

## The Political Consequences of Supreme Court Consensus:

### Media Coverage, Public Opinion, and Unanimity as a Public-Facing Strategy

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The Roberts Court has an affinity for consensus. In recent years, many, including Chief Justice Roberts himself, have remarked on the Court's desire to reach unanimous decisions. According to Roberts, "the more cautious approach, the approach that can get the most justices to sign onto it, is the preferred approach."<sup>1</sup> Boasting that one term "had more unanimous opinions announced in a row than ever before," Roberts has described a deliberate strategy to build consensus, in which agreement among the Justices in relatively minor disputes lays the foundation for consensus in more important controversies.<sup>2</sup> By 2014, media outlets were touting the Court's "remarkable achievement" of reaching unanimous decisions in more than two-thirds of its rulings, a feat that it had not accomplished for seventy years.<sup>3</sup>

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<sup>1</sup> Mark Sherman, *Roberts Touts Unanimity on the Supreme Court*, WASH. POST (Nov. 17, 2006), [www.washingtonpost.com/wp-dyn/content/article/2006/11/17/AR2006111700999.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/11/17/AR2006111700999.html).

<sup>2</sup> Jeffrey Rosen, *Robert's Rules*, ATLANTIC, (Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

<sup>3</sup> Neal K. Katyal, *The Supreme Court's Powerful New Consensus*,

Why is consensus so important to the current Justices? Roberts has suggested that unanimity contributes to “stability in the law,” which may increase the durability of precedent as well as compliance from lower courts.<sup>4</sup> Unanimity also has potential political benefits at a time in which satisfaction with the judiciary has been declining.<sup>5</sup> And unanimity may increase favorable media coverage, popular support, and acceptance of rulings.<sup>6</sup> Still, the mechanisms by which consensus translates into support remain understudied. This Article seeks to answer two related questions. First, is the public more likely to accept unanimous decisions? Second, by what process does judicial consensus translate into public support?

I think of consensus as a signal that has consequences for how the media and the public respond to rulings. I argue that high levels of support for rulings decided by large majority coalitions arise from the more favorable treatment the press gives these decisions. Because

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N.Y. TIMES (June 27, 2014), [www.nytimes.com/2014/06/27/opinion/the-supreme-courts-powerful-new-consensus.html](http://www.nytimes.com/2014/06/27/opinion/the-supreme-courts-powerful-new-consensus.html).

<sup>4</sup> Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of*

*Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534–50 (2002); *see also* Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD., no. 2325–58 (2013); *but see generally* Chad Westerland et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM J. POL. SCI. 891 (2010).

<sup>5</sup> James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Court’s Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OPINION Q. 622–41 (2016).

<sup>6</sup> *See generally* Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media’s Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCHOL. 597–614 (2006); *see also* James R. Zink et al., *Courting the Public: The Influence of Decision Attributes on Individuals’ Views of Court Opinions*, 71 J. POL. 909–25 (2009).

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most citizens do not read judicial opinions and only sporadically pay attention to the Court, they are unlikely to have noticed the recent push for consensus.<sup>7</sup> Yet consensus allows the judiciary to effectively legitimate decisions by increasing favorable media coverage of them. This is important because most citizens learn about Court decisions through the press. I theorize that the press uses voting signals from the Court when shaping coverage of rulings. The press is more likely to frame non-unanimous decisions in unfavorable terms than otherwise similar unanimous ones. This difference in coverage in turn informs public opinion about high profile rulings. The Court can foster support for its rulings by signaling its consensus to the press, which then offers favorable coverage that can increase popular approval of the Court's actions.

I develop this argument in four parts. I begin with the three ways that unanimity can foster popular support: by serving as a high credibility cue sent directly from the Court to the public; limiting public exposure to competing perspectives (i.e., dissenting opinions) that can undercut the majority's reasoning in a given case; and most important of all, shaping the public's understanding of decisions as filtered through the media. I suggest that consensus can increase support for rulings through a process in which the Court signals to the press a lack of disagreement over a ruling, the press produces favorable or even one-sided coverage of the decision, and the public, consuming this information, becomes more supportive. In part two, I review empirical evidence that voting outcomes function as a key signal to the press, which, in turn, influences its coverage of rulings. More specifically, I show that unanimous decisions receive more positive and deferential coverage than any other type of ruling. Then, I connect these findings to research on public opinion and the Court. I demonstrate that positive coverage of rulings increases popular support for the policies adopted by the Court. I close by reviewing

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<sup>7</sup> Jeffrey J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 684–85 (1994).

the strategy of consensus-building on the Roberts Court.

PUBLIC RESPONSES TO UNANIMITY AND LARGE MAJORITY  
COALITIONS ON THE COURT

How might consensual outcomes foster support for Supreme Court rulings? Drawing on research in public opinion, including that specifically focused on knowledge of the judiciary, I explore three potential pathways through which consensus may influence support. I ultimately suggest that the most likely path of influence is shaped by the media because citizens learn most of what they know about the Court from the press.

First, when the public is attentive to the Court, consensus may provide a credible indication that a policy is non-controversial and worthy of support. Research on opinion formation and persuasion demonstrates that heuristic processing occurs regularly.<sup>8</sup> This enables a wide range of cues—or simple pieces of information—to “influence opinions without systematic processing of substantive issue-relevant arguments.”<sup>9</sup> High credibility cues, including those directly related to the judiciary, have been shown to exert such an influence.<sup>10</sup> Therefore, one route for the Court to persuade a skeptical public is to send the high credibility indication of unanimity when it rules. The attentive public may use this information to make a fast and frugal judgment that the policy announced by the Court is worthy of support. A heuristic processing perspective also implies that the specific arguments offered by the Court are of limited relevance to

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<sup>8</sup> See Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of*

*Sources Versus Message Cues in Persuasion*, 39 J. PERSON. & SOC. PSYCH. 752, 753 (1980); see generally RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (Springer-Verlag 1986).

<sup>9</sup> Brandon L. Bartels & Diana C. Mutz, *Explaining Processes of Institutional Opinion Leadership*, 71 J. POL. 249, 250 (2009).

<sup>10</sup> Baird & Gangl, *supra* note 6; Zink et al., *supra* note 6.

persuading the public.

A second (and competing) perspective is that an attentive public engages in effortful, systematic processing of the arguments made by the Court. Mindful processing of arguments may make unanimous decisions particularly persuasive. When there are no dissents, those who read Court opinions to formulate their attitudes will not be exposed to counterarguments, making acceptance and support more likely.<sup>11</sup> This is consistent with research on opinion formation, which emphasizes that “top of the head considerations” and the flow of political information shape popular attitudes.<sup>12</sup>

But there’s a problem with this story. Research strongly suggests that the public is only modestly and conditionally attentive to the Court and so citizens are unlikely to be direct consumers of information from the institution.<sup>13</sup> They are more accurately characterized as intermittently attentive to the Court, with a few high profile rulings—those covered extensively by the press—attracting the most notice.<sup>14</sup> Which brings me to the third pathway: Because the vast majority of information that the public receives about the Court comes from the press, the way the press treats consensus has an

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<sup>11</sup> Bartels and Mutz, *supra* note 9 at 255.

<sup>12</sup> JOHN R. ZALLER *THE NATURE AND ORIGINS OF MASS OPINION* 47–51 (Cambridge University Press 1992).

<sup>13</sup> Gregory A. Caldeira & Kevin T. McGuire, *What Americans Know about the Courts and Why It Matters*, *INSTITUTIONS OF AMERICAN DEMOCRACY: THE JUDICIARY* 262–66 (Kermit L. Hall & Kevin T. McGuire ed., 2005); James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 *J. POL.* 429–41 (2009); James L. Gibson, Miguel M. Pereira, & Jeffrey Zeigler, *Updating Supreme Court Legitimacy: Testing the ‘Rule, Learn, Accept’ Model of Political Communication*, 20 (working paper), <https://sites.wustl.edu/jeffziegler/files/2016/02/Text-74-Updating-1543z6h.pdf>; Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 *JUDICATURE* 32, 34 (2001).

<sup>14</sup> See Gibson et al., *supra* note 14.

important effect on how the public responds. Furthermore, the press has incentive to be attentive to the degree of consensus on the Court when shaping its coverage. Because the media must balance a range of objectives when it reports on the Court, it relies heavily on information supplied by the justices themselves. Divisive rulings indicate the presence of legal and perhaps political controversy and supply multiple perspectives from the Justices, which the press has an incentive to highlight given its desire to emphasize conflict. In contrast, unanimity signals to the press strong agreement in the legal community about a dispute.<sup>15</sup>

There is thus reason to expect that consensual rulings provide a signal to the media that incentivizes positive coverage of rulings. The press becomes more likely to defer to the decisions of the Court by emphasizing the majority's perspective at the expense of counterarguments when signaled to do so by consensus. Furthermore, because the public formulates opinions about the Court largely on the basis of media coverage, systematic differences in coverage of unanimous versus non-unanimous decisions have consequences for public reactions. Simply put, given the coverage to which the public is exposed, citizens are more likely to express support for unanimous rulings than non-unanimous decisions—a benefit of the Court's recent push for consensus.

#### COVERAGE OF CONSENSUAL DECISIONS

To test the proposition that consensus fosters favorable coverage of rulings, I gathered all published coverage of a random sample of high salience Supreme Court decisions between the years 1981 and 2007. Although this time period covers only the early terms of the Roberts Court, it covers three Chief Justices' tenures and the controversies over the Bork nomination and *Bush v. Gore*. The period

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<sup>15</sup> MICHAEL A. ZILIS, *THE LIMITS OF LEGITIMACY: DISSENTING OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS* 25–35 (University of Michigan Press 2015).

also includes years in which public confidence in the Court began to decline, giving insight into the dynamics in the decades leading up to Roberts's nomination. Finally, I focus here on three of the leading sources of information about the institution, the *New York Times*, *Washington Post*, and *Washington Times*. But the trends I capture would be the same if I had included the three major cable news organizations.<sup>16</sup>

To measure favorable coverage for rulings, I rely on two metrics. First, I asked two human raters to read and score news articles on (1) the basis of their support for the majority opinion and (2) their coverage of arguments made by the members of the majority coalition versus dissenters. This allowed me to create a metric of *Decision support* for each article, which I then aggregated to the case level. Additionally, I drew on the plagiarism software Wcopyfind to measure *Deference to the Court* in news coverage.<sup>17</sup> This measure evaluates the proportion of coverage that drew directly on language from the Court's majority opinion (as opposed to any other source).

Figure 1(a) shows the degree of supportive and deferential coverage for highly salient unanimous versus non-unanimous decisions of the Court, verifying that more favorable coverage accrues to consensual decisions. For instance, direct quotations from majority opinions make up about 4.4% of all coverage of non-unanimous rulings; that percentage increases to 6.6% for unanimous rulings. This is a small but meaningful difference in the depiction of a ruling that the public receives because these direct quotations also correlate with other language that reflects positively on a ruling. This can be seen more clearly in the *Decision support* metric, which demonstrates that approximately 63% of coverage of non-unanimous rulings was favorable, while approximately 78% of coverage was

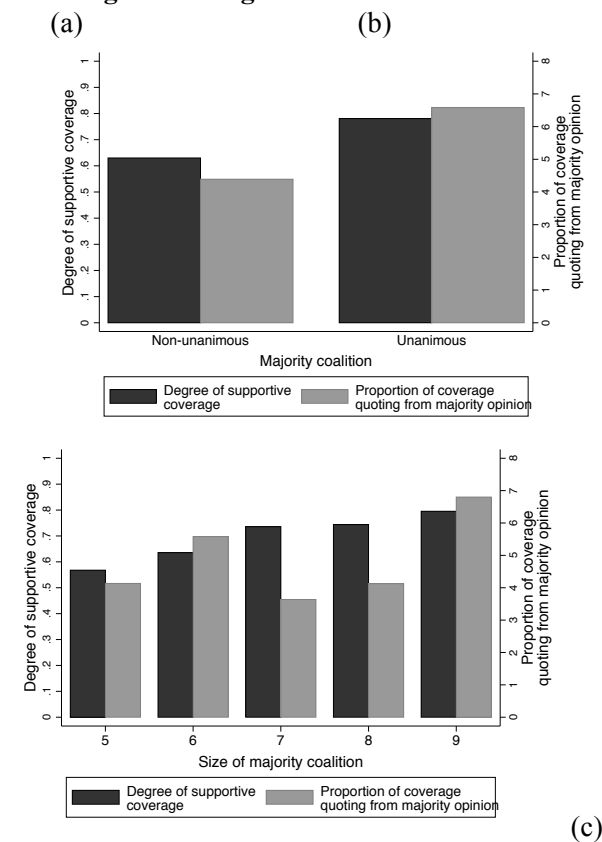
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<sup>16</sup> For an analysis of cable news coverage, see Zilis, *supra* note 16, at 108–10.

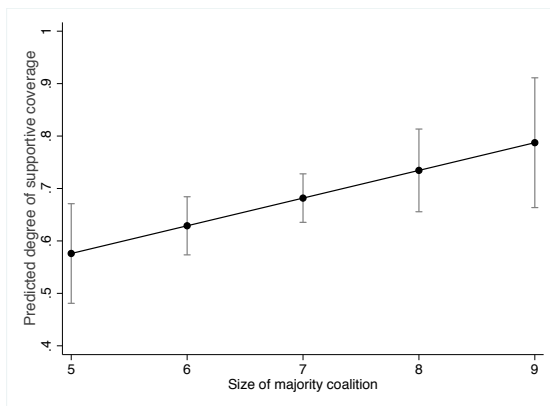
<sup>17</sup> See Louis Bloomfield, *Wcopyfind*, PLAGIARISM RES. SITE (2012), <http://plagiarism.bloomfieldmedia.com/wordpress/>.

favorable for unanimous decisions. Additionally, Figure 1(b) depicts favorable coverage as the Court’s degree of consensus (measured by the absolute size of the majority coalition) varies, suggesting a strong correspondence between the degree of consensus and positive coverage. As a general rule, the more Justices who join a majority coalition, the more favorable the coverage—with unanimous decisions receiving the most positive reports of all.

**Figure 1. Supreme Court Consensus Increases Favorable Coverage of Rulings**







Panel (a) shows the raw proportion of favorable media coverage, using the *Decision support* and *Deference to the Court* measures, for unanimous versus non-unanimous rulings. Panel (b) shows the raw proportion of favorable media coverage by size of majority coalition. Panel (c) shows the predicted amount of supportive coverage after controlling for case characteristics.

To assess this relationship more rigorously, Figure 1(c) depicts the predicted amount of supportive coverage as a function of consensus after controlling for a series of relevant case characteristics. In other words, this figure demonstrates the degree of favorable newspaper coverage that we could expect for otherwise similar cases as the size of the majority coalition varies.<sup>18</sup> Press coverage of unanimous decisions is the most positive of all. For example, in otherwise similar cases, unanimous decisions are expected to receive positive coverage 79% of the time, and quotations from those opinions make

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<sup>18</sup> I use a regression analysis that controls for the following factors: the ideological diversity of the Court's majority coalition, the ideological conflict between the majority and the president and Congress, the ideological distance between the Court and the president and Congress, the presence of divided government, the degree of issue controversy and interest group participation in a case, the characteristics of the decision itself, and the volume of coverage afforded a ruling. See Zilis, *supra* note 16, at 78–95.

up about 8% of newspaper stories (estimates not shown). The comparable figures for five-four rulings are 58% and 3%, respectively.

To make sense of these patterns, consider that the average high salience ruling generates about 5600 words of coverage in the print media. This implies that careful readers are exposed to approximately 448 words directly from majority opinions when a decision is unanimous, but only 168 when four justices dissent. The overwhelming impression given to citizens following divisive rulings is one that minimizes the perspective of the Court majority.

In sum, the media follows a model of reporting that rewards rulings with favorable coverage as the majority brings more members into the fold. This is particularly valuable to any institution concerned with increasing public support for its decisions but perhaps especially the Supreme Court.

#### THE CONSEQUENCES OF COVERAGE

Having established that internal voting dynamics on the bench shape media coverage of the Court, it is important to consider whether this affects the institution's ability to legitimate its rulings. Put differently, does the Chief Justice's drive for consensus influence the proportion of decisions that are likely to receive public support? Answering this question requires a focus on the effects of favorable media coverage.

Experimental evidence is particularly appropriate for this inquiry. By manipulating the nature of coverage to which citizens are exposed, we can get a better sense of whether changes in the media's depiction of a case cause citizens to adjust their support for the Court's decision, especially when it touches controversial issues. In my book, I present several experiments aimed at determining whether favorable coverage increases support for rulings.<sup>19</sup> I focus on one of these studies here. The goal behind the study is to see whether even a

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<sup>19</sup> ZILIS, *supra* note 15.

very modest adjustment in the tone of coverage can reshape support for a ruling on a controversial issue. To do so, I focus on the case of *Rosenberger v. University of Virginia*, which concerned both the Speech and Establishment Clauses of the First Amendment.<sup>20</sup>

In the study, subjects were recruited through an online marketplace and randomly assigned to read one of two versions of news articles about *Rosenberger*, modeled on actual media coverage (a third group, the control condition, read an unrelated story). The two versions of the *Rosenberger* story included slight but important differences in wording, describing the decision as either “praised” by supporters or “criticized” by opponents. Other than these differences, the descriptions of the ruling were identical. After reading the article, subjects answered a series of questions about their approval for the ruling.<sup>21</sup>

Their responses were revealing. Subjects in the praise condition expressed significantly more support for the ruling than those in the criticism condition. They were more likely to favor the pro-speech position taken by the Court, agree with the ruling, and believe that the Justices interpreted the Constitution correctly. I should note that these patterns were not issue-specific; I was able to replicate the results in experiments on the Second Amendment, congressional term limits, government takings of private property, and religious expression.<sup>22</sup>

Interestingly, legitimacy appears to play a central role in how media coverage shapes popular reactions to rulings. Legitimacy, a form of durable loyalty enjoyed by the judiciary, enables the institution to limit the negative consequences of unpopular decisions,

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<sup>20</sup> *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). The dispute originated from the University of Virginia’s refusal to cover the costs of printing for a student-run religious magazine. Because the university covered these costs for non-religious publications, the Supreme Court ruled that its refusal violated vital free speech principles. *Id.*

<sup>21</sup> ZILIS, *supra* note 15, at 129–42.

<sup>22</sup> ZILIS, *supra* note 15, at 129–42.

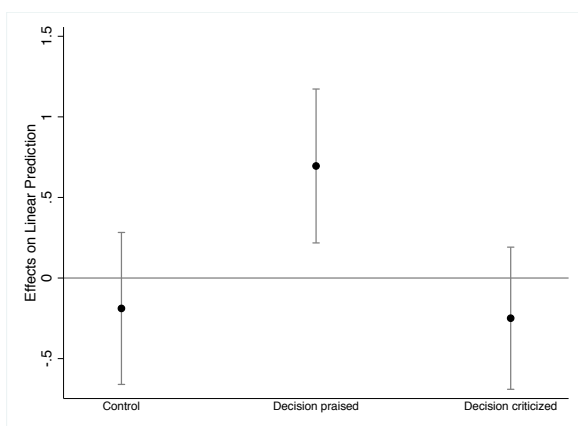
such as noncompliance or politicized attacks on the judiciary.<sup>23</sup> When it comes to how citizens respond to media presentations of controversial rulings, the experimental results show that legitimacy is critical. Figure 2 depicts the influence of legitimacy on support for the *Rosenberger* decision across experimental conditions.<sup>24</sup> As this figure demonstrates, legitimacy directly shapes support for rulings when subjects read favorable depictions, but has no effect when subjects read unflattering coverage. Put differently, subjects who assigned the Court a high level of legitimacy were more likely to support the decision when exposed to favorable press coverage, but no more likely to do so in the criticism condition. This result suggests that legitimacy is a weak persuasive currency for the Court: it only enables the Justices to increase support for rulings when the media treats them favorably.

**Figure 2. Legitimacy Buttresses Support for *Rosenberger*, Conditional on Favorable Coverage**

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<sup>23</sup> David Easton, *A Re-Assessment of the Concept of Political Support*, 5(4) BRITISH J. POL. SCI. 435,444–46 (1975); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92(2) AM. POL. SCI. REV., 343–58 (1998); James L. Gibson, Gregory A. Caldeira & Lester K. Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58(2) POL. RES. Q., 187–201 (2005).

<sup>24</sup> The figure presents the marginal discrete effect of legitimacy on decision support, by experimental condition, after controlling for a subject's religious affiliation, religiosity, conservatism, age, and gender. See ZILIS, *supra* note 15.



In short, experimental evidence demonstrates that media coverage has clear consequences for how the public responds to Court rulings. In a favorable-coverage environment, citizens rely on their pre-existing loyalty towards the Court as a lens through which to assess decisions. Because this support is often robust, positive media coverage consistently generates public support for rulings.<sup>25</sup> In contrast, unfavorable coverage, which is much more likely to come about following divided decisions, severs the legitimacy-support link, which limits popular support for rulings.

#### CONSENSUS-BUILDING AS A PUBLIC-FACING STRATEGY

Chief Justice Roberts has made no secret of his desire for a collegial, consensual Court. Though his reasons are likely many in number, he may well understand that consensus—and unanimity, in particular—buttresses public support for his Court’s decisions, including potentially controversial ones. A primary reason is that the media is attentive to and influenced by signals of controversy (or the

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<sup>25</sup> James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court’s Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59(1) AM. J. POL. SCI., 162–74 (2015).

lack thereof) from the High Court, such that unanimity or large majority coalitions blunt the press's willingness to portray rulings in a negative light. With consensus, the Court majority is far better poised to control the framing battle over its decisions and much more likely to generate support for its decisions.

The Roberts Court's thinking on the importance of consensus may well have been informed by recent controversies. I think here of the 2005 decision, *Kelo v. City of New London*,<sup>26</sup> which generated substantial public backlash, including attacks aimed at the Court and sensational attempts to embarrass the Justices—even though the case concerned a constitutional clause, the Public Use Clause, that seldom generated popular controversy.<sup>27</sup> Press coverage zeroed in on the dissenters' arguments to paint a portrait of private property under siege by the Court.<sup>28</sup> Interestingly, *Kelo* followed on the heels of another eminent domain ruling, *Lingle v. Chevron*.<sup>29</sup> Despite the view among some legal scholars that *Lingle* substantially broadened the scope of the government's eminent domain authority, the Court was able to stave off press criticism of the ruling and it passed with little public notice.<sup>30</sup> Unanimity in *Lingle* helped to forestall the

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<sup>26</sup> *Kelo v. New London*, 545 U.S. 469 (2005).

<sup>27</sup> Janice Nadler, Shari S. Diamond & Matthew M. Patton, *Government Takings of Private Property*, PUB. OP. & CONSTITUTIONAL CONTROVERSY, 286–309 (Oxford University Press 2008).

<sup>28</sup> *Id.* One of the most commonly referenced phrases in coverage of *Kelo* was Justice O'Connor's contention that “all private property is now vulnerable.” ZILIS, *supra* note 15, at 75.

<sup>29</sup> *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005).

<sup>30</sup> Jane B. Baron, *Winding Toward the Heart of the Taking Muddle: Kelo, Lingle, and Public Discourse about Private Property*, 34(2) FORHAM URB. L. J., 613–55 (2006); D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69(1) ALB. L. REV., 343–56 (2006); *but see* Gideon Kanner, *Kelo v. City of New London: Bad Law, Bad Policy, and Bad Judgment*, 38(2) URB. LAWYER 201–35 (2006). *See also* ZILIS, *supra* note 15 at 74–76.

controversy that followed *Kelo*.

Going forward, the Roberts Court faces countervailing tides. Even as the Justices have placed a renewed emphasis on unanimity, potentially buttressing support for some rulings, popular confidence in the Supreme Court is showing signs of decline.<sup>31</sup> Since institutional loyalty functions as a source of support for rulings that receive favorable coverage, the Justices may find it more difficult to gain approval for even consensual decisions. Furthermore, even Roberts himself has acknowledged that consensus is far from the Court's only goal. In his dissent in *Obergefell v. Hodges*, Roberts noted that respect for the institution "flows from the perception—and reality—that we exercise humility and restraint in deciding cases."<sup>32</sup> As perhaps the Court's most vocal advocate of consensus, Roberts's willingness to dissent and nod to concerns about the institution's legitimacy speak to the limitations of the consensus-building strategy. Nonetheless, because the press is carefully attuned for signals of conflict on the bench, with considerable consequence for the public's subsequent response, Roberts's strategy offers one path for the modern institution to potentially buttress support for its decisions.

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<sup>31</sup> Gibson & Nelson, *supra* note 4.

<sup>32</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2624 (2015).