

# Some Notes on a Principled Pragmatism

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## INTRODUCTION

The gifts of a great teacher keep on giving. Whether in class interrogations, hallway conversations, or office appointments, Paul Mishkin has taught many the rewards and pleasures that come from applying rigorous intellectual discipline, curiosity, and passion to large issues, such as the work of the Supreme Court and the role of courts in our society. In my first exposures to these gifts as Paul's student, I must admit that I did not immediately experience them as "rewards and pleasures." My struggles to keep up with the flow of his insistent questioning and probing exposed the inadequacies of my own intellectual discipline and pressed me to do better. Thus, "burdens and pressures" seemed more apt descriptions at the time. The passage of time has enabled the more painful of these memories to recede, and has also enabled me to appreciate the ways in which his teaching always sought to bring to life the disciplined pursuit of deeper understanding. That same disciplined commitment shines through his distinguished scholarly work, making it accessible to an even wider audience.<sup>1</sup>

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1. This essay examines several Mishkin articles to illustrate the returns that can accrue to giving them close attention, a focus appropriate to the occasion of a symposium on the ideas and scholarship of Paul Mishkin. One of the ideas developed here stresses the importance of remaining mindful of the wider context within which the Supreme Court operates. A similar attention to this essay's broader context compels me to note that for me, personally, the intellectual returns described here have been far exceeded by the gifts of friendship, love, advice and support that Paul and his wonderful late wife Millie have given so freely to me, my wife, Katharine Bartlett (another student of Paul's), and our children over all the years we have been blessed to have known them.

## I

## THE PRINCIPLE/PRAGMATISM DILEMMA

This essay explores one cluster of issues that Mishkin's scholarship—and on reflection back, his classroom teaching—exposes as one thinks about the nature of Supreme Court decision making. The obligation of the Court to strive to satisfy the demands and constraints of proper legal reasoning and analysis occupies a place of central importance in his writing and teaching. It is central as well to his, and our, conception of a court. My Duke colleague, Jeff Powell, has recently expressed the idea that legal reasoning constrains judicial decision making in a way that reflects how many Americans perceive the matter:

[J]udicial review—and constitutional law generally, whoever announces and enforces it—is a matter of 'interpreting and applying' a set of commands or norms rather than the creation of norms out of whole cloth, even cloth made by judicial experts. Americans do not, for the most part anyway, regard 'the Constitution' as a euphemism for rule by a bevy of Platonic Guardians.<sup>2</sup>

"Interpreting and applying" are not self-executing ideas—getting a firm fix on them would require engaging many contested ideas and problems that only lead us off course from the particular cluster of issues to be pursued in the body of this essay. Fortunately, engaging these issues in this essay does not require agreement on just how proper legal reasoning works. This essay does, however, reflect a commitment that rules out some approaches to the problems of "interpreting and applying" constitutional norms. It assumes a shared belief that the role of judicial review and the Supreme Court in our society presumes that a discipline of legal reasoning can be found, and that submitting to this discipline leads in directions different from those that a judge would pursue were he or she guided simply by a sense of what is wise or efficacious.

This distinction between the demands of judicial reasoning and the way that other policy makers confront problems finds expression in many different forms, including in the quite common expression, "result-oriented reasoning." The term is frequently in play when evaluating judicial nominees, and when it is applied to one of them it is always as a term of condemnation. It signifies that the nominee has chosen to follow his or her preference for certain results instead of letting the discipline of judicial reasoning, which follows text, history, structure, precedent, shared values, sound analysis and logic, dictate the decision, letting the chips fall where

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2. H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 379, 381 (2d Series 2006) (citing LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958)).

they may.<sup>3</sup> Result-oriented reasoning is pragmatic. It scans the horizon to gather in a full picture all the possible results that might flow from particular decisions. Judicial reasoning, in contrast, may or may not produce an all-things-considered pragmatic result if the norms and legally relevant texts point in another direction.

For Mishkin, giving primacy to legal reasoning marks only the beginning of the quest to understand the relationship between principle and pragmatism. Consider, for instance, Mishkin's reflections upon the Court's work in the *Bakke* decision. After a careful, convincing dissection of Justice Powell's decision that exposes substantial flaws in the reasoning of the opinion, Mishkin concludes that he now faces a "dilemma" in how to evaluate the case, precisely because he considers its net results to be a "major, successful accomplishment."<sup>4</sup> There exists a tension, in Mishkin's estimation, between two desirable qualities that an opinion might exhibit: its fidelity to legal craft and its pragmatically productive consequences both weigh in the balance of appraising the Court's handiwork. In contrast, anyone who flatly condemns result-oriented reasoning sees an unbridgeable divide between the pragmatism of results and the principles of judicial reasoning, and faces no such dilemma. Still others reject the entire idea of any sharp distinction between the two, and embrace a strong version of the Realist lesson that there is no real distinction between legal reasoning and ordinary reasoning.<sup>5</sup> For them assessing *Bakke* also would pose no dilemma, but for just the opposite reason from those who condemn result orientation in a judge. For the descendents of Realism, if the "net results" of the decision are a "major, successful accomplishment," the decision is simply a success that ought to be applauded. Today, such views sometimes fly under the banner of legal pragmatism, which counsels that there is no "moral or even political duty to abide by constitutional or statutory text."<sup>6</sup> Instead, the judge's job is to

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3. Of course, "result-oriented reasoning" also serves effectively as an epithet aimed directly at Supreme Court decisions. See, e.g., Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1816 (2005) ("Perhaps the most common criticism [of *Bush v. Gore*] maintained that the Court's majority had engaged in manipulative, result-oriented decision making, contrary to some of the majority Justices' own previously declared judicial principles—principles they still believe in and will apply in other cases.") (citations omitted)).

4. Paul J. Mishkin, *The Use of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 930 (1983) [hereinafter Mishkin, *Use of Ambivalence*]. His critique of *Bakke* is explored further in Part II.B *infra*.

5. See J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 773-74 (1971) (describing the Realist "equation of legal and ordinary decisionmaking").

6. Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002).

make the best possible decision under the circumstances, a judgment that ought quite properly to take results and consequences into account.<sup>7</sup>

Mishkin's stance rejects both of these resolutions of the dilemma, in a distinctive way that always acknowledges the strong normative pull of legal reasoning and strives to give it pride of place while not ignoring the larger context within which the Court functions. There is never any danger that you will turn the page of one of Mishkin's studies of the tension between principle and pragmatism to find that pragmatism has triumphed. Mishkin insists that the Supreme Court is a court of law and as such it, "as distinguished from other agencies of government[,] . . . must rest its decision on an analytically sound principle."<sup>8</sup> Yet he nonetheless sees, is attracted to, and finds positive value in pragmatic virtues. The question—the dilemma—is how these seemingly incommensurable values ought to be combined to form an overall judgment of the Court's work.

The source of Mishkin's dilemma is his appreciation of the Supreme Court both as an institution that decides cases according to a certain discipline and as a political institution of government importantly contributing to the ongoing governance of the nation. Faithful stewards of governing institutions must necessarily consider the context within which the institution is functioning, for they share a responsibility along with the office holders of other political institutions to advance the well being of the country. They must attend to considerations that would not be considered part of their primary mission of deciding cases. These include maintaining the health and effectiveness of the institution, which is instrumental to maintaining an institution capable of performing that primary mission. These institutional responsibilities are essentially pragmatic in nature, and they can lay competing claims on the scarce resources of the institution. In the case of the Court, the formal decisions it renders are its dominant resources, although not its only ones, for accomplishing its objectives. These decisions, then, become pressure points at which competing claims must be mutually accommodated in some way.

Because the normative pull of legal reasoning is so strong, it is tempting to deny that the pull of any institutional or contextual priorities actually does conflict with the demands of legal reasoning. One technique of denial is to adhere rigorously to the belief that following the norms of

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7. Pragmatism does not lead to completely ignoring some of the elements of reasoning that are important to many forms of legal reasoning, it is just that the justification for following those elements must always itself be pragmatic. For example, a pragmatist judge ought properly to include the consequences, say, of not following precedent, not because there is some species of "legal reasoning" that exercises any special normative pull, but rather because consequences may flow from such factors as lack of reliability in the law. *See id.* ("[C]ontinuity and restraint in the performance of the judicial function are important social goods, and any judge proposing to innovate must consider not only the benefits of the innovation but also the costs in injury to those goods.").

8. *Id.*

legal reasoning is simply the best way for the Court simultaneously to maintain its own health and to discharge any responsibility it has to the larger institutional interests. According to the strongest version of this view, the *only* way for the Court to maintain its institutional effectiveness is to render all decisions strictly in conformance to the requirements of such reasoning,<sup>9</sup> because only this course of action can maintain the public support upon which the Court depends so heavily for its effectiveness.

Ultimately, the relationship between the Court's institutional objectives and institutional performance is empirical in nature, not a matter of ideal form or abstract logic. Whether hewing closely to a particular form of legal reasoning advances or competes with achieving other institutional objectives is accordingly an empirical question, and hence one that must be explored rather than assumed. If it turns out that fidelity to legal reasoning and the Court's institutional responsibilities are not always congruent, then the tension between them will not have been successfully dissolved and will instead require further examination.

This essay suggests that the tension in fact cannot be dissolved. It begins with an abbreviated study of three Mishkin articles. Each of them carefully dissects a decision of the Supreme Court—*Linkletter v. Walker*,<sup>10</sup> *United States v. Nixon*,<sup>11</sup> and *Regents of the University of California v. Bakke*.<sup>12</sup> I use the essays much as Mishkin uses the cases themselves, as a gateway into the exploration of larger themes about the role of judges in our society. More precisely, I will be speaking almost exclusively of the role of “justicing,” because this essay focuses on the High Court, as Mishkin has done in these three studies. The Supreme Court is, as he says, “a rather special court,”<sup>13</sup> and the men and women who sit on it feel most acutely the tensions and cross currents that are to be explored here. I follow this abbreviated study with a further discussion of institutional responsibilities of the Court and the demands placed on its decision making by the linkage between those responsibilities and the public's perceptions of the institution.

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9. Another technique, not explored here, is to lessen the tension of competing claims by incorporating some of the institutional priorities as factors in or elements of proper legal reasoning itself. See, e.g., Philip Bobbitt's description of the role of “prudential” arguments in constitutional decision making, in *CONSTITUTIONAL FATE: THE THEORY OF THE CONSTITUTION* 61 (1982) (“[P]rudential argument is constitutional argument which is actuated by the political and economic circumstances surrounding the decision.”).

10. 381 U.S. 618 (1964).

11. 418 U.S. 683 (1973).

12. 438 U.S. 265 (1978).

13. Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 67 (1965) [hereinafter Mishkin, *Foreword*].

## II

## THREE ILLUSTRATIONS OF THE PRINCIPLE/PRAGMATISM DILEMMA

Notwithstanding the distinctiveness of the Supreme Court, at the center of Mishkin's conception of it and the work of the Justices sits a value common to all our courts: the value of deciding cases according to principles that the judge is conscientiously prepared to apply to similar cases, regardless of the judge's personal favoritism for or animosity toward the parties involved. Our commitment to this sense of equality before the law is a singular achievement of the Anglo-Saxon tradition stemming from the 1600s.<sup>14</sup> As applied to constitutional decision making, Herbert Wechsler's idea of "neutral principles" embodies a particularly demanding version of this impartiality, driven by Wechsler's belief that equal treatment under the law was an absolute prerequisite for the legitimacy of judicial review in our democracy. The Court, Wechsler argued, must be "entirely principled" and must render a decision "that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."<sup>15</sup>

Mishkin's own commitment is to a version of "principle" that is "less assertive" than Wechsler's, but one that still "places upon the Court sufficiently rigorous demands of its own," by "requiring sincere efforts to reason in terms of precepts that transcend the individual case and that are conscientiously seen as governing in all cases within their stated terms."<sup>16</sup> By insisting on precepts that "transcend the individual case," such a less assertive principle still satisfies the bedrock requirement of equality before the law. Additionally, such insistence on moving beyond the individual case differentiates Mishkin's approach from judgments that are more ad hoc and reflects a mode of decision making that is recognizably judicial. Meeting the demands of this principle comprises one of the things the Court itself must do in order to "reinforce—or at least . . . not weaken further—the general conception of the Court as a court."<sup>17</sup>

Principled decision making, however, is not necessarily timeless decision making. When compared to Wechsler's conception, Mishkin's approach to the idea of principled decision making becomes complicated in

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14. See, e.g., DON HERZOG, *HAPPY SLAVES* 132 (1989) ("A stronger version of [the law/politics distinction] might run this way: the legal system ought to ignore the social status of individuals and also to ignore their political role . . . [T]he stronger version . . . is robustly egalitarian. Attaining it, against the spirited resistance of the nobility—the House of Lords reaffirmed many of their privileges in December 1640—and the church, was part and parcel of consolidating the impartial authority of the modern state.")

15. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) [hereinafter Wechsler, *Neutral Principles*].

16. Mishkin, *Use of Ambivalence*, *supra* note 4, at 909. See also *id.* at 929 ("I am using . . . the much simpler notion of principle as that which transcends the particular case, is rationally defensible in those general terms, and is analytically adequate to support the result.").

17. Mishkin, *Foreword*, note 13, at 69.

an important way because it recognizes that developments in society, in shared values, in accepted conceptions of law and in the idea of justice itself<sup>18</sup> will mean that even precepts that transcend the individual case may from time to time need to change. The Supreme Court feels the pressure for change more than most, both because it often uses the discretion it has in its certiorari docket to select cases where profound and dynamic values clash and because it is considerably more free than the lower courts to contemplate doctrinal change. The Court's unique role means "that the Court must inevitably face and decide difficult questions on major public issues . . . and, in our rapidly changing society, not infrequently mak[e] substantial changes in previously governing law."<sup>19</sup> This implies that the most principled Justice can appropriately become convinced that the principles adhered to by the Court in the past, or indeed even by the Justice herself in prior decisions, regardless of how adequate they may have been in the times for which they were crafted, are no longer the correct principles to follow going forward.

The idea of principled legal change expressed in Mishkin's *Harvard Foreword*, written barely a decade after *Brown v. Board of Education*<sup>20</sup> and just five years after Wechsler's *Neutral Principles* Holmes Lecture<sup>21</sup>, constituted an important intervention into the neutral principles debate.<sup>22</sup> Wechsler had brooded over the failure of *Brown* to meet his neutral principles standard because he could not accept the idea that the social understanding of discrimination, which had changed since *Plessy v. Ferguson*<sup>23</sup> approved separate but equal, could or should influence the law's interpretation of principle. "Is there not a point in *Plessy*," he asked, "in the statement that if 'enforced segregation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it?'"<sup>24</sup> Wechsler acknowledged that "previous decisions must be subject to reexamination when a case against their reasoning is made,"<sup>25</sup> but he simply could not see that the problem with *Plessy* was not any logical flaw in its reasoning, but rather in the fact that *Plessy*'s characterization of social understandings no longer rang true. "For me," Wechsler argued, "assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all."<sup>26</sup> For millions of

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18. *Id.* at 63 ("[A]nother element of the symbolic view of judge-made law is that it embodies 'justice'—and a totally unadaptive body of law would disserve that dearly held and important view.").

19. *Id.* at 67.

20. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

21. See Wechsler, *Neutral Principles*, *supra* note 15.

22. He would comment more explicitly on it in his Roberts Lecture, discussing the *Bakke* decision. See Mishkin, *Use of Ambivalence*, *supra* note 4, at 906-910, and Part II.B *infra*.

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

24. Wechsler, *Neutral Principles*, *supra* note 15, at 33 (quoting *Plessy*, 163 U.S. at 551).

25. *Id.* at 32.

26. *Id.* at 34.

Americans, on the other hand, separate but equal had become a hollow standard of equality.

Where Wechsler's version of neutrality seems to encase principles in timeless amber, Mishkin's instead acknowledges that the Court fails to serve its vital role of connecting evolving social values with law if it maintains a "totally unadaptive body of law."<sup>27</sup> The idea of principled legal change, however, is not without its difficulties for a Court interested in maintaining a broad base of political support, if timelessness is important to the public's understanding of the way that courts ought to function. Mishkin reasons that the timelessness of principles is indeed important to the public's understanding of the judicial task. The public, he argues, strongly embraces the "declaratory theory" of law, whereby the judge finds preexisting law and declares its applicability to the case at hand, exercising no creativity of her own. Mishkin writes:

[T]he declaratory theory expresses a symbolic concept of the judicial process on which much of the courts' prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance.<sup>28</sup>

Mishkin recognizes that embracing the idea of principled legal change means that the declaratory theory cannot be an accurate description of what judges do.<sup>29</sup> Yet, he still insists there is an element of truth to the declaratory theory that gets lost when people focus too heavily on decisions that make "new law" and lose sight of the vast number of decisions where existing law does control. The inadequacies of the declaratory theory to be completely accurate does not detract from his belief that the image of the declaratory judge has strong public appeal and that for the public it constitutes a compelling way to understand the mechanism through which judges are able to engage in principled decision making.

If much of the courts' prestige and power depends upon the public's belief in the declaratory theory, and yet principled legal change is also necessary to maintain the law's connection to the idea of doing justice, then courts face something of a public relations problem. The Supreme Court confronts this problem with special urgency due to the highly charged nature of many of the cases before it. By serving its role of connecting law with evolving social values, the Court often makes "substantial changes in previously governing law."<sup>30</sup> In such a charged

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27. Mishkin, *Foreword*, *supra* note 13, at 63.

28. *Id.* at 61.

29. *Id.* ("It is easy enough for the sophisticated to show elements of naiveté in this view...").

30. *Id.* at 67.



environment, Justices will sometimes need to reach decisions that cannot conscientiously be grounded in the declaratory theory. Yet they ought to be reluctant to repudiate that theory too readily.

#### A. Linkletter

Mishkin's understanding of the demands of law and his understanding of the demands of maintaining public support thus opens up a space in which they may compete. The possibility of conflict is not a problem that can be defined away by thinking that the two objectives will always be compatible. It is a conflict, however, that a well functioning institution might seek to manage. A sound management strategy avoids hard confrontations when feasible.<sup>31</sup> Decisions that unnecessarily put the Court at odds with public expectations reduce public confidence in the Court without any corresponding gain in adherence to principle. Mishkin criticizes *Linkletter v. Walker* for just this reason—for unnecessarily putting each of these competing claims at odds with the other. The *Linkletter* court asserted that the Court possesses a general authority to decide whether a decision that made “new law” ought to be applied prospectively only. Mishkin views this claim as being insufficiently attentive to the conflict between the “prospective limitation of judicial decisions”<sup>32</sup> and the symbolism of declaratory theory as well as to the costs of undermining the people's faith in the Court. If followed, *Linkletter's* approach to the problem of prospectivity would lead to explicit judicial consideration of the question of retroactivity or prospectivity in every case in which the Court announced a holding that was “arguably new.”<sup>33</sup> This approach would greatly overstate the court's resemblance to a legislature, where the effective dates of new laws are routinely discussed and stated. *Linkletter* also overstates the amount of decisional freedom that Justices actually possess and experience, after accounting for professional norms and institutional rules. Such explicit treatment of the effective date of any decision announcing arguably new law would “serve to produce recurrent

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31. Justices minimize the appearance of this conflict by writing their opinions as if they were declaring preexisting law, whether or not that was a fair description of what they were doing. *See*, for example, Justice Scalia's comments in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991): “I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law. But they make it *as judges made it*, which is to say *as though* they were ‘finding’ it—discerning what the law is, rather than decreeing what it is today *changed to*, or what it will *tomorrow be*.” (emphases in the original). Remarks such as these have given birth to a spirited debate over whether the Justices should be more candid in admitting that they are making law. On a related point, *see* LINDA GREENHOUSE, *ON BECOMING JUSTICE BLACKMUN* 68 (2005) (recounting an exchange between Chief Justice Burger and Justice Blackmun after Blackmun had circulated a draft of *Roe v. Wade*: “Burger urged him to ‘consider some ‘muting’” of his description of how hard the decision was. ‘I suppose this is because I am always uncomfortable—and I think most readers are—with our speaking too much of the difficulties of close cases.’”).

32. GREENHOUSE, *supra* note 31, at 64.

33. *Id.* at 67.

contradiction of the symbolic ideal”<sup>34</sup> of the declaratory theory. As a result, the esteem and prestige of the Court would be unnecessarily damaged.

For Mishkin, all of this amounts to a self-inflicted wound to the Court. The necessity of legal change and the important symbolism of the declaratory theory could be mutually accommodated if a more modest prospectivity doctrine were available. By analyzing the reasons to make new rules prospective, viewed through the lens of the purposes of habeas review (the procedural route through which *Linkletter* reached the Court), Mishkin demonstrates that the key to reconciling the necessary symbolism with the necessity of legal change indeed does not require the jettisoning of either, because the manner in which the Court handles both could bridge most of the gap.<sup>35</sup>

In the case of *Linkletter*, Mishkin urges a course of action more congenial to maintaining the popular perception that the Court follows the declaratory theory even though that theory fails to describe the principled legal change that the Court often effects. While the tension between popular perceptions and judicial reality is real, in Mishkin’s hands, if not in *Linkletter*’s, the two are not irreconcilably at odds, because Mishkin is able to weave a course that could lay claim to being a better professional resolution of the case while minimizing its challenge to popular perceptions.

In his Foreword, Mishkin paints a rich and complex picture of the Court. At the center of this picture is the Court’s responsibility to reach results in a sound and principled manner, but it is a center that feels the pressure of other demands. The Court does not operate in a world of “pure law,” if such a thing were possible. Rather, Justices must be mindful of how their opinions will be received by the American people, because they ought to be concerned about maintaining—or at least not lessening—the reservoir of popular support required for their judgments to maintain the legitimacy necessary for the Court’s success in resolving disputes, especially the most controversial ones. That awareness ought to inform how they execute their duties.

### B. Bakke

There is, of course, no guarantee that a rapprochement among competing claims will always be possible. Indeed, by the time the reader

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34. *Id.* at 69.

35. *Id.* at 66 (“The thrust of the foregoing discussion of the [declaratory theory], then, must go not so much to the fact of change as to the manner of its accomplishment. If a broadly declared power of prospective limitation were the only effective or fair means of achieving renovation of judge-made law ... its costs would have to be borne. But that is certainly not the case ... there is a wide range of less drastic techniques for achieving or facilitating change in the law ... Indeed, there are techniques not yet generally used which in my view can accomplish virtually all that the prospectivity concept can without the latter’s disadvantages.”).

comes to the end of the Foreword, after pausing to admire the skill with which Mishkin has approached his problem, the reader might be forgiven for thinking that the success of his argument in bridging the gap between perception and reality in this particular instance pales in significance to the durability of the gap itself. Granted that the declaratory theory has “a substantial element of truth,”<sup>36</sup> the role of the Court as an agent of principled legal change will continually move it to operate in a manner inconsistent with a declaratory-theory symbolism that provides “substantial emotional support for basic truths important to proper functioning of the legal system.”<sup>37</sup>

The cross currents created by the pull of public perception are not the only complications the Court faces. When the Justices confront cases dealing with highly charged and socially significant controversies, they may have concerns for the health of the country as a whole rather than simply for the institution of the Court itself. They may come to see a constructive approach to resolving the case, one that in their opinion has the best chance to help the country cope with the controversy, but one that cannot be so easily reconciled with whatever the professional constraints of legal reasoning may impose. Or, to phrase the challenge from the other direction, an opinion that resolves the litigation in a professionally competent manner may serve to exacerbate the larger social controversies of which the case is but a single manifestation. In either case, although “the Court must always be able to justify its results in terms of principle . . . the demands of a wise and politic result may be in tension with the dictates of principle.”<sup>38</sup>

The Court confronted the challenge of mediating the tension between legal reasoning and public perception in *Bakke*. Mishkin personally supported upholding the decision<sup>39</sup> to set aside ten positions for minorities in the entering class of the Davis Medical School. Yet, he was also acutely aware that the decision could have the effect of exacerbating the already inflamed debate around the question of affirmative action. This risk derives from the public’s tendency to interpret any decision upholding the constitutionality of an action as expressing the Court’s affirmative approval and endorsement of that action.<sup>40</sup> As an unavoidable intervention into the

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36. Mishkin, *Foreword*, *supra* note 13, at 63.

37. *Id.*

38. Mishkin, *Use of Ambivalence*, *supra* note 4, at 907.

39. Mishkin authored the brief for the Regents of the University of California defending Davis Medical School’s minority-set aside program as a constitutional means to address a history of societal discrimination in preparation and training for the medical professions.

40. Mishkin, *Use of Ambivalence*, *supra* note 4, at 911 (Attributing to Alexander Bickel, and before him Charles Black, “the idea that a Supreme Court decision holding a particular statute or course of action not unconstitutional is often taken as importing much more—as connoting that the Supreme Court is affirmatively legitimating the challenged government action. . . . [T]his can precipitate a

larger social divisions surrounding the affirmative action debate, such perceived affirmation of one side risks heightening animosities instead of dampening them when dealing with a subject matter where there are "legitimate moral and constitutional claims on both side of the issue."<sup>41</sup> In Mishkin's view, the *Bakke* Court's treatment of the question of affirmative action in such a charged environment reflected an appropriate stance of ambivalence:

The stance of the Court as a whole amounted to a proclamation of ambivalence . . . Justice Powell, with the acquiescence if not the active cooperation of at least several of his colleagues, managed to mark out a position that served to heal wounds and to defuse emotion . . . [T]he stance taken by the Supreme Court as a result of Justice Powell's position both symbolically and actually recognized the legitimacy of deeply held moral claims on both sides.<sup>42</sup>

The *Bakke* court and Justice Powell's concurring opinion achieves the appropriate degree of ambivalence by recognizing the legitimacy of claims on both sides of the affirmative action debate. Four justices took the narrow position that Davis's affirmative action program was barred by Title VI of the Civil Rights Act of 1964, and avoided reaching the constitutional question entirely. Four other justices favored broadly upholding race-conscious affirmative action programs, and the Davis program in particular. Writing alone, Justice Powell's opinion controlled the result in the case. Justice Powell invalidated Davis's program on constitutional grounds, but did so in a manner that signaled acceptance of affirmative action programs in which race played a more modest role. In his judgment, the medical school's interest in academic diversity was sufficiently compelling to permit adding a "plus" to a minority applicant's file, but insufficient to justify a program that sets aside specific spaces just for minorities.

Mishkin argues that Justice Powell reached a result that made "a good deal of intuitive good sense,"<sup>43</sup> as well as one that defuses rather than ignites further heated debate. For these reasons, it ought to be considered "a major successful accomplishment."<sup>44</sup> It is with some noticeable regret, then, that Mishkin proceeds to dissect Justice Powell's reasoning, and to conclude that the opinion is "problematic."<sup>45</sup> Mishkin exposes a number of problem areas in Powell's opinion. While we will not touch on them all

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dilemma in which the court feels called upon ultimately to uphold challenged action, and yet does not wish to give that action the added impetus that its imprimatur of legitimacy would provide.").

41. *Id.* at 917.

42. *Id.* at 917-18, 922.

43. *Id.* at 924.

44. *Id.* at 930.

45. *Id.* at 924.

here, one criticism that goes to the heart of that opinion concerns the sharp distinction Justice Powell draws between an admissions process that considers minority status as one of a number of diversity-relevant plus factors versus one that separates minority files for purposes of filling a quota in an entering class. Justice Powell claims that the former is less constitutionally offensive because it “treats each applicant as an individual in the admissions process. . . . [The qualifications of any applicant who loses out in this selection process] would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.”<sup>46</sup>

As described, however, if the individualized system assigns a significant enough weight to the racial factor to make a difference in the racial composition of the entering class, then those competing applicants who do not enjoy the benefit of the “plus” associated with that factor will have been disadvantaged in the admissions process on the basis of a conscious racial criterion. Thus, “the use of a ‘plus’ may simply be a slightly less precise, and less direct, method of determining the proportion of minority students who will be given preferential admission,”<sup>47</sup> and the distinction between this and a set-aside “must to the largest degree be a matter of form rather than substance.”<sup>48</sup>

The criticisms of *Bakke* are just as trenchant as those that Mishkin had earlier leveled against *Linkletter*, and yet the tone and message of his Roberts Lecture are much more sympathetic to *Bakke* than the earlier Foreword had been to *Linkletter*. In the latter case, Mishkin had been able to craft a professionally rigorous and defensible approach to the issues of when new law might be limited to prospective application that served the same objectives as *Linkletter* while greatly reducing the tension between the manner and method of the opinion and the declaratory theory on which popular support for the Court depends. In the case of *Bakke*, Mishkin’s critique provides no hint that the absence of rigor in Justice Powell’s reasoning is associated with the potential to undermine the Court’s popular support. To the contrary, that the opinion reaches a “wise and politic” result seems laudable for two reasons. First, it assisted the country as a whole in going forward with the difficult questions of race and discrimination in a more positive environment, less fraught with emotion and ill temper than an alternative opinion would have generated. Second, the larger message that the opinion sends—both in its common sense result and in its message that there are legitimate moral and constitutional claims on both sides—most likely leaves many people with a positive impression that will not weaken support for the Court and in all likelihood will

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46. *Bakke*, 438 U.S. at 318.

47. Mishkin, *Use of Ambivalence*, *supra* note 4, at 926.

48. *Id.*

actually strengthen it. The Court thus helped to advance a laudable social goal, without damage to itself, but the opinion responsible for much of this still falls short of the standards of sound judicial reasoning. Confronted with the claims that conflicting objectives place on the Court, Mishkin ends his evaluation of the case on his own note of ambivalence.<sup>49</sup>

### C. Nixon

Mishkin's critique of *U.S. v. Nixon* sits between his assessment of *Linkletter* and of *Bakke*, both temporally and dispositionally.<sup>50</sup> As with *Bakke*, Mishkin sees the *Nixon* Court responding to a sense of responsibility to the nation, in the earlier case to help the country work through the profound questions of race and discrimination, and in the latter one to cope with the crisis in governance produced by President Nixon's complicity in obstructing justice and by the pending impeachment proceedings against him in the House of Representatives.<sup>51</sup> As with *Linkletter*, the Court's own prestige and public support did seem in some jeopardy in *Nixon*, insofar as the way in which the Court decided the appeal from Judge Sirica's order could, if mishandled, subject the Court to partisan criticism that might undermine the public's perception of it as a neutral arbiter, and might even lead to Presidential defiance.<sup>52</sup> In contrast with *Linkletter*, however, Mishkin concludes that the *Nixon* opinion "clearly increased [the Court's] prestige"—at least "in the short run," but at the cost of issuing a "soft law" opinion that mishandled legal doctrine. The result was a "weak opinion which may prove unfortunate as precedent,"<sup>53</sup> and might even create problems for the Court down the road. The very short term success of its public relations effort might, in Mishkin's view, come to damage the Court in the future by "reinforcing the public's and the judges' expectation that the Court will—and should—perform such functions in the future."<sup>54</sup> This may then embroil the Court in future disputes where the wiser counsel would be to leave them to the political

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49. *Id.* at 929. The contrast between Mishkin's treatment of *Bakke* and *Linkletter* is significant for a second reason as well: Mishkin does not offer an alternative opinion to Powell's that might accomplish the same goals that the lecture praises, but in a more professionally sound manner.

50. Paul J. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76 (1974) [hereinafter Mishkin, *Comment on Nixon*].

51. *Id.* at 76 ("[T]he Supreme Court took the case . . . because the Court felt a responsibility to the nation to bring . . . about [an expeditious resolution of the case]."); *Id.* at 77 ("[T]he American polity looked to the Court to extricate it from its political difficulties.").

52. *Id.* at 76 ("[The] Court's concern for its own institutional prestige and efficacy" helps explain its actions.); *Id.* at 86 (The Court faced two threats: "the risk that Mr. Nixon might defy the Court's order; and the danger that, whether or not he did, the Court might become the focus of animus or partisan attack by the President's supporters. Either of these possibilities—let alone both—could diminish the Court's stature, prestige and future effectiveness.").

53. *Id.* at 91.

54. *Id.*

branches. (When read from the current perspective, in the light of *Bush v. Gore*, this is a prediction that assumes a certain air of prescience.)

As with *Bakke*, Mishkin finds multiple grounds for disappointment in the lack of principled rigor in the *Nixon* decision. He attributes some of the problems with the opinion to the leverage that individual Justices might have had as a result of the felt necessity to render a unanimous decision, resulting in the opinion being larded with “gratuitous, non-consequences-bearing declaration[s] favoring a position taken by the President, followed by a somewhat off-the-mark rationale supporting a holding squarely against him.”<sup>55</sup>

Still other problems come from the Court’s apparent interest in producing a decision largely sanitized of details about the nature of the Watergate felony charges and the President’s alleged involvement in covering them up. Interest in appearing above the partisan political fray in this way may have caused the Court to reject the Special Prosecutor’s suggestion that the Court decide the case by recognizing the President’s executive privilege while at the same time acknowledging a narrow exception for conversations where a substantial basis existed to believe that the participants were involved in criminal activities.<sup>56</sup> Instead, the Court held that the privilege, at least when the only basis for it was the “generalized” need for confidential discussions between the President and his close advisors, could be overcome by a request for specific, relevant, and admissible evidence for any pending federal criminal prosecution. The breadth of the Court’s exception is “striking,” and quite outside the expectations that a decision overriding a constitutionally-based privilege would be grounded on the narrowest rationale available.<sup>57</sup> The apparent advantage of the Court’s chosen course was that it enabled the opinion to be written at a level of abstraction removed from the facts of the dispute, thus eliminating any need to make factual representations that could be interpreted as reflecting bias against the President.

These two sources of the Court’s analytical shortcomings, the necessity for a unanimous decision and the apparent importance of a rhetorically neutral opinion, find their roots in imperatives of the Court as an institution. On this occasion, they resulted in an opinion vulnerable to criticism as an inferior exercise in legal reasoning. The case study of *Nixon* thus provides a third illustration of the diverse ways in which institutional objectives compete with the demands of legal reasoning.

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55. *Id.* at 83.

56. Mishkin, *Comment on Nixon*, *supra* note 50, at 84.

57. *Id.* at 84-85.

## III

## AN INSTITUTIONAL PERSPECTIVE

The foregoing barely summarizes Mishkin's penetrating explications of the efforts of the Court to resolve three publicly significant controversies while simultaneously dealing with competing pressures. Nothing can substitute for reading the originals to appreciate the Court's complex decision-making environment. In Mishkin's judgment, it is an environment in which principled and analytically sound reasoning occupies the highest normative ground, yet also one in which other pressures influence how Justices reach their decisions. The Court faces demands other than the ideal of rendering the most rigorously structured product of legal reasoning because it is not an unanchored, free-floating mechanism for generating written resolution of hypothetical problems according to the dictates of legal reasons and reasoning. It is also a functioning institution of government, whose judgments have repercussions that may impact important features of society, including its own prestige, itself an interest that needs to be defended and anchored to the greater needs of the society in which the Court sits.

Once the glimpses into the Court provided by these three case studies are interpreted as reflecting an image of the Court as a political institution, one begins to see other features of the Court that fill out that institutional image. These features further reveal an image of an institution that, while quite distinctive from its co-equal branches, bears more similarities to the other branches of government than is commonly supposed. The emergent picture of the Court is one in which the same features of their contextual environment that influence members of Congress or the President also influence its Justices. Justices, Congress, and the President all share similar goals or objectives and engage in efforts to adjust their own behaviors in light of their anticipation of how other actors in that environment may react to their behavior. Consider some of these similarities.

A Justice and a member of Congress ("member") each make decisions with one eye on their constituents, as both anticipate being held responsible by them. In other words, both are agents in a principal-agent relationship. A member must struggle with the competing roles of a delegate and a trustee; a Justice must reconcile her fealty to legal reasoning against her responsiveness to institutional imperative. Of course, the mechanisms of accountability differ enormously and influence the mediation of these competing claims. The mechanism for members—standing for reelection—has been rejected with respect to Justices so that their decisions can be as free as possible from the kind of immediate dependency upon contemporary electoral evaluation that marks decisions on Election Day. Nonetheless, the Court needs the public's support because it is essential to



the maintenance of the Court's legitimacy,<sup>58</sup> and integral in defining the meaning of justice that the Court seeks to maintain. To the extent that the Justices fear that the public will withhold its support, they can be influenced by the anticipated public reaction, just as elected officials can be.

The principal-agent relationship of a Justice and a member of Congress might be distinguished on the basis of what motivates each to be concerned about public support. The Justice's concern about public support may be driven by the relatively high-minded reasons of maintaining institutional good health and embodying broadly shared social norms, whereas a member's concern may be driven by the less noble reason of securing her own reelection. It is not clear that the two can be so sharply contrasted, however. A member of Congress often has interests beyond her own electoral success, as, for example, when she anticipates that the acceptability of her party's broad political objectives will affect which party holds the majority. In the context of a closely divided chamber, as has been the case for over a decade, both Republican and Democratic members have demonstrated historically high levels of party cohesion due to their awareness of the consequences that a change in majority can have on their party's ability to dictate the policy agenda and to influence the direction of that policy. In recent years, this has brought to Washington some features of a more parliamentary system in which allegiance to a party dominates allegiance to a branch of government.<sup>59</sup> The governance dynamics this produces provide much to criticize, but they also confirm that members of Congress can and do link concern about electoral prospects to the ability to implement policies, thus bringing their own narrow self-interest and larger policy-related interests together.<sup>60</sup> The interest that a Justice has in maintaining public support also has a policy-related element to it as well. "[J]ustices who defy aroused public opinion risk, and know that they risk, provoking a political backlash that ultimately

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58. "When legitimacy is measured in sociological terms . . . a governmental institution or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

59. See generally, THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH* (2006).

60. In particular, the transcendence of party as opposed to branch loyalties has potentially deleterious consequences for the system of checks and balances, and the norms of accountability and transparency that this system seeks to advance. See e.g., MANN & ORNSTEIN, *supra* note 59 at 211, 216 ("Current members of Congress simply do not identify strongly as members of the first branch of government. Whether they place their ideology or partisan identity first, too many members of Congress now think little if at all about their primary role and responsibilities as members of the legislative branch. . . . We believe these developments have serious consequences for policy and governance.").

could cause their doctrinal handiwork to collapse," if that backlash prompts Presidents to appoint new Justices whose views differ from theirs.<sup>61</sup>

Not only do members and Justices take the reaction of their constituents into account for reasons related to legislative policy on the one hand and legal policy on the other, they also each make decisions with an eye on what is best for the country.<sup>62</sup> A cynic might think this gives too much credit to members of Congress, but this attitude carries a justifiable skepticism too far. Almost all careful studies of member behavior conclude that the nation's welfare is important to most of our legislators.<sup>63</sup> In addition, these studies also point out that national welfare considerations must compete with other influences on a member's behavior, not the least of which is being reelected, and it is difficult to predict in advance or know afterwards how much the nation's welfare informs particular decisions.<sup>64</sup> Once again, this is not so different from the judicial case. If we had a basis for specifying the circumstances in which the needs of the country justified pulling away from the dictates of legal reasoning, the influence of such extra-legal influences might be delimited in some acceptable way. As it is, the Court is presented with situations in which concern for national consequences and fealty to principles diverge in complex and novel ways, such that the dilemma of reconciling them cannot be avoided.<sup>65</sup>

Implicit in these comparisons is the last common characteristic that I will note. Legislators and Justices are also similar in that they engage in strategic behavior. Actors must think and act strategically when the decision-making context makes choices interdependent because the net effect of an individual's choice depends upon the reaction of others. Once the actor realizes this, the decision on how best to achieve her objectives becomes a function of her expectations about how others will react. "To say that a [J]ustice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take, not just on her own preferences and actions."<sup>66</sup> In *Bakke*, the ultimate effect of the Court's decision depended upon the reactions of the public that held strong convictions on either side

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61. Fallon, *supra* note 58, at 1833.

62. Mishkin's exegesis of both Nixon and Bakke strongly suggest that the socially constructive maneuvers that he finds in each were not accidental; the opinion writers and some (in *Bakke*) or all (in *Nixon*) of the Court were alert to the hazards or opportunities posed by the cases and took steps to minimize the damage or increase the social benefits in the way the opinions were drafted.

63. E.g., ROGER H. DAVIDSON AND WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 132 (10th ed. 2006) (Legislators "ponder factors such as the nation's welfare, their personal convictions, and constituency opinions.").

64. Thomas E. Cavanagh, *The Calculus of Representation: A Congressional Perspective*, 35 WESTERN POL. Q. 120 (1982) ("The weight assigned to each factor varies according to the nature of the issue at hand, the availability of the information necessary for a decision, and the intensity of preference of the people concerned about the issue.").

65. E.g., Mishkin, *Use of Ambivalence*, *supra* note 4, at 930.

66. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 12 (1998).

of the affirmative action question. In *Nixon*, the anticipated reactions of partisan supporters of the President and the President himself were significant in shaping the Court's decision. In each of these cases, Mishkin sees the justification for the ways in which the Court constructed its decisions to dampen the chances of negative reactions and to increase the likelihood of positive ones.

Strategic behavior comprises an element of goal-oriented instrumental rationality, and even Wechsler recognized that the Court is properly cognizant of how its decisions affect public support for the institution. Like other scholars of his generation who supported the Court's then-expanding role in protecting individual liberties through judicial review, Wechsler was only a generation removed from the crisis of 1937, in which strong adverse reactions had been generated by the Court's pre-1937 jurisprudence. When he delivered the Holmes Lecture, he was also witnessing the massive southern resistance to the *Brown* decision as well as the negative public reactions to the Court's 1957 communist decisions. He understood the implications that these reactions were having and could have on the Court's legitimacy. A central preoccupation of Wechsler and these other scholars was precisely to resolve "the dilemma of legitimating an appointed judiciary in a democracy" in order to secure the Court's "safety" so that it could reach countermajoritarian results where necessary.<sup>67</sup> This is nothing more than a strategic analysis of the Court's situation.

Wechsler conceived of principled decision making as both the legally legitimate method of legal reasoning *and* the best strategic move the Court could make in order to protect itself from those who would attack its countermajoritarian decisions. Even if Wechsler's felicitous equation of proper method and the best strategy for securing public support were correct, however, that analysis says nothing about other ways in which institutional claims can compete with the demands of legal method. Mishkin's exegesis of *Bakke* elegantly explores how positive benefits accrued from that decision in ways that had only tangentially to do with securing the public support necessary for institutional self preservation. Instead, the chief virtue of Justice Powell's opinion and the Court's overall ambivalence was that it served an objective distinct from being analytically rigorous in its reasoning, namely assisting the country in navigating a complex and difficult social problem. As for *Nixon*, the Court was sensitive to the atmosphere of constitutional crisis that surrounded the case, and it justified taking the case largely out of its sense that it had to intervene for

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67. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 247, 255 (2002) (quoting LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 6 (1996)).

the good of the country.<sup>68</sup> Ducking the dispute while impeachment proceedings were pending in the House may have been the safer course for a Court predominantly concerned with its self preservation,<sup>69</sup> and Mishkin expresses concern that the Court may have harmed itself in the long-run.<sup>70</sup> In sum, one lesson that emerges from Mishkin's three case studies is that any strategic evaluation of the Court's action must examine how a decision impacts at least two different institutional values: (1) self preservation and; (2) the ability of the country to weather a crisis or cope with a significant source of social tension.

Together, *Linkletter*, *Nixon*, and *Bakke* illustrate the role that institutional considerations other than fealty to legal reasoning may have on the Court's work product, but they do not generate generalizable techniques for mediating competing demands on the Court. As already noted, the connections between institutional acts and practical consequences necessarily involve an empirical inquiry, and the results of that inquiry will vary depending on context and case. What can be generalized, however, is the conclusion that a central ingredient in ascertaining the net effect of judicial action will be the public's reaction to it. Whether the Court's deviation from the highest professional norms influences public support, helps to solve national problems or has other ramifications ultimately depends upon public perception of and reaction to the Court's work.

Once one grasps the central importance of public perceptions to any institutional evaluation of the Court, it becomes highly unlikely that the relationship between judicial decision and public reaction could depend exclusively upon the analytical rigor of the Court's work in the way that Wechsler asserted.<sup>71</sup> The public's *perception* of the Court depends upon what the public knows about the Court, and in general the public knows very little about the details on the Court's written decisions and analysis. Overwhelmingly, the public's knowledge of the Court's work comes through the filter of media outlets, whose reporting focuses intensely on the periods shortly before and after the Court announces its most publicly salient decisions. That coverage strongly emphasizes results. In describing the aftermath to *Bakke*, for instance, Mishkin reports that "newspaper headlines and television news summaries . . . shouted that 'Bakke wins,' but were immediately accompanied by a further headline that race-

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68. *Id.* ("Particularly if I am correct that the Court [took the case] because of a felt responsibility to resolve the political agony which the country was undergoing, then [the question whether they should have taken the case] is indeed a difficult one.").

69. Whether ducking is the best self-preservation move will depend upon the public's expectations for the Court. *See infra* text accompanying notes 78-98.

70. Mishkin, *Comment on Nixon*, *supra* note 50, at 90.

71. *See supra* text at note 15.

conscious programs were not unconstitutional.”<sup>72</sup> Such reporting correctly conveyed the ambivalent straddle of Justice Powell’s opinion, but these headlines revealed nothing about the quality of the opinion’s legal reasoning. Of course, in today’s saturated news environment of cable and the internet, legal analysts quickly appear to debate the legal merits of important decisions, but most media treatments follow the crossfire format of airing strongly opposing voices in short segments. As a result, the overall judgment about legal quality remains largely unresolved as even these shows quickly shift their attention from manner and method to the practical implications of the decision.

In the years since *Bakke*, the cogency and precedent of Justice Powell’s opinion had been a growing topic of academic debate, highlighted by the panel decision of the Fifth Circuit in *Hopwood v. Texas*<sup>73</sup> which used its own independent analysis of the anticipated views of Justices currently on the Court to conclude that Justice Powell’s opinion lacked precedential weight, because it would be rejected by five of the sitting Justices. On that ground the panel elected not to follow it. While *Hopwood* reflects the minimal respect Justice Powell’s opinion received in some in professional circles, there was no indication that the discourse about the quality of Justice Powell’s decision influenced the public’s opinion of either the Court or the affirmative action issue. On the eve of the most recent Supreme Court decisions, Gallup poll results supplied a snapshot of a public still divided on affirmative action, but with a clear majority supporting some moderate efforts.<sup>74</sup> That poll suggests that Justice Powell’s ambivalent “OK” for limited affirmative action programs has stood up fairly well, notwithstanding the attacks on the opinion’s analytics: 26% favored decreasing or eliminating affirmative action programs, 28% favored an increase, and 37% thought the current efforts were about right.<sup>75</sup> When the Court rendered its judgments in the Michigan cases, *Grutter*<sup>76</sup> and *Gratz*<sup>77</sup>, instead of rejecting Powell’s *Bakke* effort as poorly reasoned, five members of the Court gave it a ringing endorsement. That result was at least partially influenced by impressive amicus filings of retired military leaders, heads of major companies and others who stressed the practical consideration that reducing affirmative action efforts could

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72. Mishkin, *Use of Ambivalence*, *supra* note 4, at 921.

73. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1995), *cert. denied sub nom.* Thurgood Marshall Soc. v. Texas, 518 U.S. 1033 (1996).

74. Jack Ludwig, *Public Warming to Affirmative Action as Supreme Court Hears Michigan Case*, April 1, 2003, <http://www.galluppoll.com/content/?ci=8092>. I have no way of assessing the impact of Justice Powell’s decision on these figures.

75. *Id.*

76. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan’s law school admissions procedures against an equal protection challenge).

77. *Gratz v. Bollinger*, 539 U.S. 234 (2003) (finding the University of Michigan’s undergraduate admissions procedures violate the equal protection clause).

lead to backsliding on training a diverse cadre of future leaders. Throughout all these expressions of public attitudes toward affirmative action, the analytical rigor of Justice Powell's opinion played no discernible role.

Many different opinion surveys find a connection between public opinion of the Court and the results the Court has reached. Immediately prior to the confirmation hearings for Chief Justice Roberts, one poll caused some alarm as it circulated among leaders of the bar and the judiciary. It showed a 42% approval rating for the Court, a historically low figure.<sup>78</sup> Gallup pointed out that it took this reading just after the Court had decided *Kelo*,<sup>79</sup> upholding the power of eminent domain for purposes of commercial development plans that transferred the taken property to private developers, as well as two Ten Commandment cases.<sup>80</sup> All three decisions received extensive press coverage and commentary, much of commentary expressing outrage at the results. *Brown v. Board of Education*, on the other hand, was a popular result in the country overall, notwithstanding massive resistance in the South or professional misgivings Wechsler expressed about the Court's inadequacies as an exercise in principled decision making.<sup>81</sup> Accordingly, public support for the Court did not take a national dip after *Brown*.<sup>82</sup>

The potential of unpopular results to undermine the Court's popular legitimacy plays a central role in the thinking of Alexander Bickel. He advocated the passive virtues as means for the Court to avoid granting certiorari if the Court's deciding the case in a principled manner would predictably threaten its public support because of hostility to the final judgment.<sup>83</sup> While the passive virtues play a role in mitigating this tension—as when the Court disposed of the *DeFunis* affirmative action

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78. Joseph Carroll, *America's Confidence in High Court Declines*, The Gallup News Service, June 21, 2005, <http://brain.gallup.com/content/default.aspx?ci=17011>.

79. *Kelo v. City of New London*, 545 U.S. 549 (2005).

80. *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). See Jeffrey M. Jones, *Supreme Court Approval Rating Best in Four Years*, The Gallup Poll News Service, September 26, 2006, <http://brain.gallup.com/content/default.aspx?ci=24802> (“A poll conducted at the end of the 2005 term found just 42% of Americans approving of the Supreme Court. That reading came just after the court ruled that local governments could use the power of eminent domain to take land from private homeowners for commercial development purposes, and after the court issued a split decision on whether monuments to the Ten Commandments could be displayed in and around government buildings.”).

81. See, e.g., Friedman, *supra* note 67, at 186 (citing Ross, *Attacks on the Warren Court By State Officials: A Case Study of Why Court-Curbing Movements Fall*, 50 BUFF. L. REV. 483, 606 (2002) (“Public opinion polls during the 1950s consistently indicated that a large majority of Americans outside the South approved of *Brown*.”)).

82. *Id.*

83. Bickel's resolution of the “Lincolnian tension” between “principle” and “expediency” produced the famous rejoinder from Gerald Gunther that this amounted to “100% insistence on principle, 20% of the time.” Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—a Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

litigation on mootness grounds<sup>84</sup>—they are at best an incomplete resolution. As Mishkin notes in his Foreword, the Court will regularly be asked to hear cases where the emotional environment runs high and strong reactions are expected.<sup>85</sup> The Justices' own priorities and sense of responsibility will move them to hear a number of these cases. They would fall short of meeting the country's expectations for the Court if they avoided too many of them. Whether an institution meets expectations is yet another factor that influences public support for that particular institution.

Fortunately for the Court, the public's negative reaction to opinions appears often to be fairly short-lived, as in the case of the pre-Roberts hearing polling mentioned above. A little over a year after that poll was taken, the same polling methodology reports that the Court's approval rating rose to 60%, a much more representative number in recent years and the highest since 2001.<sup>86</sup> Similarly, after an initial dip in confidence in the Court after the *Bush v. Gore* decision, confidence rebounded quickly. Within a year of the decision the public's approval of the Court reflected little change from the levels that existed prior to the ruling.<sup>87</sup>

These dynamics strongly suggest that the Court is able to cultivate a base of "diffuse support," "a reservoir of favorable attitudes or good will that helps [people] to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants."<sup>88</sup> One recent analysis of the nature of the Court's diffuse support concludes that the Court may actually benefit from being the object of intense public attention of any kind, due to the influence of "positivity frames," whereby current attention calls to mind positive impressions of the Court, such that "exposure to courts—including exposure associated with controversial circumstances—enhances rather than detracts from judicial legitimacy, even among those who are disgusted with the Court's ruling."<sup>89</sup>

We need to learn much more about the sources of such positive impressions of the Court. Some of the possibilities suggested by analysts include exposure to "the symbolic trappings of judicial power—the marble temple, the high bench, the purple curtain, the black robes." Most

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84. See Mishkin, *Use of Ambivalence*, *supra* note 4, at 930.

85. Mishkin, *Foreword*, *supra* note 13, at 67.

86. Jeffrey M. Jones, *Supreme Court Approval Rating Best in Four Years*, The Gallup Poll News Service, September 26, 2006, <http://brain.gallup.com/content/default.aspx?ci=24802>.

87. James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRITISH J. POL. SCI. 535, 538 (2003) (reporting a Harris poll conducted at the beginning of 2001 that revealed "only slightly less confidence [in the Court] than the results of a comparable survey conducted at the beginning of 2000). In the short run, there were measurable negative consequences for the Court's approval. Herbert Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32 (2001).

88. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965).

89. Gibson et al., *supra* note 87, at 553.

news coverage is generally respectful of the Court, which often contrasts sharply with the coverage of the other branches of government which are much more likely to be portrayed as awash with partisan bickering or immobilized. Certainly the coverage of the Court during the 2000 election controversies cast a very favorable light on the calm, deliberative environment of the Court compared to the pictures of general chaos in Florida.<sup>90</sup> This, too, may contribute favorably to overall perceptions of the Court by the public. According to some, "exposure to the legitimizing symbols of law and courts is perhaps the dominant process at play. Thus, the effect of displeasure with a particular court decision may be muted by contact with these legitimizing symbols."<sup>91</sup>

Tom Tyler and other researchers have explored different possible sources of diffuse support, or sociological legitimacy, for the judicial system through their work on procedural justice. In a growing and impressive array of studies, they demonstrate that when confronting legal authorities in society, people develop attitudes of trust and respect for those authorities from their sense of the manner in which the authorities have treated them, independently of whether the authorities have punished or rewarded them.<sup>92</sup>

[D]eference develops, we argue, when people are treated fairly by legal authorities, and people's willingness to consent and cooperate with legal authorities is rooted in their judgments about the degree to which those authorities are using fair procedures. . . . Procedural justice judgments can be contrasted to judgments about the favorability or fairness of the outcomes of people's experiences.<sup>93</sup>

This research also finds a connection between support or legitimacy and an assessment of the motives of the authorities. "Trust in the benevolence of motives and intentions of the person with whom one is dealing . . . is an inference about the character of the other person and the motivations that shape his or her behavior."<sup>94</sup> Significantly, Tyler and others find that "people do not judge the fairness of legal procedures by the degree to which they gained or lost from those procedures . . . the primary direct influence upon . . . judgments of . . . legitimacy comes from judgments about the trustworthiness of authorities."<sup>95</sup>

The findings of this and other research on trust of public institutions lead some to the conclusion that in evaluating those institutions people are

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90. *Id.*

91. *Id.*

92. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW* (2002).

93. *Id.* at 14.

94. *Id.* at 15.

95. Tom R. Tyler, *The Psychology of Public Dissatisfaction with Government*, in JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 227, 238 (2001).



looking primarily for empathy and neutrality<sup>96</sup> and not for decision-making rigor.

They just want to be secure in the belief that whatever decisions have been made were taken in the interests of the people and not in the self-interest of the decision makers. This sentiment explains why Tyler consistently finds strongest support for variables such as perception of the 'neutrality' of the decision making body, trust in the motives of those making the decisions, and perceptions of the body's level of concern for citizens . . . [Even when the Court makes decisions the public considers seriously wrong-headed, it can remain well-regarded] because of the perception that judges make their mistakes honestly.<sup>97</sup>

From the work of Tyler and others, it appears that perceptions of fair treatment and fair-mindedness provide a reservoir of diffuse support that enables the Court to weather some of the case-specific disapproval that its decisions can from time to time generate.<sup>98</sup> This research does not demonstrate that adverse results cannot operate to undermine public support more permanently. An extended series of adverse decisions may well cause people to reconsider their evaluation of fair-mindedness. The content of some adverse decisions may also provide evidence that the Court is not considering the interests of the public as a whole as conscientiously as it should. (The more persistent public displeasure at some of the Warren Court's criminal procedure decisions seems to fit this description.)

Happily, the attributes of an institution that produces favorable perceptions are to a large degree factors that a conscientious Court should already be taking seriously in seeking to resolve disputes in a judicious manner. After all, procedural justice is a premier value of the judicial system as a matter of institutional self definition, and the Court's own sense of the just handling of disputes contributes to a perception of fair treatment and fair mindedness. The solemnity of the proceedings indicates that someone's case is being taken seriously; rules for briefing and argument give the opposing sides equal opportunities to present their case; recusal rules express the norm of disinterestedness; the format of written decisions shows respect for the litigants by providing reasons for action; the secrecy of deliberations keeps from public view any petty disputes or casual disparaging remarks that could detract from a sense of seriousness

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96. John R. Hibbing and Elizabeth Theiss-Morse, *The Means is the End*, in JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 243 (2001).

97. *Id.* at 248.

98. *E.g.*, Gibson et al., *supra* note 87, at 554 ("[I]nstitutional loyalty inoculates against an unwelcome policy decision. . . . [T]he Court profits from a bias of positivity frames in the sense that the Court gets 'credit' when it pleases people, but that it is not penalized when its actions are displeasing.").

and fair-mindedness. It would thus appear that there may well be some empirical basis to find a felicitous correlation between the Court's practices in hearing arguments, deliberating, and resolving disputes in a judicially sound manner and the public's support of that institution.

There seems to be little evidence, however, of this correlation depending upon judges employing any particular decision-making methodology. People base some of their conclusions about trustworthiness and fair-mindedness on institutional characteristics that are completely independent of any particular methodology, such as the atmospherics and physical symbols of the Court or the demeanor of individual judges in open court. Insofar as the rationale for specific decisions might inform public evaluation of the Court, a number of different approaches to legal decision making seem to have the ability to satisfy the norm by treating cases with similar facts alike. The work of Tom Tyler and others shows that this kind of fairness serves an important foundation to the public's sense of fairness and neutrality,<sup>99</sup> but it does not require a rigorous commitment to principled decision making to satisfy it. Even a highly contextualized minimalist decision may seem fair and neutral, for instance, if people sense that the Justice has thought through the problem conscientiously and would apply the same diligence to the next case that comes along.

In this light, the association of public support for the Court with the particularly stringent declaratory theory of law seems too severe. Some of the attributes of public perceptions of fairness may even be met by rulings that disregard many norms of judicial decision making. To the extent that the public perceives a decision like *Bakke* to reflect Justice Powell's "level of concern for citizens," through its expressed appreciation of the meritorious arguments on both sides, the opinion's pragmatic approach to the constitutional question resonates favorably with the public's respect for the Court. After the Court announced *Bakke*, the public's expectation of fair treatment may well indicate that the next affirmative action dispute to come before the Court be treated in a manner consistent with the earlier decision. But that places no obvious constraints on how the original decision might be reached, or on the Court's ability to supersede that approach in a case in the future.

It is possible that the public has more refined expectations about the manner in which the Court decides what factors are relevant to its judgment and how it reasons, but the research so far leaves much to be explored before we have evidence of linkages that would argue for the superiority of any particular method of legal reasoning on the basis of its ability to generate public support. The current state of knowledge is instead consistent with the idea that upholding the Court's public legitimacy requires being cautious of violating certain minimal norms, such as giving

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99. See *supra* text accompanying notes 91-95.

preference to family or friends or repeatedly showing disrespect to litigants. These procedural norms, however, do not themselves point toward any particular method for “interpreting and applying” the Constitution. Insofar as public support is concerned, responses to national crises or constructive interventions into significant social problems that fall short of the standards of principled decision making will continue to be perceived as useful pragmatic attempts to help the nation address an outstanding problem, and may thus contribute to rather than detract from the public’s trust of Court as a government institution.

#### CONCLUSION

I have sought to explicate some of the reasons why a person committed to the idea that the Court must interpret and apply the law can also believe that demands generated by the institutional nature of the Court constitute legitimate competing claims, and also why there are occasions when these cross-pressures may influence the Court’s actions. The interplay among these competing pressures can be complex, and one might be forgiven if the uncertainties attendant to sorting out the relationships among them led one to retreat back to an exclusive preoccupation with judicial method, which is after all a complex and challenging subject in its own right. Sorting out the set of complexities surrounding the idea of interpreting and applying the law would be sufficient challenge for most people. Paul Mishkin, in his life and in his work, has insisted upon highlighting the external demands placed on the distinctive political institution that is the Supreme Court, while never losing sight of the demand of principled decision making. His work challenges us to continue in that effort, in order to gain a better understanding of the role of the Court in our society.