THE SUPREME COURT AND THE POLITICS OF LANGUAGE: AN EMPIRICAL INVESTIGATION

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Abstract

This dissertation argues that existing explanations of judicial power emphasizing limits on the ability of the judiciary to change society miss an important mechanism of judicial influence over the language of political discourse. Working from research in empirical judicial politics, political psychology, and political theory, this dissertation argues that by promoting constitutional language in select cases, Supreme Court majorities can influence public discourse by promoting or discouraging the use of constitutional language in mainstream media coverage of political controversies. I report the results of two case studies using newspaper editorials and articles as well as other communications media. I find strong evidence for judicial influence over political language in mainstream media coverage of both the abortion and gun regulation debates.

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Chapter One: One Language Under Law

In1966, the *Los Angeles Times* published an editorial fairly typical of how reform advocates talked about abortion policy prior to *Roe v. Wade* (410 U.S. 113, 1973). The editorial is atypical only in its length—twelve paragraphs instead of the usual three or four—and touches on almost every prominent argument that reform advocates were advancing in the 1960s (*LAT:* 8/1/1966). It discusses the suffering borne by women as a result of unsafe abortions, the risk of failed abortions, and the cruelty of preventing physicians from aiding those in medical need. It discusses cases of rape and incest, of underage girls, of unwanted children, of the effects of congenital disorders, and it discusses the nearly ten thousand American women dying from unsafe abortions every year. It argues that legalizing abortion would be humane, that it would not supplant birth control or promote promiscuity, and that it would save lives.

What it did not mention was privacy. The word did appear, however, in the newspaper's editorial page coverage on the day following the *Roe* decision, when the editors wrote,

> "It is obvious that the best way to handle unwanted pregnancies is to prevent them. Abortions are, for many,

> immoral, but there is nothing in this decision to force the unwilling to submit to the procedure. *More important is the right of privacy, which surely must include protection from unreasonable intrusions by government in private matters*" (*LAT*: 1/23/1973, italics added).

More important is the right of privacy, "surely," so sure that in the eleven editorials published in the decade prior to *Roe*, not once does the word appear on the editorial pages of the *Los Angeles Times* in connection with abortion.[1] In 1973, the editorial board of the *Los Angeles Times* declared a right to privacy to be "surely" the basis of an abortion for the first time. It would not be the last.

During this time, a second transformation paralleled the rise of a language of rights and the fall of a language of public health. In 1970, the *New York Times* published an editorial in support of an abortion reform law being debated in the state legislature. The editorial, which ran three paragraphs, reads, "reform…would place responsibility where is should be in a modern and free society—in the decision of a woman and her physician" (*NYT*: 4/9/1970). Another editorial, published later that month, reads, "the decision to have an abortion is one properly to be left with the individual woman and her physician" (*NYT*: 4/29/1970). Three years later, in their editorial endorsing the United States Supreme Court's 7 to 2 decision in *Roe v. Wade*, the editorial board of the *Los Angeles Times* wrote, "[t]he decision will not satisfy those who had argued that the mother should make the decision. It insists that the decision be made with the personal physician" (*LAT*: 1/23/1973).

[1] The closest the paper had ever come to endorsing a privacy basis for abortion access was an op-ed by Ernest Conine in 1972, in which he mentions that then-candidate George McGovern "didn't abandon his stand that abortion should be a decision between doctor and patient" (Conine, *LAT*: 6/22/1972).

In the years that immediately followed that Supreme Court ruling, the way advocates discussed women's abortion decisions had changed in a subtle but profoundly important way. Toward the end of the decade, editors would write of "a woman's right to freedom of choice;" that "a woman's right to personal privacy includes her decision whether to end pregnancy," (*LAT*: 7/1/1980) and that "the state has no business intruding into the individual woman's abortion decision." In the years following *Roe*, the abortion decision, previously talked about as medical decision made between a woman and her doctor, was transformed into a purely personal decision, devoid of any obvious medical significance.

By the end of the 1970s, American abortion advocates had largely divested their rhetoric of the language of medicine and public health. What emerged was a rhetoric characterized by an individual autonomy and a conception of the practice so abstract, so divorced from the reality of women's experiences, so much more metaphysical than physical, that one is hard-pressed to find evidence in the discourse of an established medical procedure performed on around a million American women per year (Center for Disease Control, 2007). Where there had once been a policy discourse informed by the lived experience of women, doctors, and public health professionals, in the years following *Roe*, talk about abortion in the United States became increasingly consumed by a language of rights.

This dissertation is an exploration of the institutional phenomenon underlying this transformation. I investigate how Supreme Court intervention in a policy domain may upend established discourse, promoting certain kinds of arguments while encouraging the

desertion of others. In the next chapter, I provide an account of the Court's discursive role in the liberal state. In chapter three I explain the logic and process of the methods and report the results of two case studies in the final two chapters.

This chapter is divided into three sections. In the first, "A Post-Legal Account of Judicial Power," I explain the abandonment of the law as the dominant explanation of judicial behavior. In the second, "What Can Courts Do?," I sketch a part of that evolution by reviewing the contemporary account of judicial power, which I argue is unified by two questions and one methodological innovation which enabled the post-legal turn. In the third, "Words Courts Use," I suggest that there is good reason to think that the judiciary may wield an unusual kind of influence over language, by sanctioning or marginalizing arguments about the meaning of the text, norms, and national identity which together comprise the United States Constitution.

A Post-Legal Account of Judicial Power

Two general questions have dominated recent political science research in American judicial politics: (1) Why do justices of the Supreme Court make the decisions they do, from reviewing certiorari (Brenner and Krol, 1989; Brenner et al., 2006; Caldeira and Wright, 1990; Perry, 1994) to behavior in conference (Bonneau et al., 2007; Johnson et al., 2005) to the justices' policy decisions? (Epstein et al. 1998; McAtee and McGuire, 2007; Richards and Kritzer, 2002; Segal and Spaeth, 2002) and (2) "To what extent and when is the Supreme Court able to achieve the policy results it endorses, considering constraints on the institution's ability to function in a politics dominated by Congress and the President (Bergara et al., 2003; Eskridge and Ferejohn, 2010; Segal,

1997; Sala and Spriggs, 2004; Spiller and Gely, 1992; Whitmeyer, 2006), public majorities (McGuire and Stimson, 2004; Nicholson and Howard, 2003), and no means of enforcement amidst substantial agency loss (Rosenberg, 2008)?

Explorations of these two general questions have focused on the policymaking power in both cases, emphasizing policy orders in understanding preferences and setting policy change as the standard for judicial power. Social scientists addressing both questions have assessed the power of the judiciary to influence politics by measuring the ability of justices in a winning coalition to directly enact their policy preferences against both internal and external constraints (Rogers, 2001; Rosenberg 2008; Vanberg, 2001) but little work has explored indirect mechanisms of influence.

The currently dominant social science account of judicial power is the result of a critical reaction to the failure of a prior, normatively-informed account of the judiciary. The traditional approach descends from Hamilton in *Federalist* 78 (1788) and reaches its ultimate expression in Bickel's (1961) *The Least Dangerous Branch*. Hamilton is interested in describing the Supreme Court by explicating its function within the federal system, seizing only the limited power that can be described by the expression of "neither force nor will, but merely judgment" (Hamilton, 1788). Hamilton argues that the nature of the Court's power prevents it from abusing judicial review and limits its function to policing the legislature.

The decline in social science departments of the legal account of judicial power was hastened by the increasing empirical sophistication of social scientists, nontraditional legal scholars, and historians. During the Twentieth Century, different elements of the

traditional legal model were contradicted by intersecting critiques (Beard, 1913; Cardozo, 1921; Dahl, 1957; Murphy, 1964; Shapiro, 1964). Taken together, these approaches rejected the perceived or possible independence from politics of the Supreme Court. Instead, they focused on empirical evidence of political influence on the judiciary, particularly the tendency of the Court to favor powerful litigants, and shifted focus away from the logic and design of the law itself.

Within the legal community, pretenses about the neutrality of law and legal concepts and frameworks were rejected by realist (e.g.: Cardozo, 1921; Hohfeld, 1913; Ross, 1957; Pound, 1908) and later critical (e.g.: Bell, 1973; Crenshaw, 1991; Delgado, 1984; Kennedy, 1979), economic (e.g.: Calabresi, 1961; Coase, 1960; Posner, 1973, 1979), and pragmatic, non-formalist (e.g.:Breyer, 1982; Jolls et al., 1998; Sunstein, 1989) approaches. Within the parallel literature on judicial decision making, the legal model (e.g.: Weschler, 1959; White, 1978) was mostly displaced by extralegal accounts (Brisbin, 1996; George and Epstein, 1992; Richards and Kritzer, 1992) emphasizing the justices' policy preferences (e.g.: Rohde and Spaeth, 1976; Segal, 1984; Spaeth, 1961; 1963; Spaeth and Segal, 1993) and strategic considerations (e.g.: Boucher and Segal, 1995; Epstein and Knight, 1998; Matlzman et al., 2000). The legal account of judicial power, because it treats judicial power as arising from its politically independent function within the separation of powers, is inconsistent with extralegal theories of decision making.

Scholars have used several terms to describe the piecemeal rejection of the legal model. George and Epstein (1992) described them as "extralegal," which seems to

include scholarship accepting some weak or stronger version of the attitudinal model, including most work on strategic interaction. I refer to these collectively, as well as approaches in legal, economic, and historical scholarship which contradict various components of the classical legal account, as the post-legal account. I use the term "post-legal" to emphasize the critical intellectual turn by which scholars rejected the normative myth of the law in favor of scientific and historical approaches.

The post-legal account describes a political system with a politically-cognizant judiciary headed by a Supreme Court whose justices are strategic seekers of institutional strength, individual strength within their institutions, and the public execution of their policy preferences. The justices in the post-legal account wield their institutional power not because the Constitution compels them but because they have the political opportunity and policy preferences.

The most important contradiction between the post-legal and legal accounts is the rejection in the post-legal account of the priority afforded the counter-majoritarian dynamic that underlies the classical legal model. Instead, the post-legal account prioritizes the (usually majoritarian) constraints imposed on the Court. Instead of pursuing analysis of the ethereal law, the post-legal researchers examine measurable phenomena: perceived policy preferences, policy orders, and policy outcomes. Ethereal considerations of "the law" cannot be quantitatively measured; policy preferences, orders, and outcomes can be quantified and hypotheses about them directly tested.

As a consequence of this increased empirical sophistication, social scientific explanations predicated on observation of these variables reveal a highly predictable

Supreme Court contingent on a supportive political environment to successfully execute favored policy. While post-legal approaches fall on a broad spectrum from those arguing for a politically constrained judiciary (e.g. McCloskey, 2004; Rosenberg, 2008) to those arguing for a more (conditionally) dynamic one (e.g.: Canon, 1998; McCann, 1986; Schultz and Gottlieb, 1998), they are united by their (1) rejection of law as the dispositive factor in determining case outcomes, (2) emphasis on political conditions for the execution of Supreme Court policy preferences, and (3) use of policy preferences, orders, and outcomes instead of legal materials to study the power of the judiciary.

Seminal in the post-legal approach is Rosenberg's *Hollow Hope* (1991/2008), evaluating the judiciary's design and execution of social policy. I describe the post-legal account of judicial power by using Rosenberg's (2008) critique of its legal predecessor as a framework. I outline the post-legal critique as a sum of the considerable empirical research that legal accounts of judicial power dramatically overstated the importance of legal content and understated the importance of the broader political environment in explaining the logic of judicial actions and the limits of judicial power. At the end of the section I return to the conceptual focus on policy preferences, orders, and outcomes, and suggest an alternative research path.

What Can Courts Do?

Rosenberg (2008) argues that while the Court has a limited capacity to bring about social change, that capacity is highly contingent on favorable political factors and has been overstated by both political scientists and legal experts. Rosenberg's argument

provoked substantial discourse along methodological, historical, and normative lines (see generally Schultz, 1998). Rosenberg identifies three general constraints on judicial power: limitations of judicial independence; the inability of courts to develop, execute, and monitor effective public policy; and the nature of constitutional rights themselves (Rosenberg, 2008: 10-36). The argument I make in this dissertation is, to a great extent, inspired by and in response to Rosenberg's conception of the relationship between the judiciary and society, and I seek to both complicate and critique this account of constraints on judicial power. I discuss each in turn.

Rosenberg describes four particular limitations on judicial independence. The lawyers who get appointed to the Court tend to reflect the preferences of nominating presidents and must pass Senate confirmation. The Court may be reluctant to jeopardize its reputation by issuing opinions that run against majority preferences of the public. The Congress may constrain the Court, either by legislatively overruling its interpretations of statutes, removing the Court's jurisdiction, or rewriting the rules of federal procedure. Finally, the Court follows a norm of deference to the federal government, which wins more than 70% of its cases and on which the justices of the Court often rely, through the Office of the Solicitor General, for information and effective legal argument.

The lawyers who get appointed must be agreeable to a president, but it does not necessarily follow that presidents or senators can accurately estimate future preferences, both because of a lack of contemporary information and the possibility of future ideological change (Epstein et al., 1998; Segal et al., 2000). Disagreement between the statistically generated Martin-Quinn scores (Martin and Quinn, 2002) and Segal-Cover

scores (Segal and Cover, 1989), based on interpretations of news media assessments of the ideology of Court nominees, suggest a not insignificant magnitude of incorrect public estimation of preferences at nomination.

Further, the relative unlikelihood of any individual replacement on the Court moving the median vote gives presidents a relatively free hand to nominate more radical justices than might otherwise be acceptable to the Senate (Rohde and Shepsle, 2007). Whitmeyer (2006) argues that of the last nine presidents, four have had the opportunity to move the Court's median vote in at least a quarter of cases. Most significantly, he finds that the Senate may be more deferential in significant than insignificant appointments. Johnson and Roberts (2004) review public presidential statements to demonstrate that presidents strategically expend political capital to support nominees in the face of a hostile Senate. Epstein et al. (2006) show that ideological considerations have dominated the appointment process since the Eisenhower administration.

In sum, Rosenberg's assessment about the role of the appointment process is right, but may understate the capacity of presidents to put ideologically radical justices on the Court. This is not a significant problem for his argument given his focus on the policy preferences of opinions of the Court, but might matter a great deal if our account of judicial power were expanded in response to findings that radical justices may influence the political process or future courts through their writings. Clearly justices believe they have this power, or they would not author dissents.

The hesitancy of the justices to buck public opinion has been subject to similarly extensive analyses. The classic of the genre and a transitional case of post-legal

displacement of the classical legal model is Dahl's (1957) argument that the Court is institutionally disposed to defend established governing regimes, but Dahl is difficult to square with the activism of the Warren Court, then only three years old. Following Caldeira's (1991) excoriation of judicial politics scholarship for underexploring this relationship, more recent research has largely confirmed this view though not without complicating it. Generally, the Court has shifted alongside public opinion (Link, 1995; Mishler and Sheehan, 1993; 1994)[2] or shown deference to local political majorities (Brace and Hall, 1997). Though some macro-level analyses have failed to conclusively demonstrate a public opinion constraint (Stimson, et al., 1995), several particularly expansive analyses using extensive, quality data have suggested that justices balance their own preferences and those of public opinion, both in specific issues and generally over time (Flemming and Wood, 1997; McGuire and Stimson, 2004).

The Court's relationship with public opinion is not, however, a one-way street. There is good reason to believe that the Court has a limited but measurable capacity to move public opinion under favorable conditions. In a remarkably novel and insightful analysis, Baird and Hurwitz (2002) demonstrate a profound theoretical bias in the separation-of-powers work involving the Court, noting that scholars focused on American political institutions have tended to ask how other branches constrain the Court but have neglected to work in the opposite direction, exploring how the Court constrains other branches. In a cleverly designed time-series analysis, they show, amidst high

[2] Though see Norpoth and Segal (1994) for an alternative perspective. Mishler and Sheehan (1994), responding to the article in a comment, intriguingly anticipate the development of Martin-Quinn scores, writing, "Our analysis…does not argue against the attitudinal model…but in favor of a more subtle version in which individual attitudes are treated not as static and immutable but as fluid and dynamic" (Mishler and Sheehan, 1994: 722).

endogeneity, strong evidence that both the Senate and the President (but not the House) respond to Court policy preferences over time. That work is substantiated by McFarland's (2005) analysis finding the careful use of public support as the most important locus of Court power.

Evidence generally favors limited influence in highly salient issues. Johnson and Martin (1998), working from the elaboration likelihood model of persuasion (Petty and Cacioppo, 1986), find measurable impacts on public opinion following initial rulings in salient, controversial issues, but these impacts were diminished in subsequent rulings. Brickman and Peterson (2006) revisit the Johnson and Martin conditional response approach and argue that temporal public opinion effects outweigh previous Court participation in an issue in predicting public support for Court actions. Clark (2009) reviews the considerable evidence on Congress-Court relations and concludes that the relationship is marked by judicial self-restraint, mediated by the apparent popular mandate of Congress. Other work (Franklin and Kosaki, 1989; Hoekstra and Segal, 1996; Hoekstra, 2003; Stoutenborough et al., 2006) emphasizes the conditions of influence, with scholarly debate focused on the challenges of identifying Court influence against the broader political system (Caldeira and Gibson, 1992; Gibson et al., 2003).

An important challenge to Rosenberg on this line is research suggesting that the Court has the power to increase, albeit briefly, national attention on a policy issue. Flemming, Wood, and Bohte (1997) find dramatic evidence that salient Court decisions increase general issue salience and that these impacts can be long lasting and disturb established political coalitions. The analysis begins to depart from the dominant

methodological tradition of post-legal political science in not relying on the Court's policy order as a mechanism of power. Instead, it hinges on action rather than inaction in an issue domain and measures something beyond immediate policy outcomes.

In a new section for the second edition, Rosenberg (2008) argues that other causes dwarf the influence of the Court in explaining the changing salience of and attitudes toward civil rights for gays and lesbians. Consistent with his general theory, he attributes shifting attention and attitudes toward same-sex marriage in particular to broader mobilization efforts (Rosenberg, 2008: 355-419).

The logic of congressional constraint is obvious, and a variety of models of varying formality have followed Marks (1989) describing a theoretical strategic interrelationship (Eskridge, 1991; Ferejohn and Shipan, 1990; Knight and Epstein, 1996a; 1996b; Spiller and Gely, 1992; Spiller and Tiller, 1996). Empirical evidence of the relationship has been more limited, however. Clark and McGuire (1996), studying congressional behavior in response to the Court's protection of flag burning as constitutional speech in *Texas v. Johnson* (491 U.S. 397, 1989), find that legislators' votes are best predicted by their ideology and their constituents' mean ideology rather than institutional factors. Keck (2007) finds evidence of Court-Congress conflict in cases in which the Court divides into ideologically diverse coalitions. Martin (2001) shows the members of Congress anticipate potential Court behavior and seek to constrain it in the legislating process. Clark's (2009) analysis confirms this, describing the constraint as principally one of public opinion being mediated by congressional action. Similarly, Whitmeyer (2006) finds a presidential constraint in active controversies of power roughly

equal to his or her ability to constrain by appointments. Each of these studies hinges on policy orders and outcomes.

Finally, there is the Congress' ability to overrule judicially promulgated rules of federal procedure. It has done so once, in 1971, though the threat of doing so may be, considering Martin (2001), adequate to preempt judicial action.

Measuring constraints the Court may impose on other institutions is made difficult by indirect routes of influence. For example, Patton (2007) found contingent evidence that constitutional regimes influence social legislation in state legislatures, an important step in showing Court influence outside of federal politics, suggesting a broader, less consciously strategic influence in American political culture. Similarly, Hoekstra (2005) demonstrated the complexity of assessing federal judicial constraints on state supreme courts.

Generally, the evidence for Rosenberg's first constraint is strong; justices end up looking quite similar to the presidents who nominated them and the public moods in which they act. Just as presidents may expend political capital to push the ideological envelope of their nominees against hostile a hostile Senate, so too may justices choose cases of importance to them to dissent, but less often as political viability decreases.

Considerably less political science research has explored the second constraint, the limited ability of the judiciary to design, execute, and monitor public policy. Little work has been done within political science on the inefficacy of the Court's policy design process. Natural and social scientists alike have been flummoxed by the Supreme Court's handling of technical policy issues, for example in *Industrial Union Department v.*

American Petroleum Institute (448 U.S. 607, 1980), better known as "the benzene case," in which Justice Stevens, writing for the Court, provoked scholarly condemnation in the legal community for his interpretation of the Occupational Health and Safety (Stone, 1981) and in the scientific community for the Court's indelicate handling of the technical problem of extrapolating from existing data to nonexistent data (Thomas, 1982).[3] The Supreme Court's opinion in *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers* (531 U.S. 159, 2001), a landmark 5-4 ruling profoundly limiting the regulatory reach of the Clean Water Act, was founded on such a blatant misunderstanding of hydrological science that an entire issue of *Wetlands*, the technical journal of the Society of Wetland Scientists, was dedicated to making sense of the ruling and criticizing the justices in the majority for their failure to appreciate the interconnectedness of small and large waterways (Nadeau and Leibowitz, 2003).

Work on implementation has been mixed. Gruhl (1981) argued that lower court judges actively anticipate future Supreme Court rulings, despite potential policy differences and the opportunity to slow change with which they may not agree. Lindquist et al. (2007) argue that the Court uses its limited resources for monitoring compliance to focus on recent cases, the policy behavior of the individual circuit courts, and significant differences is policy aims between the Court and circuit courts. Beyond the judiciary, the Court has virtually no means of promoting compliance in bureaucracies, whose staff can use their superior knowledge of and presence in institutions to frustrate the policy aims of judges (Diver, 1979).

[3] Thomas does, however, give Justice Stevens credit for "clearly recognize[ing] the difficulty…[of] working at the 'frontiers of science'" while making clear that the determination by the agency official was not "a mathematical straightjacket" (Thomas, 1982: 266).

The nature of constitutional rights, the last of Rosenberg's three constraints, functions to frustrate majority coalitions on the Court in a few different ways. The text of the Constitution limits the range of rights which might plausibly be claimed while imposing other apparent obligations which may be at odds with the majority coalition's policy preferences. Cases must meet a long set of inconvenient criteria which together conspire to limit the Court's control over its own agenda. Finally, opportunities for significant expressions of Court power are generally anti-democratic. Consequently, judicial actions may complicate or frustrate existing, ascendant political movements.

The Court has significant but far from absolute capacity to overcome these limitations (Kennedy, 1997; Tushnet, 1981). Examples of the far boundaries of the Court's ability to control the range of constitutional rights include Justice Douglas's articulation for the Court of the right to privacy in the "penumbras" of other rights (*Griswold v. Connecticut* [381 U.S. 479], 1965) and of the *Lochner*-era Court's defense of the right to contract in the Due Process Clause (*Lochner v. New York* [198 U.S. 45], 1905). The long tradition of "ignoring" the Second Amendment, for example, was famously critiqued by Sanford Levinson (1989).

The limitations of case selection are less significant than they may seem; the sheer volume of cases appealed to the Supreme Court in any given year provides the justices with ample opportunity to consider almost any standing constitutional regime in any given year, and major changes to federal public policy are more likely than not to generate active controversies. Further, following Epp (1999), Baird (2004) shows that if the Court seeks additional major opportunities to act in an issue domain, it is able to

generate them by ruling in minor controversies in the that domain, giving it more total cases from which to choose and increasing the ability of a majority coalition to find a case with facts favorable to their preferred outcome.[4]

Finally, Rosenberg makes a compelling case that the anti-democratic nature of rights seriously complicated existing political movements in important policy domains, including abortion access, capital punishment, and civil rights for structurally disempowered groups. The story is complex and the Court's impact not entirely or even necessarily counter-productive, as Rosenberg admits when he writes, "courts played an important role in keeping the sit-in movement going, ending the Montgomery bus boycott by providing the boycotters with leverage they could use, furthering school desegregation by threatening to cutoff federal funds under Title VI, and upholding affirmative action programs" (Rosenberg, 2008: 431).

Rosenberg, like almost all of the post-legal scholars, is able to devastate traditional legal accounts of civil rights, gender equality, and abortion by ruthlessly marshaling armies of data concerning the actual implementation of policies. In this sense he exemplifies the best of post-legal scholarship; ignoring the metaphysics of the law and focusing on the judiciary as a policy making institution is what made the post-legal turn possible. That focus, however, is not necessary to the account, and elements of judicial power existing beyond what can be discerned from a focus on policy preferences, orders, and outcomes.

Rosenberg's explication of the relationship between Court action and political movements is insightful and significant but also incomplete. His analysis is focused on

[4] Though see Peters (2007) for an alternate perspective.

direct policy change with a brief consideration of Court impacts on salience. Direct policy change is the most important measure of influence as well as the most obvious, but it is not the only possible kind of influence. Additional avenues of influence may complicate but not necessarily refute Rosenberg's conclusions.

The Court's relationship with any existing political movement involves, on the Court's end, more than the execution of its announced policy order. The relationship also involves the language the Court uses, a language that ultimately becomes embedded within political discourse, a process the results as a consequence of the Court's sanction of a constitutional regime. The Court's decisions influence the way the news media, public officials, issue advocates, and ordinary Americans talk and think about political controversies. This is a critical part of the story of the relationship between the judiciary and American society and it is one that has been underexplored by political science.

What research into law and society has accomplished is to undermine the traditional legal account of a politically independent Supreme Court composed of nine Platonic guardians of the rule of law. By using quantitative evidence of policy preferences, orders, and outcomes, the post-legal account argues for a Court possessed of a contingent policy power, conscientious of its use against popular and Congressional majorities, and dependent on friendly actors and an adequately compliant or disinterested public for its execution. In the next section I expand the post-legal account by suggesting a further complication of the legal account, a complication hinging not on the justices' policy preferences but on the language in their decisions.

Words Courts Use

The critical turn in judicial politics scholarship came because of a shift in the unit of analysis. As political scientists' attention moved from qualities of the law to quantities of preferences, decisions, and outcomes, they reconstructed the Supreme Court as an ordinary political institution possessed of ordinary political elites. The replacement of jurisprudence with rational maximization of policy preferences made suspect scholarship unconcerned with quantifiable variables.

At the same time judicial politics scholars were excising their research of untestable philosophical demons, scholars in political psychology were validating the importance of language in guiding and constraining political processes. Many lines of inquiry in political psychology offer promise for exploring institutional problems in novel ways, but I am going to focus on some findings from the literature on priming and framing and, while I explore a case that is dissimilar to each, argue that they suggest something important for the study of judicial politics.

Priming and framing are two related but distinct phenomena of communication. To frame a message is to "select some aspects of a perceived reality and make them more salient…in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation" (Entman, 1993: 52). Effective frames influence the manner in which a message is received and responded to.

Priming similarly influences individual reactions to received messages, but by cuing existing considerations in the receiver rather than providing an explicit evaluative narrative. By discussing abortion policy as abortion "rights," a communicator can prime the receiver of a message to think of morality or constitutionalism; the same conversation

about abortion "policy" happens without literal recourse to rights. Primes increase in the mind of the receiver the general salience of considerations related to the prime.

The power of primes and frames to influence human cognition has been made vivid by considerable research in social psychology. Of particular interest here are some of the ramifications explored by political psychologists. Both effects have been thoroughly explored and used to predict and explain a variety of political behaviors and dispositions. Framing effects have been used to explain presidential rhetoric (Barker, 2005), foreign policy decisions (Garrison, 2001), and sustained support for President Clinton during his impeachment (Shah et al., 2002). Priming effects have been used to explain the efficacy of campaign materials (Mendelberg, 2001), media coverage of policy problems (Iyengar and Kinder, 1987), elections to the Senate (Druckman, 2004), and basic policy dispositions (Krosnick and Kinder, 1990).

The power of framing effects can appear great. Jacoby (2000), for example, shows that fundamental views about the size of government and popular commitment to the welfare state can be made to hinge on framing effects. Beyond their potential strength, evidence for framing effects is stronger than for priming effects, which are subtler. Some research has suggested that the phenomena identified as priming effects may be misunderstood. Miller and Krosnick (2000), for example, show that increasing cognitive accessibility of a consideration does not necessarily produce priming effects. Consistent with Druckman's (2001) evidence that framing effects are contingent on the trust the receiver places in the credibility of the messenger, Miller and Krosnick show that apparent priming effects may be better explained as individuals responding to media

cues about issue importance. Lenz's (2009) work suggests that much of what is explained as priming effects may be better explained as a kind of learning, in which cues are connected with policy signals from trusted elites. Though phenomenologically distinct, this parallels Druckman's (2002) suggestion that, counter-intuitively, reliance on frames may be part of a broader, competent reasoning strategy for minimally-attentive citizens engaging in satisficing (Krosnick, 1991; Simon, 1956).

Invocations of civil and political rights in ordinary language do not fall appropriately into either category. References to abortion rights do not, on their own, constitute framing, because they lack a context that provides an evaluative criterion. They are considerably more, however, than just primes, because they do more than heighten the salience of a consideration; they do imply something like an evaluative criterion. They connect immediate, material policy considerations with shared commitments to core political values. A discussion between two advocates, one supporting a right to reproductive choice and the other a right to life, involves more than persistent priming of each other; it involves the commitments inherent in the context of a liberal constitutional republic. Rights talk bears a superficial resemblance to a series of priming effects, but also functions to substantiate and invoke broader collections of frames which, together, comprise the political culture which constrains and directs individual attitude formation and expression.

In his heavily-cited definition and analysis of frames, Entman (1993) proposed that culture is "the stock of commonly invoked frames; in fact, culture might be defined as the empirically demonstrable set of common frames exhibited in the discourse and

thinking of most people in a social grouping" (Enteman, 1993: 53). Rights regimes, which the Supreme Court can impose in constitutional cases, do not affect only public policy. By legitimizing and popularizing constitutional rights, the Supreme Court further produces framing effects in future public policy discussions related to those rights. In essence, the Court, by controlling the language of policy discourse, influences the fundamental constituent elements of the American political culture.

There are good empirical reasons to think that vocabularies of rights, enshrined in the public consciousness by media elites, would have longstanding influence over policy discourse. The efficacy of civil rights frames is documented by a variety of studies in a variety of issue domains. Nelson et al. (1997), for example, show tolerance for offensive political speech (a KKK rally) is higher when presented in a civil rights frame—freedom of speech—instead of a law and order frame. Sniderman et al. (1991) show that respondents' attitudes toward the privacy rights of AIDS patients depended on whether subjects received a civil rights or public health frame (Sniderman, et al., 1991: 52). By creating and sanctioning rights regimes, the Supreme Court fosters longstanding frames which media and opinion elites can use to advocate unpopular policies by situating them amongst more popular political ideals.[5]

Structural characteristics of American political institutions encourage the durability of these regimes. Keck (2002), extending work form American political development to judicial studies, argues that the rise after the Warren and Burger Courts of conservative-favored rights without a significant corresponding fall of liberal-favored

[5] While individual rights are often politically unpopular (Gamble, 1997), commitment to civil rights principles is quite high (Sullivan, et al., 1989).

rights reflects the path dependency of the institutions involved in constitutional development. This legal phenomenon further extends the apparent lasting influence that invocations of rights have in our political discourse.

All political elites have some kind of political influence simply by the status of their power. Significant and unique to the Court is its reputation among the public and, to a lesser extent media elites, for being less political than the other branches (Casey, 1974; Franklin and Kosaki, 1995; Hibbing and Theiss-Morse, 1995; 2002; Mondak, 1990; Scheb and Lyons, 2000; Slotnick and Segal, 1998; Spill and Oxley, 2003). Justices actively cultivate the "myth of legality," suggesting they recognize the distinctive power that flows from being perceived to operate above the political fray (Tyler and Mitchel, 1994).

There is good evidence, however, that it is not so much the perception of distance from politics but rather proximity to law that drives the consistently high evaluations the public give the Supreme Court. In a breakthrough study, Baird and Hurwitz (2006) show that individuals who believed legal processes guided a Court decision, regardless of individual agreement with that decision, supported the Court. Consistent with Fiscus's (1991) argument, it seems that the power of the Court depends on Americans' common overestimation of the role of legal rules in constraining judicial policymaking discretion.

The Supreme Court is strongest when it speaks in legal language. In creating and cultivating rights regimes, the justices do more than erect a constitutional firewall between favored policies and popular majorities. The justices cannot remove a political question from political discourse, but they can change both the specific policy questions

and the meaning of the language used to debate those questions. The Court's decision in *Roe* did not end abortion legislation or debate. Instead, it moved the legislative focus to the boundaries of the core holding—whether to require parental or spousal consent, how to restrict who can perform abortions and when, and so forth—and moved the rhetorical focus to the rights regime that displaced a discussion previously centered on public health and the social welfare of women.

Contemporary research on judicial power has overlooked the power of the Court to influence political discourse; it has done so because that influence is predicated on the Court's use of language rather than its policy order. This dissertation is an effort toward invigorating the post-legal account by moving beyond policy outcomes as the sole unit of analysis. In the following pages, I describe the rediscovery a distinctly legal authority—the sanction of civil and political rights—as a way of exploring a kind of judicial power that is found nowhere in the law. I show how that authority, derived from the privileged place the Supreme Court holds in the American psyche, allows the justices profound and lasting influence over how we debate policy in our democracy.

In the next chapter, I develop a perspective of the institutional position of the Court inspired by Rawls (1995) conception of public reason. I suggest that Rawls' account, taken as both an institutional aspiration and sometimes success, provides a useful perspective for thinking about judicial influence on language. I then offer a perspective developed from Rorty (1979; 1989; 1998) to understand how language functions as a site of political contestation.

Chapter Two: Two Perspectives on Judicial Influence

The post-legal turn in judicial politics scholarship describes the Supreme Court as more circumscribed by the other branches and public opinion than the traditional account would suggest. While this usefully describes the justices' ability to effect policy change, I argue that there are good reasons to believe the Court plays a greater role in shaping democratic discourse than is generally suspected. Though their policy orders depend on a cooperative Congress, President, and public for enforcement, I argue that their constitutional place and the unusually high public respect afforded them together promote a profound and unique power to influence the fundamental terms of public debate. In this chapter I develop two theoretical perspectives on the relationship between the Court and public discourse, one intended to clarify how the Court influences public discourse and the other to clarify how public discourse functions as a site of political contest.

In the first perspective, I emphasize two features of Rawls' account of public reason and supreme courts (Rawls, 1993: 221-40). First, Rawls works from within the post-legal account of the Supreme Court, rejecting traditional conceptions of judicial independence and legal constraint. Rawls argues that the meaning of the Constitution is

"what the people acting constitutionally through the other branches eventually allow the Court to say it is" (Rawls, 1993: 237). Second, Rawls argues that as an "exemplar" of public reason, the Court's role is "not merely defensive," but "forces political discussion to take a principled form so as to address…constitutional question[s]" (Rawls, 1993: 239). Rawls' Court, in other words, plays an important role in shaping ordinary democratic dialogue.

The second perspective I develop emerges from Rorty's account of language as a location of political contestation. I argue that Rorty provides a clear way of thinking about how different political vocabularies—ways of reasoning and talking about political problems—function to create and contest the real political world. Taken together, these two perspectives are intended to describe the potentially profound importance of the Supreme Court in determining the shape of public discourse.

Rawls on the Reason of Supreme Courts

In his discussion of the limits public reason imposes on supreme courts, Rawls (1993) suggests a way in which the unique requirement that supreme courts exercise public reason may be a source of considerable political power. I want to highlight two features of Rawls' discussion of supreme courts' exercise of public reason. I begin by sketching Rawls' understanding of the place of a supreme court in a constitutional liberal republic to show that Rawls' Supreme Court, dependent on and limited by other branches, is very much a part of the post-legal order. I then emphasize Rawls' description of the Court's promotion of public reason, which I equate with distinctly constitutional

discourse, and show that Rawls argues for a Court capable of influencing public discourse by promoting constitutional language and reasoning.

Rawls vision of the Court is situated in the post-legal tradition. Rawls' rejection of judicial supremacy follows a popular constitutional tradition rejecting judicial exclusivity, as in, for example, Lincoln's argument that the President was not bound to obey the Supreme Court's decision in *Dred Scott v. Sanford* (60 U.S. 393, 1857).[6] Rawls interprets constitutionalism as a practice that involves all actors and which underlies moments of profound political change, as in changes of constitutional meaning.

Rawls' liberal state is constitutional. In it, both power and law are divided into two kinds. Rawls draws a distinction between the ordinary power of government officers to engage in "day-to-day politics" and the extraordinary power of people's constituent capacity to establish a new regime (Rawls, 1993: 231). The duality of power is paralleled by the duality of law, which is composed of higher law, the "expression of the people's constituent power," and ordinary law, expressed by the power of the legislature. "Higher law," Rawls writes, "binds and guides this ordinary power" (Rawls, 1993: 231). "A democratic constitution," Rawls writes, "is a principled expression in higher law of the political ideal of a people to govern itself in a certain way" (Rawls, 1993: 232).

Constitutional interpretation, because it claims the mantle of higher law, carries higher political stakes. All officers of government necessarily interpret the Constitution in order to execute the duties of their offices, but legislators and executives are not restricted

[6] See Alexander and Schauer (1997) and Devins and Fisher (1998) for an extended discussion on this.

in their acts to public reason.[7] Constitutional restrictions on the Court also demand the Court justify itself publicly, and that it must interpret the constitution within the limits of public reason.

Rawls' account of constitutional democracy rejects legislative supremacy in multiple ways. It diffuses power among the different houses of governing—legislative, executive, and judicial—as well as between the legislature and the people it represents. In so doing, Rawls not only broadens the locus of Constitutional meaning from the Supreme Court to the whole of the government, but also changes the defining nature of Supreme Court practice. By removing the burden of exclusivity in interpretation, Rawls allows the practice of Supreme Court adjudication to be defined not by the practice of interpretation generally, but by a peculiar kind of interpretation. While the elected President and legislators speak to the interests of political constituencies, it is the justices of the Court who uniquely appeal to Rawls' "political values" (Rawls, 1993: 214). For Rawls, the meaning of the Constitution is not determined exclusively by the Supreme Court, but rather "what the people acting constitutionally through the other branches eventually allow the Court to say it is" (Rawls, 1993: 237). But the practice of dividing higher law from ordinary law is one the Supreme Court is one for which the Supreme Court is uniquely empowered.

Public reason applies "above all" to supreme courts because "justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statues and precedents…Acts of the legislative and the executive," however,

[7] Obviously Rawls doesn't preclude the possibility of elected officials doing the same (he says he wants to show the strongest case), but aim of justice in the practice of judicial justification should preclude the exercise of forms of reason antithetical to universal community values.

"need not be justified in this way" (Rawls, 1993: 216). Thus justices find themselves mediating disputes about what will and will not be settled on higher legal grounds and doing so by appeal to public reason.

Rawls' public reason is "the reason of equal citizens who…exercise final political…power over one another in enacting laws and amending their constitution. The limits…do not apply to all political questions but only to those involving what we may call 'constitutional essentials'…(such as) who has the right to vote, or what religions are to be tolerated..." (Rawls, 1993: 214). The content of public reason is marked by three characteristics. It "specifies certain basic rights, liberties, and opportunities," it "assigns a special priority to these rights, liberties, and opportunities," and it "affirms measures assuring all citizens adequate all-purpose means to make effective use of their basic liberties and opportunities" (Rawls, 1993: 223). These limits are "moral, not legal" and accommodate a variety of potential liberalisms, which Rawls points out generally hold up basic rights and liberties as critical to the constitutional structure of the state, in both political theory and in the practice of liberal states in the contemporary world.

Rawls locates the legitimacy of the limits of this reason imposes on public officials in his account of the liberal state. He asks, "In light of what principles and ideals must we exercise (coercive) political power if our doing so is to be justifiable to others as free and equal?" and answers "our exercise of political power is…justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them

as reasonable and rational" (Rawls, 1993: 217). Rawls identifies this as the liberal principle of legitimacy, foundational to the structure of the liberal democracy.

Rawls writes that public reason is "well suited" to the Court's role as "highest judicial interpreter," redescribing the Court's practice so that it is no longer "merely defensive." Instead, Rawls describes the Court's responsibility to "give due and continuing effect to public reason by serving as its institutional exemplar" (Rawls, 1993: 235). Rawls uses the practice to distinguish the Court from elected government, writing that it is "the only branch of government that is visibly on its face the creature of that reason and of that reason alone" (Rawls, 1993: 235). Elaborating the structural difference in practices, Rawls writes,

> Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions. The role of the justices is to do precisely that and in doing it they have no other reason and no other values than the political. Beyond that they are to go by what they think the constitutional cases, practices and traditions, and constitutionally significant historical texts require (Rawls, 1993: 235-6).

Rawls' conceptualization transforms the "limits of public reason" into a power by separating the Court's method of justification from ordinary political practice, thus imbuing the court with unique ground from which to engage in the political process. When Rawls writes that "the court's role as exemplar of public reason…give(s) public reason vividness and vitality in the public forum" by "its authoritive judgments on

fundamental political questions," he is acknowledging the power of the Court's public function.

Stated in more practical terms, Rawls' Court "forces political discussion to take a principled form so as to address the constitutional question in line with the political values of justice and public reason." He continues, "This educates citizens to the use of public reason and its value of political justice by focusing their attention on basic constitutional matters" (Rawls, 1993: 239-40). This function, which emerges coherently from Rawls' framework of the liberal state, is the unique obligation and power of the Court in the democratic polity. By deciding which public controversies fall not under the auspices of ordinary law but rather the constitutional obligations of higher law, the Court plays a profound role in shaping those controversies' corresponding public debates. Rawls' Court is both normatively and positively charged with the power and responsibility to guide the public's understanding and practice of politics by choosing how and when to infuse democratic discourse with the language of constitutionalism.

Rawls discussion of the Court's exercise of public reason provides us with a perspective for thinking about how constitutional discourse emerges and functions against a backdrop of ordinary politics. While the vast majority of public disputes do not turn on higher law, Rawls suggests a way of understanding how a liberal community can respond to the Court's promotion of constitutional values with a subsequent popular language of constitutionalism.

I turn now to the question of how the language of popular constitutionalism serves as a location for simultaneous political contestation and reaffirmation of shared national

commitments to the liberal rights framework. To do this, I develop a perspective on language as politics inspired by the theoretical approach of Richard Rorty (1979; 1989; 1998).

Rorty on Language as Politics

During the last three decades of the Twentieth Century, Richard Rorty staked out and developed a theory of language which stood against the analytic philosophical tradition not only for its repudiation of the correspondence theory of truth and resurrection of American pragmatism but also in its melding of epistemology and political theory. Rorty argues for an understanding of both the language of politics and the politics of language that treats utterances—words, phrases, statements, and treatises—as tools for perpetually constructing a new world from reflective awareness of the old. Then, drawing on Shklar's account of liberalism as opposition to cruelty as injustice (Shklar 1984), Rorty promotes a program of "liberal ironism" a practice of talking about ourselves and the identity of our community in ways that promote commitments to social welfare and civic freedom. Rorty thinks that the most important political value is the universal recognition of each other's humanity and that this value is at stake in the language we use to conduct our day-to-day politics.

In this section I first describe Rorty's theory of truth and then proceed to argue for the primacy of constitutional language in the perpetual reconstruction of the liberal state. Rorty offers his account of truth as a consequence of his theory of language. Broadly, Rorty thinks pursuit of universal truths is a misdirected hope, favoring a criterion of

meaning predicated on the real utility of language rather than its capacity to resemble some inaccessible metaphysic ideal. Rorty aims to "dissolve" distinctions of truth which are holdovers from the Enlightenment. His goal, he writes, is to show that "the vocabulary of Enlightenment rationalism, although it was essential to the beginnings of liberal democracy, has become an impediment to the preservation and progress of democratic societies" (Rorty, 1989: 44). In place of the vocabulary of Enlightenment rationalism, Rorty promotes the use of "notions of metaphor and self-creation rather than around notions of truth, rationality, and moral obligation."

I want to focus here on how Rorty describes the practice of political contestation through language, which is comprised of numerous mostly overlapping but sometimes contradictory vocabularies in competition for popular use. Rorty's vocabularies are ways of talking about and understanding the world. They do not seek universal truths, but rather create shared possible worlds which allow us to get on with the business of day-to-day life in a world defined not by certainties but contingencies. Vocabularies make the illusion of "truth" possible and even convenient for the utility to society. Rorty writes that "Truth…cannot exist independently of the human mind…because sentences cannot so exist" (Rorty, 1989: 5). Rather than setting out a definition of vocabularies, as the Enlightenment tradition impels, Rorty describes them metaphorically: "the vocabulary of ancient Athenian politics versus Jefferson's, the moral vocabulary of Saint Paul versus Freud's" (Rory, 1989: 5), and so forth. Rorty's vocabularies are larger than the utterances they enable, but smaller than the world they inhabit.

Rortyan vocabularies reflect approaches to the description of their objects; a Copernican vocabulary tells about the order of celestial bodies, an Augustinian vocabulary about the place of humanity in the ethical order of the universe, a Kuhnian vocabulary about the presence and power of scientific dispositions and descriptions. Political vocabularies function in this way. Just as Newtonian and Relativistic vocabularies offer competing descriptions of the order of things in and out of motion and being, so too do different vocabularies about national identity and the roster of inviolable liberal commitments offer competing descriptions of how we should understand the Constitution and the relations of Americans to one another. Much like constitutional interpretations, vocabularies succeed neither because they are "right" or "wrong," but because of their utility to those who employ them. As Rorty writes, "the fact that Newton's vocabulary lets us predict the world more easily than Aristotle's does not mean that the world speaks Newtonian" (Rorty, 1989: 6).

Rorty describes the contest for constitutional meaning as a practice of public philosophy. Just as "interesting philosophy is rarely an examination of the pros and cons of a thesis" (Rorty, 1989: 9), so constitutional discourse is not a unified search for some buried truth, so varied and contradictory are its approaches and doctrines. While any one doctrine of constitutional inquiry—original intent, for instance—may promote a deceptively universal criterion of "truth" in constitutional meaning, the whole of constitutional discourse, as with the whole of political discourse, is marked by competing criteria of meaning composed of mutually incompatible vocabularies of constitutionalism.

I want to focus on the scale of the individual claims offered by advocates of particular constitutional consequences. By constitutional consequences, I mean policy outcomes that advocates argue are inexorably tied to particular constitutional interpretations. There is no absolute rule to define the breadth of a vocabulary, and both comprehensive doctrines and specific policy considerations may comprise vocabularies. Bork's original understanding (Bork, 1991) and Tribe's liberal structuralism (Tribe 1990; 1999) comprise two incompatible vocabularies for telling about the whole of the Constitution. Practical considerations about the efficacy or inefficacy of gun control measures, when relied on to produce constitutional consequences, may comprise mutually useful but incompatible vocabularies for telling about the constitutionality of various gun control policies. In their exercise of public reason, the justices of the Supreme Court promote to the public both broad vocabularies of modes of inquiry and specific vocabularies of constitutional claims, claims not necessarily dependent on any particular comprehensive constitutional doctrine. It is the second of these, specific kinds of claims about constitutional understandings, that form the basis of the case studies in following chapters.[8]

Rorty's account of the language of politics points a path toward making sense of the individual language contests which underlie constitutional policy questions. In their exercise of public reason, the justices are not only adjudicating the cases before them. As the perspective turning on Rawls' analysis suggests, they are providing allies in the

[8] There is no theoretical or methodological reason to think that public contestation does not simultaneously take place between comprehensive doctrines the way I argue it does for individual claims. In fact, everything pointing to contestation at the level of claims applies equally to comprehensive constitutional doctrines. I sidestep the broader scale simply because it comprises a very methodologically different study, albeit one I hope to eventually write.

democratic arena with a language uniquely empowered by sanction, the value of that sanction a product of the limits imposed on it by the commitment to public reason. It is through a democratic contestation vitalized by the Court's exemplification of public reason that the citizenry perpetually reaffirm their political values and recreate, in Rorty's account, the identity of the community.

In this way constitutional controversies are the prime location of the eternal struggle for the identity of the nation. Rorty argues for a return in our constitutional language to what Dewey called "the problems of men" (Rorty, 1998: 97). Rorty disavows reliance on post-Enlightenment critics—Nietzsche, Heidegger, Foucault, and Derrida, in his example—in "achieving our country," placing the contest for practical understanding of the state's commitments to its citizens squarely on the practical concerns of its people. It is the primacy of a constitutional discourse that informs ordinary politics that animates Rorty's emphasis on the identity of the nation-state in the political process. Rorty draws the line himself by enthusiastically quoting Rawls:

> *What justifies a conception of justice is not its being true to an older antecedent and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us* (Rawls, 1980: 519, in Rorty, 1989: 58).

Rorty's emphasis on language as the practical means for imagining and recreating the content of the liberal state emerges naturally from Rorty's reading of Rawls, a reading that emphasizes the primacy of constitutional contests that emerge organically from discussion of ordinary political controversies.

A study of how Americans talk about politics could be conducted in a seemingly limitless range of scales and places, none distinctly "correct" or "incorrect," but each with caveats and utilities distinct to it. If Rawls is right that the Court enjoy a special kind of public attention for their commitment to public reason, realized in its public commitment to constitutional justification, and that that commitment vitalizes political discourse, then we should be able to empirically observe that process. Rorty's way of thinking about how language functions as a location of political contestation provides a lens for identifying and measuring the changes that should emerge from the constitutionalization of public discourse.

To be able to identify the not only the Court's exercise of public reason but its success in promoting constitutional language in public discourse, I divide the claims that together make up mainstream debate about an issue domain into distinct Rortyan vocabularies, ways of talking about political controversies which themselves carry political consequences. One example of such a vocabulary in abortion politics is the language of public health and medical practice. Talking about abortion in a medical language implies a way of understanding abortion as a medical procedure. Talking about abortion in a language of privacy rights implies a way of understanding abortion as a particular constitutionally defined idea, one understood without the context of the practice of medicine by.

Certain features of the Court's rhetoric—its commitment to public justification, to reliance on public reason, and the unusual respect accorded it by the other branches and the public—suggest its profound importance in shaping public discourse. Rawls provides

us a powerful perspective for thinking about how that power influences democracy, while Rorty provides a way of thinking about the way that influence operates within language. In the following chapter, I lay out the method by which I study that influence before concluding this dissertation with two case studies, of abortion and gun politics respectively.

Chapter Three: The Analysis of Influence

Public debate is better understood as a practice than a collection of discrete acts. This dissertation is a study of public debate, of the way it changes following events or does not change following non-events. In the two chapters that preceded this one, I suggested that when United States Supreme Court invokes a novel constitutional right, the legal change can promote a rhetorical change in the ongoing public debate. In the two chapters that follow, I present qualitative and quantitative evidence of that change in two case studies. This chapter explains the logic of the methods employed in the following chapters, in which I flesh out the argument with evidence from a reading of thousands of texts and a series of quantitative content analyses spanning the latter half of the Twentieth Century.

The case studies I present are comprised of a combination of discourse and content analyses situated in the theoretical framework outlined in the first two chapters of this dissertation. I define specific variables in each case. I discuss distinctions between claims and kinds of like claims, which I refer to in the analyses as political vocabularies. Error in the analysis exists between the whole of the practice and the image constructed

of that practice through the analyses. The error cannot be quantified but its description is possible through a qualitative exploration of the selected texts. This chapter explains the logic of the methods employed in this study.

The quantitative analysis, which consists of hypothesis tests of summary data from content analyses of newspaper editorial pages, and my qualitative analysis, of selections from period news media, were designed to function in a complementary manner to provide an account of judicial rhetorical influence. I build on the theoretical framework of the first two chapters to lay out the methodological framework used in the case studies. I discuss issues of discourse and content analysis, taxonomy, causality, inference, observation, validity, reliability, and generalizability.

Policy and Language

Justices and judges, by virtue of their legal authority, enjoy a unique political authority, the capacity to set the literal terms of discussion. This power is a consequence of the authority of the judiciary possesses over legal categories, particularly constitutional rights and obligations and the meaning of citizenship. Changes in legal categories are obvious; the Court's decision in *Roe* altered the metaphysical foundations of abortion law in obvious ways. But changes in society are harder to observe and make sense of. This study grapples with the challenges of studying changes in the language opinion elites use to talk about political questions.

Language, purposively chosen, has the advantage of being directly observable. Further, by using a purposive sample (Riffe, et al., 2005) of language from policy

discourse, we can, insofar as we agree about the reasonableness of the assumptions of that sample, make meaningfully precise statements about the relative waxing and waning of particular legal and political vocabularies and categories. What is significant is that this innovative research design is precisely developed to tackle the research question from which this dissertation began: Can the judiciary influence the language we use to talk about policy issues in the United States? That media and policy elites adopt the kind of language sanctioned by the courts is a previously under-realized capacity of the judiciary to change society.

The foundation of content analysis is careful discrimination between content variables (Riffe, et al., 2005: 42-3). The particular characteristics of public debate vary from issue to issue, but the composition of public debate has multiple dimensions of distinction. I focus the analysis on three kinds of distinction: the distinction between absolute vocabularies and all others (constitutional talk), between core and peripheral vocabularies (the relative significance of kinds of reasoning and language), and between ascendant and descendent vocabularies (change in prominence over time). These distinctions form the basis of the hypotheses tests conducted in the following chapters. In this section I elaborate a meta-taxonomy of kinds of policy claims and conclude with a taxonomy of methods of observing those claims.

The taxonomy divides claims into three kinds of vocabularies. I call these categories absolute, prudential, and orientational.[9] All the vocabularies we employ to talk about what kind of policies to enact fall into those classes. The categories are constructed to illuminate that character of an offered argument in relation to other members of civil

[9] The appendices include the taxonomies of claims, including rules for inclusion.

society with whom one disagrees about policy. One goal of this taxonomy is to bring out the differences between arguments which promote and discourage various forms of political compromise.

A speaker in the public sphere, committed to persuading her fellow citizens to support a public policy, will draw on vocabularies circulating in the metadiscourse and on her own experiences and expertise to contribute to the discourse, speaking in the policy language with particular policy vocabularies. Advocates use these vocabularies to construct an argument for a policy position. I describe each kind of vocabulary individually and then discuss, briefly, the social implications of their employment, before discussing methods of content observation.

Vocabularies of Absolutes

Claims about individual or group rights function in vocabularies of absolutes. Claims about rights are claims that also impose duties on others (Hart, 1960), commitments to which the state is obliged by virtue of its own nature. A right to an abortion obliges the state at minimum not to excessively interfere with abortion services and potentially to ensure the active distribution of abortion services. While a right may be either positive or negative, in either instance it imposes an obligation that non-rights do not (Berlin, 1969). Their special role in liberal political discourse is paralleled by the special constitutional function of the judiciary and particularly the Supreme Court.

Vocabularies of absolutes draw on foundational shared commitments to civil, political, and human rights. They defy easy dismissal and construct the collective

identities of peoples who employ them in the pursuit of social change (McCann, 2006). They are also the most antagonistic claims. That they are absolute is their defining feature. Rights vocabularies are the principle examples of absolute vocabularies because they play such a significant social role in discourse. Rights stake out non-negotiable territory, but so do vocabularies of constitutional "meaning" in which there is no end to the ways the language of the Constitution can be understood. In the United States, absolute claims usually concern civil and political rights and promote constitutional authority.

Absolute arguments hinge on the simultaneous mutual independence and interdependence of persons in democratic society. They force us to confront established dogmas in ways that moderate, reform-oriented thinking cannot. The Civil War was a the culmination of almost a century's worth of struggle over slavery by way of every kind of claim, but it was the absolutism of Southern states rights advocates (and the rights of plantation owners to property in their slaves) against Lincoln's absolutism, first for the preservation of the union and later for the eradication of slavery, that would win a political revolution (Jones, 2002). At a cost of over half a million dead Americans and the destruction of much of the nation's infrastructure, absolute claims about citizenship and federal power were at the heart of the Civil War and animated the Emancipation Proclamation and the Reconstruction Amendments.

Absolute claims are, like any other, used to persuade; it is their assumption of lexical priority that makes them different from other claims. Their efficacy is a product of mutual recognition (Hart, 1960). A right is, in other words, worth very little unless people

are prepared to believe in it. When a person claims an absolute right, she may do so from a position of surprisingly paradoxical weakness.

Absolute claims can be absolute for a few different reasons. They always consist of some metaphysical assumption about the world and an interpretation which entails what policies are and are not acceptable in a constitutional society. The metaphysical assumption is an assumption only in the logical sense of the word; it must be assumed because it is not the sort of claim to which a person can point to public evidence. Anti-gun regulation advocates make the claim that past a certain threshold increased gun ownership increases public safety. Opponents reply the reverse. They can begin to adjudicate, though not necessarily resolve, their disagreement by reference to public evidence.

Depending on the issue, the statistics may never have been compiled and made public or the two individuals may strenuously disagree about the meaning of the statistics, but in each case they are engaged in an investigation in which one could, conceivably, be shown to make a claim that is empirically unpersuasive. Academic research is founded on the possibility of this kind of scientific progress, as explanations are evaluated by generally agreed-upon standards. A disagreement about how to interpret statistics may be resolved by reference to established best practices, a lack of data may be resolved by data collection, or the difficulty of inferring from incomplete data may be addressed by estimates from both sides combined with an awareness of the limits of contingency. Nonetheless, the claim that gun ownership can counter-intuitively increase

public safety is not an assumption and any normative content is less obvious; it is an empirical claim, which can be falsified on empirical grounds.

No empirical falsification is possible for absolute claims. Because they are founded on metaphysical and normative analyses, the empirical basis for absolute claims cannot be engaged. One simple believes or one does not, the reasons for which are the subject of psychology, philosophy, and religion rather than policy analysis. Engagement with absolute claims is limited to engagement with their interpretation. One cannot dispute the metaphysical fact that a fetus is a living human being with a soul any more than that a fetus is a dependent non-human and there are no such things as souls.

There is of course the possibility of engagement over interpretation; this sort of engagement tends to fall into two categories. In one instance the speaker suggests that, even if the metaphysical foundation is rock solid, the obvious interpretation is wrong because of some unconsidered but related metaphysical fact. In this instance, the interlocutor grants the speaker's assumption but rejects the interpretation. This move was made, for example, in the abortion debate by Thomson (1971), who argued that even if a fetus is a person, it does not follow that one is obliged to submit her body to it for the sake of its survival. The argument, which was later developed by Regan (1979) into a new theoretical foundation for the core holding in *Roe v. Wade*, was influential for its novelty, highly criticized (Finnis, 1973; McMahan, 2003; Schwarz, 1990; Warren, 1973), and vigorously defended (Boonin, 2003; Dworkin, 1994; 1997).

The other means of engaging an absolutist claim is to transplant the foundational metaphysical assumption into some area of shared consciousness. Two centuries ago,

pro- and anti-slavery Christians strenuously defended the theological foundations of their political economy (Daly, 2004; Finkelman, 2003; Irons, 2008; Noll, 2006) with the same vigor as pro- and anti-abortion Christians (and other religious persons) do today (Curran, 2008). These are disagreements between people who either overestimate or overstate their shared worldview. It seems unlikely, in any event, that arguments about the proper interpretation of an ambiguous but sacred text are likely to persuade many people to change their moral calculus, whether that text is spiritual or legal. In each instance alike, we invoke an interpretation that is very much a product of our worldview rather than its progenitor.

Neither kind of response to an absolute claim is satisfying; neither fully engages the speaker the way one must to move past mere democracy and into deliberation. Absolute claims do not invite negotiation; they invite empathy or enmity and little between.

Absolute claims can carry a political analogue of absolutism in the material protection of rights. Liberal democracy, in extolling the individual as the foundational political unit, entails a commitment to individual rights of some sort, minimally, to make good on promises of individual autonomy integral to political liberalism (Rawls, 1971). Critically, the exact content of those rights, the question of which rights are demanded by commitment to the liberal state and which are not, is a matter of perpetual contestation. What is challenging for liberals is the place of that contestation, which must remain just outside the realm of direct democratic processes, lest the liberal ideal be disassembled by intolerant democratic majorities (Gamble, 1997).

There is a constant interaction between public discourse and the making and interpreting of the law. The democratic process makes liberal use of the language of rights and responsibilities because they are the values which animate our social, political, and economic life. Talking about our rights is how we construct much of the political world in which we live. Just as constitutional rights take precedence over statutory interpretation when the two are in conflict in judicial discourse, talk of constitutional rights has the potential to constrain and direct political discourse. Because vocabularies of rights are particularly influential in both the political and legal realm and because the Supreme Court holds the primary authority for their articulation, the justices of the Court have the power to influence political discourse through their engagement in legal discourse.

When courts articulate public reason, they infuse our language with new authoritative meaning. That meaning is carried in the language of ordinary policy discourse and influences us all. Before the Supreme Court's decision in *D.C. v. Heller* (554 U.S. 570, 2008), talking about gun rights was a mostly performative act, one in which the speaker made an argument for an ascendant but unsanctioned right. Talking after *Heller*, the performance changed from imagination to invocation. The United States Supreme Court used this power to transform the language of "gun rights" from theoretical to practical. What was once an acknowledgement of policy weakness became a reminder to others of policy strength, a strength which no democratic process could subvert.

Most absolute claims are elaborated clearly, proceeding from an assumption through evidence to a conclusion. Other claims are less elaborated. Some claims are invocations, testaments to sacred political shibboleths like "the right to life" in which a single assertive phrase entails a whole political argument.

In the chapters that follow, I employ taxonomies of the discourses comprising two issues: abortion and firearm regulation. I discuss the unique role played by absolute claims and how the Supreme Court has influenced those discourses, by showing that Court majorities were able to entrench in each instance a constitutional discourse of rights.

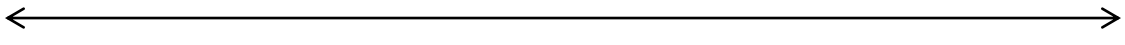
Other Kinds of Claims

Comparatively little of most kinds of policy talk is absolute. A perspective attentive to rights claims can be a healthy part of a discourse, but the bulk of policy discourse in most domains consists of less provocative language intended to convince opponents. The distinction between these and absolute claims having already been drawn, a further distinction can be drawn within non-absolute claims.

I want to draw out the difference between claims in which speaker and opponent agree on a policy goal but disagree about the means of achieving it and claims in which speaker and opponent differ on the desirability of the policy goal itself. I refer to the latter as orientational claims and the former as prudential claims. The terms are intended to be descriptive. In "orientational" claims the speaker and opponent disagree on the

appropriate orientation of policy goals. “Prudential” claims concern the prudence of following a policy given an agreed upon goal.

More conducive to compromise Less conducive to compromise



Prudential claims Orientational claims Absolute claims

On the continuum of negotiability, from highly conducive to compromise to highly disruptive of compromise, orientational claims fall between absolute and prudential claims. Orientational claims are more likely to emphasize policy goals in themselves while prudential claims are more likely to emphasize a policy mechanism.

The distinction between orientational and prudential arguments is, to some extent, a matter of art, and the line drawn can be contested in some marginal cases. Generally, I classify disagreements about end goals as orientational, while disagreements about methods of achieving those goals are classified as prudential. I have used the word “orientational” because these arguments are ideologically oriented one way or another, and take on significance in relation to that orientation. Effective advocates are skilled at engaging multiple orientational claims after having articulated prudential claims.

The actual business of policy discussion is rife with discussion about how best to achieve common goals. No one argues for more abortions for the sake of more abortions. An argument that abortion should be legal, however, in order to decrease the public health danger of unsafe abortions is a controversial policy in pursuit of an uncontroversial

goal. No opinion elites argue that the health danger that accompanies unsafe abortions should be increased in the public interest. People disagree about whether this consideration is outweighed by others or whether the policy will in fact lead to more rather than fewer unsafe abortions, but mainstream opinion elites are uniform in the view that unsafe abortions are themselves not in the public interest.[10]

Likewise, most people agree that guns should be safe to use, and that safety mechanisms are reasonable precautions, but other, also reasonable people may think that such regulations are unnecessary and only encourage further regulation. In each instance everyone agrees that gun safety is in the public interest. People who would have there be no guns would prefer what guns there are be safer, just as those who would prefer no abortions would prefer abortions be safer. Much of what comprises discourse is the back and forth of marginal regulation like this, and much of it is a sincere difference of opinion about what is most prudently done in pursuit of generally shared interests. Distinction can be artful; it is intended as something of a theoretical halfway point between hostility to and capacity for compromise.

I call the remainder of the sorts of claims that make up the discourse "extraneous claims," extraneous because they exist in a kind of irrelevancy alongside substantive claims, but they are claims nonetheless. This category, though actually quite thin in its total numbers, is diverse. Extraneous claims may include personal attacks, inexplicable

[10] It should go without saying, but of course cannot, that there are persons who regard the health consequences to women who endure unsafe "back alley" abortions as an appropriate consequence of or deterrent to the moral wrong of abortion. These arguments are so far outside the mainstream of American political discourse that they do not appear on any of the reviewed editorial pages and thus do not figure in my analysis. In each of the censuses I disregard claims appearing zero times across the population.

relationships, or anything truly bizarre and seemingly unrelated to the subject of the discourse.

Extraneous claims contribute nothing of significance to a discourse. They are felt nowhere but the margins and have no apparent influence on the models in this dissertation. I have included them in the total aggregate numbers only to demonstrate their insignificance. This division is not exactly a value judgment about the worthiness of claims. There is a categorical selection bias in how these claims are taxonomized in that their extraneous nature is related to their irrelevancy. These are claims that never go anywhere among opinion elites; they may appear from time to time, but they never become remotely common. I established a threshold of four invocations for automatic inclusion in the non-extraneous categories. None of these categorizations is likely to prove controversial and where in any doubt I have erred on the side of inclusion in the non-extraneous rather than extraneous categories.

The categorical analysis only begins to describe the wealth of questions to which content analyses can be fruitfully applied. Because individual arguments are coded, we can begin to make sense of how individual arguments emerge in response to stimuli outside the discourse itself. By reviewing these data we can observe the temporal relationship between historical events and the rhetorical construction and subsequent framing of specific policy issues. In other words, while the use of the argumentative taxonomy provides insight into the power of institutions, in this case courts of last resort, on public discourses, examination of individual argument-level data reveals how the compositions of discourses change in response to sudden environmental stimuli. In

chapter five, for example, I discuss how the shooting at Virginia Tech drew novel attention to the policy problems engendered by firearms in the hands of a person suffering from a severe mental illness.

Population Selection and Census Design

The goal of the content analysis is to quantitatively measure qualitative changes over time in the language mainstream opinion elites use when discussing rights issues in the democratic sphere. I use opinion pages of major national newspapers to provide reliable and valid markers of trends in elite discourse. While the discursive analyses use materials beyond opinion pages, the purpose of the content analysis is to provide a consistent signal of mainstream elite opinion. Because the inferences I draw in the content analysis are about mainstream opinion—and how languages of rights succeed and fail in public discourse—I limit the populations of the content analyses to mainstream opinion pages.

To substantiate the argument, I aim to demonstrate that Supreme Court sanction moves vocabularies of rights that were once the exclusive domain of fringe activists into the mainstream, as mainstream opinion elites adopt the constitutional language sanctioned by the Court. In the second of the case studies I also examine the negative case, in which a language of rights is rejected by the Supreme Court and the language employed by mainstream opinion elites is unchanged. To do this, another coder and I coded every argument made in every included opinion page text concerning each selected issue domain. Every claim made by every author on every included opinion page was

tallied, allowing comparisons of the relative and absolute penetration of political claims in mainstream discourse.

This dissertation presents two case studies, chosen in areas intended to demonstrate rhetorical influence. The purpose of this selection is not representativeness; it is the opposite of representativeness. The goal of this dissertation is to demonstrate the existence of the phenomenon. The logic of choosing each of the policy domains—abortion and gun regulation—is detailed in the respective chapters.

Here the population selection differs for the quantitative and qualitative analyses. While I discuss a variety of texts, mostly articles, editorials, op-eds, and advertising, the quantitative analysis exclusively includes opinion page texts, by editorial boards, columnists, and op-ed contributors. These include invited voices from major interests and are generally representative of the majority or consensus of opinion leaders in the United States.

The specific newspapers chosen reflect a balancing of efficiency and representativeness. Four newspapers comprise the abortion censes while fourteen make up the contemporary gun regulation censes and two are used for the study of 1963-1975. The logic of sample selection is outlined in each case study, alongside considerations toward representativeness and the reliability of newspaper selection. Generally, the guiding principle is to define a population that is both representative of mainstream opinion within the issue domain and practical for systematic study.

General concerns about newspaper editorial pages should focus on the tendency of the pages to utilize a particularly ideological language, that they should be more

ideological than journalism generally. The goal here again is not representativeness but sensitivity; the goal is to identify the phenomenon in the most fertile locations before moving to document the extent of its features. Further, the use of editorials as a source of information exogenous to case decisions is established in judicial politics research from Segal and Cover (1989).

Some newspapers print more editorials, some invite more guests, and some write editorials that are just longer. Over time ideological composition changes; the *Washington Post* went from being one of the most liberal and anti-Bush in the country in 2000 to cheerleading for the Iraq War by 2003. I have adjusted for none of these factors, because they all reflect real trends in the composition of public discourse. Concerns about ideological bias are addressed in the individual case studies.

Time periods are compelled by the cases animating analysis, but the length of time series studied is explained in each case study. The use of two series for comparison in the gun regulation case study, from 1963-1975 and 2006-208, is animated by the logic of Supreme Court intervention; those are the two periods of time in which an informed Court analyst should expect possible Court action, the Court declining to act in the first instance and answering the call in the second.

In designing the census, concern about population selection is relevant in a sense analogous to sample selection, as the data are used to generalize. As with sample selection in a usual sample, population selection for a purposively sampled census requires balancing competing goals of completeness, representativeness, and efficiency. The use of a census instead of a sample actually reflects an effort in the interest of

efficiency, because the marginal cost of additional articles from within a given newspaper remain relatively low throughout any individual paper, low enough to allow a census. Population selection in the studies required selecting policy domains, time periods, news formats, specific instances of selected news media, and establishing the claims and vocabularies of analysis.

Verifiability and Reliability

The relationship posited is not a simple causal story and the hypothesis tests are not intended to prove causality; rather they are intended to reject the possibility of irrelevance and describe the temporal relationship between external stimuli and policy discourse. The discursive analysis, the qualitative exploration of the evolving discursive landscape, is intended to flesh out the causal relationships between the judiciary, the media, and the policy process.

Because each study is a purposively sampled census, there is no traditional p-value or other measure of significance. The closest analog, the generalizability of the selected population elements, must be considered qualitatively. Generalizability from the cases is not intended to be uniform; the issues selected, following the selection logic of Rosenberg (2008), are intended to be suggestive rather than representative across issue domains.

Each text in the content analyses was coded by two different coders from a list of predetermined claims. Claims are operationalized as dichotomous variables. Claims that were not on the initial coding list were added throughout the first pass of coding, then the

coding process began anew at the beginning of the census, recoding every text with the expanded variable list. The values recorded for coder one are these "second pass" values. No agreement with first pass was necessary as first pass data were discarded. Coder two was restricted to those claims detailed by the first list. Only claims coded by both coders were included in the analyses.

Instead of traditional p-values or time-series tests, the reliability of the study must be assessed through coding reliability tests (Cohen's *kappas*) (Cohen, 1960) and comparison of the theory to existing alternative explanations (Riffe, et al., 2005). Cohen's *kappa* does not require category exclusivity and measures, from -1 to 1, agreement between coders versus chance. All censuses but one, which was excluded, had *kappas* above standard thresholds for exploratory studies.

I explain the process for calculating *kappa* in chapter four. What is important for now is that *kappa* is only a test of the consistency of category assignment. No value of *kappa* can provide evidence for the logical validity of the categories of inference. The validity of category construction must be assessed as a whole; does it make logical sense that absolute claims might function differently in argument than claims conducive to compromise or negotiation. That is the logical leap necessary for the reader. If we accept that absolute, constitutional arguments are different, then we can begin to make sense of their rise or non-rise through qualitative analysis. Any causal story emerging from the discursive analyses and not rejected by the quantitative hypothesis tests must be taken seriously because no alternate theory exists to explain the relationship but chance.

In the following two chapters, I follow this mixed methods approach to explore the rhetorical dynamics of discourses about abortion and gun politics.

Chapter Four: Abortion Rights

The way Americans talk about abortion politics changed after the U.S. Supreme Court released its decision in *Roe v. Wade*. Within the space of a few years following *Roe*, Americans' very understanding of what abortion is was transformed. Before the Supreme Court released its decision upholding a personal right to an abortion, opinion elites in government and the news media talked about a medical procedure performed by a doctor on a patient in need. By the end of the 1970s, Americans were engaged in a bitter debate that pitted a personal right to choose abortion against a fetus' right to life. A critical reading and quantitative content analysis of American journalism spanning the second half of the century strongly suggest that the transformation of how Americans understand and talk about abortion was the product of the decision of the Supreme Court.

This chapter reports the findings of a multi-method analysis of how the Court's decision, by elevating a constitutional vocabulary of politics, influenced the language of abortion politics. I develop a theoretical account of this phenomenon, a social-historical reading of the discourse, and present and contextualize a variety of texts from across half a century of debate about abortion. I conclude with the results of a quantitative empirical

investigation of the Court's influence over the way the mainstream news media talk about abortion policy. A census of opinion page coverage in four major American newspapers and an expansive review of primary sources comprise clear, substantive evidence of change in the language of abortion politics.

Abortion Politics and Supreme Court Skepticism

Skepticism about Supreme Court power has generally focused on the immediate policy influence of the Court. Other treatments have described the Court as a responsive partner in a governing coalition (Dahl, 1957) or minimized the actual impact of Supreme Court decisions against the backdrop of broader social and political changes (Klarman, 2004; Rosenberg, 2008). Recent historical work by Friedman (2010) has shown just how deeply influenced by public opinion the justices of the Court are, while other scholars have argued that the Court responds to ordinary political pressures (Tushnet, 2003). Each of these treatments advances a general skepticism toward the power of the Court to influence society.

In the years since the Court recognized a constitutional right to an abortion in *Roe v. Wade*, an extensive empirical scholarship has studied how abortion access influences society and how it has been influenced by society (e.g.: Deyak and Smith, 1976; Donohue and Levitt, 2001; Haas-Wilson, 1996; Halva-Neubauer, 1990; Medoff, 2002; Pritchard and Parsons, 1999; Sen, 2007; Wetstein and Albritton, 1995). In his case study of abortion politics, Rosenberg focuses on changes in material access to abortion in the

short-to-medium-term and rejects the possibility of other kinds of judicial influence (Rosenberg, 2008: 228-46).

Subject to far less empirical scholarship have been changes in how we understand abortion. Despite good theoretical analysis that Americans no longer talk and think about abortion as they did in the pre-*Roe* era,[11] empirical scholars have only begun to explore these complex social changes. Using a study of thousands of newspaper texts, I explore how the Court's decision in *Roe* changed the way Americans talk about politics. From both a qualitative reading and a set of quantitative hypothesis tests, I report compelling evidence that the rights vocabulary of the Court's opinion in *Roe* dramatically influenced the language of the mainstream American abortion debate. Consequently, my analysis runs against the skeptical tradition by pointing to rhetorical influence as a critical means of Supreme Court power.

I argue that Rosenberg's analysis fails to recognize the significant role the Court played in influencing the language and criteria of the public debate that followed *Roe*. While this is not the sort of "social change" Rosenberg directly implicates, it is a vital, important part of our political culture, one in which the Supreme Court has played a unique and significant role, and it proves that contrary to Rosenberg's general view, the Supreme Court can profoundly change society in subtle but incredibly important ways.

Abortion is a logical domain in which to test for judicial influence over American political language. The histories of abortion policy and debate are characterized by properties which make abortion politics an ideal candidate for influence. Not only did the

[11] See chapters one and two. For an alternative account indicting the Supreme Court for domain-nonspecific constitutionalization of American political discourse, see Glendon (1993).

Court speak suddenly and powerfully in *Roe*, but it did so in the most dramatic fashion possible—suddenly recognizing a fundamental constitutional right—at a time when a substantial democratic discourse was coming into focus, with increasingly clearly defined criteria, arguments, and language.

Beyond the historical circumstances surrounding the Court's decision in *Roe*, the case is valuable because Rosenberg uses the case so effectively in making his argument. Rosenberg is clear that he believes the Court did not significantly impact policy and did not catalyze or otherwise impel any apparent social change (Rosenberg, 2008: 228-41). Rosenberg identifies specific criteria for what he calls "extra-judicial influence," but fails to find evidence of such a phenomenon in abortion politics.[12]

A skeptic might argue that social movements drive both Court decisions and culture alike, that unidentified exogenous variables may simultaneously direct decisions and changes in political language. These stories are not, however, competitive but complementary. The Court's power is often the power to amplify, and throughout history the Court has often identified strands of thought from social movements and promoted them to the public sphere (Kramer, 2004). Each issue must be made sense of with respect to its peculiar history and culture. These data are presented as a new way of reading the history of the role of the Supreme Court in the abortion debate in the United States, one that illuminates a previously underappreciated expression of judicial power.

The purpose of the qualitative analysis is to present some sense of the complex interrelationships of the changing rhetorical gestures, presumptions, and orthodoxies of

[12] My research strongly supports Rosenberg's deeper point, however, that the Court's decisions can have significant negative consequences for democratic politics (Rosenberg, 2008: 155-6).

the abortion debate. The standard quantitative hypothesis testing that follows is intended to substantiate the internal validity of the analysis, showing that my reading of the language of abortion politics is more than a collection of anecdotes, that it is an account grounded in the material reality of the abortion debate in the United States, and that anecdotes provided in the text are representative rather than anachronistic.

Method and Reliability

Following the research design outlined in chapter three, I conducted a census of opinion page stories (editorials and op-eds) dealing with abortion policy in four major national newspapers: the *New York Times*, the *Los Angeles Times*, the *Chicago Tribune*, and the *Washington Post*. The census begins in 1950.[13]

The first relevant editorial in any of the four newspapers ran in 1951. The census concludes for three newspapers at the end of 1980. The *New York Times* census, which included more than half the ultimately included total editorials, was conducted through the end of 2000 to provide additional insight into the debate as it continued to evolve. Though these are the limits of the census, I also discuss some texts beyond the census in the qualitative analysis that comprises the middle section of this chapter.

I offer a reading of the mainstream American abortion discourse as it played out among opinion elites in the latter half of the Twentieth Century. The goal of this reading is to elucidate the most important qualities of the debate in a broader social context. The

[13] There are no relevant editorials about abortion from prior to 1951 in any of the newspapers in the census. Data were collected until 1980 to in all cases except the *New York Times*, for which data collection was extended through 2006. This was done in order to balance maximizing measure integrity when most important while allowing a test on a prolonged time period as well.

structure of the taxonomy is compelled by the underlying data but arranged to illustrate how specific sorts of principled, constitutional claims function and why they triumphed over more pedestrian political arguments.

The idea of taxonomy as argument hinges on the possibility of taxonomy revealing meaningful information inherent in existing data. Making sense of the abortion discourse by disentangling the interrelated webs of ideas is what makes the proceeding analysis possible. I measure category reliability with *kappa*,[14] but the validity of the categories themselves must substantiated logically. Robust and theoretically coherent results, measured by human understanding rather than by a threshold statistic, are the best indicators of taxonomic coherence here (Riffe, et al., 2005). The taxonomy I employ in the abortion discourse analysis satisfies these requirements.

My taxonomy of the mainstream abortion debate detects difference on two levels of analysis: differences between specific claims and between kinds of claims. The first of these is obvious: distinctions between different claims made for the same policy. The second is a more theoretical matter; what are the important qualities of claims which together comprise coherent political vocabularies and which evolve together? In this case, I want to ask how the basic argumentative and linguistic structure of the abortion debate changed following legal constitutionalization. Because the core argument I make is that the Court has a special power to force discussion in constitutional terms, the most important distinction to be made is between rights claims and other kinds of claims. The categories, then, are consistent with the taxonomy, which is derived from the theory.

[14] I explain Cohen's *kappa* in chapter three. *Kappa*, a measure of inter-coder agreement, runs from -1 to 1, with a measure of .7 or better generally preferred for exploratory research (Riffe et al., 2005).

Across the 339 editorials and op-eds in the census, a total of 663 claims were recorded, a mean of 1.96 claims per editorial or op-ed. These 663 claims were grouped into 45 different categories grouped into four general kinds. Of the 339 total, 251 came from the *New York Times* (the extended series), and 88 from the *Chicago Tribune*, *Los Angeles Times*, and *Washington Post*. Claims in support of abortion policy liberalization are detailed in table 4.1.

All data collected from the *Washington Post*, *Los Angeles Times*, and *Chicago Tribune* as well as a representative subsample of the data from the *New York Times* were coded by a second coder. A living human coder, equipped with the coding protocol, carefully read entire selected texts and noted instances of specified arguments and lexical gestures, such as references to "abortion rights" or the "right to choose" that postulate or assume the existence of a right. After coding the census, the coder returned to complete coding from the beginning with the expanded database, continuing until all items had been coded at least once for each possible argument. In practice, this affected only a few arguments that were not predicted prior to starting coding. Conceptually similar arguments were aggregated in collective "rights," "prudential," and "orientational" vocabularies after coding and general categories of meaning were constructed to give coherence to the analysis. Semantic gestures, such as unexpanded references to "abortion rights" or a "right to life" are easier to code than arguments. Semantic gestures may evolve, but they are a longstanding part of political communication. These gestures and arguments comprise the meaning units of the content analysis.[15]

[15] These units should not be confused with what Holsti (1969) called "character units" or Krippendorf's "thematic units" (Krippendorf 2004), which are comprised of the structure of a text, such as ironic tone or

Table 4.1: Taxonomy of claims supporting and opposing abortion policy liberalization.

Rights claims[16]	Orientational claims	Prudential claims
Supporting claims		
Privacy, right to	Jurisdiction/judicial scope	Modernization
Autonomy, right to	Judicial behavior, prediction	Public health
Choice, right to	Due process requirements	Social pluralism
Equal protection, right to	Stare decisis	Prohibition unenforceable
Liberty, right to	International trends	Part of family planning
Human rights	Ubiquity of abortion	Social welfare
Healthcare, right to	Public opinion (domestic)	
Abortion, general right to	Moderate position	
	Cultural compromise	
	Compassion	
	Fetal health/deformity	
	Class fairness	
	Gender equality, non-rights	
	Nature of fetus/pregnancy	
	Viability compromise	
Opposing claims		
No constitutional right	Pregnancy as punishment	Prevent sex-selection
Right to life	Abortion is not medicine	Respect for life
	Religious tradition	Unimportant issue
	Social tradition	Encourage childbirth
	Intrinsic morality	Respect for marginal cases
		Social welfare

The conventional standard for content analysis is a sample for coding by another coder or, less preferably, by the same coder at a later date (Riffe, et al., 2005). Typically, a second sample is taken within the first sample, but because the total number of units

significance as a cultural reference. In this study, the meaning units are identified as syntactic, propositional, and semantic units (Rifee, et al., 2005) which have representational meaning in a shared discursive space.

[16] Categories, particularly the difference between prudential and orientational (more intensely ideological) claims, are explained in greater detail in chapter three.

comprising the included census is a manageable 339, I have performed inter-coder reliability assessments on all data in the abortion census except for some limited parts of the extended-series *New York Times* data.[17] The principal reliability measure I employ for these data, Brennan and Prediger's (1981) free-marginal *kappa*, is a kind of Cohen's *kappa* (Cohen, 1960). This *kappa* imposes no fixed categorization rules on coders (i.e. requiring category exclusivity). *Kappa* ranges from -1 to +1, with -1 indicating perfect disagreement below chance and +1 perfect agreement.

Interpreting *kappa* is notoriously difficult, and the peculiarities of a study demand unusually thoughtful attention in interpretation of reliability (Riffe, et al., 2005). As with the interpretation of p-values, a researcher is tempted to end discussion with reference to a numerical threshold for "significance" rather than to present data in a context making clear meaningful constraints on validity and reliability. For example, Lombard, Snider-Dutch, and Bracken (2002) identify 0.7 as a common threshold for novel analyses such as this one and note that *kappa* tends to produce more conservative levels of agreement than many other popular measures. Because this study is in largely unexplored territory, utilizes a novel taxonomy, and the measure is comparatively conservative to begin with, I report individual *kappas* throughout the analysis while excluding data achieving levels of

[17] In their influential book, Riffe, Lacy, and Fico (Ibid., p. 98) criticized McLoughlin and Noe (1988) for performing a census of Harper's, Atlantic Monthly, and Reader's Digest coverage of leisure activities including 936 magazine issues, arguing they should have sampled instead of taking a census and used the time saved to expand their population to include more periodicals. One need not disagree with their evaluation to see the value in censuses, however, which have significant advantages, particularly in historical work. I have utilized a census because the number of newspaper sources with searchable databases from periods prior to the 1980s is so limited that the data remain manageable. Using census data rather than a sample means the primary internal reliability statistic, Cohen's kappa, stands on its own as a measure of data integrity but of course does not speak to the validity of the taxonomy itself or of the internal logic of its application.

agreement below 0.7. Generally, however, the practice I follow is to present the data for what they are and provide context that speaks to their validity and reliability.

Datasets were divided by newspaper and *kappas* calculated on that basis. The reasoning for the division by newspaper is the sometimes noticeably different rhetorical tones of papers, occasionally described as "house style." Individual *kappa* calculations allow for comparison between coding of different editorial pages as well as the ability to isolate a particularly ambiguous style. Reliability of included newspapers ranged from .71 for the *Los Angeles Times* to .88 for the *Chicago Tribune*.[18]

The principle constraints on data integrity are the representativeness of the purposive sample, that is, how broadly can we generalize from these four newspaper editorial boards, and the reliability of the coding procedure itself. Though all included data were coded by two coders and meet the established thresholds for reliability, there may be good reason to think the taxonomy itself either misrepresents some existing features in the discourse about which we might care or that it imposes an answer upon the question. Getting these caveats right is essential to dealing with the first of these concerns; the second is largely unproblematic. I demonstrate the coding method further in the next section while discussing the abortion discourse prior to *Roe v. Wade*.

Abortion Policy as Ordinary Politics: 1950 to 1972

[18] Keeping in mind Riffe, Lacy, and Fico's remarks (2005) on the importance of interpreting reliability statistics in light of theoretical validity, I leave it to the reader to conclude how robust these data are. While certainly not as robust as econometric data, they portray in whole an obvious and significant overwhelming trend. Correlation never implies causation, of course, and for this reason I emphasize compelling theoretical reasons to believe that the data are both adequately reliable and valid to begin to draw important conclusions about the relationships between the news media, general public, and the Supreme Court, and the language of abortion politics.

Abortion policy was traditionally the purview of state legislatures, but the reality of abortion access for American women before *Roe* was determined by socio-economic status, community mores, and the practices of local law enforcement. Access to legal abortion was widely available in the United States prior to the Civil War, but disappeared in the late-Nineteenth Century before a variety of cultural and legal trends culminated in its reintroduction in the states in the late 1960s and ultimate recognition as a constitutional right in 1973 (Davis, 1985; Mohr, 1979; Rosenberg, 2008). During this time period, abortion receded not only from open practice but from open discussion as well. As late as 1869, the *New York Times* published no fewer than sixty-nine different stories concerning abortion (Luker, 1984: 268), yet by the turn of the century discussion of abortion had disappeared from newspapers prominent in polite society.

The *New York Times*, for example, would not publish an editorial in the Twentieth Century concerning abortion prior to 1965. Of the four newspaper opinion pages comprising the census discussed in this chapter, the first to feature an editorial, the *Washington Post*, did so on November 10, 1951. That editorial concluded that abortion is inherently more dangerous than childbirth and thus should be illegal to protect the public health.

The historic editorial gets facts wrong, does not consider whether the purported danger of abortion procedures could be a product of their illegality, points out the need for access is ubiquitous, and claims sincere compassion for women as its motive. It is a

typical artifact of the assumptions, language, and culture which dominated pre-Sixties mainstream discussion of abortion policy.[19]

In the more than two decades between the publication of that abortion editorial in late 1951 and the Supreme Court's ruling in *Roe*, released January 22, 1973, the four major national newspapers in this study published 74 editorials addressing abortion policy. All four newspapers proved supportive of liberalizing abortion policy, with the *Chicago Tribune* being the least enthusiastic, but still coming to support decriminalization, primarily on public health grounds. Though anti-abortion claims appear in these pages, they are more often than not being discussed by supporters of liberalization.[20] Even the conservative *Los Angeles Times* and *Wall Street Journal* initially supported liberalization. Most organized national opposition to abortion access emerged in the decade following, rather than preceding, *Roe*.

As for making sense of the caveats to this study, the preceding lessons apply; the observational data are limited to newspaper editorials and op-eds mostly in favor of liberalization. Opposition to abortion liberalization was very rare among major newspaper editorial boards of the era and while I discuss anti-abortion language, the data reflect the actual, unbalanced composition of elite discourse in the 1970s, before the Republican Party had reconstituted itself as an anti-abortion party under candidate and later President Ronald Reagan, during which time opposition to abortion access became an important shibboleth of the conservative movement.

[19] See Luker (1984) on conceptions of gender and the anti-abortion movement.
[20] I have excluded these from analysis for this reason, and because there are so few to begin with.

Support for liberalization was largely predicated on changing medical technology and the increasing influence of public health professionals, who repeatedly pointed to illegal abortions as dangers. Consider this example from the *Los Angeles Times* on July 28, 1967, titled "Abortion Laws." The full editorial is reproduced below:

> The American Medical Assn.'s adoption, by almost unanimous vote, of a policy approving therapeutic abortions in certain situations is encouraging news. It promises to exert a strong influence on state legislatures to update their laws on this subject. Already, two more states are following the example of Colorado and North Carolina in liberalizing abortion laws. California and the Florida Senate have now adopted similar measures.
>
> The new laws have received a strong impetus from the American Law Institute, which drew up a model abortion code. Basically the measures recognize recent advances in medical knowledge of how drugs, diseases such as German measles, and other factors can produce defective infants.
>
> It should be made clear that none of these new laws has to do with "birth control" in the conventional sense, nor should they. Rather the laws are aimed at special situations and provide stringent safeguards against the possibility that they would turn the state into an abortion mill. The Colorado law, for example, permits an abortion only where a three-doctor board in an accredited hospital agrees unanimously that the surgery is justified. The grounds for the operation are limited to circumstances where pregnancy would result in death or grave impairment of the mother's health, in a defective child, or where rape or incest has occurred.
>
> As Dr. Edmund W. Overstreet of the UC Medical School has pointed out, polls show a majority of Americans now favor liberalization of abortion laws. The thalidomide babies of a few years ago may have dramatized the issue, but there are a few other equally compelling situations where this operation ought to be authorized for humanitarian reasons (*LAT*: 7/28/1967).

This editorial has four distinct claims and a fifth, less distinct, potential claim, which I discuss last. Typical of editorials of the pre-*Roe* era, it features no constitutional

claims; all its claims are situated in the language of ordinary politics. The first of the four appears in the second paragraph, where the authors cite the trend across various states toward liberalization of abortion laws. This article is coded "public opinion," to indicate the argument from public opinion appears. Though the legislatures are not exactly correspondent with their publics, the categories are intentionally loose enough to contain conceptually analogous arguments.

The claim is repeated more directly in the last paragraph, but the line about liberalization in other states is adequate to count the editorial as making the public opinion claim. The editorial's second claim appears in the third paragraph. Here the authors note that medical care has advanced considerably, presumably since contemporaneous abortion laws had been established, suggesting, albeit implicitly, that laws should be not merely changed but modernized. Arguments for modernization of abortion laws are coded as "modernization." The third claim is a reference to a German measles outbreak of recent years, but is not fully developed until the fifth paragraph, in which the authors reference a "defective" child. This argument for abortion access is coded as "congenital defect."

The last claim with which we are concerned, "compassion," suggests a traditional thematic unit (Krippendorf, 2004), but is properly coded as a meaning unit within this study because it is characterized by specific language rather than holistic allusion. In this case, we note the use of imagery of the woman unable to access an abortion, invoking "death or grave impairment."[21] The lack of any reference to the general health of women,

[21] The decision to code this as compassion rather than public health is a delicate one, and I present this particular editorial to emphasize that there are interrelationships between many of the claims in a category.

the vivid language, and the presence of a singular "woman" is more an appeal for compassion for another human being than an argument about public health.

There is a potential fifth claim in this editorial, hinted at in three places: the seemingly approving mention of the requirement for unanimity of a three-physician panel to carry out the procedure, that use of the procedure does not constitute "birth control," and the rule-based limitations on the use of the procedure. Yet these are merely facts about a policy, and any characterization that may seem to emerge in the aggregate is precisely the sort of thematic unit this study eschews (Krippendorf, 2004).

Consider another instructive example of pre-*Roe* abortion politics discourse. Absolute claims were offered occasionally in the pre-*Roe* era, but usually at the hands of the courts, with the editorial authors citing judicial wisdom. These cases show the diversity of the discourse because they operate simultaneously with prudential and orientational claims. The editorial below is particularly rich in its variety of argument. Printed November 10, 1969, in the *New York Times* and titled "Changing the Abortion Law," it is reproduced in full below:

> A new avenue has just been opened for the possible elimination of New York State's archaic abortion law. Federal Judge Edward Weinfeld has ruled that there is sufficient substance to four suits challenging the constitutionality of the law to warrant the consideration of a three-judge Federal Court. Without attempting to anticipate the Court's decision, there is ample room for hope that it will be favorable to the plaintiffs' contentions that the law is unconstitutional because it is vague, invades privacy and denies due process and equal protection of the laws.
>
> The California State Supreme Court recently declared that state's abortion law unconstitutional on very similar grounds. It held that the law violated "the fundamental right of a woman to choose whether to bear children" and a

> patient's "right to life which is involved because childbirth involves risks of death." The same reasoning would seem to the layman to apply to the abortion laws of New York and 37 other states, which are substantially similar to the statute.
>
> The American Civil Liberties Union, which with other organizations is assisting four physicians who filed one of the suits here, promises to carry the fight to the United States Supreme Court. The suit charges that the law violates a doctor's right to practice medicine according to the highest possible standards, and a patient's right to safe and adequate medical advice and treatment. But the possibility that the courts may void New York's 86-year-old abortion statute should not deter the Legislature from doing what it should have done long ago, and almost certainly would have done last year except for an emotional and irrelevant plea by one member. In the last three years ten states have modernized their abortion laws; the time is ripe for New York to do the same (*NYT*: 11/10/1969).

This is a particularly long editorial that gives a good sense of the range of pre-*Roe* claims. The reference in the first line to "New York's archaic abortion law" is an appeal for modernization, an argument for prudence, while the next paragraph makes a non-rights-based argument from privacy. Two constitutional claims are then offered, that the abortion restrictions in question violate due process and equal protection guarantees.[22]

The penultimate paragraph includes a claim that fell out favor following *Roe*, but which was prominent in the early abortion debate of the 1950s and '60s. Here the

[22] That the argument for modernization is classified as prudential rather than orientational is about as hard a case of classification as is found in the system. Following the discussion in the previous chapter concerning the foundations of the taxonomic distinction between orientational and prudential claims, one might ask whether, for example, modernization could be an orientational claim, since two advocates may reasonably disagree about what direction modern society ought to head in. This would surely be a normative policy difference, however, the modernization claim is a positive claim in that it does not purport to put a value on any particular modern change, but rather privileges purported changing trends over the status quo. It would be an unusual in the modern era to argue that progress is inherently problematic. Nonetheless, this does point to the sometimes delicate distinctions necessary when making inferences about the nature of the debate hinging on a rigid and principled distinction between orientational and prudential kinds of claims, as discussed in chapter four.

editorial argues that the restrictions violate "a doctor's right to practice medicine according to the highest possible standards" and further impinge on "a patient's right to safe and adequate medical care." This claim is coded as "right to healthcare," which, along with medical privacy, faded from the discourse in the years following *Roe*. While the argument from medical privacy was transformed into the three major post-*Roe* absolute arguments for abortion rights—privacy, choice, and autonomy—the argument from a right to healthcare is fairly trivial in its prevalence. It appears only three other times in the census.

Abortion policy cannot be separated from the language of the abortion debate, which has both shaped and been shaped by abortion policy itself. The history of modern abortion policy begins in earnest in broader social movements, emerging from the rise of mainstream feminism and the liberalization of attitudes toward sexuality among the cohort who came of sexual maturity during the Sixties. Public attitudes toward abortion were both coming into being and changing during this time. Public opinion research during this period is of generally poor quality and, as Zaller wrote regarding the surveying of opinions generally, "what gets measured as public opinion is always and unavoidably dependent on the way questions have been framed and ordered" (Zaller, 1992: 95). Add to these general concerns the specific historical context in which polling of abortion attitudes was conducted. Rosenberg (2008: 258-65), relying on contemporary accounts, makes a case that movement was nearly uniformly toward liberalization. In making his case, he cites not only Gallup polls but also the National Fertility Study, the American Council of Education, and the Commission on Population Growth and the

American Future (Rosenberg, 2008: 260-2). While the quality of Gallup polling in the late 1960s can be debated, these interest group polls must be taken with more than one grain of salt. The question formulation employed by the Commission on Population Growth, for example, asked whether respondents agreed with the statement that an abortion decision "should be left up to persons involved and their doctor."

It is difficult from the poll, which was reported in the *New York Times* (*NYT*: 10/28/1971), and absent equivalent prior polling, to know what to make of the fifty percent who agreed. The statement is one-sided, to say the least, and one can be politically opposed to abortion access and still find disagreement difficult, as President George H.W. Bush discovered in an interview with the *Times* in 1992 when, asked to comment on how he would react to one of his granddaughters pursuing an abortion, not only acknowledged that it should be her choice but seemed genuinely unable to imagine the alternative. Asked if the choice should ultimately be hers, the anti-abortion president responded, "Well, whose else's, who else's could it be?" (*NYT*: 8/12/1992).

Beyond the questionable quality of these polls, there are general difficulties associated with public opinion on uncrystalized issues, particularly when their salience is increasing and the public are being initially exposed to partisan cues. Polling concerning an emerging political issue increases the uncertainty associated with survey response, particularly when that emergence is marked by an unstable mixture of elite opinion, as in the abortion case. As Zaller points out, "if people are exposed to a shifting balance of liberal and conservative communications, the balance of considerations in their minds will shift" (Zaller, 1992: 64). If we accept that the most fundamental organizing

principles of the contemporary American two-party system are economic, it should not be surprising that when *Roe* was handed down, there was no obvious ideological connection between either of the major parties and abortion policy *per se*. The Democratic Party was generally perceived as (marginally) more welcoming to feminists. While the Republican Party platform had endorsed the Equal Rights Amendment as early as 1940, the Democratic Party had opposed it until 1972, largely out of concern, originally voiced by Eleanor Roosevelt and organized labor, that the Amendment would invalidate government regulations protecting women from the ravages of the market (Mansbridge, 1986).

While contemporary abortion attitudes are frequently characterized by the polarization and absolutism of the public debate surrounding the policy and are dominated by interest groups, actual attitudes in the contemporary electorate reflect a significant, ordinary level of ambivalence and uncertainty (Craig et al., 2002). No doubt, public opinion toward abortion was evolving during the 1960s, but there is no way to disentangle these results from the rapidly changing partisan and ideological taking of shape going on in the media coverage of the abortion debate, not only during the 1960s but in the two decades following Roe, during which the parties adjusted and assumed distinct positions (Adams, 1997), a far cry from the ambivalence of Presidents Nixon, Ford, and Carter.

Particularly vexing for making sense of public opinion about abortion during the pre-*Roe* years is the impossibility of knowing what the various words and phrases associated with abortion policy actually meant to respondents. This problem is further

compounded by error introduced by social desirability bias, which we should expect to be particularly strong in social and health issues such as abortion (Berinsky, 2004; Sudman, et al., 1995).

These methodological concerns do not throw into doubt reasonable inferences that, whatever prior absolute levels of support for various abortion policies, attitudes appeared to begin changing in the 1960s prior to Supreme Court action. It is impossible to say the extent to which these changes were caused by elite action, interest group organization, external events, changing methods of measuring public opinion, or diffuse cultural change. Regardless of the interactions of these important causes of aggregate public opinion change, they influenced not only attitude change but policy change as well.

The liberalization of abortion policy in the United States began in the Sixties with the California legislature debating abortion decriminalization in 1961 and the New York legislature following as early as 1966 before a wave of liberalization efforts in 1967, when twenty-eights states would introduce reform bills and Colorado would pass the nation's first. Later that year Governor Ronald Reagan would sign California's liberalization bill and North Carolina would liberalize its abortion laws without significant controversy. Over the next few years, several other states enacted bills ordering various levels of reform, while national political elites remained largely indifferent or disinclined to engage in the emerging issue (Rosenberg, 2008: 183-9).

The movement to legalize abortion in the United States was in the midst of a period of profound legislative success when the Supreme Court declared that the

constitutional right to privacy, a right itself identified by the Court only eight years earlier, further entailed a right to an abortion. The Supreme Court's action in *Roe* was a sudden interjection into a society already in the midst of a profound transformation. The abortion debate was vibrant, diverse, and progressive when the Supreme Court entered into in 1973.

Despite the arc of reform, by the end of the 1960s abortion was illegal almost everywhere and everywhere people had begun talking about making it legal. Because abortion restrictions were mostly state laws, reformers concentrated their political efforts on state legislatures. The debate surrounding the New York abortion law, for example, makes up the majority of pre-*Roe* abortion discussion in the *New York Times*. By the time the Court decided *Roe*, eighteen states had liberalized their abortion laws.

As Rosenberg points out, the liberalization of abortion attitudes during this period was driven primarily by factors exogenous to the political system; an outbreak of German measles and the widespread use of Thalidomide to treat infertility both significantly increased incidence of birth defects in the United States. These incidents help explain the preponderance of concern over congenital disorders in pre-*Roe* abortion discourse. The census includes ten such arguments prior to 1973, while in the seven years following *Roe* the argument appears only four times, despite a vastly greater number of total editorials. I return to these data in more detail later in this chapter.

It was during these, the last of the pre-*Roe* years, that newspaper coverage of abortion was most pro-liberalization. In contrast to the dire warnings of the *Washington Post* two decades prior, by 1971 the *Chicago Tribune* would warn against a “cruel” law

leaving women with a choice of whether to "patronize[] an abortion mill where the mortality rate is likely to be as much as 33 times that in a hospital" (*CT*: 6/11/1971) and forcing them into "surgery…without benefit of qualified doctors or hospital services" (*CT:* 7/12/1971). The popular syndicated columnist Ernest Fergurson wrote that year that legalization was inevitable so that women in need would not need to fear the criminal and health risks associated with pursuit of an illegal abortion (*LAT*: 1/20/1971).

Late pre-*Roe* discussion of abortion was permeated with concern for practical matters; sterile operating rooms, preventing exposure of vulnerable women to career criminals, and the distinct emotional traumas of pursuing an illegal abortion. These pieces are a world away from the sometimes sterile metaphysical world of abortion prose that emerged after *Roe,* consumed with abstract rights at the comparative expense of real consequences. Of the almost four thousand editorials in the full census, among the most compelling post-*Roe* pieces are the rare few that recall the pragmatism of the pre-*Roe* discourse, as they call to mind more easily emotions, which may be superior predictors of political attitudes than more utilitarian considerations (see Brader, 2006).

The language of the debate anticipates as well as remembers. One notable early reference to abortion rights in the *New York Times* was not in an article or editorial but a quarter-page advertisement, placed by a group called WONAAC, the Women's National Abortion Action Coalition. Run by WONAAC on behalf of a number of groups and social activists, it promotes a rally for legalizing abortion, assembling at First Avenue and 27th Street and concluding with a rally three hours later at Union Square. The ad, which ran April 30, 1972 (*NYT*), almost a year before the Supreme Court recognized the

existence of abortion rights, declares “the right to abortion is under attack in New York!...Abortion must be a woman’s right to choose!” This ad invokes the languages of choice and rights as well as a tone of immediate threat, all of which would come to be hallmarks of abortion discourse during the 1970s and '80s. Seen today against the backdrop of reporting and editorializing of the era, the ad stands out, ahead of its time.

The pre-*Roe* era features advocates auditioning many arguments that were later abandoned, but the presence of the undeveloped right to an abortion is clear in some of the media outlets further toward the periphery of American politics. What remained at the end of 1972 was for a respected institution to endorse a formulation of abortion policy privileging rights talk. The rights formulation adopted by the Court would prove to have profound implications for the way Americans would debate abortion in the following decades.

The Court Speaks

The distinction between the absolutism of many advocates and the non-absolutism of elite mainstream discourse in abortion rhetoric prior to *Roe* is broadly apparent in the print coverage of the era. An article from January 2, 1973 (*NYT*), just a few weeks before the decision in *Roe*, makes clear the variety of kinds of arguments being made. The article, titled “Both Sides Gird for Renewal of Fight on Legalized Abortion,” examines the activists mobilized on both sides of the abortion discourse and includes excerpts from interviews. While editorials in the *Times* and other national newspapers of the era were largely devoid of the kind of uncompromising language of absolutism, the activists

interviewed for the piece by Tom Buckley speak a language of indefatigable principle. Representatives of the Women's National Abortion Coalition and a monsignor of the Catholic Church are quoted alike rejecting compromises placing legislative limits on abortion, speaking of "a principle that cannot be bent to conform to the ideals of a pluralistic society, since what is involved is no less than the murder of the unborn" or that women should have "absolute control," including "the right to an abortion at any stage of pregnancy" (*NYT*: 1/2/1973).

In the years immediately prior to the Supreme Court's decision in *Roe v. Wade*, activists were engaged in a vibrant discourse. Their language, concerned with sex and class equality, public health, and compassion for the plight of women in difficult positions, only hints at major issues of choice and privacy. Despite occasional remarkable exceptions such as these, there are few incidents of rights language identifiable in the news media prior to *Roe*. Exceptions to a general paucity of rights claims in pre-*Roe* newspapers are instructive curiosities; they foreshadow our era, in which these claims dominate our collective consciousness. Put another way, while these fundamental arguments were familiar to activists, the abortion debate that existed in the media sounded very different from how it would come to sound.

The first modern editorial from the *Chicago Tribune*, for example, includes two arguments. The editors write, "Most Americans think of Canada as a relatively staid, conventional country with a moral outlook not greatly unlike our own. This appraisal is doubtless quite correct, but parliament has now virtually approved sweeping changes in Canada's criminal code…liberaliz[ing] the present law to permit abortions…" before

quoting Canadian Prime Minister Trudeau saying the reform is intended to "take the government out of the bedrooms of the nation" (*CT*: 7/5/1969). The first of these, an argument that the United States should follow international example, is coded as "international trends," while the second, less pedestrian argument presented by Trudeau appears more subtle. Getting "out of the bedrooms" draws on common shared desire for personal privacy without having to utter the word. The connection between abortion and privacy is clear, but it is not structured in the formal way privacy claims would come to be in the years following *Roe*. Here the claim is coded as "privacy (implicit)," because the claim is ultimately about privacy, albeit indirectly and informally.

Many editorials pack few arguments but use context to amplify their impact. Context is usually a blank slate on which to write about abortion, but space is more often spent on context than argument in editorials relying on pathos, which are prominent in the early debate. An editorial titled "Indifferent in Illinois" from the Chicago Tribune in 1971 is reproduced in full below:

> By defeating in committee two bills to reform the state's restrictive abortion law, Illinois legislators have struck a blow for a cruel status quo. Henceforth, as before, Illinois women have three choices: paying hundreds of dollars to go to a state where the procedure is legal; patronizing an abortion mill where the mortality rate is likely to be as much as 33 times that in a hospital; or bearing the child of an unwanted pregnancy, even if that pregnancy was the result of rape or incest. Some lawmakers may feel satisfied or even smug in having dispensed so easily with a controversial issue. But their indifference to a rational solution to problem pregnancies will be ultimately reflected in the needless suffering of thousands of Illinois women (*CT*: 6/11/1971).

This editorial features two distinct claims. References to the mortality rate of abortion mills, here with a statistic attached, are coded as public health. The second half of the editorial draws on the plight of women in need of an abortion and the terrible fate they faced in a state with no legal recourse to one. This line of argument is coded as "compassion," which is defined as an orientational claim because an anti-abortion editorial would argue for a contradictory policy from compassion for the fetus. This editorial features no rights claims.

Privacy from Medical to Moral

Though explicit references to a right to an abortion stemming from a right to privacy are few prior to *Roe,* where they do appear, they appear most commonly as arguments from medical privacy. Here we see the real genesis of the line of argument elevated to dominant status by Justice Blackmun's opinion. Where advocates were talking of privacy, they tended to talk about emphasizing not the privacy of an abortion decision but rather the privacy of a *medical* decision. The de-medicalization of the abortion discourse following *Roe* degraded the discourse in its loss of this important aspect of the abortion decision; if abortion is a legitimate medical procedure, surely it must be allowed that the wall of privacy surrounding the doctor-patient relationship entails the right of the doctor to counsel about abortion care.

In the year immediately preceding the Court's decision in *Roe,* the *New York Times* published 11 editorials dealing primarily with abortion. Across these the editors made three arguments stemming from any kind of privacy, and in each case did so

relying on the principle of medical privacy. Generally, the prevalence of medical language is substantial; talk of decision-making with doctors would not give way to the total rhetorical autonomy of women for some years. Prior to *Roe*, hypothetical women in real arguments more often made decisions in concert with their physicians than alone. A representative editorial from 1970 references "the decision of a woman *and her physician*" (*NYT*: 4/9/1970) while another from the same year argues the abortion decision "rightfully belongs with the woman and her physician" (*NYT*: 4/11/70). An editorial from 1972 explains that "the decision to have an abortion is one properly to be left with the individual woman and her physician" (*NYT*: 4/29/1972). The next reference, in a follow-up editorial a few days later, consists of an approving citation of a commission's finding that "the matter of abortion should be left to the conscience of the individual concerned, in consultation with her physician" (*NYT*: 5/1/1972). Another simply states that the abortion decision "belongs with the woman and her doctor" (*NYT*: 5/3/1972).

This transformation of the public conception of the abortion decision happened without any apparent notice, but it is a profound transformation, one potentially influenced by both evolving attitudes about abortion and the role of women in society. In op-ed from the *Los Angeles Times* less than a year before the decision in *Roe*, Ernest Conine approvingly quotes presidential candidate George McGovern saying that "abortion should be a decision between doctor and patient" (*LAT*: 6/22/1972), a formulation that not only removes agency from the woman but reduces her to the role of the patient. The rhetoric of the patient, who knows nothing of medicine and is at the

mercy of doctors, is a far cry from the post-*Roe* tendency toward a rhetoric of choice, in which it is the woman seeking an abortion who is empowered and the physician's role is to enable her to exercise her choice.

Justice Blackmun's opinion for the Court is itself a product of the medical theory of privacy, an influence apparent in his handling of the doctor-patient relationship and understandable in biographical terms considering his experience as legal counsel to the Mayo Clinic. The *Los Angeles Times* editorial supporting the decision states, "the decision will not satisfy those who had argued the mother should make the decision. It insists that the decision be made with the personal physician" (*LAT*: 1/23/1973).

Justice Blackmun's decision, however, ultimately places the physician's counsel in the medical service of a woman's private decision, but his invocation of medical language would be lost in the media rearticulation of the right. This suggests that the Court can constitutionalize a discourse, but it cannot force the permanence of any particular rights that make up that constitutionalization. Ultimately it is the activists, the legislators, and the commentators who perpetually recreate the constitutionalized discourse.

The shadow cast by medical privacy is longer than its own stature; its waning dominance is plainly evident in the decade following *Roe* and its eclipse by a rising rhetoric of choice and autonomy not immediate. As theory suggests, the rhetorical influence of the Court functions in this case through media, with advocates repositioning themselves and reconstructing their rhetoric in the discursive market. As advocates learn the kind of language that effectively utilizes media resources, cultural changes are

evident in both the changing likelihood that kinds of arguments are made as well as the intensity of their presentation. In its editorial applauding the Court's decision in *Roe*, the *Los Angeles Times* wrote "a woman and her physician now have unrestricted discretion as to whether a pregnancy should be aborted in the first three months" (*LAT*: 1/23/1973).

Particularly significant in the editorial, however, are the board's repeated references in the piece to a "right to privacy" that "surely must include protection from unreasonable intrusions by government in private matters" (*LAT*: 1/23/1973). That the *Los Angeles Times* editors thought in 1973 that the right to privacy so surely includes an abortion right is surprising. Particularly curious, if this argument was so obvious to them, is why they never made the argument in any of the eleven editorials favoring abortion policy liberalization in the years prior to *Roe*. While the *Los Angeles Times* argued that abortion was a medical decision for a woman and her doctor to make, the editorial directly dealing with Justice Blackmun's opinion is the first instance of the paper ever endorsing a right to privacy that entails a right to an abortion. The strange but purported obviousness of this argument is a smoking gun of judicial rhetorical influence.

Journalists' immediate reaction to the Court's decision was to present the argument largely on its own terms, adopting and directly quoting the language of Justice Blackmun's opinion and paying some lesser but non-trivial attention to the concerns of Justice White's dissent. The *Los Angeles Times* news article covering the Court's decision, titled "Abortions and the Right of Privacy," describes and then rhetorically endorses, through uncritical use, the existence of a right to privacy entailing a right to an abortion (*LAT*: 1/23/1973: A1). The *Washington Post* editorial is similar. The *New York*

Times did not author an editorial supporting (or opposing) the decision, but the lead story, titled "High Court Rules Abortions Legal in First Three Months," covers the decision broadly, recapitulating arguments on both sides and providing political context (*NYT*: 1/23/1973: A1). The *New York Times* also printed excerpts of the opinion and dissent in a 3:1 ratio, roughly equivalent to the 7 to 2 vote, providing a good summary of each (*NYT*: 1/23/1973: A20).[23]

The *New York Times* did not run an editorial focused on abortion policy during the three years following *Roe,* but finally took the bait following the conviction by a legally confused Boston jury in the case of Dr. Kenneth Edelin, an abortion provider. The heart of the editorial is an acknowledgement of the complexity of the abortion issue, suggesting that absent good reason to say life begins at one point or another, the law should favor the welfare of women (*NYT*: 2/19/1975). The *Times* explicitly endorsed the core holding of *Roe* in a 1977 editorial in which the editors wrote, "the state has no business intruding into the individual woman's abortion decision." The editorial concludes with a powerful call for privacy as a form of compassion, quoting abortion provider Dr. Denes saying, "abortions reside in the realm of individual struggle, personal defeat, private hell" (*NYT*: 1/31/1977).

About the same time, the *Chicago Tribune* would argue for abortion rights in seven more editorials from 1973 to 1979, framing the decision with reference to the expertise of a physician only once. While the paper would write in 1976 of "physicians' rights to make professional decisions in the best interests of their patients" (*CT*:

[23] The coverage of the abortion cases was somewhat muted by the death of Lyndon Johnson, which was reported on January 23, 1973 as the lead story over the abortion decisions. George Foreman's astounding defeat of Joe Frazier ranked third on the front pages covering that unusually historic day.

11/26/1975), every reference to the abortion decision itself in the remainder of *Roe*'s decade rests entirely with the woman. The paper would write of "the rights of individual women," (*CT*: 9/7/1975) that "society does not have any right to deny a woman an abortion," (*CT*: 11/10/1976), "a woman's right to have an abortion," (*CT*: 12/11/1976) "a woman's right," (*CT*: 1/11/1979), a "woman's untrammeled freedom of choice," (*CT*: 7/6/1980), and so forth.

As the notion of an abortion right founded on privacy rose to rhetorical dominance during the 1970s, advocates found themselves writing of an abortion decision no longer made in concert with a physician but instead by a woman, in the privacy not of a medical office but rather her own conscience. This is a profound if subtle change in the social conceptualization of abortion, and it is apparent only in the slow transformation of American political language following the 1970s. It is a transformation that occurred as part of a broader social change, as women achieved an increasing share of social power and respect and the media came to address them as moral agents unto themselves. It cannot be separated from any one cause; the linguistic transformation was a part of the social change of the era. It is a transformation in which the authority of the Court, and particularly the pen of Justice Blackmun, can be clearly felt.

The right to an abortion in the years following *Roe* came to be argued for from three rhetorical frames: privacy, choice, and autonomy. Each of these is of course closely related to the other two. Choice is an inherently individual act. Autonomy is a necessary condition of choice as well as a condition of realized freedom to choose. The transformation of medical privacy into Court-sanctioned conceptions of privacy—

personal privacy, personal choice, and personal autonomy—emerged prior to and partially alongside a broader trend toward a general de-medicalization of abortion. As American political society came to understand abortion as a matter of private choice, abortion lost its medical character and discussion of the medical implications of abortion policy declined. In the place of talk of the importance of sterile instruments and competent physicians rose discussion of moral imperatives, metaphysical concerns far removed from the reality of abortion and far more comfortable subjects of discourse for news reporters and editors who were almost all male and who naturally possessed far more experience talking about legal principles than medical practice.

Discussion of public health was the dominant concern of news media elites and politicians prior to the Court's decision in *Roe*. In the 1972, the *New York Times* published eleven editorials discussing abortion policy. An argument for liberalizing abortion policy on the basis of public health issues is offered in every one of the eleven. Ohe 45 editorials published by the *New York Times* between 1967 and the end of 1972, 31 feature an argument from public health and 24 argue for "modernizing" abortion laws, an argument that almost always hinges on the idea that abortion laws are a product of another medical era.

This is a profound dominance. By comparison, the *Times* includes during these years only one invocation that abortion is a form of murder, a quotation of Judge T. Emmett Clarie commenting that a liberalizing decision by an Appellate Court panel in Connecticut "invite[d] unlimited feticide" (*NYT*: 4/23/1972). Shortly after, the editors approvingly cite a Connecticut legislator saying that if abortions are to be performed in

Connecticut, "they [should] be done by doctors in hospitals and not 'by somebody with a coat hanger'" (*NYT*: 4/23/1972). The editorial also refers to the Connecticut statute banning abortions as "ancient," a not-too-subtle claim for the need for modernization.

Another editorial from the *New York Times* that year laid the facts out in more detail:

> The current anti-abortion drive is, ironically, being mounted just as figures released by the Health Services Administration of New York City attest to the beneficial impact of the recent reform. Thus, in the first six months of the life of the present law, an average of 480 women reported monthly to municipal hospitals suffering from the effects of incomplete, illegal abortions; in the second six months, the monthly average had dropped to 350 women; in the third six months, to 199. The figures also show that more women have been having more legal abortions earlier, reducing the chance of complications (*NYT*: 4/29/1972).

This simple statistical argument, that abortion policy liberalization reduces medical harm to many women, was typical of pre-*Roe* discussions of abortion policy. The same editorial refers to "the medieval status" of abortion prohibition laws, while another editorial refers to prohibition as "a medieval form of coercion" (*NYT*: 5/1/1972). A *Los Angeles Times* editorial from 1966 is more straightforward still. In the piece, titled "Our Archaic Abortion Law," the editors begin the editorial writing, "California's law of abortion, like that of most other states, is an antiquated, cruel, and—to a great extent—an unenforceable statute…" The editorial continues, "many of these illegal (abortion) operations are performed by persons with absolutely no medical training at all. Many others are performed, or attempted, by women on themselves" (*LAT*: 5/1/1972).

The pre-*Roe* period generally featured more explicit engagement with the material world of illegal abortions. A 1971 *Chicago Tribune* editorial warned of "surgery…without benefit of qualified doctors or hospital services" (*CT*: 6/12/1971) while in a *Los Angeles Times* op-ed the same year we find a fairly typical mention of illegal abortions "carried out in…unsanitary conditions" (*LAT*: 1/20/1971). A vivid op-ed from William Farrell, published less than a year prior to the decision in *Roe*, is accompanied by a large photo of a man in a business suit; extended in his arm is coat-hanger. The image, accompanying an article focusing on the unique challenges women face amid legislatures dominated by men, is a compelling argument that anticipates a day 31 years later when President George W. Bush would sign the Partial Birth Abortion Act, flanked on stage by nine men in business suits and no women.

The reality of illegal abortions comes through these texts, a reality that is lost in favor of metaphysical exposition in the years following *Roe*. While I present quantitative evidence of the magnitude of this shift in the next section, I want to focus for a moment on the persuasive qualities of this discourse as it compares to the absolutism of the post-*Roe* era. Public health continues to be referenced, albeit far less frequently, after *Roe*, but the nature of the references underwent a qualitative change alongside the more obvious and easily contextualized quantitative change. This is due, more than anything else it seems, to the fact that for most women illegal, unsanitary abortions were a thing of the past by the middle of the 1970s.

Typical references to public health in the post-*Roe* period recall the past rather than comparing distinct presents, and the change in the material conditions experienced

by women seeking abortions plays out in the nature of the arguments offered from public health. A 1982 editorial opposing the Hatch Amendment, a proposed amendment to the Constitution to devolve jurisdiction over abortion rights from the Supreme Court to the federal Congress or the states (explicitly favoring the more restrictive law in cases of conflict), reflects this change, writing, "the Hatch Amendment would, at best, take the country back to the time before (*Roe*), when legal and safe abortions were available only to women who could travel to states that permitted them…" (*NYT*: 3/10/1982). An editorial from 1983 approvingly quotes Justice Powell, writing that additional abortion regulations would "drive the performance of many abortions back underground free of effective regulation and often without the attendance of a physician" (*NYT*: 6/17/1983). Generally after *Roe* the most effective arguments from public health are essentially arguments for compassion, as in an editorial from 1988 detailing the gruesome death of a Brazilian woman from a "clandestine" abortion (*NYT*: 12/15/1988).

These are unusually stark examples. More commonly, the public health argument for abortion was reduced in the post-*Roe* years to little more than a shibboleth uttered without any elaboration. One typical editorial simply referred to a legal right to "safe abortion," as opposed to the unmentionable alternative (*NYT*: 12/18/1985). An article a decade later would describe the alternative to safe and legal abortion access as "terrible risks" (*NYT*: 1995). The reality of those risks is rarely spelled out in these editorials.

It is possible that advocates for abortion access felt the argument to be so well known and understood by the 1990s that they no longer had to spell it out, content to gesture toward a past increasingly remote, particularly to persons who came of sexual

maturity in a world with broad abortion access. Typical are references to the "back-alley," a caricature of pre-*Roe* abortion providers (*NYT*: 10/5/1991). A piece from 1977 reminds the public of the "common experience that where safe abortions are forbidden by law or by parental fiat, back-alley abortions flourish" (*NYT*: 6/3/1977).

These subtle but real changes in the nature of the public health argument mirror changes in the privacy argument, from medical to personal, but where the privacy argument exploded in popularity following the Court's decision, the argument from public health declined to a point of almost astonishing insignificance. Post-*Roe* abortion language bears little resemblance to the world that came before it not primarily because the way specific arguments were made changed, but because the arguments that were made in the first place changed. While it is important not to lose sight of qualitative changes within arguments, the heart of the story of the linguistic politics of the abortion debate is in the extraordinary shift in the kinds of arguments advocates made and the frames used to make those arguments.

Rights as Policies

Most people, Rosenberg argues, believe Justice Blackmun's opinion in *Roe v. Wade* radically changed abortion laws. Rosenberg thinks that view is mostly mistaken, that the case did little to accelerate access to abortion services (Rosenberg, 2008). I argue, however, that by changing the legal basis of abortion access the decision profoundly changed the language with which Americans talked about abortion policy. The influence seems likely to last as long as the Court's recognition of the abortion right itself. In the

decades that followed *Roe*, abortion advocates developed a vocabulary of rights, held by individual women in opposition to the state, and responsibilities, of the state to ensure the promise of the right was fulfilled.

This change is broadly observable across the news reports and editorials written about abortion over the nearly four decades since the Court's decision in *Roe*. The immediate objection to my general thesis might be that these changes in language are brought about by changes in the law rather than changes in the basis for the law. It is not, however, only the law that matters. Empirical judicial politics scholarship is insightful about what power it supposes to exist. But beyond the law itself, the justification for the law matters.

Though I think it is self-evidently more obvious that a vocabulary of rights and responsibilities would flow from legal constitutionalization, there is a convenient test of this possibility. Several states legalized abortion prior to the Court's decision, New York doing so in 1970. In anticipation of the Governor's pre-announced signing of the bill, the *New York Times* wrote a supporting editorial, reproduced in full below:

> After years of patient effort and emotion-charged debate, New York State is expected soon to have on the books an abortion-reform law that leaves the decision on abortions, up to the 24th week of pregnancy, where it rightfully belongs—with the woman and her physician.
>
> If the Governor signs this bill, as expected, New York will join a dozen other states in removing an antiquated restriction on individual choice that has caused incalculable mental anguish and physical risk. The new law should offend the conscience of no man. Rather, it leaves to the conscience of each the decision on an intensely personal matter in which the state has no business to intervene.
>
> Credit is due to Assemblyman Constance E. Cook, Ithaca Republican and chief sponsor of the reform bill, who

> persisted with calm, persuasive argument in the face of intense emotional opposition (*NYT*: 4/11/1970).

The editorial features an implicit reference to medical privacy, but it is a narrow one that follows the tendency of pre-*Roe* discourse and otherwise references only modernization ("an antiquated restriction") and pluralism ("[t]he new law should offend the conscience of no man [sic]…it leaves to the conscience of each…"). *The New York Times* would not directly evaluate an abortion policy or decision again until it reviewed *Roe* three years after it was handed down in an opinion in which the *Times* invoked a "right to privacy" entailing an abortion right for the first time in that newspaper's history. In that piece, the editors of the *Times* wrote of "the Court's reaffirmation of this most intimate of privacy rights" (*NYT*: 6/3/1976). The same editorial describes the abortion decision itself not in terms of doctor and patient, but instead as "a decision for the woman to make for herself" (*NYT*: 6/3/1976). The change in the abortion law in New York State did not appear to change the way the *New York Times* talked about abortion. The Court's ruling in *Roe* did.

This is not to say discussion of public health disappeared immediately; the decline of public health took place over the course of the decade following the decision, while the rise of a language of rights was stark and sudden. A piece in 1976 makes reference to a National Academy of Sciences report finding that "legal liberalization was followed by a sharp decline that would undoubtedly be even steeper had the full horrors of the past not been hidden by the secrecy that prevailed prior to legalization" (*NYT*: 2/5/1976).

The language of rights is not constrained to affirmations of a woman's abortion right; it came to permeate thinking about abortion and the state. In 1976, the editors of the

Chicago Tribune wrote that "society does not have the right to deny a woman an abortion" (*CT*: 11/10/1976) and would elaborate a little more than two years later, discussing late-term abortions, that "there is a point…where priority must be given to society's right to protect itself from having to condone…evils" (*CT*: 1/11/1979). An op-ed by Stephen Chapman a few years later lamented while quoting then-candidate Jesse Jackson Jr. that "life 'is really a gift from God. Therefore, one does not have the right to take away (through abortion) that which he does not have the ability to give'" (*CT*: 2/19/1984). Here, the summary of opposition to abortion that finds its way into popular press is a powerful statement of rights derived from natural law; in this case, not only of the absence of any such rights but the implication of an absolute barrier to ethical action.

The language of rights, established in the general case, necessarily informs discussions of the abortion controversies that came to define the years after *Roe*, centering on issues like parental and spousal notification, Medicare funding, and federal support for international programs providing abortion services. The *Los Angeles Times* argued in 1976, for example, against parental notification laws, writing "parents do not have the right to veto their daughter's decision" (*LAT*: 6/5/1976). Even when discussing the potential personhood of a fetus, the *New York Times* would, by the 1980s, find itself referring to "the rights of a nonviable fetus" (*NYT*: 5/27/1985).

The scope of rights talk grew larger and its exercise more rote over time. In a 1989 op-ed, Mary Steichen Calderone makes an extended argument for abortion access as a means of reducing the general incidence of congenital defects. What is strange about this argument, which had been very common prior to *Roe* but fell out of favor after 1973,

is that Calderone makes the argument from a "fetus' right not to be born," a formulation totally non-existent in discussions of congenital defects prior to *Roe* (*NYT*: 9/16/1989). At other times rights are used more illustratively, as in an op-ed in which Richard Berke quotes L. Douglas Wilder, the Democratic candidate for Governor of Virginia, characterizing his opponent as "someone who would 'take away your right to choose and give it to the politicians'" (*NYT*: 10/15/1989).

The rise of rights language persists to the present day and continues to influence discourse and diminish the capacity for democratic compromise. Returning to the theoretical approach, it should be clear that there is ample theoretical and historical reason to think that Supreme Court decisions can dramatically influence the way people talk about politics and that they do so in particular by identifying and imbuing arguments with the majesty of law. Considering the conditions under which this is likely, the Court released its decision in *Roe* under circumstances ripe for profound influence over future discourse.

Rosenberg is particularly insightful in his discussion of *Roe*'s fortuitous timing. The case was similarly well-suited to impact the language of the debate. The issue was an inherently moral one, was not (yet) significantly partisan, and was decided on constitutional grounds with a substantial (7 to 2) majority of the Court. The impression one gets from immersion in the debate of the era is of a discourse transformed from practice to theory, but the qualitative analysis can be subjected to quantitative tests intended not to replicate the insight of the reading but instead to substantiate its core content orthogonally. Specifically, we can make theoretical predictions about the

composition of the discourse which can be falsified or, absent falsification, provide us clearer insight into the relative magnitude of these changes. While qualitative reading is critical to understanding the nature of the change, a quantitative reading allows us both to attempt to falsify the general theory and to make sense of the magnitude of the Court's rhetorical influence.

The contemporary abortion discourse is highly constitutionalized. For claims to carry weight, it is more important that they be imbued with metaphysical force than speak to material conditions in the world. The general theory of Supreme Court influence over the politics of language can be explored qualitatively to no end, but the qualitative story is incomplete. The theory must be tested. We must be able to step back from exploring the nature of the trees in order to assess the magnitude of the forest.

In the next section of this chapter I develop and test three hypotheses in an effort to falsify this theoretical reading. The reading I offer in this section of the chapter is focused primarily on the language of the mainstream American news media. Though I discuss examples from reporting, my hypothesis testing focuses exclusively on editorials and op-eds, in which pretenses of objectivity are traded for argumentative clarity

Hypotheses

In the final section of this chapter I empirically test the theory developed in the first three chapters of this dissertation, in which I argue from prior analyses in political psychology and legal theory for a Supreme Court invested with power to shape the rhetorical foundations of American politics. Thus far in this chapter I have developed a

theoretical and practical reading of the language of the American abortion policy debate. In the remainder of this chapter I present the results of a traditional quantitative empirical analysis, first in an attempt to falsify the theory, then as a tool for assessing the relative (quantitative) magnitude of the changes already qualitatively investigated.

I report the results of three hypothesis tests in which Supreme Court influence over political language may be observable. First, we should observe in the public debate a proportional and absolute increase in the incidence of arguments endorsed by the Court. For the data reported in this paper, that means that however much the argument endorsed by the Court was made by newspaper editorial boards prior to the Court's ruling, those same boards should be making that argument in a greater proportion of the editorials and op-eds printed after the ruling. This is the *promotion hypothesis*.

Second, we should observe a corresponding decrease in the incidence of any existing argument left unendorsed by the Court. This is the *diminution hypothesis*. We should aim to observe this most readily in the decline of a popular line of argument prior to rejection by the Court, which might come in the form of ignoring the opportunity to endorse the argument or ever outright rebuking it.

Third, if the Court articulates a constitutional right or state responsibility, we should see an increase in constitutional claims of all kinds and a decrease in non-constitutional claims of all kinds. I call this the *constitutionalizing hypothesis,* because the Court has "constitutionalized" the discourse. This because appeals intended for a legislature's concern for the good should, theoretically, be secondary to a Court charged

with observing the lexically-prior constitutional "right." This is the hypothesis with the greatest significance for democratic theory.

These hypotheses are offered as an initial description of the possibility of Court influence; by no means do I want to suggest they are the limit of what might be observed. This study is unique in comprising a substantial effort at documenting changes in the real composition of American political language following decisions by the Supreme Court.

The most important specific arguments and rhetorical gestures I isolate in this study are the language of "privacy," arguments proceeding from consideration of public health (and the related argument for "modernization" of abortion policy), and a constitutional language of rights and state responsibilities. I have isolated each of these for a different reason; together, they suggest a profound change in the abortion debate. The language of privacy is obviously central because the Court's decision in *Roe* turned on the notion of privacy, first articulated in 1965 in *Griswold v. Connecticut*, entailing the state could not constitutionally interfere with a person's decisions about his or her own body, including the decision to abort a physically dependent fetus. Following the promotion hypothesis, we should expect use of arguments turning on privacy to grow in incidence in the discourse following *Roe*.

Considerations relating to public health formed the most significant pre-*Roe* arguments for liberalizing abortion policy. Public health concerns of various sorts were cited as justifications for liberalizing abortion policy an average of 1.1 times per editorial in the pre-*Roe* period included in the census, the highest for any single argument. Concern for public health, though it contributed no doubt to Justice Blackmun's

reasoning, did not underlie the decision. Consequently, following the diminution hypothesis, we should predict a decrease in incidence of references to public health following the Court's decision.

Because the Court issued a ruling on constitutional grounds invalidating a law, we should, following the constitutionalizing hypothesis, expect to observe an increase in the proportion of arguments proceeding on constitutional grounds and a decrease in the proportion of all arguments made proceeding on other grounds.[24] To suggest that the Court had successfully "constitutionalized" the abortion discourse, we would want to observe both an increase in constitutional claims and a decrease in other kinds of claims.

Results

All editorials and op-eds in the four newspapers printed between 1950 and 1980 were included in the census, as well as all *New York Times* editorials and op-eds through 2000. By following the theoretical taxonomy outlined above, 663 claims were ultimately included in the census. The results of that analysis of the census strongly suggest that the media reacted to the Supreme Court's decision in *Roe* by adopting a rhetoric that emphasized constitutional claims at the expense of all other kinds of claims.

The extent to which the rhetorical force of the Court directly influenced culture rather than the media is not meant to be inferred from these data. Instead, these data mostly confirm predictions consistent with the theoretical story laid out above, in which

[24] In this case, I have divided other claims into "prudential claims" and "orientational claims." Prudential claims are arguments that a policy furthers a widely-accepted goal, such as public health, while orientational claims propose that controversial goals are actually desirable or undesirable. Put another way, prudential claims should, theoretically, turn on evidence, while orientational goals are irreducibly normative.

Table 4.2: Editorial claims concerning abortion in four major national newspapers, 1950-1972, presented as proportion of claims over all editorials.

Newspaper (Cohen's *K*)	Editorials (coded claims)	Privacy	Constitutional claim	Public health or modernization	Prudential claim	Orientational claim	Excluded from analysis
New York Times (.78)	49 (184)	0.14	0.39	1.20	1.84	1.49	0.02
Los Angeles Times (.71)	11 (39)	0.36	1.27	0.91	1.55	1.64	0.45
Washington Post (.73)	9 (38)	0.44	1.56	1.11	1.89	0.00	0.44
Chicago Tribune (.89)	5 (10)	0.20	0.20	0.40	0.40	0.20	0.40

The .14 here indicates that there are .14 privacy arguments for abortion per editorial. In other words, that the expected number of privacy arguments is 0.14 per editorial. $.14^{-1} = 7.14$ editorials per privacy argument.

the Court utilized its institutional powers to elevate constitutional arguments from relative obscurity to commanding stature. Following *Roe*, the media came to discuss abortion on the rhetorical and philosophical terms dictated not by an emerging democratic debate but rather by a constitutionally-empowered but unelected institution.

From 1950 through the end of 1972, the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Chicago Tribune* printed 74 editorials directly arguing for or against an abortion policy; some focused on their states' policies and others on national policy but all advocated a particular policy change on the basis of at least one justification or through use of at least one dispositive rhetorical gesture.

Table 4.3: Editorial claims concerning abortion in four national newspapers, 1973-1980 and 1973-2000, presented as proportion of claims appearing in editorials.

Newspaper (Cohen's *K*)	Editorials (coded claims)	Privacy	Constitutional claim	Public health or modernization	Prudential claim	Orientational claim	Excluded from analysis
New York Times through 2000 (.78)	202 (480)	0.24	1.26	0.22	0.47	0.65	0.02
New York Times through 1980 (.78)	24 (71)	0.25	0.96	0.42	0.92	1.08	0.00
Los Angeles Times (.71)	24 (95)	0.38	1.54	0.25	0.63	1.42	0.38
Washington Post (.73)	27 (122)	0.30	2.11	0.19	0.52	1.04	0.85
Chicago Tribune (.89)	12 (23)	0.00	1.17	0.08	0.33	0.33	0.00

These data show the comparative prevalence of some key arguments in the pre-*Roe* abortion discourse. When editorial boards wrote about abortion in the two decades prior to the Supreme Court's decision in *Roe*, this is, in an important sense, what they were saying to each other. As the tables show, the discourse prior to *Roe* was composed of a rich mix of constitutional, prudential, and orientational claims. The argument from privacy, the argument that would eventually carry the day at the Supreme Court, was comparatively obscure. The argument from public health, however, cast a long shadow over the debate, appearing more than any other claim.

These data show the composition of the abortion debate in the wake of the Supreme Court's decision. To test the three hypotheses outlined above, these post-*Roe*

Table 4.4: Evolution of political language of the abortion debate in four major national newspapers, 1950-1972 compared with 1973-1980 and 1973-2000, presented as a ratio of post-*Roe* period over pre-*Roe* period ratios.

Newspaper (Cohen's *K*)	Editorials (coded claims)	Privacy	Constitutional claim	Public health or modernization	Prudential claim	Orientational claim	Excluded from analysis
New York Times through 2000 (.78)	251 (664)	1.66	3.26	0.19	0.26	0.44	1.21
New York Times through 1980 (.78)	73 (255)	1.75	2.47	0.46	0.50	0.66	1.00
Los Angeles Times (.71)	35 (134)	1.03	1.21	0.28	0.40	0.87	0.83
Washington Post (.73)	36 (160)	0.67	1.36	0.17	0.27	0.52	1.92
Chicago Tribune (.89)	17 (33)	1.00	5.83	0.21	0.83	1.67	0.00

ratios are compared to the pre-*Roe* ratios reported in table 4.3. The resulting data are the ratio of post-*Roe* to pre-*Roe* frequency of claims.

Table 4.4 shows these ratios, post-*Roe* to pre-*Roe* claims, which I refer to as post-pre ratios. These figures represent the frequency of claims per editorial during the second period as a proportion of the first period. The *Los Angeles Times*, for example, has a post-*Roe*-to-pre-*Roe* constitutional claims ratio of 1.21, meaning that for every claim per editorial they printed in the years preceding Roe, they averaged 1.21 times as many constitutional claims per editorial in the years following.[25]

[25] No traditional measure of statistical significance is reported because the data are drawn from a census of editorials in the purposive sample. Statistical significance in a census is an irrelevant measure because all relevant data are already included. Thought the reliability figures surpass established thresholds, uncertainty in the analysis may derive from issues of extrapolation.

The easiest way to think about these ratios of ratios is to think about the predicted number of claims per editorial. If an argument has a post-pre ratio of 1.00, that means that if you selected a random pre-*Roe* editorial and a random post-*Roe* editorial, you would have an equal likelihood of identifying that argument in each editorial and would predict an equal number of arguments in each editorial. That the post-pre ratio for privacy in the non-extended series *New York Times* is 1.75 means that whatever the predicted number of claims in a randomly selected pre-*Roe* editorial arguing from privacy (0.14, see table 4.2), the predicted number of claims is 1.75 times that in the post-*Roe* period (0.24, see table 4.3). I report the results of the hypothesis tests using post-pre ratios.

The results of the analysis presented in table 4.4 strongly support the latter two of the three hypotheses while providing mixed evidence for the first hypothesis, the promotion hypothesis. This hypothesis states that we should observe an increase in the incidence of the argument endorsed by the Court, in this case the argument from privacy.

To falsify the hypothesis, we would need to observe no substantive positive change in the ratio of privacy claims before and after the Court's decision. A substantive change would constitute a failure to reject the hypothesis and would suggest that the hypothesis has explanatory power as a statement of the logic of the theory.

Because there is no simple threshold for substantive change in a study like this (Riffe, et al., 2005), one must observe what happened and make sense of the magnitude of a change in relation to other changes. These values are quantifiable historical phenomena which resulted from the playing out of numerous independent and interdependent processes; we can only evaluate changes in relationships to other changes

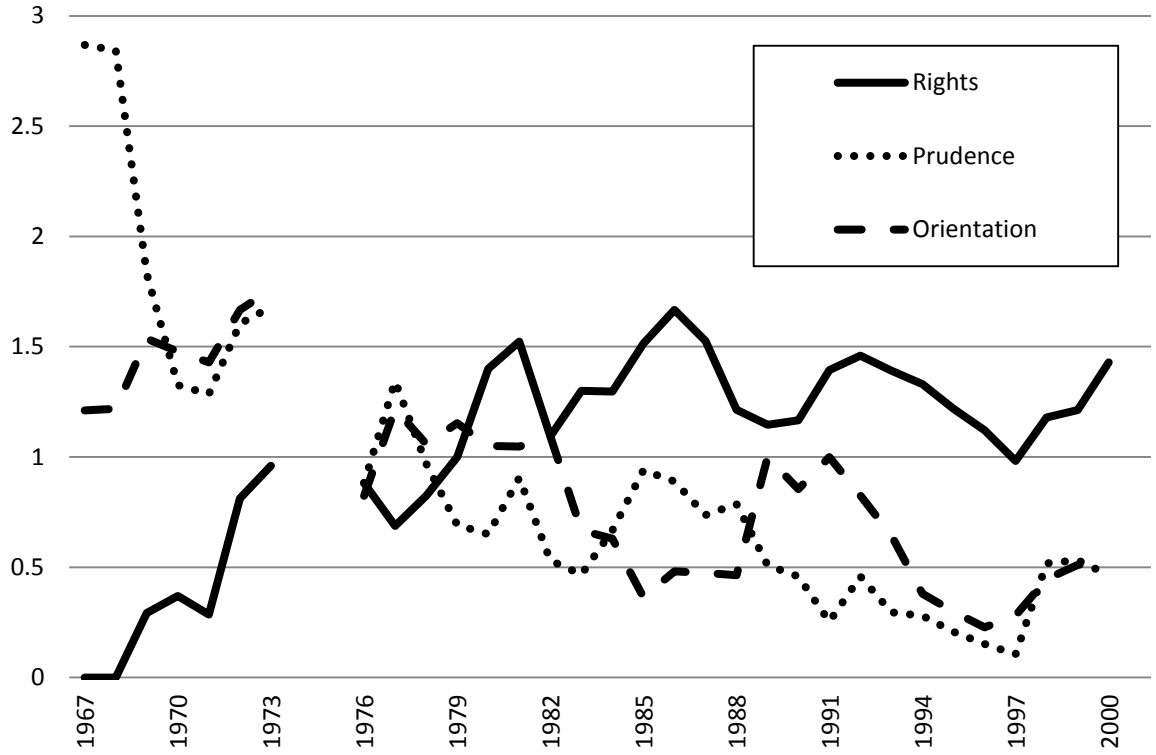
or non-changes. It is a strength of this approach that, unlike the summary statistics of traditional regression models, we can focus on interpreting the relative magnitudes of various changes.

The promotion hypothesis predicts that the values for privacy should all exceed 1.00. As can be seen in table 4.4, the post-pre ratios for privacy range from 0.67 to 1.75. In two of the newspapers, the *Chicago Tribune* and the *Los Angeles Times*, no substantial change was observed, while in the *Washington Post* the post-pre ratio was actually under 1.0, inconsistent with the theory. In each of these three cases, there is ample evidence to reject the hypothesis.

This was not the case, however, for the *New York Times*, in which we observe a post-pre ratio for the equivalent period, 1973-1980, of 1.75, suggesting strong support for the promotion hypothesis, while maintaining a rate of 1.66 over the full extended series through 2000. While this is the case in only one of the four newspapers, it is significant because the combined sample size of the other three newspapers is 88 editorials and 327 claims, while the *New York Times* alone includes 251 editorials and 664 claims in the extended series. The *Times* data, in other words, are more comprehensive than those found in the other three newspapers. In general, we cannot from the data discount, let alone falsify, the hypothesis, but the mixed nature of the data do not constitute compelling evidence for the promotion hypothesis on their own.

Evidence for the diminution and constitutionalizing hypotheses is far stronger. The diminution hypothesis states that we should observe a substantive decrease in the

Figure 4.1: Trends in the abortion discourse, from the *New York Times*, as a weighted average of the prior three years, 1967-2000. N(editorials)=249, N(claims)=663, *K*=.78.



Two years (1974 and 1975) excluded for low populations.

most significant argument unendorsed by the Court. In the case of *Roe*, this is the line of argument from public health and modernization that, though it undoubtedly influenced Justice Blackmun's thinking, did not form the basis of his opinion for the Court, which hinged on the right to privacy first articulated by the Court in *Griswold v. Connecticut*.

This should be observable in the post-pre ratio for the aggregate category of public health and modernization. To falsify the hypothesis, we would need to observe no substantive decrease in the ratio of public health and modernization claims to editorials following the Court's intervention in *Roe*. A decrease in this ratio would appear as a post-

pre ratio under 1.00. A number close to 1 would suggest no change following Court action.

Substantial evidence for the hypothesis was observed in all four newspapers, and none came close to falsification under the articulated standard. The likelihood of a given editorial referencing public health or the need to change abortion policy to reflect modern medical advances decreased considerably in each of the included newspapers following the Court's intervention in the abortion debate. In the extended *New York Times* series, the expected number of distinct public health and modernization claims decreased from 1.20 to 0.22, an 81% reduction in predicted claims. The experience of engagement in the abortion debate undoubtedly changed in this respect; in the thirteen years prior to the Court's ruling in *Roe*, the *New York Times* discussed public health or modernization so often that on average a reader could expect to find at least one and maybe more distinct arguments for abortion liberalization from public health or medical modernization. In the years following, that expectation would be mistaken; a reader of the *Times* across the extended post-*Roe* series (1973-2000) could expect to find an argument from public health or modernization in every fifth editorial he or she read.

The numbers in the other papers are similar. The *Los Angeles Times* post-pre ratio is 0.28, almost as dramatic a decrease, while the *Washington Post* and *Chicago Tribune* score post-pre ratios of 0.17 and 0.21, respectively, virtually identical to the *New York Times* 0.19.These findings not only fail to falsify but actually comprise strong corroborative evidence for the diminution hypothesis. These effects are easily observable, theoretically predicted, and substantial in magnitude.

The constitutionalizing hypothesis is the most important of the three. It states that when the Court rules on a constitutional basis, the political language of the issue should become "constitutionalized." In other words, the stuff of ordinary political discourse should be replaced with constitutional language emphasizing unalienable rights or affirmative obligations. In the case of abortion, to falsify the constitutionalizing hypothesis we would need to fail to observe in the years following the Court's decision in *Roe* a decrease in the comparative incidence of prudential and orientational claims and a corresponding increase in constitutional claims. In other words, the hypothesis predicts that after the Court upholds an abortion right the language of the abortion debate will fundamentally shift from pragmatic politics to a principled language of rights. Post-pre ratios for prudential and orientational claims should be below 1.00 while the post-pre ratio for constitutional claims should be over 1.00, with relative differences in magnitude pointing to real differences in change.

Evidence for the constitutionalizing hypothesis is the strongest of the three hypotheses and is found across all four newspapers in the study. Post-pre ratios for prudential claims were under 1.00 in all four newspapers, ranging from 0.26 in the case of the extended *New York Times* series to .46 for the same series only through 1980, with the other three papers coming in between. Post-pre ratios for orientational claims were slightly less depressed, and actually increased at the (small-N) *Chicago Tribune,* but in all cases were radically dwarfed by the magnitude of the increases observed in the newspapers' post-pre ratios for constitutional claims. These ranged from a comparatively modest 1.21 for the *Los Angeles Times* to a substantial 3.26 for the extended *New York*

Table 4.5: Abortion discourse in the New York Times across three time periods, presented as claims per editorial from 1965-1972, 1973-1991, and 1992-2000. *K*=.78.

Time period	N of editorials (coded claims)	Mean editorials per year	Mean claims per year	Mean claims of all kinds (per editorial)	Constitutional claims (per editorial)	Prudential claims (per editorial)	Orientational claims (per editorial)
Pre-*Roe*	49 (183)	6.1	22.8	3.7	.39	1.84	1.51
From *Roe* to *Casey*	96 (268)	5.1	14.1	2.8	1.24	.64	.92
Post-*Casey*	104 (212)	11.6	23.6	2.0	1.27	.33	.44

Times and a striking 5.83 at the *Chicago Tribune*. In each case, the increase is substantial and corresponds with a comparative decrease in ordinary political language. Clearly, not only the arguments themselves but the kind of arguments made following *Roe* functioned differently from the more pedestrian discourse they followed.

The *New York Times* data show the robustness of the Court's influence, as the discourse remains clearly constitutionalized. Generally, the results of the quantitative analysis corroborate the qualitative analysis; under favorable circumstances, the Court's decisions exert significant and previously underappreciated influence over the language and meaning of American politics.

In the final chapter I present evidence from the gun regulation debate during the "turbulent Sixties" (1963-1975) and the modern era (2004-2008), utilizing 14 mainstream national newspapers, both supporting and opposing gun regulation liberalization.

Chapter Five: Gun Rights

During the 2000s, how much people had to say about gun politics was mostly a function of their proximity, geographic and temporal, to atypical gun violence. The content of that discussion, however, depended on two factors. The specific arguments were determined by the specific characteristics of handgun violence in the news. The kinds of arguments, whether they were about health and safety or constitutional and moral commitments, depended on the status of a closely-watched civil case that made its way to and through the Supreme Court.

In the summer of 2008, following two years of increasing media anticipation, the Supreme Court of the United States declared that the Second Amendment protects an individual right to possess a handgun (*District of Columbia v. Heller*, 2008). The five justices in the majority reached the conclusion that the previously unrecognized right had been violated in the District of Columbia by a fairly ordinary municipal handgun ban, of a sort found on the books in almost every major American city.

Despite this substantial change in the constitutional cosmos, the Court's ruling did not significantly impact public policy. *Heller* applied only to the District of Columbia,[26] exempted most popular regulations from constitutional review (Henigan, 2009), did not significantly constrain lower court judges (Tushnet, 2009), and applied directly only to policies which seem to have little or no impact of public safety (Cook et al., 2009). As Rosenberg's argument (1991/2008) suggests, the gun control cases are unlikely to significantly influence either gun ownership or crime in America's cities.

And yet, the Court's decision in *Heller* has the potential to profoundly influence the way Americans talk about and make gun policy, more so than either long trends in crime or jarring, violent events. This chapter is about how the way we talk about guns is beginning to change as a result of *Heller* and what that says about the Court's power to influence democracy.

Putting Rhetorical Influence in Perspective

In the two years preceding the Court's decision in the case, the salience of gun regulation increased at a fairly consistent, gradual rate. The exception to this was a sudden spike in salience following the April 16, 2007 attack by a mentally unstable gunman at Virginia Polytechnic Institute in Blacksburg, Virginia.

The year between the tragedy at Virginia Tech and the Supreme Court's decision in *Heller* was marked by an increasingly constitutionalized and decreasingly pragmatic discourse of American gun politics. Following the shooting, the content of the discourse changed little; little, at least, in comparison to a dramatic change that coincided with an

[26] The ruling was later incorporated in *McDonald v. Chicago* (2010).

increasing expectation of Supreme Court action. What most dramatically changed the way Americans talk about gun politics in the 2000s was not an act of violence but the location of a lawsuit in relation to the Supreme Court.

In the previous chapter, I demonstrated how the constitutional regime established in *Roe v. Wade* impelled a dramatic change in the way advocates talk about abortion politics. When the Court spoke in *Roe*, it infused a political language of public health and safety with a constitutional vocabulary, one that expanded until almost totally eclipsing the once-dominant language of ordinary politics. That absolutism emerged simultaneously from pro- and anti-abortion access sides with little potential for negotiation or mutual understanding. In this chapter, I show that as the likelihood that the Supreme Court would declare a right to own a gun increased, the constitutionalism of the gun politics discourse similarly increased, ultimately becoming an established part of gun politics in the United States.

I present an analysis of the gun regulation discourse in two periods, 1963-1974 and 2005-2010, with special attention to the period of time (2006-2008) immediately surrounding the Court's decision in *D.C. v. Heller*. I present the results of the analysis throughout this chapter and conclude with some considerations about policy implications.

Following the case study of abortion, I use a case study of gun regulation to demonstrate different aspects of the same phenomenon while substantiating the general theory in another context. Several characteristics of gun politics in the mid-2000s bear a striking resemblance to abortion politics in the early-1970s, while the differences are themselves illuminating. In this chapter I point to four important shared characteristics,

some important differences in data (but not underlying phenomena), and then four important differences between the underlying political contests themselves.

Advocates contest the historical understanding of the role of guns in the Republic. Justice Scalia's opinion for the Court in *District of Columbia v. Heller* makes a case for a historically broad individual right to gun ownership, a right he grounds in the legacy of the English Bill of Rights, Blackstone's *Commentaries*, and the post-ratification writings, including *dicta*, of some jurists (Malcom, 2009). The historical argument against this view, both the difficulty of recovering "original meaning" and of making sense of that meaning in light of over two centuries of technological and legal change, is described in the historians' *amici curiae* brief in *Heller*,[27] Cornell (2009), and Merkel (2009).

Contestation is not limited to historical recovery. The text of the Second Amendment is itself contested (Cramer and Olson, 2008; Konig, 2009). Prior to its ruling in *D.C. v Heller*, the Supreme Court interpreted the Amendment only once, in *U.S. v. Miller* (307 U.S. 174, 1939). The Supreme Court heard arguments in that case concerning the constitutionality of the National Firearms Act. Justice McReynolds' unanimous decision for the Court addresses two interpretive questions: What constitutes a "militia"? and What constitutes "arms" within the text of the Amendment?

The circumstances of the case were unusual, and there are case-specific reasons to question how much the opinion should constrain modern interpreters. First, though the case was remanded for further proceedings, the respondent was subsequently murdered,

[27] Brief of Amici Curiae. Rakove, Jack; Saul Cornell; David Konig; William Novak; Lois Schwoerer; Fred Anderson; Carol Berkin; Paul Finkelman; Don Higginbotham; Stanley Katz; Pauline Maier; Peter Onuf; Robert Shalhope; John Shy; and Alan Taylor, in support of petitioners. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

rendering the proceedings moot. Second, the Court appears to have crucially misunderstood a factual matter dispositive to the case. This problem was exacerbated by a lack of interest in the case and the respondent's destitution, which led the Court to decline to hold oral arguments. Lacking an opportunity to learn important information (Johnson, 2004), the Court issued a ruling that could not effectively instruct other courts. Instead, Justice McReynolds' opinion presented a general view that elected representatives have a conditional authority to regulate firearms in the public interest. The Supreme Court declined to intervene meaningfully during the remainder of the Twentieth Century, leaving the constitutional question unanswered.

Constitutional gun politics in the mid-2000s, like abortion in the early 1970s, involved constitutional questions with little guiding precedent or textual constraint. The Court's ruling in *Roe v. Wade* was grounded firmly in the right to privacy articulated in *Griswold v. Connecticut* and a simultaneous wave of liberalization in state legislatures. The impetus for Court intervention in the gun regulation debate emerged from a late-Twentieth Century shift in the national electorate, in the composition of the Court, and in academic consensus surrounding the meaning of the Second Amendment (Bellesiles, 2001; Tushnet, 2009: 1441-2).

Like abortion, gun politics enjoyed a period of rising constitutional possibility. Though it looked quite different from the legislative transformation happening in statehouses in the pre-*Roe* period, the years prior to *Heller* witnessed liberalization in state legislatures. In 2004, the Republican-controlled Congress allowed the Federal Assault Weapons Ban to lapse, ten years after its enactment. While some politicians,

notably mayors of major cities, continued to publicly advocate pro-regulatory reform, their efforts ran against a well-coordinated and effectively organized anti-regulatory lobby, led by the NRA, one of the most successful lobbying groups in American history (Herz, 1995, but see also Barnett and Kates, 1996).

The texts examined in this study together portray a decade during which anti-regulatory sentiment increased in state legislatures and President George W. Bush and the Republican-controlled Congress opposed federal gun regulation (Siegel, 2008). At the same time, less prevalent in much of the texts prior to the grant of certiorari in *Heller*, was the ideological implication of Justice O'Connor's replacement with Justice Alito. That replacement meant the Court's median gun control vote would from the nominally pro-regulation O'Connor to the considerably more hostile-to-regulation Justice Kennedy (Kopel, 2010: 130), a likelihood that became apparent to newspaper editors when the Court signaled its willingness to consider the constitutional question underlying gun politics.

Justice Holmes famously described the law as "The prophecies of what the courts will do in fact, and nothing more pretentious" (Holmes, 1897). Though Holmes was speaking for his hypothetical "bad man," his positivist formulation captures the power of constitutional rhetoric to warp policy discourse by the possibility of future action. In 1991, following President Regan's 1988 replacement of Justice Powell with the conservative, Catholic, and presumably anti-*Roe* Justice Kennedy, the appointment by the first President Bush of the also presumably anti-*Roe* Justice Souter was perceived to potentially move the median vote on the court from the pro-*Roe* Justice O'Connor to an

unnamed anti-*Roe* justice. Justice Souter proved to be the new median justice on the Court generally (Martin and Quinn, 2002), and ultimately voted with Justice Kennedy to affirm a constitutional right to an abortion, but advocates at the time had good reason to expect the Court to overrule *Roe*.

The retirement of Justice O'Connor was followed shortly by the death of Chief Justice Rehnquist. The replacement of the conservative Chief with conservative Appellate Judge John Roberts did nothing apparent to disturb the ideological balance of the Court, but the replacement of Justice O'Connor with Appellate Judge Samuel Alito entailed a shift in the Court's median vote. Following Justice O'Connor's departure, Justice Kennedy replaced her as the pivot point on the Court, a move from .321 to .486, a significant increase in conservatism, on the Martin-Quinn ideal point scale (Martin and Quinn, 2002). Justice Alito's ascent to the Court threw into question the constitutional legitimacy of any issue on which Justice O'Connor had been a deciding fifth vote. Gun regulation, however, had not directly come before the Court since 1939, and the power of Congress and lesser government actors to regulate the sale of firearms was well established. Why would gun regulation be an obvious candidate for a change in constitutional regime?

In addition to political change in the state legislatures, the Congress, and on the Court, the range of orthodoxy in Second Amendment scholarship had been radically expanding since the 1980s (Siegel 2009: 222-4). That decade was marked by profound change in the intellectual and political respectability of anti-regulation views. Consider two illustrative examples, seminal law review articles drawn from the beginning and end

of the decade: Kates' heavily-cited "Handgun Prohibition and the Original Meaning of the Second Amendment" (Kates, 1983) and Levinson's massively influential "The Embarrassing Second Amendment" (Levinson, 1989).[28] Kates' piece provided an intellectual foundation for a new generation of conservative lawyers, ascendant within the Reagan administration, to argue for a sweeping reinterpretation of the dominant post-War regulatory framework. Kates was a prominent gun regulation litigator and the article was essentially a blueprint for constitutionally-focused appellate gun regulation litigation.

Levinson's piece, published at the end of the 1980s, accused mainstream legal scholars of blithely ignoring the Second Amendment because of "a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation" (Levinson, 1989: 642). Levinson identified the pointed disinterest exhibited in mainstream scholarship despite the obvious and apparent conflict between major modes of constitutional analysis, the text and history of the Amendment, and the existing constitutional regime of gun politics. Levinson invited the academic Left in specifically to revisit the meaning of the Second Amendment. While Kates' article provided an intellectual foundation for conservative lawyers and judges to attack gun regulation, Levinson's article attracted attention to the debate from the full ideological spectrum of the legal academy.

[28] The tremendous influence of both articles is evident in their exceptionally high citation scores on Google Scholar, the Kates scoring 409 and the Levinson 614. Typical scores for 1980s major law review articles are under 100. Bogus (2000) elaborates on the significance of each, along with several other seminal pieces in the line.

In the two decades following Levinson's article, there was a noticeable change in the tone of the academic discourse on the Second Amendment (Siegel, 2008: 225-6). Academics and eventually judges organized the discourse around two questions: First, What, if any, government actor is legally empowered to regulate the sale and possession of guns? and second, Does the Second Amendment confer on an individual (rather than state militias or other limited collective of persons) the constitutional right to possess guns? Each of these questions begs the same follow-up questions: What exceptions might be appropriate? What groups of people will we exclude from all guns? What guns will we exclude from all people? What sorts of places will we exclude people with guns? The two constitutional questions are two different legal formulations of what is really a single policy question. Absent a constitutional right, the powers of governments to regulate dangerous consumer products like guns are assumed to be far-reaching. And increasingly during the 1990s, scholars were approaching the constitutional question from an individual rights perspective.

The cultural transformation in the academy was not entirely organic. Following the publication of Levinson's (1989) article, the NRA began a major program to recruit and financially encourage anti-gun control legal work. This program was described by Bogus (2000) as a "concerted effort to promote more writing supporting the individual right position. Through a related foundation, the NRA began distributing large sums to friendly scholars." Stephen Halbrook, who authored six articles in support of an individual right, collected $38,569 from the NRA in 1991 and '92 (Bogus, 2000: 53). The NRA established an annual pro-individual rights essay contest with a $25,000 grand

Figure 5.1: Change in total law review discussion of the First and Second Amendments.

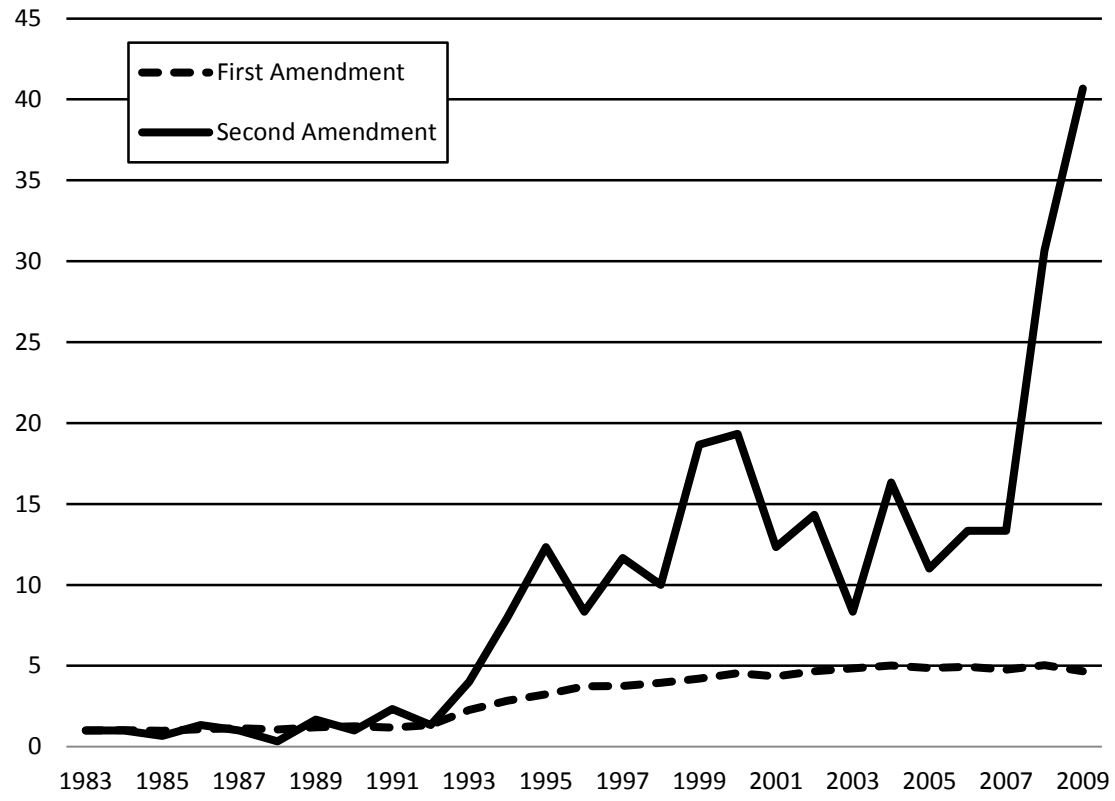


Figure for each year is the number of articles, notes, and commentaries significantly discussing First or Second Amendment law, identified by five or more references, expressed as a proportion of the number of such articles published in the mean of the first three years in the series. Data collected through Lexis-Nexis Law Review Index.

prize. Siegel points out that Nelson Lund, who originated the analysis of the Amendment describing the first clause as "prefatory" and the second as "operative" (Lund, 1996), received an endowed chair funded by a million dollar gift from the NRA to George Mason University School of Law (Siegel, 2008: 239).[29] Bogus, citing an increase in the

[29] The prefatory/operative distinction, which Lund invented in 1996, is foundational to Justice Scalia's "originalist" interpretation. He writes, "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause." The chair, announced in 2003, is the Patrick Henry Professor of Constitutional Law and the Second Amendment at the George Mason University School of Law (Siegel, 2008: n250).

popularity of individual rights formulations during the period, argues these programs were a major success, and points out that pro-individual right scholarship surged (Bogus, 2010: 55.).

Three periods of particularly pronounced increases in academic output warrant notice. The first of these occurred during the first three years of the Clinton administration as two major gun regulation bills were passed by Congress. By 1996, the ascent of Second Amendment law was prominent enough that Barnett and Kates would declare, "research conducted through the 1980s has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment" (Barnett and Kates, 1996: 1141). While the historical evidence behind their argument is not as uniform as Barnett and Kates present (Cornell, 2002; 2004; 2007), the ability to make a mainstream argument in good faith marked a dramatic departure from the genuine regulatory consensus, a consensus beginning to show cracks in its edifice.

A second spike in salience followed the Columbine mass murder in 1999. The third followed the Court's 2008 ruling in *Heller*. Each of these is visible in figure 5.1, which also shows scholarship focusing on the First Amendment as a stable reference to account for growth in electronic database expansion and growth in the total number of law reviews, special symposia, and other phenomena that have increased the size of the legal academy's output over the relevant time period. The proportional growth of Second Amendment scholarship from 1983 to 2009 was 40.7. Put another way, for every article discussing the Second Amendment published in 1983, in 2009 more than 40 were

published. For perspective, we must compare that growth, more than 16-fold the year prior to *Heller* and more than 40-fold the year after, with a reference. The equivalent growth for First Amendment scholarship, a stable issue subject to no particularly distorting popular trends in the included years, was only 4.7-fold.

Growth in Second Amendment scholarship from 1983 to 2004, the year before *Heller*, was 16.3-fold compared with 5.0 for First Amendment. That significantly higher rate of growth is partly because the total number of articles is smaller. The Second Amendment rose from 3 in 1983 to 122 in 2009; the First Amendment was a major subject 234 times in 1983 and 1092 times in 2009. But there is no good alternative explanation for this period of heightened scholarly growth; from the end of the 1980s to the Supreme Court's confrontation of the issue in *Heller*, Second Amendment scholarship underwent a profound transformation. It was during this heightened interest that an individual rights interpretation of the Amendment was vociferously advanced by proponents who succeeded, with the help of some traditionally liberal allies, in making the interpretation respectable. Respectable enough, at least, for what became—in the seven months between certiorari and decision—an expectation ultimately fulfilled by five members of the Court.

While most liberals remained opposed to an individual rights interpretation, among the defectors was Laurence Tribe, whom Levinson had specifically criticized in his 1989 article for ignoring the amendment in his treatise on constitutional law (Tribe, 1990). In the second edition of his influential *Constitutional Law*, Tribe had relegated the issue to a single footnote in a volume intended to be theoretically comprehensive and

made up of more than a thousand pages. In the third edition, Tribe did more than discuss the constitutional foundations of gun regulation; he endorsed a qualified individual rights reading of the Amendment (Tribe, 1999). Tribe built his analysis on the work of Akhil Amar (1991; 1992), who had argued for an understanding of a collective right in a pair of prominent analyses in the *Yale Law Journal*, incorporating an individual rights from collective rights framework into the most important treatise in constitutional law (Bogus, 2000).

All this is to point toward a generally changing intellectual atmosphere prior to the Supreme Court's return to the Second Amendment atmosphere in flux much like the one surrounding abortion in 1973. The other period when public opinion began to suddenly change on gun regulation was during the 1960s, a time marked by civil unrest and assassinations. Like abortion before it, gun regulation was framed as a public safety issue and the merits of policies judged in a language of prudence with a vocabulary of safety at its foundation.

Talking About Gun Rights and Regulation: 1963-1975 and 2006-2008

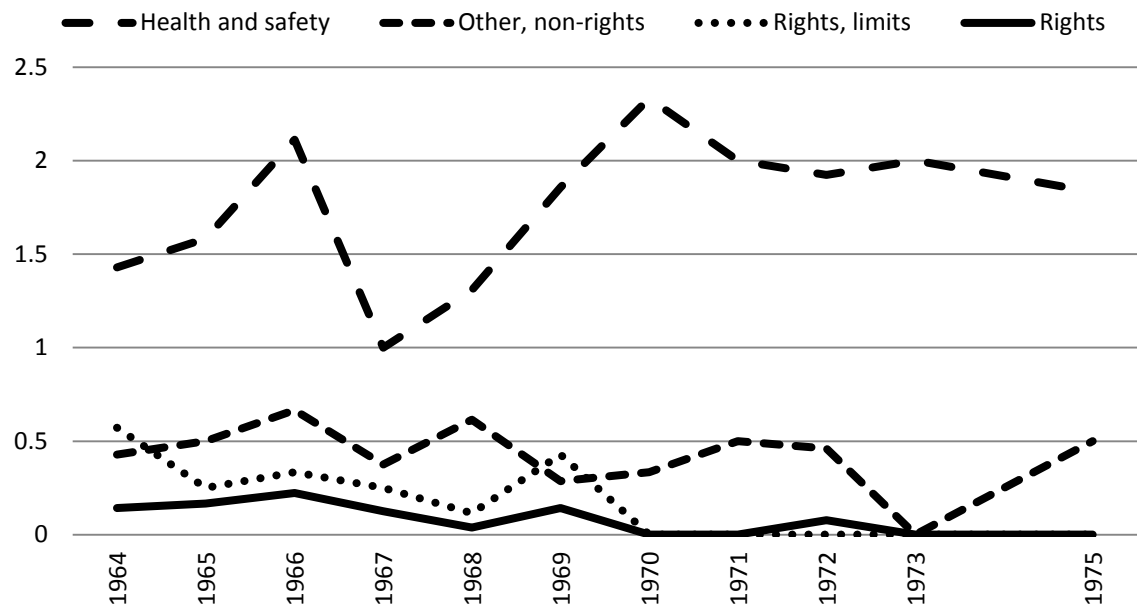
The November 1962 assassination of President Kennedy turned public attention to gun laws. The remainder of the decade, marked by prominent acts of public violence, inaugurated an era of interest in gun regulation (Bellesiles, 2001). That period, during which the Supreme Court declined to intervene in the gun debate, provides an opportunity to examine rhetorical influence in a situation in which the Supreme Court did not act.

The results of a census, similar in design to the one outlined in the case study of abortion, are presented in figures 5.2, 5.3, and 5.4. The census includes all editorials published from 1963 to 1975 in the *New York Times* and *Los Angeles Times*. The summary results omit figures for 1963 and 1974 because of low population sizes (figure 5.2). These figures together give some additional insight into the distributional properties of the data.

There were few references to gun rights in the gun regulation debate during the 1960s and early '70s. Almost all discussion was about how a particular regulation would influence public safety. Even indirect reasons for regulatory change, such as public support for change, ultimately hinged on public safety. Arguments for gun regulation not predicated on public safety are unusual but important. They may be strongly affirmative, as in this passage from the *Los Angeles Times*: "Public opinion polls show that most Americans want tougher restraints (on gun ownership)" (*LAT*: 1/15/1971), or they may mitigate reservations about regulation, as in this example from the *New York Times*: "the licensing of hunting rifles…is no more an abridgement of freedom than licenses to drive, marry, fish, or open a barbershop" (*NYT*: 12/17/1970).

There are, however, a few notable exceptions to discussion of public safety and the ordinary balancing of competing preferences. When the Supreme Court declined to hear a Second Amendment case, the *Los Angeles Times* ran an editorial offering three reasons to doubt an individual Second Amendment right and articulated one explicit right in the process (*LAT*: 4/30/1969). A *New York Times* editorial shortly after the assassination of President Kennedy declared that "the Second Amendment is not…a

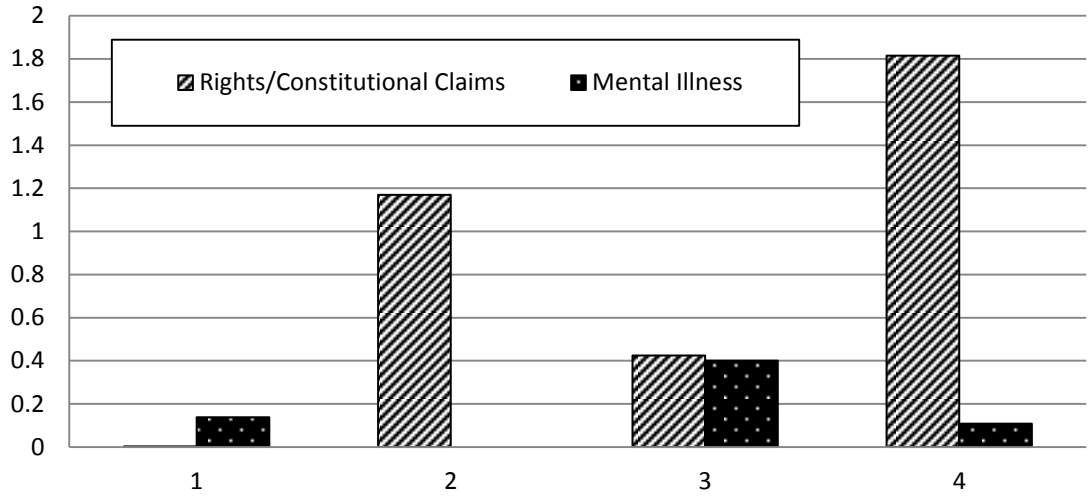
Figure 5.2: Trends in the gun regulation discourse, the *New York Times* and *Los Angeles Times*. Figures are incidence per editorial, 1964-1975. (1963 and 1974 excluded from graph.) N(editorials)=99, N(claims)=243, *K*=.835.



personal right" and admonished those "who argue that to have a shooting iron over the mantelpiece…is the constitutional right of every citizen and good for the country in time of peril" (*NYT*: 12/14/1963). An op-ed by James Kilpatrick in 1965 lightly ridiculed the idea that the Supreme Court might uphold an individual right to gun ownership (*LAT*: 8/12/1965). More typical still is a rejection of a caricature, as in "opponents (of gun regulation) argue incessantly that law-abiding American citizens have a right to possess firearms. But the law-abiding citizen is a significant factor in the nation's rising murder rate" (*LAT*: 7/16/1968).

Advocates of gun rights may have argued it, but as with the abortion advocates who believed in a right to an abortion predicated on privacy and choice prior to *Roe*, arguments for rights unrecognized by Courts are not arguments that media and opinion

Figure 5.3: Editorials on gun regulation and statements of interest surrounding *D.C. v. Heller*. Series runs from 6/6/2006 to 12/23/2008.
N(newspapers)=14, N(editorials)=165, N(claims)=872, K=.75



Period 1: 6/06-2/07 (Court of Appeals Ruling); Period 2: 2/07-4/07 (Virginia Tech Shooting); Period 3: 4/07-11/07 (Supreme Court Grants Certiorari); Period 4: 11/07-12/08 (Series End).
The dark bars indicate mentions of the threat of guns in the hands of persons suffering from mental illness per editorial. The lighter bars indicate constitutional claims (mostly rights) per editorial.

elites take seriously, at least not seriously enough to make them when talking about policy. The story of the gun discourse remained undisturbed until a constellation of factors in the '00s suggested that the Supreme Court would likely soon recognize an individual right to gun ownership.

After the shooting at Virginia Tech, discussion of access to guns and the particular problem posed by mentally disturbed persons with guns both increased in salience. This effect can clearly be seen in lines in figure 5.3. Prior to the attack at Virginia Tech, mentally disturbed persons barely warranted a mention in the gun regulation discourse. In the months that followed, concern over a sociopath with a gun

became the biggest issue in the debate. But it did not influence the way people talked about gun regulation beyond a passing interest in mental illness; the popularity of a claim changed, but the kind of claims, the way advocates talked about gun regulation, did not. Only legal change, change driven by the judiciary, seems to have potentially changed the metaphysical foundation of the debate. Supreme Court attention prompted constitutional obligations to rival health and safety in the gun regulation debate.

The discursive transformation of the late ‘00s began not with the release of the ruling in *Heller*—though that accelerated it tremendously—but during the period of time immediately prior to and following *certiorari*. This temporal relationship, in which the Court signaled a willingness to consider the existence of a right, is the complement of the temporal relationship apparent in the 1960s data, when the Supreme Court declined to consider an individual right in *Burton v. Sills* (394 U.S. 812, 1969). In the case of *Burton*, by dismissing the case for want of a federal question, the Supreme Court was signaling its unwillingness to recognize a Second Amendment right to gun ownership. Speculation about such a right not only disappeared following the dismissal, but rights talk, both for and against, faded from the discourse.

The Court declined the invitation to articulate an individual right in 1969, but embraced the opportunity in 2008. The changes in the discourse suggest that legal expectations, the best prediction of what the Supreme Court might actually do, predicted the nature of the discourse during the two years immediately preceding and in the months following the decision in *Heller*.

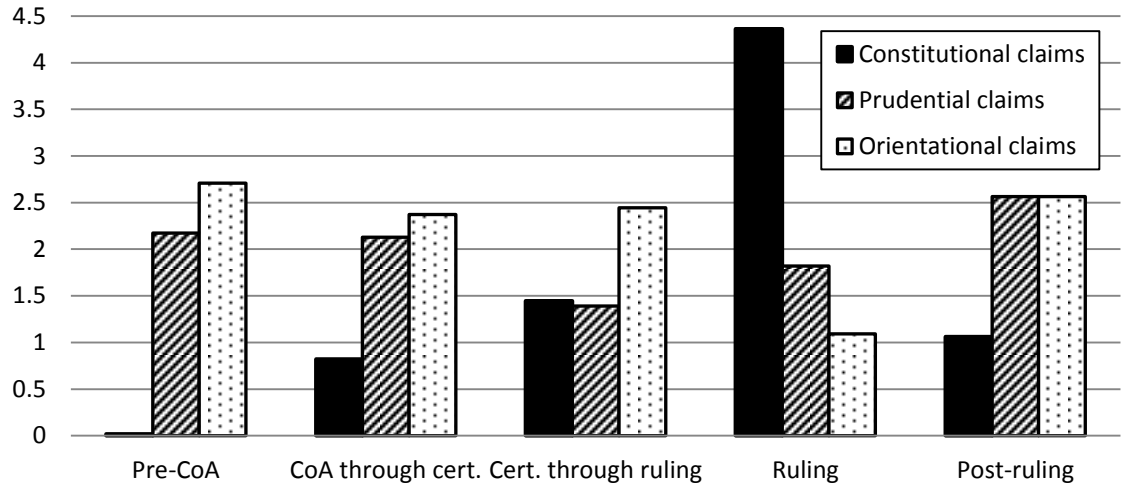
Shortly after the Court of Appeals ruled in favor of *Heller*, commentators began speculating on the probability that the case would eventually allow the Supreme Court to declare an individual right. The *Wall Street Journal* forecast the decision as a consequence of legal constraints and broader trends, writing:

> Justice Kennedy would be hard-pressed to deny that the Second Amendment is an individual rights given his support in so many other cases for the right to privacy and other rights that aren't even expressly mentioned in the Constitution. No less a left-wing scholar than Laurence Tribe has come around to the view…for this very reason (*WSJ*: 1/22/2008).

As the likelihood of Supreme Court recognition of an individual gun ownership right increased during the year preceding the ultimate ruling, pro-regulation advocates increasingly utilized a vocabulary of rights to describe ordinary regulatory rationales and exercises. The *New York Times* ridiculed the nascent rights talk, writing, "the real issue is the rights of sociopaths and terrorists to make future purchases at their friendly local AK-47 dealer" (*NYT*: 9/26/2006). Another editorial argued that "there needs to be a better balance between the rights of gun owners and the right of everyone not to be shot by an illegal gun" (*NYT*: 5/23/2006).

Though claim-level results of the content analysis were presented in figure 5.4, figure 5.5 includes summaries of the incidence of kinds of claims divided into five time periods. As figure 5.4 makes vividly clear, as the apparent likelihood of the Supreme Court articulating a right to gun ownership increased, the discourse became increasingly constitutionalized. Constitutionalization peaked immediately after the ruling and

Figure 5.4: Claims in fourteen newspapers discussing gun control, 2006-2008. N(newspapers)=14, N(editorials)=165, N(claims)=872, K=.75.



Figures demonstrate that initial constitutionalization of the gun regulation discourse occurred in response to the prediction rather than exercise of the Supreme Court's recognition of a right. A temporary burst of extreme constitutionalization followed the ruling. The rights talk endures post-ruling. Excludes implicit rights claims.

stabilized at a rate around one claim per editorial, a marked increase from a negligible presence before the Court of Appeals issued its initial ruling.

The power of the Supreme Court to influence the law through the predictions of others about what the Court *will* do is particularly apparent in accounts of oral arguments. Not only do journalists often explicitly predict outcomes, but editors use language responsive to that likely outcome. For example, one editorial from the *Wall Street Journal* predicted, "the debate this week augurs well for a conclusion that the Second Amendment guarantees an individual right to bear arms" before discussing Framers' intentions and couching regulatory possibilities in a framework of limits on rights rather than the powers of democratic majorities (*WSJ*: 3/22/2008). The same rhetorical strategy was employed by the *Los Angeles Times* when it argued at length that any new right

would face considerable limitations, just as the First Amendment does (*LAT*: 3/18/2008). This is in contrast to the paper's previous tendency to frame the discussion in regulatory language rather than rights talk.

Editorials anticipating the Court's decision in *Heller* mostly predicted a majority for an individual right, writing "Justice Kennedy…the swing vote, informed all in attendance that 'in my view, there's a general right to bear arms quite without reference to the militia either way" (*WSJ*: 3/22/2008); "a majority of Supreme Court justices seemed to embrace the notion that the Second Amendment recognizes an individual right to keep and bear arms" (*WP*: 3/20/2008); "Justice Kennedy…the…swing vote, said flatly that the amendment grants 'a general right to bear arms'…it seems likely they'll embrace an individual right" (*USA*: 3/19/2008); and "during oral arguments…a majority of the Supreme Court indicated it sees gun ownership as a right" (*CSM*: 3/21/2008). The *Chicago Tribune* wrote, "if you want to know how the Supreme Court is likely to (interpret) the Constitution…the best guide is not what the framers wrote…but what the justices themselves had to say the last time they considered that provision" (*CT*: 3/25/2008).

The tendency of advocates to constitutionalize their language in response to Supreme Court stimuli is apparent across discourses which may be legally or semantically linked. Opposing a state bill that would allow Georgians to keep firearms in their cars while at work regardless of workplace regulations, the *Atlanta Journal-Constitution* wrote that the bill "represents a moral assault on the right of businesses to set standards for their employees," while a similar bill was opposed by the *New York*

Times, which defended ordinary workplace gun prohibitions in the interest of public safety. Confronted with a rising assault on gun regulation predicated on a right to gun ownership, the regulatory advocates defended the regulatory regime in stark rights talk, describing the bill as denying a "common-sense right to workplace safety" and framing the problem as an example of a "property rights" problem (*NYT*: 3/30/2007). Discussing the logic of allowing guns in a workplace makes a great deal of sense; discussing the subject as essentially a complicated property rights problem, while legally relevant, does not make any particular sense as a rhetorical strategy, unless one is straining to provide semantic balance against the rights of the gun owners. The semantic equivalence implies (but does not actually substantiate) a legal equivalence between the opposing rights claims. The same rhetorical strategy was employed by the *Atlanta Journal-Constitution* when the editors wrote that the Georgia bill "tramples private property rights by denying companies the right to set their own policies for their company-owned parking lots" (*AJC*: 12/4/2007).

While pro-regulatory advocates were describing regulation as a right of democratic majorities, anti-regulatory advocates were increasingly refining their own rights talk with an explicit constitutionalism. A *Detroit News* editorial, responding to certiorari in *Heller*, pointed out that their interest was "academic" since "Michigan's Constitution makes gun ownership an explicit personal right in its declaration that 'every person has a right to keep and bear arms for the defense of himself and the state' before endorsing the approach federally, writing, "the Michigan Constitution has it right. People have a right to gun ownership for self-protection" (*DN* 12/4/2007).

The editorials immediately following the Supreme Court's ruling in *Heller* are permeated with discussion of the constitutional issues in the case. Supportive editorials tended to quote the opinions at length. The editorial published in the *Wall Street Journal* immediately after the ruling quotes or makes on its own eight distinct constitutional claims as well as employing rights as a framing device (*WSJ*: 6/27/2008). The *Denver Post* quoted the opinion painted the ruling as reasonable, moderate, and above-all grounded in constitutional text and history (*DP*: 6/27/2008).

Editorials opposing the Court's decision quoted less, but utilized constitutional language throughout their discussions. The two passages from Justice Scalia's opinion to be widely quoted both dealt with limitations to the core holding. Reiterating the familiar point that "more handguns in the District of Columbia will only lead to more violence," the *Washington Post* and many others quoted Justice Scalia, writing "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" (*WP*: 6/27/2008). The *Los Angeles Times* was among those who chose the other passage popular with opponents, in which the justice wrote, "the right (to keep and bear arms) was not unlimited, just as the 1st Amendment's right of free speech was not" (*LAT*: 6/27/2008).

The opposing editorial from the *St. Louis Post-Dispatch* emphasized that the new rights regime would have limits, just as the old regulatory regime did (*STL*: 6/27/2008). The same limitations form the basis of the editorial from the *Boston Globe* (*BG*: 6/27/2008). The *San Francisco Chronicle* quoted Justice Stevens' dissent alongside the same passage from Justice Scalia's opinion defending limits (*SFC*: 6/27/2008). The

Chicago Tribune wrote a lengthy editorial opposing the ruling. The editorial, which was almost entirely about interpreting the Constitution, titled "Repeal the 2nd Amendment," argued that "citizens have had the right to protect themselves in their homes with other (non-gun) weapons" but that "the ruling takes a significant public policy issue out of the hands of citizens" (*CT*: 6/27/2008).

In the months following the Court's decision in *Heller*, the constitutional detail of the explanatory pieces that immediately followed faded. The discourse that remained was not the frenzied cacophony of rights that the reactions to the decision were, but rights talk, almost absent prior to the appearance of the case on the national radar, had become embedded as a substantial part of the discussion. By the end of the year, the existence of the right was treated as presumptive by almost all the newspapers in the census.

It will be some time before the language of gun politics is firmly grounded, but it is now profoundly more infused with vocabularies of rights than it was prior to the passage of *Heller* through the federal judiciary. The creeping rights language is evident in editorials like one from the *Denver Post* worrying that allowing guns into National Parks will undermine the "rights of millions of visitors to view wildlife and enjoy a safe vacation" (DP: 12/12/2008). Another, from the *New York Times*, fought rights with rights by describing a Congressional bill to expand approved classes of guns in the District of Columbia as "trampling the right of the district to govern itself" (*NYT*: 9/10/2008). A *Los Angeles Times* editorial framed the policy questions remaining after the ruling in terms of *Miranda* rights and the right to privacy (*LAT*: 10/22/2008).

The character of the discourse at the end of 2008 was one in which ordinary regulatory challenges were framed in terms more constitutional than they previously had been. Ordinary regulatory arguments were being offered through a language increasingly marked by rights talk.

What is most striking in the analysis of the gun regulation discourse is the role the courts played in influencing the use of constitutional rhetoric, to a more substantive and apparently longer-lasting extent than did the violence at Virginia Tech. Generally, there is good reason to believe that in the case of the gun regulation discourse, expectations about an emerging constitutional regime greatly influenced the way advocates talked about gun regulation, an influence that persisted after the actual ruling.

The constitutional transformation of the gun regulation discourse differed from that of the abortion discourse in two particularly significant ways: it occurred more rapidly and it produced an equilibrium in which rights talk went from playing a negligible role to a stable, sizable minority of the discourse. The best explanation for the first of these, as suggested previously, is a combination of less significant political opposition, changing social trends, and a higher level of media saturation.

The second difference is more normatively interesting. Why did the Court's ruling in *Roe* constitutionalize the abortion discourse so much more completely than did the ruling in the gun regulation cases? Each ruling left enormous questions about permissible regulations lingering. Each legitimized a comparatively anachronistic legal view with the imprint of the Supreme Court. The most likely answer is that the difference is illusory,

that with another decade of constitutional rule the gun regulation discourse will look the same.

Policy and Policy-Making Implications

Heller seems poised to be influencing the way people talk about gun rights in much the same way *Roe* did abortion rights. If this influence persists, it will profoundly influence the way future policy debates are conducted, both the language that is used and the criteria by which claims are judged. The question of policy impact, however, is murkier. Given the constraints under which the Court operated in *Heller,* Rosenberg's analysis (2008) suggests that the immediate policy impact of the decision is likely to be severely muted.

Returning briefly to the discussion from chapter one, Rosenberg brings together the constrained and dynamic accounts of Court influence over social policy by identifying three constraints on the Court. Absent those constraints and only absent those constraints is the Court free to influence social policy. In the case of *Heller,* only two of three constraints were absent.

Rosenberg's first constraint, the need for an existing social and legal opportunity, applies to the theory of rhetorical influence as well. The Court is most effective at promoting vocabularies of rights when those vocabularies are well ordered and developed by members of an organized movement that includes an active contingent of lawyers.

The gun rights movement exemplifies such a movement, as Siegel (2008) discusses in her analysis of *Heller* as a product of popular constitutionalism. Siegel

describes the gun rights movement in the late Twentieth Century as a collection of "practices of democratic constitutionalism," including public persuasion and an organized effort to "capture institutions that can authoritatively pronounce law," which enabled "citizens to contest and shape popular beliefs about the Constitution's original meaning and so confer upon courts the authority to enforce the nation's foundational commitments in new ways" (Siegel, 2008: 194).

Siegel's striking insight about *Heller* is that, by understanding it as a triumph of popular constitutionalism, "we can see forms of discipline and discretion that narratives of originalism occlude" (Siegel, 2008: 195). She describes the process by which movement advocates gained respectability in and out of government in tension with the aspirational originalism of Justice Scalia's opinion. The opinion betrays Justice Scalia's originalism, Siegel argues, because the justice's formulation that the "Amendment protects the law-abiding citizen's ability to defend himself and his family from criminals - and not the republican vision of a militia prepared to defend against government tyranny" (Siegel, 2008: 239). This formulation reflects the rhetoric of the New Right culture warriors—Siegel points to "Harlon Carter, Ronald Reagan, and Charlton Heston"—and displaces the historically relevant understanding of the Amendment. This reformulation of the purpose of the Amendment is integral to its popular constitutional reconstruction; it quite literally means what it does because of the efforts of advocates at every level of government and society to persuade their fellow Americans.

The second of Rosenberg's constraints is support from other branches of government. Here, again, the Supreme Court acted with relative freedom, and perhaps

some encouragement to decide sooner rather than later. As Tushnet (2009) points out, there is good reason to believe that the window of opportunity for the pro-*Heller* judges is a small one. The median vote was provided to the coalition with the ascension of Justice Alito in January, 2006. The Court granted certiorari in the next Fall term, their last opportunity to do so and rule in the case prior to the Presidential Election of 2008, which was widely seen to favor the Democrat, who would presumably be less supportive of a conservative ruling than then-current President George W. Bush.

The Court had good reason to count on support from the Congress as well. Though controlled by Democrats, the Democrats who had retaken the House and Senate in 2006 included a dispositive number of opponents of gun control such that the median gun control vote would be generally hostile to regulation (Kopel, 2010: 130). The anti-gun control votes that had allowed the Assault Weapons Ban to expire were still there, ready to be cast by Democrats as well as Republicans.

The third constraint, the Court's inherent inability to execute policy, can only be overcome by public support for the execution of the policy by relevant actors. Here, the scope of the Court's decision is telling. The Supreme Court in *Heller* authored an opinion that acknowledged an individual right to gun ownership with few apparent implications. The right in *Heller* does not, Justice Scalia is clear, interfere with a wide variety of popular restrictions. The list of examples of acceptable restrictions includes "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial

sale of arms" as well as any kinds of weapons not "in common use at the time (of ratification)" (*D.C. v. Heller,* 2008).

Tushnet (2009) argues that the Court has created a right in name only, that the originalist framework will prove impractical for lower courts, which will instead favor balancing mechanisms under a strong rational basis test. Beyond the explicit list provided by the Court, he identifies three classes of permissible regulations impacted by the Court's framework. First, "Heller may actually ease the path to the adoption of regulations," (Tushnet, 2009: 1436-8) because registration requirements will be found constitutional if they amount to less than a *de facto* ban. Second, safe storage regulations are likely to fail. Third, there is explicit room for the regulation of unusual and dangerous weapons.

Cook, Ludwig, and Samaha (2009) echo the view that the exceptions list is without historical or legal grounding, writing,

> "The majority's list of presumptively valid…regulation was not supported with serious originalist investigation. In fact, the list was not supported with much of any argument. It is quickly becoming one of the most important features in the majority opinion, yet its foundation is far easier to locate in contemporary political consensus or perhaps the necessity of pragmatic compromise in building a five-vote coalition on the bench than it is to support with eighteenth-century regulatory examples" (Cook et al., 2009: 1065).

The kinds of regulations allowed by *Heller*, in other words, are likely to be the kinds of regulations that are popular with both Justice Kennedy and the public. Broad handgun bans, like the one at issue in *Heller*, however, are unpopular, opposed by 68% of respondents in a 2007 Gallup Poll (Cook et al., 2009: 1072).

Despite strong popular support for an individual rights interpretation of the Second Amendment (Jones, 2008), specific so-called "commonsense regulations" like prohibitions on gun ownership for those suffering from severe mental illnesses are individually popular. Kopel (2010) describes these popular regulations, which may have been necessary to secure Justice Kennedy's vote, as a product of "living constitutionalism," writing, "the *Heller* list of presumptively constitutional gun controls includes controls that were not practiced in the Founding Era and cannot reasonably be derived from the controls that were practiced" (Kopel, 2010: 100).

The Supreme Court was able to craft an opinion recognizing a popular right to gun ownership provided it did not imply popular regulations were unconstitutional. A compounding irony is that the few policies clearly invalidated seem unlikely to have had much of a public health impact anyway. Guns clearly have a substantial negative social cost; their presence increases the fatality rate of suicide attempts and the negative social effects of crimes (Cook, el al., 2009: 1073-5). Yet the effect of local handgun bans and concealed carry laws on gun ownership and violence appear to be trivial (Cook et al., 2009: 1078-83)[30] and the concentration of guns does not appear to increase criminality at either the local or national level (Kates and Mauser, 2007).

That the Court was constrained must have been obvious to the justices. What then was the point of releasing an opinion that declared a right if doing so required the Court to write exceptions so significant that they would render it not only toothless for gun control opponents but into a potential weapon for control advocates (Tushnet, 2009)? The

[30] One great concern is that the ruling may deter municipalities from experimenting with new, potentially effective regulations (Cook, et al., 2009: 1091-3).

value of the right is both legal and political. The ruling promotes the aims of the ruling coalition by sketching a right that future Courts may expand and which advocates can more effectively use to persuade the public to liberalize gun laws. If trends in public opinion toward gun control continue, future generations of voters will be more amenable to erasing the sorts of popular regulations excepted in the Court's opinion (Saad, 2009).

The *Heller* coalition have handed a rhetorical bludgeon to opponents of gun regulation, but it is not a unique one. Findings from the study of abortion, presented in the previous chapter, combined with findings from the gun control domain thus far, suggest that opponents of the ruling will increasingly rely on rights formulations in their own rhetoric. Property rights are the most obvious candidate for gun control advocates, but rights to assemble peacefully might be construed to require safe environments and the abstract right to life may come to form a rhetorical basis for gun regulations. In response, regulation opponents are likely to pursue free expression-based claims to oppose gun registration fees, gun-specific taxes, and advertising bans (Cook, et al., 2009). As with abortion, the path drawn by rights talk will prove seductive to both sides.

Conclusions

Democracy works because citizens discuss how government should function. It is through the language of politics that we express our aspirations for society and it is in language that we situate our fundamental social commitments. What we do with our government and what we do as a society is shaped by the structure of our language. In this dissertation, I have shown one way in which the structure of our language is shaped by a political institution—the Supreme Court—that is itself a peculiar instantiation of our government and society. It is the peculiarities of the institution, the quasi-democratic manner in which it is staffed and operated and the occasionally anti-democratic character of its power, that determine the particular kind of influence it exerts on the language of politics. The analyses comprising this dissertation pose some distinct lessons for the study of the judiciary specifically and of political institutions generally. These results also suggest a fruitful direction for the study of the politics of language.

For judicial politics scholarship, these studies show that it is possible to analyze forms of influence that do not fit neatly into established ways of thinking about political power. In the first chapter, I tried to show that the post-legal turn embodied more than a

conceptual transformation in judicial politics research. That conceptual transformation was made possible and further catalyzed by methodological innovations, primarily in the statistical analysis of aggregations of case decisions and formal modeling of judicial behavior. These methodological innovations allowed social scientists to empirically ground historical work, often marginalized in the legal academy, which understood the Court to be a political actor beholden to political context and animated by political goals. As I have explained, this image of the Court is now almost completely dominant in political science and increasingly acknowledged by lawyers, yet this success has engendered an unnecessarily narrow theoretical focus. The most common feature of the methodological innovations which provoked the post-legal turn in political science was their emphasis on the policy order of the Court majority. Case outcomes are discrete, easily quantified, and allow for large datasets conducive to hypothesis testing. In breaking the myth of the law, case outcomes were the most logical and fruitful place to start. But the demonstrated utility of case outcomes in shattering the myth of the law is no good reason for their continuing dominance in the data.

Where scholars have moved beyond case outcomes as an object of inquiry into Court power, they have both grounded core findings and revealed deep and significant features of the Court. This is particularly obvious in work on case assignment and oral arguments, for example, showing that strategic considerations come into play not only in opinion writing but in fact permeate judicial behavior. While contemporary scholars of judicial politics have begun to look for evidence of strategic behavior inside the Court,

the method and case studies in this dissertation show that forms of judicial power beyond direct policy outcomes can be observed outside the Court as well.

For judicial politics scholarship, this dissertation offers two insights. First, that the post-legal account need not stop at the end of Court order and the measurement of the consequent policies, nor need our investigation be confined between the walls of the Court itself. Second, that the social position of the Court is greatly privileged and the unique features of the system of separation of powers that give rise to that position of privilege—the Court's purported political independence and commitment to legal reasoning—imbue the Court with a capacity to influence the language with which democratic politics is carried out.

This lesson applies to scholarship in American political institutions generally. The methodological innovations engendering new theoretical freedom of one era easily become the unrecognized theoretical shackles of the next. Research grounded in history and language makes possible accounts of contextual interrelationships between the branches and the public in ways that complement but do not displace behavioral research. Words matter in a democratic society; to take democracy seriously we must commit to an awareness of the role of the structure in language in predisposing certain kinds of processes and outcomes, not only in the political theory arm of the discipline but empirical scholarship on institutions and behavior as well.

These two case studies show the importance of this. In the case study centering on abortion policy, this dissertation shows that the language adopted and entrenched by the Court, a language of rights instead of policy considerations, presaged an era of bitter

entrenchment and policy gridlock. As opinion elites discussed abortion politics, they inevitably used the language of *Roe*—rights to privacy, liberty, and choice against rights to life and to legislate—whether invoking the case itself or the controversy. And as state legislatures debated the consequent legislative issues of abortion politics—issues such as parental and spousal consent, waiting periods, and the breadth of permissible medical counsel—they did so in a linguistic framework ill-suited to mutual understanding, let alone compromise.

The outcome of the Supreme Court's intervention in the gun politics cases remains too recent to fully evaluate its impact on following legislative battles, though as I have discussed there are very good reasons to think the discourse will play out no differently than in abortion politics. The Court's decision in *Heller* did more than upend longstanding legal precedent; it began a fundamental shift in the language of gun politics, as advocates for liberalizing gun laws moved from imagining a constitutional right to invoking one and opponents who once talked about the dangers of guns in the hands of political radicals or the mentally ill found themselves arguing for the rights of communities to legislate safety and of workplaces to determine what goods can be brought onto their property.

In abortion and gun politics alike, the enthusiasm of an initial signal from the Court was replaced with the reality of talking politics in a constitutionalized discourse. Our democracy has few shared, foundational commitments; it is our constitutional law that comprises those commitments and it is with the language of constitutionalism—individual and group rights, state responsibilities—that we embed those commitments

within higher law. Public deliberation about constitutional commitments is challenging; it is supposed to be. To envision alternative policies and potential national identities is much harder when that imagination demands the transformation of foundational elements of our national character. In *Roe* and *Heller*, the Court embedded controversial political commitments not only in our Constitution but in the very language of democratic discourse.

This transformation shows the importance of the study of the politics of language. The more committed we are to foundational political principles in our Constitution and language, the less capacity we have to use democratic institutions to imagine policy change. This possibility, the possibility of democratic action through mutual understanding, is arguably the essential virtue of the democratic process.

While political theorists have often sought harmonious order emergent from satisfying first principles, the political contestation of language has reflected the imaginable change that remains necessary for the functioning of democratic society. It was the possibility of the triumph of singular beliefs—the idea that universal and foundational commitments can be marked and that public deliberation should be pathologized for its failure to produce ideal outcomes—that animated the totalitarian ambitions of the Twentieth Century. Of the possibility of a single final conception of justice, Isaiah Berlin wrote,

> One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of

> society. This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution. This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another…[N]either political equality nor efficient organization nor social justice is compatible with more than a modicum of individual liberty…justice and generosity, public and private loyalties, the demands of genius and the claims of society, can conflict violently with each other. And it is no great way from that to the generalization that not all good things are compatible, still less all the ideals of mankind. But somewhere, we shall be told, and in some way, it must be possible for all these values to live together, for unless this is so, the universe is not a cosmos, not a harmony; unless this is so, conflicts of values may be an intrinsic, irremovable element in human life (Berlin, 1969: 167).

The possibility of simultaneously imagined values depends on a free and open language, one in which foundational commitments are few and animate rather than diminish discourse between opposing parties. Democracy, as it is lived by its participants, is a practice of public deliberation, but the process of deliberation is inevitably influenced by the language in which that deliberation proceeds. Constitutional commitments are necessary for the functioning of democracy, but regardless of policy changes they may engender, political actors cannot enshrine them in our law without also enshrining them in our language. The Supreme Court of the United States may or may not, in issuing rulings upholding civil and political rights, be able to influence social policy, but it seems clearly capable of influencing how our democratic society talks about and understands itself. It is in the democratic character of our political language that multiple values and visions for our country can be simultaneously imagined and pursued.

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