Brooklyn; Manhattan; Salina, N.Y.; and Washington D.C.[29]

Consider one article, entitled "Fighting the Power to Take Your Home," which explores the process for condemning homes. The piece catalogues the emotional reactions of homeowners to eminent domain, characterizing the power as commonly used. Though the story raises some concerns about the tactic – and mentions the impending *Kelo* decision – it also depicts takings law as fairly straightforward. "Most people accept the practice of eminent domain, even if they consider it unpleasant and distasteful," the article notes. According to one lawyer, "without eminent domain, we'd hamstring the general public's interest at the expense of one individual."[30]

Despite conventional wisdom that *Kelo* thrust the spotlight on a little known area of the law, then, eminent domain issues were not entirely obscure in the spring of 2005. In fact, fully one quarter of the stories involving property rights in the mainstream press discuss this government power. But in the pre-*Lingle* phase, the media depicts property rights in vague and uncontroversial terms. Private property is lauded and eminent domain recognized, but very few reports detail dramatic struggles between states and property owners. Against this backdrop, the

[28] Downey, Kirstin. "Revitalization Projects Hinge on Eminent Domain Lawsuit." *Washington Post*. May 21, 2005.
[29] Cardwell, Diane. "Ferrer and Mayor Clash on Brooklyn Rezoning." *New York Times*. May 10, 2005. Murdock, Deroy. "Scrap the Freedom Tower." *National Review*. May 9, 2005. Applebome, Peter. "Clear the Way, Fellows. The Yellow Brick Road is Coming Through." *New York Times*. May 8, 2005. Nakamura, David. "Stadium Talks with Landowners Set to Begin." *Washington Post*. May 5, 2005. Fisher, Eric. "DCBSA Bid Gains Support on Council." *Washington Times*. May 17, 2005.
[30] Downey, Kirstin. "Fighting the Power to Take Your Home." *Washington Post*. May 7, 2005.

Supreme Court prepared to release its May 22 opinion that broadened the ability of the government to conduct regulatory takings.

Phase 2: Post-*Lingle*, Pre-*Kelo*

The Court's *Lingle* decision passed with little notice, in spite of the fact that it violated a popular presumption about the imperviousness of property rights. Though existing models of framing suggest that culturally incongruent frames like the one espoused by the Court – that the government need not demonstrate a legitimate interest in taking property – should activate counter-frames in the press (Entman 2004), the press does not frame *Lingle* as a violation of American values. In fact, the few stories that comment directly on the ruling express deference to the Court. According to Dissensus Dynamics Theory, the justices fostered favorable coverage by achieving unanimity.

The *New York Times* first reports on the decision on May 24 in a six paragraph article, noting, "In a unanimous ruling, the court clarified its private property precedents." The article draws heavily on O'Connor's majority opinion in describing the ruling as one that lifts confusion in takings jurisprudence.[31] Five days later, the *Washington Post* editorializes that the court "unambiguously repudiated a dangerous doctrine it had articulated in 1980, a doctrine with horrid implications for environmental and other regulatory enforcement." The *Post* relies on the language of the O'Connor's opinion in its analysis and largely focuses on the ruling's apparent legal implications. It gives only passing mention to the rent-cap on Chevron's Hawaii filling stations that sparked the lawsuit.[32] In another article, law professor Richard Garnett praises the Supreme Court's ability to achieve unanimity. He contends that, despite the fact that people focus on controversy, the Court sometimes achieves consensus in difficult-to-decide cases.[33]

Garnett's offhand characterization of *Lingle* as a complicated legal matter belies the *Times* and *Post* coverage portraying the decision as self-evident. It does, however, echo much of the legal literature on the case. In fact, there are three reasons that the ruling might have fostered greater attention and controversy in the media. First, the outcome of the case surprised some legal observers (Fletcher 2006), which may have drawn the attention of reporters and editors

[31] Greenhouse, Linda. "In Free-Speech Ruling, Justices Say All Ranchers Must Help Pay for Federal Ads." *New York Times*. May 24, 2005.
[32] "Judicial Takings and Givings." *Washington Post*. May 29, 2005.
[33] Garnett, Richard W. "Unanimous!" *National Review*. June 1, 2005.

under the right conditions. Second, many scholars view the ruling as one of the most significant in takings law (Baron 2007, Barros 2006). They argue that by discarding the "substantially advances" test, the Court fundamentally altered three decades worth of limits on the takings power, with major ramifications for property owners. News organizations could have used the *Lingle* ruling as an opportunity to explore judicial limits on property rights. They may have further framed the case as a precursor to the Court's consideration of "public use" requirements in *Kelo*. And finally, the decision appeared to violate the common assumptions about the secure nature of property rights. Some press outlets might have chosen to explore further the implications that the government does not need to feign a legitimate interest in taking property, that it can enact rent caps on business whenever it deems appropriate.

Instead, *Lingle* passed with little fanfare. But favorable coverage of the ruling (which the Court helped to ensure by achieving consensus) left other media narratives about property rights undisturbed; they remained largely unchanged from the pre-decision phase. Once again, mentions of private property occur with frequency – in nearly 60% of the articles in the Phase 2 sample. Some invocations of the term are purely descriptive. At other times, reports emphasize respect for property rights. A *Washington Times* Op-Ed typifies such a story, arguing, "Without a responsible rule of law that protects private property rights, incentives and free markets, there can be no sustained development."[34] A guest on NPR depicts the violation of property rights as unethical."[35]

With the Michael Jackson testimony ending, references to non-Takings Clause portions of Fifth Amendment decline. Similarly, the media focuses less on potential threats posed by eminent domain in the post-*Lingle* phase. As of June 22, 2005, the media had made little effort to portray property rights as under threat, despite the Supreme Court's significant enhancement of takings power in *Lingle*. Eminent domain and regulatory takings constitute a small minority of property rights news. Rather, most coverage continues to frame private property as a bedrock principle of American society, albeit one subject to reasonable limits imposed by the government and the judiciary.

[34] Rahn, Richard W. "A Run on the World Bank." *Washington Times*. June 3. 2005
[35] Inskeep, Steve. *Morning Edition*. National Public Radio. June 7, 2005.

Phase 3: Post-*Kelo*

The ruling in *Kelo v. New London* alters dramatically the media portrayal of property rights. Without question, *Kelo*'s influence can be traced in part to its violation of strong cultural norms and values regarding property (Nadler, Diamond, and Patton 2008; Lee 2006; Sax 2005). But this explanation is not enough on its own, for *Lingle* similarly curtailed protections for private property. Why, then, did *Kelo* change the way in which the media discussed property rights?

Initial reports in the wake of a news event may be quite influential. In the case of judicial decisions, this influence is magnified. Legal rulings present difficulties to reporters that must trace a case history, interpret complex jargon, parse legal implications, and explore societal aftereffects in a compelling and entertaining manner (Greenhouse 1996). In most cases, a small cadre of reporters, who have legal training and years of experience working at the Supreme Court, shape initial coverage of a ruling (Davis 1994). Their reports help structure a press narrative over time. *Kelo* provides evidence for this pattern. The initial reports on the decision focus more on its legal meaning and offer more diverse viewpoints than many subsequent stories, but they also highlight many of the same arguments that recur in later coverage.

In the first two days after *Kelo*'s announcement, over 40 stories consider the case and its ramifications. Many news sources explain the ruling as the result of a broad interpretation of public use – that courts often read the Fifth Amendment to favor the government over individual property owners. The public use frame reflects positively on the ruling in *Kelo*, as it echoes closely the majority's analysis. It further gives the impression that the types of takings endorsed by the majority are not altogether novel, but rather a continuation of a long-recognized, rarely used government power. Indeed, some reports emphasize that the Court defers to lawmakers concerning eminent domain because the public helps constrain their interpretation of "public use." According to CNN legal analyst Jeffrey Toobin:

> And basically what the majority said is, look, this belongs in the political system. If you don't like how your mayor is exercising the power of eminent domain, vote him out of office, but the Constitution is no bar to it. We're not going to get involved in micromanaging how mayors run their cities and how they exercise all their powers. The Constitution says – the literal words in the constitution are "public use." Eminent domain

> can be used for a public use. Under the majority's view, public use includes some kinds of private development that benefits the community.[36]

These reinforcing frames – that the Constitution allows takings for public purposes, broadly defined, and that courts defer to legislative judgments about them – occur with some regularity in both the initial coverage of *Kelo* and in Stevens's majority opinion. Though it is not the place of the Court to adopt a new "bright-line rule" about the meaning of public use, according to Stevens, "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." Had the media limited its coverage of *Kelo* to this argument, the portrait of the case in the press would not have differed markedly from that of *Lingle*.

Instead, however, a preponderance of the coverage frames the decision in less deferential terms. Stories highlight the Court's redefinition of public use as public purpose, the hardships the ruling will impose on homeowners, the vulnerability of private property in a post-*Kelo* society, the expansion of government power, and the privileging of wealthy interests over those of the poor. Almost all of these frames are new to the discussion of private property since the spring of 2005. Many of these arguments originate in the opinions released by the Court (particularly those of the dissenters), namely: the redefinition of public use, the vulnerability of property, the expansion of government power, and the harm done to the poor. The media readily employs the language of dissenting opinions to make these arguments (although, as we will see, some of the most compelling language in them receives a disproportionate share of the attention). On the other hand, the powerful human-interest frame gains traction due mainly to the sympathetic nature of the victims in *Kelo*. All of these frames take shape in the days after the ruling and continue to shape the discussion of the case throughout Phase 3. I consider each of them in detail below.

[36] O'Brien, Soledad. *American Morning*. CNN. June 24, 2005.

Table 4.2 Post-*Kelo* Framing of Property Rights

Frame	Part of Dissenting Opinions?
Hardships on ordinary homeowners	No
Redefinition of public use	Yes; "The Court has erased the Public Use Clause from Our Constitution" (Thomas)
Vulnerability of property	Yes; "All private property is now vulnerable to being taken and transferred to another owner" (O'Connor)
Expansion of government power	Yes; "An external, judicial check … is necessary if this constraint on government power is to retain any meaning" (O'Connor)
Privileging of wealthy interests	Yes; "These losses will fall disproportionately on poor communities" (Thomas)

The Hardships on Ordinary Homeowners

A number of stories in *Kelo*'s aftermath employ a human-interest angle, exploring the effects of the ruling on the plaintiffs and other homeowners. Susette Kelo, in particular, offered a gripping personal story. "Protecting her Victorian dream house from the urban renewal bulldozer was always going to be an uphill fight," *USA Today* notes. Kelo laments, "I am sick. Do they have any idea what they've done?"[37]

The media's attention to sympathetic homeowners is not limited to the plaintiffs, however. A number of other reports explore the ramifications of the Court's decision for a wide variety of property owners. For instance, CNN airs an interview with the son of another New London property owner, who makes plain the stakes surrounding takings: "The house, you know, is not a commodity to my father. My father came over from Italy in 1962 and, you know, land to him means that he's rich and that he's got all the gold in the world. You take that away from him, and you know, he has nothing."[38] Other reports follow suit, cataloguing the battles of ordinary homeowners to maintain their property in the face of government power. For instance,

[37] "Ruling Leaves Door Open to Abuse." *USA Today*. June 24, 2005. Salzman, Avi and Laura Mansnerus. "For Homeowners, Frustration and Anger at Court Ruling." *New York Times*. June 24, 2005.
[38] O'Brien, Soledad. 2005. *American Morning*. CNN. June 24, 2005.

the use of eminent domain for a baseball stadium project in Washington D.C. had been praised by newspapers in May 2005 but earns some unflattering press in a story entitled "Half St. Citizens Continue to Fight Ballpark Bullies."[39]

The human-interest hardship frames can be traced most directly to the sympathetic nature of the victims in *Kelo*. These frames are powerful, indeed, and likely had a major impact on the public's negative reactions to the decision (Nadler, Diamond, and Patton 2008). Nonetheless, they represent just one change in press coverage of private property post-*Kelo*, and the only one directly traceable to the identity of the parties in the case. Other private property frames are related more directly to the Court's voting coalitions.

The Redefinition of Public Use as Public Purpose

The day after the release of the *Kelo* decision, Matt Dery, the son of the case's plantiff, spoke to NPR, saying, "Yes, the Constitution does allow the taking of private property for public use, but redevelopment is not a public use." Dery gave voice to an argument that had animated the history of *Kelo* and informed the analysis of its dissenters, but had seldom appeared in the media's discussions of private property. Other commentators take issue with the majority's definition of public use as well.[40]

Not surprisingly, the most comprehensive analysis of the public use requirement comes from reporters with extensive experience at Supreme Court. These include Linda Greenhouse at the *New York Times*, Charles Lane at the *Washington Post*, Guy Taylor at the *Washington Times*, Nina Totenberg at NPR, and Jeffrey Toobin at CNN. Their detailed coverage of the Court's opinions regularly informs other pieces. Totenberg and Greenhouse put the dispute over the public use at their center of their analysis, with Greenhouse alternately quoting from Stevens's broad reading of the clause and O'Connor's objections. "The decision was a clear defeat for the long-term effort by Chief Justices Rehnquist and Justice Scalia to limit government control over private property."[41] The story also uses the powerful language of Thomas's dissenting opinion: "The court has erased the Public Use Clause from our Constitution."

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[39] Knott, Tom. "Half St. Citizens Continue to Fight Ballpark Bullies." *Washington Times*. July 6, 2005.
[40] Inskeep, Steve. 2005. *Morning Edition*. National Public Radio. June 24, 2005. Will, George F. "Damaging 'Deference.'" *Washington Post*. June 24, 2005. Simon, Scott. *Weekend Edition*. National Public Radio. June 25, 2005.
[41] Greenhouse, Linda. "Justices Uphold Taking Property for Development." *New York Times*. June 24, 2005.

Indeed, nearly all discussion of public use in the press can be traced to the Court's controlling and dissenting opinions themselves. Compared to other concepts, "public use" and its associated terms occur with a high degree of frequency in *Kelo* (and in the dissenting opinions in particular). The media's use of this frame in the post-*Kelo* phase follows from the fact that the dissenters decry the "redefinition" of public use.

The Vulnerability of Private Property

The idea that *Kelo* suddenly made private property vulnerable shattered the pre-ruling myth of its inviolability. The tenuous hold that Americans had on their homes and other possessions became a central storyline in the press. Consider the progression of print headlines regarding eminent domain: "The Limits of Property Rights" on June 24, "Your Castle No More" on June 27, "Uninformed Expropriation" on June 29, "Homeowners Lose on Property Rights" on July 1, "Your Land is My Land" on July 5, "Home, Seized Home" on July 18.[42] Many media outlets focus on the impact of *Kelo* on the ordinary homeowner, but others explore the its implications for the poor or even for large retailers.[43]

Consider how this coverage differs from the press characterization of *Lingle*'s effect on property rights. Why did *Kelo* suddenly cause reporters to suggest that the Court had attacked private property? The vulnerability frame comes directly from O'Connor's dissenting opinion in *Kelo*, where she argues, "All private property is now vulnerable to being taken and transferred to another private owner." This powerful and alarming argument has a major effect on the way in which the press views the decision's impact. Eight stories quote this phrase directly and many others build on the argument. In one of the earliest reports on the ruling, CNN warns that, "You never know when your home or business is going to be targeted."[44] The frame retains its power throughout most of July 2005, with stories raising the vulnerability concern again and again.

The influence of O'Connor's dissent suggests that justices may be particularly powerful in shaping the responses to their opinions if they craft a compelling portrait of them in a way to engage the press and public. Justice Ruth Bader Ginsburg's oral dissent in *Ledbetter v.*

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[42] "Limits of Property Rights." *New York Times*. June 24, 2005. Hudgins, Edward. "Your Castle No More." *Washington Times*. June 27, 2005. Rahn, Richard W. "Uninformed Expropriation." *Washington Times*. June 29, 2005. "Homeowners Lose on Property Rights." *USA Today*. July 1, 2005. Tierney, John. "Your Land is My Land." *New York Times*. July 5, 2005. Lambro, Donald. "Home, Seized, Home." *Washington Times*. July 18, 2005.
[43] Knott, Tom. "Land Grabbers' Aim At Skyland is Way Off Target." *Washington Times*. July 21, 2005.
[44] Blitzer, Wolf. *Wolf Blitzer Reports*. CNN. June 23, 2005.

Goodyear Tire & Rubber Co. had a similar effect, leading to a backlash to the ruling and paving the way for the Lilly Ledbetter Act in Congress (Toobin 2012).

In an interesting twist, the media also notes an effort to seize the home of Supreme Court Justice David Souter in response to *Kelo*. The plan recommended building a Lost Liberty Hotel to increase tourism and tax revenue on the site owned by "someone largely responsible for destroying the property rights of all Americans."[45] CNN, Fox News, MSNBC, The *Washington Times*, and *USA Today* covered the effort throughout July 2005.

The Expansion of Government Power

The theme of property vulnerability couples nicely with two other arguments that regularly surface in press coverage of *Kelo*: that the decision represents a dramatic expansion of government power and that it privileges the interests of the wealthy. Importantly, the ideological divide between the justices becomes most salient when the government power frame is used. NPR's legal expert characterizes the ruling as "the sort of expansive definition of government that economic conservatives generally object to."[46] The *Washington Times* pays careful attention to the matter. In its initial report on the ruling, it mentions the dissenters' argument that the Court abandoned a longstanding limitation on government power. The accompanying editorial calls the decision a victory for big government. The paper argues, three days later, that calling the decision "corporatist or fascist is no mere epithet. It designates a system that maintains the veneer of property while political authorities have extensive powers to limit rights in the name of economic planning."[47] Guests on cable news programs pick up on these arguments and raise them with regularity.

The characterization of *Kelo* as sanctioning an all-powerful government, however, was misleading. Rather than endorsing government overreach, the Court majority made clear that its decision followed the Constitution and exhibited deference to the will of elected representatives. The decision portrayed the courts as a neutral arbiter in the fight over the constitutionally mandated power of eminent domain. Furthermore, according to the Court, the public sharply constrained the ability of lawmakers to abuse this power (*Kelo v. New London*, *Hawaii Housing*

[45] Pierce, Greg. "Souter's Property." *Washington Times*. June 29, 2005.
[46] Chadwick, Alex. *Day to Day*. National Public Radio. June 23, 2005.
[47] "A Win for Big Government." *Washington Times*. June 24, 2005. Taylor, Guy. "Supreme Court Backs Eminent Domain." *Washington Times*. June 24, 2005. Hudgins, Edward. "Your Castle No More." *Washington Times*. June 27, 2005.

Authority v. Midkiff). Congress, too, failed to cooperate with the news portrayal of a unified large government apparatus. A bipartisan group of representatives called *Kelo* a serious mistake. Congressmen pledged to block federal funds for state and local governments using eminent domain.[48]

Though some news reports blame the expansion of government power on a coalition of the Supreme Court's five most liberal justices (who made up the majority in *Kelo*), this depiction fails to gain widespread traction. In fact, though the decision arguably increased government power, it did not fit soundly an ideological narrative. For instance, the ostensibly liberal majority had not only sided with the government but also, apparently, with the interests of large corporations over those of ordinary Americans. And Clarence Thomas – perhaps the most conservative justice – used his dissent to discuss *Kelo*'s ramifications for minorities and the poor.

The Privileging of Wealthy Interests

Commentators demonstrate particular concern that the redefinition of public use as public purpose would make legislatures more likely to upgrade property by transferring it to businesses (the Court majority and dissenters debated this very point in their opinions). According to Thomas:

> Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to accomplish any beneficial goal guarantees that these losses will fall disproportionately on poor communities… It encourages 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms' to victimize the weak (*Kelo v. New London*, Thomas dissenting)

Though the media demonstrates less outright concern for the rights of the poor than those of "ordinary" homeowners in *Kelo*'s wake, the decision's unequal impacts did not go unnoticed. In fact, many of the claims the press makes about the use of eminent domain in blighted areas are quite dramatic: "This is only the beginning of fleecing the poor to give to the rich." "Our new city-kings can take any property they choose – particularly if they take from the poor and give to the higher-tax paying rich." "Several justices said this is a ruling for the wealthy and against the

[48] Hurt, Charles. "Congress Assails Domain Ruling." *Washington Times*. July 1, 2005.

poor." "This situation, it seems to me, is ripe for abuse by rich developers preying on the poor, the weak."[49]

The Impact of Dissent

Lingle and *Kelo* receive dramatically different coverage, despite their similarities. In both cases, the Court upheld a broad reading of the Takings Clause, making it easier for governments to seize private property for economic development, without demonstrating a legitimate interest in doing so. Prior to these rulings, many news outlets portrayed property rights as a bedrock of American society. A few stories drew attention to eminent domain condemnations, depicting them as a rarely used tool for the good of society as a whole. Though *Lingle* did little to upend the general tenor of property rights coverage, the media used a frame of deference to characterize the decision. But *Kelo* introduced a host of new frames into the coverage of property rights, many of which raised concerns about government takings.

Two major differences drive the divergent press reactions to the decisions. To begin with, the nature of the victims in the two cases likely fostered more critical coverage of *Kelo* (Nadler, Diamond, and Patton 2008). This can be seen most directly in reports that discuss the hardships on ordinary homeowners that the decision would bring about. Because the dramatic stories of the *Kelo* plaintiffs were particularly newsworthy, this contributed to the outsize press attention to the decision. At the same time, the public's negative reaction to the decision may have been animated by feelings of threat aroused by the coverage of ordinary Americans losing their homes.

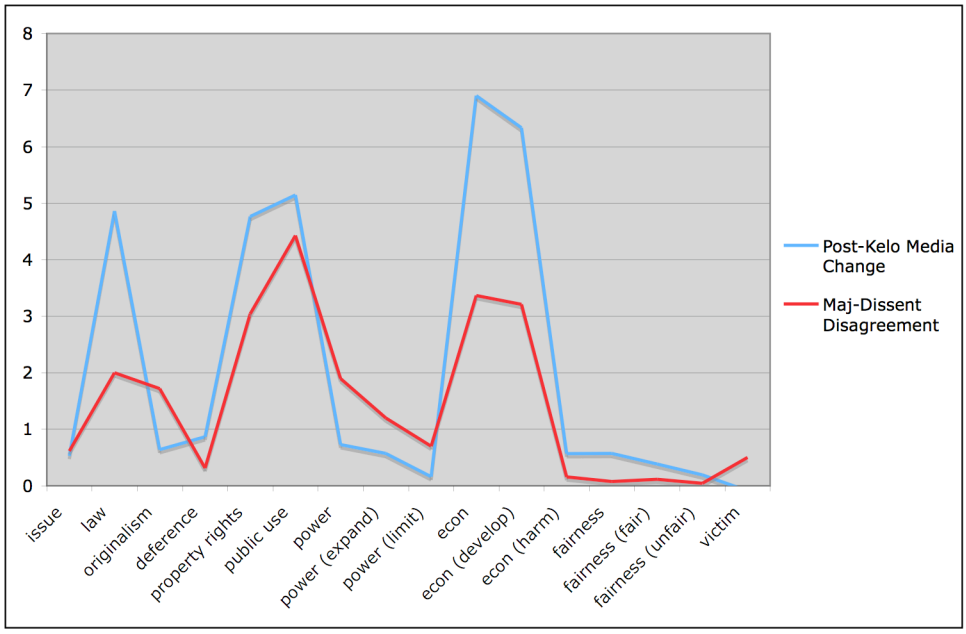
And yet, the media shaped its coverage not only around the case's victims, but in response to the closely-divided nature of its outcome. A 5-4 vote sets *Kelo* apart from the remainder of the Supreme Court's Takings Clause rulings. And absent *Kelo*'s dissenters (and two powerful dissenting opinions), many reporters might have continued to portray property seizures as rare, limited, and for the benefit of society overall. But the dissenters impacted the coverage of property rights both indirectly, by drawing attention to the case and supplying fodder for critics who disagreed with the decision, and directly, by providing frames that resonated in

[49] Knott, Tom. "Eminent Domain Ruling Slaps Down the Owner." *Washington Times*. June 30, 2005. Gaziano, Todd and Paul Rosenzweig. "A Fitting Property Rights Memorial." *Washington Times*. July 7, 2005. Conan, Neil. *Talk of the Nation*. National Public Radio. June 23, 2005. Carlson, Tucker. *The Situation*. MSNBC. June 23, 2005.

the press. In fact, the media was about three times more likely to mention judicial disagreement in its property rights coverage post-*Kelo*. And four of the frames employed by the dissenters in their written opinions came to dominate coverage of the issue in June and July 2005.

In Figure 4.4, I provide more evidence that the opinions of the justices influenced directly the content of coverage. To create this figure, I analyze the written opinions in *Kelo* to develop keyword searches for the most prevalent frames they employ (issue specific frames, legal frames, originalism, deference, etc.) These are plotted along the x-axis. The figure depicts the framing struggles in which the majority and dissenting engaged (the red line) and changes in the media framing of property rights from pre- to post-ruling (the blue line). These track close with one another, suggesting that the written opinions in *Kelo* have a direct effect on media framing of property rights, in addition to their indirect effect.

Figure 4.4 Framing of Property Rights, in *Kelo* and in the News



Blue line represents the change from Phase 2 to Phase 3 in the number of words per story using the given frame in the media. Red line represents the difference in frequency of dissenters and majority using the given frame (absolute value).

And what of the nature of the Court's voting coalitions? In the case of *Kelo*, there is little evidence to suggest that the media paid special attention to partisan politics in its discussion of property rights, in spite of the fact that the more liberal and conservative members of the Court divided over its outcome. One reason why the ideological rupture may have failed to resonate involves the unique nature of the decision, which saw liberal justices favoring an economic

development plan over, according to the dissenters, the interests of the poor. To the extent that these actions were inconsistent with existing narratives about liberalism, the media gave them minimal attention. Indeed, after the ruling, many liberal and conservative politicians joined together in attacking the Court's definition of property rights.

A Post-Hoc Account

Divergent press coverage of *Lingle* and *Kelo* provides evidence in favor of Dissensus Dynamics Theory, but it also furnishes a more full portrait of how the press uses negative frames to characterize dissensual decisions.

In order to craft simple, accurate, and dramatic accounts of legal controversies, news organizations draw on the straightforward information that the Supreme Court communicates. The justices represent the highest level of elites in legal controversies and, as other research shows, press coverage tends to highlight the range of perspectives and frames used by such elites (Bennett 1990, 2003). So when a decision is consensual, reporters rely on the analysis of the justices alone. They explain the Court's reasoning and highlight the outcome, portraying it as uncontroversial. But when a decision is conflictual, reporters use the opportunity to discuss multiple, competing perspectives on the legal controversy. They explain the findings of the Court majority but also emphasize the criticisms raised by dissenters.

But while dissent powerfully impacts the press coverage, the effects of dissenting opinions are idiosyncratic. The specific arguments raised by dissenting justices receive coverage to the extent that they are relevant and resonant. Other criticisms that the dissenters fail to raise may nonetheless gain news coverage due to the press's willingness to employ outside sources following dissensual decisions. The role of dissenters, then, is *to cause reporters to offer competing perspectives in their coverage of Supreme Court rulings, based on newsworthy frames from inside and outside the Courthouse*.

In 2005, the Supreme Court's property rights jurisprudence helped to illustrate this process. The media's reports on *Lingle* framed the decision as an unremarkable application of the Takings Clause, replete with recognition that the government at times possessed the power to sharply regulate and/or seize private property. Because the press made little effort to give voice to *Lingle*'s critics, the decision passed with minimal notice. It did little to change news coverage of property rights in the United States. But judicial division over *Kelo* allowed the press to

highlight criticisms of the Court's application of the Fifth Amendment. The media may have ignored Clarence Thomas's textualist critique of the decision, but it seized on O'Connor's contention that the Court had made all personal property vulnerable. Over time, the media built on this warning by emphasizing the human-interest consequences of the ruling.

It is important to note, however, the *Kelo*'s extraordinary resonance cannot be traced simply to divisions between the justices themselves. Rather, a confluence of factors – including O'Connor's evocative warnings, the sympathetic nature of the victims in the case, and the willingness of other critics to attack the Court – raised alarm that the decision violated "bedrock" private property rights.

Kelo continued to resonate. Before the decision, most national news coverage portrayed property rights in vague terms, as a sacred part of the political system. One year later, discussions of the issue most prominently explored the intricacies of government takings. Over 60% of the stories published on the issue between June 23 and July 22, 2006 continued to mention eminent domain controversies.[50]

Judicial dissent in *Kelo* had set forth an arresting account of property rights abuse that continued to shape coverage long after the decision was announced. In this sense, it was truly unique. But the case also illustrates how the media responds to judicial voting coalitions in covering the Court. In the following chapter, I explore whether leading newspapers in the U.S. shape their coverage similarly, with an eye towards judicial votes, across a range of high profile cases from the past three decades.

[50] I generate this data using Lexis-Nexis keyword searches as described earlier in the chapter, during the period from June 23-July 22, 2006.

Chapter 5

"I Respectfully Dissent":

5-4 Decisions, Ideological Division, and Newspaper Coverage of Supreme Court Rulings

According to one veteran print journalist, "A useful story about a Supreme Court decision, in my view, is necessarily interpretive … Readers also need to know the content of the decision, what the decision means, how the case got to the Court in the first place, what arguments were put to the Justices, what the decision tells us about the Court, and what happens next. Not all of these elements are necessary in each story, and not all of the questions can be answered in every case" (Greenhouse 1996, 1545). This perspective suggests a compelling alternative to Dissensus Dynamics Theory – that there is little systematic in how newspapers cover a wide range of judicial decisions. After all, each case brings forth a unique set of facts, claimants, legal principles, and political implications. Can we really expect news organizations to use simple voting cues in shaping their coverage of diverse rulings? Do similar principles guide coverage of 5-4 decisions involving both abortion rights and tax law simply because of the votes of the justices? Do the same factors that shape coverage of the Court's property rights jurisprudence also influence reporting on other decisions?

To be sure, the media highlights distinct features of each Court decision. It employs different frames to discuss the various issues on which the justices rule. At the same time, however, the environment facing journalists on the Supreme Court beat is relatively stable. The Court has followed a similar set of procedures in handing down decisions throughout its history (Epstein and Walker 2010). It releases a fixed set of information that includes written opinions and the case syllabus (Davis 1994). Reporters are largely at the mercy of the Court, lacking knowledge about when it will rule and access to speak with the justices (Greenhouse 1996). They remain under considerable constraints, required to simplify decisions in an entertaining and timely manner. As such, *many of the same ingredients shape journalism at the Supreme Court*

for various news organizations across cases and time. And some reporters who work on the Supreme Court beat confirm that they sketch their coverage using a consistent set of parameters (Davis 1994, 83).

Dissensus Dynamics Theory predicts that we can trace the consistent features of press coverage to the constraints placed on journalists and news organizations. To the extent that reporters observe divisions among the justices, they become more likely to highlight criticisms of a ruling raised by both the dissenters and other elites. In this chapter, I provide the first statistical tests of the theory by exploring how three leading newspapers have covered high profile Supreme Court decisions in recent decades. Newspaper coverage provides an interesting test case for Dissensus Dynamics Theory. On the one hand, organizations like the *New York Times* provide some of the most comprehensive reporting on the Court. Because many of their judicial reporters have followed a large number of cases (Davis 1994), they may more readily rely on formula in shaping their coverage. At the same time, however, these journalists also have unparalleled knowledge. They are well equipped to ignore simple cues like the voting signal sent by the Court, instead drawing on their own understanding of the law and on contacts with sources to sketch a unique portrait of each decision. To the extent that these journalists have expertise in judicial affairs, they may rely less on simple pieces of information in fashioning their coverage, making the newspaper context a difficult test of the theory.

Nonetheless, in the following pages I show that the *New York Times*, *Washington Post*, and *Washington Times* use judicial votes to guide their coverage of the Supreme Court, presenting more favorable portraits of rulings reached by large and ideologically-diverse majority coalitions. This is some of the first evidence to demonstrate the systematic nature of reporting on the Supreme Court beat.

Study Design

In this chapter, I test Dissensus Dynamics Theory with newspaper coverage of judicial rulings. I utilize a random sample of all high salience decisions handed down by the Court between 1981 and 2008. The universe of high salience cases is based on an index from Epstein and Segal (2000) that identifies rulings that received a front-page story in the *New York Times*

the day following their official announcement.[51] I focus on high profile rulings since most Americans pay attention to only a limited amount of salient judicial decisions. The sample consists of 88 cases.[52]

For each case, I conduct a Lexis-Nexis search of *New York Times*, *Washington Post*, and *Washington Times*[53] coverage of the decision by using a keyword that includes either the name of the plaintiff, or (in cases in which the plaintiff had a common name, e.g., the United States) the name of the defendant. This selection of sources includes three leading national news organizations that cover the Court extensively, provide information to many other local papers, and help shape public understanding of judicial action. Furthermore, their editorial boards represent an ideologically-broad spectrum of opinion (Ho and Quinn 2008, Peake 2007, Groseclose and Milyo 2005). I read and coded all articles (545 total) focusing on the Court's decision in the relevant case that were published within 30 days of the ruling.

Dependent Variable: *Decision Support*

The Construct

Media coverage of a single Supreme Court decision provides a profusion of frames that may reflect either positively and negatively on it. For instance, the media's treatment of property rights law during 2005 highlighted a variety of perspectives. Some of these reflected positively on the rulings in *Lingle v. Chevron* and *Kelo v. New London* (i.e., that eminent domain is used rarely and for the good of society); many of them did not (i.e., that a decision was an example of the government abusing its power). The distinction between positive and negative decision frames can be carried across other cases as well.

In this study, I am interested in thinking broadly about how media coverage varies between more and less favorable across a wide-range of Supreme Court rulings. The cost of doing so involves a loss of issue-specific detail. But the benefit involves a better understanding of how issue-independent features of judicial decisions impact their reception in the press. This may have important consequences for both the political communication literature, which largely

[51] I focus on cases that receive front-page attention to explore the content of press coverage (and not why the press covers some decisions and ignores others).

[52] The original version of this study over-sampled decisions released before 1987 and after 2005. To correct for this imbalance, I report results that include a probability sampling weight correction (reported findings are robust to the exclusion of the weights, as well).

[53] *Washington Times* coverage available from 1989-present. I examine whether source-specific effects altered the major findings present here; because they do not, I pool analyses across all sources.

overlooks the judiciary (e.g., Entman 2004, Bennett 1990), and for public opinion scholars who seek to understand more generally the conditions under which the Court can persuade (e.g., Hoekstra 1995, Johnson and Martin 1998).

To characterize media coverage in broad terms, I focus on two questions. First, to what extent does coverage depict rulings in positive terms using either implicit cues or explicit arguments? This is the supportive tone of an article (author coded) – whether it directly or indirectly expresses approval of a decision. Second, to what extent does a Court majority effectively frame news coverage? This is the frame dominance of an article (author coded) – how extensively it explains the decision, gives voice to justices in the majority coalition, and mentions supporters vis-à-vis critics of the decision.

I combine the article level measures supportive tone and frame dominance – which tap different portions of the favorable coverage construct – into a *decision support* scale (also at the article level). But Dissensus Dynamics Theory requires a decision-centered measure. So I average article scores across all coverage of a case. The ruling-centered measure of *decision support* (the DV) captures the degree of favorable coverage (in tonal and framing terms) afforded any single ruling across the entirety of its coverage.

Reliability

The reliability of a measure is the extent to which it is free from random error (Hoyle, Harris, and Judd 2002). To improve reliability, I formalize a set of coding standards for both the supportive tone and frame dominance measures. These coding standards are included in Appendix A. Using these standards, a research assistant who was blind to the study's hypotheses read and coded news coverage of a random sample of cases (10.3% of the newspaper articles).

I evaluate the reliability of supportive tone and frame dominance using percent agreement and Krippendorff's alpha. Percent agreement is .64 for the tone measure and .55 for the frame dominance measure (three coding categories for each, .33 agreement expected by change). Krippendorff's alpha is among the most conservative standards for intercoder reliability, guarding against agreement by chance (Lombard, Snyder-Duch, and Bracken 2002; Lombard, Snyder-Duch, and Bracken 2004; Krippendorff 1987; Freelon 2010). Krippendorff's alpha scores range from .425 (the frame dominance category) to .542 (the supportive tone category). These reliability scores fall short of accepted standards, which is to be expected given the

complex nature of the coding task. To the extent that measurement error is non-systematic (i.e., the difficulty of the coding task leads to random error in article level coding), this will decrease the efficiency of estimated effects without biasing them (King, Keohane, and Verba 1994).

Nonetheless I take two steps to further improve reliability. First, I use a decision-centered dependent variable (*decision support*) to alleviate inefficiencies that arise in the coding of individual articles. Though we cannot use intercoder reliability scores to assess this summary measure of decision-centered coverage, we would expect the effect of article level coding error to diminish as the media publishes more stories on a given ruling. To test this possibility, I run a simple OLS model of Dissensus Dynamics for print outlets only (see Table 5.2 on page 88). Since we expect more coverage to generate a more reliable *decision support* measure, the error term should be smaller for the most high salience decisions. This is indeed the case – high coverage volume decreases the size of the residual term (though this relationship is not significant and other diagnostics indicate that heterogeneity is not a problem for the models presented in Chapters 5 and 6). This suggests that combining multiple articles into a decision-centered measure, as I do here, may increase the efficiency of estimates and reliability of the dependent variable.

Additionally, combining the supportive tone and frame dominance measures improves reliability (the *decision support* scale). The measures are highly correlated with one another; the scale reliability coefficient (Cronbach's alpha) is .898 for the newspaper sample.

Validity

The validity of a measure is the extent to which it reflects only the desired construct without contamination from other systematically varying constructs (Hoyle, Harris, and Judd 2002). We can assess the validity of the *decision support* measure in a variety of ways.

Convergent validity represents the overlap between measures of a single construct that have different sources of systematic error. The measures of favorable decision coverage that I employ are supportive tone and frame dominance. The former taps the portion of the construct associated with direct praise for a ruling, which is most often found in editorials and Op-Eds. This measure fails to account for the ways in which a ruling can receive favorable coverage absent direct praise. Most importantly, it does not allow us to distinguish between framing contexts depending on whether they adhere to or depart from the Court's analysis. The frame

dominance measure, on the other hand, allows us to tap framing contexts that are favorable to the Court, but it overlooks whether the frames are employed to praise or criticize a ruling. For instance, coverage of *Roe v. Wade* may employ the "zone of privacy" frame to denounce the ruling as misguided (even though the majority coalition developed the frame). The shortcomings of the supportive tone and frame dominance measures are a result of the different sources of systematic error in each; I therefore combine these distinct measures of the favorable coverage construct into a scale of *decision support*.

A measure with discriminate validity serves to distinguish between the construct it taps and other constructs. One concept that is associated with but ultimately distinct from favorable coverage is *judicial activism* charges. The activism critique suggests that a court has "overstepped its institutional role" (Young 2002, 1140) by, among other things, striking down the actions of other branches, ignoring precedent, and creating legislation (Kmiec 2004). Articles scored as mentioning *judicial activism* either explicitly employ the term to describe Court decisions or extensively charge the Court with acting in an activist manner without explicitly using the term (author coded, see Appendix A for codebook). For example, an activism charge suggests that the Court is acting improperly as a policy-maker, substituting its political judgments in place of those made by legislative bodies, or overturning established law or precedent.

As we might expect, accusations of judicial activism correlate negatively with *decision support* (r =-.337) but decrease the reliability of the scale when added to it. The *decision support* scale, then, appears to tap the desired construct while discriminating between the related yet distinct construct of judicial activism charges in the news.

Finally, the *decision support* measure has strong predictive validity. To test this, I use Ho and Quinn's analysis of newspaper editorials on Supreme Court decisions from 1994 to 2004 (Ho and Quinn 2008). In a sample of 25 papers, the authors rank the *New York Times* and *Washington Post* as the most liberal and seventh most liberal sources. They rank the *Washington Times* as the third most conservative. Thus, we would expect a valid measure of *decision support* to show that favorable coverage varies depending on the relationship between source and decision ideology, all else equal. I measure decision ideology with the Bailey ideal point estimate of the median justice in a majority coalition (see Carrubba et al. 2012) and offer separate models of *decision support* for liberal (the *New York Times* and *Washington Post*) and

conservative (the *Washington Times*) newspapers. In a simple model of the effect of *majority median* on *decision support* by source, liberal newspapers project less support for rulings reached by conservative majority coalitions on the Court, as expected. This result further attests to the validity of the *decision support* measure. See Appendix B for more details involving the construction, reliability, and validity of the DV.

Independent Variables from Dissensus Dynamics Theory

Dissent

Using the Supreme Court Database (SCDB, Spaeth 2010), I focus on conflict between the justices in a given case, including the absolute size of the majority coalition (*majority votes*). Because majority and minority coalition sizes exhibit an almost-perfectly inverse relationship, I expect that as the number of majority votes decreases so too will *decision support* in the press (the Dissent Hypothesis). I also consider whether media coverage responds to other indicators of dissent, including whether a decision is *unanimous*, with no dissenting justices, or whether it is decided by a *5-4 vote*.

Ideological Diversity

I expect that news outlets pay attention not only to the presence of dissent but also the ideological makeup of the justices in the Court's voting coalitions. Martin and Quinn (2002) and Bailey (2007, Bailey and Maltzman 2009) provide widely used ideal point estimates for every Supreme Court justice in every year of his tenure.[54] I employ these estimates to characterize a case's majority and minority voting coalitions based on the year it was decided. To measure *ideological diversity* I take the absolute value of the distance between the most liberal and most conservative justices in the majority coalition, with the expectation that rulings with more ideologically-diverse majorities will garner sympathetic coverage (the Ideological Diversity Hypothesis).[55]

[54] The results are substantively similar for either set of measures. Because Bailey estimates allow for inter-institution comparisons, I report them here.

[55] Ho and Quinn (2010) caution that labels like "liberal" and "conservative" are arbitrarily assigned when describing Martin-Quinn scores. But because the press commonly assigns these designations to two distinct wings of the Court, I follow this practice here.

Independent Variables from Alternative Hypotheses

Non-Judicial Elites

One important alternative hypothesis to Dissensus Dynamics Theory states that political elites shape coverage of rulings when they disagree with them. To test this alternative hypothesis, I compare the ideological preferences of leading political actors with the ideological substance of Court rulings using Bailey's ideal point estimates, which are comparable across institutions and time. I construct the *decision-president distance* measure by taking the absolute value of the distance between the median member of a ruling's majority coalition and the president. Similarly, the *decision-House distance* captures the absolute value of the ideological preference difference between the median members of the Court majority and the House of Representatives.[56] These measures allow me to test whether disagreement with rulings from other political elites shapes the media coverage afforded them.

Political Context

A second alternative hypothesis to Dissensus Dynamics Theory suggests that the media offers more unfavorable coverage of rulings when it perceives inter-institutional conflict. So, for instance, any high profile decision handed down by a liberal Court is likely to receive negative coverage when conservatives control the other branches, since this scenario allows the press to highlight critics of the Court with ease. Using Bailey's institutional ideology scores (2007, Bailey and Maltzman 2009), I create measures of the *Court-president* and *Court-House distance*, with larger values indicating inter-institutional preference differences. And I control for the presence of *divided government* when a decision is released.

Issue Area and Issue Controversy

A third alternative explanation to Dissensus Dynamics Theory is that certain cases and issues will be inherently divisive, garnering critical press attention even when Supreme Court justices reach a consensus in ruling. I employ a measure of controversy, adapted from Blake and Hacker (2010), based on the issues on the Court's docket that receive disproportionate media

[56] The justification for using the majority median to measure the substance of Supreme Court decisions is supplied by Carrubba and colleagues (Carrubba et al. 2012).

coverage (*BH controversy*).[57] Another measure of contentiousness involves the extent to which a given case generates pre-decision interest. Because interested parties can take part in a case by filing "friend of the court" briefs, I assume that the number of amici curiae provides a proxy for the controversy and attention surrounding a case (*amici n*).[58] Finally, I use the presence of *lower court dissenters* in a case history to measure its divisiveness. This measure, available in the Supreme Court Database, captures the existence of dissent in a lower court case being reviewed by the Supreme Court. The measure allows me to consider whether certain cases or issues are inherently controversial as they make their way through the judicial system.

Decision Characteristics

Finally, I also test whether specific characteristics of the ruling (beyond the voting outcome) affect coverage. An alternative hypothesis to Dissensus Dynamics Theory is that the ideological characteristics of a decision affect coverage. For instance, the press may be particularly unsympathetic to rulings decided by conservative majority coalitions, which employ textual analysis that lacks the simplicity and drama the media craves. To account for this possibility, I control for the *majority median* of a ruling using Bailey estimates to measure decision content. This measure of ideology is among the best available ways to characterize Supreme Court rulings (see Carrubba et al. 2012). I also control for whether a decision *altered precedent* or *declared law unconstitutional*. These measures are taken from the Supreme Court Database, whose coding is based on an analysis of the written opinions of the Court. I further control for *end of term* rulings (which I define as those announced in June or July) and those written by the chief justice (*chief justice authorship*). Both of these measures use data on rulings available from the SCDB.

[57] Using the SCDB's categorization of the major substantive issue upon which the Court rules in a given case, I also create a measure of controversy for issue that arouse deeply held personal convictions in most individuals (Wisneski et al. 2009, Skitka et al. 2002). Issues coded as controversial were as follows: abortion, affirmative action, desegregation, First Amendment / obscenity, and sex discrimination. Non-controversial issues, which frequently involve legal provisions, include: libel, national supremacy, securities, and state regulation. Estimated effects are substantively similar for both measures of issue controversy and I utilize the *BH controversy* measure in all reported models.

[58] I generate this data by analyzing the number of amici mentioned in published case materials from Lexis-Nexis.

A Summary Portrait of Supreme Court Coverage

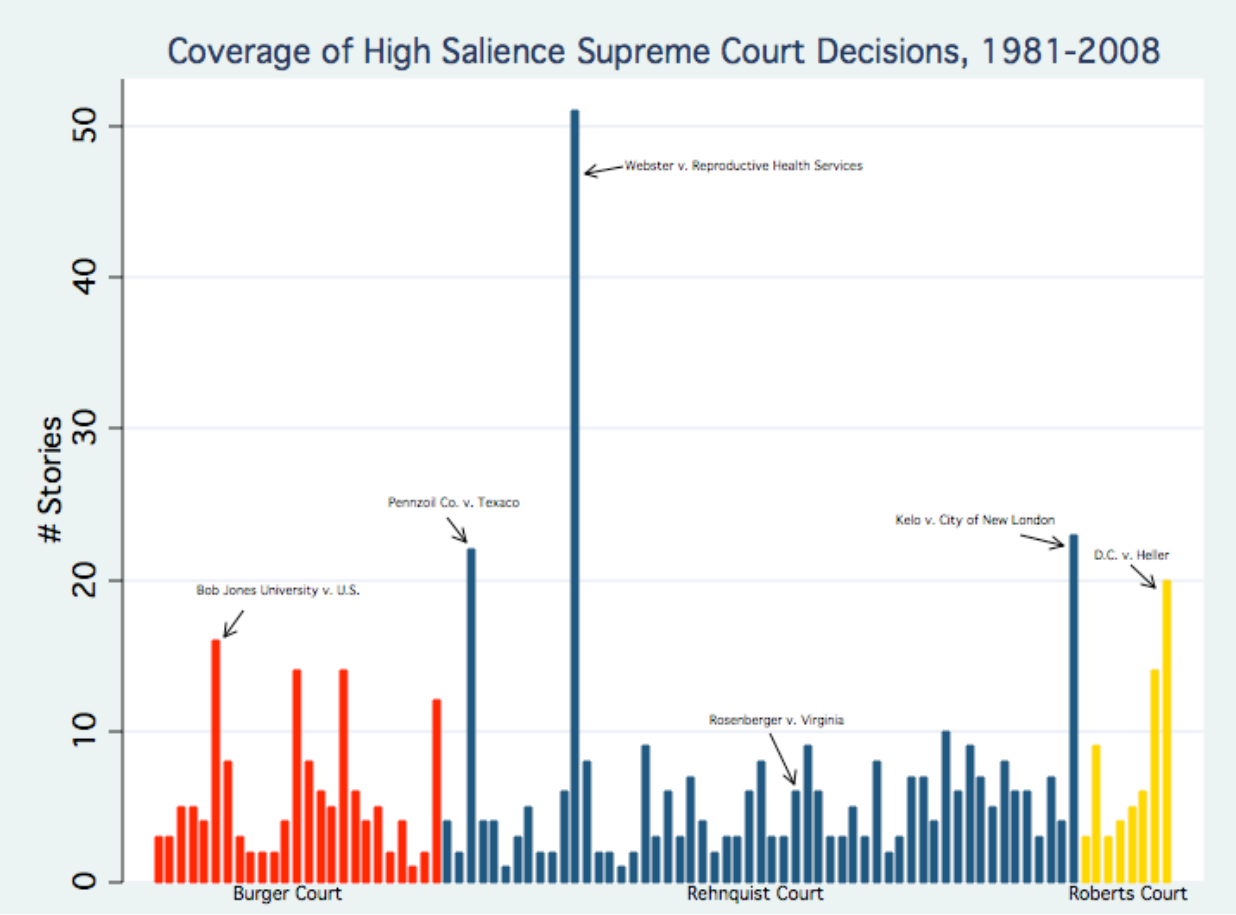
Before offering the first statistical test of Dissensus Dynamics Theory, I provide a general portrait of how leading national newspapers portray High Court rulings. In so doing, I demonstrate important variance in coverage across cases. This variance occurs not only in the volume of reports (which has been explored previously) but also in content. I suggest that the *decision support* scale provides a meaningful look at the content of coverage.

But first I offer a few words about salience. Newspapers cover landmark Supreme Court rulings with varying degrees of intensity. Some of the most prominent decisions saturate the news, with coverage most prominent the day after their announcement. While papers publish fewer articles on a case over time, it is not uncommon for the most high profile cases to be the subject of five or more stories in the month after the Court releases them. At the other end of the spectrum, even low impact decisions in the sample receive, at minimum, front-page coverage in the *New York Times*. The average ruling in the sample garners about six unique print articles after its announcement.

Figure 5.1 plots the volume of coverage for sampled cases, which has remained fairly constant since the early 1980s. Nonetheless, from time to time, monumental decisions lead to a spike in coverage. *Kelo v. City of New London* stands out as one such ruling; the 2005 decision caused newspapers to publish a host of stories that examined its implications for property rights in the United States. The press similarly paid careful attention to the abortion rights ruling in *Webster v. Reproductive Health Services*, printing nearly two stories per day on the case for an entire month. Coverage of *Webster* unfolds in accordance with a common pattern, where the press shifts over the course of time from a focus on decision mechanics to more analytic perspectives.[59]

[59] Ponce, Linda. "Justices' Decisions in High Profile Suits Defy Easy Labeling." *Washington Times*. July 5, 1989. Dellinger, Walter. "The Abortion Decision: Momentum to Confusion; The Court Steers Us Toward Social Disaster…And Threatens Other Personal Liberties as Well." *Washington Post*. July 9, 1989. Balz, Dan and David S. Broder. "Governors Assess Impact of Abortion." *Washington Post*. August 2, 1989.

Figure 5.1



What allows certain rulings to draw the attention of the press? The cases I review above suggest that decision salience stems in large part from newsworthiness. As the previous chapter demonstrates, media outlets focused on the most dramatic features of the *Kelo* ruling to shape their coverage. They allowed ordinary homeowners to discuss their personal anguish about the decision and they emphasized O'Connor's striking warning about its consequences. In both *Kelo* and *Webster*, the press uses the rulings to highlight human-interest perspectives, surprise outcomes on the Court, and controversy over the cases in American society.

More germane to our purposes, however, is the content of coverage in high profile cases. Do newspapers largely defer to the analysis set forth by the Court majority? Do they employ alternative frames that reflect poorly on rulings? The *decision support* scale provides a valid summary measure of content, showing wide variations in coverage of individual rulings.

The Spectrum of Coverage

Consider a few Supreme Court rulings that meet with the most positive newspaper clippings. In *U.S. v. Winstar Corporation* (1996, *decision support*=1), the Court ruled that Congress violated contracts with savings and loans when it tightened their accounting rules, and ordered the government to pay damages. In its lead story on the decision, the *Washington Post* focuses on the Court's reasoning. It quotes a Washington attorney who portrays the ruling as self-evident, "a straight contract law case. They [the justices] ruled that the government can't renege on a contract." According to the story, the government issued no comment about the ruling. The *Post*'s editorial board views the ruling as "Costly but Correct."[60]

Rumsfeld v. Forum for Academic and Institutional Rights (2006) garners similarly supportive coverage (*decision support*=.944). In the case, the justices upheld federal financing cuts for universities that restrict access to military recruiters. Notably, newspapers find few sources to criticize the decision. Even gay rights groups, who opposed the military's "don't ask, don't tell" policy, saw a "silver lining": the ruling would build momentum for a repeal of discriminatory policies. Editorial boards offer similar praise for *Miller-El v. Dretke* (2005, *decision support*=.875): "an important ruling that reiterates to all courts the importance of keeping discrimination out of jury selection" and a "strike against bias."[61]

How does this type of coverage contrast with less favorable reports on a ruling? A small number of judicial decisions raise the ire of print media outlets. They include *R.A.V. v. City of St. Paul* (1992, *decision support*=.313), *Bennis v. Michigan* (1996, *decision support*=.194), and *Kelo* (2005, *decision support*=.098). Unfavorable coverage frequently takes the form of editorials that offer direct criticism of the Court.[62] But even straightforward news stories portray these rulings in an unfavorable light by focusing on arguments raised by the dissenting justices and by outside sources.[63]

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[60] Knigh, Jerry and Joan Biskupic. "High Court Ruling May Add Billions to S&L Cleanup Cost." *Washington Post*. July 2, 1996.. "Costly but Correct." *Washington Post*. July 5, 1996.

[61] Files, John. "Advocates Hope Supreme Court Ruling Can Renew Attention to 'Don't Ask, Don't Tell.'" *New York Times*. March 12, 2005. "Prosecutorial Racial Bias in Texas." *New York Times*. June 15, 2005. "Strike Against Bias" *Washington Post*. June 14, 2005.

[62] Hentoff, Nat. "Scalia Outdoes the ACLU." *Washington Post*. June 30, 1992. Fein, Bruce. "Benchmarks of Absurdity." *Washington Times*. March 12, 1992.

[63] Marcus, Ruth. "Supreme Court Overturns Law Barring Hate Crimes." *Washington Post*. June 23, 1992. Murray, Frank J. "High Court Backs Asset Confiscation." *Washington Times*. March 5, 1996. Biskupic, Joan. "Court Upholds Criminal Forfeiture Law." *Washington Post*. March 5, 1996.

On average, decisions receive neutral-to-favorable news notices, with reporters quoting from or explaining rulings to readers. Coverage of the Court's landmark decision involving gun rights in *D.C. v. Heller* is emblematic of how newspapers offer a variety of perspectives on a ruling while remaining largely deferential to the judgment of the justices. The *New York Times*, *Washington Post*, and *Washington Times* published 20 stories on the case. One editorial in the *Post* offers strong criticism of the Court, calling the decision a "misguided" form of judicial overreach. A number of other stories praise the ruling as a wise and reasonable interpretation of the Second Amendment.[64] The vast majority of coverage, however, does not take a strong stance on the ruling, but instead defers to the Court majority while mentioning its critics. So, for instance, in the *New York Times*'s 1800-word lead story on the ruling, the first six paragraphs describe the legal reasoning behind the decision. The next six paragraphs highlight a dispute between the majority and dissenting coalitions over the text and history of the Second Amendment. The article goes on to review the history of gun rights in the United States and concludes with more detail about how the Court interpreted the "operative clause" of the Second Amendment.[65] Despite the controversial issue at the center of *D.C. v. Heller*, then, its coverage approximates that of the average case in the sample, featuring a diverse set of perspectives counterbalanced by deference to the majority's written opinion.

Table 5.1 Selected Summary Statistics of Newspaper Coverage

Variable	Mean	SD	Min	Max	Obs
Decision support	.67	.21	.10	1	88
Frame dominance	.71	.23	.11	1	88
Supportive tone	.63	.21	.09	1	88
Judicial activism	.10	.22	0	1	88
Stories per case	6.19	6.49	1	51	88

What factors influence how newspapers cover important Supreme Court rulings? Why does the media portray many rulings in uncontroversial terms, while it denounces the justices at other times? And when are Supreme Court rulings most vulnerable to the type of press censure that characterized *Kelo*?

[64] "Handguns Supreme." *Washington Post*. June 27, 2008. "Gun Ban Ends." *Washington Times*. June 27, 2008. Duggan, Paul. "Having Toppled D.C. Ban, Man Registers Revolver." *Washington Post*. July 19, 2008.
[65] Greenhouse, Linda. "Justices, Ruling 5-4, Endorse Personal Right to Own Gun." *New York Times*. June 27, 2008.

Results and Analysis

Framing Supreme Court Decisions

I begin by exploring the effects of a fractured Court with a simple model of *decision support*. In accordance with Dissensus Dynamics Theory, I expect that coverage of decisions becomes more favorable when their majority coalitions are large and ideologically-diverse.

Figure 5.2 shows the actual sample means of *decision support* by the number of votes in a majority coalition. It suggests that the justices can, indeed, earn favorable coverage for their decisions when they assemble large majority coalitions and limit dissent. Whereas roughly 80% of the coverage of unanimously decided cases presents them in a positive light, less than 60% of articles involving closely-divided decisions are similarly supportive. Furthermore, the ability of the Court majority to dominate press coverage depends directly on its size. Decisions reached by nine-member majorities receive more support than those of eight-member majorities, which receive more support than those reached by seven justices, and so on. There is nothing in unanimity that changes dramatically the media's responsiveness to coalition size. Supreme Court journalism appears unique in the sense that reporters respond not to the presence of conflict (i.e., they do not treat unanimous decision different than others) but rather to extent of dissent.

They also, it seems, respond to the nature of conflict. Figure 5.3 plots the relationship between ideological diversity in a ruling (the distance between the most conservative and most liberal members of the majority) and support for it in the news. Broad and ideologically diverse majority coalitions receive the most favorable types of coverage, as expected.

Figure 5.2 Majority Votes and Decision Support

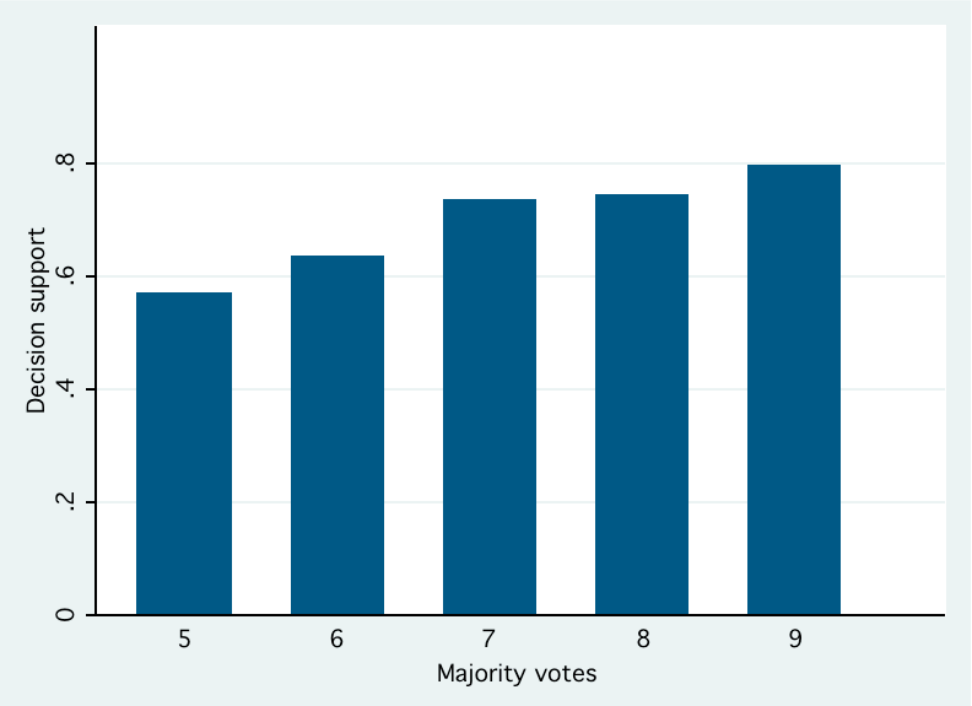
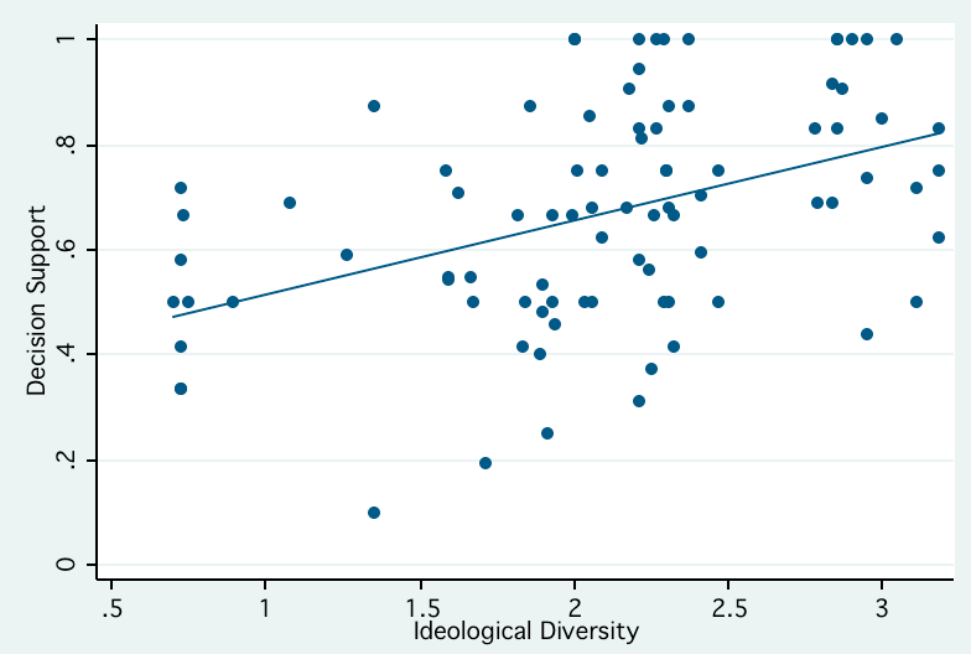


Figure 5.3 Ideological Diversity and Decision Support



But not surprisingly, there exists a strong correlation between the size and ideological-diversity of majority coalitions (r =.605), raising the question of whether press support for

rulings more directly follows from one or the other. Does the Court majority set the terms of coverage in 8-1 rulings because reporters defer to the judgments of a large majority coalition or because they defer to the judgments of an ideologically-broad spectrum of the Court? To what extent can we even distinguish between these things?

Table 5.2 Basic Models of Favorable Coverage

	(1) Decision support	(2) Supportive tone	(3) Frame dominance	(4) Judicial activism
Majority votes	.032*	.024	.039*	-.034*
	(.019)	(.018)	(.021)	(.017)
Ideological diversity	.091**	.094**	.088**	.053
	(.040)	(.042)	(.042)	(.037)
R-sq	.227	.189	.221	.273
N	88	88	88	88

Results are OLS coefficient estimates with robust standard errors in parentheses. Model 4 includes controls for *alters precedent* and *declares unconstitutional* (estimates not reported). *p<.1, **p<.05, ***p<.01.

Table 5.2 illustrates a basic test of Dissensus Dynamics Theory, where the press pays attention only to the voting signals sent by the justices. It provides preliminary support for both the Dissent and Ideological Diversity Hypotheses, suggesting that the larger and broader the majority voting coalition, the more able the Court to garner supportive coverage for its decisions. These results hold across a number of indicators of decision support including, most surprisingly, whether news outlets include accusations of judicial activism.[66] Large majority coalitions act as a bulwark against the charge, even once we control for the substance of their decisions (whether they alter precedent or declare laws unconstitutional). The media's attentiveness to judicial voting signals indicates that the Court may insulate itself from criticism when it reaches consensus.

What other factors may influence the manner in which the press frames judicial outcomes? Perhaps reporters pay attention not only to the signals sent by the Court but those offered by other elites. Perhaps certain issues on the Court's docket will generate critical press attention regardless of a ruling.

[66] Activism charges, by definition, describe judges "legislating from the bench" (i.e., striking down laws, ignoring precedent); the formal concept has no relation to coalition size.

I test the most powerful alternative explanations to Dissensus Dynamics Theory: whether elite disagreement, political context, issue area, or ruling characteristics affect coverage (Table 5.3). There are reasons to expect that the media might pay attention to each of these features. For instance, perhaps the press depends on other elites to determine which legal rulings deserve unfavorable attention (Entman 2004). One might expect that the president impacts media support for decisions depending on the extent to which he agrees with them. Presidents may praise the Court when it rules in accordance with their own ideological preferences and upbraid it when they differ. They may more willingly criticize Courts that have a reputation for ignoring their wishes. Or, given the popular standing of the Supreme Court and the risks that criticism entails, they may remain silent. Can leading political figures diminish the persuasive power of the Court with their criticism? To test this possibility, I look at what happens when the Court comes into conflict with political elites. Models 1 and 2 confirm that elite disagreement with the Court does little to alter the media coverage it receives. On the other hand, elite disagreement *within* the Court (voting coalitions) continues to matter.

But perhaps criticism of the Court will follow depending on the cases it chooses to decide. For instance, certain cases, like those involving abortion rights, are likely to be inherently divisive, which allows reporters to seek out critics of regardless of the outcome on the Court. Again, the data does not support this alternative explanation: there is no indication that issue controversy shapes press coverage of the Court. Controlling for the issue area (Model 3), attention to the case, and presence of conflict in a case history does little to diminish the impact of majority coalition size and diversity. All else equal, the presence of one additional vote in the majority coalition leads to coverage that is roughly 3.3% more supportive of the decision.[67] If the additional vote also adds to the coalition's ideological diversity (i.e., the justice who casts it is more conservative / liberal than any other majority justice), news coverage becomes still more favorable.

[67] The effect is statistically significant for *Washington Times* coverage and for *New York Times* and *Washington Post* coverage.

Table 5.3 Dissensus Dynamics Theory: Decision Support in Newspapers, 1981-2008

	(1)	(2)	(3)	(4)	(5)
Majority votes	.045**	.029	.033*	.051**	.053**
	(.021)	(.019)	(.019)	(.023)	(.021)
Ideological diversity	.067	.108**	.089**	.039	.047
	(.050)	(.042)	(.040)	(.049)	(.049)
Non-Judicial Elites					
Majority median - pres distance	.022	--	--	--	-.046
	(.025)				(.095)
Majority median - House distance	-.099**	--	--	--	.028
	(.049)				(.726)
Political Context					
Court - pres distance	--	.127	--	--	.378
		(.130)			(.464)
Court - House distance	--	.011	--	--	.060
		(.128)			(.562)
Divided government	--	-.013	--	--	.008
		(.065)			(.080)
Issue Controversy					
BH controversy	--	--	-.022	--	-.018
			(.043)		(.046)
Amici n	--	--	.010	--	.033
			(.017)		(.021)
Lower court dissenters	--	--	-.024	--	-.027
			(.043)		(.047)
Decision Characteristics					
Majority median	--	--	--	-.091*	-.098
				(.046)	(.778)
Alters precedent	--	--	--	-.075	-.066
				(.113)	(.162)
Declares law unconstitutional	--	--	--	-.020	-.037
				(.068)	(.074)
Chief justice authorship	--	--	--	.029	-.008
				(.072)	(.080)
End term	--	--	--	.011	-.042
				(.045)	(.062)
Coverage n	--	--	--	-.004	-.004
				(.004)	(.005)
R-sq	.270	.243	.195	.294	.348
N	88	88	.87	88	87

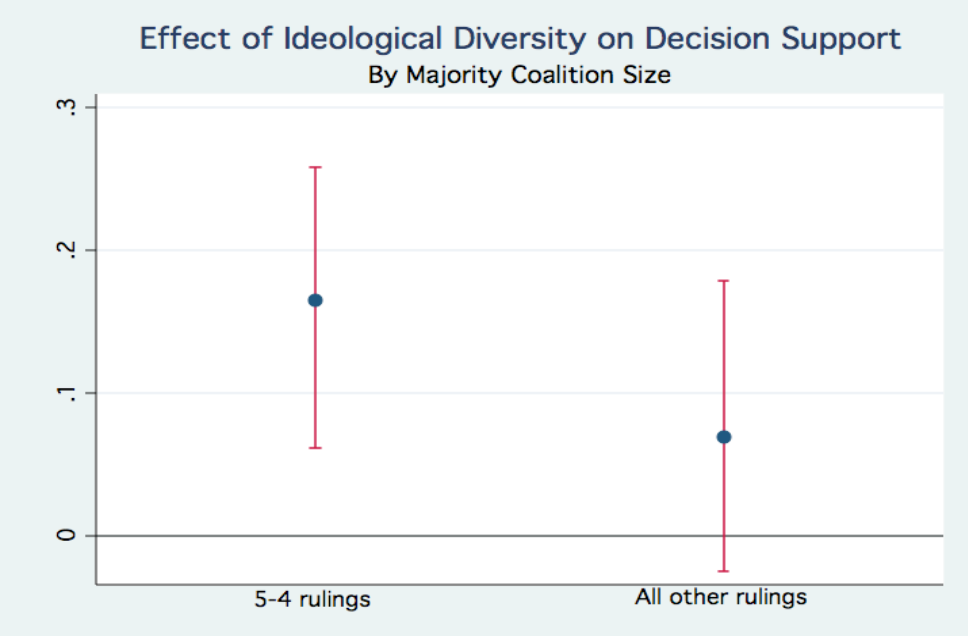
DV is *decision support*. Results are OLS coefficient estimates with robust standard errors in parentheses. *p<.1, **p<.05, ***p<.01.

Indeed, there is strong evidence that press coverage of the Court responds directly to the signals sent by the justices alone. Most importantly, large majority coalitions effectively frame decisions by garnering supportive media coverage, regardless of the issues on which they rule, the substance of their decisions, and the opinions of other elites. Across all models, the presence of one additional majority vote generates coverage that is between 2.9% and 5.3% more supportive. To evaluate the significance of this, consider that the press portrays otherwise identical decisions that are reached by five and nine member majorities in very different terms. The latter decision will receive up to 21% more positive coverage. Americans who read about these two decisions will come away with very different portraits of them. Consider the case of *D.C. v. Heller* again. Of the 20 articles published, approximately one in four portrayed the 5-4 decision in unfavorable terms. Had the justices achieved unanimity while reaching an identical decision, direct criticisms of it may have entirely disappeared from the press. In their place, readers would have likely read editorials praising the ruling.

It is unclear whether ideologically-diverse majority coalitions can similarly shape press coverage. *Ideological diversity* has uneven effects across the range of models presented in Table 5.3. This may be due, in part, to multi-colinearity in the more full specified models. It is worth noting that majority votes and ideological diversity are closely related (r =.605), particularly in the most consensual decisions. This suggests that the diversity cue is most informative to the press in closely-divided rulings.

To test this effect, I re-run Model 3 separately for 5-4 decisions and all others, with the expectation that ideological diversity most powerful affects media coverage when dissensus is high. Figure 5.4 presents the estimated coefficients and confidence intervals on *ideological diversity* in these cases, providing support for the Diversity Hypothesis in the case of 5-4 rulings. The effect of *ideological diversity* is significant in closely-divided decisions alone, meaning that newspapers frame 5-4 rulings in more favorable terms only when their majority consists of an ideologically-broad coalition of justices.

Figure 5.4

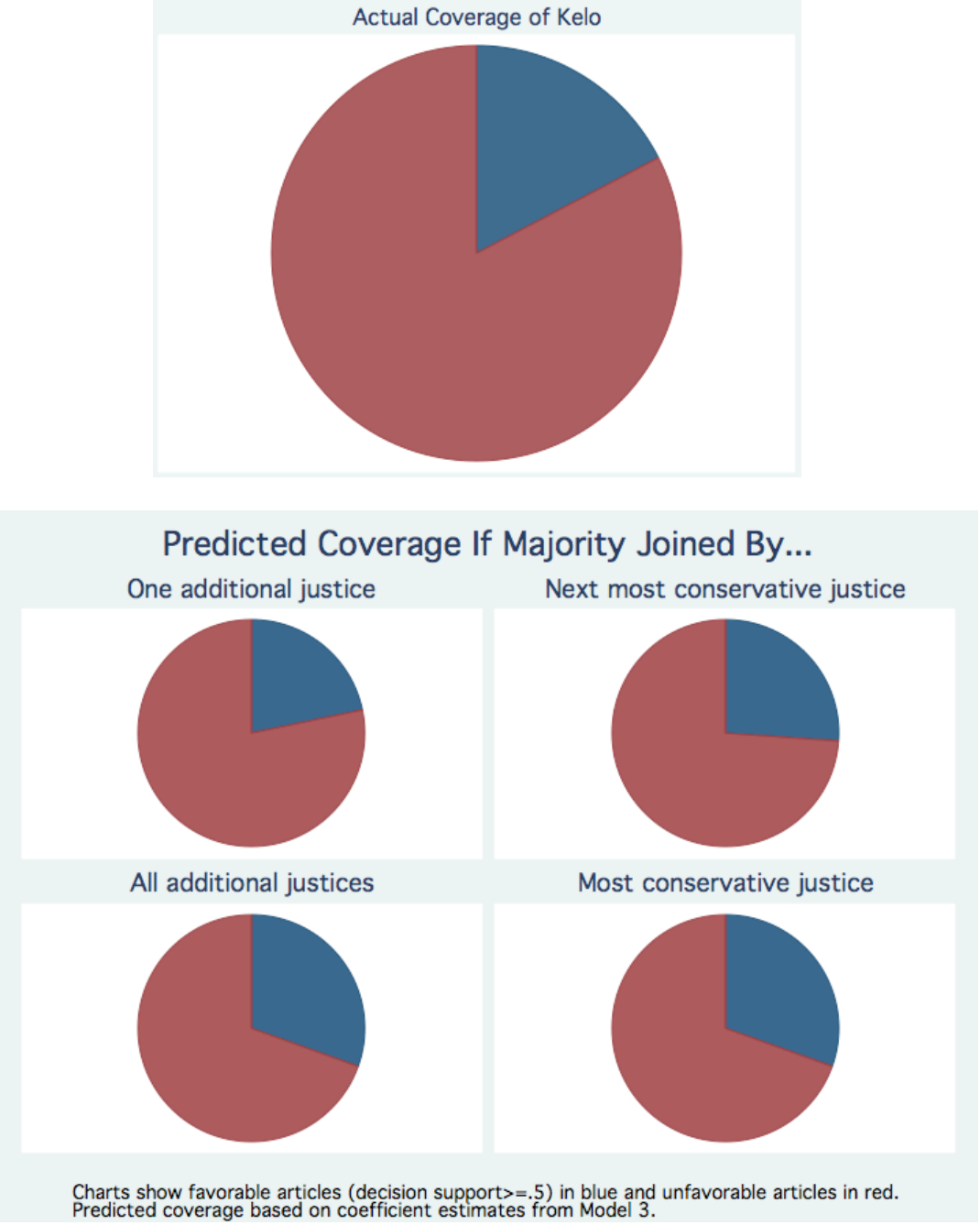


Graph shows the estimated coefficients and 95% confidence intervals of the effect of *ideological diversity* on *decision support* from Model 3, run separately for 5-4 rulings (n=30) and all others (n=58).

I use coverage of *Kelo* to provide an example of the magnitude of effects. As we have seen, the media presented the ruling in a negative light, warning about the expansion of government power and the dangers it posed to ordinary homeowners. Many of these arguments are drawn directly from the written opinions of the dissenting justices. As a result, *Kelo* receives the most unfavorable newspaper reports of any case in the sample (*decision support*=.098). The press greeted the ruling, reached by five of the Court's most liberal jurists, with tremendous skepticism.

What does Dissensus Dynamics Theory tell us about how the voting outcome in *Kelo* contributed to its coverage? I use coefficient estimates from Model 3 to explore this question. In Figure 5.5, I first graph the number of favorable (blue) and unfavorable (red) stories that were published on the decision. Then, using the coefficient estimates, I predict how this breakdown changes in four instances: when one additional justice joins the majority, when all four dissenters join the majority, when the next most conservative justice replaces a member of the majority, and when the most conservative justice replaces a member of the majority. All of these shifts have modest, yet statistically significant, effects on *Kelo*'s coverage. All told, changes in the voting outcome alone shift coverage of the maligned decision in a noticeably more positive direction.

Figure 5.5



As the press shapes its coverage of high-profile Supreme Court rulings, these results demonstrate the attention they pay to the justices themselves. Most importantly, jurists can strongly signal the presence of consensus by forming large majority coalitions and, in turn, impact positively the coverage their rulings receive. When dissenters become more numerous, however, press attention becomes more critical. But the media pays attention to another

important signal in closely-divided decisions: the makeup of the Court's voting coalitions. An ideologically-broad spectrum of justices can limit the most aggressive press censure that often accompanies 5-4 rulings. When ideological division accompanies dissent, on the other hand, the Court loses its ability to frame effectively its decisions.

Discussion

While national newspapers cover extensively some of the most important Supreme Court rulings, the nature of their coverage varies dramatically from case to case. Rather than defer to the judgments of the Court majority, reporters shape their coverage in response to the size and alignment of the majority and dissenting coalitions.

Newspaper coverage of the Court has characteristics similar to that in other areas of American politics, particularly in its reliance to elite sources (Bennett 1990, Entman 2004). But, in legal controversies, the media defers to the justices themselves at the expense of all other elites. Given the Court's popularity, it is unlikely that political actors have the incentive to criticize decisions reached by a large majority. And, given the institutional constraints faced by reporters, they too rely on the signals sent by the justices. Most directly, the size of the majority voting coalition influences strongly whether a decision meets with favorable coverage. As more justices join the Court majority, the arguments against its decision become both less numerous and less powerful, leading to more sympathetic coverage. In closely-divided cases, on the other hand, media outlets more willingly highlight criticisms of a decision. But closely-divided decisions come in different forms. When a five-member majority coalition is ideologically diverse, critics of the Court can effectively contest its decision on legal grounds, using the arguments raised by dissenters. But when the five-member majority is ideologically narrow, the media highlights both legal and political challenges to a ruling. It is these types of cases – decided by homogenous five member majorities – in which the print media may most directly circumscribe the Court's ability to persuade.

How do reporters translate voting signals into a diverse array of coverage? Evidence from the previous chapter suggests that judicial dissensus has both a direct effect on coverage by supplying criticism of a ruling and an indirect by broadening the scope of conflict, which allows outside sources to frame a ruling in negative terms. Coverage of *D.C. v. Heller* shows these mechanisms in action. Initial reports on the decision include prominent discussions of dissent,

which allows journalists to effectively navigate the constraints associated with work on the Supreme Court beat.[68] By exploring internal disagreements on the Court, reporters illuminate the meaning and scope of legal disputes in a manner that showcases conflict to keep readers interested. Reporters may also use a frame of ideological conflict when discussing rulings over which the justices disagree.

But dissent on the Court has an indirect effect as well – broadening the range of sources that reporters to consult to help shape their coverage. In its coverage of *Heller*, the *Washington Post* published a story on "new skirmishes" between advocacy groups that the ruling would engender. The report solicits reactions from presidential candidates John McCain and Barack Obama, congressmen, mayors, historians, law professors, the National Rifle Association, and Democratic and Republican campaign strategists. Many of these sources raise considerations that Supreme Court had not addressed. Pollsters debate which party would benefit more from the ruling. Mayor Richard M. Daley of Chicago asks, "Does this lead to everyone having a gun in our society?"[69] In broadening the sources it consulted, the *Post* provides a portrait of *Heller* that considers its negative consequences more fully than did the justices themselves.

This chapter provides the first comprehensive test of Dissensus Dynamics Theory across a range of decisions. Though there are reasons to expect that leading print journalists may eschew formulaic coverage given their considerable knowledge about the law, evidence suggests that the size of the majority coalition has the strongest influence on positive coverage afforded a decision. Though experienced journalists disagree about whether they rely on a template to cover the Court (Davis 1994, Greenhouse 1996), evidence from this chapter shows that they cannot help but respond to judicial voting signals.

Does press attentiveness to voting coalitions hold across other forms of media? In the next chapter, I provide a test of the theory on cable news outlets.

[68] Greenhouse, Linda. "Justices, Ruling 5-4, Endorse Personal Right to Own Gun." *New York Times*. June 27, 2008. Barnes, Robert. "Justices Reject D.C. Ban on Homeownership." *Washington Post*. June 27, 2008.
[69] Balz, Dan and Keith B. Richburg. "Historic Decision Renews Old Debate." *Washington Post*. June 27, 2008.

Chapter 6
Mediated Justice:
Dissent, Debate, and Depictions of Decisions on Cable News

On the morning of June 28, 2012, Americans who watched cable news saw a stunning, complex, and ultimately erroneous account of the Supreme Court's Affordable Care Act ruling. Minutes after the Court released the decision, a CNN reporter noted, "It appears as if the Supreme Court justices have struck down the individual mandate, the centerpiece of the healthcare legislation." The network quickly posted onscreen two banner headlines: "Supreme Ct. Kills Individual Mandate" and "Individual Mandate Struck Down." Shortly thereafter, the station switched gears, with its anchor cautioning that the Court's action "would" be dramatic, but more information was to follow.

On Fox News, the story was similar. A news anchor reported that the mandate was unconstitutional, with a banner headline noting the same. Quickly, though, Fox began to backtrack. Another anchor stepped in to suggest that the justices had upheld the Affordable Care Act law as an exercise of the taxing power (though the erroneous headline remained onscreen). CNN then updated its banner headline: "Supreme Court Rules on Obamacare." The network continued to portray the decision incorrectly, but added qualifications to its analysis. After nearly ten minutes of confusion, both CNN and Fox News confirmed that the Court upheld the individual mandate in Affordable Care Act (Goldstein 2012).

These developments help to crystallize the unique challenges facing cable news networks in their coverage of the Supreme Court. While networks strive for accuracy, they place a greater premium on instantaneous reporting than print outlets. They also may focus more on the sensational and dramatic in their coverage (Graber 2001). And the structure of cable news reporting differs in important ways from newspaper coverage. In place of edited copy written by a single journalist, cable news networks feature a variety of anchors, reporters, and guests (with

varying degrees of expertise) in their Supreme Court coverage. Because of these characteristics, cable news channels are even more likely to rely on simple cues like judicial voting signals in shaping their reports.

But no existing research examines the basis of Supreme Court coverage on cable news channels. This gap in the literature detracts from our understanding of popular responses to rulings since many Americans learn about judicial politics from television broadcasts. And because of the singular nature of the cable news environment, televised stories may have complex effects on American attitudes towards the law. The rapidly shifting and unclear reports on the Affordable Care Act ruling, for instance, provide a stark contrast to the straightforward information presented to subjects in experimental studies of policy legitimation (i.e., Hoekstra 1995, Bartels and Mutz 2009). How might differences in the informational environment affect American responses to high profile judicial decisions?

In this chapter, I apply Dissensus Dynamics Theory to cable news reports on the Supreme Court since 1995.

Cable News Coverage of Supreme Court Rulings

Compared to newspaper accounts, cable news coverage of the Supreme Court tends to be less technical, less precise, and less structured. But cable news channels more readily emphasize drama in their reports and they more willingly feature variegated perspectives offered by multiple on-camera personalities. Consider how the following cable news discussions of *Kelo v. New London, CT* (2005) employ speculation in place of legal analysis:

- "How do you justify this kind of opinion? I mean a lot of people, lay people are going to look at this and they're going to say wait a second, so some mayor wants to build a new waterfront and he can just say all right, you know what, I'm going to take that home and that home and that home and that home, and I'm going to get rid of them."

- "This situation, it seems to me, is ripe for abuse by rich developers preying on the poor, the weak and the unpolitically connected. Why shouldn't people who are powerless fear that their land is going to be taken?"

- "I think it's an example of Chief Justice Rehnquist, who may be leaving the Court shortly, not having had his way on several important issues. And this is an issue he has believed in for a long time, limiting the power of government, limiting eminent domain. But he's in the minority. He never persuaded his colleagues. And 5-4 is the same as unanimous. It's the law of the land. So this gives local politicians, local government

authorities, more or less carte blanche to condemn property and give it to other private people if they believe it's in longer term interests of the community."

- "The Supreme Court is made up of appointees from both administrations. And in this particular instance, not that it always works this way, it was the liberals that allowed government in, not the conservative members of the court. And it has nothing to do with the Bush administration. He, to date, has not appointed anybody on the Supreme Court. So this is -- you could look back to all the presidents who had the opportunity to make appointees and blame each and every one of them and that includes president Clinton, President Reagan and so on."[70]

Many of the stories involving *Kelo* used dialogue between on-air personalities to further illuminate its implications. For instance, CNN aired a pre-recorded report on the ruling from correspondent Brian Todd before cutting to anchor Wolf Blitzer, who prods for further clarifications. "How did this little community, Brian, in Connecticut get this big case?" he asks.[71] Discussions like these – which employ non-technical language to provide context – are common in cable news coverage. A number of reports also feature more animated arguments about the legal merits, political dimensions, and human-interest implications of judicial rulings.

To be sure, then, there are important stylistic and substantive differences that distinguish print and cable news reporting on the U.S. Supreme Court. And indeed, research suggests that broadcast journalism is more likely to emphasize drama and controversy (Slotnick and Segal 1998), focus on human-interest perspectives (Graber 2001, Postman 1985), emphasize partisan considerations (Iyengar and Hahn 2009, Bennett and Iyengar 2008), and eschew context for episodic information (Iyengar 1991, 1987).

But even though cable and newspaper organizations produce content that differs in style, their reporters face a similar set of constraints as they shape coverage of the Supreme Court. For instance, one important distinction that sets apart newspapers and cable news channels – the use of unedited interviews with elites, which are broadcast quite frequently on television but not often published in print outlets – does not materialize when the Court is involved. Because they lack direct access to the justices, print and broadcast reporters have the same legal information at their disposal – the written opinions of the Court. And cable news stations have goals similar to

[70] Abrams, Dan and Martin Savidge. *The Abrams Report*. MSNBC. June 23, 2005. Carlson, Tucker. *The Situation*. MSNBC. June 23, 2005. Kagan, Daryn, Jamie McIntyre, and Kimberly Osias. *Live Today*. CNN. June 23, 2005. Harris, Tony, Ken Dolan, and Daria Dolan. *Dolans Unscripted*. CNN. June 25, 2005.
[71] Blitzer, Wolf, Jamie McIntyre, Jennifer Eccleston, Karl Penhaul, Christine Romans, and Brian Todd. *Wolf Blitzer Reports*. CNN. June 23, 2005.

those of print media: to emphasize drama and conflict, present accurate yet simple information, and report in a timely fashion (Forgette and Morris 2006, Bennett 2007).

Given these priorities, we would expect cable news to closely adhere to the predictions of Dissensus Dynamics Theory, with judicial voting signals proving instrumental. All else equal, coverage is more likely to be favorable and deferential to the Court in cases when a large majority coalition forms. The ideological makeup of the Court majority provides a similarly consequential signal, which cable news programs may emphasize given their affinity for partisan conflict (Iyengar and Hahn 2009). We would expect more supportive coverage to surround rulings reached by ideologically diverse coalitions of justices.

Dissensus Dynamics Theory can also offer predictions about an important feature of the cable news environment: televised incivility (Forgette and Morris 2006, Mutz 2007, Brooks and Geer 2007, Sobieraj and Berry 2011). Mutz and Reeves define this phenomenon as political conflict in the form of "particularly tense and heated exchanges" onscreen (Mutz and Reeves 2005, 3). Consider the following example from the MSNBC program *The Situation*, as on-air personalities debate the merits of *Kelo*:

> Guest 1: I think it [the ruling] benefits the liberal wing of the Court, simply because it was done on the basis of, the stores will generate more money for government to spend than your home will.
>
> Guest 2: You can take a partisan angle on it, but there is another side to it, too, which is –
>
> (Crosstalk)
>
> Host: Well, it's not partisan. It's ideological.
>
> Guest 2: Well, to say this is a liberal problem … it's not necessarily a left-right split. On this case, the one, I think, silver lining here is that states can take action to protect homeowners if they want to. And I think states will.
>
> (Crosstalk)
>
> Host: I think what makes it a liberal issue, in effect – and a lot of liberals I know are appalled by this – but in the case of the Court, is that it's a victory over the group over the individual. The Court is essentially saying, these people can get bent in favor of the greater good.

(Crosstalk)

Host: And that's a scary precedent.

(Crosstalk)[72]

These unstructured discussions, which allow guests to interrupt one another with regularity, add a singular dimension to how the media covers judicial politics. They are so qualitatively distinct from the types of reports in print media that they deserve attention. They tend to take shape based on a few simple pieces of information (i.e., ideology of a majority coalition on the Court), which enables guests who lack legal expertise to join the debate. Furthermore, they may have important implications for the Supreme Court: though the institution depends on diffuse support to function effectively, a growing body of research suggests that aggressive rhetoric diminishes citizens' trust in the political process (Mutz and Reeves 2005, Forgette and Morris 2006, Brooks and Geer 2007).

I suggest that, much as news organizations rely on judicial voting signals to guide the extent of favorable coverage they afford a ruling, they similarly use voting signals to determine when they feature incivility in their reports. The reasons for this are twofold. To begin with, cable news producers and program hosts are more likely to feature conflictual voices on-air when the justices signal internal discord with their votes. So, in response to judicial dissensus, producers invite incivility through their selection of guests. At the same time, on-air personalities have more material to animate their arguments when the justices disagree. They may draw directly on the disputes that the majority and dissenting coalitions highlight in their analyses. Or guests may disagree aggressively about the meaning and implications of a decision by making inferences based on the voting behavior of the justices. In exchange recounted above, for instance, ideological conflict on the Supreme Court allows guests to tussle over whether the *Kelo* ruling represents a liberal expansion of government power.

Televised Incivility Hypothesis – Large and ideologically diverse majority coalitions diminish televised incivility in cable news coverage.

[72] Carlson, Tucker. *The Situation*. MSNBC. June 23, 2005.

Dissensus Dynamics Theory suggests that reportorial and editorial motivations interact with context to determine the nature of Court-related cable news coverage. To impart knowledge and provide entertainment, cable news organizations rely on the information that elites convey. With respect to the judicial branch, this information takes on a specific form: the voting outcomes that accompany their decisions.

Study Design

In order to examine Dissensus Dynamics Theory in the cable news environment, I utilize a simple random sample of all high salience decisions handed down by the Court between 1995 and 2008 (see Chapter 5). The sample consists of 48 cases, 11 of which receive no coverage from cable news stations (and are thus excluded from regression analyses). For each case identified, I review CNN, Fox News, and MSNBC coverage of the decision by using Lexis-Nexis keyword searches for the name of the plaintiff, the name of the defendant, and a term relevant to the case. I read and coded all stories focusing on the Court's decision in the relevant case that were broadcast within 30 days of the ruling (359 stories total). I then take the indicators for each story-variable and average them across all broadcasts that dealt with a given decision. The resulting score supplies a measure of the overall tenor of the coverage for each variable surrounding a single high salience Court ruling. The independent and dependent variables, which I review here, are described in more detail in the previous chapter and in Appendices A and B.

Dependent Variables

Decision support

The measurement of *decision support* uses the same procedures and standards described in Chapter 5. To capture frame dominance, I rate an article based upon how extensively it explains the decision, gives voice to justices in the majority coalition, and mentions supporters vis-a-vis critics of the decision. An indicator for supportive tone is based upon the balance given in the broadcast to viewpoints that support and oppose the ruling. For a random sample of cases (29% of stories), a blind coder analyzed cable news coverage. Krippendorff's alpha reliability

scores between the author and the blind coder for supportive tone and frame dominance were .74 and .62, respectively.

As before, I improve reliability by combing the two author-coded measures into a scale of *decision support* (Cronbach's alpha of .87). I also improve the efficiency of estimates by averaging story-level *decision support* over the entire spectrum of a ruling's coverage, which allows me to provide a summary measure of content for any given case. The *decision support* scale maintains convergent, predictive, and discriminate validity in the cable news sample. For more information, see Appendix B.

Televised incivility

To investigate the unique impact of the television medium, stories are scored as to whether they feature *televised incivility* (Mutz and Reeves 2005). In these instances, two or more figures engage in contentious debates, interacting in a less-than-cordial manner. In Appendix A, I provide a descriptive codebook that formalizes the coding standards for this variable based on the definition provided by Mutz and Reeves (2005). Percent agreement between the author and the blind coder is .76 for this measure, with Krippendorff's alpha of .49. To improve the efficiency of estimates, I again aggregate *incivility* scores across the entirety of a ruling's coverage.

The *televised incivility* measure has desirable validity properties as well. In particular, its discriminate validity allows us to effectively distinguish it from the measure of *decision support*. As we might expect, incivility on cable news programs is associated with decreases in *decision support* (r =-.406), but adding the incivility measure to the *decision support* scale weakens its reliability. Later in the chapter, I provide more evidence about the relationship between the two distinct constructs of *decision support* and *televised incivility*.

Independent Variables

To account for alternative explanations, I employ the independent variables described in Chapter 5. These allow me to test the alternative hypothesis that factors outside judicial voting outcomes influence cable news coverage. In particular, I explore whether the preferences of non-judicial elites, the political context, the issues before the Court, or the specific characteristics of decisions affect the content of cable news reports.

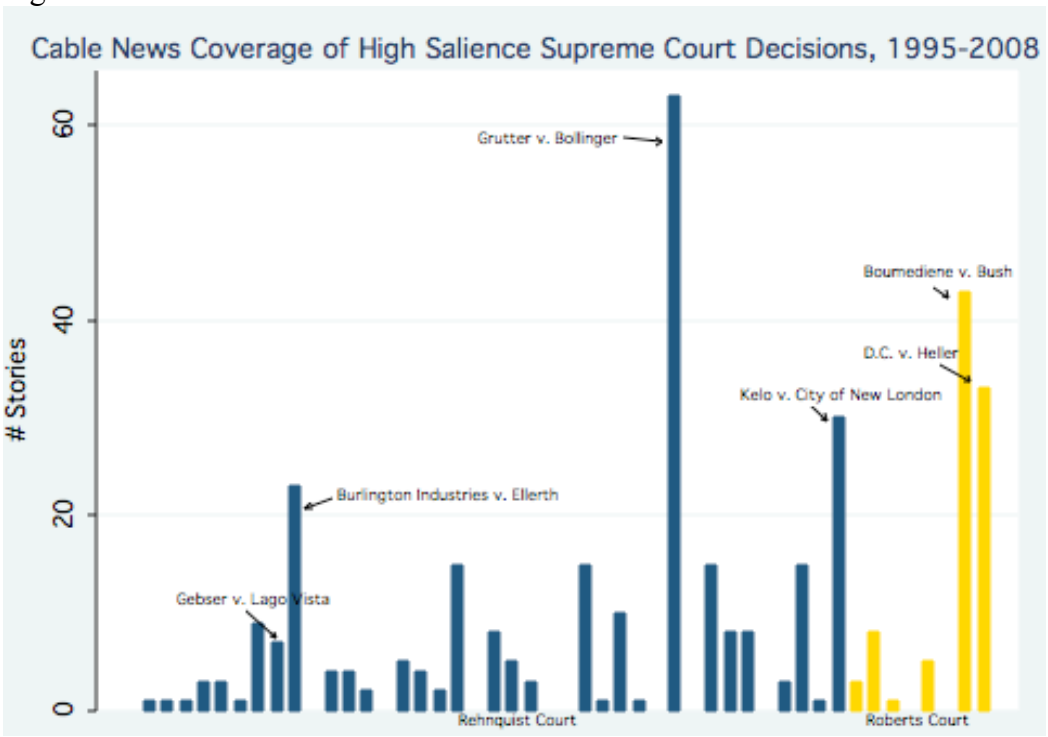
A Summary Portrait of Supreme Court Coverage on Cable News

The content analysis provides novel insight into how cable news programs portray judicial decisions. To begin with, it suggests that cable news channels pay careful attention to the Supreme Court. The typical high salience case in the sample receives nearly eight unique segments worth of coverage. To be sure, some of these stories are brief, but many others use extensive legal analysis to explore a decision's implications. Eleven of the 48 cases sampled receive no news coverage, while the Court's affirmative action ruling in *Grutter v. Bollinger* draws the most notice (63 stories).

Table 6.1 Selected Summary Statistics of Cable News Coverage, 1995-2008

Variable	Mean	SD	Min	Max	Obs
Decision support	.68	.27	0	1	37
Frame dominance	.69	.30	0	1	37
Supportive tone	.67	.28	0	1	37
Judicial activism	.07	.15	0	.67	37
Televised incivility	.14	.17	0	.6	37
Stories per case	7.58	12.33	0	63	48

Figure 6.1



The Spectrum of Coverage

A broad range of Supreme Court rulings meet with deferential press coverage, despite the fact that cable news outlets readily emphasize conflict (Forgette and Morris 2006). For instance, coverage of *Kimbrough v. U.S.* (2007; *decision support*=1) portrays the ruling as one of common sense and judicial modesty. According to one reporter, "As you know…there is a disparity between the sentences for crack and powder cocaine, and the justices basically said, look, judges can take that disparity into consideration when they are sentencing."[73] The informal language and simple analysis is emblematic of televised Court coverage, but stories on *Kimbrough* nonetheless give the viewer the impression that the justices exercised wise judgment.

In another case, *Burlington Industries v. Ellerth* (1998; *decision support*=.83), the Supreme Court ruled that companies can be held liable if they do not exercise reasonable care to prevent sexual harassment in the workplace. Cable news stations broadcast 23 stories on the decision, many of which speculate about its implications for sexual harassment suits against President Bill Clinton. The ruling "drew immediate praise from women's groups" and would create a "better workplace." One guest on a news program argues, "One of the advantages of having the Supreme Court make a pronouncement is its somewhat uniform throughout the country."[74] The vast majority of reports involving *Burlington Industries* follow this template: praising the decision and speculating about its implications.

At other times, cable channels highlight conflict and raise substantial criticism of rulings, questioning the legal findings and political motivations of the Court majority. In so doing, the programs most commonly rely on information provided by the dissenting justices, the responses of political actors, perspectives from attentive interests groups, and the editorial judgments of on-air personalities. Consider coverage of a ruling concerning the Establishment Clause of the First Amendment. Much as it did in *Kelo*, the media focuses on a compelling argument raised by the dissenters in the case. Using language from a dissenting opinion by Justice Clarence Thomas, CNN reports that the ruling "bristle[d] with hostility" to any form of religion. The network also

[73] Phillips, Kyra, Sean Callebs, Larry Smith, Kelli Arena, Jessica Yellin, Chad Myers, Miles O'Brien, Don Lemon, and Kathleen Koch. *CNN Newsroom*. CNN. December 10, 2007.
[74] Hume, Brit. *Special Report with Brit Hume*. Fox News. June 26, 1998. Waters, Lou and Charles Bierbauer. *CNN Tod*ay. CNN June 19, 1998.

invites dialogue between proponents and opponents of religion in public life, which has the effect of portraying the Court as a party to an ongoing political dispute.[75]

Unfavorable depictions of a ruling take hold most often during the course of on-air arguments (televised incivility). Decisions in *U.S. v. Playboy* (First Amendment law), *Atkins v. Virginia* (cruel and unusual punishment), and *Grutter v. Bollinger* (affirmative action) receive some of the most extensive uncivil coverage in the sample. On Fox News, discussions of the *Playboy* case use the type of rhetoric that characterizes televised incivility, with guests denouncing one another in succession:

> Guest 1: I say shame on the Supreme Court
>
> Host: You're misrepresenting the case. This case was about an attempt to protect constitutionally protected speech.
>
> Guest 1: Alan, that's your opinion.
>
> Host: No, it's not my opinion. That's the Court's opinion.
>
> Guest 2: The Supreme Court's opinion.
>
> Host: That's not my opinion.
>
> Guest 1: Well, I'll tell you, I agree. The Supreme Court 200 – 100 years ago felt that African Americans weren't persons.
>
> Guest 2: We're not talking about the Supreme Court 200 years ago.
>
> Guest 1: 50 years ago – 50 years ago, all of the material…
>
> Host: That's not the issue …
>
> Guest 1: … all of the material on these cable sex channels would have been considered obscene and unprotected by the First Amendment.
>
> Host: You're misrepresenting – you're misrepresenting the case, Bob.
>
> Guest 1: How did we get from there to a place where you can expose…
>
> (Crosstalk)

[75] Chen, Joie and Charles Bierbauer. *The World Today*. CNN June 19, 2000. Waters, Lou and Charles Bierbauer. *CNN Today*. CNN. June 19, 2000.

Guest 2: You're not even on the same page. You're not even in the same century.[76]

As is common in these types of exchanges, talking heads frequently stop one another mid-sentence, speak over one another, and direct insults at one another (Mutz and Reeves 2005). Many such debates reflect poorly on the work of the Supreme Court, not only by heightening popular distrust of the political process, but more directly by attacking the decision-making capabilities of the justices themselves. At times, however, uncivil exchanges are limited in focus; while on-air personalities argue with one another, they may betray respect for the Court and its rulings. CNN features similarly vigorous debate over the *Playboy* case, but while guests express different views about censorship, they defer to the findings of the Court about acceptable legal standards of judgment.[77]

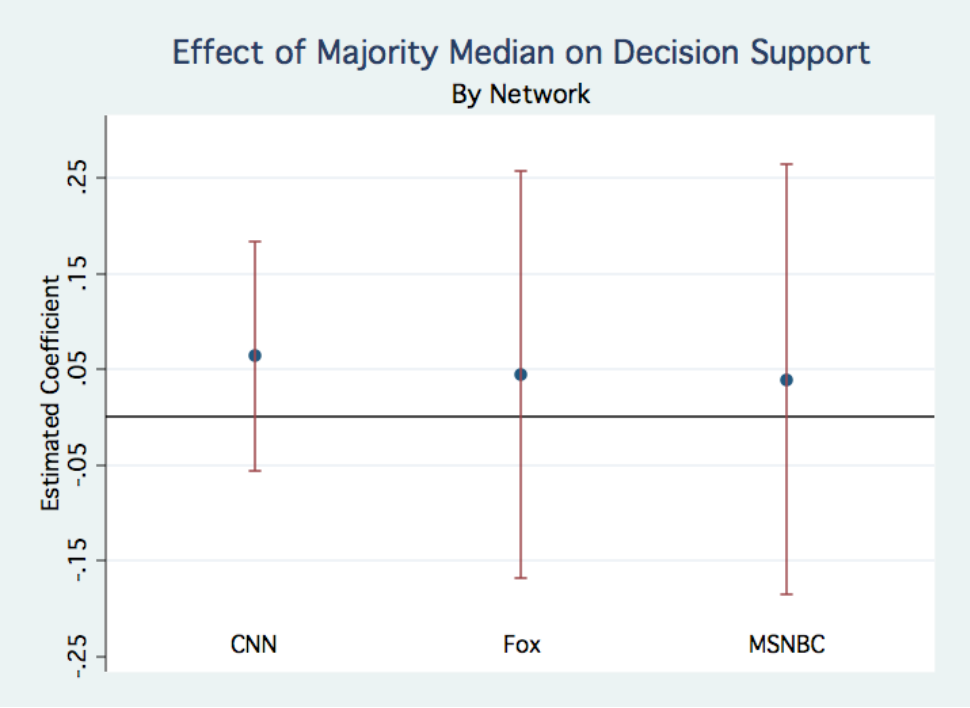
Partisanship and Ideology on Cable News Channels

To be sure, then, important differences in style distinguish coverage of the U.S Supreme Court across print and broadcast media. In particular, the simple yet heated exchanges that appear prominently on CNN and other cable channels have no equivalent in the *New York Times* or the *Washington Post*. But what about partisan rhetoric on cable news? Existing evidence suggests that broadcast journalism involving the Court might be particularly likely to explore the political and ideological implications of its rulings (Iyengar and Hahn 2009, Bennett and Iyengar 2008).

But there is no evidence to this effect. Indeed, cable news networks do not cover rulings differently based on their apparent ideological content. In Figure 6.2, I plot the estimated effect of *majority median* (a measure of a ruling's ideological content; Carrubba et al. 2012) on *decision support* across the three cable news networks. Though Fox News is widely presumed to be more politically conservative than MSNBC, there are no discernable differences in how the networks treat liberal versus conservative rulings.

[76] Hannity, Sean and Alan Colmes. *Hannity and Colmes*. Fox News. May 23, 2000.
[77] Van Susteren, Greta, Roger Cossack, and Charles Bierbauer. *Burden of Proof*. CNN. May 18, 2000.

Figure 6.2



Graph shows estimated coefficients and 95% confidence intervals for the effect of *majority median* on *decision support* by network, with positive coefficients indicating increased support for conservative rulings.

These findings do not suggest that there are no important distinctions between the cable news networks in their coverage of the Court, but rather that they are unlikely to afford favorable coverage to rulings simply on the basis of ideological content. As we will see later, the ideological cues that the Court offers have a consistently small influence on broadcast coverage when compared with print stories.

With this general picture of cable news' depiction of judicial decisions in hand, we turn now to the central question of this analysis: to what extent do features of Supreme Court rulings determine the nature of cable news coverage given them?

Results and Analysis

Does cable news coverage become more unfavorable when a judicial decision features multiple dissenters and narrow ideological coalitions? There are reasons to expect some similarities between print and cable sources in their coverage. Most importantly, reporters for both receive identical signals on decision day: the case syllabus, majority, concurring, and dissenting opinions. While journalists may seek comment from other sources, official

communications from the justices play the most important role in informing news coverage because they emanate from precisely the type of legitimate elite voices that newsmen covet (Bennett 1990, Entman 2004).

Table 6.2 examines *decision support* and *televised incivility* on the cable news networks. I begin with simple models of favorable coverage (operationalized with the *decision support* indicator), controlling for the opinions of non-judicial elites, the political context, the issues under consideration, and characteristics of the decision itself (Models 1-4). Given the appetite for controversy on cable news channels, the strongest alternative account to Dissensus Dynamics Theory suggests that broadcast journalism depicts judicial rulings in a more unfavorable light when they concern contentious issues (irrespective of how the Court rules). There is a minimal amount of evidence for the issue controversy explanation (in Model 3 alone, one indicator of issue controversy – judicial disagreement at the lower court level in a case's history – significantly decreases *decision support*). But even then, large majority coalitions continue to increase the supportive coverage granted a decision on cable news outlets.

Table 6.2 Dissensus Dynamics Theory on Cable News, 1995-2008

	Decision Support					Televised Incivility				
	(1)	(2)	(3)	(4)	(5)	(1)	(2)	(3)	(4)	(5)
Majority votes	.096**	.090*	.099**	.132***	.109*	-.066**	-.081**	-.083**	-.061**	-.071*
	(.046)	(.045)	(.037)	(.047)	(.057)	(.026)	(.024)	(.025)	(.025)	(.035)
Ideological diversity	-.162	-.128	-.076	-.346**	-.219	.086	.119*	.137*	.102	.124
	(.128)	(.122)	(.108)	(.130)	(.138)	(.074)	(.066)	(.073)	(.068)	(.085)
Controls for…										
Non-judicial elites	x				x	x				x
Political context		x			x		x			x
Issue controversy			x		x			x		x
Decision characteristic				x	x				x	x
R-squared	.174	.179	.244	.399	.617	.319	.305	.157	.594	.646
N	37	37	37	37	37	37	37	37	37	37

Results are OLS coefficient estimates with standard errors in parentheses. *p<.1, **p<.05, ***p<.01.

Indeed, across Models 1-4, there is strong evidence that majority coalition size influences coverage content. On average, an additional justice joining the majority coalition generates

cable news reports that are approximately 10% more supportive of a ruling. Model 5 presents a fully specified account of *decision support* that controls for all alternative explanations. Once again, it shows evidence that broadcast journalists craft coverage in response to the voting outcome on the Supreme Court.

Dissensus Dynamics Theory is particularly effective at accounting for coverage of *Kimbrough* (seven justices in the majority coalition, *decision support*=1) and of *Lorillard Tobacco Company v. Reilly* (five votes in the majority coalition, *decision support*=.75). Despite the fact that the former case dealt with a more newsworthy controversy (which allowed the media to seize on the racial implications of disparities in drug sentencing) it also garners more supportive coverage than the latter. CNN's coverage of *Lorillard* features objections to it from one of the parties to the case, Attorney General Tom Reilly of Massachusetts. "Every day that goes by that they [tobacco companies] are able to target their advertising toward kids like this is a bad day," he notes.[78] Because cable channels do not view the *Lorillard* ruling as particularly noteworthy (they broadcast only three stories on it), they do not give detailed explanations about the Court's written opinions. But the presence of four dissenters signaled to CNN the need to broaden the range of debate about the ruling to include Reilly (even if the channel did not use the arguments raised by the dissenters). These reports contrast with the deference shown by the network to the 7-2 ruling in *Kimbrough*.

On the other hand, the cases that receive a minimal amount of coverage on cable news networks present the most problems for the full model (Model 5). For instance, two of the cases with the worst fitted values – *Bush v. Vera* (1995) and *Smiley v. Citibank* (2000) – garner one story apiece. In the case of the former, CNN frames the decision favorably in spite of a 5-4 vote on the Court. *Smiley* meets with criticism in the single cable news report to cover it, despite the Court's unanimous verdict. The model's shortcomings with respect to lower salience cases like *Smiley* are reasonable given the fact that the entirety of their coverage rests on more limited – and thus more volatile – editorial decisions.

Majority coalition size performs similarly well in accounting for the presence of *televised incivility* (Models 6-10). All else equal, the presence of an additional vote in the majority decreases cable news reliance on on-air confrontations by about six to eight percentage points.

[78] Woodruff, Judy, Kate Snow, Kelli Arena, Candy Crowley, Ron Brownstein, Robert Novak, Eileen O'Connor, Rea Blakely, Major Garrett, William Schneider, and Charles Bierbauer. *Inside Politics*. CNN. June 28, 2001.

To understand the significance of this effect, consider once again reporting on *Kelo v. City of New London*. Cable news outlets broadcast 30 stories involving the decision, with one-third of them featuring the type of televised incivility that grabs the attention of viewers. These reports use aggressive language (i.e., "ridiculous") and feature guests interrupting one another frequently. Had the Court reached an identical ruling in *Kelo* by unanimity, however, we would expect uncivil coverage to decline markedly. Instead of broadcasting ten segments with incivility present, cable news channels would have substantially reduced this coverage to three or fewer reports, according to the models I present here.

Televised Incivility and Decision Support

Statistical evidence demonstrates that large majority coalitions significantly increase the favorable coverage afforded a Supreme Court ruling and significantly decrease the use of intemperate rhetoric on cable news programming. But we still have an incomplete sense of the relationship between these two coverage characteristics. To what extent can we differentiate between *incivility* and *decision support*?

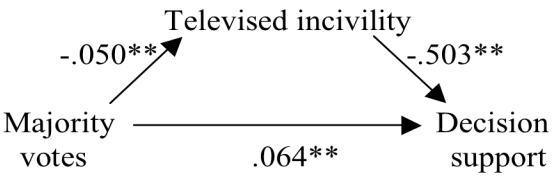
According to scholars, unfavorable messaging can be differentiated from incivility based on style and tone (Mutz and Reeves 2005, Mutz 2007). "Some comments can, in fact, be quite critical of an opponent, and still not earn a classification as 'uncivil.' Incivility requires going an extra step; that is, adding inflammatory comments that add little in the way of substance to the discussion" (Brooks and Geer 2007, 4-5). In cable news coverage of the Supreme Court, uncivil exchanges feature aggressive rhetoric used by on-air personalities while unfavorable coverage directs criticism at judicial rulings. These characteristics are not indistinguishable. For decisions that receive mostly unfavorable coverage (*decision support*<.5), incivility is present in about one in four news reports. This figure drops to one in ten for rulings that generate mostly positive coverage.

One account of incivility and decision support, then, sees intemperate on-air discussions as contributing to unfavorable coverage. The process takes place as follows. After the Court rules, a cable news organization looks to the voting signals sent by the justices to shape coverage. Dissent both directly and indirectly fosters unsympathetic portraits of a ruling. It allows news reporters to emphasize arguments raised by the dissenting justices to the extent that they are compelling. It also causes them to seek out other sources to criticize a ruling. At the

same time, dissent has an effect on the production of news. Cable channels view closely-divided rulings as worthy of debate since the justices themselves disagreed over the case. To emphasize this conflict, networks become more likely to use a broadcast format where anchors and guests can express differences of opinion. Programs like *Hardball* and *Crossfire*, in particular, might be more likely to cover dissensual rulings since these programs, by design, foster incivility. As on-air debates transpire, critics of the Court are more likely to emerge. Furthermore, they are empowered to attack rulings using the arguments the dissenting justices have published.

The above account suggests that televised incivility mediates the relationship between dissent and negative coverage of a ruling. I use Baron and Kenny's (1986) mediation analysis to explore this possibility. Their test consists of estimating the effect of the independent variable on the mediator (should be significant), estimating the effect of the IV on the dependent variable (should be significant), and (3) estimating the effects of the IV and mediator on the DV (mediator's effect should be significant and larger). Co-linearity is a particular concern given the structure of the test and the variables employed here (MacKinnon, Fairchild, and Fritz 2007; Hayes 2009). For this reason, I focus on three variables exclusively: *decision support* (the DV), *televised incivility* (the mediator), and *majority votes* (the IV). I exclude other independent variables since *majority votes* has the only significant effect across all coverage models in Table 9. The results of the test, presented in Figure 6.3, suggest a strong relationship between *majority votes* and *decision support* that is mediated by the presence of incivility on cable news networks.

Figure 6.3 Voting Coalitions and the Content of Cable News Coverage



OLS Coefficient estimates

To understand how uncivil debate mediates the relationship between majority coalition size and press coverage, recall the case of *U.S. v. Playboy*. In response to the Court's 5-4 ruling

that struck down regulations of explicit programming as a restriction on speech, the press took notice, broadcasting five reports on the decision within days of its announcement. These reports mix criticism and implicit support for the majority's holdings.

In news-oriented segments, reporters use a measured tone and intersperse background information, quotations from the majority and dissenters, and sound-bites from activists. For instance, on CNN, reporter Charles Bierbauer reads from Anthony Kennedy's opinion, quotes Stephen Breyer's dissent, and includes taped reactions from the Family Research Council, National Cable Television Association, and Playboy Enterprises. On programs like Fox News's *Hannity and Colmes*, however, contentious debates drive the discussion. The hosts and guests argue over First Amendment principles, the definition of obscenity, and the role of federal government. Some of these arguments echo those made by the Court majority and dissenters. Other portions of the debate diverge from the justices' analyses, as when one guest on the program levies a charge of activism: "The Supreme Court does not recognize any authority over itself. The Supreme Court lives in the arrogance of power."[79]

The case illustrates the process linking judicial dissensus to cable news coverage. At times, the press draws directly on the arguments made by the justices themselves to support or critique a decision. But dissensus also entices the media to feature televised incivility. Networks broadcast three segments on *U.S. v. Playboy* featuring guests that they could, ahead of time, reasonably expect to have vehement disagreements with one another. In the *Hannity and Colmes* segment, the guests include the president of Morality in Media and the vice-president of "Penthouse" magazine. The debate between these guests shapes the coverage of the case, calling into question the Court's ruling, referencing both original arguments and those espoused by the justices, and levying accusations of judicial recklessness.

Distinguishing between incivility and negativity in this manner provides one of the first pieces of evidence that helps to disentangle the responses of producers and reporters to judicial decisions. It suggests why journalists, editors (for print publications), and producers (for cable news networks) may react similarly to judicial voting signals. For instance, because reporters rely on sources to add texture to their coverage, they can raise criticisms of the Court most easily when they give voice to dissenting justices. But editors and producers are more likely to prioritize reporting that will attract an audience with drama and conflict. Though they intend to

[79] Hannity, Sean and Alan Colmes. *Hannity and Colmes*. Fox News. May 23, 2000.

highlight schisms on the bench whenever possible, they can most readily do so in closely-divided rulings.

The first support for this implication of Dissensus Dynamics Theory comes from cable news networks, where we can partially disentangle the work of producers (who invite guests on-air to foster intemperate debates) and reporters (who describe a case outcome using sources). As we see, both of these groups respond to dissent on the Supreme Court.

Cable News and the Effect of Ideological Diversity in the Court Majority

Cable news channels pay almost no attention to the ideological makeup of the Court majority. Contrary to the predictions of Dissensus Dynamics Theory, there is no evidence that more diverse majority coalitions attract more favorable coverage for rulings. This can be seen in Table 6.2, where the estimated effect of *ideological diversity* on coverage is significant in only three of the ten models presented, and *in the wrong direction*. In Model 4, for example, broad voting coalitions actually decrease positive coverage of rulings. To consider the impact of ideological diversity more fully, I estimate its effect on coverage for only 5-4 rulings, where we would expect the press to pay the most careful attention to it. Once again, diverse majorities have no impact on cable news reporting, even in the most closely-divided decisions.

How can we account for this null effect? After all, Chapters 5 confirms that newspapers consider the makeup of judicial voting coalitions in their Supreme Court coverage. Why would cable news networks behave differently? One explanation is that the balance of reporting constraints differs for cable news networks, which are much more likely to feature guests who lack expertise about the law in their coverage.[80] It is difficult for on-air personalities to make inferences based on the ideology of the justices if they do not follow the Court closely (Davis 1994). And in fact, the justices often behave in a manner that obscures their ideological beliefs: reaching unanimity, couching their opinions in the language of the law, deferring to precedent, distancing themselves from the party of the president who appointed them, and denying that personal values play a role in their decisions (Epstein, Segal, and Spaeth 2001; Davis 1994; Bailey and Maltzman 2008).

For these reasons, guests on cable news networks sometimes struggle to characterize rulings along an ideological spectrum. Consider a debate broadcast on MSNBC about *Kelo*.

[80] Also, recall again the erroneous reporting of CNN and Fox News about the Obamacare ruling.

One guest depicts the decision as liberal because it would generate money for the government (though the guest does not reference the makeup of the majority coalition on the Court). The news anchor clarifies this perspective, arguing the decision was ideological but "not partisan." Finally, another guest asserts, without any justification, that the decision could not be portrayed along an ideological spectrum.[81] Given the incomplete depictions of *Kelo* each figure offers, it is not surprising that they failed to reach agreement about its ideological content.

Discussion

Cable news organizations offer a singular portrait of Supreme Court jurisprudence. They confound our expectations in a number of ways. Though research shows that cable programs tend to focus on the sensational and dramatic, they offer ample coverage of the law and the Court. In fact, networks broadcast upwards of twenty distinct reports on the most newsworthy of cases. Though research demonstrates that cable channels emphasize partisan conflict in their coverage, there are no clear differences in how various networks portray conservative (or liberal) Supreme Court rulings. Despite the fact that newspapers exhibit deference to decisions reached by an ideologically varied assortment of justices, cable channels pay little attention to the makeup of voting coalitions. And despite the fact that the Court follows procedures to raise respect for and compliance with its decisions, television networks regularly use colloquial language and aggressive rhetoric in their discussions of the law.

In fact, the stylistic content of cable news coverage merits more attention than it has received to this point. The shortcomings of the experimental literature on policy legitimation become even more apparent when one contrasts the staid stimuli it employs with the type of coverage found on channels like CNN and Fox News. Scholars know little about whether informal and entertainment-oriented discussions of the Court serve to increase interest in the law or whether, on the other hand, they have detrimental effects on public knowledge. And most of the research involving televised incivility focuses on campaign contexts (Mutz and Reeves 2005, Brooks and Geer 2007), despite the fact that the Court depends on political trust to a greater extent than other actors. Might intemperate arguments on cable news networks damage the legitimacy of the judicial institution?

[81] Carlson, Tucker. *The Situation*. MSNBC. June 23, 2005.

But despite the singular aspects of the cable news environment, broadcast journalists respond, as expected, to the size of the majority coalition on the Supreme Court when crafting their coverage of rulings. Voting outcomes have a direct effect by supplying journalists with arguments from the justices' written opinions and an indirect effect by motivating reporters to seek out outside sources for reactions to dissensual rulings. But the effect of judicial votes is further mediated by uncivil debates on cable news, which producers invite more readily in response to divided decisions. In the course of these debates, on-air personalities use belligerent language against one another and regularly denounce the Court's decision-making capabilities. These findings provide more support for Dissensus Dynamics Theory, attesting to the important link between judicial votes and media coverage across time and medium.

A Review of Dissensus Dynamics Theory

Taken altogether, the evidence provided in Chapters 3-6 provides a novel account of how coverage takes shape in response to judicial rulings. It demonstrates significant cross-case variation in how the press depicts decisions. It provides strong evidence that the content of press coverage responds directly to the size of voting coalitions on the Court (the Dissent Hypothesis). It also demonstrates the media coverage is influenced by the ideological makeup of the majority voting coalition, but this effect only occurs in print sources (the Ideological Diversity Hypothesis). I summarize the most important findings from Chapters 3-6 below:

- Given the constraints that face journalists on the Supreme Court beat, they look to judicial voting signals when crafting their coverage of rulings. Reporters portray decisions unfavorably, including criticism and counter-frames to the ones offered by the majority, as the dissenting coalition increases in size. This effect occurs similarly across mediums, news outlets, and time.

- The size of a judicial voting coalition signals to journalists whether to accept the frames offered by the majority or to highlight conflict in coverage. In dissensual decisions, written dissenting opinions receive coverage to the extent that they are newsworthy (the direct effect). Dissenting votes also cause reporters to seek out other sources, including critics who may challenge a decision by using arguments not raised in the written opinions of the justices (the indirect effect).

- Given the constraints that face journalists on the Supreme Court beat, they also use the ideological makeup of the voting coalitions to guide their coverage. But they do so only under certain conditions. There is evidence that the value of an ideological conflict frame depends on a ruling's compatibility with existing ideological narratives (see Chapter 4).

- There are important distinctions between cable news and print media. Newspapers offer more favorable coverage to decisions reached by ideologically diverse majorities when this information has the most value to them – in the case of 5-4 decisions. Cable news outlets, on the other hand, give little weight to the ideological makeup of majority coalitions. Because these outlets more readily feature those with little legal expertise in their coverage of the Supreme Court, they are poorly equipped to discern with accuracy the ideological signals sent by the justices.

- Ruling coverage produced by cable news also differs in style from that of newspapers, employing colloquy and speculation more readily. More importantly, cable news produces content featuring aggressive rhetoric and debate in response to dissensual decisions.

In the following chapter, I shift focus, drawing on the insights of Dissensus Dynamics Theory to offer an account of opinion responses to high profile decisions. Though we now have strong evidence that the media covers decisions in more negative terms when the majority coalition is small, scholars have little sense of how such coverage may impact public opinion. In particular, the literature has failed to examine the effects of countervailing pieces of information: the cue of a Supreme Court endorsement coupled with a negative frame about its ruling. I assess the relative effects of these factors in Chapter 7.

Chapter 7
In the Court of Public Opinion:
Frames, Cues, and the Limits of Policy Legitimation

The previous chapters make plain a disconnect between theory and reality in the study of the policy legitimation capabilities of the U.S. Supreme Court. Though a wealth of experimental research suggests that the institution's credibility allows it to persuade the public (Bartels and Mutz 2009, Hoekstra 1995, Mondak 1990), it rarely does so in actuality (Marshall 1989, Persily 2008). One of the most important explanations for this puzzle lies in the fact that the literature fails to consider the types of information the media conveys to the public about judicial decisions.

Studies suggest that negative frames and counter-frames can diminish the impact of an initial positive frame, but scholars have little sense of the role source cues play in framing struggles (Druckman et al. 2010). Can frames undo the impact of decisions reached by a high credibility source like the Supreme Court? Can they diminish the standing of the source itself?

In this chapter, I conduct two experiments using descriptions of actual Supreme Court rulings to explore the limits of its persuasion powers. I demonstrate that negative frames can mute the ability of even a high credibility source like the Court to garner approval for its rulings. I also explore the effects of framing on diffuse support for the institution. I show that a negative frame limits the Court's persuasive power by divorcing evaluations of the institution from evaluations of its specific output. But diffuse support for the Court remains intact.

These findings suggest that public backlash to Supreme Court decisions may arise out of framing struggles that effectively circumscribe and undo its persuasive powers, in spite of the institution's credibility.

Press Reports and Public Responses

Frames matter. In recent years, scholars have begun to take seriously the fact that framing contests are rarely one sided. One important line of research suggests that elite competition and the framing struggles it fosters can attenuate framing effects under certain conditions (Druckman 2004, Druckman et al. 2010, Chong and Druckman 2007a, 2007b, 2012, Riker 1995). While an initial frame regularly influences opinion in a positive direction (that is, in agreement with the direction of the frame), negative frames and subsequent counter-frames reverse these effects. This may be due to the fact that framing struggles stimulate conscious deliberation and effortful processing amongst some individuals, leading them to focus on "the substantive merits of a frame in judging its persuasiveness" (Chong and Druckman 2007a, 109).

Is it worth considering whether framing effects diminish institutional persuasion? After all, it is not unreasonable to suggest that the credibility of the Supreme Court might enable it to persuade even in the face of criticism (Woodson, Gibson, and Lodge 2011). Perhaps the press cannot limit judicial policy legitimation, regardless of the type of coverage it offers?

There are, in fact, two arguments as to why judicial endorsements may prove more powerful than the frames used to describe them. One account suggests that Court draws on its legitimacy to ensure that criticism of its decisions does not receive media coverage. As we have seen in the previous chapters, this explanation is demonstrably false. Rather, the Court is quite vulnerable to negative portrayals of its work, particularly when a decision features multiple dissenters. A second account suggests that, even in the face of criticism, the Court can persuade simply by signaling its position on a policy. Given the trust Americans place in the Court, a cue (judicial endorsement) may lead them to support a policy even when it is framed in negative terms. If this account is correct, then existing experimental research offers a compelling account of policy legitimation. It would be unnecessary to control for framing effects if the Court is similarly persuasive across a variety of contexts.

Put another way, the question of framing effects is a question that directly implicates the external validity of existing experimental research (McDermott 2002). If the cue of a Court endorsement is powerful enough to persuade regardless of framing context, then experiments that present simple descriptions of rulings (i.e., Hoekstra 1995, Bartels and Mutz 2009) provide a reasonable depiction of how decisions may influence opinion in actuality. But if the framing of a judicial decision has a systematic effect on opinion about it, then the literature has overlooked an

important factor in the study of policy legitimation. The study of how cues and frames matter in context has broader implications as well, since scholars have little sense of how they interact to shape opinion more generally (Chong and Druckman 2007a; Druckman et al. 2010 offer one of the first studies of frames and cues in tandem).

In this chapter, I explore the relative effects of frames and cues surrounding the Supreme Court, with a focus on making connections between the theory of policy legitimation and the reality of how the media portrays the institution. The cue in question is a Supreme Court endorsement of policy with a ruling. Because people generally trust the Court, this cue allows them to make inferences without drawing on more detailed policy knowledge (Druckman 2001, Druckman 2007). It has the effect of moving opinions in a positive direction – that is, in agreement with the policy advocated by the Court (Bartels and Mutz 2009, Mondak 1990). Framing effects, on the other hand, occur when people develop a particular conceptualization of an issue (Chong and Druckman 2007a, Druckman 2001). I define positive frames as pieces of information that emphasize considerations that are likely to increase policy agreement with the Supreme Court, and negative frames as those likely to decrease agreement with it.

There are a number of reasons to expect that the Court's credibility will afford it limited influence in framing struggles. To begin with, the Court does not write its opinions with popular framing struggles in mind.[82] But critics of the Court can design potent arguments to convince the public. Frames may effectively target certain segments of the public for persuasion (Clawson and Waltenburg 2003). No evidence shows that the nature of Court legitimacy – in the form of public support for preserving the institution – similarly makes it a persuasive source in the face of criticism. Second, frames may prove more influential than cues on opinion construction in general by having initial unconscious effects on the evaluation of an issue (Druckman et al. 2010). And finally, the prevalence of backlash suggests that the Court's power to persuade may prove ineffective in real world framing struggles. According to one study, "Backlash usually has roots that grow from sources other than a broad dislike of the institution issuing the decision … in the wake of a court decision, elites and interest groups mobilize its holding, discussion of the issue becomes more critical than when the issue was absent from the media radar screen, and a

[82] The decisions in *Lingle v. Chevron* and *Kelo v. New London, CT* (2005) illustrate this point. Though they had many parallels, *Lingle* went unnoticed by the public while *Kelo* generated strong backlash (Barros 2006; Nadler, Diamond, and Patton 2008). One study attributes the difference in these responses to the framing of the rulings: "The Court was far more effective in *Lingle* than in *Kelo* in engaging directly with public unease about the relationship between government and private property" (Baron 2007).

section of the public then develops an opinion contrary to the Court's resolution of the case" (Persily 2008, 12). Therefore, I expect that even when the cue of a Court endorsement is present, frames will have a systematic effect on popular approval of policies. I expect a ruling framed in negative terms to garner less support than an identical ruling framed in positive terms.

Negative Frames – Negative framing of a Court ruling will mute the persuasive power of the institution.

By what mechanism might negative frames limit the influence of the Court? Two explanations exist. On the one hand, negative frames may decrease support for a ruling by impacting how Americans view the Court. In this scenario, people exposed to criticism of a judicial decision may lose confidence in the Court. As trust in the Court declines, Americans become less likely to view its judgment as relevant and wise, stripping the endorsement cue of its potency. On the other hand, the Court may suffer no reputational cost when critics attack a specific ruling. Rather, targeted negative frames may lead people to essentially ignore the cue of a Court endorsement when formulating their attitudes.

This second explanation – endorsement irrelevance – is more plausible. I expect that specific negative frames – aimed at a single ruling – have no effects on diffuse support for the institution; indeed, there is a large body of evidence that demonstrates the durable nature of support for the Supreme Court (Gibson, Caldeira, and Spence 2003; Gibson and Caldeira 2009a; Gibson and Caldeira 2009b). But a targeted negative frame will impact support for a decision irrespective of people's attitude towards the Court.

Diffuse Support Stability – Specific criticism of a Court ruling will have no effect on diffuse support for the institution.

Endorsement Irrelevance – Specific criticism of a Court ruling will limit the institution's persuasive power by divorcing diffuse and specific support from one another.

These hypotheses allow us to explore an important yet understudied part of the policy legitimation process – the relative effects of frames and source cues. I expect the effect of negative frames to vary based on case-specific factors, individual level attributes, and their substance and strength. But they should prove consequential even in the face of an endorsement from a high credibility source like the Supreme Court.

Study 1: Framing a Religious Expression Ruling

To explore the effects of a framing struggle, I administered an online experiment to a pool of 165 subjects in the Winter of 2012. I focus on three important questions. First and most basically, I investigate whether a simple negative framing of a Supreme Court ruling diminishes its support relative to a positive frame (the type that existing research commonly employs). Second, can such frames prove effective when they come from relatively unknown sources and fail to reference sophisticated arguments? And finally, how do framing struggles mute the impact of Court endorsements?

Study Design

I recruited subjects from Amazon's Mechanical Turk (mTurk) pool of workers to take part in a study about "political issues in the news."[83] They were advised that the researcher was interested in learning their opinions on a range of policy matters and directed to read a story about a current event from the *Washington Post*. In actuality, subjects had been randomly assigned to one of three conditions - to read a story about a Supreme Court decision ensuring public funding of some types of religious expression (treatment conditions) or an unrelated article (control group). Subjects in the treatment groups were presented a news article that included a Court cue (the ruling) coupled with a positive or negative decision frame.[84] This design allows me to explore the relative power of frames as they relate to a High Court ruling.

I took care to ensure external validity with respect to the treatments; in fact, I suggest that a lack of external validity in existing experimental research has systematically biased results in favor of legitimation. In this research, subjects typically receive either a cue (Court endorsement) or a frame (majority reasoning) that is likely to increase their support for a decision. But the media regularly frames rulings in more negative terms.

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[83] When the researcher takes the proper measures, the data quality in online experiments is typically high and Internet studies generate substantially similar results to laboratory experiments (Berinsky, Huber, and Lenz 2011, Joinson 1999, Krantz and Dalal 2000, Reips 2000, Stanton 1998). For the study presented here, I required subjects to verify their age and location in the United States to participate. Subjects were experienced mTurk workers who had earned approval in over 95% of the studies in which they have participated and demonstrated their attentiveness to the survey as they responded. They received a nominal sum for their participation, which lasted about eight minutes on average.

[84] An additional group of subjects was randomly assigned to a different framing treatment during the course of the study. This final condition was used for exploratory purposes and was not germane to the study presented here.

I adapt articles from actual newspaper coverage of *Rosenberger v. Virginia* (1995), where the Court ruled that the University of Virginia was constitutionally bound by the First Amendment to fund a publication by a Christian student group as it did other secular publications. Treatment articles describe the decision identically across conditions, including the cue of a Court endorsement. They differ only as to whether they frame the decision in positive ("praise") or negative ("criticism") terms. In the positive frame condition, subjects read arguments that the Court protected the Constitution and put an end to the double standards in the funding of religious student groups; in the negative frame condition, they read that the Court dishonored the Constitution and created a new double standard (see Appendix E).

The design of these treatments is very conservative, by intention. Subjects receive identical descriptions of the ruling across conditions. The positive and negative frames use substantively similar arguments to praise and criticize the Court (i.e., that it either protected or dishonored the Constitution). This ensures that differences in the strength of frames do not contribute to the results presented here. The design allows me to explore most basic framing critique of the Court necessary to undo policy legitimation. By describing a decision concerning religious expression, an issue on which most people hold strong opinions, I further expect that frames will have a smaller effect on mass opinion than they would on a less salient topic (Brickman and Peterson 2006, Hoekstra 1995). After reading the article, subjects responded to a brief survey intended to measure demographic characteristics, political knowledge, trust in the Court, opinions about religion, and attitudes towards the decision.

Subject Population and Variables

Seventy-five males and ninety females took part in the study and a majority of subjects were white (83 percent) and over the age of forty (55 percent). They were, in general, well educated, knowledgeable about politics, and secular. Ninety-nine subjects (60 percent) had received a bachelor's degree or higher, approximately half expressed a preference for the Democratic Party, and the median subject categorized himself as "moderate." Thirty-two percent of subjects expressed no religious preference; of those that did express a preference, a plurality identified themselves as Mainline Protestants. And nearly half of all subjects indicated that they never attend religious services apart from occasional weddings, baptisms, and funerals.

In the analysis to follow, I pay careful attention to the meaning and measurement of support for a Court decision. Too often, research fails to consider fully the nature of policy legitimation, a complex phenomenon that must be measured with care. Legitimation may indicate an increase in public support for the political issue-position that the Court endorses. With respect to the case here, subjects respond as to whether to allow public funding for religious publications. Legitimation may also result in an increase in support for the Constitutional interpretation offered by the Court, which here privileges free speech considerations over the separation of church and state. It may involve support for a ruling of the Court, regardless of the substance of the ruling. I also explore whether subjects differentiate between their "personal opinions" and their views about the Constitution when considering a ruling of the Supreme Court. All told, I utilize a four-item *decision approval* scale that taps the complex nature of reactions to the Court's religious expression ruling.[85]

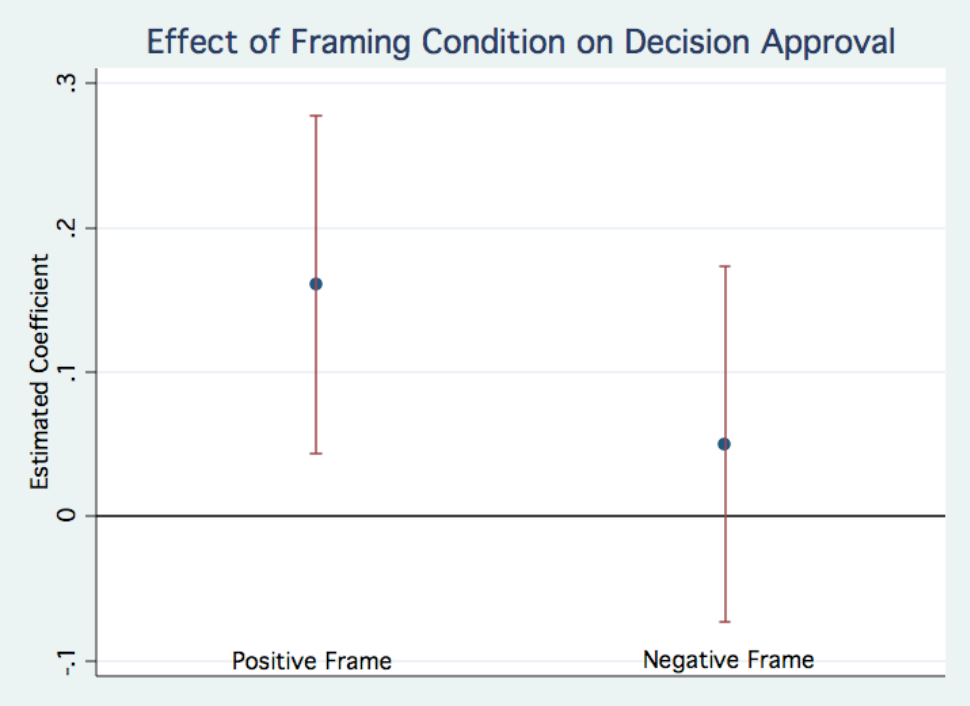
I also measure diffuse support for the Supreme Court. The six-item *institutional legitimacy* scale (scored 0-1) remains a staple of the literature, tapping durable support for the judiciary. It measures willingness to abolish the Court and limit its jurisdiction, trust in Court decision-making, beliefs that the Court favors some groups over others and is too politicized, and views about the Court's role as arbiter of the Constitution (see Chapter 2 and Gibson, Caldeira, and Spence 2003).

Results

We begin by looking at the effects of framing struggles on support for the religious expression decision. As expected, the frames used to describe the decision influence opinion about it. Subjects who read about a positively-framed Court ruling express significantly more support for allowing the government to fund religious publications than those in the control condition (M_{diff}=.16, p=.007, two-tailed). But subjects confronted a negative decision frame opposite a Court endorsement are not persuaded by the ruling (M_{diff}=-.05, p=.42, two-tailed).

[85] The scale reliability coefficient is .873. The scale generates a single significant underlying factor. The items used to construct the *decision approval* scale: (1) Do you favor or oppose allowing public schools and universities to fund religious publications in equal measure as secular (non-religious) publications? (2) In your personal opinion, do you believe that it is more important to ensure the separation of church and state by prohibiting government funding for all types of religious expression or to protect the freedom of speech by allowing the government to fund religious expression? (3) The Supreme Court recently ruled that the Constitution permits government funding of religious expression. In your personal opinion, do you agree with this Supreme Court decision? (4) Regardless of your personal opinion, do you agree that the Constitution permits government funding of religious expression?

Figure 7.1



Bars are OLS coefficient estimates of the effect of framing condition on *decision approval* (relative to the control group). Lines represent 95% confidence intervals. Results robust to the inclusion of other variables.

Figure 7.1 shows the estimated effects of framing on support for the Court's decision. The significant effect of a positive frame on decision support is not surprising, as the treatment in this condition adheres closely to those employed in existing research on legitimation. It is relatively uncontroversial that, on some issues, a positively framed judicial endorsement can legitimate policies. But the impact of a specific negative frame has not yet been explored, and under these conditions, the Court's ability to legitimate policies diminishes. This result provides some robust support for the Negative Frames Hypothesis given the conservatism of the treatments applied. Recall, again, that all information presented to subjects in the two conditions is equivalent, with the exception of whether it is used to praise or criticize the ruling. It does not appear it is necessary for negative frames to employ strong arguments to lessen the Court's persuasive capacity (in spite of its institutional reputation).

But what of this reputation? In general, subjects rate the Court somewhat favorably on the *institutional legitimacy* scale ($M_{control}$=.562), a result in line with other findings about judicial legitimacy (Gibson, Caldeira, and Spence 2003). But there is evidence that people credit the institution when presented with a positively-framed ruling; subjects in this condition view that

Court as significantly more legitimate (M_{diff}=.073, p=.018, two-tailed). This result follows other research that suggests a positivity bias – people credit the institution for decisions of which they approve but do not penalize it when they disapprove of a ruling (Gibson and Caldeira 2009a, Gibson and Caldeira 2009b; but see Grosskopf and Mondak 1998). And as expected, the Court's standing does not suffer, relative to the control group, when respondents read about a ruling framed negatively (M_{diff}=.038, p=.253, two-tailed).

Because the Court's legitimacy does not suffer when its decision is attacked (Diffuse Support Stability), it begs the question of how specific and diffuse attitudes involving the judiciary relate during framing struggles. If we assume that there are no differences in the diffuse and specific support expressed by respondents in the control and negative treatment groups, two competing explanations exist. People may defer to the Court *more* when its rulings come under criticism (to the extent that they view it favorably), or they may defer to it *less*. In the former scenario, there should be a strong correlation between diffuse and specific support in the negative framing condition alone: those who view the Court most positively should applaud the ruling while those who like it least should oppose the ruling when it is criticized. In the latter scenario, the pattern would change, with no correlation between diffuse and specific support when a negative frame is present. This is indeed the case.

Table 7.1 and Figure 7.2 offer support for the Endorsement Irrelevance Hypothesis. Diffuse and specific support are closely related in the positive framing condition but unrelated in the negative framing scenario. This is shown across the three models of *decision approval* presented in Table 7.1. While church attendance has a significant effect on support for the religious expression ruling regardless of condition, attitudes towards the Court are significant only in the positive framing condition. In this case, positive views about the institution increase support for its ruling. But when the ruling is framed in negative terms, perceptions of *institutional legitimacy* no longer affect support for its output.

As can be seen in Figure 7.2, this effect is driven by those who view the Court most favorably: they defer to it much more when its ruling is praised, but then quickly eschew deference when a negative decision frame is before them. On the other hand, there is little correlation between framing condition and decision approval for those respondents who rate the Court least favorably.

These tests provide some of the first evidence about the importance of framing struggles surrounding High Court decisions. They suggest that policy legitimation may prove harder for the justices to achieve when the press frames their rulings negatively. They also suggest that powerful source cues do little to lessen framing effects. Though the Court's diffuse support remains intact across conditions, its ability to persuade changes markedly. Whereas one might assume that judicial credibility proves most persuasive when the Court is under attack, the evidence here shows the opposite pattern – people essentially ignore their attitudes about the Court when formulating opinions about a negatively framed ruling. The theory of policy legitimation depends on the link between support for the institution and support for its output, but diffuse and specific support seem to have little relationship once a judicial ruling receives criticism.

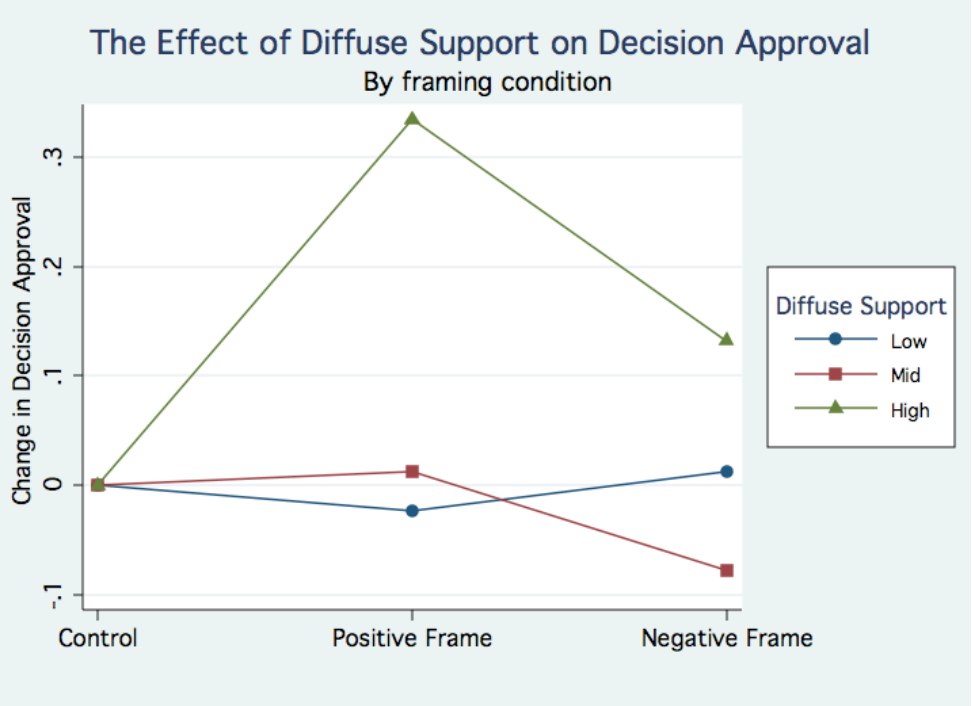
Study 1 raises important questions about the potency of judicial influence. It also offers an explanation as to why policy legitimation appears prevalent in the laboratory but not in the real world. Nonetheless, questions remain as to whether frames can similarly diminish Court influence across a range of legal controversies.

Table 7.1 Framing Effects, Institutional Legitimacy, and the Basis of Decision Approval

	Decision Approval		
	Control	*Positive Frame*	*Negative Frame*
Institutional legitimacy	-.138 (.210)	.714*** (.235)	-.251 (.249)
Protestant	.130 (.082)	.203** (.076)	.052 (.123)
Frequent church attendance	.419*** (.150)	.282* (.154)	.330** (.156)
Conservatism	.223* (.132)	.530*** (.144)	.204 (.172)
Age	-.151 (.111)	-.200 (.133)	.028 (.156)
Female	.028 (.066)	.140* (.079)	.177* (.093)
R-sq	.409	.451	.339
N	58	54	48

Results are standardized regression coefficients. *p<.1, **p<.05, ***p<.01. The effect of *institutional legitimacy* is substantively similar across a variety of specifications.

Figure 7.2



Symbols represent the intra-group mean of *decision approval* relative to the control group. Among those expressing the most support for the Court, *decision approval* is significantly higher in the *positive frame* condition than in the control condition (p=.0007, two-tailed). No other intra-group relationships are significant.

Study 2: Framing Four Legal Controversies

In Study 1, I demonstrated how negative frames attenuate policy legitimation, even when they oppose the potent cue offered by a Supreme Court decision. I explore these results further in Study 2. My purpose here is twofold. First, I look at the *relative effects of frames and cues* with a design that allows me to vary both. (In Study 1, variations in frames constituted the treatments, while the cue of a Court endorsement was present across both treatment conditions). This approach allows me to better disentangle the interactive effects of frames and cues when they are consistent (i.e., a positive frame and cue present) and inconsistent (i.e., a positive frame and no cue present). And second, I explore whether the results of Study 1 are issue-dependent. Is the Court's ability to persuade circumscribed by strong pre-existing attitudes people may have held about religious expression? Does the salience of the issue influence the power of a judicial endorsement (see Hoekstra 1995)? To better answer these questions, I explore a variety of legal controversies in Study 2.

Study Design

Subjects were recruited, again through mTurk, to participate in a survey about their opinions on a variety of political issues during the Winter of 2012-2013. I focus on four controversies that have come before the Supreme Court: gun rights, religious expression (the separation of church and state), government takings of private property, and term limits for members of Congress.[86] These controversies were selected because they vary across a number of potentially important dimensions.[87] To the extent that the salience matters in how people react to judicial decisions (Hoekstra 1995), these issues may prove instructive, varying from relatively high profile (gun rights) to relatively low profile (term limits). The issues also implicate different dimensions of opinion. For instance, subjects may be more likely to defer to the Court regarding the constitutionality of term limits than they would about a matter involving church-state separation, about which they may hold strong *a priori* opinions. And finally, the decisions vary in their ideological implications, which may impact how subjects view them (Egan and Citrin 2009). One ruling was more consistent with political conservatism (where the Court struck down gun control legislation), one was more consistent with liberalism (where the Court banned the display of the Ten Commandments in public places), and two had ambiguous ideological characteristics.

I randomly assigned subjects to either a control group, where they answered a variety of questions about these and other issues, or a treatment group, where they were first tasked with reading a newspaper article about one of the rulings. These articles varied as to whether they included the cue of a Supreme Court endorsement and whether they used a positive or negative issue frame.[88] The four distinct articles per issue included: positive frame + endorsement cue, positive frame only (no cue), negative frame + endorsement cue, and negative frame only (no cue). All told, the experiment was a 4 issue (gun rights, religious expression, takings, term limits) x 2 frame (positive, negative) x 2 cue (present, absent) design, with a control group.

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[86] In the gun rights condition, the Court was described as striking down the Gun Free School Zones Act (based on the decision in *U.S. v. Lopez*). In the religious expression case, the Court was portrayed as banning the display of the Ten Commandments in public places. The eminent domain case was based on the ruling in *Lingle v. Chevron*. Finally, the Court was described as striking down term limits for congressmen, based on its decision in *U.S. Term Limits v. Thornton*.

[87] During the time frame the study was administered, a school shooting in New Jersey led to a national debate about gun control. Approximately two-thirds of subjects took part in the survey prior to this event. Their response patterns are substantively similar to the responses patterns of all subjects, which I present here.

[88] In contrast to Study 1, positive and negative frames do not raise identical considerations.

The issue of gun rights provides a more full illustration of the experimental design. The positive frame was defined as a position consistent with a Supreme Court ruling on the topic. The positive frame article highlighted arguments in favor of gun rights: that the federal firearms regulations infringed on local authority and Second Amendment protections. The negative frame article took an anti-gun position, emphasizing the safety of school children and the authority of Congress to regulate guns under the Commerce Clause. Frames were drawn from actual media coverage of a relevant Court ruling. Articles that included a cue mentioned that the Supreme Court had ruled in favor of gun rights recently. So subjects in the treatment groups were randomly assigned to read one of four articles:

- Positive frame + cue: arguments *in favor* of gun rights with information about a pro-gun rights Supreme Court decision
- Positive frame: arguments *in favor* of gun rights
- Negative frame + cue: arguments *against* gun rights with information about a pro-gun rights Supreme Court decision
- Negative frame: arguments *against* gun rights

This design allows for a more careful examination of the relative effects of cues and frames, which often occur in concert with one another in coverage of the Supreme Court. Full versions of stimuli are available in Appendix F.

Subject Population and Variables

After reading these articles, subjects responded to a series of questions regarding their attitudes on gun rights, religious expression, eminent domain, term limits, and the Supreme Court. For each issue, I create a four-item *decision approval* scale (0-1) that taps various dimensions of approval for policies. These items mimic the design of questions used to construct the *decision approval* scale in Study 1. They tap into various attitudes surrounding the issue in question.[89] Scales used to create the key dependent variables had sound properties. Reliability

[89] For the gun rights issue, the items used to construct the *decision approval* index are as follows: (1) In your personal opinion, should the federal government have the power to ban guns near schools, or should this be a matter left to state and local governments? (2) In your personal opinion, what is more important, ensuring safety from violence with strict gun control policies, or ensuring that the government does not infringe on the right to bear arms? (3) Do you support or oppose the law known as the Gun Free School Zones Act, which gives the national

coefficients for the *decision approval* scales were .81 for gun rights, .71 for religious expression, .67 for takings law, and .65 for term limits. For *institutional legitimacy*, reliability was .78. All scales generated a single significant underlying factor.

595 subjects took part in the study – 346 males and 249 females. About three quarters of the subjects were white, with Asians (9%) and blacks (7%) as the next largest groups. Subjects were also fairly well informed about politics. About 58% of subjects expressed a preference for the Democratic Party and characterized themselves as liberal. The average subject spent about seven minutes participating in the study, for which he was compensated $0.50.

Results

How might Americans respond to a complex informational environment as they learn about legal controversies? In this study, I focus on two features of the environment that are most relevant to the study of policy legitimation: framing context and cueing information. I expect both factors to influence opinion.

To test these expectations, I look at approval across experimental conditions for policies involving gun rights, religious expression, eminent domain, and congressional term limits. In each case, I compare the opinions of subjects in a treatment group with those in the control group. Figure 7.3 presents mean differences in *decision approval* across these groups.

Unsurprisingly, frames and cues have the most powerful effects on opinion when they align with one another in a positive direction. For instance, subjects who read a story that frames limits on religious expression in positive terms (i.e., "the government must protect the rights of all Americans, no matter their religion") and mentions a Supreme Court ruling on the matter express significantly more support for church-state separation than those in the control group (M_{diff}=.139, p=.062, two-tailed). Similarly, a positive frame coupled with a Court endorsement of gun rights leads to a significant increase in approval (M_{diff}=.185, p=.030, two-tailed). These effects are as expected because, in both scenarios, the considerations that subjects bring to mind when expressing their attitudes have a consistent effect on their opinions (Zaller 1992, Druckman et al. 2010).

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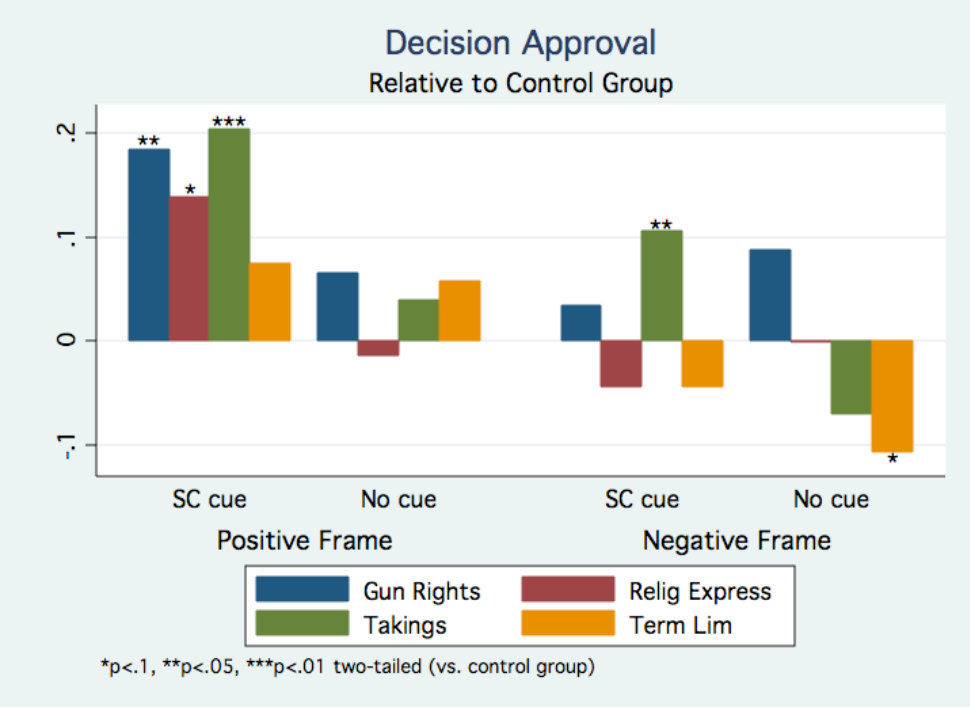
government the power to ban guns near schools? (4) Regardless of your personal opinion, what do you believe the Constitution permits? Items for other issues followed a similar structure by framing the political controversy in various terms and asking respondents to distinguish between personal opinions and views about the Constitution.

Figure 7.3



More interesting, however, is what transpires when frames and cues are at odds with one another. In particular, coverage of the U.S. Supreme Court regularly approximates that presented to subjects in the negative frame + SC cue condition, especially when dissent on the Court is high. In these instances, as we have seen in the case of *Kelo*, the media regularly portrays a ruling (the cue) in unfavorable terms (the frame).

According to existing research, the Court's credibility may allow it to persuade despite the negative framing context. Indeed, "the Court is more influential than Congress in using its institutional credibility to move opinion, and *it can do so fairly unconditionally, regardless of people's sophistication levels, levels of issue-relevant thinking, or the presence of issue-relevant arguments*" (Bartels and Mutz 2009, 259, emphasis added). But accounts such as these seem to offer an inflated assessment of the ability of the Supreme Court to persuade.

Study 2 provides additional evidence that opinion change is minimal when frames and cues are at odds. Across the eight contrast conditions (cue + negative frame, no cue + positive frame), opinion changes in a positive direction only in the case of takings law. In all other conditions, the differences between policy support in the control and treatment groups is statistically indistinguishable. In fact, the pattern of responses remains relatively issue-independent. There is no evidence that positive frames absent a Court endorsement are more

powerful for some controversies more than others. There is no evidence that the Court is more influential on low salience issues like term limits for congressmen. These results, particularly in the negative frame + SC cue conditions, demonstrate limits on the Court's ability to persuade. They echo the findings from Study 1.

According to the Endorsement Irrelevance Hypothesis, negative frames divorce diffuse support for the institution from specific support for its output. Trust in the Court remains stable after criticism of a ruling, but cues lose their potency. This limiting effect may be due in part to relevance since issue-specific frames provide information that directly relates to a policy issue, whereas cues speak only indirectly to policy considerations. When an endorsement cue is the most relevant information present, it has the most powerful effect on opinion (policy legitimation). But the cue loses influence when a frame raises more pertinent considerations. Diffuse support for the institution remains stable, but the Court loses its ability to persuade.

Figure 7.4

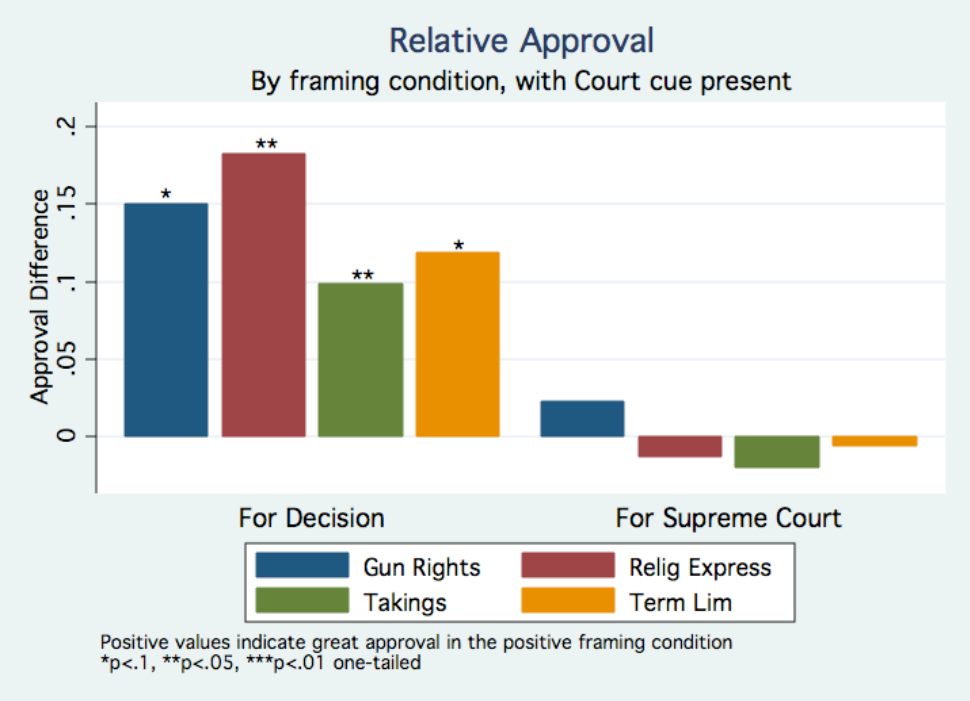


Figure 7.4 provides evidence that diffuse support has little effect on policy legitimation when framing struggles take place. For all four issues, subjects express significantly more support for a policy when presented with a positive frame + cue compared with a negative frame

+ cue. But across all four issues, frames have no effect on support for the Court. Consider the matter of eminent domain. Subjects who read arguments in favor of takings and learned about a Supreme Court ruling with the same substantive effect (the positive frame + cue group) are more supportive of them than those who read about the same ruling coupled with counterarguments (the negative frame + cue group). But subjects in both conditions express similar levels of trust in the Court. In fact, both groups of subjects respond similarly even when asked to assess whether the justices "can usually be trusted to make decisions that are right for the country as a whole." Nonetheless, this trust does not lead to policy legitimation.[90] Taken together, the results of Studies 1 and 2 suggest the important role the frames play in shaping public responses to judicial rulings.

Discussion

The literature on the Supreme Court and policy legitimation does little to situate rulings in the type of news context through which most Americans learn about them. Though numerous studies demonstrate how a Court endorsement legitimates policies in even controversial cases, the actual persuasive power of the Court is more circumscribed. I provide and test a new explanation that accounts for the failure to persuade: framing struggles. In fact, I suggest that the power of framing effects is similarly important as the effect of a Court endorsement, with support for a ruling dependent on the presence of positive frames. Using two experiments that provide varying depictions of judicial rulings, I find evidence for this account. Critics need not introduce any novel considerations nor reference sophisticated arguments to effectively neutralize the Court. Reports that simply "criticize" a decision using the same generic arguments that can be employed to praise it can successfully limit Court influence.

As negative frames of its decisions emerge, the Court loses the ability to convince. The institution's diminished persuasion powers stem not from a loss of legitimacy – as subjects are reticent about formal censures of the Court – but rather from an unwillingness to defer to it. As the framing environment becomes more unfavorable towards the judiciary, it can face, if not a dramatic erosion of support, the prospect of decision-specific disapproval. Theses findings hold

[90] Because the cell sizes in Study 2 are small (the average size of a cell in a treatment group is 29), there is not enough evidence to suggest that diffuse support has a significant influence on *decision approval* across framing conditions (as we saw in Study 1).

across a range of controversies with which the Supreme Court has involved itself in recent decades.

Still, this account does little to suggest what drives backlash to a ruling (where people express significantly *less* support for a policy *after* the Court endorses it), which future research would do well to explore. It may be the case that backlash arises only when strong negative frames dominate the media environment (Chong and Druckman 2007b). It is also possible that a single news article offers only a limited impetus for backlash; for many other issues, it may take a sustained media campaign for people to reject strongly a Supreme Court decision. For instance, the public's overwhelmingly negative reaction to *Kelo v. New London* occurred while the press lavished attention (much of it unfavorable) on the ruling.

This chapter also suggests that more work is needed to explore the relative effects of frames and cues. I demonstrate that both matter to an extent: particularly when frames and cues align with one another, they powerfully affect opinion. But the cue examined here – a ruling by the Supreme Court of the United States – is a relatively powerful one, given the credibility of the institution. Do cues remain as potent when the source is unknown? When it is viewed in negatively? One might imagine a more comprehensive study of how endorsements impact political campaigns depending on the identity of the endorser. But I would also suggest that the study of frames and cues should move beyond the campaign context to consider other communication environments.

For now, we can say with confidence that the Supreme Court's ability to persuade is more limited than previously believed. It is circumscribed by the types of framing struggles that regularly characterize coverage of the judiciary, which cause Americans to eschew the endorsements the Supreme Court offers.

CHAPTER 8
Conclusion

How will Americans make sense of one of the most important judicial decisions in modern history? What effects will the Supreme Court ruling ultimately have on attitudes towards the healthcare law known as the Patient Protection and Affordable Care Act?

Though an expanding body of research continues to explore reactions to judicial rulings, it offers conflicting answers to these questions. According to the *policy legitimation hypothesis*, the ruling should create consensus in favor of the PPACA. As Americans paid close attention to the case, they learned that an essentially fair and trustworthy institution had endorsed the once-controversial policy, which should increase their approval of it. The *conditional response hypothesis* offers qualifications: since American attitudes towards the law had crystallized long before the decision, it should have no persuasive impact. Not so, according to evidence showing that *structural responses* characterize reactions to judicial rulings. To the extent that Americans discussed the decision across disparate social contexts, they may diverge in their reactions to it.

These distinctions make plain the shortcomings of the literature on Supreme Court persuasion. Each account suggests that an additional variable – a source cue, a voting cue, a measure of salience – improves our understanding of policy legitimation (Zink, Spriggs, and Scott 2009; Bartels and Mutz 2009; Baird and Gangl 2006; Hoekstra 1995). But while this approach has some value, it has lead to a confused portrait of Court influence. We can observe distinct reactions to decisions not only because of the small details associated with each, but more notably because each decision does not exist in a vacuum. The Court depends on the media to characterize its rulings for public consumption. But no existing research explores the differences in press coverage across a range of decisions, or how these differences come about. Given the disjointed state of the literature – the various models of Court influence, the troubling divide in conclusions between experimental and survey research – it is not a stretch to say

meaningful research on policy legitimation cannot proceed absent attention to the role played by the media after the Court rules.

How will Americans respond to the ruling on the PPACA? The answer to this question depends not only on popular views about the Court and pre-existing attitudes towards the law. It also depends on the information conveyed by the press about them.

Review of Dissensus Dynamics Theory

I argue that leading national news organizations shape their coverage of Supreme Court rulings systematically in response to judicial voting coalitions. Dissensus Dynamics Theory suggests that rulings meet with the most favorable reports when the majority coalition is large and ideologically diverse. In these cases, reporters will defer to elites on the Court, who possess expertise about legal controversies. Small and ideologically narrow coalitions on the bench have the opposite effect, as the press more willingly portrays their rulings in unflattering terms. Dissent has the direct effect of supplying critical arguments for use by the press; it also has an indirect effect, by giving reporters an incentive to seek out competing voices.

To evaluate the theory, I marshal a diverse range of evidence, with each piece designed to address the shortcomings of another. In theoretical terms, I demonstrate how constraints faced by reporters on the Supreme Court beat – the need to emphasize drama and conflict, the dual goals of simplicity and accuracy, the demand for timely reporting – lead them to shape coverage around judicial voting outcomes at the expense of more complex pieces of information. In fact, a number of experienced Supreme Court journalists attest that, for many decisions, they skim written opinions for such simple cues and craft coverage according to formula. I demonstrate that this account – where the press looks to elites to shape its coverage – fits with findings from other research on political communication (i.e., Entman 2004). I also suggest that the theory may allow us to fill in gaps in the literature on policy legitimation.

A case study provides the first empirical evidence in favor of Dissensus Dynamics Theory. It demonstrates how press coverage of two analogous rulings differs markedly, in large part because the cases featured distinct voting outcomes. The case study adds texture to Dissensus Dynamics Theory. Examining media coverage of property rights law, I show that dissent has both a direct and an indirect impact. The written opinions of the justices may be most influential when they allow the press to emphasize internal disagreements on the Court and

when they use compelling and evocative language that makes them newsworthy. Technical legal analysis from the dissenters has a less potent effect on media coverage. Nonetheless, the signal sent by dissenters with their votes encourages reporters to broaden their use of sources. Outside actors more willingly criticize what they perceive to be a divided bench.

The case study also allows us to examine alternative explanations to Dissensus Dynamics Theory. For instance, one of the most potent critiques of the model suggests that certain issues the Court chooses to hear are much more likely to receive unfavorable coverage, no matter the substance of a ruling. By controlling for issue area in the case study, we can rule out this alternative account quite effectively. Indeed, *Lingle* and *Kelo* not only involve the same issue, they have further substantive similarities: their legal implications, significance, and ultimate outcome. The case study also allows us to trace media coverage over time. It helps demonstrate that not only did the press cover *Kelo* in negative terms, *it did so in a manner that changed popular discussions of property rights from the pre-ruling phase*.

In later chapters, I find evidence in favor of Dissensus Dynamics Theory across a range of years (1981-2008), cases (a random sample of high salience decisions), mediums (newspaper and cable news), and news outlets. These findings suggest that we can draw a broad conclusion: that the effect of judicial votes on press coverage is not restricted to a few exceptional cases or a few news organizations. Americans who learned about high profile Supreme Court rulings in the last thirty years – whether they read the *New York Times* or watched Fox News – saw much more positive portrayals of consensual decisions than dissensual ones, *even if the cases were otherwise similar*. For some of the most widely covered decisions, a unanimous bench (in place of a closely-divided one) would generate 10-15 more positive stories in place of negative ones, all else equal. On cable news channels, the voting result has the added effect of significantly decreasing incivility of the type frequently seen on programs like *Hannity and Colmes* and *Crossfire*.

To the extent that this evidence paints a clear, consistent, and convincing portrait of how the press covers the Court, it adds a new dimension to our understanding of how policy legitimation may come about. And yet, even the most recent experimental work fails to consider whether the framing context alters the impact of Court rulings. Do negative portrayals of rulings – the kind that prevail most frequently when the Court majority is small and narrow – diminish their persuasive appeals? This question is not a rhetorical one: a number of studies suggest that

the simple cue of a judicial endorsement is enough to persuade, regardless of the contextual information that comes with it. I design two related experiments to explore why Dissensus Dynamics Theory matters. Using stimuli that have a greater degree of external validity than that typically found in the literature, I suggest that *negative frames limit the Court's ability to persuade, even after people are made aware of a relevant ruling*. This loss of influence stems not from diminished standing for the Court – subjects continue to rate it as trustworthy and unbiased – but rather from the ability of negative frames to divorce support for the institution from approval of its output.

With these findings, I advance the study of Supreme Court influence along multiple lines. I point to an important shortcoming of existing research that is responsible for its divergent conclusions. I suggest that future studies of policy legitimation must consider that role played by the press. One can think about judicial persuasion not as something that operates solely on the public, but also as constituted by the ability of courts to earn favorable press notices. I offer new insight about journalism at the Supreme Court. To this point, little research gives a systematic account of how decision-centered coverage takes shape. And I link experimental stimuli with real world context more closely than the literature has. I explore some of the implications of my research more fully in the following pages.

Implications for Studies of Political Communication

A significant portion of the literature on political communication explores the quality and content of the news (for an overview, see Graber and Smith 2005). This research regularly finds important links between mainstream government debate and media coverage (Bennett 1990). According to Althaus and colleagues, "We should distinguish three ways of segmenting U.S. elites: governing elites as a whole; the executive branch or administration, which typically initiates foreign policy; and oppositional officials, whom the media generally identify among members of the opposition party in Congress. Together the administration and its critics in Congress compose the *governing elite*" (Alhaus et al. 1996, 408). Judges and judicial branch sources are conspicuously absent from this formulation.

In fact, the vast majority of research involving media-government relations focuses on executive branch actors (Entman 2004, Bennett 1990, Bennett and Manheim 1993, Owen and Davis 2008, Campbell and Jamieson 2008, Hart 2002). The volume of research on

communication strategies employed by the George W. Bush administration alone is impressive (Bennett, Lawrence, and Livingston 2006; Winkler 2007; Winkler 2008; Benoit and Henson 2009; John, Domke, and Coe 2007). A large portion of this work considers foreign policy crisis in particular. Other areas of active research include new media institutions (Livingston and Bennett 2003, Sobieraj and Berry 2011, Xenos and Bennett 2007) and political communication in campaigns (Gibson et al. 2010; Benoit and Arne 2009; Falk, Grizard, and McDonald 2006; Spillotes and Vavreck 2002).

The imbalance in political communication research is troubling. In fact, in studies of the relationship between elite influence and news coverage, researchers often pitch their findings too broadly since the elites in question are almost always executive branch actors. To what extent can we generalize these findings to other areas of the government? Does their reliance on executive branch elites affect the conclusions they draw?

In this dissertation, I have suggested that models of elite influence capture an important portion of the court-press dynamic. I demonstrate that the media's reliance on elite expertise, and its willingness to index coverage to elite voices, allows Supreme Court justices to use their votes to shape how their rulings will be framed. Consensus among these elites causes reporters to offer a unified and deferential perspective in coverage. But division among the justices opens the Court to framing challenges both internal and external. In this respect, elite disagreement is similarly influential whether occurs on the bench or inside the White House.

But Dissensus Dynamics Theory also demonstrates how focusing on presidential administrations obscures other aspects of news production. One missing piece of existing research concerns *elite source credibility*, which captures the extent to which various high levels sources have an incentive to offer counter-framing perspectives. Given the durable nature of its legitimacy, the Court may have a higher level of inherent credibility than other branches of the federal government. Because Americans penalize aggressive attacks on the Court (Shesol 2010), political actors have limited incentives to express disagreements with it.[91] Wielding this credibility, the justices have more power to frame than other actors. Attacks on the Court are unlikely except when it is internally divided. Indeed, evidence shows that elite disagreement

[91] In this respect, we might see parallels to foreign policy conflicts where political actors become reluctant to criticize the president.

with the Court does not affect its coverage once we control for the size of its majority voting coalition.

Dissensus Dynamics Theory also shows the importance of *strategic communication*. According to Entman, framing challenges occur readily in response to culturally incongruent frames. Presidents are unlikely to define issues successfully when they employ frames that are incongruent with "schemas that dominate the political culture." But, "a good match between a news item and habitual schemas pulls a frame into people's thoughts with virtually no cognitive cost" (Entman 2004, 14-15). The examples of *Lingle* and *Kelo*, however, refine this perspective. In both cases, the Court offered a decision that challenged prevailing cultural norms: that private property rights were not sacrosanct, but rather subject to government interference. But the media rejected the Court's frame only in the latter case, where the majority failed to communicate its decision effectively (Baron 2007). Rather, it was the dissenters who offered successful strategic arguments that were designed to inflame public sentiment over the ruling.

An important contribution of this study, then, is to demonstrate how research on political communication has drawn broad conclusions while focusing on a narrow range of elites. I hope to suggest ways to refine and improve existing models of elite influence in the future, paying more systematic attention to press coverage of other actors like the justices of the Supreme Court.

Implications for Studies of Judicial Decision Making

The attitudinal model of judicial decision-making, which has played a key role in the study of Supreme Court rulings, suggests that justices base their votes on personal policy preferences alone (Segal and Spaeth 2002). Scholars continue to refine this perspective, demonstrating that the justices also take into consideration legal principles (Clark and Carrubba 2012, Knight and Epstein 1996), the preferences of other political actors (Segal 1997, Sala and Spriggs 2004, Harvey and Friedman 2006, Clark 2009), the state of public opinion (Marshall 1989, Mishler and Sheehan 1993), and the identities of claimants (Carrubba et al. 2012). Many of these approaches recognize a role for strategic behavior on the bench (see also Maltzman, Spriggs, and Wahlbeck 2000). So, for instance, justices have at times preferred unanimous decisions to guard the legitimacy of the institution (Epstein, Segal, and Spaeth 2001).

How might strategic considerations come into play when we consider media coverage of the Supreme Court? Imagine the choice facing a justice as he or she prepares to vote in a case. Existing research shows that concerns about the Court's image and a desire to shape the outcome create incentives to join the majority coalition. But, as this dissertation demonstrates, voting decisions also have consequences for how the media will portray a ruling. A justice may more effectively circumscribe the Court's persuasive power by dissenting.

To be sure, media coverage likely plays a small role in judicial voting decisions, since it is unclear as to whether judges concern themselves with how the press depicts their work (see Davis 1994 and Baum 2006 for discussions). It is even less clear as to whether the Court cares about decision-specific coverage; rather, it may focus on maintaining its diffuse support alone. But there are some indications that the justices may, at times, behave strategically through their votes and written opinions to influence the public. Most importantly, the Court lacks the ability to enforce its rulings; it depends on the other branches to do so and on the public to comply (Johnson 1967). With a dissenting vote, a justice may make public outcry – like the type that followed the *Kelo* decision – more likely.

There are, indeed, a few instances where a dissenting justice attempted to undermine popular support for a ruling. In *Arizona et al. v. U.S.* (2012), the Court ruled that federal immigration law pre-empted an Arizona statute. In a stinging dissent, Justice Antonin Scalia took aim at the ruling. "Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws," he asked. In *Ledbetter v. Tire & Rubber Co.* (2007), Justice Ruth Bader Ginsburg read an impassioned dissent from the bench, where she asserted, "the ball is in Congress's court … the Legislature may act to correct this [decision]." And in *Kelo*, Justice Sandra Day O'Connor issued a warning about the case's implications for ordinary Americans. All of these dissents strayed from formal legal analysis, using language to that betrayed concern with public opinion.

Going forward, I suggest that the study of judicial behavior should begin to incorporate how justices might use dissent to diminish public support for rulings. This motivation, of course, is but a single ingredient of the many that shape judicial voting behavior. But there are reasons to expect that each justice holds distinct preferences about the tradeoffs between shaping a case outcome, buttressing Court legitimacy, and ensuring public compliance with decisions.

Implications for Studies of Public Opinion

Finally, my findings have a number of implications for the study of public opinion. I have taken care to explore a process that links elite action and public response more fully than other research on policy legitimation. Scholars have long suggested that elites influence public opinion through messaging in the media (Zaller 1992, Zaller 1996), but studies of political communication and public opinion often exist separate from one another. With respect to the Supreme Court, this separation has generated disputes rooted in methodological differences, since experimental studies offer an incomplete look at the information conveyed to the public. I suggest that future research on public opinion would do well to explore media effects in a more realistic context.

Already, recent studies have taken steps in this direction. Chong, Druckman, and colleagues explore the impact of multiple, competing frames on public opinion (Chong and Druckman 2007b, 2012, Druckman 2004, Druckman et al. 2010). Their work demonstrates some important limits on framing effects in competitive contexts. I hope to advance this discussion by demonstrating when and why credible sources fail to frame problems effectively in the media, which may in turn sharply constrain their ability to persuade. But the study of contradictory cues and frames is in its early stages. Much more remains to be explained about how public opinion takes shape in a complex media environment.

But at this point evidence shows that the link between the Court and public is much less direct than commonly assumed. Because the institution depends on the media to translate its decisions to ordinary Americans, its influence is circumscribed. As this dissertation demonstrates, to important effect, the press does not defer to the wisdom of the justices in all cases, but rather uses voting signals to craft its coverage of the High Bench.

APPENDIX A

Coding Standards for Media Coverage Variables

Frame dominance

0 (Frame parity): If frame parity is present, critics of the Court / decision will receive extensive voice in the article. Their arguments, either summarized or directly quoted, will *contest the ruling* on substantive (and possibly legal) grounds, often offering *differing interpretations* of the Court decision and its impact. While the majority and/or its supporters may receive voice in the article, they will clearly fail to dominate the discussion and establish the superiority of their preferred frame. Content of article focusing on Court majority's frame at the expense of opposition frames: ~0-50%.

.5: The article presents the viewpoints of *both supporters and critics* of the Court's decision. The Court's opinion might be quoted and/or explained in detail, but in this case dissenters and/or opponents will also offer their viewpoints. Alternatively, some articles may fail to mention the positions of the Court and its critics in great detail. Articles that briefly mention a decision outcome but then discuss other matters related to it (that do not implicate support for or rejection of the majority's frame) should be coded here. Content of article focusing on Court majority's frame at the expense of opposition frames: ~50-75%.

1 (Frame dominance): If the Court's issue frame is accepted, the article will describe extensively *what the Court ruled and why*, frequently choosing to *quote from the majority opinion* itself. Opposing viewpoints (like those of dissenters on the Court, or activists upset with the decision) might also be present in the article, but these will be given very little space relative to the majority's opinion and the reasoning behind it. Content of article focusing on Court majority's frame at the expense of opposition frames: ~75-100%.

Supportive Tone

0 (Opposition/unsupportive): Articles unsupportive of the Court's decision may reject the Court's framing of the issue (by giving extensive voice to critics of the ruling) and additionally express either *explicit or implicit disapproval* of the ruling. Implicit approval is associated with the absence of challenges to the critics' positions. Alternatively, the article may be neutral with respect to the Court's issue frame, but highlight explicitly a position that is unfavorable towards the ruling.

.5 (Neutral/balanced): The article may be neutral as to whether it accepts the Court's issue frame and, in doing so also fail to indicate support or opposition to the ruling through its language or tone. It may also give equal voice to both critics and supporters of the decision – similar in their level of vehemence – in equal measure. Alternatively, the article may either accept or reject the Court's frame, but explicitly convey ambivalence about the decision overall.

1 (Supportive): Articles supportive of the Court's decision may accept the Court's issue frame (by giving extensive voice to the majority and/or supporters of the ruling) and additionally express either *explicit or implicit approval* of these supporters. Implicit approval is associated with the absence of challenges to the Court's positions. Alternatively, the article may be neutral with respect to the Court's issue frame, but highlight explicitly a position that is favorable towards the ruling.

Uncivil debate (cable news sample only)

0 (No): The program does not include two or more figures engaged in a back-and-forth discussion. Alternatively, a program may include the presence of multiple figures engaged in a discussion in a "civilized" manner. They may discuss the meaning and impact of a decision, with one of them acting as devil's advocate for the purposes of better understanding a ruling (and not to actually generate a contentious substantive debate). Similarly, two speakers can actually debate the merits of a ruling, but if they do so in the most civilized manner (no charged language, no long / contentious exchanges, no interruptions of one another) it should be coded here.

1 (Yes): The program includes two or more figures that debate the merits of an issue/decision in anything less than a cordial manner. Such debate is often characterized by charged language, lengthy back-and-forth discussions that take the form of an argument, and/or speakers interrupting one another during the course of a discussion.[92]

Activism

0 (No): No mentions of the term "activism" and its derivatives to characterize the decision. Brief or no mention of overturning a lower court and/or legal precedent. The article may say things like "groundbreaking," "clarifies old law," "answers new questions," "overturns lower court," though, and still be coded as 0.

1 (Yes): The article clearly portrays the decision as activist. This is most typically done with a mention of the phrase "activist" or "activism," but might instead include a description of the Court's overturning of a legal precedent. However, *mentions of overruling a precedent should be explicit and obvious*. Passing phrases about the establishment, clarification, and/or alteration of precedent do not indicate activism, but clear charges of an activist judiciary do. These charges might emphasize an *unelected* body making *policy judgments* or a deliberate *refusal to honor precedent or law*.

[92] Follows the definition presented by Mutz and Reeves (2005).

APPENDIX B

The Measurement of *Decision Support*

Construction of the Measure

Dissensus Dynamics Theory explores the links between judicial voting outcomes and favorable media coverage of rulings. *Decision support* serves as the main measure of news content, intended to tap *the degree of favorable coverage afforded to any one Court decision*.

To construct the measure, I begin by taking a random sample of all high salience Supreme Court rulings handed down between 1981 and 2008. For each ruling in the sample, I limit the window of coverage from the day of its announcement to 30 days afterwards. This time frame allows me to survey the vast majority of coverage that will ever be published on most decisions. I conduct a Lexis-Nexis keyword search for "supreme court" and the name of one of the parties to the case in the *New York Times* (1981-2008), *Washington Post* (1981-2008), *Washington Times* (1989-2008), CNN (1995-2008), Fox News (1996-2008), and MSNBC (1996-2008). In most cases this party is the plaintiff, but when the search retrieves a small set of results or a large number of irrelevant results, I refine by searching for the name of the defendant. Since cable news channels are less likely to mention the names of the parties before the Court, I also search for a substantive term related to the case on cable outlets (i.e., "abortion" in the case of *Webster v. Reproductive Health Services*). For each article in the sample, I focus on only the relevant portions of the text. For instance, when an article summarizes a series of decisions in separate sections, I evaluate only the portion of the story that focuses on the ruling in question. This helps to ensure that coverage is decision-specific.

I expect that the news media can convey support for a decision by making positive evaluative judgments of it and/or by employing frames used by the Court majority. Therefore, I code stories using two separate ordinal measures. The *supportive tone* of a report captures whether it directly or indirectly expresses support for a decision. The *frame dominance* captures

how extensively a report explains a decision, gives voice to justices in the majority coalition, and mentions decision supporters vis-à-vis critics.

I combine the article level measures *supportive tone* and *frame dominance* – which tap different portions of the favorable coverage construct – into a *decision support* scale (also at the article level). But Dissensus Dynamics Theory requires a decision-centered measure. So I average article scores across all coverage of a case. The ruling centered measure of *decision support* (0-1) captures the degree of favorable coverage (in tonal and framing terms) afforded any single ruling across the entirety of its coverage.

Performance of the Measure

Reliability

The reliability of a measure is the extent to which it is free from random error (Hoyle, Harris, and Judd 2002). To improve reliability, I formalize a set of coding standards for both the *supportive tone* and *frame dominance* measures. These coding standards are included in Appendix A. Using these standards, a research assistant who was blind to the study's hypotheses read and coded news coverage of a random sample of cases (10.3% of the newspaper articles, 29% of the cable news stories).

I use a number of tools to assess and improve reliability. Table B.1 presents two measures of intercoder reliability: percent agreement between coders (the author and the research assistant) and Krippendorff's alpha. With three coding categories for each variable, the baseline is 33.3% agreement by chance; in actuality, percent agreement ranges between 55.4% and 70.2%. Krippendorff's alpha is among the most conservative standards for intercoder reliability, guarding against agreement by chance (Lombard, Snyder-Duch, and Bracken 2002; Lombard, Snyder-Duch, and Bracken 2004; Krippendorff 1987; Freelon 2010). Krippendorff's alpha scores range from .425 (the *frame dominance* category in the newspaper sample) to .735 (the *supportive tone* category in the cable news sample). The print news reliability scores fall short of accepted standards, which is to be expected given the complex nature of the coding task. To the extent that measurement error is non-systematic (i.e., the difficulty of the coding task leads to random error in article level coding), this will decrease the efficiency of estimated effects without biasing them (King, Keohane, and Verba 1994).

Table B.1 Reliability of the Dependent Variable

	Frame dominance		*Supportive tone*	
	% agree	Krippendorff's α	% agree	Krippendorf's α
Newspaper sample	.554	.425	.643	.542
Cable news sample	.635	.623	.702	.735

I address remaining reliability concerns in two ways. First, I use a decision-centered dependent variable to alleviate inefficiencies that arise in the coding of individual articles. Though we cannot use intercoder reliability scores to assess the summary measure of decision-centered coverage, we would expect the effect of article level coding error to diminish as the media publishes more stories on a given ruling. To test this possibility, I run an OLS regression of Dissensus Dynamics Theory for print outlets only. Since we expect more coverage to generate a more reliable *decision support* measure, the error term should be smaller for the most high salience decisions. This is indeed the case – high coverage volume decreases the size of the residual term (though this relationship is not significant and other diagnostics indicate that heterogeneity is not a problem for the models presented in Chapters 5 and 6). This suggests that combining multiple articles into a decision-centered measure, as I do here, may increase the efficiency of estimates and reliability of the dependent variable.

Additionally, combining the *supportive tone* and *frame dominance* measures improves reliability (the *decision support* scale). The measures are highly correlated with one another; the scale reliability coefficient (Cronbach's alpha) is .898 for the newspaper sample and .873 for the cable news sample.

Validity

The validity of a measure is the extent to which it reflects only the desired construct without contamination from other systematically varying constructs (Hoyle, Harris, and Judd 2002). We can assess the validity of the *decision support* measure in a variety of ways.

Convergent validity represents the overlap between measures of a single construct that have different sources of systematic error. The measures of favorable decision coverage that I employ are *supportive tone* and *frame dominance*. The former taps the portion of the construct associated with direct praise for a ruling, which is most often found in editorials and Op-Eds.

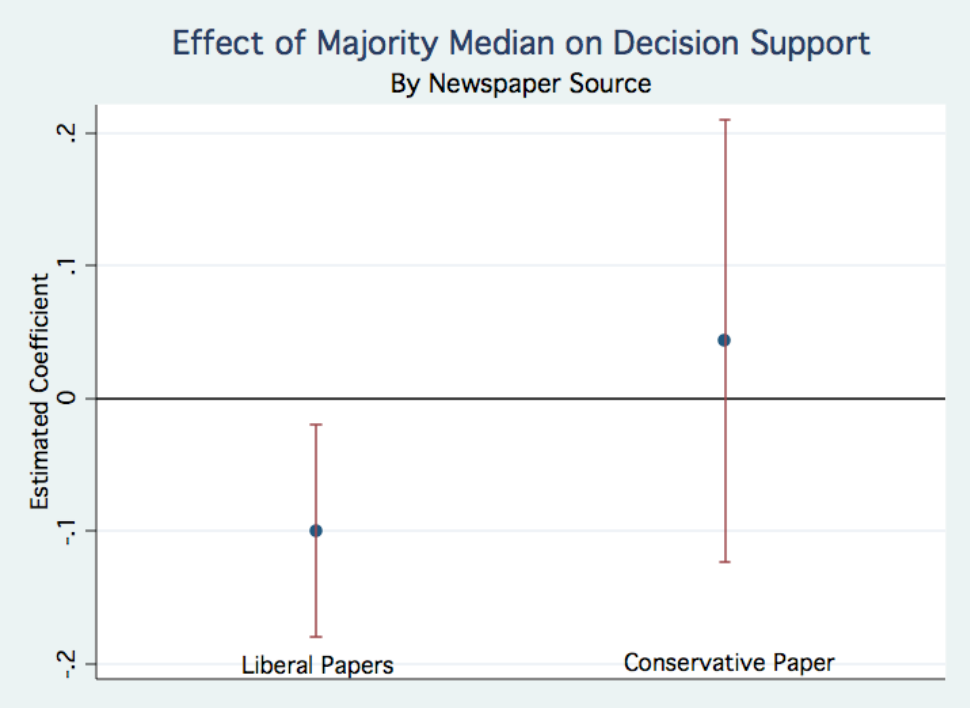
This measure fails to account for the ways in which a ruling can receive favorable coverage absent direct praise. Most importantly, it does not allow us to distinguish between framing contexts depending on whether they adhere to or depart from the Court's analysis. The *frame dominance* measure, on the other hand, allows us to tap framing contexts that are favorable to the Court, but it overlooks whether the frames are employed to praise or criticize a ruling. For instance, coverage of *Roe v. Wade* may employ the "zone of privacy" frame to denounce the ruling as misguided (even though the majority coalition developed the frame). The shortcomings of the *supportive tone* and *frame dominance* measures are a result of the different sources of systematic error in each; I therefore combine these distinct measures of the favorable coverage construct into a scale of *decision support*.

A measure with discriminate validity serves to distinguish between the construct it taps and other constructs. Two of the concepts that are associated with but ultimately distinct from favorable coverage include incivility and judicial activism charges. As we might expect, incivility on cable news programs is associated with decreases in *decision support* (r =-.406), but adding the incivility measure to the *decision support* scale weakens its reliability. Similarly, accusations of judicial activism correlate negatively with *decision support* (r =-.337) but decrease the reliability of the index. The *decision support* scale, then, appears to tap the desired construct while discriminating between the related yet distinct constructs of incivility and judicial activism in the news.

Finally, the *decision support* measure has strong predictive validity. To test this, I use Ho and Quinn's analysis of newspaper editorials on Supreme Court decisions from 1994 to 2004 (Ho and Quinn 2008). In a sample of 25 papers, the authors rank the *New York Times* and *Washington Post* as the most liberal and seventh most liberal sources. They rank the *Washington Times* as the third most conservative. Thus, we would expect a valid measure of *decision support* to show that favorable coverage varies depending on the relationship between source and decision ideology, all else equal. I measure decision ideology with the Bailey ideal point estimate of the median justice in a majority coalition (see Carrubba et al. 2012) and offer separate models of *decision support* for liberal (the *New York Times* and *Washington Post*) and conservative (the *Washington Times*) newspapers. Figure B.1 presents the estimated effect of *majority median* on *decision support* by source. As expected, liberal newspapers project less

support for rulings reached by conservative majority coalitions on the Court, further attesting to the validity of the *decision support* measure.

Figure B.1



Graph shows estimated coefficients and 95% confidence intervals for the effect of *majority median* on *decision support* by newspaper source, with positive coefficients indicating increased support for conservative rulings.

Decision Support in *Kelo v. New London*

We can observe the *decision support* measure in action in the case of *Kelo v. New London*. The realized value of the variable is .098 in the newspaper sample, meaning that the measure characterizes coverage of the ruling as highly unfavorable towards it in both tone and framing content. In fact, *Kelo* has the lowest realized value for *decision support* in the sample.

Data from Chapter 4 provides evidence that the *decision support* measure characterizes coverage accurately. The media's displeasure with the decision is both strong and widespread. Editorials call it "uninformed expropriation" and "fascist." One source, speaking about the Supreme Court, says, "Do they have any idea what they've done?" The tone employed in the press with respect to the ruling is almost exclusively negative; so too are the frames used to characterize the decision. As detailed in Chapter 4, five of the major frames in the news describe the decision in an unflattering light.

To be sure, the *decision support* measure is one that captures central tendency alone. It does little to suggest that a few articles praise *Kelo*. It offers no information about the variety of negative perspectives that concern the decision. It does not catalogue the specific frames used by the Court and its opponents. But it is not intended to do so. The *decision support* measure taps a construct that applies across a wide range of rulings: the degree of favorable coverage afforded any Court decision. Though *Kelo* represents an extreme case along this spectrum, the measure performs quite well in characterizing its coverage in highly negative terms.

APPENDIX C

Cases in the Newspaper Coverage Sample

United States v. MacDonald (1982)

International Longshoremen's Association, AFL-CIO, Et Al. v. Allied International, Inc. (1982)

Plyler, Superintendent, Tyler Independent School District, Et Al. v. Doe, Guardian, Et Al. (1982)

Board Of Education, Island Trees Union Free School District No. 26, Et Al. v. Pico, By His Next Friend Pico, Et Al. (1982)

New York v. Ferber (1982)

Bob Jones University v. United States (1983)

City Of Akron v. Akron Center For Reproductive Health, Inc., Et Al. (1983)

Simopoulos v. Virginia (1983)

Motor Vehicle Manufacturers Association Of The United States, Inc., Et Al. v. State Farm Mutual Automobile Insurance Co. Et Al. (1983)

Container Corporation Of America v. Franchise Tax Board (1983)

Solem, Warden, South Dakota State Penitentiary v. Helm (1983)

Dirks v. Securities And Exchange Commission (1984)

Grove City College Et Al. v. Bell, Secretary Of Education, Et Al. (1984)

Hishon v. King & Spalding (1984)

Hawaii Housing Authority Et Al v. Midkiff Et Al. (1984)

Schall, Commissioner Of New York City Department Of Juvenile Justice v. Martin Et Al. (1984)

Firefighters Local Union No. 1784 v. Stotts Et Al. (1984)

United States v. Leon Et Al. (1984)

Federal Election Commission v. National Conservative Political Action Committee Et Al. (1985)

Tennessee v. Garner Et Al. (1985)

Pattern Makers' League Of North America, AFL-CIO, Et Al. v. National Labor Relations Board Et Al. (1985)

Philadelphia Newspapers, Inc., Et Al. v. Hepps Et Al. (1985)

Bowen, Secretary Of Health And Human Services v. American Hospital Association Et Al. (1986)

Davis Et Al. v. Bandemer Et Al. (1986)

Local 28 Of The Sheet Metal Workers' International Association Et Al. v. Equal Employment Opportunity Commission Et Al. (1986)

Immigration And Naturalization Service v. Cardoza-Fonseca (1987)

California Coastal Commission Et Al. v. Granite Rock Co. (1987)

Pennzoil Co. v. Texaco Inc. (1987)

Edwards, Governor Of Louisiana, Et Al. v. Aguillard Et Al. (1987)

McNally v. United States (1987)

Richard A. Lyng, Secretary Of Agriculture v. International Union, United Automobile Aerospace And Agricultural Implement Workers Of America, UAW, Et Al. (1988)

K Mart Corp. v. Cartier, Inc., Et Al. (1988)

Morrison, Independent Counsel v. Olson Et Al. (1988)

Skinner, Secretary Of Transportation, Et Al. v. Railway Labor Executives' Association Et Al. (1989)

Board Of Estimate Of City Of New York Et Al. v. Morris Et Al. (1989)

Patterson v. Mclean Credit Union (1989)

Webster, Attorney General Of Missouri, Et Al. v. Reproductive Health Services Et Al. (1989)

University Of Pennsylvania v. Equal Employment Opportunity Commission (1990)

James v. Illinois (1990)

Saffle, Warden, Et Al. v. Parks (1990)

Yellow Freight System, Inc. v. Donnelly (1990)

Pennsylvania v. Inocencio Muniz (1990)

International Union, United Automobile, Aerospace & Agricultural Implement Workers Of America, UAW, Et Al. v. Johnson Controls, Inc. (1991)

American Hospital Association v. National Labor Relations Board Et Al. (1991)

Pervis Tyrone Payne v. Tennessee (1991)

Christine Franklin v. Gwinnett County Public Schools And William Prescott (1992)

Robert R. Freeman, Et Al. v. Willie Eugene Pitts, Et Al. (1992)

R. A. V. v. City Of St. Paul, Minnesota (1992)

John Sullivan v. Louisiana (1993)

St. Mary's Honor Center, Et Al. v. Melvin Hicks (1993)

Ferris J. Alexander, Sr. v. United States (1993)

City Of Ladue, Et Al. v. Margaret P. Gilleo (1994)

Florence Dolan v. City Of Tigard (1994)

Turner Broadcasting System, Inc., Et Al. v. Federal Communications Commission Et Al. (1994)

Judy Madsen, Et Al. v. Women's Health Center, Inc., Et Al. (1994)

Ronald W. Rosenberger, Et Al. v. Rector And Visitors Of The University Of Virginia Et Al. (1995)

Tina B. Bennis v. Michigan (1996)

Barbara Smiley v. Citibank (South Dakota), N. A. (1996)

United States v. Winstar Corporation, Et Al. (1996)

State Oil Company v. Barkat U. Khan And Khan & Associates, Inc. (1997)

Joseph Oncale v. Sundowner Offshore Services, Incorporated, Et Al. (1998)

Alida Star Gebser And Alida Jean Mccullough v. Lago Vista Independent School District (1998)

Burlington Industries, Inc. v. Kimberly B. Ellerth (1998)

Victoria Buckley, Secretary Of State Of Colorado v. American Constitutional Law Foundation, Inc., Et Al. (1999)

Albertson's, Inc. v. Hallie Kirkingburg (1999)

City Of Erie, Et Al. v. Pap's A. M., Tdba 'Kandyland' (2000)

United States, Et Al. v. Playboy Entertainment Group, Inc. (2000)

Lori Pegram, Et Al. v. Cynthia Herdrich (2000)

Santa Fe Independent School District v. Jane Doe, Individually And As Next Friend For Her Minor Children, Jane And John Doe, Et Al. (2000)

Legal Services Corporation v. Carmen Velazquez, Et Al. (2001)

Gail Atwater, Et Al. v. City Of Lago Vista Et Al. (2001)

Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams (2002)

Tahoe-Sierra Preservation Council, Inc., Et Al. v. Tahoe Regional Planning Agency Et Al.

(2002)

Nevada Department Of Human Resources, Et Al. v. William Hibbs Et Al. (2003)

Elk Grove Unified School District And David W. Gordon, Superintendent v. Michael A. Newdow Et Al. (2004)

United States v. Freddie J. Booker (2005)

Jennifer M. Granholm, Governor Of Michigan, Et Al. v. Eleanor Heald, Et Al. (2005)

Alberto R. Gonzales, Attorney General, Et Al. v. Angel Mcclary Raich Et Al. (2005)

Thomas Joe Miller-El v. Doug Dretke, Director, Texas Department Of Criminal Justice, Correctional Institutions Division (2005)

Susette Kelo, Et Al. v. City Of New London, Connecticut, Et Al. (2005)

Kelly A. Ayotte, Attorney General Of New Hampshire v. Planned Parenthood Of Northern New England, Et Al. (2006)

Donald H. Rumsfeld, Secretary Of Defense, Et Al. v. Forum For Academic And Institutional Rights, Inc., Et Al. (2006)

Neil Randall, Et Al. v. William H. Sorrell Et Al. (2006)

Brian Michael Gall v. United States (2007)

Derrick Kimbrough v. United States (2007)

Donna S. Riegel, Individually And As Administrator Of The Estate Of Charles R. Riegel v. Medtronic, Inc. (2008)

Boumediene v. Bush (2008)

District Of Columbia v. Heller (2008)

APPENDIX D

Cases in the Cable News Coverage Sample

Tina B. Bennis v. Michigan (1996)

Barbara Smiley v. Citibank (South Dakota), N. A. (1996)

George W. Bush, Governor Of Texas, Et Al. v. Al Vera Et Al. (1996)

United States v. Guy Jerome Ursery (1996)

United States v. Winstar Corporation, Et Al. (1996)

Rachel Agostini, Et Al. v. Betty-Louise Felton Et Al. (1997)

State Oil Company v. Barkat U. Khan And Khan & Associates, Inc. (1997)

Joseph Oncale v. Sundowner Offshore Services, Incorporated, Et Al. (1998)

Alida Star Gebser And Alida Jean Mccullough v. Lago Vista Independent School District (1998)

Burlington Industries, Inc. v. Kimberly B. Ellerth (1998)

Victoria Buckley, Secretary Of State Of Colorado v. American Constitutional Law Foundation, Inc., Et Al. (1999)

Vaughn L. Murphy v. United Parcel Service

Albertson's, Inc. v. Hallie Kirkingburg

J. Daniel Kimel, Jr., Et Al. v. Florida Board Of Regents, Et Al. (2000)

City Of Erie, Et Al. v. Pap's A. M., Tdba 'Kandyland' (2000)

United States, Et Al. v. Playboy Entertainment Group, Inc. (2000)

Jenifer Troxel, Et Vir v. Tommie Granville (2000)

Lori Pegram, Et Al. v. Cynthia Herdrich (2000)

Santa Fe Independent School District v. Jane Doe, Individually And As Next Friend For Her Minor Children, Jane And John Doe, Et Al. (2000)

Legal Services Corporation v. Carmen Velazquez, Et Al. (2001)

Gail Atwater, Et Al. v. City Of Lago Vista Et Al. (2001)

John Paul Penry v. Gary L. Johnson, Director, Texas Department Of Criminal Justice, Institutional Division (2001)

Lorillard Tobacco Company, Et Al. v. Thomas F. Reilly, Attorney General Of Massachusetts, Et Al. (2001)

Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams (2002)

Tahoe-Sierra Preservation Council, Inc., Et Al. v. Tahoe Regional Planning Agency Et Al. (2002)

Daryl Renard Atkins v. Virginia (2002)

Rush Prudential Hmo, Inc. v. Debra C. Moran Et Al. (2002)

Board Of Education Of Independent School District No. 92 Of Pottawatomie County, Et Al. v. Lindsay Earls Et Al. (2002)

Pharmaceutical Research And Manufacturers Of America v. Peter E. Walsh, Acting Commissioner, Maine Department Of Human Services, Et Al. (2003)

Nevada Department Of Human Resources, Et Al. v. William Hibbs Et Al. (2003)

Barbara Grutter v. Lee Bollinger Et Al. (2003)

Gary Locke, Governor Of Washington, Et Al. v. Joshua Davey (2004)

Elk Grove Unified School District And David W. Gordon, Superintendent v. Michael A. Newdow Et Al. (2004)

United States v. Freddie J. Booker (2005)

Donald P. Roper, Superintendent, Potosi Correctional Center v. Christopher Simmons (2005)

Roderick Jackson v. Birmingham Board Of Education (2005)

Jennifer M. Granholm, Governor Of Michigan, Et Al. v. Eleanor Heald, Et Al. (2005)

Alberto R. Gonzales, Attorney General, Et Al. v. Angel Mcclary Raich Et Al. (2005)

Thomas Joe Miller-El V. Doug Dretke, Director, Texas Department Of Criminal Justice, Correctional Institutions Division (2005)

Susette Kelo, Et Al. v. City Of New London, Connecticut, Et Al. (2005)

Kelly A. Ayotte, Attorney General Of New Hampshire v. Planned Parenthood Of Northern New England, Et Al. (2006)

Donald H. Rumsfeld, Secretary Of Defense, Et Al. v. Forum For Academic And Institutional Rights, Inc., Et Al. (2006)

Neil Randall, Et Al. v. William H. Sorrell Et Al. (2006)

Brian Michael Gall v. United States (2007)

Derrick Kimbrough v. United States (2007)

Donna S. Riegel, Individually And As Administrator Of The Estate Of Charles R. Riegel v. Medtronic, Inc. (2008)

Boumediene v. Bush (2008)

District Of Columbia v. Heller (2008)

APPENDIX E

Stimuli from Study 1, Framing a Religious Expression Ruling

Condition: Cue + Positive Frame

Praise for Supreme Court Ruling in Favor of Religious Groups

WASHINGTON (AP) - The Supreme Court recently enhanced the ability of religious groups to promote their messages in the public arena. In a 5 to 4 vote, the Court held that the University of Virginia was constitutionally obligated to subsidize a student religious publication, as it did other non-religious publications.

The decision marked the first time that the Court approved government funding for a religious activity.

Many groups hailed the ruling as a major victory for Constitutional principles.

"We have crossed a critical threshold in the fight over the First Amendment," said Jeffrey Fort, chief litigator for the American Center for Law and Justice. "The message is clear: The Supreme Court has protected the United States Constitution."

In the case, a former university student had sought $ 5,800 from a student activities fund to publish "Wide Awake: A Christian Perspective at the University of Virginia." The Supreme Court ruled that once a state-supported university decides to underwrite the private speech of any group of students, it "may not silence the expression of selected viewpoints" on the grounds that the expression is religious in content.

Martin Renault, executive director of Americans United, was one of the many to praise the decision and said the Court provided a level playing field for all students. “The Court has, for the first time, balanced the freedom of speech and the freedom of religion,” Mr. Renault said. “This decision puts an end to the double standards used in university funding of student groups.”

Condition: Cue + Negative Frame

Criticism for Supreme Court Ruling in Favor of Religious Groups

WASHINGTON (AP) - The Supreme Court recently enhanced the ability of religious groups to promote their messages in the public arena. In a 5 to 4 vote, the Court held that the University of Virginia was constitutionally obligated to subsidize a student religious publication, as it did other non-religious publications.

The decision marked the first time that the Court approved government funding for a religious activity.

Many groups denounced the ruling as a major defeat for Constitutional principles.

"We have crossed a critical threshold in the fight over the First Amendment," said Jeffrey Fort, chief litigator for the American Center for Law and Justice. "The message is clear: The Supreme Court has dishonored the United States Constitution.

In the case, a former university student had sought $ 5,800 from a student activities fund to publish "Wide Awake: A Christian Perspective at the University of Virginia." The Supreme Court ruled that once a state-supported university decides to underwrite the private speech of any group of students, it "may not silence the expression of selected viewpoints" on the grounds that the expression is religious in content.

But Martin Renault, executive director of Americans United, was one of the many to criticize the decision and said that the Court failed to provide a level playing field for all students. “The Court has, for the first time, failed to balance the freedom of speech and the freedom of religion,” he said. “This decision creates a double standard that will be used in university funding of student groups.”

APPENDIX F

Selected Stimuli from Study 2, Framing Four Legal Controversies

Gun Rights Issue: Cue + Positive Frame

Controversy Over Gun Ban Grows As Supreme Court Declares it Unconstitutional

Washington (AP) – In a landmark decision, the U.S. Supreme Court struck down the Gun Free School Zones Act, declaring it an unconstitutional exercise of federal power. The Court ruled that only state and local governments have the ability to shape gun control policies in school zones.

Nonetheless, the longstanding debate over gun control in the United States continues to inflame passions, as both supporters and opponents of gun restrictions have turned their attention to firearms near schools. Many activists oppose the law known as the Gun Free School Zones Act because it grants broad power to the federal government to restrict gun rights. They argue, instead, that because education is primarily a local matter, that state and local government must have the exclusive ability to enact gun laws near schools in accordance with the Constitution.

According to James A. Michael, a gun rights advocate, "There is no doubt that Congress lacks the authority to regulate matters that deal with local schools. It is not up to federal officials to ban the gun rights enshrined in the Second Amendment while local governments retain authority over the educational institutions near which they are banned." He pointed to the fact that the federal ban was overly broad, including a 1000-foot radius around all schools, which he argued Congress was using to chip away at gun rights.

"If we accept the argument that the national government can ban guns near schools, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate," said Martin O'Brien, a Washington D.C.-based attorney and Constitutional expert. By the same logic, he added, school curricula and state laws governing divorce and child custody would also come under federal control.

The Gun Free School Zones Act has been controversial since its adoption. At issue are two major principles. With respect to the matter of federal power, opponents of the Act argue that it drastically expands the authority of the national government beyond what the Constitution permits. Congress is not permitted, they say, to regulate matters dealing with education. Second, the Act has angered gun rights advocates, who view it as an unconstitutional infringement on the right to bear arms.

The Supreme Court has settled this debate for the time being, striking down the gun ban and limiting the power of Congress.

Gun Rights Issue: No Cue + Positive Frame

Controversy Over Gun Ban Grows

Washington (AP) – The longstanding debate over gun control in the United States continues to inflame passions, as both supporters and opponents of gun restrictions have turned their attention to firearms near schools. Many activists oppose the law known as the Gun Free School Zones Act because it grants broad power to the federal government to restrict gun rights. They argue, instead, that because education is primarily a local matter, that state and local government must have the exclusive ability to enact gun laws near schools in accordance with the Constitution.

According to James A. Michael, a gun rights advocate, "There is no doubt that Congress lacks the authority to regulate matters that deal with local schools. It is not up to federal officials to ban the gun rights enshrined in the Second Amendment while local governments retain authority over the educational institutions near which they are banned." He pointed to the fact that the federal ban was overly broad, including a 1000-foot radius around all schools, which he argued Congress was using to chip away at gun rights.

"If we accept the argument that the national government can ban guns near schools, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate," said Martin O'Brien, a Washington D.C.-based attorney and Constitutional expert. By the same logic, he added, school curricula and state laws governing divorce and child custody would also come under federal control.

The Gun Free School Zones Act has been controversial since its adoption. At issue are two major principles. With respect to the matter of federal power, opponents of the Act argue that it drastically expands the authority of the national government beyond what the Constitution permits. Congress is not permitted, they say, to regulate matters dealing with education. Second, the Act has angered gun rights advocates, who view it as an unconstitutional infringement on the right to bear arms.

Government Takings Issue: Cue + Negative Frame

Controversy Over Gun Ban Grows As Supreme Court Declares it Unconstitutional

Washington (AP) – In a landmark decision, the U.S. Supreme Court broadened the "takings" power, which allows the government to extract revenue from private companies. The Court found it constitutional for the government to regulate the property of private entities for the public good, so long as it provides compensation for the taking.

Nonetheless, the longstanding debate over property rights in the United States continues to inflame passions. Both supporters and opponents struggle over the proper scope of the takings power, which allows the government to extract revenue from private companies. Many activists argue that the government does not have the power to trample on private property rights. They argue that government takings do little to ensure economic fairness.

According to James A. Michael, a lawyer who opposes most government takings, "The Takings Clause of the Fifth Amendment allows the government to seize private property in only the rarest of cases." He pointed to the fact that most takings do not further the public good, even though governments have used this rationale to expand their control over the private market. In Hawaii, for instance, the government has limited the rent that companies can charge to use their property.

"Private property is a bedrock of our society and we must protect it from bureaucratic interference," said Martin O'Brien, a Washington D.C.-based attorney and Constitutional expert. He argued that city governments have traditionally used the eminent domain power to clear land that belongs to homeowners, even if they do not wish to give up their property. According to O'Brien, "Though governments must provide some compensation when they take land, this is little solace to the people whose property is seized."

Controversy over regulatory takings has increased in recent years. At issue are two major principles. With respect to the Fifth Amendment, opponents of takings argue that the Constitution guards against abuse by a powerful government. Second, many activists argue that the government must protect the property rights of all Americans, since such rights are a fundamental part of society and ensure a prosperous economy.

The Supreme Court, however, has settled this debate for the time being, upholding the right of the government to extract revenue from private companies as a constitutional exercise of the takings power.

Government Takings Issue: No Cue + Negative Frame

Controversy Over Property Rights Grows

Washington (AP) – The longstanding debate over property rights in the United States continues to inflame passions. Both supporters and opponents struggle over the proper scope of the takings power, which allows the government to extract revenue from private companies. Many activists argue that the government does not have the power to trample on private property rights. They argue that government takings do little to ensure economic fairness.

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