Chicago-Kent Law Review

Volume 88
Issue 2 *The Supreme Court and the American Public*

Article 2

April 2013

Introduction: The Supreme Court and the American Public

Carolyn Shapiro
IIT Chicago-Kent College of Law

Christopher W. Schmidt
IIT Chicago-Kent College of Law

THE SUPREME COURT AND THE AMERICAN PUBLIC

Carolyn Shapiro and Christopher W. Schmidt
Symposium Editors

THE SUPREME COURT AND THE AMERICAN PUBLIC

INTRODUCTION

CAROLYN SHAPIRO AND CHRISTOPHER W. SCHMIDT

Despite the central role that the Supreme Court regularly plays in significant matters of public concern, our understanding of the relationship between the Court and the American public remains strikingly underdeveloped. We have voluminous scholarship on the Court itself—on the development of the institution, on the people who have sat on the bench, and on their written opinions.[1] And we have some understanding, largely through opinion poll data, of attitudes of the American people toward their highest court and the decisions it issues.[2] But when it comes to the connection between the two—on the pathways of communication that link the public and their Supreme Court—there is still much work to be done. This issue of the Chicago-Kent Law Review marks an important step toward a better understanding of the nature and evolution of the relationship between the Court and the public.

In recent years, there has been a shift in how many in the legal academy understand the relation of the Supreme Court and American society. Previous generations of legal scholars tended to take as their starting point the idea that the Court largely was and certainly should be insulated from the ebbs and flows of politics and public opinion—that it should be a "voice of reason,"[3] a "forum of principle."[4] Today, however, a different paradigm has gained influence, one that understands the Court as deeply embedded within a matrix of democratic

1. Just to cite a sampling from two Symposium participants, *see, e.g.*, LINDA GREENHOUSE, THE U.S. SUPREME COURT: A VERY SHORT INTRODUCTION (2012); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA (2007).

2. *See, e.g.*, JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE (2009); PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin, & Patrick J. Egan eds., 2008); THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989).

3. H.M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

4. RONALD DWORKIN, A MATTER OF PRINCIPLE 71 (1985); *see also, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (1962) ("Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. This is what Justice Stone called the opportunity for 'the sober second thought.'" (footnote omitted)).

constraints.[5] While the Court serves a distinct role in the American political system, responding to different pressures from the elected branches, a growing rank of legal scholars are concluding that it is best understood to be largely responsive to durable shifts in public opinion.[6]

Considering the flow of influence and communication in the opposite direction—that is, how the Court's pronouncements affect society—here too we have seen a recent wave of scholarly reassessment. Many in the academy—as well as many practitioners—have become increasingly skeptical of the ability of the Court to affect popular attitudes and social relations. The high hopes liberals placed on the Supreme Court during the Warren Court-era have dissipated, as academics and lawyers have been frustrated both by the limits of judicially led reform to change society and by an increasingly conservative Supreme Court.[7] Although some on the right have exhibited a newfound enthusiasm for their own brand of public interest litigation,[8] they have yet to approach the liberal faith of past generations in judicially led social change. Even that most revered case in modern constitutionalism, *Brown v. Board of Education*, has come in for reconsiderareconsideration, with new scholarship emphasizing the ways in which the decision shows the limits of the Court's influence in the face of entrenched social norms.[9] A growing body of scholarship has sought to

5. The roots of this strand of legal scholarship are found in political science, with Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957), typically identified as the seminal text. *See, e.g.,* Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl's, Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 50 EMORY L.J. 613, 613-14 (2001).

6. Leading works of "majoritarian" scholarship of the Supreme Court in the legal academy include: BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008 (2009); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VIR. L. REV. 1 (1996); *see generally* Thomas M. Keck, *Party Politics of Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511 (2007).

Even among those who accept the premise of majoritarian scholarship, there remains considerable debate over how to define the "public" and how best to measure public opinion. *See, e.g.*, Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

7. *See generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

8. *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

9. *See, e.g.*, GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d. ed., 2008); KLARMAN, *supra* note 6; Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, Brown v. Board of Education: *Facts and Political Correctness*, 80 VA. L. REV. 185 (1994).

demonstrate that the consequences of judicial opinions are complicated and contradictory—they can inspire mobilization in support of a decision and they can inspire defiant backlash against; they can draw public attention to an issue and they can be ignored. Often we see some difficult-to-categorize combination of all these factors at once.[10]

The diverse collection of scholarship in this issue of the Law Review addresses this elusive connection between the Court and the people. Linda Greenhouse has written eloquently of the nature of this connection:

> It is an imperfect and sometimes inaudible dialogue, to be sure: one side seemingly remote and theoretically insulated from external influence, the other only episodically attentive and often woefully uninformed. It is a highly attenuated dialogue, filtered through, and at times distorted by, the intervening structures of the media, electoral politics, and the legal system itself. It is dynamic, not static, fluctuating over time and across substantive areas of the Court's and the public's concern.[11]

The dialogue between the Supreme Court and the American people, as Greenhouse makes clear, is subtle, complicated, and fluid. Thus it is hardly surprising that we still struggle to explain precisely how this connection operates. Many questions remain to be explored. For example, if the Supreme Court is indeed responsive to popular sentiment, then what are the mechanisms of influence between the Court and the people? There is, of course, the appointment process—what Chief Justice Rehnquist once described as "indirect infusions of the popular will"[12]—but appointments alone fail to fully account for the dynamic relationship between the work of the Court and the commitments and expectations of the American people. For this matter, does it even make sense to view the Court and the public as separate and in-

10. *See, e.g.*, MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 165-82 (2012); PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 2, *passim*; Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC. REV. 151 (2009); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash,* 42 HARV. C.R.-C.L. L. REV. 373 (2007); Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion,* 83 AM. POL. SCI. REV. 751 (1989).

11. Linda Greenhouse, *Public Opinion & the Supreme Court: The Puzzling Case of Abortion*, 141 DAEDALUS 69 (Fall 2012).

12. William H. Rehnquist, *Presidential Appointments to the Supreme Court*, 2 CONST. COMMENT. 319, 330 (1985). On appointments as a mechanism by which a dominant regime influences the Court, *see, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution,* 87 VA. L. REV. 1045 (2001); Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 90, 97 (1993); Dahl, *Decision-Making in a Democracy*, *supra* note 5.

dependent entities?[13] The Court, after all, is part of society, the justices members of their larger communities. As Benjamin Cardozo famously observed almost a century ago, the "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[14] And when the people respond to a Court decision, what is it that they are responding to? Where do they get their information, and how do they understand the information they receive? That there is a dynamic relationship between the Court and the people is clear. The question is how this relationship works.

What is needed, we believe, is more systematic and sustained consideration of the pathways of communication and influence that connect the Supreme Court and the American people. Three basic questions about the relationship between the Court and the public can serve as a useful framework for moving our discussion forward: First, how does the public receive information from and about the Supreme Court – or, from the opposite perspective, how does the Court (and how do the justices) communicate with the public? Second, how does the public understand and respond to what it hears? And third, what (if anything) can and should be done to improve or strengthen the connection between the Court and the public?

Each of the following contributions to the Symposium on the Supreme Court and the American Public offers valuable insight into one or more of these framing questions. These contributions explore a diverse collection of issues and employ a wide array of methodological tools, yet each in its own way illuminates the linkages that make possible the critical dialogue between the Supreme Court and the American people. Together, they form the beginning of a much needed conversation.

I. How Does the American Public Hear the Supreme Court?

The official – and paradigmatic – mode of communication between the Court and the public is, of course, the written opinion. Indeed, justices regularly refuse to discuss their opinions in other fora because they believe that the opinions can, do, and should speak for them-

13. *See, e.g.*, Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. Penn. J. Const. L. 263, 264, 280-81 (2010); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods,* 41 Am. J. Pol. Sci. 468 (1997).

14. Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

selves.[15] But even that norm masks the many decisions that the justices individually and the Court as an institution make in crafting and disseminating their decisions.

Professor Nancy Marder's article on the use of images in opinions sheds new light on this little-remarked-on, but increasingly prevalent, aspect of judicial communication.[16] Amidst all technical language of a typical Supreme Court opinion, a well-chosen image—such as a map, chart, table, artifact, or photograph—may be uniquely accessible to the layperson. The inclusion of evocative or clarifying visual imagery in opinions, Professor Marder suggests, has a unique potential to "foster discussion and debate."[17]

Then there is the justices' practice of announcing their decisions from the bench, a topic to which longtime Supreme Court correspondent Tony Mauro brings his unique insight.[18] The justices clearly value this ritual, as evident in their careful, and sometimes quite lengthy, presentation of major opinions—including, on occasion, their dissents.[19] Justices Ruth Bader Ginsburg and Antonin Scalia go so far as to circulate transcripts of their spoken remarks to the press.[20] When there was talk about abandoning opinion announcements, Justice Felix Frankfurter vehemently defended the practice; it "put the public on a wavelength with the justices," he explained, "and gave them a better idea what kind of persons the justices are."[21] Yet, Mauro notes, the extent to which they reach the public is less than clear. Current practice is not to release audio recordings until months later. Accounts of dramatic opinion announcements can become part of the public discourse, but only when promulgated by the media and other interested parties who happened to be at the Court on opinion day.

The justices' resistance to abandoning established practice, particularly when it comes to utilizing new (or even not-so-new) technologies to facilitate public engagement with the Court, goes well beyond opinion announcements, as evidenced by their well-documented re-

15. *See* Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI.-KENT L. REV. 487, 488 (2013).

16. Nancy S. Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 CHI.-KENT L. REV. 331 (2013).

17. *Id.* at 333.

18. Tony Mauro, *Opinion Announcements*, 88 CHI.-KENT L. REV. 477 (2013).

19. *See generally* Christopher W. Schmidt & Carolyn Shapiro, Oral Dissenting on the Supreme Court, 19 WM. & MARY BILL OF RTS. J. 75 (2010).

20. Mauro, *supra* note 18, at 481-82.

21. Mauro, *supra* note 18, at 480.

sistance to video cameras in oral arguments.[22] ("[O]ver my dead body," was Justice Souter's famous admonition about cameras in the Supreme Court.[23]) Keith J. Bybee's contribution to this volume considers how such reluctance affects the Court's relationship to the "digital revolution."[24] He attributes the Court's skepticism toward new technology to the fact that "open-source principles"—a commitment to transparency, public participation, and a critique of hierarchies—run up against the very essence of what the justices understand to be the distinctive identity of the Supreme Court.[25]

There are, nonetheless, many ways in which the Court or the individual justices speak to the public. With the Court's current policy of same-day release of audio recordings of oral arguments for major cases, we now regularly hear the justices voices as part of radio and the television coverage of the Court. And the justices are offering up plenty of material, for, as Judge Richard A. Posner notes in his keynote speech at the Symposium, today there is an "increased volubility" on the part of the justices at oral argument.[26] Judge Posner also discusses some of the justices' off-the-bench activities, such as presiding over mock trials of historical figures or characters from literature. Professor Schmidt further explores the various ways in which the justices' off-the-bench activities may contribute to public discourse.[27] He presents a history of the justices' authorship of books, speaking tours, appearances on television, and the like, and considers the motivations justices might have for engaging in this kind of communication.

Unique among off-the-bench communication may be the confirmation hearing, at which nominees often speak explicitly about the role of the Court and the nature of judging. For many members of the public, these hearings may be the only time they hear about such matters directly from the justices themselves. As a result, confirmation hearings may be critical moments in the relationship between the Court and the public. In her contribution to this volume, Professor Shapiro examines the nature of the discourse during Supreme Court confirmation hear-

22. On the debate over cameras in the Supreme Court, *see, e.g.*, Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489 (2012).

23. Tony Mauro, *Roll the Cameras (or Soutersaurus Rex)*, LEGAL TIMES, Apr. 8, 1996, at 9.

24. Keith J. Bybee, *Open Secret: Why the Supreme Court has Nothing to Fear from the Internet*, 88 CHI.-KENT L. REV. 309 (2013).

25. *Id.* at 315.

26. Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299 (2013).

27. Schmidt, *supra* note 15.

ings, focusing in particular on the way the nominees describe the work of a justice.[28]

II. How Might the Public Respond?

When the Court does reach the public—whether through distribution of a written opinion, a media summary of an opinion announcement, an audio clip from oral argument, a public event by a justice, or some other mechanism of communication—how does the public respond? A number of the Articles in this volume consider this question.

Several of the contributors draw on the tools of experimental psychology to gain insight into how a general audience responds to judicial opinions. Two of the articles, one by Tom Tyler and Margaret Krochik,[29] the other by Dan Simon and Nicholas Scurich,[30] find that people respond not only to the outcome of a case, but also to their perception of the process through which the decision was made. Professors Tyler and Krochik find that people are more willing to defer to judicial decisions they disagree with when they view the judiciary as adhering to principles of "procedural fairness." Decision-makers need to show not only that they are neutral and consistent, but also that they are concerned about the people who will be affected by their decisions and that they respect their values. Similarly, Professors Simon and Scurich find that people respond more favorably to an outcome (whether or not they agree with it) if they believe that the court considered arguments on both sides of the issue.

The kind of close attention these scholars give to how general audiences receive judicial rulings is particularly relevant in light of the recent work of Dan Kahan (and others) exploring how unconscious cognitive biases can effectively prevent people from incorporating information that conflicts with their ideological commitments.[31] As Professor Kahan writes in his contribution to this volume, due to the biasing effects of cultural cognition, "constitutional cases are no longer seen as adjudicating the facts of particular disputes but as determining

28. Carolyn Shapiro, *Claiming Neutrality and Confessing Subjectivity in Supreme Court Confirmation Hearings*, 88 Chi.-Kent L. Rev. 455 (2013).

29. Tom Tyler & Margaret Krochik, *Deference to Authority as a Basis for Managing Ideological Conflict*, 88 Chi.-Kent L. Rev. 433 (2013).

30. Dan Simon & Nicholas Scurich, *Judicial Overstating*, 88 Chi.-Kent L. Rev. 411 (2013).

31. *See, e.g.*, Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 Stan. L. Rev. 851 (2012); Dan M. Kahan, *The Supreme Court 2010 Term – Forward: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law,* 125 Harv. L. Rev. 1 (2011).

the *status* of the cultural groups with whom contending characterizations of those facts have become identified."[32] A recognition of how cultural cognition can distort public reactions to the Supreme Court's adjudication of contentious constitutional issues raises concerns about the institution's legitimacy: "rather than quieting anxiety over state neutrality, the enforcement of constitutional law itself *multiplies* the occasions in which the adherents to competing moral outlooks experience law as denigrating their cultural identities."[33]

Of course, it is not only the justices' official speech that might elicit a public response. Judge Posner decries justices role-playing at mock trials in part because he thinks these events misrepresent the legal system and risk undermining the dignity of the Court in the public's eye. Yet, as Professor Schmidt notes, it is often in extrajudicial settings that we can see citizens responding to the justices in a uniquely direct, unmediated, and dynamic way. Consider, for example, the episode Professor Schmidt describes when Justice Scalia, in a question-and-answer session following a lecture to students at Princeton University, is challenged by a gay student who found personally offensive the justice's dissents in the Court's gay rights decisions. The debate that took place in the university lecture hall was quickly picked up by various media outlets, and the Princeton student received an opportunity to discuss his experience confronting Justice Scalia on national news.[34] Rarely do we see such a discussion over a substantive legal issue between an American citizen and a Supreme Court Justice play out in such a immediate way.

III. How Should the Justices Think About Their Communication With the Public?

What should be done to improve the pathways of communication between the Supreme Court and the American people? What *can* be done? To one degree or another each of the Symposium articles engage with these normative concerns.

Some of the contributors emphasize institutional fixes. Tony Mauro argues that the Court should make its opinion announcements more accessible and easier for journalists and others to understand. If nothing else, the Court should make the changes necessary to avoid embar-

32. Dan M. Kahan, *Cognitive Bias and the Constitution of the Liberal Republic of Science*, 88 Chi.-Kent L. Rev. 367 (2013).

33. *Id.*

34. *See* Schmidt, *supra* note 15, at 508.

rassments, such as the initial confusion on cable news about the holding of the Affordable Care Act case.[35] Broadcasting announcements, Mauro concludes, would be a step in the right direction (and perhaps a first step toward broadcasting oral arguments). Jerry Goldman sees technology, properly harnessed, as critical in allowing the Court to communicate more directly with the public in our era of "big data."[36] The Court should aim not only to better serve the public directly, by improving the accessibility of its website and electronic materials, but also to allow third parties (including computers) to more readily process and analyze the documents that the Court releases. Professor Bybee draws on his research on the ability of the public to view a "politicized" Court as still legitimate[37] to make the case for increased availability of information by the Court. Information about the Court will inevitably become more accessible to the public in our information-saturated age, he notes, but this new reality is unlikely to substantially affect the public's considerable faith in the institution.

Professors Tyler and Krochik emphasize, however, that transparency alone does not necessarily promote judicial legitimacy. More than simply openness, what people desire of their public officials is a process that demonstrates official attentiveness to issues of public concern. They argue that the legitimacy of the courts, even in the face of persistent ideological divisions, is best served by establishing robust, readily visible procedural safeguards.

Other contributors focus their prescriptive energies on how individual justices write their opinions or speak about their roles. Professor Marder counsels the justices to think more carefully about what they are doing when they use images in their opinions. There are clear benefits to including images, she notes. They can strengthen legal arguments; they can make opinions more accessible for a broader audience. But there are also risks to including images that only serve to inflame contentious issues. justices should also not assume that an image necessarily speaks for itself, Professor Marder emphasizes.

35. *See* Tom Goldstein, We're getting wildly differing assessments, SCOTUSblog (Jul. 7, 2012), http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/.

36. Jerry Goldman, *The U.S. Supreme Court and Information Technology: From Opacity to Transparency in Three Easy Steps,* 88 CHI.-KENT L. REV. 325 (2013).

37. Keith J. Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, *in* WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, & WHAT'S AT STAKE 306 (Charles Gardnes Geyh ed., 2011); *Will the Real Elana Kagan Please Stand Up? Conflicting Public Images in the Supreme Court Confirmation Process*, 1 WAKE FOREST J. L. & POL'Y 137 (2011).

Several of the articles converge around a critique of the tendency toward what Professors Simon and Scurich call "judicial overstating": when a judge attempts to legitimize a ruling by listing every conceivable inference in favor of his or her conclusion, while ignoring those pointing to a different result. Professors Simon and Scurich's findings suggest that this kind of one-sided mode of justification can have corrosive effects on the Court's legitimacy. Similarly, Professor Kahan calls on the courts to be more attentive to the cognitive biases of its potential audiences. He offers "debiasing strategies" that are designed to lessen the perceived threat to groups who are on the losing end of judicial rulings. For example, opinions could be written in a way that demonstrates respect for the losing side and embraces, rather than occludes, the underlying complexity of an issue. Judges, Kahan explains, should embrace "a discourse norm protective of expressive over-determination," in that they allow for "a plurality of cultural meanings congenial to a diverse set of cultural styles."[38]

In her study of Supreme Court nomination hearings, Professor Shapiro suggests that those who aspire to be members of our highest court should be willing to admit that the role of the justice is not one of neutral umpire.[39] Indeed, in light of the findings set forth in other articles in this volume, claims of neutrality, like judicial overstating, can undermine people's acceptance of judicial decisions they disagree with. Perhaps, then, nominees should instead talk about what makes some cases difficult; about the merits on the other side of contentious legal issues; about the unavoidably subjective element in judicial decision making at the highest levels. Professor Shapiro's prescriptions align with those of Professor Bybee and others[40] who have challenged how much judicial legitimacy really depends on a popular belief that judges mechanically apply law to facts to arrive at the one correct answer. Judicial candor, these scholars agree, may be a better pathway to judicial legitimacy.

What about when the justices step out from behind the bench and participate in various forms of extrajudicial activity? Here too our contributors find both pitfalls and opportunities. Judge Posner is most concerned with the former, as he urges the justices to avoid public

38. Kahan, *supra* note 32, at 406.

39. *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005), for one of many discussions of this reality.

40. *See, e.g.*, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2009); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?* 45 L. & SOC. REV. 195 (2011).

events where they play the role of experts on issues outside their area of expertise. Professor Schmidt, in contrast, suggests that the costs of public engagement by the justices are often exaggerated, and that there may be valuable opportunities for Court-public dialogue when justices provoke substantive debate through their public writings and remarks. Such moments provide at least one opportunity to realize Professor Tyler and Krochik's prescription that the justices "articulate the way in which the public's needs, concerns and values are being considered during Court decision-making."[41]

CONCLUSION

If there is a common denominator running through the articles in this Symposium issue, it is a recognition that the public work of the Supreme Court involves much more than issuing written opinions that defend the legal rationale behind its rulings. Despite the confirmation hearing rhetoric about umpiring and applying law to facts, what the justices actually do when they decide the most contentious of constitutional and legal disputes involves a far more complicated process. The act of judging, particularly at the highest level of the judiciary, involves, inevitably, values, ideology, and discretion. The question is, then, how best to deal with this reality in a constitutional democracy. And this, we believe, is in essence a question of understanding the relationship between the Court and the American people—what it is, and what it might be.

Taken together, the following Articles offer a promising step forward in a conversation about the Supreme Court and its connections to the American public that we hope will continue well beyond this volume.

41. Tyler & Krochik, *supra* note 29, at 447.