

Considering Legitimacy

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ABSTRACT

This Article on Richard Fallon’s Law and Legitimacy in the Supreme Court focuses on public acceptance of the Supreme Court’s authority, what Fallon calls sociological legitimacy. After setting out Fallon’s accounts of legitimacy and constitutional argumentation, the Article looks at public opinion data and political science scholarship on the extent to which the Court’s decisions affect public acceptance of the Court. It then turns to the normative question of whether, even if the Court’s decisions may undermine its sociological legitimacy, that impact is a legally legitimate factor for the Court to consider. The Article argues that strategic consideration of the Court’s public legitimacy can be an appropriate factor in the Justices’ decision making, but such consideration may end up actually harming the Court’s reputation if undertaken openly and candidly as Fallon would seem to require.

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It would be hard to imagine a more auspicious time for a symposium on Richard Fallon's *Law and Legitimacy in the Supreme Court*. The legitimacy of the Supreme Court is at the forefront of political and public life to an extent not seen for decades.¹ To be sure, attacks on the Supreme Court from both sides of the political spectrum have been growing for years.² But today challenges to the Court are at new levels, pushed there by the deep political divides over the courts that were evident in the recent political battles over Justice Kavanaugh's confirmation and Judge Merrick Garland's failed nomination, and the resultant shift to the right of the Court's membership.³ Both conservative and liberal commentators portray the Supreme Court's legitimacy as under threat, though they diverge dramatically in their accounts of the source of that threat and how the Court should respond.⁴ The Court's legitimacy is increasingly a subject for legal

1. See, e.g., Barry Friedman, *The Coming Storm over the Supreme Court*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/08/opinion/kavanaugh-supreme-court-conservative.html> [<https://perma.cc/QL7Q-BTG5>].

2. See, e.g., Eric R. Claeys, *Sebelius and the Election*, NAT'L REV. (July 30, 2012), <https://www.nationalreview.com/2012/07/sebelius-and-election-eric-r-claeys/> [<https://perma.cc/U5RY-ZNUN>] (criticizing Chief Justice Roberts for violating principles of statutory interpretation in order to uphold the constitutionality of Obamacare); Richard Hasen, *The Chief Justice's Long Game*, N.Y. TIMES (June 25, 2013), <https://www.nytimes.com/2013/06/26/opinion/the-chief-Justices-long-game.html> [<https://perma.cc/VPC9-TNAM>] (critiquing *Shelby Cty. v. Holder* as a dramatic reversal of constitutional law hidden "behind a cloak of judicial minimalism"); Anthony Lewis, *Abroad at Home: The Supreme Power*, N.Y. TIMES (June 29, 1999), <https://www.nytimes.com/1999/06/29/opinion/abroad-at-home-the-supreme-power.html> [<https://perma.cc/P9ZA-C9ZK>] (labelling the Rehnquist Court "a band of radical judicial activists determined to impose on the Constitution their notion of a proper system of government"); Howard Slugh, *Obergefell's Toxic Judicial Legacy*, NAT'L REV. (Apr. 10, 2017), <https://www.nationalreview.com/2017/04/obergefell-judges-invent-rights/> [<https://perma.cc/5G3S-GF4B>] (complaining that Justice Kennedy's majority opinion in *Obergefell v. Hodges* encouraged "judges [to] read inventive new rights into the Constitution") For a discussion of the criticism directed at the Warren Court's judicial activism, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 244, 257–58 (2009).

3. See Linda Greenhouse, *The Broken Supreme Court*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2018/06/21/opinion/supreme-court-janus-unions.html> [<https://perma.cc/5NQQ-NS4R>]; Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing A Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1 2018), <https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/> [<https://perma.cc/8UK6-75D9>]; Matthew Yglesias, *Brett Kavanaugh's Confirmation Will Delegitimize the Supreme Court—And That's Good*, VOX (Oct. 5, 2018), <https://www.vox.com/2018/10/5/17941312/brett-kavanaugh-supreme-court-legitimacy> [<https://perma.cc/SLX8-43VX>].

4. Compare, e.g., William McGurn, *John Roberts's 'Illegitimate' Court*, WALL ST. J. (May 27, 2019), <https://www.wsj.com/articles/john-robertss-illegitimate-court-11558989312> [<https://perma.cc/SW3S-6EWG>] (arguing that not overturning *Roe* out of fear of political response undercuts the Court's legitimacy), and Ilya Shapiro, *How the Supreme Court Undermines Its Own Legitimacy*, WASH. EXAMINER (July 18, 2019), <https://www.washingtonexaminer.com/opinion/how-the-supreme-court-undermines-its-own-legitimacy> [<https://perma.cc/Q7FR-X949>] (arguing that deciding cases with an eye to political repercussions destroys the public belief that the Court is moved by law and not politics, which is central to its legitimacy), with Leah Litman et al., *We Ought to Be Concerned About Preserving the Political Order of the Supreme Court*, WASH. POST (June 18, 2019), https://www.washingtonpost.com/opinions/yes-the-publics-perception-of-the-supreme-court-matters/2019/06/18/5b25128c-91e6-11e9-b58a-a6a9afa0e3e_story.html [<https://perma.cc/9CTE-WR3L>] (arguing it is legitimate for the Court to take its public legitimacy into account).

scholarship as well.⁵ Court-packing, long criticized as an executive power overreach by FDR, has newfound progressive advocates, and support for Supreme Court term limits is growing in many quarters.⁶

These concerns around the Court's legitimacy came to a head recently with two filings in *NYS Rifle & Pistol Association v. City of New York*, a case involving a Second Amendment challenge to a New York City regulation limiting the transportation of guns to training facilities. A brief from five Democratic Senators argued that new state legislation and repeal of the regulation made the case moot and warned the Court about ignoring established justiciability rules to advance a conservative political agenda.⁷ After describing ongoing conservative campaigns to influence the Court and growing public views of the Court as political, the brief concluded: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"⁸ All fifty-three Republican Senators wrote an angry letter to the Court in response, accusing their Democratic colleagues of "openly threaten[ing] th[e] Court with political retribution if it failed to dismiss the petition as moot."⁹ Urging the Court not to be "cowed," the Republicans promised to protect the Court against court-packing.¹⁰ In addition to providing some high drama to enliven the Supreme Court's summer break in 2019, the competing filings demonstrated how the Supreme Court's legitimacy is becoming a central theme of political debate.¹¹

Given this maelstrom, understanding the nature and basis of the Supreme Court's legitimacy is of particular importance. What do we mean when we say the Court's legitimacy may be in called into question? Should this be a real worry? To what extent do the decisions of the Court affect its legitimacy? If we

5. See generally, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Court*, 129 YALE L.J. 148 (2019); Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)); Suzanna Sherry, *Our Kardashian Court (and How to Fix It)* (Vanderbilt Univ. Law Sch., Research Paper No. 19-30, 2019).

6. See Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST (Aug. 9, 2002), <https://www.washingtonpost.com/archive/opinions/2002/08/09/term-limits-for-the-high-court/646134cd-8e13-4166-9474-5f53be633d7c/> [<https://perma.cc/94SE-WLMH>]; Ian Ayres & John Fabian Witt, *Democrats Need a Plan B for the Supreme Court. Here's One Option.*, WASH. POST (July 27, 2018), https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html?utm_term=.16fe4a1612f6 [<https://perma.cc/SE7L-KXF3>]; Ezra Klein, *Ruth Bader Ginsburg and the Case for 18-Year Supreme Court Terms*, VOX (Dec. 26, 2018), <https://www.vox.com/policy-and-politics/2018/12/26/18155093/ruth-bader-ginsburg-supreme-court-term-limits> [<https://perma.cc/ZQK9-QRND>].

7. Brief of Senator Sheldon Whitehouse et al. as Amici Curiae in support of Respondents at 12–16, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 86 F. Supp. 3d 249 (S.D.N.Y. 2015) (No. 18-280).

8. *Id.* at 18.

9. Letter from Senator Mitch McConnell et al. to Scott S. Harris, Clerk, Supreme Court of the U.S. 1 (Aug. 29, 2019).

10. *Id.* at 2.

11. See Linda Greenhouse, *Who Cares About the Supreme Court's "Legitimacy"?*, N.Y. TIMES (June 6, 2019), <https://www.nytimes.com/2019/06/06/opinion/supreme-court-census-roberts.html> [<https://perma.cc/WL9F-AQ84>].

recognize the Court's political and ideological character, does that mean constitutional adjudication—indeed, the Court's decision making writ large—is necessarily illegitimate? And, perhaps most pointedly, is it legitimate for the Court to take concerns about its legitimacy into account in deciding cases?

Many of these questions lie at the heart of *Law and Legitimacy in the Supreme Court*. The book is animated by Fallon's desire to show how constitutional adjudication can be a legitimate enterprise, notwithstanding that much of the Constitution's meaning is indeterminate and the Justices inevitably draw on broader moral, political, and ideological concerns in interpreting it. Fallon deftly weaves together interdisciplinary and conceptual work on legitimacy and linguistic meaning with details of constitutional methodology and the Supreme Court's interpretive practices. Of particular value is Fallon's identification of three distinct types of legitimacy as well as his account of constitutional argumentation. He portrays constitutional argumentation as a practice constrained by shared understandings and norms of good-faith, reasoned argumentation in which the Justices inevitably—and appropriately—draw on moral, political and ideological judgments.¹²

Yet one area of Fallon's analysis remains unsatisfying, and that concerns what he calls sociological legitimacy. By sociological legitimacy, Fallon means broad public acceptance of the authority of the Constitution and of the Court, which undergirds and enables constitutional adjudication.¹³ But he does not unpack the concept of sociological legitimacy in detail—for example, to address problems created by multiple and diverse publics or to specify how public acceptance of the Supreme Court is affected by the Court's actions. Moreover, his focus is on explaining how constitutional adjudication can be an internally, morally, and legally legitimate practice rather than on how the Court can or should respond to sociological legitimacy concerns. We are left in an uncertain position, told that sociological legitimacy is a basic prerequisite for legitimate constitutional adjudication and warned that the Court's sociological legitimacy is at great risk, yet unsure about how such legitimacy emerges or what, if anything, the Court can do to secure it.

In what follows, I first describe Fallon's insightful account of different forms of legitimacy and the practice of constitutional adjudication, focusing in particular on his account of sociological legitimacy and the questions it raises. I then turn to examining survey data and political science scholarship to assess, descriptively, the extent to which the Court's decisions may call public acceptance of the Court into question. Finally, I turn to the normative question of whether strategic consideration of the Court's public standing and legitimacy can be an appropriate factor in the Justices' decision making. I argue that judicial consideration of sociological legitimacy can be legally legitimate, even under Fallon's account. The harder question is whether such consideration will backfire and end up

12. See *infra* text accompanying notes 46–50.

13. See *infra* text accompanying notes 16–17, 29–31.

harming the Court's reputation, at least if strategic decision making is undertaken openly and candidly as Fallon's commitment to good-faith, reasonable argumentation might seem to require.

I. FALLON'S ACCOUNT

As Fallon himself states at the outset, *Law and Legitimacy in the Supreme Court* "is an ambitious book."¹⁴ In it, Fallon dissects the concept of legitimacy, offers accounts of constitutional interpretation and constitutional theory in the Supreme Court, analyzes the constraints the Court faces in undertaking constitutional adjudication, and assesses whether constitutional decision making at the Court today is legally and morally legitimate. Critical to Fallon's project is his careful analysis of legitimacy as a metaconcept encompassing sociological, moral, and legal legitimacy, as well as his account of the prerequisites for legitimate constitutional adjudication by the Court.

A. Multiple Legitimacies

Fallon begins the book by setting forth three distinct but related understandings of legitimacy: sociological legitimacy, moral legitimacy, and legal legitimacy. "Sociological legitimacy involves prevailing public attitudes towards government, institutions, or decisions."¹⁵ Fallon describes the question of sociological legitimacy as "whether people (and, if so, how many of them) believe that the law or the constitution deserves to be respected or obeyed for reasons that go beyond fear of adverse consequences."¹⁶ Often equated with public acceptance of or institutional loyalty towards the Court, sociological legitimacy is what underlies legal compliance in practice; the more the legal system is viewed as legitimate, the more people will voluntarily adhere to its requirements.¹⁷

Moral legitimacy, in turn, is not concerned with "whether the Justices or anyone else in fact respects or endeavors to obey the Constitution or laws of the United States. It is, rather, whether . . . people ought to do so or whether government officials are morally justified in coercing compliance."¹⁸ On Fallon's account, moral legitimacy takes two forms, reflecting that we live "in a world in which unanimous agreement on the requirements of perfect justice cannot reasonably be expected."¹⁹ There is, first, moral legitimacy as "a minimum" which "[g]overnments must satisfy . . . in order to deserve support and respect and to justify their officials in exercising coercive force."²⁰ And there is also moral

14. RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* ix (2018).

15. *Id.* at 21.

16. *Id.* at 22.

17. *See id.* at 23; *see also* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 58–59, 63 (1990) (discussing empirical evidence indicating that "legitimacy has a significant effect on compliance," although noting that, "[i]f citizens feel they have been treated unfairly, their behavior is less strongly influenced by their judgments about the legitimacy of legal authorities").

18. FALLON, *supra* note 14, at 23.

19. *Id.* at 34.

20. *Id.*

legitimacy “as a relative ideal,” “involving mixed elements of substantive justice, democratic decision making, and procedural fairness,” to which “governments and their officials should . . . aspire to move their regimes closer.”²¹

Finally, there is legal legitimacy, which goes to “whether the Justices’ decisions accord with or are permissible under constitutional or legal norms.”²²) For Fallon, the critical feature of legal legitimacy is its orientation inside the legal system. He uses legal legitimacy “to mark judgments based solely on a legal system’s internally recognized norms.”²³ As a result, the ultimate measure of legal legitimacy in the United States is the “Constitution and surrounding norms of interpretation” that form the backbone of the legal system.²⁴

Among these three dimensions of legitimacy, sociological legitimacy is the most distinct. Both moral and legal legitimacy have a strong normative component, they speak to what a court ought to do for its decision making to be legitimate. Indeed, Fallon underscores the close association of these two forms of legitimacy by arguing that “the moral legitimacy of decisions by the Supreme Court will normally depend on their legal legitimacy.”²⁵ As he puts it: “If the Constitution is law that legally binds the Supreme Court, and if it is also minimally morally legitimate”²⁶—which Fallon concludes it is²⁷—“then whether the Justices have behaved morally legitimately will almost necessarily depend on whether the Justices have acted legally correctly or legitimately.”²⁸) As a result, moral legitimacy as an independent idea seems to do little work for Fallon.

Sociological legitimacy is factual rather than normative; it speaks to whether the public views the legal system as legitimate and not whether they ought to so view it. Yet sociological legitimacy bears a critical linkage to legal legitimacy. Fallon emphasizes that the Constitution’s sociological legitimacy, its popular acceptance, is what “g[ives] it legal legitimacy.”²⁹ As he puts it: “The ultimate measure of legality in our legal system—as in any other—inheres in currently accepted standards for identifying past events as possessing legal authority. . . . [W]hat ultimately matters today . . . is that nearly everyone continues to accept the Constitution . . . as valid, binding law.”³⁰ Moreover, “the bounds of acceptable legal judgment have partly sociological foundations” as well; popular acceptance shapes what counts as a legally reasonable argument and what falls outside the pale.³¹

21. *Id.* at 34–35.

22. *Id.* at 35.

23. FALLON, *supra* note 14, at 35–36.

24. *Id.* at 36.

25. *Id.*

26. *Id.*

27. *See id.* at 29.

28. *Id.* at 36.

29. FALLON, *supra* note 14, at 86.

30. *Id.* at 85.

31. *Id.* at 40.

Despite his equation of moral and legal legitimacy, Fallon also suggests that legal legitimacy as well as sociological legitimacy are to some extent dependent on moral legitimacy. Both “can be compromised and made vulnerable by moral fissures within a society,”³² if these fissures are deep and wide enough to undercut popular acceptance of the Constitution and reasonable legal disagreement. As Fallon puts it: “When we believe others’ moral views to be not just mistaken but unreasonable, we will almost inevitably conclude that judicial decisions that reflect those views . . . are unworthy of respect.”³³

Legitimacy is a central concern of Fallon’s book. Yet as Fallon’s own analysis reveals, the term is protean with multiple possible meanings that are often conflated. It is worth asking: why invoke legitimacy at all? Or, in the words of David Strauss: “Why not just talk about moral right and wrong, or about legal right and wrong, or about whether a particular law or legal system is generally accepted by a population? Using the term ‘legitimacy’ only adds the potential for confusion; why not dispense with it?”³⁴ Strauss’s answer is that to call a law or a judicial decision illegitimate is to suggest not just that it is wrong, but further that it does not deserve obedience.³⁵

Fallon resists the idea that legitimacy is firmly tied to obedience, suggesting that we may have an obligation to obey an illegitimate decision.³⁶ Instead, he defines legitimacy in terms of being worthy of respect.³⁷ But his prime response is to reject the idea that correctness can be equated with legitimacy at all. He repeatedly insists that a decision can be legally wrong and yet legally legitimate, for example, underscoring that ample room exists for reasonable debate and disagreement over constitutional meaning.³⁸ Fallon analogizes legal legitimacy to the concepts of jurisdiction and discretion, both of which connote authority to make decisions that may be wrong. A court does not lose jurisdiction when it issues a decision that is reversed for legal error, and the idea of “abuse of discretion” signals a decision that is not just mistaken but outside the pale of accepted decision making. So too an erroneous decision could still be legally legitimate provided the court “had lawful power to decide” it, “rested its decision only on considerations that it had lawful power to take into account,” and “reached an outcome that fell within the bounds of reasonable legal judgment.”³⁹

B. The Practice of Constitutional Adjudication

This distinction between correctness and legitimacy is central to Fallon’s core preoccupation in the book, which is to articulate an account of legitimate

32. *Id.*

33. *Id.* at 158.

34. David A Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1854 (2005).

35. *Id.*

36. See FALLON, *supra* note 14, at 41.

37. See *id.* at 8.

38. See *id.* at 38, 43–44.

39. *Id.* at 39–40.

Supreme Court constitutional adjudication. Here, Fallon's focus is on moral and legal legitimacy, although sociological legitimacy concerns—the fear that the public will come to see the Court as an ideologically-driven institution no different from the political branches—are a brooding presence in the background.⁴⁰

In Fallon's portrayal, the central challenge is to explain how constitutional adjudication can be a lawful, constrained activity, while also acknowledging that it is an activity laced with indeterminacy and inevitably affected by the Justices' moral values and ideological commitments. His analysis proceeds incrementally, almost methodically were it not for the sophistication of his arguments. Fallon begins by showcasing the Constitution's multiple meanings, the inability of original public meaning to produce linguistic determinacy, and the new sources of interpretive authority that emerge over time. Having established the ground of constitutional indeterminacy, Fallon devotes himself to explaining why constitutional adjudication is nonetheless a legally and morally legitimate enterprise.

On Fallon's account, "American constitutional law is a practice . . . constituted by the shared understandings, expectations, and intentions of those who accept the constitutional order" and participate in it.⁴¹ He emphasizes that as practices go, American constitutional adjudication is "a relatively fluid and an open one" that inherently draws on "the domains of moral, political and prudential judgment."⁴² To be legitimate, this practice must look backwards, recognizing "the paramount authority of the Constitution" and taking seriously past elucidation of constitutional meaning through historical practice and precedent.⁴³ But it must simultaneously look forwards, drawing on "forward-looking considerations of substantive justice and procedural fairness"⁴⁴ to make "the morally and practically best decisions that the law allows."⁴⁵ Putting these factors together, Fallon views legitimate constitutional decision making as turning on "whether the Justices employ reasonable and consistent decision making methodologies, exhibit fidelity to legitimate prior authorities, show morally good substantive judgment in establishing law for the future, and maintain a fair distribution of political authority among courts and other institutions."⁴⁶ Fallon implements this general instruction through a reflective equilibrium model for constitutional adjudication. Judges should approach constitutional adjudication with a strong presumption in favor of the "methodological or interpretive principles" they had previously embraced, but they should be open to adjusting those principles in light of "substantive constitutional judgments" they develop from the case at hand.⁴⁷ Through

40. *See id.* at 155, 157.

41. *Id.* at 88. For another prominent account of constitutional adjudication as a practice involving certain forms ("modalities") of argument that are considered legitimate, see PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

42. FALLON, *supra* note 14, at 91.

43. *Id.* at 98.

44. *Id.* at 82.

45. *Id.* at 10.

46. *Id.* at 167.

47. *Id.* at 144–45.

“a back-and-forth” process of reflective adjustment, Fallon seeks to provide room for both principled decision making and case-specific constitutional convictions.⁴⁸

Recognizing the open-endedness of constitutional adjudication under his description, Fallon underscores a number of external constraints: the governmental structure that the Constitution creates, political checks on the court, and the institutional demands of a multimember body are some. But the primary constraints he emphasizes are internal: the norms that govern the practice of constitutional adjudication and demarcate the bounds of reasonable constitutional argument. Here is where Fallon’s distinction between legitimacy and correctness proves pivotal; he insists that the Justices may disagree with a constitutional interpretation but nonetheless accept that it is legitimate in the sense of representing a reasonable constitutional argument. “[T]he Justices can share standards that call for the exercise of moral or practical judgment . . . yet disagree about what good judgment requires.”⁴⁹

For Fallon, a critical norm of reasonable constitutional argumentation, and thus of legitimate constitutional adjudication, is good faith. As Fallon puts it:

[W]e can respect Justices with whom we disagree, provided that the disagreement is principled. We can even respect Justices who change their minds, so long as they provide reasons But our respect for the Justices—and our appraisal of the Court’s decisions and its institutional legitimacy—would rightly suffer grievously if we came to view the Justices as cynical manipulators whose arguments possess no integrity.⁵⁰

This requirement of argumentative good faith leads Fallon ultimately to offer a mixed assessment of whether the Court’s current constitutional adjudication meet the requirements of legitimacy. In his view, “current Supreme Court practice appears to include more than a few deviations from interpretive methodological regularity and argumentative good faith.”⁵¹ Yet the tenor of the book as a whole is far more optimistic, defending the potential for morally and legally legitimate constitutional adjudication and concluding that such legitimacy could obtain today “with relatively modest and imaginable changes” to current practice.⁵²

C. *A Sympathetic Critique*

I find many features of Fallon’s account compelling, in particular his insistence on the indeterminacy of constitutional meaning and the inevitable role that moral commitments play in constitutional adjudication. To contend otherwise is, as he

48. FALLON, *supra* note 14, at 144.

49. *Id.* at 95.

50. *Id.* at 12–13.

51. *Id.* at 173.

52. *Id.*

argues, “to blink reality.”⁵³ I also agree with his rejection of both originalism and the cynical realist view under which judges’ votes and positions are determined solely by their ideological preferences. And I agree with Fallon’s view that constitutional law is a practice constituted by the shared assumptions and understandings of participants. As he repeatedly notes, there are many relatively easy constitutional questions where judicial agreement is broad or at least judges are not divided along ideological or political lines.

I am less sanguine, however, that those shared assumptions and easy cases can establish the legitimacy of the Supreme Court’s constitutional decision making in far more contentious and ideologically-divided contexts. In such contexts, we may not be able to see those we disagree with as adhering to reasonable standards of constitutional adjudication but simply reaching different conclusions than we do. In this regard, Fallon’s account seems likely to suffer from the level-of-generality problem that plagues many a constitutional theory.⁵⁴ Few may disagree on the rules of constitutional adjudication that Fallon sets out at the abstract and general level at which he posits them—for example, that the Constitution is “paramount authority . . . in all cases” or that “powerful legal and moral considerations can trump” adherence to settled law. But drill down further in contested cases and profound methodological disagreements along with claims of unprincipled decision making quickly rise to the fore, raising the question of how much agreement really exists on the bounds of reasonable constitutional argumentation.⁵⁵ The open-endedness of constitutional adjudication under Fallon’s description likely exacerbates the problem, as it means the Justices are regularly drawing on values and commitments in particular cases that others may not share.

My bigger concern centers on the concept of sociological legitimacy and how it fits into Fallon’s project. Although he repeatedly acknowledges the interdependency between sociological legitimacy on the one hand and moral and legal legitimacy on the other, Fallon offers little sustained analysis of this relationship. He notes that issuing a legally and morally illegitimate constitutional decision does not undermine public acceptance of the Court.⁵⁶ But at the same time, he is plainly concerned that growing political polarization may undercut public perceptions of constitutional adjudication as a legitimate enterprise, given the close correlation between political ideology and constitutional views.⁵⁷ “In a society in

53. *Id.* at 147.

54. *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1062–63 (1990) (describing how a constitutional theory centered on original intent raises questions regarding whose intent matters and at what level of generality).

55. *Compare, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015) (Justice Kennedy’s majority view of how the Due Process Clause of the Fourteenth Amendment should be interpreted), *with id.* at 2632–34 (Thomas, J., dissenting) (Justice Thomas’s interpretation of the Due Process Clause); *compare also* *NLRB v. Noel Canning*, 573 U.S. 513, 523–25 (2014) (Justice Breyer’s majority view of the role of historical practice in constitutional interpretation), *with id.* at 571–73 (Scalia, J., concurring) (Justice Scalia’s view on the use of historical practice in constitutional interpretation).

56. *See* FALLON, *supra* note 14, at 156.

57. *See id.* at 157.

which the ideological gulfs are too wide, perceived illegitimacy in Supreme Court decision making may become . . . [a] familiar . . . fact of life.”⁵⁸

Descriptively, then, this creates a puzzle: to what extent do contentious political and ideologically-laden constitutional decisions undermine public confidence in the Court? As important, however, is the normative question that follows: to what extent should the Justices “allow other people’s perceptions of the moral legitimacy of their decisions to affect their actual decision making”?⁵⁹ At the end of the book, Fallon signals that he believes the Justices should be more attentive to the political repercussions and political context of their decision making. In particular, he urges the Court to exercise greater restraint when it comes to invalidating legislation, especially at the federal level, and insists that “the ideal of moral reasonableness in judicial decision making includes considerations involving the fair allocation of political power.”⁶⁰ Fallon justifies this position on grounds of democratic legitimacy and respect for the constitutional views of popularly elected branches, yet it is clear that he also hopes the Court will retreat from high-visibility political debates.⁶¹ Fallon never explains, however, how efforts by the Court to avoid political confrontations fit within the norms of reasonable constitutional adjudication. Moreover, as Tara Grove argues in her recent review of Fallon’s book, fitting these two together may be no easy feat. In her view, strategic voting based on factors external to the case at hand “is antithetical to the way in which many of us conceive of Supreme Court decisionmaking” and “violates norms of our constitutional practice.”⁶²

Indeed, Fallon’s call for judicial restraint in invalidating legislation showcases this tension. Scholars have long debated whether restraint in invalidating legislation is proper as a matter of substantive constitutional law—whether it appropriately respects the Constitution’s principles of democratic accountability and the constitutional role of courts, or instead represents a failure by courts to adequately protect individuals against majority oppression.⁶³ These substantive arguments plainly fall within the realm of reasonable constitutional debate. But the strategic argument that Justices should avoid invalidating legislation to protect the Court’s institutional standing is thought by many to be outside the legal pale.⁶⁴

58. *Id.* at 158.

59. *Id.* at 13.

60. *Id.* at 129.

61. *See id.* at 159–62.

62. Grove, *supra* note 5, at 2263.

63. The jurisprudence and scholarship relevant to this debate is vast. For relatively recent entrants, see generally RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* (2016) (arguing against judicial restraint in invalidating legislation); Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 *FORDHAM L. REV.* 1715 (2013) (arguing in favor). For the classic argument in favor of judicial restraint, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129, 136 (1893).

64. *See* Grove, *supra* note 5, at 2259–60, 2269 (suggesting that such an action would be legally illegitimate); Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 *FLA. L. REV.* 1993, 1997 (2013).

II. SOCIOLOGICAL LEGITIMACY AND CONSTITUTIONAL ADJUDICATION

The rest of this Article focuses on descriptive and normative dimensions of sociological legitimacy. I begin with the descriptive dimension, reviewing political science scholarship on whether the Supreme Court's public standing is affected by politically and ideologically contested decisions. I then turn to the normative dimension, assessing whether strategic concerns about preserving public confidence in the Supreme Court are a legitimate factor for the Justices to consider in constitutional adjudication. Putting the two together, my overall conclusion is mixed. In my view, concerns about preserving public support for the Court fall within the bounds of reasonable constitutional adjudication—both as currently undertaken and in the form that Fallon advocates. The bigger problem is that overt consideration of the impact of a decision on the Court's standing may prove self-defeating by leading the public to view the Justices as little more than politicians in robes, thereby undercutting the very institutional legitimacy the Justices sought to preserve. An alternative would be for the Justices to take sociological legitimacy into account, but only *sub rosa*. Yet not only does that approach raise serious concerns about judicial candor, it also stands in tension with Fallon's prime commitment that the Justices must engage in constitutional adjudication in good faith.

A. Politicized Decision Making and Public Acceptance of the Supreme Court

The Supreme Court is increasingly divided along ideological and partisan lines. Since 2010, when Justice Kagan replaced Justice Stevens, “all of the Supreme Court's Republican-nominated Justices have been to the right of Democratic-nominated Justices.”⁶⁵ According to Neal Devins and Lawrence Baum, this is a new phenomenon; “the Court never had clear ideological blocs that coincided with party lines” before now.⁶⁶ Although there remains some division among the conservative justices—notably, Justices Gorsuch and Kavanaugh voted together only 70% of the time last term—the Court shifted further to the right when Justice Kennedy, a conservative justice who voted with liberals in some highly salient cases, was replaced with the more reliably conservative Justice Kavanaugh.⁶⁷ Party-line voting dominates in Supreme Court confirmation battles and the ideological division between liberal and conservative justices has grown significantly.⁶⁸ The result is that the Court “has come to be rigidly divided

65. NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP* 4 (2019).

66. *Id.*; Lee Epstein & Eric Posner, *If the Supreme Court is Nakedly Political, Can it be Just?*, N.Y. TIMES (July 9, 2018) <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/3PTH-BXYL>].

67. DEVINS & BAUM, *supra* note 65, at 4, 6; Lee Epstein et al., *Replacing Justice Kennedy* 6–7 WASH. U. L. RESEARCH (Oct. 8, 2018), <http://epstein.wustl.edu/research/ReplacingJusticeKennedy.pdf> [<https://perma.cc/4NXF-8U6Y>]; Amelia Thompson-Deveaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019), <https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/> [<https://perma.cc/9DMF-Q747>].

68. DEVINS & BAUM, *supra* note 65, at 2, 6.

by both ideology and party,” with the liberal votes in close cases overwhelmingly coming from Democratic-appointed justices and conservative votes coming from Republican-appointed ones.⁶⁹

Many worry that the Court’s sociological legitimacy will erode as the Court increasingly reflects our current polarized climate.⁷⁰ Even Justice Kagan has voiced this concern, warning that people “will reject the Court and say, you know, we don’t view it as legitimate anymore” because they see the Court “as just an extension of the political process.”⁷¹ To be sure, the Supreme Court enjoys “strong and enduring” public support.⁷² According to a September 2019 Gallup survey, 54% approve and 42% disapprove of how the Court is handling its job, while an August 2019 Pew survey reported that 62% of Americans say they view the Court favorably.⁷³ These numbers are substantially up from 2016, when 42% approved and 52% disapproved of how the Court was handling its job, and only 48% of Americans had a favorable view of the Court, compared to 43% who had an unfavorable view.⁷⁴ Public support for the Court is also higher and more consistent than support for Congress or the President.⁷⁵

On the other hand, survey data on public views of the Court do provide some basis for concern. Overall, “confidence in the court has been declining over the past 30 years.”⁷⁶ After largely being in the 45%–50% range from 1973 to the early 2000s, the percentage reporting a great deal or quite a lot of confidence in the Court has been between 30–40% since 2006.⁷⁷ Even more striking, Pew found

69. Epstein & Posner, *supra* note 66.

70. See, e.g., Grove, *supra* note 5, at 2240; Epps & Sitaraman, *supra* note 5, at 2–3; Sherry, *supra* note 5, at 2; Epstein & Posner, *supra* note 66; Kevin McMahon, *Is the Supreme Court’s Legitimacy Undermined in a Polarized Age?*, THE CONVERSATION (July 7, 2018), <http://theconversation.com/is-the-supreme-courts-legitimacy-undermined-in-a-polarized-age-99473> [<https://perma.cc/G4KK-FHYL>]; Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018), <https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/> [<https://perma.cc/AW66-SWRC>].

71. Ian Millhauser, *Kagan Warns that the Supreme Court’s Legitimacy is in Danger*, THINK PROGRESS (Sept. 17, 2018.), <https://thinkprogress.org/justice-kagan-warns-that-the-supreme-courts-legitimacy-is-in-danger-2de1192d5636/> [<https://perma.cc/937S-JPPA>].

72. Joseph Daniel Ura & Alison Higgins Merrill, *The Supreme Court and Public Opinion*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 432, 439 (Lee Epstein & Stefanie A. Lindquist eds., 2017).

73. *Gallup Historical Trends: Supreme Court*, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/9WZ3-DWWM>] (last visited Mar. 1, 2020); Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, PEW RES. CTR. (Aug. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> [<https://perma.cc/5SEF-8PDL>].

74. *Gallup Historical Trends: Supreme Court*, *supra* note 73; *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RES. CTR. (July 29, 2015), <http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/> [<https://perma.cc/BC3V-www4>].

75. *Gallup Historical Trends: Supreme Court*, *supra* note 73; Ura & Merrill, *supra* note 72, at 435.

76. Thomson-Deveaux & Roeder, *supra* note 70.

77. Although capturing overall trends, these ranges hide fluctuation in confidence in the Court, sometimes year-to-year. *Gallup Historical Trends: Supreme Court*, *supra* note 73.

that unfavorable opinions of the Supreme Court reached a 30-year high in 2015, with seven in ten Americans saying that Supreme Court Justices “are often influenced by their own political views” in deciding cases and only 24% saying that Justices “generally put their political views aside.”⁷⁸ In addition, the recent upticks in approval of the Court largely predate Justice Kavanaugh’s confirmation, which entailed contentious hearings and created a more solid conservative majority than had previously existed.⁷⁹ Indeed, the Court’s approval rating in Pew’s survey declined from 66% in April 2018 to 62% in August 2019,⁸⁰ although as noted above Gallup’s polling shows a slight improvement in the number approving of the Court in September 2019 compared to recent years.⁸¹

Particularly troubling is the significant partisan divide evident in public views of the Court. Republican and Democratic approval of the Court have long varied to some extent, but in 2019 this divide is particularly stark, with 75% of Republicans and Republican-leaning independents having a favorable view of the Court compared to only 49% of Democrats and Democratic-leaning independents.⁸² This 26 point divide represents the largest partisan gap in two decades.⁸³ Moreover, the 2018–2019 term of the Court was a relatively quiet one, with few ideologically or politically charged cases.⁸⁴ If the Court hears more politically salient cases and resolves them in a consistently conservative direction, this partisan divide is likely to worsen.⁸⁵

Yet whether approval rates for the Supreme Court are good proxies for public acceptance of it is a matter of some debate. Political science scholarship has long differentiated between “specific support” and “diffuse support” for the Court. Specific support reflects individuals’ favorable evaluation of the Court’s decisions and performance and is captured by approval rates, while diffuse support reflects individuals’ willingness to accept the Court’s decisions even when they don’t agree with the results it reaches.⁸⁶ Diffuse support is conventionally viewed as representing the Court’s sociological or institutional legitimacy, as it measures

78. *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RES. CTR. (July 29, 2015), <http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/> [<https://perma.cc/BC3V-www4>].

79. Gallup notes one 2019 survey on level of support for the Court, which suggests that the percentage reporting a great deal or quite a lot of support for the Court held steady from 2018 (37%) to 2019 (38%). *Gallup Historical Trends: Supreme Court*, *supra* note 73.

80. *Democracy and Government, the U.S. Political System, Elected Officials and Governmental Institutions*, PEW RES. CTR. (Apr. 26, 2018), <http://www.people-press.org/2018/04/26/1-democracy-and-government-the-u-s-political-system-elected-officials-and-governmental-institutions/#views-of-congress-and-the-supreme-court> [<https://perma.cc/HEE9-7CZZ>]; Brockway & Jones, *supra* note 73.

81. See *supra* text accompanying notes 73–74.

82. *Democracy and Government*, *supra* note 80.

83. Brockway & Jones, *supra* note 73.

84. Adam Liptak & Alicia Parlapiano, *A Supreme Court Term Marked by Shifting Alliances and Surprise Votes*, N.Y. TIMES (June 29, 2019.) <https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html> [<https://perma.cc/AM86-DRTX>].

85. Epps & Sitaraman, *supra* note 5, at 7.

86. See James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. LAW SOC. SCI. 201, 202–03

broader public acceptance of the Court as an institution. A critical question concerns the relationship between specific and diffuse support. The conventional view is that “levels of diffuse support are relatively immune to short-term changes in specific support” and thus individuals do not see the Court as illegitimate when it issues decisions with which they disagree.⁸⁷ However, some recent scholarship argues that individuals’ diffuse support for the Court decreases as they perceive greater ideological disagreement between their views and the Court’s decisions—and that even one highly salient decision can affect assessments of the Court’s legitimacy.⁸⁸

The threat to the Supreme Court’s sociological legitimacy is clearly more ominous under the latter account. If ideological disagreement with the Court’s decisions can have an immediate and direct impact on the Court’s legitimacy, then the growing gap in how Republicans and Democrats view the Court would signal an imminent threat to the Court’s broader legitimacy. Yet even under the conventional view, specific and diffuse support are at least generally linked.⁸⁹ Some scholars suggest that individuals keep a “running tally” of decisions, with diffuse support for the Court suffering once a sufficient number of disapproved decisions have accumulated.⁹⁰ In the recent past, the presence of Justices who were swing voters—voting sometimes with liberals and sometimes with conservatives in highly contested cases—meant that the overall ideological tally for the Court was mixed.⁹¹ No single political or ideological group continuously lost. The danger raised by Court’s intensifying ideological and partisan blocs is that this running tally will become increasingly one-sided over time, causing the Court’s legitimacy to erode for the group that continuously loses. Which group ends up as the continuous losers depends on which political and ideological group has control of the Court. Not surprisingly, in the face of an increasingly solidly Republican and conservative majority, the current concerns about the Court’s eroding legitimacy

(2014). The terms were originally coined by David Easton in *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965).

87. Gibson & Nelson, *supra* note 86, at 206; *see generally* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992).

88. Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 185, 197 (2013) (“When individuals perceive that they are in ideological disagreement with the Court’s policymaking, they ascribe lower legitimacy to the Court compared to individuals who perceive that they are in agreement with the Court.”); Dino P. Christenson & David M. Glick, *Chief Justice Robert’s Health Care Decision Disrobed: The Microfoundations of the Supreme Court’s Legitimacy*, 59 AM. J. POL. SCI. 403, 410, 416 (2014). For criticisms of this scholarship, see James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court’s Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162 (2015).

89. Ura & Merrill, *supra* note 72, at 434.

90. *See* Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333 (2001); Gibson & Nelson, *supra* note 86, at 206–07.

91. *See* Gibson & Nelson, *supra* note 86, at 208; *see also* Bartels & Johnston, *supra* note 88, at 187, 190–91 & Table 2 (arguing that the contemporary Court could be perceived as conservative, moderate, or even liberal, and providing supporting evidence of mixed perceptions of the Court’s ideology by survey respondents).

are raised largely by Democrats and liberals who view the Court as increasingly at odds with their ideological preferences.

An important additional factor here is that our politics are not only polarized, but also highly competitive, with both partisan camps being sizeable and politically powerful nationally.⁹² As Keith Whittington emphasizes in his Article for this symposium, what distinguishes our current polarized age from prior ones is that neither side has emerged as the victor.⁹³ This has several worrisome implications for the sociological legitimacy of the Court. To begin with, the competitive nature of our polarized politics means that the group of continuous ideological losers at the Court will be large, even at times representing a majority of the national electorate.⁹⁴ Additionally, it seems likely to increase the chances that our sharply contested politics, and as a result, ideological divisions over the Court will last and not be resolved by elections.⁹⁵ It may also increase the likelihood of the Court being asked to intervene on highly politically salient disputes, with both parties unwilling to compromise and more inclined to use the courts to secure wins not obtainable through political channels.⁹⁶ True, the competitive nature of our polarized politics increases the chances that either party could win the presidential elections,⁹⁷ thereby potentially gaining the ability to bring the ideological balance on the Court more in line with its preferences. But arguably, this fact has only intensified perceptions of the Court as political and worsened the challenge to the Court's sociological legitimacy.⁹⁸

92. See Frances Lee, *American Politics Is More Competitive Than Ever. That's Making Partisanship Worse*, WASH. POST: MONKEYCAGE (Jan. 9, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/09/american-politics-is-more-competitive-than-ever-thats-making-partisanship-worse/> [<https://perma.cc/53XD-68ZW>] (emphasizing that current national "politics is distinctive for its narrow and switching national majorities" so that "[n]early every recent election has held out the possibility of a shift in party control of one institution or another").

93. Keith E. Whittington, *Practice-Based Constitutional Law in an Era of Polarized Politics*, 18 GEO. J.L. & PUB. POL'Y, 227, 238 (forthcoming May 2020).

94. Michael Geruso et al., *Inversions in US Presidential Elections: 1836–2016*, at 23 (Nat'l Bureau of Econ. Res., Working Paper No. w26247, 2019).

95. See Nolan McCarty, *Polarization, Congressional Dysfunction, and Constitutional Change*, 50 IND. L. REV. 223, 228–30 (2016). For the argument that predictions of ongoing and lasting polarization are exaggerated, see Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015).

96. Sarah Binder, *How Political Polarization Creates Stalemate and Undermines Lawmaking*, WASH. POST: MONKEYCAGE (Jan. 13, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/13/how-political-polarization-creates-stalemate-and-undermines-lawmaking/> [<https://perma.cc/VU5Z-MHY5>]; Lee, *supra* note 92; Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 634–46 (2018); see also Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125–26 (2019) (detailing a dramatic increase in the federal government's request for emergency and extraordinary relief from the Supreme Court).

97. Geoffrey Skelley, *Are Blowout Elections a Thing of The Past?*, FIVETHIRTYEIGHT (May 28, 2019) <https://fivethirtyeight.com/features/are-blowout-presidential-elections-a-thing-of-the-past/> [<https://perma.cc/82WR-T4ZA>]; Lee, *supra* note 92.

98. Sahil Kapur, *Democrats Shift to Seize on Supreme Court as 2020 Campaign Issue*, BLOOMBERG (May 17, 2019), <https://www.bloomberg.com/news/articles/2019-05-17/democrats-shift-to-seize-on-supreme-court-as-2020-campaign-issue> [<https://perma.cc/VD5G-YAT9>]; Eric Bradner & Joan Biskupic,

The stark divide in partisan perceptions of the Court suggests an additional challenge in assessing the Court's public acceptance and legitimacy. Political scientists focus on public acceptance of the Court writ large, but in reality, there are many different publics, of which partisan groupings represent just one. Some political scientists and journalists divide the country and even North America into different "nations" identified by particular historical, cultural and geographic features.⁹⁹ Others emphasize urban-rural distinctions or identify certain representative communities as models that repeat across the country.¹⁰⁰ Economic, educational, and demographic differences or factors such as employment or religious background also seem likely to be significant to how individuals respond to the Court. For example, the Court's "perceived legitimacy among . . . legal elites is extremely high—and much higher than it is for the mass public at large."¹⁰¹ One explanation given is that frequent exposure to the Court means not just greater awareness of how well the Court's decisions accord or diverge from one's own views, but also "expos[ure] to legitimizing symbols . . . that tend to create a presumption that, even if [an] outcome is undesirable, the process of decision making is fair."¹⁰² In contrast, the perspective that white evangelicals take to the Court is framed by decades of preaching and religious activism around judicial decisions.¹⁰³ The differences among these many publics seem likely to affect actual views on the Court's institutional legitimacy and the resilience of such views.¹⁰⁴ As important, these differences may make it more difficult to protect the Court's legitimacy. Moves that help prevent the Court from veering too predictably and consistently in one political direction may undermine the Court's legitimacy with some publics even as they reinforce the Court's legitimacy with others.¹⁰⁵

How the Supreme Court Could Shape the 2020 Presidential Race, CNN (Jan. 23, 2019), <https://www.cnn.com/2019/01/23/politics/supreme-court-2020-politics/index.html> [<https://perma.cc/793F-WXGG>]; see generally Christopher W. Schmidt, *The Forgotten Issue? The Supreme Court and the 2016 Election*, 93 CHI.-KENT L. REV. 411 (2018).

99. See, e.g., JOEL GARREAU, *THE NINE NATIONS OF NORTH AMERICA* (1981); COLIN WOODARD, *AMERICAN NATIONS: A HISTORY OF ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA* (2011).

100. See, e.g., JONATHAN RODDEN, *WHY CITIES LOSE* (2019); DANTE CHINNI & JAMES GIMPEL, *OUR PATCHWORK NATION* (2010); Peter Grier, *The Deep Roots of America's Rural-Urban Political Divide*, CHRISTIAN SCI. MONITOR, (Dec. 16, 2018), <https://www.csmonitor.com/USA/Politics/2018/1226/The-deep-roots-of-America-s-rural-urban-political-divide> [<https://perma.cc/V8B6-ZVLA>].

101. Brandon L. Bartels et al., *Lawyers' Perceptions of the Supreme Court: Is the Court a "Political" Institution?*, 49 LAW & SOC'Y REV. 761, 764 (2015).

102. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMP. LEG. STUD. 592, 593–95 (2017).

103. James Fea, *Why Do White Evangelicals Still Staunchly Support Donald Trump?*, WASH. POST (Apr. 5, 2019), <https://www.washingtonpost.com/outlook/2019/04/05/why-do-white-evangelicals-still-staunchly-support-donald-trump/> [<https://perma.cc/7HJA-7P37>].

104. Bartels & Johnston, *supra* note 88, at 185; Brockway & Jones, *supra* note 73 (noting that 75% of Republicans and Republican-leaning independents viewed the Court favorably while only 49% of Democrats and Democratic-leaning independents held the same view, an inverse from positions in 2016).

105. See Shapiro, *supra* note 4.

Efforts to respond to legitimacy threats facing the Court are further complicated by evidence that the Court's reasoning, and not just its results, can affect the Court's legitimacy. Notably, recognition that the Justices' ideological orientations affect their decision making may not have much of an effect on the Court's legitimacy on its own.¹⁰⁶ But perceptions that the Court is politicized, that the Justices are "little more than 'politicians in robes'" who engage in "strategic, rather than sincere, decision making," do have a legitimacy-undermining effect.¹⁰⁷ Of particular relevance is a recent study of public reactions to the suggestion that Chief Justice Roberts switched his vote in *NFIB v. Sebelius* out of institutional legitimacy concerns. It showed that the Court's legitimacy suffered when individuals perceived the Court not just as ideologically misaligned with their views, but further as acting politically in issuing a decision.¹⁰⁸ Another study found that loyalty to the Court was highest when opinions used conventional legalistic arguments, but decreased as the Court's reasoning became more controversial and "extraconstitutional."¹⁰⁹

B. Is the Court's Consideration of Sociological Legitimacy Defensible?

This descriptive data thus suggests that the Court's legitimacy with broad sections of the public may be at risk, at least over time, if its decisions go consistently in one ideological direction in politically salient cases. One potential solution would be for Justices to vote in a way that ensures more ideological variety in order to protect public acceptance of the Court. As noted, whether as an empirical matter such strategic voting would enhance the Court's legitimacy is debatable, a point I return to below.¹¹⁰ For now, I will focus on the core normative question: even if the Court's decisions can undermine its public standing, should the Justices take that impact into account in their decision making? Put into Fallon's terms, is it legally or morally legitimate for the Court to take its sociological legitimacy into account in deciding a particular case? Given Fallon's equation of legal and moral legitimacy in the U.S. legal system, this is essentially a question about whether the Court's sociological legitimacy is a legally legitimate factor.

An important point to note at the outset is that strategic decision making on the Supreme Court is a familiar and well-established phenomenon. Indeed, as members of a multi-person court who need to get four colleagues to sign onto their opinions to obtain a majority, the Justices necessarily have to pay attention to their colleagues' views in writing their drafts. And Justices sometimes switch

106. See Gibson & Nelson, *supra* note 86, at 211–12; see also Christianson & Glick, *supra* note 88, at 415 (impact on legitimacy came when individuals viewed the Court's decision not just as ideological but also as ideologically disaligned with their own views).

107. See Gibson & Nelson, *supra* note 102, at 594–95, 598.

108. Christianson & Glick, *supra* note 88, at 411.

109. Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 210, 213 (2012).

110. See *infra* Part II.C.

their votes in response to draft opinions.¹¹¹ More than this, scholars have argued that Justices write their opinions with an eye to the preferences of other institutions, such as Congress, the President, and the public, in order to ensure that their opinions—and the policy positions those opinions embody—have staying power.¹¹² They may, for example, strategically opt to overrule doctrines incrementally rather than in one fell swoop in order to lessen backlash.¹¹³

A second point is that there are well-known instances of the particular type of strategic judicial decision making at issue here, namely, strategic consideration of the impact decisions may have on the Supreme Court's public standing. The classic example is *Marbury v. Madison*, in which the Court heard a challenge to Secretary of State James Madison's refusal to deliver judicial commissions, an action taken on President Thomas Jefferson's instructions. Given the political climate at the time, not least the perception by Jefferson and his Democratic-Republican party of the Court as a Federalist bastion with Marshall at its head, the odds that the Jefferson administration would comply with a Court order requiring the commissions be delivered were slim. After all, the government refused to even come to the Court to defend itself in the action. Marshall's solution to this challenge to the young Court's power, holding that statutes granting the Court jurisdiction were unconstitutional, is often invoked as a paragon of judicial strategy. It allowed the Court to simultaneously affirm the principle of judicial review and avoid the danger that the political branches would undercut the Court by refusing to comply with its decision.¹¹⁴

The Court at times has also used justiciability rulings to avoid hearing contentious cases because of concerns about how the public would respond. This approach was famously advocated by Alexander Bickel in the early 1960s, who urged the Court to exercise prudential judgment—the “passive virtues”—in deciding what to hear, out of concern about the impact that the Court's decisions on the merits could have on “public opinion and the political institutions.”¹¹⁵ As Grove details, the Court's infamous denial of jurisdiction in *Naim v. Naim*, refusing to hear a challenge to Virginia's prohibition on interracial marriage that was squarely within its mandatory jurisdiction, resulted from concerns that reaching

111. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 12–13, 17 (1998); Forest Maltzman & Paul Wahlbeck, *Strategic Considerations and Vote Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 582, 591 (1996).

112. EPSTEIN & KNIGHT, *supra* note 111, at 13–17, 138–77; *see generally* Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision Making*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* (Keith E. Whittington et al. eds., 2008) (providing an overview of strategic theories of judicial decision making).

113. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

114. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 2; *see also* Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 16–20, 27–33 (2003).

115. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 48, 54, 69–70, 129 (1962); Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42, 48, 51 (1961).

the merits and invalidating the ban would create more resistance to *Brown v. Board of Education* and school desegregation.¹¹⁶ Some have described the Court's decision that standing was lacking and it had no jurisdiction in *Hollingsworth v. Perry* as reflecting, in part, the sense that the country was not yet ready for the Supreme Court to pronounce on the constitutionality of state prohibitions on same sex marriage.¹¹⁷ The fact that the Court enjoys broad discretion over the cases it hears means that denials of certiorari are an easily available and largely non-public means by which the Court can avoid cases that might prove particularly contentious and provoke sharp public response.¹¹⁸

Perhaps the most prominently invoked example of strategic Supreme Court decision making to preserve the Court's public standing is today the most debatable: Justice Owen Roberts' vote to uphold the constitutionality of Washington's minimum wage statute challenged in *West Coast Hotel v. Parrish* after having invalidated a nearly identical New York law just the term before.¹¹⁹ Given that *West Coast Hotel* was decided against the backdrop of President Franklin Roosevelt's proposal to pack the Court, a proposal that lost steam when the Court started upholding New Deal economic regulation, Roberts' vote was long heralded as the switch-in-time-that-saved-nine.¹²⁰ Subsequent revisionary scholarship has called that view into question, arguing that Roberts had voted in *West Coast* before the court-packing plan was released and reflected a longer term evolution in his legal views.¹²¹ Yet even if Roberts' vote was based in legal principles and not just a response to head off a political threat to the Court, most scholars see the evolution in the Court's views towards New Deal economic measures as also influenced by the changing public climate.¹²² Indeed, studies of the Court by both legal and political science scholars demonstrate that the Court often aligns with public opinion.¹²³

More recently, the issue of whether Justices decide cases to protect the Court's legitimacy rose to the fore in the aftermath of *NFIB v. Sebelius*, which upheld the Affordable Care Act's individual mandate.¹²⁴ Reports soon emerged of Chief

116. Grove, *supra* note 5, at 2257–58.

117. Michael J. Klarman, Windsor and Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 144–46 (2013).

118. See, e.g., Helen Alvare, *Symposium: Roe—Or Wait?*, SCOTUSBLOG (July 24, 2019), <https://www.scotusblog.com/2019/07/symposium-roe-or-wait/> [<https://perma.cc/7KUN-WGMG>] (describing Court's practice over the 2018 Term of ducking questions about the constitutionality of abortion restrictions by not granting certiorari).

119. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

120. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 213–36 (1995); Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

121. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 5–7 (1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1900–02 (1994).

122. See Friedman, *supra* note 121, at 1952; Kalman, *supra* note 120, at 1075–79.

123. See generally FRIEDMAN, *supra* note 2.

124. 567 U.S. 519 (2012).

Justice Roberts having switched his vote to supporting the mandate's constitutionality out of concern over the public fallout the Court might face were it to invalidate the most important social welfare legislation of a generation.¹²⁵ Whether Roberts in fact did so remains a matter of debate.¹²⁶ For many ACA opponents, however, it was the possibility of such a "Roberts flip" that threatened the Court's public reputation.¹²⁷

To be sure, these are all instances of implicit strategic consideration of the Court's public standing. Explicit reference also occurs, but more rarely. The leading example comes from the joint opinion in *Planned Parenthood v. Casey*. The joint opinion invoked the Court's public legitimacy as an additional reason for it to adhere to its past decision in *Roe v. Wade*:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . [T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.¹²⁸

Concern about the impact overruling a decision may have on "public faith in the judiciary" has surfaced in other stare decisis analyses.¹²⁹ But stare decisis is not the only context in which the Court has taken public reaction into account in its decision making. According to one study, "The justices have made seventy-one . . . references to the Court's institutional legitimacy" since *Brown* was decided in 1954.¹³⁰ Nearly all members of the Roberts Court have signed onto

125. JOAN BISKUPIC, *THE CHIEF* 221–22, 233–48 (2019) (discussing changes in Roberts' votes on the mandate, and of the votes of Roberts, Kagan, and Breyer on the Medicaid expansion); Jan Crawford, *Roberts Switched Votes to Uphold the Health Care Law*, CBS NEWS (July 2, 2012, 9:43 P.M.), <https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> [<https://perma.cc/5PDB-MS5B>].

126. See Jonathan Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, in *THE HEALTH CARE CASE 171* (Nathaniel Persily et al. eds., 2013) (arguing that Roberts' decision in *NFIB* was "of a piece with his prior opinions as a justice and circuit court judge and his accounts of the proper judicial role"); Grove, *supra* note 5, at 2255.

127. Matthew J. Franck, *The Chief Don't Get No Respect*, NAT'L REV. ONLINE (June 29, 2012), <https://www.nationalreview.com/bench-memos/chief-dont-get-no-respect-matthew-j-franck/> [<https://perma.cc/E2DK-EGQD>] ("[T]he chorus seems to be 'the chief justice behaved politically,' and then that putative behavior is either praised or blamed."); Robert J. Pushaw Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 1997 (2013).

128. *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

129. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970); see also *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1115–20 (1995).

130. Farganis, *supra* note 109, at 207; see also LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 46–49 (1998).

opinions in recent years that invoke the need to preserve “public confidence” in the Court as a justification for their rulings.¹³¹

Some Justices expressly have invoked the Court’s legitimacy as reason for the Court to adhere to a limited role and, in particular, to sidestep highly political disputes. Justice Frankfurter famously insisted that “[t]he Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment . . . from political entanglements and by abstention from injecting itself into the clash of political forces.”¹³² In recent years, Chief Justice Roberts has channeled this Frankfurterian view, arguing that the Court needs to hew to a narrow role to preserve its legitimacy.¹³³ During oral argument in *Gill v. Whitford* in 2018, Roberts stated that “the main problem” he had with finding partisan gerrymandering unconstitutional is that such a determination would threaten the Court’s public standing:

We will have to decide in every case whether the Democrats win or the Republicans win. . . . [L]et’s say . . . the Democrats win . . . [a]nd the intelligent man on the street is going to say . . . [i]t must be because the Supreme Court preferred the Democrats over the Republicans. And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.¹³⁴

And despite his criticism of the *Casey* joint opinion’s invocation of legitimacy, Justice Scalia raised a similar fear in his dissent in *Obergefell v. Hodges*, noting that the Court’s legitimacy might be eroded by its lack of restraint in invalidating state prohibitions on same sex marriage.¹³⁵

Strategic consideration of public reaction to judicial decisions is thus a long-standing and ongoing phenomenon at the Supreme Court, but it is nonetheless controversial. *Casey*’s argument that the Court should refrain from overruling past decisions in “intensely divisive” contexts met sharp criticism from both Chief Justice Rehnquist and Justice Scalia in their respective dissents. Some of

131. The exception is Kavanaugh, reflecting his recent appointment to the Court. *See, e.g.*, *Carpenter v. United States*, 138 S.Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting) (“When judges abandon legal judgment for political will we . . . risk undermining public confidence in the courts themselves.”); *Buck v. Davis*, 137 S.Ct. 759 (Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Kagan and Sotomayor, JJ.) (“Relying on race to impose a criminal sanction poisons public confidence in the judicial process, . . . a concern that supports Rule 60(b)(6) relief.”) (internal quotations omitted); *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292, 2391 (2015) (Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissenting) (“The Court’s patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter.”).

132. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

133. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 143, 256 (2005).

134. Transcript of Oral Argument at 37–38, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) (No. 16-1161); Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI.-KENT L. REV. 505, 505–06 (2018).

135. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2627–29 (2015).

this criticism underscored the tension between the joint opinion's insistence on sticking with precedent when under popular fire and the multiple ways in which it simultaneously deviated from the precedent of *Roe*.¹³⁶ The dissents further insisted, however, that the Court should not consider how it would be publicly viewed in reaching its decisions at all. According to the Chief Justice, "[t]he Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution."¹³⁷ Justice Scalia made a similar point, bluntly stating that "whether it would 'subvert the Court's legitimacy' or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening."¹³⁸

Recently, Tara Grove has developed this point further, arguing that that it is not legally legitimate under any interpretive theory for the Court to decide a case based on concerns about its sociological legitimacy. Grove focuses on "switches," instances in which "one or more Justices is said to have ruled in a way that they believed to be legally *incorrect* . . . in order to protect the Court."¹³⁹ Switches, in her view, would "violate norms of consistency, good faith, and candor,"¹⁴⁰ and she notes that "the Justices . . . are most certainly not candid about 'caving' to public pressure."¹⁴¹ She argues that a switch may even be at odds with the case and controversy requirement of Article III, insofar as it means that a Justice is not focusing "on the case or controversy before her."¹⁴² In her view, the Court faces an unavoidable "legitimacy trade-off": "a steadfast commitment to legal legitimacy may put at risk the Court's sociological legitimacy," but at the same time "a steadfast commitment to sociological legitimacy may lead a Justice to compromise the legal legitimacy of her own rulings."¹⁴³

Such rejections of consideration of sociological legitimacy are hard to square with the Justices' practice of regularly invoking the Court's public standing in their opinions. One way of resolving this inconsistency is to be clearer about how exactly sociological legitimacy might factor into a Justice's decision making. Sociological legitimacy might be simply one factor among many that leads a Justice to a particular decision. Alternatively, it might be the only factor a Justice considers or, as in Grove's switch category, a Justice might decide based on sociological legitimacy and contrary to her view of the law. Although even the

136. *Casey*, 505 U.S. at 861–64, 957–64 (Rehnquist, CJ., dissenting); *id.* at 998–1000 (Scalia, J., dissenting).

137. *Id.* at 963 (Rehnquist, CJ., dissenting).

138. *Id.* at 998 (Scalia, J., dissenting).

139. Grove, *supra* note 5, at 2259.

140. *Id.* at 2262.

141. *Id.* at 2245.

142. *Id.* at 2262.

143. *Id.* at 2272. Other scholars agree. See Erwin Chemerinsky, *Loving v. Virginia: A Triumph and a Failure of the Supreme Court*, 25 VA. J. SOC. POL'Y & L. 259 (2018) ("The Court's job is to enforce the Constitution . . . whatever the public reaction.").

first, limited consideration of sociological legitimacy might be problematic for some theories of interpretation, on the whole it does not trigger much concern. The latter versions of taking sociological legitimacy into account are far more contentious. This distinction is evident in the actions of the Justices. When the Justices invoke sociological legitimacy, it is overwhelmingly used as an additional reason to reach a certain result and not the sole basis for decision. What makes the joint opinion in *Casey* stand out is its oblique suggestion that preserving the Court's public status should outweigh the correct view of the law. Notably, however, the joint opinion does not argue that sociological legitimacy should be the determining factor, and it is mentioned alongside both more standard *stare decisis* factors and a lengthy constitutional analysis.

Yet, even the concerns about more extreme consideration of sociological legitimacy also seems exaggerated. To begin with, such instances seem likely to be quite rare. This is particularly true of switches, because it seems improbable that a Justice would decide the legal merits before considering the public impact of a case, rather than taking the public impact into account in the course of deciding what the correct outcome is. If nothing else, theories of motivated reasoning suggest that the Justices' desire to avoid outcomes that will harm the public standing of the Court will lead them to shade their assessment of the legal merits.¹⁴⁴ Nor is it necessarily problematic for a Justice to reconsider her initial instincts on the legal merits because of the possible impact of such a view on the Court's public standing. Much would depend on how she ultimately reasoned to her new position and how she might approach analogous cases in the future. Even if sociological legitimacy concerns drove Chief Justice Roberts' decision in *NFIB*, his opinion explaining why the individual mandate should be deemed a constitutional tax accorded with the Constitution's text, structure, and history and was supported by Supreme Court precedent on the scope of the tax power.¹⁴⁵ And if Roberts adheres consistently to that view going forward, suggesting that he was led not just to a different result in a particular case but more broadly to reconsider his understanding of the tax power, it would be hard to call his decision making entirely unprincipled.

Moreover, assessments of a decision's external effects are not categorically excluded from legally legitimate decision making. To the contrary, examination of whether a decision would be at odds with public reliance or whether a line of doctrine has proven unworkable in practice are an essential part of the doctrine of *stare decisis*—a doctrine the Court has identified as “a foundation stone of the rule of law” that sometimes requires the Court to adhere to determinations that

144. Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011); Michael L. Wells, “Sociological Legitimacy” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 911, 1026–27 (2007).

145. Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 88–93 (2012).

are settled over those it believes to be right.¹⁴⁶ Although *stare decisis* has become a source of dispute on the Court as of late, only Justice Thomas has called for revocation of the doctrine, and his argument against it rests on the broader point that judges exceed their constitutional power if they adhere to decisions they believe are demonstrably incorrect.¹⁴⁷ Concerns about workability, judicial capacity, and interbranch relations also lie at the core of many political question decisions and other justiciability doctrines.¹⁴⁸

Perhaps most significantly, the importance of public acceptance of the Court to its ability to function effectively and “surviv[e] as a viable institution”¹⁴⁹ provides a principled reason for the Justices to consider sociological legitimacy. Put differently, ensuring that the Court can perform its constitutional role effectively is itself of constitutional importance. Although we often focus on the Constitution’s concern to constrain the branches of government, constructing an effective government is also a constitutional goal.¹⁵⁰ Deborah Hellman has argued that the Court’s “ability to justifiably compel compliance with its rulings in particular cases” requires that it “be effective enough to compel compliance with its pronouncements generally. . . . [I]f the Court can protect its effectiveness through safeguarding its image, [it] . . . ought to do so.”¹⁵¹ At a minimum, therefore, preserving the sociological legitimacy of the Court should be seen as a functional prerequisite for principled legal decision making and not just as a potential threat.

Consideration of the Court’s public standing also appears to accord with Fallon’s account of constitutional adjudication. Like others, Fallon insists on the importance of adherence to principle, but he also insists that principled decision making does not preclude judicial attention to moral, prudential, and political concerns. The impact of sociological legitimacy on the Court’s effectiveness is a central prudential factor. Moreover, Fallon himself suggests that preserving the Court’s effectiveness carries moral significance as well: “[W]e should remember throughout that enhanced sociological legitimacy is morally relevant insofar as it seems necessary to sustain a climate of mutual respect among citizens and of

146. *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 798 (2014); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2422–23 (2019).

147. See *Gamble v. United States*, 139 U.S. 1960, 1981–89 (2019).

148. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2500–01 (2019) (holding that partisan gerrymandering claims represent nonjusticiable political questions because there are no “clear, manageable, and politically neutral” standard for determining when partisan districting is unfair and goes too far); *Vieth v. Jubiler*, 541 U.S. 267, 291 (2004) (plurality) (referencing the need for a determinate judicial standard “to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577–78 (1992) (invoking concerns about the courts and Congress intruding excessively on the executive in finding no standing).

149. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 213, 216–21 (1968).

150. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 44–45 (2017).

151. Hellman, *supra* note 129, at 1139.

recognition by citizens of the government's right to rule."¹⁵² Finally, Fallon's discussion of judicial restraint suggests yet another reason why the Court's consideration of its public standing is legitimate: the close overlap between strategic and substantive arguments over the political ramifications of the Court's actions. Disentangling these two will often prove difficult; the strategic concern that the public will see the Court as overstepping its proper constitutional role and intruding on the political sphere is likely to go hand-in-hand with the substantive concern that the Court is in fact overstepping. Allowing the substantive version into the realm of legitimate constitutional adjudication thus likely means bringing its strategic twin in as well.

C. *Candor and Sociological Legitimacy*

Therefore, I believe it can be legally legitimate for the Justices to consider the Court's sociological legitimacy in their decision making and perhaps even to decide cases based on sociological legitimacy concerns. Whether such consideration is actually legitimate in practice is a different question. Much turns on how and why the Justices take sociological legitimacy into account, as well as the specific features of the case at hand.

In particular, the Justices' consideration of the Court's sociological legitimacy would need to accord with the norms of good-faith, reasonable constitutional adjudication. As a result, instances in which a Justice would be justified in deciding solely on sociological legitimacy are extremely rare, at best; the threat to the Court's public standing would need to be dire to justify such a deviation from usual constitutional practice. Even in more likely scenarios, when sociological legitimacy enters a Justice's decisional calculus simply as one of many factors, Justices may be faulted for giving it undue weight or miscalculating what the public impact of a decision would be. As Luis Fuentes-Rohwer has suggested, a real danger exists of the Justices crying wolf; given the generally high levels of public approval of the Court, there often should be a more than sufficient buffer for the Court to issue an unpopular or castigated decision and still enjoy substantial sociological legitimacy.¹⁵³ Grove similarly warns that the Justices may not be particularly good at assessing when their decisions pose a risk to the Court's legitimacy, and the ongoing debate over diffuse support for the Court suggests those assessments are difficult to make.¹⁵⁴ This likelihood of error is exacerbated by the presence of multiple publics, as noted above.¹⁵⁵ Studies suggest that Judges are particularly attuned to the audiences they are close to, such as legal elites.¹⁵⁶ But they may be less able to predict how other audiences will respond to their decisions, and selective attentiveness to only some publics seems unjustifiably

152. FALLON, *supra* note 5, at 159.

153. Fuentes-Rohwer, *supra* note 134, at 519-23.

154. See *supra* text accompanying notes 86-88; Grove, *supra* note 5, at 1168; LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 64-66 (2006).

155. See *supra* text accompanying notes 99-104.

156. DEVINS & BAUM, *supra* note 65 at 39-57; BAUM, *supra* note 155, at 23, 70, 162-64.

partial.. Finally, whether a specific Justice is justified in considering sociological legitimacy will also turn on her own interpretive theory. If a Justice espouses an interpretive theory that demands decisions be based on specific sources, such as originalists who argue that constitutional interpretation must depend on the original public meaning of the Constitution's text, then for the Justice to actually decide based on sociological legitimacy would be at odds with the obligations of good faith and consistency in constitutional adjudication.¹⁵⁷

An especially difficult question relates to whether the Justices must be candid about considering the Court's public standing in deciding a case. Judicial candor is often identified as essential to legitimate judicial decision making, a position that accords with Fallon's emphasis on good-faith, reasoned adjudication as the core of our constitutional practice.¹⁵⁸ Intuitively, judicial candor would appear especially important here, given doubts about the legal legitimacy of Justices considering the Court's sociological legitimacy at all. Absent candor, it will be hard for outside actors to assess whether a Justice's consideration of sociological legitimacy in a particular context was justified or for our constitutional practice to develop norms about when such consideration is legally legitimate. Not requiring candor might also lead to excessive reliance on sociological legitimacy in judicial decision making, making the Justices too free to consider the public impact of their decisions because they can do so without suffering the constraints of public criticism.¹⁵⁹

The problem is that judicial candor about considering the public impact of the Court's decisions may be particularly harmful to the Court's public standing. This danger is highlighted by the studies emphasizing that how judges reason may matter as much as the decisions they reach.¹⁶⁰ If paying attention to the public impact of the Court's decisions makes the public see the Justices more like politicians or conclude the Justices are acting extraconstitutionally, then the Justices' candor may cause the very damage to the Court's sociological legitimacy that they were trying to avoid.

One response would be to exempt the Justices from the requirements of judicial candor when doing so protects the Court's public standing. Michael Wells has advocated such an approach, arguing that "putting an attractive face on its rulings may serve the Court's vital institutional need for public confidence."¹⁶¹ In his view, the central importance of preserving the Court's sociological legitimacy justifies the Court's engagement in appearance management when describing its

157. See *supra* text accompanying note 50.; Grove, *supra* note 5, at 2263–64.

158. See Richard H. Fallon, *Essay: A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2266 (2017).

159. See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 732, 737 (1987) ("In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes and precedents count for little if judges free to believe one thing about them and say another."); see also Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 988–90 (2008) (canvassing arguments for and against judicial candor).

160. See *supra* text accompanying notes 106–109.

161. Wells, *supra* note 144, at 1014.

reasoning and as a result offering those reasons that the public will accept instead of full candor.¹⁶² Some might question whether broad judicial candor (as opposed to candor in discussions with other judges) is really likely to yield a more accountable and careful approach to the role of sociological legitimacy in judicial decision making.¹⁶³ It seems also possible that fears of public criticism might make Justices wary of developing a coherent, higher profile account of when to take that impact into account, leading them instead to adopt an ad hoc stance or just forego consideration of public impact altogether. Indeed, the extent to which legally legitimate decision making requires full disclosure of all the factors a judge considers, or whether selective disclosure or even mere avoidance of intentional deception would suffice to meet the requirements of reasoned adjudication, is a matter of some debate.¹⁶⁴

Fallon, however, appears committed to candor, identifying reasoned judicial argumentation undertaken in good faith as essential for legally legitimate judicial decision making. At least under his account, therefore, some judicial candor about considering the public impact of a decision would seem to be required. Interestingly, in an earlier article, Fallon acknowledged gradations in the candor requirements, distinguishing between the obligation and the ideal of judicial candor. On his view, judges “who offer what look on the surface to be reasons for their decisions but provide scant insight into their actual reasoning or the difficulty of a legal problem . . . fall far short of the ideal,” yet “normally do not breach an obligation of candor,” absent “a willful effort to deceive or the utter unintelligibility of proffered legal reasoning.”¹⁶⁵ This account might create an opening for Justices to forego discussing concerns about the impact a decision might have on the Court’s public standing when that impact does not play a significant or determinative role in their decision making. But that would still require the Justices to be candid in cases in which they put heavy reliance on the effect a decision might have on the Court’s public standing—arguably, the very instances that will make the Court look most politicized.

An alternative approach might be to question whether the Justices’ acknowledging that they considered the impact of a decision on how the Court is viewed would in fact undercut the Court’s sociological legitimacy. Arguably, such

162. *Id.* at 1051.

163. See Fallon, *supra* note 159, at 2283–85 (describing how candor might harm judicial decision making); Scott C. Idleman, *Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1335–57 (1995) (critiquing several justifications for judicial candor).

164. Compare, e.g., Fallon, *supra* note 159, at 2269 (stating reasons minimally, but intelligibility and without deception, is sufficient), and Idleman, *supra* note 164, at 1310 (“[J]udges . . . may regularly forgo candor under the principles of logic and prudence and still retain their political legitimacy and institutional integrity.”), and Wells, *supra* note 144, at 1051–54 (arguing that sometimes managing its public appearance is more important for the Court than candor), with Schwartzman, *supra* note 160, at 990–91 (arguing that “judges must make public the legal grounds of their decisions” for their decisions to be legitimate); Shapiro, *supra* note 160, at 737 (“requirement that judges give reasons for their decisions . . . serves a vital function in constraining the judiciary’s exercise of power”).

165. Fallon, *supra* note 159, at 2269.

openness might enhance the Court's standing by demonstrating the Justices' honesty, especially for those who believe such external factors determine judicial decision making at least as much, if not more, than internal legal ones.¹⁶⁶ And it would safeguard the Court against potential hits to its legitimacy, should it be revealed that the Justices had decided based on sociological legitimacy concerns and never acknowledged it. David Shapiro has made this point about judicial candor generally, arguing that "lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges."¹⁶⁷ There is something to all these points, and more research is clearly needed to determine whether individuals really view judicial consideration of public impact to be purely political and if judges can alleviate that concern by greater openness. But the Justices would still face a quandary if they concluded that public acceptance of the Court required that they consider the public impact of certain decisions in deciding how to vote, yet they would damage the Court's public standing if they were open about doing so.

I find myself drawn to a slightly different conclusion. Although judicial candor likely does have some flexibility in its joints, I agree with Fallon that an honest explanation of the reasons for a decision remains a core demand of our constitutional system. And today's increasingly ideologically and politically world, both on the Court and off, suggests that the Justices cannot simply ignore the impact that their decisions may have on public confidence in the Court. Perhaps the Justices can take this impact into account openly without undercutting their public legitimacy, but the contentiousness over consideration of sociological legitimacy suggests that the Justices must do more. Specifically, I think it is incumbent on members of the Court to develop a persuasive account of when public confidence is a legitimate consideration in judicial decision making. It is the responsibility of the Justices to convince their many publics that they are indeed acting in a legally legitimate manner—acting like judges rather than politicians in robes—when they seek to preserve public confidence in the Court. Such an account of when sociological legitimacy is a legally legitimate consideration is becoming increasingly essential for the Court to navigate our current world of deep and lasting partisan and ideological divides.

166. *Cf.* Kahan, *supra* note 144, at 60–63 (suggesting that greater judicial candor about the vulnerabilities in their reasoning will dampen "the tendency of those whose identities are threatened by the decision to suspect bias by the Court").

167. Shapiro, *supra* note 160, at 737.