

Law is Not a Spectator Sport:
Addressing Challenges Posed by Civic Education through Public Engagement with
the Supreme Court

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Democracy relies on an informed and engaged citizenry. Low knowledge of public policy debates makes it difficult for government to meaningfully reflect the will of the people or for citizens to engage in fruitful public discussions. The discussions we manage to have about law and politics too often resemble a hyper-partisan cable news show rather than an honest effort at a conversation. In addition, many studies have suggested that, on the whole, Americans are not as informed about the courts as one would hope.¹ This is especially true of the United States Supreme Court, which benefits from the “myth” that it is an institution insulated from the beltway politics that surround it.² Critical Legal Studies scholars have long argued that judicial opinions are not immune from politics. In fact, this widely shared assumption, they argue, is not only false but also dangerous.

The purpose of this paper is to elaborate upon explanations of low public awareness of and engagement with the decisions of the United States Supreme Court. It identifies and explains the problems with existing outlets for public interaction with the Court as well as proposes the implementation of a hybrid of two existing public participation models, specifically citizens’ assemblies and consensus conferences, in order to more fully engage Americans with the decisions of the highest court. Most generally, citizens’ assemblies provide a space for discussions moderated by professional facilitators who encourage respectful disagreement and sincere inquiry into the views of those with whom one disagrees. Consensus conferences form

¹ Lupia argues that scholars have focused too narrowly on measuring what they believe Americans *ought to know* about politics, and not necessarily what one *must know* in order to be an informed citizen. See Arthur Lupia, “How Elitism Undermines the Study of Voter Competence,” *Critical Review* 18 (2006): 217-232.

² The term “myth of legality” has been used to describe the media’s tendency to portray the Court as apolitical, which has contributed to the popular belief that it operates above the partisan fray characteristic of the legislative and executive branches. See Vanessa A. Baird and Amy Gangl, “Shattering the Myth of Legality: The Impact of the Media’s Framing of Supreme Court Procedures on Perceptions of Fairness,” *Political Psychology* 27 (2006): 597-614.

panels of citizens that are given the opportunity to learn about scientific developments, question experts, and discuss public policy implications. These models of public participation have yet to be applied to the judiciary, much less as ways of encouraging citizens to engage with judicial decisions themselves.

A greater understanding of the judiciary, particularly the highest court, would hopefully positively impact the voting decisions of the American public. My hope is that by having a broader and more nuanced understanding of what the Court considers (and, perhaps, what it should consider) when deciding matters of law, voters would be more sensitive to how they conduct themselves and view their roles in our democracy. This increased awareness and civic-mindedness might be a surer way to ensure fairness and liberty for all. If we start with voters, and implicitly ask them to “think” like judges more often than they normally would, perhaps we would be left with a diminished chance of discriminatory legislation ever being enacted. Colorado’s Amendment 2, for example, might not have passed if voters had a greater appreciation for the harm they were causing, both to the individuals directly affected as well as to the broader concept of equal protection.³

³ Amendment 2 prohibited the adoption or enforcement of any law or policy that allowed a person to claim “discrimination, protected status, minority status, or quota preferences” based upon their sexual orientation. The initiative passed with 53.4% of the vote during the 1992 general election. The United States Supreme Court later struck down the amendment in *Romer v. Evans*. During the 2008 election, California voters faced their own discriminatory constitutional amendment. Proposition 8 amended the state’s constitution to eliminate the right of same-sex couples to marry. Numerous marriage equality organizations encouraged activists to engage in conversations with friends and family about the harm such an amendment would cause. While those efforts undoubtedly changed some hearts, Proposition 8 unfortunately passed with 52.3% of the vote. *Perry v. Schwarzenegger*, a lawsuit filed in federal court, challenges the constitutionality of the ban. Presently, the Ninth Circuit Court of Appeals has asked the California Supreme Court to decide whether Proposition 8’s backers may defend the law in court, as California officials have refused to do so.

The result would be a community of voters more adequately prepared to carefully examine matters of law and politics. Rather than one based on pure self-interest, the alternative model I propose would help engender a concern for how law affects others, particularly those belonging to the most vulnerable groups in our society. Once democratic values are made real through careful discussions about the Constitution, those values and interactions with diverse individuals would then have a better chance of informing the decisions of the body politic.⁴ I do not expect all Americans to unanimously agree or disagree with the conclusions found in specific cases, but I do believe such discussions are worth having precisely because they can help more Americans appreciate the reasoning the Court should utilize. While no paradigm shift in how Americans view and interact with their government can be expected to be immediate, change over time is possible. Engagement and knowledge acquisition undoubtedly require effort and institutional and cultural changes, but demonstrating that individual voices are valued can help inspire that change. This paper rests on an optimistic premise: that when we take seriously the idea that regular citizens, empowered with accurate information, can carefully consider and engage with substantial legal questions, we are able to better appreciate what a democratic society can, and ought to, look like. I shall argue that far from encouraging active citizenship, the media, American civic education, and the Court itself instead serve as impediments to the larger goal of public engagement with Supreme Court decisions. Given the failures of these

⁴ There is something to be said about how our personal awareness of the individuals a law affects may impact our views. A 2009 Gallup Poll found that among those who personally know someone who is gay or lesbian, 49% were in favor of same-sex marriage while 47% were opposed. Of those who do not personally know someone who is gay or lesbian, 72% opposed same-sex marriage while only 27% were in favor of its legalization. In regards to same-sex relationships more generally, of those who know a gay or lesbian individual, 67% are “accepting” of such relationships. Of those who do not know any such individual, 57% do not believe such relationships should be legal. *See* Gallup Poll, May 7-10, 2009, N=1,015 adults nationwide, MOE + or – 3%. <http://www.gallup.com/poll/118931/knowning-someone-gay-lesbian-affects-views-gay-issues.aspx>.

existing institutions, we must instead envision a new public participation model, indeed a new institution, which is most concerned with encouraging informed and civil dialogue.

I. The Nature of the Problem

The mass media have a substantial part to play in what Americans know about their government; they not only select the information that is disseminated, but they also frame the issues of the day. In other words, we are not necessarily told what to think, but what to think about. Doris Graber has demonstrated the importance of the so-called fourth branch of government by imagining a time at which society is devoid of news.⁵ The result, Neuman argues, is instructive: “The government simply has no means of its own to communicate with the public. It depends on existing media institutions to conduct its fundamental business – political communications.”⁶

But what happens when that all-important messenger fails to tell the whole story? There is already a substantial amount of literature about the quality of media coverage of the United States Supreme Court.⁷ Scholars have also demonstrated time and again that Americans do not know as much about politics and law as one might hope. Among oft-cited statistics, a 2010 FindLaw.com poll found that two-thirds of Americans are unable to name at least one Supreme Court justice.⁸ In response, Justice Stephen Breyer told CNN, “I say that’s fine if they don’t know my name. What isn’t fine, what isn’t fine at all, is [if] they can’t name the three branches

⁵ See Doris A. Graber, *Mass Media and American Politics* (Washington, D.C: CQ Press, 1980), ix.

⁶ W. Russell Neuman, “The Threshold of Public Attention,” *The Public Opinion Quarterly* 54, (Summer 1990): 160.

⁷ See, e.g., Elliot Slotnick and Jennifer Segal, *Television News and the Supreme Court: All the News That’s Fit to Air?* (New York: Cambridge University Press, 1998), 10-12.

⁸ FindLaw.com Poll, N=1,000 adults nationwide, MOE + or – 3%.
<http://company.findlaw.com/pr/2010/060110.supremes.html>.

of government. If they can't name the legislature, Congress; the President, the executive; the courts, the judiciary, then we're in trouble."⁹ It bears noting that a 2006 Zogby poll found that 73 percent of those polled could name each of the Three Stooges, while only 42 percent could name the three branches of government.¹⁰

An additional factor is the state of American education. Existing models of education, both compulsory and higher, often focus too narrowly on becoming a productive member of the national economy, not on developing the critical acumen needed of a citizen in a democratic society. Instilling democratic values effectively takes a back seat to the current "teach to the test" pedagogical norm, largely due to state and federal funding being contingent on increased standardized test scores. This approach insists upon a superficial view of academic achievement and knowledge acquisition, which does not serve a democratic society like our own.

The Court itself cannot be left out of the equation, either. While journalistic norms and American civic education do little to illuminate issues surrounding the judiciary, the Court's own conventions are arguably counterproductive to the larger goal of creating a knowledgeable citizenry. As Linda Greenhouse notes, the Court's most frequent contact with the public is through its opinions, and many times it is difficult for the Court, even if it were so inclined, to communicate the practical effects of its decisions.¹¹ Perhaps unsurprisingly, Hoekstra has shown that citizens know most about the decisions that directly affect their own lives and

⁹ Stephen Breyer. (2010, September 16). "Justice Breyer on head vs. heart. *"Larry King Live.* (L. King, Interviewer) CNN.

<http://www.cnn.com/video/data/2.0/video/bestoftv/2010/09/15/lkl.breyer.head.vs.heart.cnn.html>.

¹⁰ Zogby Poll, July 21-27, 2006, N=1,213 adults nationwide, MOE + or - 2.9%.

<http://www.zogby.com/Soundbites/readclips.cfm?ID=13498>.

¹¹ Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 Yale L J 1537 (1996).

communities.¹² Caldeira and McGuire have argued that what the public knows about the Court is much more nuanced than one might assume.¹³

Amid the explanations that have arisen about poor media coverage and even worse levels of public awareness of the Court, there has been little discussion of how to “fix” the problem.¹⁴ One must first concede, however, that journalism is a business, American education will never be perfect, and that the United States Supreme Court is not a public relations firm. One cannot expect them to be anything different; the institutional norms of each are deeply entrenched, and it would be unreasonable to expect radical changes in how they operate. Still, there is much to be said about the roles each of these institutions play in affecting the lives of Americans, and how modest reforms could positively impact how Americans interact with the judiciary, particularly with the Supreme Court.

Citizens’ assemblies have been used to provide a space for productive discussion and inquiry into diverse sets of views. They focus on facilitating respectful dialogue and coalition-building. Consensus conferences, on the other hand, have been used to incorporate the public’s views into the assessment of emerging scientific technologies. Consensus conferences redefine the meaning of public good; citizens question experts and, in effect, engage in grassroots

¹² Valerie J. Hoekstra, “The Supreme Court and Local Public Opinion,” *American Political Science Review* 94 (March 2000): 89-100.

¹³ Gregory A. Caldeira and Kevin T. McGuire, “What Americans Know About the Courts and Why It Matters,” in *Institutions of American Democracy: The Judiciary*, eds. Kermit L. Hall and Kevin T. McGuire. (New York: Oxford University Press, 2006), 262-279.

¹⁴ Herbert Kritzer suggests the only obvious, albeit problematic, answer to the issue of low levels of knowledge about the Court is to air proceedings on television. The Court has resisted similar proposals, and, as Kritzer argues, its reasons may be justified given the charged rhetoric surrounding the *Bush v. Gore* decision. In effect, some may worry that citizens who are informed of and engaged with the Court’s decisions may threaten the isolation justices have historically enjoyed. See Herbert Kritzer, “The Impact of *Bush v. Gore* on Public Perceptions and Knowledge of the Supreme Court,” in *Judicial Politics: Readings from Judicature*, ed. Elliot Slotnick, (Washington, D.C.: CQ Press, 2005): 500.

discussions of policy and society. Much like a civil grand jury, at the conclusion of the conference the lay panel drafts a report of its findings and recommendations that is widely circulated. Both models trust in citizens' abilities to work together when given the opportunity to do so. Cousins to this idea, such as Fishkin and Ackerman's deliberative polling, have been used to more fully understand political knowledge.¹⁵ However, these models have yet to be applied to the judiciary. What makes this paper's proposed hybrid of the two models unique is my concern with both education and productive engagement. Citizens' assemblies, if left unaltered, would not serve the goals I will later articulate. Instead of educating participants about issues, assemblies provide a space for respectful disagreement about them. Of course, one may respectfully disagree but hold a demonstrably false view of a particular issue. As far as consensus conferences are concerned, I am primarily interested in their ability to encourage discussion rather than their goal of arriving at a unanimous "verdict," so to speak.

This paper does not go so far as to propose citizens practice judicial review *literally*, but rather that they become more knowledgeable about the often-misunderstood world of constitutional interpretation.¹⁶ After all, while one might hope citizens would manage to answer to higher principles when ultimately "deciding" difficult constitutional questions, we must remember that real citizens are often far from optimal ones. Biases and prejudices undoubtedly get in the way, and we as a society have decided that judges, despite their own human imperfections, have a better chance of fairly resolving constitutional conflicts than the rest of us. If the Supreme Court usually has the final say on what the Constitution means, then it is a far

¹⁵ See, e.g., Bruce Ackerman and James Fishkin, *Deliberation Day* (Oxford: Blackwell, 2004).

¹⁶ Arriving at a deeper understanding of what constitutional interpretation actually entails might disarm simplistic, binary (and usually partisan) assumptions that jurists either "call balls and strikes," *a la* Chief Justice Roberts' characterization during his confirmation hearing, or ignore the law due to one's personal moral code.

from radical suggestion that Americans ought to at least be aware of what the Court decides. After all, the traditional concern with judicial review is that the practice is anti-democratic, and that it therefore retains a rather strange place in a democracy like our own. Given this concern, the Court at the very least owes us an honest effort to welcome public engagement with its decisions.

II. Three Contributing Factors

A. The Media Aren't Telling the Whole Story

American society is immersed in media. The rise of television made rapid mass communication possible, and allowed diverse perspectives to enter into American homes. While political education can happen through personal research and speaking with friends and family, outside of those firsthand experiences the mass media play an integral role in affecting the relative political awareness or ignorance of the American public.¹⁷ This notion becomes all the more real when it comes to the Supreme Court. Michael Delli Carpini and Scott Keeter have pointed out that even the most civically engaged citizens must still rely on the media for political information.¹⁸ Given the Court's isolation from the life experiences of most Americans, there must be a comprehensive commitment made by media professionals to attempt to cover the Court in all its complexity. Without such a journalistic vision, the public may continue to suffer from the fantasy that the Court is comprised of nine special individuals deciding esoteric issues, and that what those nine super humans decide makes little difference in the daily lives of most Americans.

¹⁷ See, e.g., David H. Weaver, "What Voters Learn from Media," *Annals of the American Academy of Political and Social Science* 546 (July 1996): 34-47.

¹⁸ Michael X. Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters*. (New Haven: Yale University Press, 1996), 59.

Given that the mass media are the most important vehicles of communication in American society, they have been the subject of intense study and scrutiny across disciplines. Scholars have closely surveyed the amount, content, and tone of legal affairs reporting, particularly the journalism that focuses on the highest court. Four major criticisms of Supreme Court media coverage have emerged, namely, case and issue visibility, mischaracterization of the Court, counterproductive journalistic conventions and lack of legal knowledge, and the ubiquitous business model of journalism.

1. *Case and Issue Visibility*

Most Supreme Court cases remain invisible in the mass media.¹⁹ Of the decisions the media do report on, those cases tend to hold special significance for controversial social policies, such as abortion and school prayer.²⁰ Slotnick and Segal found that media tend to not report on decisions focusing on economic issues, federalism, and judicial power.²¹ These findings should not be surprising. Controversial cases are “sexy” precisely because they speak to fundamental moral questions, while the arguments in the latter group might not be as “bipolar” in nature, comparatively speaking.²² We may expect activists in an environmental interest group to feel strongly about a decision in the realm of environmental law, but the same cannot be said for most

¹⁹ Charles H. Franklin and Liane C. Kosaki, “Media, Knowledge, and Public Evaluations of the Supreme Court,” in *Contemplating Courts*, ed. Lee Epstein (Washington, D.C.: CQ Press, 1995), 353-375.

²⁰ See Jerome O’Callaghan and James O. Dukes, “Media Coverage of the Supreme Court’s Caseload,” *Journalism Quarterly* 69 (Spring 1992): 195-203.

²¹ See *supra* note 7.

²² Justice Scalia has said that for the media to report on many cases accurately, they would have to describe them boringly. See Ruth Bader Ginsburg, *Informing the Public about the U.S. Supreme Court’s Work*, 29 *Loyola U Chi L J* 275 (1998).

Americans.²³ On the question of abortion, however, numerous problems arise, such as the status of unenumerated rights, gender equality and women’s rights, balancing interests, how we define “person,” rape or incest exceptions, and whether the termination of a pregnancy at one time versus another is less morally acceptable. The news media are understandably more inclined to latch onto cases that inspire passion than focus on ones steeped in subtlety. It is true that particularly for the news media, nuance is far from “sexy.”

2. Mischaracterizations of the Court

The first thing that any American student learns about his or her government is that the legislative branch makes the laws, the executive branch enforces them, and the judicial branch interprets them. There is a popular myth that the Supreme Court, even more so than the lower federal and state courts, operates above politics. Scholars have argued that the way in which the media report on the Court, particularly as an apolitical institution, contributes to this belief in an institution that stands apart from its more obviously political counterparts.²⁴ In highly simplified terms, members of Congress make policy, take part in floor debates, and serve on committees while the President develops national policy, acts as commander of the armed forces, directs foreign policy, and influences the development and subsequent passage of legislation. Both are held accountable to voters through elections. While federal judges neither face reelection nor the effects of the ebbs and flows of public opinion polls, it is widely believed that the Court is, in some respects, a political body. As Bob Woodward notes:

The only two questions really worth asking about the courts are “Is there justice?” and “How do they [the courts] operate as a political institution?” The press doesn’t do a very good job of trying to answer either

²³ I do not assume that all cases have an innate constituency.

²⁴ *See supra* note 2.

[of those questions]. The courts are a political institution, and we don't cover them as such. Anyone who thinks differently has his head in the sand.²⁵

Perhaps even the loudest critics of the media can understand how these mischaracterizations originate. After all, the Supreme Court beat involves a voluminous amount of information, and reporters must be at least somewhat familiar with the primary debates within the field of constitutional theory in order to handle the beat effectively. Most generally, reporters must comprehend events and subsequently communicate the facts and their significance as fairly and accurately as possible. Perhaps it is simply easier to defer to the Court and assume the justices know best. After all, they benefited from outstanding legal training and education. They write the opinions and know the cases. Surely they, of all people, would know what they are talking about. While on some level we do trust jurists - after all, we have decided to hand them difficult legal questions with the hope that they will be able to resolve them - the judiciary remains a branch of our government, and it is also given the important, though at times controversial, power of judicial review. It is important that we never blindly defer to the Court, even if “[i]t is emphatically the province and duty of the Judicial Department to say what the law is.”²⁶

If one were to speak with young journalists, one would likely find that many went into the field because they wanted to hold powerful people accountable; they wanted to give a voice to the downtrodden; they imagined using Freedom of Information Act requests to make government answer for poor decisions made on behalf of the American public. Perhaps the visions of those idealistic, though civic-minded, reporters were too romantic. Still, if journalists are to act as the watchdogs they believe themselves- and many of us trust them- to be, the

²⁵ Quoted in David Shaw, “Media Coverage of the Courts: Improving but Still Not Adequate,” *Judicature* 65, (1981): 21.

²⁶ *Marbury v. Madison* 5 U.S. 137 (1803).

skepticism implied in that role must not die at the Court's steps. A reporter who all too quickly defers to the Court, or is not willing to read between the lines of a decision is simply not reporting at all. Lazy and unsophisticated journalism serves no one.

3. Journalism Conventions and Legal Knowledge

The conventions of journalism are often counterproductive to the desired in-depth coverage of legal issues. The “news values” hammered into journalism students and professionals alike are often as follows: timeliness, novelty, proximity, impact, conflict, celebrity, and human interest are what make a story. These are the criteria that make news “news” and not simply a book report or retelling of an event, and they also help reporters frame stories and decide on angles. Ask journalism students and professionals about how one ought to report on the Supreme Court, and the answer might be that, in their view, very little about the Court would be exciting (i.e.-“newsworthy”) to most Americans, at least not in the conventional sense. However, this understanding reflects the choices made by those who report on the Court, and not necessarily true of the institution itself.²⁷ Court decisions are current (“timeliness”), focused on resolving emerging legal issues (“novelty”), contribute to our understanding of government (“impact”), affect the lives of citizens (“proximity”), clarify points of law in an adversarial setting (“conflict”), involve notable people and interest groups (“celebrity”), and in some instances present the concerns of an individual (“human interest”). This characterization of the Court, of course, would then satisfy the conventional definition of “news.” Legal affairs

²⁷ Justice Scalia has suggested that accurate reporting of many of the Court's actions would be necessarily boring. *See supra* note 22. While his point is well taken, I am more concerned with the fact that there is room to improve in the coverage we already have. I do not believe that all cases merit “above-the-fold” coverage, but I do think the Court's decisions deserve improved coverage as far as frequency and depth are concerned.

reporting ought to take seriously the idea that the Supreme Court is a dynamic institution worthy of coverage. Surely the ultimate arbiter of the United States Constitution deserves as much.

After all, the Court takes cases in order to clarify developing law, particularly in cases of a circuit split. Reasonable people can arrive at different conclusions about what the law means in hard cases, often due to fundamental disagreements about the appropriate role of government in the lives of its citizens. We as a society largely leave those disputes to the courts, trusting in their ability to come up with the “right” answer.²⁸ Oftentimes these cases may turn on subtle distinctions, rather than on evaluations of competing views that are worlds apart in their plausibility. Some reporters, however, are too anxious to report the final “score” of a simplistic winner-loser paradigm: either a party to a case, or the partisan theme of the Court’s term (i.e. whether the liberal or conservative blocs emerged victorious in a particular year).²⁹

The misrepresentation of Court actions remains a problem. As Justice Ginsburg notes, when the Court was faced with California’s Proposition 209, which amended the state’s constitution to forbid affirmative action considerations, the Court denied review. One news report proclaimed “[T]he United States Supreme Court upheld California’s sweeping ban on affirmative action policies.”³⁰ While the denial of *certiorari* left the amendment intact, the crux of the story misrepresented what the Court actually did. While the decision to not hear the case effectively left the law in place, the story implied the Court approved of it. Instead, “[t]he denial of a writ of *certiorari* imports no expression of opinion upon the merits of the case, as the bar has

²⁸ While I do not assume that all laws are “opaque,” it would likewise be a mistake to suggest all laws have easily discernable meanings, both in their real-world applications and in borderline cases.

²⁹ See *supra* note 11.

³⁰ See *supra* note 22 at 279.

been told many times.”³¹ The story misconstrued the Court’s action, however significant the action’s effect may have been.

Such problems raise the question of whether legal training should be required of journalists that are assigned the legal beat. If they are getting the basics wrong, perhaps we should send them to law boot camp.³² Others might even suggest a professional degree such as the J.D. as adequate training. The question then becomes whether we are creating better journalists or simply more lawyers as a result. There are very good reasons behind wanting journalists to have some professional training in the field they cover, especially one as complex as law. A significant example of this need is found in *Romer v. Evans*, where little was reported about the significance of the Court striking down Amendment 2 under what it called rational basis standard of review.³³ Reporters familiar with the different levels of review would be able to not only understand but also explain the significance of what the Court did. While reporters got the conclusion correct (that the Court struck down Amendment 2), too few delved into how the Court arrived at its decision. Considering law is interpretive and is not subject to a formula one punches into a “constitutional calculator” that gives the “right” answer, I do not think it is improper for legal journalists to analyze at least some parts of a judicial decision.

This would require, however, reporters to become more diligent in their source gathering and more willing to seek out perspectives from experts in the field to make sure they are getting

³¹ *United States v. Carver* 260 U.S. 482 (1923).

³² Bernard Witkin’s proposal is a six- to twelve-month crash course law program designed for journalists, rather than the three years necessary to complete a full time J.D. program. *See supra* note 25.

³³ *See e.g.*, Linda Greenhouse, “Colorado Law Void,” *New York Times*, May 21, 1996, A.1. Rational basis is the lowest standard and only requires the state to demonstrate its actions are rationally related to a legitimate government interest. Commentators have questioned whether Justice Kennedy was actually applying rational basis in the Court’s opinion, or instead a heightened standard of review (“rational basis with bite”). *See, e.g.*, Gayle Lynn Pettinga, Note, “Rational Basis with Bite: Intermediate Scrutiny by Any Other Name,” 62 *Ind L J* 779 (1987).

the gist, as well as the nuance, right. Of course, allowing reporters to interpret news would welcome the possibility of charges of partisanship and one-sidedness. However, this conflict would result in a cost-benefit analysis. Would we rather have reporters “dumb down” decisions (either intentionally or not), or allow them to read between the lines of what the Court says it is doing? One’s answer, of course, depends on what one believes a reporter should be. If the role of the reporter is to simply provide the facts, perhaps my suggestion gives reporters too much power. In my view, however, a reporter does her job well when she not only conveys the facts of a case, but when she also tries to communicate its context and significance as fairly as possible. It is then not unreasonable for reporters, when sufficiently trained and knowledgeable, to be trusted with this responsibility.

The noble aim of preparing reporters to report on legal issues would not be satisfied in law school. If we want reporters to have working knowledge of the legal system, clinics and conferences are better suited for this type of training.³⁴ After all, we want journalists to think like journalists, not lawyers. As Mark Obbie observes, the “deadliest sin” of legal reporting is to become a true believer.³⁵ As a society purportedly devoted to a free press, we should prefer that journalists remain skeptical and avoid acquiring an insider perspective. The insider should be providing the “scoop,” not writing the story.³⁶

³⁴ Loyola Law School Los Angeles’s Journalist Law School is a four-day seminar on the American legal system taught by law faculty. The Carnegie Legal Reporting Program at the Newhouse School of Public Communication of Syracuse University is offered to future journalists and public relations practitioners who seek to better explain the law and our legal system, as well as any undergraduate or graduate student researcher whose work includes legal issues.

³⁵ Mark Obbie, “*My how-not-to list for legal reporters*,” last modified March 29, 2007, http://newhouse-web.syr.edu/legal/blog_comments.cfm?blogpost=228.

³⁶ An appropriate analog is the fact that many have resisted the idea of a professional jury system because they believe such an overhaul might threaten the “check” a jury of one’s peers places on

4. *Journalism as a Business*

Even the most idealistic among us must realize that at the end of the day, journalism is a business. Adding to that fact, declining revenues and audiences have only compounded the hard business choices media outlets must make. As those in management and executive decisions guard the bottom line, “nonessential” beats are cut in order to free up already scarce resources.³⁷ These decisions leave media organizations with more general assignment reporters that can be tossed from one beat to another, no matter how unfamiliar the reporter is with the subject at hand. With a topic as complex as law, the likely consequences are obvious.

New and alternative forms of media have posed challenges to the aims of greater political knowledge among Americans. The rise of the Internet, blogs, and cable news has resulted in a high media and high choice environment. In other words, newer forms of media have allowed news consumers to more easily vote their preferences in which information they consume. A fan of celebrity news for example, might spend many hours a day reading the latest gossip from celebrity blog and news sites just as easily as someone who is interested in law chooses to scan through their RSS feed of law-oriented blogs and news sites.³⁸ As Prior has observed, while it might seem counterintuitive that levels of political knowledge have decreased for a large part of the electorate despite tremendous gains in the amount of media, a high choice media

the coercive power of the state. It makes sense, then, that we would want our watchdogs to remain skeptical outsiders rather than a lawyer in journalist’s clothing, so to speak.

³⁷ See *supra* note 11 at 1541.

³⁸ RSS is “Really Simple Syndication.” By using an RSS feed reader, the technology alerts web users when their frequently visited websites (such as blogs and news sites) are updated. Commonly used RSS feed readers are Google Reader and Bloglines.

environment is largely to blame.³⁹ When we make it is easier for people to tune out, they often do.

A more thematic problem within the “journalism as a business” frame is its conflict with constitutional protections. Oftentimes in political disagreements both sides presume to have special insight into what the “Founders intended.” If one manages to uncover what a Founding Father wrote on a specific issue that agrees with one’s side, the speaker uses that evidence as a trump card. *District of Columbia v. Heller*, for example, reignited the age-old debate of whether the Second Amendment describes a collective or individual right to possess firearms.⁴⁰ Publicity surrounding cases involving the establishment clause has also led to some Americans claiming the Founding Fathers for their respective teams.⁴¹ While taking what the Framers said as inherent truth is a mistake, attempting to understand what press freedom meant in the 18th century is a worthy exercise, particularly because it illuminates the difference between the press the Framers hoped to protect, and the media we have today.

David Anderson has argued that while some may view the press and speech clauses of the First Amendment as synonymous today, press freedom was the greater concern among the Framers’ generation.⁴² To them, a free press was necessary for the American experiment to succeed. It was the “bulwark of liberty” and “essential to the security of freedom in a state.”⁴³ In Anderson’s words, “It had to be protected, not for its own sake, but because it provided a necessary restraint on what the patriots viewed as government’s national tendency toward

³⁹ Markus Prior, “News vs. Entertainment: How Increasing Media Choice Widens Gap in Political Knowledge and Turnout,” *American Journal of Political Science* 49 (2005): 577-592.

⁴⁰ *District of Columbia v. Heller* 554 U.S. 570 (2008).

⁴¹ See, e.g., *Salazar v. Buono* 130 S. Ct. 1803 (2010). For a humorous take on America’s culture wars, see Jay Wexler’s *Holy Hullabaloo: A Road Trip to the Battlegrounds of the Church/State Wars* (Boston: Beacon Press, 2009).

⁴² David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L Rev* 455 (2005).

⁴³ *Ibid.* at 533.

tyranny and despotism.”⁴⁴ Press freedom was a “product of revolutionary thought” and seen as a necessary component of a free society.⁴⁵ Today, however, we are instead left with a journalism that seems to value noise (ex. cable news) over substance, and extreme simplicity over nuance.⁴⁶

However, any explanation of low public awareness of the Court’s decisions that simply blames the media is incomplete. As Joseph Mandel argues, we cannot expect the media to teach civics, *per se*.⁴⁷ While Mandel’s point is not in dispute- after all, inspiring civic-mindedness is not an enumerated responsibility of a journalist- it should be noted that many jobs carry larger responsibilities not necessarily stipulated in the job description. Those in positions of exceptional power and influence should be especially aware of how they may responsibly wield both. Media professionals interview sources, conduct research, and file stories, but that is not all they do. They also serve a role in our society that, whether they like it or not, carries with it tremendous implications for democracy.

Still, the mere fact that information is published will not guarantee that it is consumed. In addition, there is an important distinction between consumption and *critical* consumption. As Franklin and Kosaki point out, “[W]hile exposure to news coverage is a necessary condition for awareness [of Supreme Court decisions], it is not sufficient.”⁴⁸ There is an additional factor that affects Americans’ ability to think critically about current events and politics.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ In his 1958 speech to the Radio and Television News Director Association convention, Edward R. Murrow made the important point that while television has the potential to play an incredible educational role, “it can only do so to the extent that humans are determined to use it to those ends.” Ratings and business concerns have all but killed the possibility of media that truly “illuminate” and “inspire.” The text of the speech is available at http://www.rtdna.org/pages/media_items/edward-r.-murrow-speech998.php.

⁴⁷ *See supra* note 25 at 20.

⁴⁸ *See supra* note 19 at 361.

B. The Poor State of American Civic Education

One would hope that compulsory public education would adequately prepare children for active citizenship.⁴⁹ The mere fact that we have a compulsory system demonstrates that we as a society believe we have an obligation to educate the younger generation. In addition, the civic virtues that contribute to becoming a good citizen must be developed somewhere. Short of a family that encourages children to actively question the very values their own family holds dear, schools are the optimal place for this growth *precisely because* students spend many hours of their day away from their families. Instead, they spend the bulk of their days with others with whom they must learn to cooperate. The school is perhaps one of the first places where children learn that there are some families that do not look like theirs, and that some people do not hold the same convictions they do.⁵⁰ This realization is an important one, and lays the groundwork for a deeper discussion about how we as citizens of a society like our own ought to interact with one another, especially when we disagree about fundamental questions.

Existing popular models of education tend to focus too narrowly on a “cram and vomit” method, which has become even more disturbingly prevalent given the rise of standardized testing. Rather than focusing on developing the critical acumen needed to be a productive member of a free society, teachers are instead compelled to “teach to the test,” and students are expected to “spit up” enough information in order to secure scare funding for already under-

⁴⁹ In 2006, 25,000 students in grades 4, 8, and 12 were assessed on their understanding of the significance of American political institutions. While two out of three students have achieved at least a “basic” level of understanding, only 28% of eighth graders managed to explain the purpose of the Declaration of Independence and only 50% of twelfth graders were able to identify the outcome when state and federal laws conflict. See Anthony Lutkus and Andrew R. Weiss, “The Nation’s Report Card: Civics 2006 (NCES 2007–476),” *U.S. Department of Education, National Center for Education Statistics* (Washington, D.C.: U.S. Government Printing Office, 2007).

⁵⁰ Homeschooling and private schools can serve opposite ends, and instead shelter children from this realization.

funded schools. This approach leaves too little room for developing the critical thinking skills necessary for becoming an informed citizen.⁵¹

Even if civic education were improved, it would be naïve to suggest that all Americans are equipped to engage with Supreme Court opinions, whatever their education level. The simple fact that one has attained a college degree does not guarantee, for example, that one has refined the substantive skills and qualities expected of a college graduate.⁵² Undoubtedly some high school graduates complete their compulsory education by flying under the radar; they graduate without having grasped the basic skills necessary to succeed in college and in life. In college, the cycle continues. Some professors become remedial writing instructors out of necessity, or are faced with unmotivated students who perhaps pursued college for the wrong reasons. We also cannot assume that education level, even among those studying politics and current events, serves as a proxy for engagement with the institutions presumed to be under investigation. Enrollment in political science courses does not necessarily guarantee a student is intrinsically interested in the legislation Congress enacts, for example. Absent an intrinsic interest, we can safely assume that those same students are perhaps much less knowledgeable about the subject they are supposedly studying than they should be.

⁵¹ Programs for highly motivated high school students, such as the Advanced Placement (AP) and International Baccalaureate (IB) programs, arguably do provide a space for this kind of critical thinking. The IB program in particular requires students to complete an epistemology course, the themes of which are carried over into the rest of the curriculum. IB students are expected to gain a global perspective in order to better understand and appreciate cultural differences. These programs, however, leave open the question of who is able to access them, and, even when lower-performing schools manage to offer them, whether students are adequately prepared to excel in such rigorous programs.

⁵² See Sara Rimer, “What are most students learning in college? Not enough, study says,” *The Hechinger Report*, January 18, 2011, available at http://hechingerreport.org/content/what-are-most-students-learning-in-college-not-enough-study-says_4979/. See also Joel Rose, “Study: College Grads Unprepared for Workplace,” *NPR*, May 28, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=127230009>.

There is still another group. Many “politics junkies” exist outside of political science departments and perhaps know a great deal more about politics than their cohorts. This speaks to the larger issue of the effort one puts into acquiring information. While it would be unreasonable to expect a majority of Americans to become “Jeopardy”-like experts of their political and legal institutions, “Jeopardy” shows us that all information and knowledge acquisition takes effort. One is not born with encyclopedic knowledge of the Supreme Court or any other interest area for that matter. So, there is something to be said about a person’s motivation that moves one to participate in the hard work of information gathering and processing. Those individuals who choose to learn about the Supreme Court are understandably more knowledgeable about the Court, and might be considered to have some level of “expertise” on the subject. These experts are more likely to feel comfortable discussing a subject of which they are knowledgeable. But if we cannot expect every person to become an expert, how can we ensure non-expert citizens are prepared to participate in the discussions this paper supposes are so important?

While Lupia correctly points out that scholars frequently make implicit value judgments when it comes to what kinds of knowledge one ought to have about the broad area of politics, engagement with a judicial decision does require some minimal knowledge of our legal system.⁵³ For instance, perhaps it is not *necessary* for one to know the exact number of justices and the name of the chief justice, but the ability to “talk shop” on some level certainly does not hurt. Being able to speak the same “language” decreases the chance of ideas getting lost in translation. If we are precise in our common vocabulary, we can be clearer on where we agree and disagree (and more importantly, *why*), rather than talking past one another. We are then better able to

⁵³ *See supra* note 1. For instance, despite the lack of an education requirement to serve on a jury, *voir dire* in some ways can serve as an educational exercise for jurors unfamiliar with different standards of proof or unsure of whether a criminal defense attorney carries the burden of proving a defendant’s innocence (which, of course, they do not).

avoid the unproductive cable news-style “dialogue” that has contributed to the vitriol increasingly characteristic of modern American politics.

Anyone who has ever attempted to discuss current events from a legal dimension with a person unfamiliar with the relevant case law appreciates the feeling that the speakers exist on two different planes. If a person is entirely unfamiliar with the standards of review employed in equal protection analysis, for example, how can we reasonably expect them to appreciate the deeper disagreements among justices about which standards are appropriate in certain cases?⁵⁴ More broadly, there is often a sea of difference between a person with specialized knowledge in a subject (*i.e.*, an expert) and someone with even the best of intentions but who is only casually interested in or perhaps entirely unfamiliar with the same. Still, both groups of speakers have something to offer in discussions of substantial legal questions. If we imagine a marketplace of ideas in the best sense of the expression, we can better entertain the idea that truth has a better chance of emerging through a “multitude of tongues,”⁵⁵ which should include the perspectives of experts and non-experts alike.

C. And the Court isn’t Helping

One cannot expect that the goals and values of the media and the Court will ever match up, even imperfectly. Their roles are distinct and serve different purposes for society. With all that has been said about the media’s many flaws, however, the Court cannot remain blameless. The Court’s own institutional conventions hinder the goal of greater levels of public understanding about the judiciary; practical effects of opinions are often difficult to surmise, the

⁵⁴ *See, e.g.*, Brennan and Rehnquist’s disagreement in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

⁵⁵ *United States v. Associated Press*, 52 F.Supp. 362 (S.D.N.Y. 1943), *aff’d*, 326, 33 U.S. 1 (1945).

ability to access legal information is incorrectly assumed to be the same as engagement, and justices understandably benefit from the fact that most Americans agree to “pay no attention to the [persons] behind the curtain”⁵⁶ announcing decisions.

1. *Translating “Legalese” into Practice*

Hoekstra has demonstrated that Americans know most about the decisions that they believe directly affect them.⁵⁷ Perhaps a suitable explanation for why so many Americans do not seem to believe more cases affect them is because the Court does not include practical effects of what it decides. It would not be far off to assume, for example, that many Americans may believe the Court hears esoteric issues and later releases pages and pages of “legalese.” If the Court were better equipped to explain the real world impact of its opinions perhaps more Americans would be interested. Still, as Justice Ginsburg notes, this hope may be pure fantasy. In an address given at the Loyola University Chicago School of Law, she noted that our common law system is not necessarily built to meet such an expectation. If, as is often done at the Supreme Court, an opinion is issued in order to clarify a point of law or remands a case back to a lower court, the impact of that decision cannot be fully felt until an attempt is made to actualize the decision or a lower court applies the Court’s guidance in its reconsideration of a case. There is, as Ginsburg notes, an ever-evolving dialogue with the other branches of government, as well as with the states and the private sector. A matter may not be “fully settled” with just a handful of decisions.⁵⁸ Appreciating this point, we can understand that a speculative “practical effects”

⁵⁶ Fleming, V. (Director). (1939). *The Wizard of Oz* [Motion Picture].

⁵⁷ See *supra* note 12.

⁵⁸ See *supra* note 22 at 281.

section may not be optimal. Still, informed predictions may be made by experts and inquiring citizens when examining judicial decisions.

2. Accessibility is Not Engagement

It has been said that the Internet is an integral tool for democracy in that it provides a space to express one's views, as well as a means of accessing information. At its best, the Internet both satisfies and inspires curiosity. One encouraging example of making complex information comprehensible is Recovery.org. The comprehensive website provides abundant resources for citizens to learn more about federal spending specifically related to the American Recovery and Reinvestment Act of 2009.⁵⁹ Still, websites like Recovery.org as well as freedom of information legislation are only as good as the public's willingness to acquire and inspect that information. Bureaucratic paper dumps do not guarantee open government, just as one's performance on a standardized test does not necessarily determine future success. The same can be true of the Supreme Court, the decisions of which are widely accessible by varying mediums and on numerous websites.⁶⁰ The mere fact that information is published on the Internet does not guarantee that it will ever be read, no matter how novel the proposal or fascinating the finding. Unfortunately, like much academic literature, Supreme Court decisions often have a narrow audience, namely lawyers, judges, and law professors, whether we like it or not.

Ginsburg argues that justices do make some effort to increase public understanding of what the Court does and how it decides. Opinion authors give bench statements, and at least in

⁵⁹ Recovery.org is described as the "U.S. government's official website that provides easy access to data related to Recovery Act spending and allows for the reporting of potential fraud, waste, and abuse." The website's tagline is "Track the money."

⁶⁰ The Court's own website, as well as the Oyez Project and Cornell Legal Information Institute are excellent sources for full opinions as well as succinct summaries.

Ginsburg’s case, she says she tries to write such statements “in plain English, copyable by reporters racing against a clock.”⁶¹ What the media eventually do with that information, however, cannot possibly be blamed on the Court. The Court’s Public Information Office exists to guide reporters to resources, but is a far cry from the popular image of a public relations outfit. “Here, we do not do spin,” says longtime Court Public Information Officer Toni House.⁶² Finally, the justices do make an effort to be seen in public. They give talks at universities and other gatherings, as well as appear on educational programming such as C-SPAN’s “Supreme Court Week.”

3. *Insulation is Not an Option*

In describing the Supreme Court, Justice Thomas has referred to the building, as well as to the institution itself, as a “marble palace” due to its relative isolation from politics, surrounding Washington, D.C., and the rest of the country.⁶³ Of course, jurists have reached a special level in the community; their roles as public servants are also distinctly different from their counterparts in the other branches. For Supreme Court justices, this effect is only multiplied. Perhaps the pros outweigh the cons, however. Supreme Court justices enjoy tremendous job security, literally and figuratively; their campaign advisors do not quiver at the ebbs and flows of public opinion polling, precisely because justices do not *have* campaign advisors and do not face voters’ ire in fierce election cycles.

⁶¹ See *supra* note 22 at 275.

⁶² See *supra* note 22 at 276.

⁶³ Jamshid Ghazi Askar, “Clarence Thomas calls Supreme Court a ‘marble palace,’” *Deseret News*, July 18, 2010, available at <http://www.deseretnews.com/article/700048984/Clarence-Thomas-calls-Supreme-Court-a-marble-palace.html>.

Still, justices cannot be loose cannons during their tenure on the Court. On some level, before they even reach the marble steps, justices are held accountable to citizens during confirmation hearings. Upon receiving the President's nomination, that nominee must also receive the Senate's blessing. Confirmation hearings have become media spectacles, mostly because they manage to shed at least some light onto the mythical work of the Supreme Court. Viewers gain insight, however little, into how an individual may approach her work if confirmed. Still, following the failed confirmation of Robert Bork, nominees have become much less candid with the Senate Judiciary Committee in their answers.⁶⁴ Many have opted to instead characterize the work of judges as something along the lines of calling "balls and strikes," perhaps strictly for political posturing.⁶⁵

Beyond the vetting process of confirmation hearings, impeachment can provide recourse for egregious conduct of jurists. Article II of the United States Constitution specifies the criteria for impeachment, while Article III articulates the requirement for good behavior.⁶⁶ Indicative of the infrequency of the proceedings, only one justice, Samuel Chase, has ever been impeached, but he was never removed from the bench. Justice Abe Fortas resigned from the Court in 1969 at

⁶⁴ Following Justice Kagan's confirmation hearings, Mark Greenbaum wrote that the hearings have largely "outlived their usefulness" due to cautious nominees who all too clearly remember Bork's dashed hopes. *See* Mark Greenbaum, "Let's get rid of Supreme Court confirmation hearings," *Salon.com*, July 4, 2010, available at http://www.salon.com/news/feature/2010/07/04/kagan_hearings_pointless.

⁶⁵ *See supra* note 16.

⁶⁶ Article II § 4: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Article III § 1: "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

the urging of Chief Justice Earl Warren in order to avoid impeachment proceedings and their potential damaging effects to the integrity to the Court.⁶⁷

Speaking to the possibility of a productive model of Court-media relations, Greenhouse retells an almost impossible to imagine event in which a Supreme Court justice opened his door, literally, to a reporter.⁶⁸ George Garner was a rather green Washington reporter for the *Louisville Courier-Journal* assigned to report on a decision penned by Justice Oliver Wendell Holmes. Not being able to make heads or tails of the decision, Garner decided to go straight to the source; he arrived at the justice's home asking for help. Holmes had friends over, and he told Garner he would be happy to help the panicked reporter once they left. The justice immediately changed his mind and invited Garner upstairs and the two proceeded to go over the opinion for an hour. The justice also attempted to dictate, in newspaper-ready language, the story Garner would later write. Garner recalled the compliments the story garnered for its intelligence and clarity in a letter he wrote to the justice years later. It would be unreasonable to ask all justices to have an open door policy or to hold "office hours" for reporters unclear on a legal concept or turn of phrase. Still, the story serves as an apt metaphor for the good justices can do when they are concerned with how their decisions are communicated to the rest of the country. While decisions are available in their entirety on the Internet and in print, most Americans will become accustomed with what the Court decides through what the media report. What journalists say about an opinion matters, and where justices can help, they should. No one, perhaps especially a Supreme Court justice, wants to be misunderstood.

⁶⁷ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*. (New York: Simon and Schuster, 1979), 16.

⁶⁸ See *supra* note 11 at 1559-1560

III. The Court's Role in Public Relations

A. What is Public Relations?

Contrary to popular belief, public relations (PR) is not simply publicity and press releases.⁶⁹ PR practitioners are also concerned with two-way conversations and reputation management. Admittedly, the practice of PR is often subjective; practitioners are trusted with crafting messages that show individuals, businesses, causes, and ideas in the most favorable light.⁷⁰ Americans are perhaps most acquainted with PR through watching clips of the White House Press Secretary fielding questions from reporters. Others may be most familiar with British Petroleum's (BP) campaign to regain the public's confidence following the devastating 2010 Deepwater Horizon oil spill in the Gulf of Mexico. BP ran a series of advertisements, also posted to its YouTube channel, about the company's efforts to assist in the aftermath of the environmental disaster.⁷¹ Toyota's 2009-2011 vehicle recalls (informally known as "pedalgate") serve as an additional example of a corporation attempting to practice PR, however insincere those efforts may have been.⁷² BP and Toyota's efforts fall under the narrow umbrella of "crisis communications." Crisis communications is a highly specialized area in PR, and requires significant planning and proactive messaging in the event of a "blowup" such as the aforementioned examples. Like publicity, crisis communications is simply one area within the broad field of PR.

⁶⁹ Due to the term's negative connotation, PR practitioners often use euphemisms such as "public affairs" and "community outreach" to describe the practice. *Note*: "Public" and the plural "publics" are terms used in professional practice to describe the target of PR messaging.

⁷⁰ Derogatively, "spin." Some practitioners have begun to use the term "advocacy communication" to more clearly convey the goals of PR.

⁷¹ An example of BP's public relations efforts may be viewed at <http://www.youtube.com/watch?v=KKcrDaiGE2s>.

⁷² Toyota's 2010 "Commitment" commercial may be viewed at <http://www.youtube.com/watch?v=XZoBfpm1zHg>.

However, the concerns addressed in this paper are best framed within what is known as the two-way symmetrical model of PR.⁷³ This model emphasizes two-way communication as an important tool in resolving conflict and promoting understanding.⁷⁴ In other words, the primary goal becomes building goodwill through accurate and fair conversations between an organization (i.e. institution) and its publics. “Spin,” as it is commonly understood and practiced, becomes unnecessary.

B. Why the Court Should Care About Public Relations

Without calling it public relations, Kevin Esterling has proposed that the best way for courts to promote both judicial independence and responsiveness is by practicing community outreach and implementing public education programs.⁷⁵ Underlying Esterling’s proposal is the idea that when courts must rely on third parties to communicate their messages (i.e. media reporting on judicial decisions), they often have little recourse to correct misstatements and mischaracterizations. Surely Justice Ginsburg appreciates this point. Following a 1996 lecture at Louisiana State University, the Associated Press (AP) published a release that suggested the justice’s criticisms of the Constitution amounted to her calling it “outdated.”⁷⁶ The justice had

⁷³ Todd Hunt and James Grunig have outlined four different models used in PR practice. The remaining three are the press agency/publicity model, which is most concerned with garnering favorable media coverage; the public information model, which emphasizes the dissemination of objective and accurate information as well as the role of the PR practitioner as somewhat of an “in-house” journalist; and the two-way asymmetrical model, which is primarily concerned with reorienting publics toward a particular attitude or point of view. *See generally* James Grunig and Todd Hunt, *Managing Public Relations*. (New York: Holt, Rinehart and Winston, 1984).

⁷⁴ David Guth and Charles Marsh, *Public Relations: A Values-Driven Approach* (Boston: Allyn and Bacon, 2009).

⁷⁵ Kevin M. Esterling, “Public Outreach: The Cornerstone of Judicial Independence,” in *Judicial Politics: Readings from Judicature*, ed. E. E. Slotnick (Washington, D.C.: CQ Press, 2005), 507-512.

⁷⁶ *See supra* note 21 at 287.

criticized the Constitution as being largely “skimpy on individual rights,” but also praised its ability to evolve, much as Justice Brennan had done at Georgetown University when he said the document’s “genius” is “the adaptability of its great principles to cope with current problems and current needs.”⁷⁷ As a result of the report, the Justice Ginsburg received letters from Americans who believed she held an “alien, Anti-American ideology” and said they were ashamed that she was ever appointed to the Court.⁷⁸ As Ginsburg discovered, even following the AP’s correction, “bad news, however incorrectly spun or distorted, is not easily erased.”⁷⁹ All government institutions are susceptible to media sensationalism, but such weaknesses are especially compounded for the judiciary, whose primary actors lack the tools necessary to respond for fear of being viewed as impartial or improperly defensive.

The Ginsburg event demonstrates the very real need for courts, particularly the Supreme Court, to become more proactive in how they respond to partisan attacks and criticism. Hosting news conferences and issuing sound bites every time a judicial decision is unfairly criticized would be far from ideal for countless reasons. However, Esterling’s proposal is much more modest. He, like a majority of PR practitioners, appreciates the fact that proactive responses are usually more helpful than reactive ones, and that education can be immensely useful in demonstrating the Court’s accessibility to citizens. In an age when simplistic sound bites are replayed over numerous news cycles, the Court must take an active role in educating the public about the legal process characteristic of judicial decision-making, and clarify the judiciary’s unique role among the three branches. This can be done through the creation of a comprehensive

⁷⁷ See Peter Shinkle, “Justice Ginsburg: Constitution ‘Skimpy,’” *The Baton Rouge Advocate*, October 25, 1996, at 1B-2B. See also William J. Brennan, Jr., “Speech to the Text and Teaching Symposium, Georgetown University,” October 12, 1985, available at <http://www.fed-soc.org/resources/id.50/default.asp>.

⁷⁸ See *supra* note 22 at 287-288.

⁷⁹ See *supra* note 22 at 287.

outreach strategy, which would encourage justices to become more visible in the community and keep them in touch with the values of the country they serve.⁸⁰

IV. Public Participation and the Judiciary

We do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all.⁸¹

Of the 100 possible questions one may be asked during the civics portion of the Naturalization Test, one asks specifically about the “responsibility that is only for United States citizens.”⁸² The official possible answers are to “vote in a federal election” or “serve on a jury.”⁸³ Many Americans seem to do rather poorly in regards to the former as evidenced by voter turnout data.⁸⁴ The latter is one of the rare opportunities Americans have to participate in their legal system, yet jury service seems to be dreaded like the plague.⁸⁵ If we cannot seem to get

⁸⁰ I am cautious in this suggestion precisely because some may assume that this means I approve of justices’ appearances at political fundraisers, which I do not. Political fundraisers do not serve the greater goal of educating citizens and encouraging civil dialogue. Arguably, in many cases, they do the opposite. It should also be noted that in February 2011 a group of more than 100 law professors requested that Congress introduce legislation that would apply a code of conduct to Supreme Court justices. The request came in the wake of some justices’ recent appearances at political fundraisers. See R. Jeffrey Smith, “Professors ask Congress for an ethics code for Supreme Court,” *Washington Post*, February 23, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022304975.html>. Note: the Code of Conduct for United States Judges does not apply to the United States Supreme Court, as per 28 U.S.C. § 351(d)(1). The code is available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx>.

⁸¹ Pericles as quoted in David Held, *Models of Democracy* (Stanford: Stanford University Press, 2006), 14.

⁸² Study materials for all portions of the Naturalization Test are accessible at <http://www.uscis.gov/portal/site/uscis>.

⁸³ *Ibid.*

⁸⁴ See, e.g., United States Elections Project at George Mason University, available at http://elections.gmu.edu/voter_turnout.htm.

⁸⁵ See, e.g., Cynthia Daniels, “Jury Service No-Shows Get the Word: No Excuses.” *Los Angeles Times*, July 2, 2004, B.2.

Americans to take their basic civic responsibilities seriously, how can we reasonably expect them to participate in careful discussions about the Supreme Court and its decisions?⁸⁶

The working assumption of this paper is that, most of the time, our democracy is best served when citizens participate in the institutions that represent them. Low knowledge levels negatively impact awareness of and engagement with American political institutions.⁸⁷ As outlined previously, there are numerous factors that at least partly explain low public engagement with the judiciary. We cannot expect a paradigm shift in how the media, American civic education, or the Court operates. But we do not need such a shift. Rather, if these three contributing factors undermine our goals, we must supplement the shortcomings of each with a new institution. The goal is not perfection but improvement in how Americans interact with their government. The proposal outlined here serves to empower citizens by involving them in discussions of important legal questions.

If we take seriously the idea that law cannot be entirely separated from politics, or at least that many judicial decisions may have political implications worthy of inquiry, it is useful to investigate the potential of at least some Americans to actively participate in politics. Barack Obama's successful 2008 campaign, for example, serves as an excellent case study of what can happen when citizens unite behind a common message.⁸⁸ As the Chairman of the Democratic National Committee, Howard Dean proposed the 50-State Strategy that placed resources in states

⁸⁶ Voter disenchantment may be explained by lack of political knowledge, frustration with politicians and the media, or other social, economic, and cultural barriers to voting. Common complaints about jury service in particular are too little compensation, having to take time off work, and the lengthy selection process.

⁸⁷ Liane C. Kosaki, "Public Awareness of Supreme Court Decisions" (August 29-September 1, 1991) (paper presented at the Annual Meeting of the American Political Science Association).

⁸⁸ Some may praise efforts such as the Tea Party Movement for giving a voice to the concerns of both libertarians and conservatives. I would instead argue such praise is undeserved and that far too many "tea partiers" contribute to the type of political conversation I believe is more harmful than helpful.

often considered unwinnable for the Democratic Party. Acting against the “battleground state” paradigm, Obama enacted a form of Dean’s strategy, demonstrating his campaign’s interest in states too often viewed as foregone victories for the Republican Party. This strategy, along with the right political circumstances and an optimistic message that resonated with many Americans, resulted in a campaign that witnessed incredible grassroots outreach and canvassing efforts by citizens and young voters who in many cases had never been involved in politics before. Obama’s campaign showed us that all is not lost when it comes to Americans and their potential for political engagement. If this kind of engagement is possible in politics, it is not an unreasonable extrapolation that similar opportunities may exist when considering legal questions.

There are many terms that describe the sort of public participation that I am proposing.⁸⁹ The difficulty with most descriptions is that they speak to how we *ought to make* political decisions, rather than the means by which citizens *interact with* political and legal institutions. What I am most interested in here is how we can improve the “conversation” between the Supreme Court and the people for whom it decides. Indeed, I am more interested in the educational and engagement possibilities of legal and political institutions rather than the question of how such institutions *ought to* do business.

In proposing a new model of public engagement with the Supreme Court, I have borrowed from two models that serve different, but not entirely unrelated, purposes. Citizens’ assemblies focus on facilitating productive and respectful dialogue between those often found at the “opposite” ends of the political spectrum. They may involve panels of representatives from

⁸⁹ For instance, participatory democracy is an umbrella term that includes ideas such as consensus democracy and deliberative democracy. I prefer “grassroots,” but recognize the term’s incomplete coverage of what I am proposing.

well-known interest groups, or may simply provide a space for citizens to discuss issues about which there is much to disagree. Consensus conferences, on the other hand, are most often used to include the public's concerns and recommendations in further explorations of scientific technologies. A lay panel questions experts and drafts a report that is widely circulated and used in future discussions of proposed public policies. The two models have different aims and results, and are therefore outlined in more detail in the following sections. I ultimately combine what I see as the best of both in order to better facilitate an informed and respectful dialogue about the judiciary and broader goals of government.

A. Citizens' Assemblies

Citizens' assemblies are used to encourage dialogue among groups that often vehemently disagree.⁹⁰ They bring together leaders of influential organizations in order to discover otherwise unthinkable coalitions on numerous issues.⁹¹ The format generally takes the form of a small-group dialogue that also involves elements such as conflict resolution strategies and how to improve listening skills. Given the bridge-building nature of these assemblies, the Transpartisan Alliance has created something called the "Transpartisan Toolbox," which organizers believe will help improve discussions that too often result in *ad hominem* attacks and highly emotional debates.⁹² The Toolbox is a multi-week dialogue series that aims to build trust, encourage active

⁹⁰ There are numerous grassroots movements that share an interest in facilitating dialogue across party lines. Recent examples are the Transpartisan Alliance, Unity08, and the Coffee Party USA. For the purposes of simplicity, I will refer to their activities collectively as "citizens' assemblies."

⁹¹ A panel held in late 2009 by the Transpartisan Alliance brought together the founders of MoveOn and FreedomWorks (parent organization of the Tea Party Movement) for a discussion of how to combat incivility in politics.

⁹² More information about the Transpartisan Toolbox may be accessed at <http://network.transpartisan.net/profile/ORGANIZER>.

listening skills, understand the role of emotion, and learn how to more constructively approach conflict. Trained facilitators participate by offering their perspectives and helping participants navigate thorny areas of disagreement. At the core, these discussions draw an important distinction between debates and community dialogues. While the former imply advocacy for a position, the latter have a better chance of encouraging a spirit of inquiry; they challenge participants to become genuinely curious about an opposing position. Indeed, the wall we run up against in many political discussions is when we are unclear on what the opposition's claim is. We shut our ears, shout our position, and assume the worst about those with whom we disagree. When our preconceived ideas about the opposition are confirmed in some instances, we all too quickly (and unfairly) assume those opponents are representative of all others.

The idea of a facilitated discussion is an important contribution of citizens' assemblies. While town hall meetings are useful, they serve different purposes; recent media coverage has revealed that some of them are especially susceptible to becoming yelling matches. Where town hall meetings go wrong, citizens' assemblies go "right" in the sense that they provide a safe space for discussion, disagreement, and coalition building. They also promote productive discussion by having a neutral third party available to reign in discussion when needed as well as prompt an exchange of ideas when voices fade.

As with any adaptation of an existing model, some components may be imperfect fits for a new set of circumstances. Citizens' assemblies nobly seek to foster healthy discussions among equals who often share very different ideas of how to solve problems. What is missing, however, is the educational aspect. Citizens' assemblies tend to focus too much on facilitating discussions and too little on ensuring the participants in those discussions have an informed opinion. While it is important to engage with the opposition and understand their perspective, it is just as

important, if not more, to have good reasons behind one's views. To have good reasons, one must first be informed. After all, it is entirely possible that one earnestly holds a view that is demonstrably false, or at least probably is. While on the right track, the citizens' assembly model by itself would not adequately address the goals articulated in this paper.

B. Consensus Conferences

Much like a jury, consensus conferences seek to bring together a peer group that represents the surrounding community. Often randomly selected, participants then meet to learn about an emerging scientific issue and ask questions. Consensus conferences form a lay panel that learns about a development in science or technology that involves social and ethical considerations. In late 2006, Boston University (BU) hosted a consensus conference on human biomonitoring and its implications.⁹³ In BU's case, fifteen people diverse in gender, age, race and ethnicity, and income level, became participants in a three-weekend event. The first two weekends served to brief citizens so that they would be well prepared to discuss the issue at hand. They read background literature, met with experts, and worked with professional dialogue facilitators. By the third meeting, the lay panel released its findings in a report and presented it to the public. These widely circulated reports convey the "consensus" of the lay panel regarding the possible consequences of a specific technological development. Consensus conferences trust in the wisdom of average citizens, and serve not only as places for democratic discussion, but also for learning. They are an improvement over other methods of gathering information about public opinion. Whereas focus groups, surveys, and polls seem to generate information from the often-

⁹³ Human biomonitoring allows individuals to assess their exposure to environmental toxins and their affects on the body through tests conducted on human tissue, bone, and fluids. In an effort to make its conference more accessible, BU posted an overview available at <http://vimeo.com/1231071>.

uninformed masses, consensus conferences recognize the value of investing effort into acquainting citizens with a complicated question and trusting they can wrestle with it and at least begin to appreciate its complexity. Not only that, but organizers of such conferences also trust in the good intentions of citizens and their abilities to make good recommendations.

The strength of consensus conferences lies in their focus on briefing the public before ever engaging with an issue. Organizers appreciate the fact that fruitful discussion about difficult questions must be informed, and that when given accurate information, citizens can be trusted to make wise decisions and recommendations. They also recognize that citizens, even without highly specialized knowledge and training, have valuable perspectives. Like juries, consensus conferences trust in collective wisdom and the idea that a complete assessment of an issue must include many voices. The inclusion of components like expert testimony and dialogue facilitation enable consensus conferences to be much more than glorified town hall meetings. Instead, they provide a space for education and tangible involvement in the policy making process.

Still, by its very nature, the typical consensus conference model is meant to result in some agreement (i.e. a “verdict”) at the conclusion. In the realm of discussions about the Supreme Court and its decisions, we cannot possibly expect there to be a complete consensus on whether the Court’s conclusion in a particular case was the “right” one.⁹⁴ There are too many factors at play that may affect how one assesses an opinion, either through the lens of one’s politics, religious views, or personal experiences. That very fact makes a consensus on a number of issues impossible. Indeed, reasonable people may earnestly disagree on a number of issues. Instead, we should aim for a greater appreciation of the reasoning that underlies an opinion. By

⁹⁴ Even ghastly cases like *Plessy v. Ferguson* retain the support of some otherwise intelligent people.

forcing participants to defend their own conclusions in consensus conferences, and allowing their peers to question their premises, there is a better chance of participants arriving at a deeper appreciation of what justices must do when they write an opinion. Perhaps even if one disagrees with the conclusion, one might be more willing to recognize the Court's reasoning as valid. The educational component of consensus conferences should be adapted in order to help citizens better understand how justices make decisions and interpret murky areas of law.⁹⁵ Undeniably, participants may ultimately have to take sides in complex debates when learning about and discussing the Court's decisions. I would expect and welcome this result, but would also point out that it is entirely possible for us to sincerely disagree without being disagreeable.

C. The Hybrid Alternative

I find the two previous examples to be excellent reminders of what good citizens can do when trusted to participate in meaningful deliberation about complex questions. Still, perhaps for the law-oriented among us, it may seem strange that similar proposals have not included the judiciary. After all, previous projects seem to cover the work of crafting and enacting legislation, but not on questions of whether such legislation could be unconstitutional. Discussions that take what courts actually do into account would not only satisfy the goals of the aforementioned projects, but would also strengthen them in the process. Any discussion that covers legislation should not only cover what social good we hope to achieve with them, but also how we will enforce such laws and what courts might say about them. Discussions that leave out judicial considerations are incomplete.

⁹⁵ The Court attempted to clarify and limit the reach of the historically amorphous exclusionary rule when it decided *Herring v. United States*. Writing for the majority, Chief Justice Roberts envisioned a balancing approach to determine when the rule applies, while Justice Ginsburg argued for a broader conception of the rule.

Citizens' assemblies are an important example of the value in facilitating dialogue. Without a neutral party working to ensure all sides are heard and represented, we might imagine such gatherings easily dissolving into the heated town hall meetings (i.e. shouting matches) aired on the evening news. Citizens' assemblies recognize the importance of including as many diverse views as possible in order to uncover common values and discern where honest disagreements actually exist. This allows participants considering constitutional questions to be exposed to unfamiliar views, as well as to prepare them for more careful investigation into the roots of their disagreement.

The educational component of consensus conferences is critical for the implementation of a public participation project aimed at the judiciary. Given high levels of political ignorance among citizens, it is clear that a fruitful discussion of complex issues, particularly legal ones, requires some minimal education or training.⁹⁶ Far from requiring a J.D., consensus conferences attempt to answer this challenge by dispersing carefully selected and balanced background literature in addition to giving the lay panel numerous opportunities to discuss these issues with experts in the field.

Adapting these two components to a new model provides citizens with the opportunity to learn important civic virtues such as tolerance and cooperation. In addition, citizens may receive a "crash course" in constitutional law, and at least learn the basic terminology and concepts employed by the Court when it makes decisions. Giving participants a common language in which to speak empowers them to express their views and clarify their disagreements within a legal framework. These discussions will also challenge participants to not assume that their life

⁹⁶ This would not, of course, resolve fundamental disagreements raised by cases that implicate difficult moral questions such as abortion. However, minimal education in judicial decision-making may, for example, encourage even the most strident "pro-life" advocate to at least better appreciate what the Court actually decided in *Roe v. Wade*.

experiences are representative. Being able to engage with people from diverse walks of life, for example, can help one to become more sensitive to the experiences of others. For instance, a discussion of the constitutionality of immigration laws like Arizona's Senate Bill 1070 may look very different when a person who has been affected by racial profiling is given the opportunity to share her personal experiences. These discussions provide the opportunity to open oneself up to the experiences of others, and to recognize the value of seeing laws from many vantage points. They give us a chance to investigate the political motivations behind our nation's laws. They also allow us the opportunity to appreciate the broader notion that the personal is political and to consider what that might mean to different people.⁹⁷ A related point is that these discussions are a real life application of a marketplace of ideas. They force participants out of their comfortable echo chambers and offer them the opportunity to learn from perspectives they perhaps have never taken seriously before. The heightened sensitivity that results from these interactions can leave participants with the realization that their choices- that is, how they vote, speak with others, and treat others- matters a great deal. When we encounter the reality that no action of ours is "light" in its effects (though the *decision* may be made lightly), there is a greater possibility of all of us becoming more responsible citizens. Ultimately, we cannot separate knowledge and civility. While dogmatism undoubtedly exists among even the most knowledgeable, there is a better chance of appreciating the nuance within certain disagreements (and dealing with them fairly) when participants know the subject well enough. When we approach this higher level of

⁹⁷ Walter Olson suggests critical race theory and legal feminism are contrived applications of identity politics to law. See Walter Olson, "Podcast: Schools for Misrule: Legal Academia and an Overlawyered America," *Cato Institute*, available at <http://www.cato.org/store/books/schools-misrule-legal-academia-overlawyered-america>. The personal is political is a phrase often used by feminists. See Carol Hanisch, "The Personal is Political," February, 1969, available at <http://www.carolhanisch.org/CHwritings/PIP.html>.

understanding, we are more able to see and appreciate subtle distinctions and perhaps be more charitable in dealing with those with whom we disagree.

Admittedly, this model presupposes a specific “type” of citizen who is already willing to “play the devil’s advocate,” so to speak. No conceivable model of public participation will manage to cover all “types” of citizens, and the especially stubborn among us pose a special challenge. Facilitating discussions aimed at those already primed for this kind of mature interaction, however, must be the first challenge of admittedly many more to come. Sometimes it is simply more practical to begin to address large problems with “solutions” that are much smaller in scale.

This model may also provide us with some useful insight into the consequences of Court decisions. As Justice Ginsburg has explained, we should not expect a “practical effects” section in the Court’s decisions any time soon.⁹⁸ But as consensus conferences have shown, there is value in discussing the consequences of proposed public policy. While lay panels participate in research, question experts, and convey their recommendations and concerns, we can do much of the same with judicial decisions. Law professors and legal professionals, for instance, are often called to testify before congressional committees.⁹⁹ They also give talks at law schools and various interest groups. Surely it is possible to reorient these talks to fit this new education-engagement participation model.

⁹⁸ *See supra* note 22 at 281.

⁹⁹ Professors Randy Barnett, Walter Dellinger, Charles Fried; Oregon Attorney General John Kroger; and Michael Carvin of Jones Day testified before the Senate Judiciary Committee on “The Constitutionality of the Affordable Care Act” on February 2, 2011. Webcast available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4964>.

Conclusion

In this paper I have tried to survey the existing factors that I believe contribute to low public awareness of and engagement with the decisions of the Supreme Court. I have suggested that we cannot expect grand changes in how the media, American [civic] education, and the Court operate, and that we therefore must supplement each with a fourth institution. Using two existing public participation models as guides, I have borrowed the best components of each in order to imagine a way in which we may not only educate the public about the important work of the Supreme Court, but also provide a democratic space in which we may productively discuss the opinions themselves.

While many have suggested that some things in government may be too important to be left to citizens, I have argued much the opposite.¹⁰⁰ In arguing that citizens are indeed equipped to engage with important legal questions when given accurate and balanced information, I believe the consequences of these discussions may ultimately inform the decisions of at least part of the electorate and perhaps even lead to a ripple effect. In giving citizens a space in which to learn how to disagree without being disagreeable, I think we are left with a much better chance of citizens pausing before simply voting their self-interest or personal prejudices. Perhaps simply engaging with a person who has lived vastly different life experiences may enlighten at least some voters' decisions at the ballot box.

At the end of the day I think that involving the public in these important discussions results in more than mere conceptual benefits. Participating in discussions about all branches of government has a very real chance of at least inspiring civic-mindedness in a society inundated with sensationalist media accounts, a far from optimal education system, and a Court that, no

¹⁰⁰ Some have expressed concerns about voter ignorance demonstrated by opinion polls and whether jurors, particularly in complex civil litigation, are equipped to deliberate intelligently.

matter how hard we may wish upon a star, will remain largely isolated from the experiences of most Americans. Ultimately, the hope is that when Americans participate in discussions about their government, America itself may become more democratic.

I do not think we can expect a large percentage of Americans to directly participate in these discussions. We also cannot force each other to “behave” in the discussions I envision, even when given all the tools one needs to “play nicely.” In addition, no matter how good an idea may be in theory, we must be weary of the fact that “real life” forces many of us to make compromises.¹⁰¹ Ideas, no matter how constructive they are, rely on the willingness of others to carry them out. Still, if citizens’ assemblies and consensus conferences are any indication, there are people who appreciate the opportunity to share their views with others and learn from those who disagree. We cannot ignore these people, just as we cannot pretend that disinterested and obstinate Americans do not exist. If, as I have tried to argue throughout this paper, constitutional law is dynamic and affects us all, we must at least be willing to enact what I have tried to propose, even on the smallest scale. On our best days, Americans seem to believe that even an individual voice matters. We must not forget that, especially when critics may dispute the logistics and value of these discussions.

¹⁰¹ Amazon.com customer reviews of Fishkin and Ackerman’s *Deliberation Day* raise the important point that child rearing, job considerations, and daily responsibilities often get in the way of being a model citizen, or even a decent one.

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