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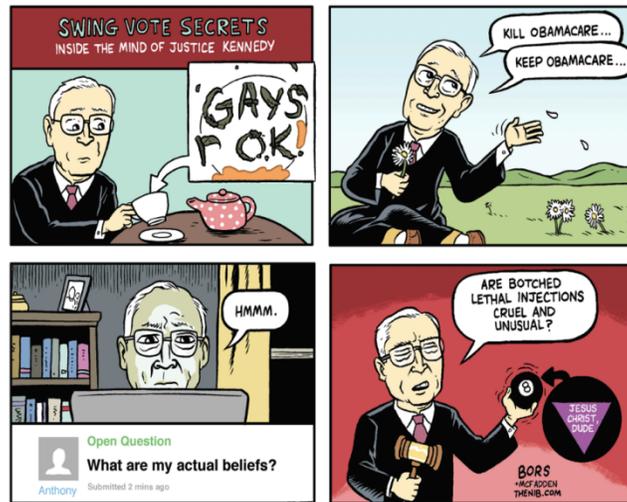
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Note

Getting Back to Basics: Recognizing and Understanding the Swing Voter on the Supreme Court of the United States

Kristin M. McGaver*



Justice Anthony Kennedy, depicted in Matt Bors' cartoon, *Swing Vote Secrets: Inside the Mind of Justice Kennedy*,¹ has

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1. Matt Bors, *Swing Vote Secrets: Inside the Mind of Justice Kennedy*, DAILY KOS (May 13, 2015), <http://www.dailykos.com/story/2015/5/13/1384273/-cartoon-swing-vote-secrets>.

been labeled the swing voter of the Supreme Court since the departure of his colleague Sandra Day O'Connor.² Before O'Connor, Justices Byron White and Lewis Powell were the Supreme Court's swing voters in the 1970s.³ And even earlier, Justice Forman Reed carried the swing vote mantle.⁴

It goes without saying that swing voters have a long and storied history on the Court. But what does the term actually mean? There is an extensive history and tradition of labeling Supreme Court Justices as "swing" Justices.⁵ And yet the content of this label remains unclear. Some use the terms to convey a negative sentiment. Bors' cartoon is a prime example of this, insinuating that Kennedy used comical sources such as tealeaves, daisies, Internet message boards, and a Magic 8 Ball to decide his vote in seminal cases.⁶ Others suggest that being a swing voter or swing Justice is undesirable by using words like "wishy-washy" or even weak.⁷ At the same time, some use the terms more positively, focusing on the power one person can have to change law, policy, and even history.⁸ Complicating

2. See *id.*; see also Emily Bazelon, *Swing Your Partner: O'Connor Versus Kennedy as the Justice in the Middle*, SLATE (June 20, 2008), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/06/swing_your_partner.html (characterizing Kennedy as "a *swinger* who knows how to be in a long-term relationship" and O'Connor as "a bit of a tease" (emphasis added)).

3. See *infra* Part II.B.

4. Justice Reed was actually called a "swingman"—likely a hybrid role of the swing Justice and median Justice if viewed in modern terms. For a discussion of this, see *infra* Part II.A.

5. These types of actors emerge in marginal cases or cases that address socially divisive issues. See JEFFREY TOOBIN, *THE NINE* 84–85 (2007) ("What's the most important law at the Supreme Court? . . . 'Five! The law of five! With five votes, you can do anything around here!'") (quoting Justice Brennan)).

6. Bors, *supra* note 1; see also *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Obergfell v. Hodges*, 135 S. Ct. 2584 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

7. Antonin Scalia, Senior Assoc. Justice of the U.S. Supreme Court, Remarks at the 2015 Stein Lecture (Oct. 20, 2015) (answering a question about the swing voter, Justice Scalia replied, "[i]t doesn't seem to me to be leading the Court but following the Court. I don't know why anyone would aspire to that") (notes on file with author); see B. Drummond Ayers, Jr., *The 'Swing' Justice: Byron Raymond White*, N.Y. TIMES, June 30, 1972, at 16. It has also jokingly been suggested that O'Connor used a Magic 8 Ball to make decisions. See Jim Huber, *On Sandra Day O'Connor's Retirement*, POLITICALLY CORRECT (July 3, 2005), <http://www.conservativecartoons.com/cartoon.php?toon=401>.

8. See, e.g., Brandon L. Bartels, *The Sources and Consequences of Polarization in the U.S. Supreme Court*, in AMERICAN GRIDLOCK 171 (James A. Thurber & Antoine Yoshinaka eds., 2015) (characterizing the swing voter as a powerful dictator on the Court); Editorial, *Supreme Sandra*, AZ CENT. (July 3, 2003), <http://archive.azcentral.com/specials/special47/articles/0703thur1-03.html> (calling O'Connor "Supreme Sandra" and "the single most powerful

things further, there is sometimes a conflation between the *electoral* swing voter and the *judicial* swing voter, failing to separate the two as applied to the different branches of government.⁹ Most recently, another strain of confusion has emerged thanks to scholarship showing that *swing* Justice and *median* Justice may not always align, even though the two terms are often used interchangeably.¹⁰

This plethora of uses demonstrates that there is a multi-layered and widespread confusion about what “swing” actually means when applied to a Supreme Court Justice. In light of the enormous importance the actors defined by these terms play in shaping and defining the differences between law, politics, and society in America, it is perhaps surprising to learn that scholars have yet to trace the etymology of these terms.¹¹ This gap in existing scholarly literature is problematic: swing Justices are among the most important and mythic figures in American legal and political life, and yet it is not entirely clear what this title actually conveys. Thus, a thorough analysis of swing voter’s various meanings, its origin, and historical use is long overdue.

woman in America”). For more positive or neutral depictions of Kennedy see, for example, Richard L. Hasen, Op-Ed, *A Court of One: Anthony Kennedy*, L.A. TIMES (June 30, 2015), <http://www.latimes.com/nation/la-oe-0702-hasen-kennedy-court-20150630-story.html>; Matt Purple, *The “Swing Vote” on the Supreme Court Is Actually a Libertarian*, RARE (June 26, 2015), <http://rare.us/story/the-swing-vote-on-the-supreme-court-is-actually-a-libertarian>; see also Patrick D. Schmidt & David A. Yalof, *The “Swing Voter” Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209 (2004) (proposing an expanded conception of swing voting using Kennedy as the prime example for study).

9. The electoral swing voter is the topic of a 2008 flop film featuring Kevin Costner as the determining vote in a presidential election. SWING VOTE (Touchstone Pictures 2008); see also *infra* Part I.B.2.

10. See Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1090 (2013) (“While this justice will often be pivotal, the term-specific median justice does not always cast the fifth majority or deciding vote.”); see also H. Roger Segelken, *What Moves the Supreme Court’s ‘Swing’ Justices*, CORNELL CHRON. (Oct. 31, 2013), <http://www.news.cornell.edu/stories/2013/10/what-moves-supreme-court-s-swing-justices> (proposing the “swing Justice” casting the pivotal vote is not always the median of the Court).

11. The law-politics distinction “presupposes an unduly stringent separation between professional reason and popular values. . . . [It] is both real and suffused with ambiguity and uncertainty.” Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473, 1474 (2007).

Against this background, this Note seeks to deepen our understanding of the origins and various uses of the term swing voter as applied to Supreme Court Justices. By detailing swing voter's etymological history and transformation in legal and non-legal contexts, this Note acknowledges that swing voter's meaning is not as straightforward as initially assumed, especially when the term is employed in the Supreme Court context. By deploying an etymological analysis and intellectual history, crucial tools in helping us understand and apply contested concepts and meanings, this Note seeks to discover (or perhaps reclaim) the true meaning of "swing voter" and "swing Justice" as it relates to Supreme Court Justices.¹² To accomplish this goal, Part I begins by tracing the history of "swing voter" back to its origins in the term swingman, connecting the terms and mapping their transition into well-known descriptors for particular Supreme Court Justices. Part II identifies and examines five individual examples of Justices historically identified as swing voters, swing Justices, or median Justices in an effort to show why each Justice fits a different iteration of the swing voter mold.¹³ Part III explains the normative implications of this failure to define what it means to be a swing voter, swing Justice, or median Justice, including conceptual confusion for academics from several disciplines who use all the terms to describe the same or different Justices; public confusion about what a swing Justice actually is; and the lack of a true distinction between law and politics.

I. FROM SWINGMAN TO SWING VOTER: MAPPING THE CONVERGENCE OF THE TERMS AS DESCRIPTORS FOR JUSTICES ON THE SUPREME COURT

To fully understand the present day definition of swing voter, it is necessary to map out the evolution of the term from its origins as "swingman" all the way to its many uses today, where it is now often used interchangeably with "median Justice." Section A tracks the history of the term swingman, with its eclectic assortment of uses, attempting to pinpoint its vari-

12. For an amusing contemporary explanation of why etymologies are important with examples, see Cristina Gusano, *An Introduction to Etymology: Eight Great Word Origins*, BABEL, <https://www.babel.com/en/magazine/an-introduction-to-etymology-eight-great-word-origins> (last visited Nov. 28, 2016).

13. Swing voter only recently ballooned in popular discourse. Thus, the examples weigh heavily toward the Court's contemporary eras.

ous definitions over time. Section B hones in on the use of swingman in reference to specific members of the Court, and discusses, somewhat speculatively, the conversion of swingman to swing voter in that context.

A. THE SWINGMAN: FROM RANCHES AND RAILROADS TO THE RULE OF LAW

The precise origins of the word swingman are unclear. It initially appeared sometime around the start of the twentieth century—irregularly at first and then increasing progressively over time. Regrettably, very little material exists that appears to accurately trace the development of the term. Nonetheless, some evidence makes it possible to trace its origin and evolution. Subsection 1 discusses the multiple dictionary definitions of swingman over time in combination with examples from media of the period. Subsection 2 discusses swingman’s earliest uses in reference to Supreme Court Justices.

1. Uses and Connotations Referenced in Dictionary Definitions¹⁴

In 1903, the first documented use of swingman, or “swingmen” in this instance, emerged in *The Log of a Cowboy*, to reference cowboys who would ride on the outskirts of a cattle herd, known as “flank rider[s],” and guide lost cattle back to the group.¹⁵ Swingman is sometimes written as “swing man”; yet, there does not appear to be any drastic difference in meaning due to spacing.¹⁶ As the word increased in popularity, it also became a commonplace descriptor for gifted male jazz musicians

14. See, e.g., *Swingman*, OXFORD ENGLISH DICTIONARY (1st ed. 1919) [hereinafter OXFORD]. Dictionaries often lag behind popular culture in the adoption of words. See Geoffrey Clive Williams, *Art for Dictionaries’ Sake: Comparing Cultural Outlooks Through Dictionaries and Corpora*, in ENGLISH DICTIONARIES AS CULTURAL MINES 175 (Roberta Facchinetti ed., 2012) (“[T]he senses found in a dictionary are not necessarily those that predominate in current usage.”). Dictionaries are “much better on range and variation than on connection and interaction.” RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 19 (1983). Because of this, dictionary definitions are not always the best resources to identify and evaluate evolving terms.

15. ANDY ADAMS, *THE LOG OF A COWBOY* 25 (1903) (“The main body of the herd trailed along behind the leaders . . . guarded by outriders, known as *swing men*.” (emphasis added)); see also PHILIP ASHTON ROLLINS, *THE COWBOY: HIS CHARACTERISTICS, HIS EQUIPMENT, AND HIS PART IN THE DEVELOPMENT OF THE WEST* 253 (1922).

16. See, e.g., JOHN PITT, *USA BY RAIL: PLUS CANADA’S MAIN ROUTES* 289 (8th ed. 2012) (illustrating that both swingman and “swing man” were used to describe the third brakeman on the railroad).

who played swing music, popular from about 1935 to 1946.¹⁷ These men were admired in their communities and honored for their lively musical talent and performance abilities.¹⁸ During the latter portion of this time period, the media began to use swingman to describe active government leaders who aspired to achieve certain goals or obtain specific positions as well as those that “maintain[ed] a fair balance between different points of view.”¹⁹ In 1944, swingman was also employed in the aviation context to describe a “jack of all trades.”²⁰

Beginning in the late 1960s, the “jack of all trades” definition might have led to the use of swingman as slang for multifaceted players in sports, describing a man adept in multiple positions.²¹ The swingman in sports was the most versatile man on the court, field, course, or in the ring.²² Swingman has always been an inherently gendered term, used primarily to de-

17. See RAY B. BROWNE & PAT BROWNE, *THE GUIDE TO UNITED STATES POPULAR CULTURE* 333 (2001).

18. See, e.g., *Biography*, BENNY GOODMAN: THE OFFICIAL WEBSITE OF THE KING OF SWING, <http://www.bennygoodman.com/about/biography.html> (last visited Nov. 28, 2016); see also Angelynn Grant, *The Golden Age of Jazz Covers*, ANGELYNN GRANT DESIGN, <http://angelynngrant.com/the-golden-age-of-jazz-covers-the-golden-age-of-jazz-covers> (last visited Nov. 28, 2016) (quoting James Flora describing Benny Goodman as “one of the great ones as a *swing man*” (emphasis added)).

19. *Paul M. Herzog, Dean at Harvard; Headed N.L.R.B. Under Truman*, N.Y. TIMES, Nov. 25, 1986, at D27 [hereinafter *Herzog*]; see, e.g., Robert C. Albright, *Michigan Leader Sets Sights on Two Main Senate Posts*, WASH. POST, Dec. 18, 1946, at 1.

20. William W. Prescott, *Accepted: One Fortress*, FLYING, Dec. 1944, at 50, 51.

21. See Phil Elderkin, *Knicks Playoff Material?: Playoff Basketball Stallworth ‘Swingman’ Free Ride Offers*, CHRISTIAN SCI. MONITOR, Sept. 22, 1965, at 13; *Thomas Faces Joe’s Guns: Minnesota Farmer Opposes Louis in Title Bout Tonight*, L.A. TIMES, Apr. 1, 1938, at A13 (using swingman in boxing context). Following the evolution to the present day in the sports context, swingman appeared in a few other random places in the 1970s: in literature to describe individuals involved in the drug trade, particularly drug dealers, and to define emerging revolutionary leaders in Latin American coup d’états. See JOHN WAINWRIGHT, *HIGH-CLASS KILL* 157 (1973) (“Tell us about the dope he pushed He was taking from his *swingman*.” (emphasis added)); see also Martin C. Needler, *Military Intervention in Latin America*, in *THE MILITARY AND MODERNIZATION* 89–90 (Henry Bienen ed., 2009).

22. This remains the case today. See Andrew Capel, *Good News for Adelaide as Versatile Swingman Andy Otten Nears Return*, HERALD SUN (June 28, 2015), <http://www.heraldsun.com.au/sport/afl/teams/adelaide/good-news-for-adelaide-as-versatile-swingman-andy-otten-nears-return/news-story/6f1852b020fbc0d1b55c30edf6b9d173>; Rusty Simmons, *Versatile Swingman Iguodala ‘A Step Ahead of Everybody,’* SF GATE (Apr. 16, 2015), <http://www.sfgate.com/warriors/article/versatile-swingman-iguodala-a-step-ahead-of-6205212.php>.

scribe men of athletic achievement and ability.²³ Today, this use of swingman is still the most common, if not its sole use.²⁴

Despite dictionaries' extensive chronicling of uses for swingman across decades, they fail to mention one of swingman's most subtly relevant uses for the purposes of this Note: the title for a third brakeman on a railroad car.²⁵ Overall, the imagery of such a position on the railroad was positive. The railroad swingman played an essential role in keeping train travel safe.²⁶ The swingman's purpose was to keep the railroad functional.²⁷ He played an important role in the maintenance and healthy operations of the system as a whole.²⁸ Foreshadowing the swingman's role on the Supreme Court, the swingmen of the railroads mediated feuds between the conductor and engineer.²⁹ This understanding of the swingman—as an intermediary between two potentially opposing parties—seems to be applicable more generally to situations that arise on committees, boards, and most importantly, appellate benches.³⁰

23. See *supra* notes 21–22.

24. Swingman is the name of a popular Nike baseball collection. See Austin Boykins, *Swing for the Fences with the Nike Swingman Collection*, SNEAKERWATCH (Apr. 27, 2015), <http://www.sneakerwatch.com/article/029796/swing-for-the-fences-with-the-nike-swingman-collection>. Swingman is most often used to describe versatile basketball players. See, e.g., James Herbert, *Report: Blazers, Veteran Swingman Mike Miller Agree on a Buyout*, CBS SPORTS (Sept. 27, 2015), <http://www.cbssports.com/nba/eye-on-basketball/25319053/report-blazers-mike-miller-agree-on-a-buyout>.

25. See PITT, *supra* note 16. Several solicitations for male railway workers, including *swingmen*, are listed in the classifieds of the early years of this period. See, e.g., Classified Ad 22, CHI. DAILY TRIB., May 4, 1945, at 32; see also Classified Ad 5, N.Y. TIMES, Mar. 20, 1944.

26. In 1949, the Supreme Court itself addressed the role of a swingman on the railroad in *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430, 431 (1949).

27. See Rrboomer, Comment to *What is a "Swingman," What is His Job, and Why Did He Ride the Roof?*, CLASSIC TRAINS MAG. (Nov. 11, 2011, 4:25 PM), <http://cs.trains.com/ctr/f/3/t/198874.aspx> (explaining the role of a swingman); see also *Negro Rail Firemen Lose on Job Appeal*, N.Y. TIMES, Jan. 19, 1960, at 7 (discussing a discrimination controversy involving the swingman position); *Sparks from the Rail: Winston's Spicy Gossip of Men and Events in the Railroad World*, CHI. DEFENDER, Apr. 26, 1913, at 7 (publicizing Mr. John Fite's new role as "swing man").

28. See Rrboomer, *supra* note 27.

29. See *id.*

30. See, e.g., Robert Doherty, *Court Gives Approval to Morse Pact: 6 to 5 Management Edge Possible*, CHI. DAILY TRIB., May 17, 1957, at C9; Herzog, *supra* note 19; Laura A. Kiernan, *McGowan Is Named Chief Appeals Judge*, WASH. POST, Jan. 15, 1981, at F1.

2. Earliest Mentions of the Swingman on the Supreme Court

The search for the first use of swingman in the judicial context is imperfect, and there is a possibility that earlier uses exist.³¹ Yet, based on near duplicate prints of an article by newspaper reporter Frank R. Kent, it is clear that the swingman in the Supreme Court context appeared as early as 1937.³² Each version of Kent's article identifies Justice Owen Roberts as the Justice "in the position of 'swing man' upon whose whim all decisions depend" because he was the fifth vote in *West Coast Hotel v. Parrish*, a decision more infamous for its underlying political implications than for its holding.³³ Some historians recount Roberts' vote in *Parrish* as a strategic politically motivated switch in support of New Deal legislation and a departure from his previously conservative voting choices.³⁴ These historians speculate that Roberts swung his vote to deliberately prevent President Roosevelt's threat to add more Justices to the Supreme Court from coming to fruition.³⁵

Kent's article only identifies a swingman in a single decision. The first use of swingman to describe the overall decision-making style and impact of a specific Justice, however, appeared later in a January 1947 issue of *Fortune* magazine.³⁶ The article, written by Arthur Schlesinger, classifies the members of the Supreme Court based on their individual beliefs.³⁷ Sandwiched between Schlesinger's "judicial activists" and "champions of self-restraint," are two Justices, Chief Justice Fred Vinson and Justice Stanley Reed, who Schlesinger describes as the "balance of power."³⁸ Although both men are apparently the "balance of power," only Reed is labeled as the

31. Some newspapers from earlier decades remaining offline, and search engines provide only limited additional resources. Further research may lead to even earlier uses.

32. Frank R. Kent, *The Great Game of Politics*, L.A. TIMES, Apr. 22, 1937, at 4 [hereinafter *Great Game I*]; Frank R. Kent, *The Great Game of Politics: "Their Reluctance Increased,"* WALL ST. J., Apr. 20, 1937, at 4 [hereinafter *Great Game II*].

33. 300 U.S. 379, 398–400 (1937) (emphasis added) (upholding Washington's minimum wage law); *Great Game I*, *supra* note 32; *Great Game II*, *supra* note 32.

34. E.g., Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70–71 (2010).

35. See *id.* President Roosevelt based his threat on public discontent with the perceived splitting and stalemating of the Court.

36. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73.

37. *Id.*

38. *Id.* at 74–78.

“swing.”³⁹ Schlesinger writes that Reed’s “position as swing man makes him the object of special solicitude on the part of his brethren as well as of the lawyers before the court.”⁴⁰ To color Reed’s characterization as the swingman, Schlesinger also describes him as the “center of the ideological controversy” and “the key man.”⁴¹

Only two years later, swingman appeared even more prominently in a 1949 *Stanford Law Review* article that questioned the characterization, role, and impact of Justice Reed.⁴² The author sought to “present a limited analysis of the common view that [Reed was] the swing man on the present Supreme Court.”⁴³ Reed’s central position in defining the majority for specific kinds of labor and trade regulation cases likely prompted this swingman analysis.⁴⁴ The author questions Reed’s generalized role as the swingman, basing this judgment on the sway of Reed’s votes in cases addressing specific issues versus his decision-making practices as a whole.⁴⁵ This article, which focused on an overall analysis of Reed’s voting practices and emphasized his collective voting pattern, compared to Kent’s discussion of Roberts’ singular “swing” vote in *Parrish*, solidified Reed as the first officially labeled swingman of the Supreme Court.

B. FROM SWINGMAN TO SWING VOTER

The transition from swingman to swing voter is murky and, at times, confusing.⁴⁶ Subsection 1 begins with a survey of legal, political, and layman’s dictionaries in search of clues as to when swingman evolved to swing voter. Subsection 2 addresses the development of the term swing voter as a descriptor for a subset of voters in the general populace.

39. *Id.* at 78. This raises questions as to whether the Chief Justice can ever be the swingman.

40. *Id.*

41. *Id.*

42. See *Mr. Justice Reed—Swing Man or Not?*, 1 STAN. L. REV. 714 (1949) [hereinafter *Mr. Justice Reed*].

43. *Id.* at 715.

44. See *id.* at 728; see, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

45. *Mr. Justice Reed*, *supra* note 42, at 728–29.

46. *Swingman / Swing Voter*, YURI DOLGOPOLOV, A DICTIONARY OF CONFUSABLE PHRASES: MORE THAN 10,000 IDIOMS AND COLLOCATIONS 311 (2010).

1. The Legal, Political, and Layman's Definitions

Swingman's general definition listed in both the *Oxford English Dictionary*⁴⁷ and *Merriam-Webster's Dictionary* lack reference to swingman's use in the judicial context entirely.⁴⁸ Surprisingly, *Merriam-Webster* does not have a separate entry for swing voter, but merely recognizes the term as a derivative of the word "swing."⁴⁹ Additionally, the *Oxford English Dictionary* acknowledges swing voter's use in contexts outside of the polling electorate only in passing, providing "also, a casting voter" as an alternative definition.⁵⁰ On the other hand, legal and political dictionaries merely contain the definition for "swing vote(r)," leaving swingman entirely absent from their pages.⁵¹

In the legal realm, "swing vote" appeared as an entry in the second edition of *A Dictionary of Modern Legal Usage* in 1995.⁵² Even then, the single definition it did provide applies solely to the term's use in the judicial context: "An appellate judge's vote that determines an issue on which the other judges are evenly split."⁵³ *A Dictionary of Modern Legal Usage* offers O'Connor as an example of a swing voter, citing a 1989 *Newsweek* article.⁵⁴ *Black's Law Dictionary* provided a definition for swing vote for the first time in 1999, implicitly suggesting that the phrase may have been considered slang up until that time.⁵⁵ Political dictionaries seem to have a similar lag time.⁵⁶ The length of this lag was actually quite long since

47. See *supra* Part I.A.1.

48. See *Swingman*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) [hereinafter MERRIAM] ("A player capable of playing effectively in two different positions and esp. of playing both guard and forward on a basketball team."); see also OXFORD, *supra* note 14.

49. But, *Merriam-Webster's Dictionary* does contain an entry for swingman. See MERRIAM, *supra* note 48.

50. OXFORD, *supra* note 14.

51. BLACK'S LAW DICTIONARY (7th ed. 1999); GARNER'S DICTIONARY OF LEGAL USAGE (3d ed. 2011); KATHLEEN THOMPSON HILL & GERALD N. HILL, REAL LIFE DICTIONARY OF AMERICAN POLITICS: WHAT THEY'RE SAYING AND WHAT IT REALLY MEANS 267-68 (1994).

52. *Swing Vote*, A DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995).

53. *Id.*

54. *Id.*; see also George Hackett & Ann McDaniel, *All Eyes on Justice O'Connor*, NEWSWEEK, May 1, 1989, at 34.

55. BLACK'S LAW DICTIONARY, *supra* note 51 ("Swing vote. The vote that determines an issue when all other voting parties, such as appellate judges, are evenly split.")

56. See HILL & HILL, *supra* note 51 (publishing an edition with a "swing vote" entry in 1994).

swing voter appeared nearly three decades earlier in a 1966 issue of *The Economist*, describing a legislative committee member's voting patterns.⁵⁷ Simultaneously, *swingman* solidified itself in the sports world and its other meanings lost cultural relevance.⁵⁸ This left *swing voter* to eventually become the commonplace descriptor for influential voters in the electorate and pivotal Justices on the Supreme Court, finally appearing in legal dictionaries after decades of use in popular discourse.⁵⁹

2. Distinguishing the Electoral Swing Voter

Unlike *swingman*, which has had its definitions pared down to a sole use in the sports context, *swing voter* has consistently retained two popular uses in the electoral and judicial contexts.⁶⁰ *Swing voter* is often used to define particular blocs of the electorate, typically an independent or floating voter that might not be tied to a political party.⁶¹ At first glance, the use of *swing voter* in the electoral context would seem to be closely connected to the use of *swing voter* in reference to the Supreme Court. Yet, somewhat surprisingly, the use of *swing voter* to describe a group in the electorate likely originated independently of its judicial counterpart.⁶²

Political parties of the eighteenth century asked the public to vote for their "ticket."⁶³ In the late nineteenth century, the idea of a "split ticket" enticed certain voters "across party

57. *Feeling for the Brake*, ECONOMIST, Mar. 5, 1966, at 898, 898 ("He is expected to join Mr. Daane as a 'swing voter,' leaving Mr. Martin with only one conservative colleague . . .").

58. See MERRIAM, *supra* note 48.

59. Swing music faded in popularity and the rise of automobiles and planes made train travel less common, leading to the waning relevance of the *swingman* in these contexts and in public conversation. See *The Decline of Rail Travel: Three Decades of Turmoil*, AMERICANRAILS.COM, <http://www.american-rails.com/decline.html> (last visited Nov. 28, 2016); *Swing*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/swing> (last modified Nov. 9, 2015).

60. Although there are documented uses of *swingman* in the electoral context, it is now essentially obsolete in this context. See, e.g., *Electoral Sabotage*, WASH. POST, Aug. 10, 1960, at A14 ("Southern states may bid for a swing-man role in the presidential election.").

61. See generally LINDA KILLIAN, THE SWING VOTE: THE UNTAPPED POWER OF INDEPENDENTS (2012) (examining the role of independent and swing voters in modern elections).

62. See DAVID K. BARNHART & ALLAN A. METCALF, AMERICA IN SO MANY WORDS: WORDS THAT HAVE SHAPED AMERICA 260 (1997).

63. *Id.* (entire word capitalized in original source); see also *Ticket*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) ("A list of candidates for nomination or election.").

lines.”⁶⁴ But, it was not until the 1964 presidential election that the moderate voters who emerged out of the Republican Party and elected Lyndon B. Johnson to the presidency were referred to as a “swing voter” bloc.⁶⁵ Electoral swing voters have been described as “ambivalent” or “cross-pressured.”⁶⁶ Typically the target of study for political strategists in presidential campaigns, swing voters “are especially concentrated in swing states.”⁶⁷ Swing states are a relatively recent and distinct phenomenon, first heavily discussed in media reports covering the 2000 presidential election.⁶⁸ Just as swing voter is used interchangeably, despite the term’s different connotations, swing state is (arguably, inconsistently) equated with battleground states, bellwethers, or in reference to states where polls suggest competitive elections.⁶⁹

As the driving force in presidential elections, swing voters create swing states.⁷⁰ Swing voters within a state are identified

64. BARNART & METCALF, *supra* note 62; *see also Split Ticket*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (“A ballot cast by a voter who votes for candidates of more than one party.”).

65. BARNART & METCALF, *supra* note 62, at 260–61. Some scholars have connected the use of the term in the electorate to the simultaneous use of “swing,” or more accurately “swinger,” as a descriptor for people who switch sexual partners. *Id.* at 261 (“Perhaps there was a hint of sexiness in being a swing voter, even if not a swinging one.”). The act of engaging in “group sex” or “mate swapping” is known as “swinging.” LAWRENCE R. SAMUEL, *SEXIDEMIC: A CULTURAL HISTORY OF SEX IN AMERICA* 96 (2013); *see also* GILBERT D. BARTELL, *GROUP SEX: A SCIENTIST’S EYEWITNESS REPORT ON THE AMERICAN WAY OF SWINGING* (1971) (researching the unique sexual practices of “swingers” in the 1960s).

66. WILLIAM G. MAYER, *THE SWING VOTER IN AMERICAN POLITICS* 2 (2008).

67. Stacy Hunter Hecht & David Schultz, *Introduction: Swing States and Presidential Elections*, in *PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER* xxi (Stacy Hunter Hecht & David Schultz eds., 2015) (citing LINDA KILLIAN, *THE UNTAPPED POWER OF INDEPENDENTS* (2011)); *see also* Gerald F. Seib, *Who Will Be the Swing Voters in 2016?*, *WALL ST. J.* (May 25, 2015), <http://www.wsj.com/articles/who-will-be-the-swing-voters-in-2016-1432574507>.

68. Hecht & Schultz, *supra* note 67, at xiii; *see also* Darshan J. Goux, *The Battleground State: Conceptualizing Geographic Contestation in American Presidential Elections, 1960-2004*, at 17 (Spring 2010) (unpublished Ph.D dissertation, Univ. Cal. Berkeley), <http://eprints.org/uc/item/8dp32778> (stating that swing state was mentioned as early as 1936 four times in the *New York Times* but increased in popularity only in recent years).

69. *See* Hecht & Schultz, *supra* note 67, at xiv, xvi (“[I]t is clear from these few definitions, as well as others provided by journalists and pop culture references, the concept swing state is not precisely defined.”); *see also* ALEX THOMSON, *A GLOSSARY OF U.S. POLITICS AND GOVERNMENT* 168 (2007) (defining swing state as a state with no dominant political party).

70. *See* KILLIAN, *supra* note 61, at 17 (noting that when swing voters re-

and defined by demographics.⁷¹ Thus, significant alterations in the demographics of a region make or break a swing state.⁷² But, demographics are just the beginning to a more in-depth analysis involving ideology, socioeconomic variables, and even the median voter theorem.⁷³ The rhetoric in this context is intense and complicated, but the most intriguing aspect is how identical it is to the rhetoric about swing voters on the Supreme Court.⁷⁴ This simultaneous use begs an analysis of the implications for the Supreme Court, and more broadly, the rule of law.

C. SWING VOTER, SWING JUSTICE, AND MEDIAN JUSTICE

Prior to identifying and discussing specific Justices, this Note seeks to consider the application of the median voter theorem to the Supreme Court, known as the median Justice theorem,⁷⁵ and how that application interacts with the use of swing voter and swing Justice.

The median Justice is “the Justice in the middle of a distribution of Justices.”⁷⁶ This is a spin on the median voter theorem.⁷⁷ The theorem posits that the median Justice of the Court “controls the content” of majority opinions.⁷⁸

side in a state that also oscillates between Democrat and Republican, the swing voters are particularly important).

71. See, e.g., Wesley McCune, *Farmers in Politics*, 319 ANNALS AM. ACAD. POL. SOC. SCI. 41, 42 (1958) (“The farm vote as a whole is a swing vote, changing relatively easily . . .”).

72. See AMERICA’S NEW SWING REGION: CHANGING POLITICS AND DEMOGRAPHICS IN THE MOUNTAIN WEST 147 (Ruy Teixeira ed., 2012).

73. See Hecht & Schultz, *supra* note 67, at xxiii–iv (detailing methods including asking about feelings toward the two parties, actual voting in presidential elections, and demographic variables).

74. See, e.g., MAYER, *supra* note 66, at 20 (“[I]t is the swing voter who controls the balance of power in elections.”).

75. Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1277 (2005) (“Social scientists . . . tend to use . . . the ‘median’ Justice, that is, the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more ‘conservative’ than) the median and half are to the left of (more ‘liberal’ than) the median.”).

76. *Id.*

77. For an introduction to how median voter theorem is applied to the Supreme Court, see VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 152–55 (2007); Martin et al., *supra* note 75, at 1280–83 (detailing the role of the median Justice in the voting patterns of Justices in sex discrimination cases).

78. See generally Cliff Carrubba et al., *Who Controls the Content of Supreme Court Opinions?*, 56 AM. J. POL. SCI. 400 (2012).

Since the method of identifying the median Justice is more than a bit ambiguous, legal commentators and researchers alike have attempted to identify the median Justice using a plethora of descriptors including the “center of the Court,” the Court’s “middle,” the “swing” Justice, the “pivotal” Justice, and “the most powerful Justice.”⁷⁹ Although most social scientists tend to exclusively use the term “median” to identify the crucial Justice,⁸⁰ confusion remains as other social and political scientists, commentators, researchers, advocates, and even members of Congress equate the swing Justice with the median Justice.⁸¹ This equation imports all sorts of assumptions that simply do not track the historic use of either term and perpetuates the improper use of swing voter in such a context, leading to further obfuscation of all three terms and their modern uses.

There are several kinds of pivotal Justices on the Supreme Court. Whether a Justice is described as a swing voter, swing Justice, or median Justice carries differing implications. These words designate very specific kinds of actors, serving various purposes and inhabiting different roles on the Court. Conceptually, the median Justice is a phenomenon of social and political science, rooted in a foundation of statistical voting patterns and placement on an ideological spectrum. On the other hand, the swing Justice is typically unpredictable, not easily cabined by a standard voting pattern or ideological label. Further, swing voter is continually, and perhaps inappropriately, employed in the Supreme Court context when there is a strong argument that it should be relegated only to its electoral uses. One Justice can certainly carry all of these labels and inhabit all of these roles at one or several times; however, the distinctions are important and imply very different things about who a Justice is on the bench.

79. Martin et al., *supra* note 75.

80. *See id.*; *see also* Bernard Grofman & Timothy J. Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of “Natural Courts” 1953–1991*, 112 PUB. CHOICE 55, 57 (2002) (stating their intention to identify the Court’s median).

81. *See, e.g.*, Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 44–45 (describing how the term “median Justice” is used in both public and congressional discourse).

II. WHO IS A SWING VOTER, SWING JUSTICE, OR MEDIAN JUSTICE AND WHY?

The confines of this Note only allow for a thorough analysis of five Justices typically identified as swing voters, or some iteration thereof. When thinking about which Justices are labeled as such, the connotations have repeatedly shifted to take on new meanings, depending on the Justice, time period, and intended use of the descriptor. This Part uses five Justices as illustrative case studies, showing how the use of swing voter, or some iteration thereof, to define each Justice fails to capture all of the nuances of each Justice's individual characterization. The use of one term to describe each of these five Justices fails to encapsulate who each Justice was and how they did their work on the bench.

Section A analyzes the characterization of Reed as the first identified swingman in the late 1940s, translating to a modern mixture of both the swing Justice and the median Justice. Section B focuses on the characterization of the "moderate" median Justices of the 1970s, White and Powell. Section C addresses a portion of O'Connor's tenure from 1993 to 2005, when she served as the first female swing voter on the Court. Section D brings the analysis into the present with Kennedy, the modern swing Justice from 2005 to present day.

A. JUSTICE STANLEY REED: THE FIRST SWINGMAN

This Section discusses Reed's characterization as the first Supreme Court swingman within the developing legal and political setting of the late 1940s, translating into a combination of swing Justice and median Justice. Reed is identified as the first swingman instead of Owen Roberts because of Reed's consistent characterization over an extended period of time, instead of just in a singular case.⁸² It is important to contextualize Reed's characterization within the social and political movements of the time period. Thus, Subsection 1 will provide a brief description to set the scene within which Reed emerged as the first swingman of the Court. Subsection 2 will then explain that being a swingman meant, embodying attributes of both the Supreme Court swing Justice and median Justice roles, depending on the issue at hand and under the influence of social change and theory feuds.

82. See *infra* Part I.A.2.

1. The New Deal with the Supreme Court

In the early days of the republic, the Supreme Court worked internally to develop decision-making norms and externally to establish the judiciary's role in American society. Chief Justice John Marshall played a primary role in shaping each of these pursuits.⁸³ Perhaps the most cogent example of this is *Marbury v. Madison*, the unanimous 1803 decision establishing judicial review.⁸⁴ As Chief Justice, Marshall nearly singlehandedly pushed his colleagues to unanimity in the interests of nationalizing the law, strengthening the powers of the federal judiciary, and setting precedents for future Courts.⁸⁵

During the *Lochner*-era (1897–1937), the Supreme Court employed foundational practices laid down by Marshall to emerge as the institution charged with upholding the rule of law as a concept over and above politics.⁸⁶ The Court depicted the law as a last legal monument, preventing socialism from destroying democracy, capitalism, and liberal legal thought.⁸⁷ Simultaneously, the Progressive Movement (1890–1920) brought about state-administered socialist structures as a rehearsal for the New Deal.⁸⁸ Progressivism, as a legal and politi-

83. See KENT R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 72 (1985) (describing Marshall as a “quiet statesm[a]n”).

84. 5 U.S. 137 (1803) (establishing judicial review under Article III of the United States Constitution).

85. See NEWMYER, *supra* note 83, at 79 (discussing the “working unity of the Court” and the Marshall Court’s “firm nationalist determination to expand the powers of Congress”). The Marshall Court looked, interacted, and operated quite differently than the Supreme Court of 2017. Today’s Justices no longer live in a boardinghouse; there are nine Justices instead of six, three of whom are women; and the racial composition is more varied. *The Current Court*, THE SUPREME COURT HISTORICAL SOCIETY, <http://supremecourthistory.org/history-of-the-court> (last visited Nov. 28, 2016). Compared to the Marshall Court, however, present-day unanimous opinions or “opinions of the Court” are rare. See, e.g., *Stat Pack for the October Term 2014: Unanimity*, SCOTUSBLOG STAT PACK 19 (June 30, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf (last visited Mar. 16, 2016) (providing statistics of different types of unanimity in the October 2014 term).

86. The *Lochner*-era began with the Supreme Court’s decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) and ended with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). During this time period, the Supreme Court used substantive due process to strike down many laws, acting like a board of censors in some sense. See *Lochner v. New York*, 198 U.S. 45 (1905).

87. *But see* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 232–302 (1942) (positing that the “intellectual class” will fundamentally contribute to capitalism’s demise by appointing politicians and judges that are not good administrators).

88. *E.g.*, *Progressivism and the Wisconsin Idea*, WISCONSIN HISTORICAL SOCIETY, http://www.wisconsinhistory.org/turningpoints/tp-036/?action=more_

cal movement, pushed on the neutrality of the rule of law and its independence as a legal perspective.⁸⁹ It specifically challenged the bias of the rule of law's human administrators, including judges, lawyers, clerks, and their elite viewpoints.⁹⁰

A feud erupted over the law-politics distinction, spearheaded by Justice Oliver Wendell Holmes and the legal realists.⁹¹ Legal realism is a school of thought that challenges the idea that legal reasoning is separate and autonomous from politics and society.⁹² Roosevelt's New Deal and its ensuing litigation engaged the legal realist philosophy by actively taking legal concepts, operationalizing them, and dealing with the law pragmatically by substantially involving the federal government in the economy.⁹³ In 1937, towards the end of New Deal implementation, the Court struggled to maintain a unified appearance and externalized its divisiveness.⁹⁴ In response, Roo-

essay (last visited Nov. 28, 2016); see Thomas G. West & William A. Schambra, *The Progressive Movement and the Transformation of American Politics*, HERITAGE (July 18, 2007), <http://www.heritage.org/research/reports/2007/07/the-progressive-movement-and-the-transformation-of-american-politics> ("Progressivism was a reform movement that ran from the late 19th century through the first decades of the 20th century . . .").

89. See JOHN D. BLUENKER ET AL., PROGRESSIVISM 3–21 (1986).

90. See JEROME FRANK, LAW AND THE MODERN MIND 10 (1963) ("There is no hypocrisy. The lawyers' pretenses are not consciously deceptive. The lawyers, themselves, like the laymen, fail to recognize fully the essentially plastic and mutable character of law."); see also TODD C. PEPPERS, COURTIER OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 206–12 (2006) (providing a brief history of the role and relationship of law clerks to the Supreme Court).

91. Holmes and his fellow legal realists acted as iconoclast reformers, attacking the cherished law-politics distinction. Jerome Frank, a famous legal realist, criticized "the basic legal myth" of "the Father-as-Infallible-Judge," proposing that the "desire [for] certainty in law is to indulge in a childhood fantasy." Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175, 182 (1991) (quoting FRANK, *supra* note 90, at 19); see also ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 129–63 (1985) (examining Frank's legal realism on the bench). For more information on the life and legacy of Holmes, see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993).

92. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 193 (1992).

93. See *The Progressive Era's Legacy: FDR's New Deal*, DISCOVER THE NETWORKS, <http://www.discoverthenetworks.org/viewSubCategory.asp?id=1228> (last visited Nov. 28, 2016) (mentioning FDR's dictator-like power in instituting economic programs during the Great Depression).

94. See Samuel D. Thurman, Jr., *The Coming Test of the Supreme Court*, 22 J. ST. B. CAL. 21, 21 (1947) ("The present [Vinson] court . . . [is] the most badly divided court in American history.").

sevelt proposed a plan to “pack the Court.”⁹⁵ The plan “would have added a Justice to the court as sitting Justices reached the age of 70 without retiring.”⁹⁶ This proposal prompted Roberts’ infamous “switch in time [that] saved nine,” and the plan never made it past the Senate.⁹⁷

In 1947, ten years after the New Deal’s adoption, the Court was tasked with handling the influx of New Deal litigation as a result of poor legislative draftsmanship, even though no one Justice could boast more than ten years of service.⁹⁸ As it overturned or slowly chipped away at precedents, critics accused the Court of lacking objectivity and weakening the doctrine of stare decisis.⁹⁹ The external discord combined with the weak leadership of then-Chief Justice Vinson set the stage for the emergence of the Court’s first swingman, Reed.¹⁰⁰

2. Reed: The Court’s First Swingman

Reed, a former government lawyer that had “vainly [argued] many of the early New Deal measures before the Supreme Court,” accepted President Roosevelt’s nomination in 1938.¹⁰¹ The Senate rapidly confirmed his appointment.¹⁰² Reed was simultaneously described as occupying a “central position on the Bench” and as “a figure of great influence,”¹⁰³ bolstering

95. JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 3 (2010) (addressing the context surrounding Roosevelt’s plan).

96. Walter Trohan, *Reed Becomes Top Dissenter of High Court*, CHI. DAILY TRIB., June 12, 1955, at 34.

97. SHESOL, *supra* note 95, at 434 (alteration in original); *id.* at 429–43 (narrating the aftermath of Supreme Court decisions regarding the Wagner Act and their impact on Roosevelt); *see also infra* Part I.A.2.

98. *See* MELVIN I. UROFSKY, *THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY* 4 (2001) (noting the large amount of legislation and its “sloppy” quality); Thurman, *supra* note 94, at 32 (commenting that one-hundred percent of the Justices were appointed in the last ten years).

99. *See* Thurman, *supra* note 94, at 22.

100. *See* UROFSKY, *supra* note 98, at 29 (“A weak chief . . . Frederick M. Vinson—can often find himself stymied . . . and end up doing little more than presiding over a judicial battlefield.”).

101. *See id.* at 32; Thurman, *supra* note 94, at 32.

102. *Senate Quickly Confirms Reed Nomination: New Justice Is Expected To Sit Next Week*, N.Y. TIMES, Jan. 26, 1938, at 4; *see also* John P. Frank, *The Appointment of Supreme Court Justices: III*, 1941 WIS. L. REV. 461, 505 (“Confirmation of Stanley Reed . . . was more in the nature of an accolade than an investigation.”).

103. John P. Frank, *The United States Supreme Court: 1947–1948*, 16 U. CHI. L. REV. 1, 49 (1948); *see also* Arthur M. Schlesinger, *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73, 78 (“Reed[s] . . . position as swing man

his dual characterization as swing Justice and median Justice. As early as 1947, commentators identified Reed as swingman of the Court: “A solid moderate whose opinions have seemed more rooted in the case at hand than in any leanings, left or right.”¹⁰⁴ Reed’s “moderate” nonideological position seemed to place him square in the middle of the bench, much like a median Justice.¹⁰⁵ But being swingman for Reed did not imply an active mediating position; rather, it meant a passive tipping of the scales in equally split disputes.¹⁰⁶ This scale tipping sounds more like the role a swing Justice would play in any given case. Reed’s dual characterization displays a desire by academics and the public to discuss the particularities of Reed’s role, but confusion about the proper way to characterize the fluidity of his position. Despite his seeming importance, Reed was a relatively inconspicuous man in most contexts.¹⁰⁷ Nevertheless, his vote remained crucial in marginal cases. Between 1945 and 1950, the Court released 112 five-to-four/four-to-three decisions out of 725 total opinions.¹⁰⁸ Reed appeared in the majority in eighty-one of these decisions, or 72.3 percent of the time.¹⁰⁹ Whether Reed was playing ideological median of passive scale-tipper on any given case did not change the fact that his vote was unpredictable and desirable to both factions on the Court.

Notwithstanding the numbers, the generalized description of Reed as swingman and the lack of a precise definition for the term produced some doubt at the time. This prompted a study

makes him the object of special solicitude on the part of brethren as well as of the lawyers before the Court.”).

104. *Justice Reed Retires*, CHRISTIAN SCI. MONITOR, Feb. 2, 1957, at 22; see also Thurman, *supra* note 94, at 32 (“An assiduous steering of a middle course has made his vote most frequently the deciding one in five-to-four decisions.”).

105. *Id.*

106. *Justice Reed Steps Down*, N.Y. TIMES, Feb. 1, 1957, at 19 (“During these turbulent years he has evolved from ardent advocate of the New Deal laws to one of the more conservative group on the Supreme Court bench. And, between times, he was ‘swing man’ of the court whose opinions in close decisions would tip the scales one way or the other.”); *The Spinning Spectrum*, WALL ST. J., Feb. 4, 1957, at 12 (noting many five-to-four decisions).

107. See Thurman, *supra* note 94, at 32 (“Reed [is] the least colorful member of the group . . .”).

108. The figures cited were determined using raw data compiled by THE SUPREME COURT DATABASE, <http://www.supremecourtdatabase.org/data.php> (last visited Nov. 28, 2016). From that raw data, the author identified one-vote decisions, be it five-to-four or four-to-three, over the period cited. The author then reviewed each decision to determine whether the Justice fell within the majority or minority. Finally, the author compiled case-specific information so that the Term could be thoroughly examined.

109. *Id.*

of his voting patterns in particular issue areas, leading to the proposition that his vote was not always crucial.¹¹⁰ The study's conclusions accurately predicted Reed's later tendency towards the conservative bloc, noting his votes were "considerably more often" detrimental to the liberal wing's position.¹¹¹ It could also be the case that Reed became the Court's swingman based on his voting pattern, or lack thereof, in certain types of cases, specifically matters involving trade regulation and labor issues.¹¹² Although some doubt may have existed about a generalized swingman label for Reed throughout his entire time on the Court, his identification as the first swingman of the Court on issues of trade regulation and labor between 1945 and 1950 went unchallenged.

As is the case with every Justice identified as pivotal, Reed's identity as swingman depended entirely on an equal split amongst his brethren. Whether Reed embodied the characteristics of a swing Justice or median Justice at any given point was meaningless without a four-to-four split between the other Justices. Without an equal division, Reed's vote would be no more remarkable than that of any other Justice.

B. JUSTICE BYRON WHITE AND JUSTICE LEWIS F. POWELL: THE MEDIAN JUSTICES OF THE 1970S

This Section explores the identification of White and Powell as swing voters in the 1970s, since each man was identified as a pivotal player on the Burger Court.¹¹³ Subsection 1 contextualizes the characterizations of both Justices within the broader framework of the resurgence of the idea of an objective rule of law and its continued tension with the legal realist movement. Subsection 2 posits the question whether White and Powell occupied the ideological middle of the Court or simply adhered to an unchanging individualized judicial philosophy.¹¹⁴

110. See *Mr. Justice Reed*, *supra* note 42, at 729 (suggesting that future statistical work should assess if Reed's vote truly was crucial).

111. *Id.* at 719, 722.

112. See *id.* at 728; see also Robert C. Barnard & Sergei S. Zlinkoff, *Patents, Procedure and the Sherman Act—The Supreme Court and a Competitive Economy, 1947 Term*, 17 GEO. WASH. L. REV. 1, 2 n.6 (1948) (providing a table of opinions broken down by Justice in trade regulation cases in the 1947 Term).

113. For background on the Burger Court, see TINSLEY E. YARBROUGH, *THE BURGER COURT: JUSTICES, RULINGS, AND LEGACY* 3 (2000).

114. See Lance Liebman, *Swing Man on the Supreme Court: The Court Is in Two Factions Now and Justice White Is in the Middle*, N.Y. TIMES, Oct. 8, 1972, at SM17; see also Linda Greenhouse, *Byron R. White, Longtime Justice*

Regardless, based on the public perceptions and actual statistics of decision-making during the majority of their terms, White and Powell's roles as swingmen make them look more like median Justices than swing Justices.

1. The Resurgence of the Rule of Law

President Eisenhower nominated Earl Warren for Chief Justice of the Supreme Court in 1953.¹¹⁵ Often compared to John Marshall, the "Superchief" was known for his unique "ethicist" approach to controversy.¹¹⁶ When Burger succeeded Warren as Chief Justice in 1969, this approach, perceived by some as judicial activism, produced a belated backlash to legal realism.¹¹⁷ This backlash birthed an "extremist" version of legal realism: adhering to the maxim that "all law is politics" instead of the earlier Holmes and Frank version that "all law is policy."¹¹⁸ Critics, spurred by perceptions of the judiciary's unchained policymaking, advocated for a return to objectivity, the rule of law, and neutrality in judicial decision-making.¹¹⁹

Burger valued the formalities of the Court over its more pragmatic functions.¹²⁰ This leadership style, however, alienated other Justices and stifled the potential for a compromising, collegial, and united Court.¹²¹ This is illustrated by the fact that Justice Potter Stewart felt estranged enough to provide inside information about the Court and Burger to outsiders, resulting in *The Brethren*.¹²² Burger's favoritism for appearances and in-

and a Football Legend, Dies at 84, N.Y. TIMES (Apr. 16, 2002), <http://www.nytimes.com/2002/04/16/us/byron-r-white-longtime-justice-and-a-football-legend-dies-at-84.html?pagewanted=all> (quoting former clerk, Kate Stith Cabranes, in discussing the change in ideology of the Court while "Byron White didn't change").

115. See G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 129–58 (1982) (detailing the nomination).

116. UROFSKY, *supra* note 98, at 34, 35; see also WHITE, *supra* note 115, at 369 ("He . . . act[ed] . . . from his instincts for what was fair, honorable, politically feasible and sensible at the time.").

117. Calvin Woodard, *Whose Law Is It?*, N.Y. TIMES (Sept. 9, 1990), <http://www.nytimes.com/1990/09/09/books/whose-law-is-it.html?pagewanted=all> (book review).

118. *Id.*

119. See *id.*

120. Formalities meant the rituals, appearances, and administration of the Court. See YARBROUGH, *supra* note 113, at 232.

121. See *id.*

122. See generally BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979) (detailing an insider's perspective of the Supreme Court's operation and decision-making processes).

stitutional rituals did nothing to preserve the Court's image as the rule of law's objective gatekeeper. In fact, under Burger's leadership, the Court's image seemed far more political than impartial.

The 1970s brought about a slew of socially divisive issues, including the Vietnam War,¹²³ the Pentagon Papers,¹²⁴ the death penalty,¹²⁵ and abortion.¹²⁶ In 1972, following the nominations of Lewis F. Powell and William H. Rehnquist, President Nixon opined that the Court was "as balanced as [he] had an opportunity to make it."¹²⁷ Naturally, Nixon's perception of balance was skewed by his political ideology. This blatant attempt by a President to manipulate the Court echoed back to the interactions between Roosevelt and the split Court of 1937.¹²⁸ Because of Nixon's interference, the Justices of the Burger Court frequently found themselves positioned in opposing blocs: the four Nixon appointees in opposition to the four "survivors of the Warren Court."¹²⁹ White, an appointee of President John F. Kennedy, played a pivotal role in equally split cases, oftentimes making a majority of five.¹³⁰ Along with White, Powell also emerged as a pivotal voter when he established himself as a moderate on the Court. Powell's tenure exceeded White's and continued into the 1970s, also arguably increasing his importance in divided cases. Both White and Powell, in their respective roles as ideological medians, were wedged between opposing factions on the Court with their comparatively moderate perspectives.

123. See, e.g., *Sarnoff v. Shultz*, 409 U.S. 929, 929–30 (1972) (denying certiorari due to the political nature of the request to review financial disbursements for the Vietnam War).

124. See, e.g., *Gravel v. United States*, 408 U.S. 606, 628–29 (1972); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (deciding issues regarding the release of the Pentagon Papers).

125. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

126. See, e.g., *Doe v. Bolton* 410 U.S. 179, 185–86 (1973) (holding that a right to abortion is rooted in the constitutional right to privacy); *Roe v. Wade*, 410 U.S. 113 (1973) (expanding on this right).

127. James J. Kilpatrick, *Nixon Court: On Its Way*, TUSCALOOSA NEWS, July 20, 1972, at 3.

128. See *supra* Part II.A.1.

129. John P. MacKenzie, *Justice White Swing Man in Nixon's 'Balanced' Court*, WASH. POST, July 3, 1972, at A2. In 1972, the four Nixon appointees were Blackmun, Burger, Powell, and Rehnquist. The four Warren Court survivors were Brennan, Douglas, Marshall, and Stewart.

130. See, e.g., *Miller v. California*, 413 U.S. 15 (1973); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Furman v. Georgia*, 408 U.S. 238 (1972).

2. The 1970s' "Moderate" Medians¹³¹

As a 1946 law clerk to Vinson during Reed's time as swingman, Byron White came to the Court without a distinct ideological label.¹³² A median Justice on the bench, White was also a celebrated swingman on the football field, baseball diamond, and basketball court.¹³³ In this role, "White's strengths and weaknesses as a judge echoed his talents as an athlete."¹³⁴ Throughout his career, White maintained a belief that a "[J]ustice's job was to decide particular cases rather than advocate and pursue an overarching constitutional vision."¹³⁵ With this mantra, he oftentimes became the pivotal vote in close cases.¹³⁶ Serving on the Court for over three decades, White's peak as median Justice distinctly spiked between 1971 and 1973.¹³⁷ During this time, out of the Court's 539 decisions, 86 were five-to-four or four-to-three decisions; White appeared in the majority in 62 of those 86 decisions.¹³⁸ This amounted to being in the majority of split cases 72.1 percent of the time.¹³⁹

The 1972 Court had two factions, and "Justice White [was] in the middle."¹⁴⁰ Oftentimes stuck between the Nixon appoin-

131. *But see* William B. Schultz & Philip K. Howard, *The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court*, 50 N.Y.U. L. REV. 798, 800 (1975) ("Justice White and Powell . . . aligned themselves with members of the right voting bloc rather than acting as swing voters between the blocs. Only Justice Stewart was a true swing voter in the aggregate of cases."). Schultz and Howard demonstrate the dangers of conflating median Justice, swing Justice, and swing voter. Both Justices White and Powell could have been median Justices on the Court while Stewart simultaneously played the role of swing voter.

132. *See* PEPPERS, *supra* note 90, at 138–39 (describing White's accolades without mentioning any ideological orientation); Greenhouse, *supra* note 114 ("[N]o ideological label ever fit White comfortably.").

133. *See* YARBROUGH, *supra* note 113, at 67. White competitively played pick-up basketball with his clerks in the Court's gym, nicknamed the "highest court in the land." WOODWARD & ARMSTRONG, *supra* note 122, at 65–66. For a photograph of such, see PEPPERS, *supra* note 90, at 78.

134. John C. Jeffries, Jr., *The Athlete as Judge*, 66 U. CHI. L. REV. 495, 505 (1999) (reviewing DENNIS J. HUTCHINSON, *THE MAN WHO WAS ONCE WHIZZER WHITE* (1998)).

135. DAVID L. HUDSON, JR., *THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY* 38 (2007).

136. *See From Triple Threat to the Bench*, TIME, Apr. 6, 1962, at 24 (discussing White's relationship with the Kennedys, which led to federal judgeship).

137. *See* YARBROUGH, *supra* note 113, at 67 ("[White's] tenure extended from 1962 until his retirement in 1993.").

138. *See supra* note 108.

139. *Id.*

140. Liebman, *supra* note 114.

tees and Warren Court survivors, White maintained his label-less existence.¹⁴¹ Preferring narrow decisions tied closely to the facts, his judicial record is more easily examined by issue than in general terms.¹⁴² White's individualized judicial philosophy and decision-making practices failed to fit neatly into any pre-determined box, particularly because his decisions were not considered "politically reliable."¹⁴³ To some, this suggested the makings "of a new centrist faction and a new set of Court themes."¹⁴⁴ Yet, White's portrayal as the "unpredictable 'swing'" of the Court was not only inaccurate if distinguishing the terms appropriately within context, but also implied that his ideology arbitrarily swung. In reality, "there [was] nothing wishywashy about Justice White."¹⁴⁵

In the split opinions of 1972, White voted "with the conservatives more often than not" with some notable exceptions, including nullification of the death penalty, wiretapping, and representation for indigent defendants.¹⁴⁶ Did White encompass the ideological middle of the Court or did he have an independent judicial philosophy? The answer to this question seems to be both. Not surprisingly, which Justice fits the ideological middle of the Court depends upon the changing ideologies of those to his left and right, sometimes pushing Stewart into the median Justice role during this time period as well.¹⁴⁷ Yet, White's judicial philosophy and values remained consistent over time.¹⁴⁸ Thus, the changing face of the Court combined with White's unchanging mantra determined when and how White found himself in the median Justice seat. As late as

141. See John Kamps, *There's Still No Label for Justice White*, L.A. TIMES, Aug. 13, 1972, at M7 ("White has shown no partisan political tendencies since he joined the [C]ourt.").

142. See YARBROUGH, *supra* note 113, at 68.

143. Ayers, *supra* note 7 (explaining the conservative/liberal split on the Court and White's unpredictability).

144. Liebman, *supra* note 114, at SM94.

145. Ayers, *supra* note 7.

146. Kamps, *supra* note 141, at M6.

147. See Janet L. Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative?*, 52 J. POL. 530, 539–40 (1990) (discussing the 1972–1974 bloc shifting of Powell, Stewart, and White); Ruth Marcus, *White Becomes High Court's Key Vote*, WASH. POST, June 25, 1990, at A4 (noting that the addition of Scalia, Kennedy, and O'Connor positioned White in the middle).

148. See generally Dennis J. Hutchinson, *Two Cheers for Judicial Restraint: Justice White and the Role of the Supreme Court*, 74 U. COLO. L. REV. 1409 (2003) (providing a review of Justice White's opinions to support testimonials of his judicial restraint).

1990, commentators continued to dub White a “key vote.”¹⁴⁹ But if you asked White’s former law clerk, Lance Liebman, he would say, “If you’re there a long time, you know these things come and go.”¹⁵⁰

In 1971, as he was simultaneously appointed to the Court with then-Associate Justice William Rehnquist, most people expected Powell to side with the Nixon bloc of the Court.¹⁵¹ His appointment was part of Nixon’s continuing attempt to “stack the Court.”¹⁵² Yet, as time passed, Powell’s allegiance to the Nixon appointees arguably decreased, and his identification as a moderate median Justice solidified.¹⁵³ Powell’s depiction was overwhelmingly positive, described as a “balancer” and ameliorator of conflict.¹⁵⁴ Some critics claimed that designating Powell as the swing voter makes generalizations without reliable quantitative support.¹⁵⁵ Yet, these critics make the mistake of assuming that being the median Justice, occupying a critical role on the Court, receiving the swingman label, and being the swing voter all mean the same thing. These critics nonetheless continued to claim that Powell’s characterization was based more “on a common sense view of judicial voting behavior” than on empirical analysis.¹⁵⁶

The compiled figures do lend credence to this empirical criticism since Powell has a much lower percentage in five-to-four/four-to-three majorities when compared to other median Justices and swing Justices.¹⁵⁷ Out of the 651 total decisions be-

149. See, e.g., Marcus, *supra* note 147.

150. *Id.*

151. President Reagan made a successful dual nomination again in 1986, promoting Associate Justice Rehnquist to Chief Justice and placing Justice Antonin Scalia on the Court. See HUDSON, *supra* note 135, at 29.

152. Fred P. Graham, *A Shift in the Center of Power*, N.Y. TIMES, Jan. 9, 1972, at E10.

153. *But see* Schultz & Howard, *supra* note 131 (questioning this “decreasing allegiance” as occurring in but a few types of cases and arguing that Powell most often voted with the Nixon bloc). When asked if “he would describe himself as a moderate, Powell replied, ‘I don’t characterize myself any way.’” Glen Elsasser & Janet Cawley, *Powell Quits Supreme Court*, CHI. TRIB., June 27, 1987, at 1.

154. Blasecki, *supra* note 147, at 530; *see also* Stuart Taylor, Jr., *Justice Powell Shaping Law as Swing Man on High Court*, N.Y. TIMES, Apr. 26, 1987, at 1 (describing Justice Powell “as the man in the middle of the Supreme Court’s ideological divide”).

155. See Blasecki, *supra* note 147, at 532 (“Powell voted with the majority in almost three-fourths of the Court’s 5-4 decisions (118 out of 161).” (quoting Paul W. Kahn)).

156. *Id.*

157. Compare *supra* note 139 and accompanying text, with *supra* note 109

tween 1976 and 1979, Justice Powell appeared in the majority in 53 of the 90 five-to-four/four-to-three decisions.¹⁵⁸ This meant that in split decisions, Powell was in the majority only 59.9 percent of the time.¹⁵⁹ Nevertheless, a common-sense view would not weaken the impact the public label has on Powell's decision-making legacy as a moderate in the middle. This is especially true given Powell's pivotal vote in seminal First Amendment cases, jury verdicts in criminal cases, affirmative action, and gay rights.¹⁶⁰ Powell's most notable decision as the median Justice was in 1978's *Regents of the University of California v. Bakke*.¹⁶¹ Powell's compromising view upheld affirmative action programs for minorities but struck down an admissions program at the University of California Medical School under federal civil rights law.¹⁶² Like White, Powell's most common characterization as median Justice pinned him as the philosophical middle of the Court, regardless of whether that was empirically true or not.¹⁶³

and accompanying text, and *infra* note 202 and accompanying text.

158. See *supra* note 108. Note that Powell recused himself in one five-to-four case in both 1977 and 1979.

159. See *supra* note 108.

160. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986) (holding that a Georgia statute criminalizing sodomy was constitutional); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (holding racial quotas in admissions decisions unconstitutional, but also holding that race could be a factor in the admissions process); *Branzburg v. Hayes*, 408 U.S. 665, 707–09 (1972) (holding that the First Amendment does not allow reporters to conceal the criminal activities of their confidential sources when responding to a grand jury subpoena); *Apodaca v. Oregon*, 406 U.S. 404, 412–13 (1972) (holding that the Sixth Amendment does not require unanimity in a state jury trial); *Johnson v. Louisiana*, 406 U.S. 356, 378–79 (1972) (holding that the Fourteenth Amendment does not require unanimity in a state jury trial).

161. 438 U.S. 265.

162. See *id.*; see also J.F. terHorst, *The Court Makes Itself Hard To Understand . . .*, L.A. TIMES, July 12, 1978, at D5 (“They split 5 to 4 on each of them, with Justice Lewis F. Powell Jr. serving as swingman in each instance—for admitting Bakke to the UC Davis medical school, against the use of racial quotas, but for the rule that race may be considered in weighing an applicant’s qualifications.”); *No One Lost: Swing Man Swung the Court, with Something for All*, N.Y. TIMES, July 2, 1978, at E1 (stating that the Court found affirmative action programs constitutional but strict quotas unconstitutional, with Justice Powell serving as the “swing man” on both issues).

163. See Al Kamen, *Powell Acts as Court Majority-Maker: Virginian Is Swing Vote on Divided Bench*, WASH. POST, Apr. 1, 1985, at A1 (“But if Justices were arrayed by philosophy, Powell would sit exactly in the middle.”); see also Taylor, *supra* note 154 (describing Justice Powell “as the man in the middle of the Supreme Court’s ideological divide”).

C. JUSTICE SANDRA DAY O'CONNOR: THE FEMALE SWING VOTER

This Section discusses Sandra Day O'Connor as the first female swing voter on the Supreme Court. Subsection 1 contextualizes the conversation within the increased perception of Court polarization. Subsection 2 seeks to emphasize the total disappearance of swingman to describe pivotal actors on the Court to the gender-neutral swing voter (eventually swing Justice) descriptor while explaining why O'Connor is most accurately portrayed as a swing voter.

1. An Era of Increasing Polarization

As part of his campaign platform for the 1980 presidential election, Ronald Reagan declared that he would appoint the first female Supreme Court Justice.¹⁶⁴ In 1981, Reagan held true to his word and appointed O'Connor.¹⁶⁵ O'Connor spent the majority of her tenure as a member of the Rehnquist Court.¹⁶⁶ Although Chief Justice Rehnquist made unanimity a goal and is regarded as a better leader than his predecessor, Burger,¹⁶⁷ “[c]ritics . . . excoriated the Court for departing from precedent and for adhering too closely to it; for exercising too little activism and too little restraint; for being too result oriented and not cognizant enough of the effects of its decisions.”¹⁶⁸

Later in O'Connor's tenure, American government began to show signs of increased political polarization.¹⁶⁹ The Supreme Court was no exception, leading the oftentimes outspoken O'Connor to express concern about the political extremism and polarizing “undertow dragging the Court into politics.”¹⁷⁰ This

164. See HUDSON, *supra* note 135, at 43.

165. See Ed Magnuson et al., *The Brethren's First Sister*, TIME, July 20, 1981, at 10. O'Connor asserted herself as the “FWOTSC.” Sandra Day O'Connor, Letter to the Editor, *High Court's '9 Men' Were a Surprise to One*, N.Y. TIMES (Oct. 12, 1983), <http://www.nytimes.com/1983/10/12/opinion/l-high-court-s-9-men-were-a-surprise-to-one-225413.html>.

166. Rehnquist served from 1986 to 2005. See HUDSON, *supra* note 135, at 35.

167. See *id.* at 27–29 (“Burger was not . . . effective as a leader of the [C]ourt.”).

168. *Id.* at xii.

169. See generally *Political Polarization*, PEW RES. CTR., <http://www.pewresearch.org/packages/political-polarization> (last visited Nov. 28, 2016) (describing the increasing gap between liberals and conservatives, Republicans and Democrats).

170. TOOBIN, *supra* note 5, at 204; see also NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 131 (1996)

polarization and O'Connor's role on the Court is best explained through an example of arguably one of the most politically charged decisions the Court has ever made, *Bush v. Gore*.¹⁷¹

The majority of five, including Kennedy, Thomas, Rehnquist, Scalia, and O'Connor, drafted the opinion that effectively decided the 2000 presidential election.¹⁷² This majority faced heavy criticism. Scholars accused the Justices of deciding based upon the "personal identity and political affiliation of the litigants."¹⁷³ Additionally, several Justices encountered accusations of ethical violations in failing to recuse themselves from the decision.¹⁷⁴ Specifically, O'Connor and her husband allegedly made statements that a Gore victory would be a "personal disaster" and would prevent her retirement, prompting a flood of articles.¹⁷⁵ Ultimately, the Court's increasing separation directed cases "to a single [J]ustice—O'Connor."¹⁷⁶ Commentators and litigants alike focused their attention to the "O'Connor Court," recognizing its fracture and resorting themselves to unstable predictions of O'Connor's vote.¹⁷⁷

2. The Obvious Swing Voter

Based on the events surrounding *Bush v. Gore* alone,¹⁷⁸ O'Connor is easily typecast as the swing voter. While her first few years and overall voting behavior on the Court can be de-

("[T]he Rehnquist Court . . . has suffered from a jurisprudential polarization.").

171. 531 U.S. 98 (2000); see TOOBIN, *supra* note 5, at 7 ("[T]he Rehnquist Court—the Court of *Bush v. Gore*—dwelled in the center of American political life."). *But see* Michael C. Dorf, *Is There a Distinction Between Law and Politics? Yes, and the Bush v. Gore Decision Proves It*, FINDLAW (Dec. 27, 2000), <http://writ.news.findlaw.com/dorf/20001227.html>.

172. *See 554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7.

173. ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 at 174 (2001). *But see generally* Ronald D. Rotunda, *Yet Another Article on Bush v. Gore*, 64 OHIO ST. L.J. 283 (2003) (responding to arguments that the Justices decided the case based on their political preferences, not precedent).

174. In addition to O'Connor, Rehnquist, Scalia, and Thomas also faced accusations. *See generally* Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375 (2003) (discussing the accusations against each Justice in depth).

175. TOOBIN, *supra* note 5, at 142–44; Neumann, *supra* note 174, at 375–78, 377 n.8.

176. TOOBIN, *supra* note 5, at 204.

177. Jeffrey Rosen, *A Majority of One*, N.Y. TIMES MAG. (June 3, 2001), <http://www.nytimes.com/2001/06/03/magazine/a-majority-of-one.html>; Op-Ed, *The O'Connor Court*, WASH. POST (July 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070101835.html>.

178. 531 U.S. 98 (2000).

scribed as conservative, her decision-making practices bothered many who expected her to be more consistent and predictable in that respect.¹⁷⁹ Between 1993 and 2005, “more than a quarter of all *Time* and *Newsweek* articles discussing O’Connor labeled her as a swing voter.”¹⁸⁰ This appears to be the most regular use of swing voter to describe any one Justice on the Court up to that point.

During those twelve years spanning 1077 opinions, O’Connor voted in the majority in 155 of the 544 five-to-four decisions, or 69.9 percent of the time.¹⁸¹ Her method of assessing the potential public reaction prior to acting gave her immense power and encapsulated her swing Justice role.¹⁸² This involved a close tethering of her rulings “to what most people wanted or at least would accept.”¹⁸³ She typically favored malleable standards over bright-line rules.¹⁸⁴ Her preferred style of “pragmatism in service of principle” supplemented that power by balancing interests on a case-by-case basis.¹⁸⁵ Yet, O’Connor’s perceived power threatened critics of her substantive decisions who derided the female swing Justice for “legislating from the bench.”¹⁸⁶

179. See Robert E. Riggs, *Justice O’Connor: A First Term Appraisal*, 1983 BYU L. REV. 1, 15; see also TOOBIN, *supra* note 5, at 58–59, 206–07 (providing examples of the internal and external criticism of O’Connor’s unexpected deviation from conservatism).

180. Abigail Perkiss, *A Look Back at Justice Sandra Day O’Connor’s Court Legacy*, NAT’L CONST. CTR.: CONST. DAILY (July 1, 2016), <http://blog.constitutioncenter.org/2016/07/a-look-back-at-justice-sandra-day-oconnors-court-legacy>. As early as 1990, media outlets recognized O’Connor as a “critical ‘swing’ vote.” Stephen Wermiel, *Sandra Day O’Connor Emerges as Key Player in High Court Rulings*, WALL ST. J., June 11, 1990, at A1.

181. The figures cited are taken from the *Harvard Law Review’s* 1982–2006 surveys of the preceding Supreme Court Term. For a general explanation of how the statistics are compiled, see *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 415–19 (2005). See also *supra* note 108.

182. See Michael D. Lemonick & Viveca Novak, *The Power Broker*, TIME, July 11, 2005, at 30.

183. TOOBIN, *supra* note 5, at 7. O’Connor is also seen as a strong proponent of judicial independence, which seems to be in conflict with her practice of taking the public temperature on issues. See Va McLean, *Reflections of a Retired Justice; Sandra Day O’Connor Says Judicial Independence Is Imperiled and Electing Judges Is Not Wise. The Immigration Debate? Spanish Was Her Grandmother’s First Language*, USA TODAY, June 8, 2006, at A21.

184. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (holding the “undue burden” standard as the test for abortion).

185. Craig Joyce, *Afterword: Lazy B and the Nation’s Court: Pragmatism in Service of Principle*, 119 HARV. L. REV. 1257, 1271 (2006).

186. TOOBIN, *supra* note 5, at 225; see also Dahlia Lithwick, *A High Court of One: The Role of the “Swing Voter” in the 2002 Term*, in A YEAR AT THE SU-

O'Connor's role as swing Justice led her to be courted, so to speak, by the eight male Justices eager to mold her "persuadable mind."¹⁸⁷ In this manner, she rose to a position of perceived influence, claiming to pursue centrism and moderation as not only a judicial but also a political philosophy.¹⁸⁸ Deemed "Supreme Sandra," O'Connor's "open mind" made her the "single most powerful woman in America."¹⁸⁹ Nonetheless, O'Connor did not embrace the swing voter label.¹⁹⁰ One theory for this lack of acceptance is that swing Justice was used more like an insult when applied to her rather than as a descriptor.¹⁹¹ Portrayals of O'Connor's assertion of power on the Court are riddled with sexism, influencing her characterization in both academia and the media. This is an apparent reflection of "a history of obstacles for women," as even pieces meant to praise O'Connor's accomplishments and unique position are rife with gendered language, sexist connotations, and innuendos.¹⁹² In this context, swing voter was probably meant to be more of a slight to O'Connor than a compliment to individuality.

PREME COURT 13, 15 (Neal Devins & Davison M. Douglas eds., 2004) ("The outcry about O'Connor's disproportionate influence is sometimes conflated with a resentment of the way she decides cases.").

187. Charles Lane, *Courting O'Connor: Why the Chief Justice Isn't the Chief Justice*, WASH. POST, July 4, 2004, at W10. The term "courting" implies something more like dating than an analysis of a Justice's judicial decision-making. A simple Google search produces results solely related to dating in a romantic context. GOOGLE, <http://www.google.com/#q=courting> (Google search for "courting") (last visited Nov. 28, 2016). Swing voters in the electorate are also often described as "persuadable." See, e.g., Nate Silver, *Swing Voters and Elastic States*, FIVETHIRTYEIGHT (May 21, 2012), <http://fivethirtyeight.com/features/swing-voters-and-elastic-states>; Ruy Teixeira, *Why There Are Many More Swing Voters than You Think*, NEW REPUBLIC (Apr. 11, 2012), <https://newrepublic.com/article/102612/election-swing-voters-campaign-2012>.

188. See TOOBIN, *supra* note 5, at 7.

189. See *Supreme Sandra*, *supra* note 8.

190. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 177 (2007) ("O'Connor repeatedly insisted she wasn't the deciding vote, but just one of nine.").

191. See Susan Gluck Mezey, *Gender and the Federal Judiciary*, in *GENDER AND AMERICAN POLITICS: WOMEN, MEN, AND THE POLITICAL PROCESS* 229–32 (Sue Tolleson-Rinehart & Jyl L. Josephson eds., 2005).

192. *Id.* ("O'Connor wound up on the highest court in the land instead of the typing pool because she rejected both limitations and victimhood. (Another good lesson for the young of both genders.)"); see, e.g., Bazelon, *supra* note 2 (characterizing O'Connor as "a bit of a tease"). For a more in-depth critique of the portrayals of women in leadership positions, see *MISS REPRESENTATION* (Girls' Club Entertainment 2011).

D. JUSTICE ANTHONY KENNEDY: THE MODERN SWING JUSTICE

This Section seeks to explore Kennedy's depiction as the Court's current swing Justice, prompting an influx of public interest and criticism. Subsection 1 supports Kennedy's swing Justice characterization with a discussion of his unpredictable decision-making style, harkening back to Matt Bors' cartoon.¹⁹³ Subsection 2 provides the context for this modern characterization, previewing the implications that centuries of undefined use has had on the Supreme Court, academics, the public, and even the rule of law.

1. The Troublesome Swing Justice¹⁹⁴

A fellow Reagan appointee, Kennedy joined O'Connor on the bench in 1988.¹⁹⁵ The two at times shared or exchanged the swing Justice label until O'Connor stepped down in July 2005.¹⁹⁶ With O'Connor gone, Kennedy established himself as a different kind of swing Justice, one creating more publicized worry than O'Connor.¹⁹⁷ In fact, his position on issues such as capital punishment and use of foreign law in opinions encouraged conservative leaders to call for his impeachment.¹⁹⁸ Just as O'Connor shook the Court as the obvious female swing voter, Kennedy represents a similarly provocative figure.

Kennedy does not consider himself a swing Justice, stating that there is "a connotation of inconsistency, of change, but I think it's just the opposite. I think it's the cases that change, not the law."¹⁹⁹ As an initial "moderate conservative," Kennedy agreed with Rehnquist in ninety-three percent of the cases de-

193. See Bors, *supra* note 1.

194. Even Kennedy cannot grasp a tangible definition of swing voter. See Marcia Coyle, *Justice Anthony Kennedy Loathes the Term 'Swing Vote,'* NAT'L L.J. (Oct. 27, 2015), <http://www.nationallawjournal.com/id=1202740827841/Justice-Anthony-Kennedy-Loathes-the-Term-Swing-Vote?slreturn=20160129233646> ("And if you want to get on the wrong side of Kennedy, call him the high [C]ourt's 'swing vote.' 'I hate that term,' he said. 'I get this visual image of spatial gyrations. The cases swing; I don't.'").

195. See HUDSON, *supra* note 135, at 45–46 (describing the confirmation process that led to Justice Kennedy's nomination).

196. See William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST (July 1, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070101842.html> (discussing Justice O'Connor's decision to resign in 2005).

197. See Dahlia Lithwick, *Swing Time*, SLATE (Jan. 17, 2006), <http://www.slate.com/id/2134421> ("Kennedy uniquely engenders hysteria . . .").

198. See Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

199. GREENBURG, *supra* note 190.

cided while the two shared the bench.²⁰⁰ But, whether he believes it or not, Kennedy has been the swing Justice on the Roberts Court since 2005.²⁰¹ Out of 770 total opinions, Kennedy has appeared in the majority in 140 of the 169 five-to-four decisions.²⁰² This is an impressive 82.8 percent.²⁰³ It is not Kennedy's existence as a supposedly moderate Justice that necessarily raises issues, since a moderate philosophy is respected and has arguably existed on the Supreme Court in some form for decades.²⁰⁴ Instead, the concern is the threatening perception that Kennedy—a Justice “Blackmunized” in terms of his views on social issues—holds the power to sway decisions singularly as swing Justice.²⁰⁵ This is what makes Kennedy's role on the Court, as perceived by many academics, advocates, and the public, problematic.

Commentators have recently taken to the idea that it is Kennedy's world, and we are just living in it.²⁰⁶ This proposition is supplemented by the fact that Kennedy “has been in the majority in virtually every notable 5–4 case.”²⁰⁷ After O'Connor's departure, Kennedy stood “alone in the middle—and that en-

200. David G. Savage, *Anthony M. Kennedy and the Road Not Taken*, in *A YEAR AT THE SUPREME COURT* 35, 39 (Neal Devins & Davison M. Douglas eds., 2004).

201. See Branigin et al., *supra* note 196 (discussing Justice O'Connor's 2005 resignation, resulting in Kennedy solely inhabiting the swing voter role).

202. See *supra* note 108.

203. See *id.*

204. See Lithwick, *supra* note 186, at 14. In fact, Kennedy's moderate philosophy has been described as “romantic,” reminiscent of the “men with grand visions about the role of the Court in society.” Edward Lazarus, *The Pivotal Role of Justice Anthony Kennedy: Why the Supreme Court's Romantic May Only Become More Influential over Time*, FINDLAW (Aug. 7, 2003), <http://writ.news.findlaw.com/lazarus/20030807.html>; Lithwick, *supra* note 186, at 28.

205. Richard Brust, *The Man in the Middle: Justice Kennedy's Opinion in the Gay Rights Case Underlines His Growing Influence*, 89 A.B.A. J. 24, 25 (2003).

206. See Dahlia Lithwick, *How the Supreme Court Justices Spent Their Summer Vacation*, SLATE (Oct. 1, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/10/supreme_court_summer_vacations_can_justices_forgive_one_another.html.

207. Akhil Reed Amar, Comment, *Heller, HLR, and Holistic Reasoning*, 122 HARV. L. REV. 145, 179 (2008); see Lani Guinier et al., *The Supreme Court 2007 Term: The Statistics*, 122 HARV. L. REV. 516, 522 (2008) (showing that Justice Kennedy joined the majority in eight of twelve five-to-four decisions in the 2007 term); see also Patrick D. Schmidt & David A. Yalof, *The “Swing Voter” Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209, 209–17 (2004) (advocating for an alternative form of the swing voter using Kennedy as an example).

hances his importance.”²⁰⁸ Kennedy’s position potentially has identifiable consequences. One scholar has noted that “the frequency of polarizing decisions that involve five-to-four votes along predictable ideological lines may contribute to the [proper] public perception that the Supreme Court has become a political institution rather than a legal institution.”²⁰⁹ Kennedy represents the Court’s modern permutation of the swing Justice. He is a figure that presents a slew of questions regarding the implications of the perception of such a figure and the implications such an actor has on the rule of law and Supreme Court jurisprudence more generally.

2. The Value of Precedent

The importance of stare decisis in the American legal system and the preservation of the judiciary as an objective gatekeeper of the law implies that precedent should mean something.²¹⁰ The appearance, even if only an appearance, that one person holds the ability to dictate the maintenance or destruction of precedent is troublesome.²¹¹ In Justice Breyer’s words, “It is not often in law that so few have so quickly changed so much.”²¹² The decision to overturn or maintain precedents has obvious political consequences. This is the work of Supreme Court Justices. In his role as the modern swing Justice, Kennedy has at times ignored stare decisis and either frustrated or encouraged attempts to overturn significant precedents, oftentimes agonizing over the law in the process.²¹³

208. Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST (May 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586.html>.

209. Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 247–48 (2016).

210. See TOOBIN, *supra* note 5, at 335–36 (describing the final day of the 2007 term in which Breyer asked, “What has happened to stare decisis?”).

211. See Lithwick, *supra* note 186, at 20.

212. TOOBIN, *supra* note 5, at 336; see also Erin Miller, *Doubts About Death*, SCOTUSBLOG (May 27, 2010, 1:30 PM), <http://www.scotusblog.com/2010/05/doubts-about-death>.

213. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that marriage is a fundamental right, even for same-sex couples); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (holding that a corporation is a person within the meaning of the Religious Freedom Restoration Act’s protection of a person’s exercise of religion); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371–72 (2010) (holding that limiting corporate contributions to political action committees infringes the First Amendment rights of corporations); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that an anti-sodomy statute is a violation of the Due Process clause); see

Dahlia Lithwick, a prominent Supreme Court commentator, posits that “[t]he true paradox of swing voters is not that they hold more influence than their colleagues, but that the public believes it holds more influence over *them*.”²¹⁴ If true, this proposition is troubling. But, what this writer finds even more troubling is the inability of academics, media, and the public to differentiate and identify the Court’s swing Justice and median Justice, particularly failing to recognize that these actors are not always one in the same. Yet, the failure of many of these same actors to distinguish the swing Justice and the median Justice from the swing voter, a wholly separate phenomenon in American political culture, is most concerning.

These case studies emphasize swingman, swing voter, swing Justice, and median Justice’s fractured use. Reed was labeled a swingman, but his ideology and beliefs were generally unknown.²¹⁵ Swingman’s use as a descriptor for Reed was likely due to its fresh development in the Supreme Court context and the lack of a more solidified descriptor for who Reed was and how he behaved on the bench. White and Powell may not have been the true ideological medians of the Court, but because of the intense divide between the Nixon and Burger appointees, the most accurate descriptor for the two was as median Justices.²¹⁶ In her approach to cases and the law, O’Connor was more like an ideological median. Yet, commentators and the public categorized her as a swing voter, the unpredictable wild card wherein the dangers of the Court laid.²¹⁷ This characterization was especially salient given the scrutiny seemingly fueled by sexism associated with her apparent power to singularly decide cases. Finally, many perceive Kennedy as extreme on the bench, harnessing unlimited power, not as a median Justice, but as a truly unpredictable swing Justice.²¹⁸ But, Kennedy would say otherwise, maintaining that he is not a swing Justice at all, proposing that “[t]he cases swing; the [J]ustices don’t.”²¹⁹

Jeffrey Rosen, *Annals of Law: The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82.

214. Lithwick, *supra* note 186, at 20.

215. See *Mr. Justice Reed*, *supra* note 42, at 717.

216. See MacKenzie, *supra* note 129 (discussing the stark split between holdovers from the Warren Court and new Nixon appointees).

217. See, e.g., Wermiel, *supra* note 180 (referring to Justice O’Connor as the “swing vote” and detailing occasions in which she sided with the Court’s liberal bloc rather than her conservative colleagues).

218. See Coyle, *supra* note 194 (noting that Justice Kennedy hates his “swing vote” identification).

219. See GREENBURG, *supra* note 190.

These five examples illustrate just how haphazardly pivotal Justices are labeled. The terms used to describe them are employed without regard to their actual meanings, defining very different actors behaving in very distinct ways on the Court.

III. THE IMPLICATIONS OF OUR FAILURE TO DISTINGUISH SWING VOTER, SWING JUSTICE, AND MEDIAN JUSTICE

Having established that there exists considerable confusion as to the meaning of swing voter and swing Justice in the context of Supreme Court Justices, this Part argues that there are serious implications resulting from this confusion. Section A contends that the haphazard use of swing voter, swing Justice, and median Justice without consideration for the chosen term's effect results in conceptual confusion for academics of several disciplines as well as a troubling amount of unacknowledged public confusion. Section B argues that the specific misuse of swing voter to describe actors that are more accurately described as swing Justices and/or median Justices illustrates the lack of a true distinction between law and politics, admitting the reality of legal realism. Section C implores scholars to draw a sharper distinction between the median Justice and the swing voter and swing Justice, questioning the median Justice theorem's assumptions and assessing how these assumptions contribute to the existing ambivalence surrounding the swing voter and swing Justice.

A. HAPHAZARD TERM USAGE RESULTS IN CONCEPTUAL CONFUSION

Those using the terms swing voter, swing Justice, and median Justice might benefit from increased awareness of past misuse and a commitment to conscious use in the future. As evidenced by the case studies in Part II, academics conflate and confuse labels to mischaracterize Justices all too often, indiscriminately using terms without truly understanding their underlying differences. This is dangerous since a linguistic designation, especially in academia, can impact the entire conclusion of a study or piece of research. Lack of care when labeling Supreme Court Justices as swing voter, swing Justice, and/or median Justice leads to results based upon potentially faulty assumptions, skewing outcomes and affecting the reliability and accuracy of the final product. Use of terms without a thorough understanding of their respective meanings leads to fundamen-

tally inaccurate results, muddled by unacknowledged and unaddressed assumptions. Failing to recognize these differences is a fundamental misstep. This failure prevents meaningful conversation and results in a lack of genuine understanding in any given discipline. Thus far, swing voter, swing Justice, and median Justice's contextual differences have gone relatively unrecognized, and the terms remain obfuscated and unrefined.

In order to completely understand the implications and make accurate conclusions in analyses and studies of these actors, academics should consider the connotations accompanying terms when assigning them to various Supreme Court Justices. Nevertheless, the process of refining and differentiating these terms does not begin and end with academics. Commentators, advocates, and the public more generally are confused about the true meaning of swing voter, swing Justice, and median Justice too, arguably even more than academics. If academics do not maintain, or even acknowledge, the differences between various actors, how is the public expected to know and understand the difference? This confusion alienates the public and perhaps results in deeper-set animosity towards the Supreme Court, other branches of government, and potentially the law more generally. This disconnect should be concerning since it upsets people's perceptions about the value of their own role in democracy. A chasm so deep might even discourage the individual faith and participation that is so crucial to the American system.²²⁰

B. ROOTED IN LEGAL REALISM

The Supreme Court's crucial Justice matters most in close cases: whether it be a stable ideological median consistently balancing competing factions or an unpredictable wildcard vote.²²¹ The confused identification of swing Justices as swing voters is particularly illustrative of an implication beyond mere confusion. It demonstrates, and perhaps even more problematic, reinforces, the distinction, or lack thereof, between law and politics.²²² This absence of a true distinction between law and

220. See *One Vote Can Make a Difference*, PEW CHARITABLE TR. (Apr. 7, 2015), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2015/04/07/one-vote-can-make-a-difference> (providing examples of local races in which one or two votes decided the outcome).

221. See Lithwick, *supra* note 186, at 20.

222. See generally THE LAW/POLITICS DISTINCTION IN CONTEMPORARY PUBLIC LAW ADJUDICATION (Bogdan Iancu ed., 2009) (discussing the blurry distinction between law and politics through a collection of works).

politics is a central tenet of legal realism.²²³ Swing voter's simultaneous use to describe different types of actors in two independent branches of government is concerning. The dual use of such a contested term is troubling because the branches of American government are so painstakingly separated in other contexts.²²⁴

Separation of powers is at the heart of the American legal system. It is touted as one of the greatest achievements of modern democracy, striking a "happy mean" that "combines the energy of government with the security of private rights."²²⁵ The commonplace, interchangeable use of swing voter in both the electoral and judicial contexts blurs this separation, failing to demonstrate that there are actually any real differences between the swing voter on the Supreme Court and the swing voter in the electorate. In fact, it complicates the apparent existence of those differences. This lack of linguistic separation implies a lack of actual separation. It begs questions about our systematic beliefs, beliefs that rely on the maintenance of the rule of law above the meddling world of politics and popular elections. If one person in either branch of government has the power to change the law and overturn precedent based on what they ate for breakfast, the implication is that *stare decisis* as an institutionalized preservation practice is all for naught: just part of the greater myth of the law-politics distinction.²²⁶ If the law-politics distinction is no distinction at all, then what really separates the Court from elections or legislating?²²⁷ Is judging really different?

A thorough understanding of swing voter's etymological history and politically charged connotations lays bare an un-

223. See *supra* note 91 and accompanying text.

224. See, e.g., U.S. CONST. art. I, art. II, art. III (detailing the separate powers of the three branches in American government).

225. William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in SEPARATION OF POWERS—DOES IT STILL WORK? 65, 66 (Robert A. Goldwin & Art Kaufman eds., 1986) (quoting Alexander Hamilton).

226. See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 162 (1973) ("[A] trial judge, because of overeating at lunch, may be so somnolent in the afternoon court-session that he fails to hear an important item of testimony and so disregards it when deciding the case.").

227. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." (quoting *Mistretta v. United States*, 488 U.S. 361, 407 (1989))).

stable reliance on the law-politics distinction. A distinction that has long been utilized to preserve beliefs about what distinguishes the judicial from the political. A distinction that exists when it preserves the institutional status quo but sometimes disappears when it would be less convenient.²²⁸ The law-politics distinction mystifies the rule of law, promoting the notion that we are ruled by law and not men. But ultimately we are ruled by men: the elite administrators of the law, chosen not by the public their decisions govern, but by the political party in power at the time of their appointment. With that understanding, it is clear that the law-politics distinction is nothing more than a bedtime story that members of the legal community tell themselves and the general public to cloak the political nature of their work.

C. THE MEDIAN JUSTICE IS NOT SYNONYMOUS WITH THE SWING JUSTICE

The Supreme Court swing Justice is not automatically synonymous with the median Justice identified by any given political or social science study. This dissimilarity is especially true when a study focuses on the general voting behavior of a Justice as compared to an assessment of the votes in a particular case, range of years, or topic area.²²⁹ The focus of most studies that apply the median voter theorem is on mathematical precision and/or game theory.²³⁰ The existing imprecision of the way swing voter, swing Justice, and median Justice are used in these studies amounts to faulty analytics, lacking important distinctions that can and ought to be made for clarity, coherence, and sound reasoning. This is especially relevant in political and social science research, where the results oftentimes depend entirely on the definition of what exactly constitutes a

228. A stark example of this institutional preservation exists in the flood of literature on the legacy of recently deceased Justices. This literature emphasizes the difference between the decaying body versus the intact legal mind. See, e.g., Charles Lane, *Chief Justice William H. Rehnquist Dies*, WASH. POST (Sept. 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301911.html>; Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

229. Compare *Mr. Justice Reed*, *supra* note 42 (analyzing the voting behavior of Reed in particular), with Grofman & Brazill, *supra* note 80 (performing a multidimensional analysis to identify the median Justices from 1953 to 1991).

230. See, e.g., Lynn A. Baker, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice*, 70 S. CAL. L. REV. 187, 190–92 (1996).

swing voter, swing Justice, or median Justice in any given context. This is important to consider because the use of an unclear definition results in a slew of unclear conclusions.

The existing imprecision matters because it assumes that there is a median on the Court who stabilizes coherent competing blocs or factions operating in the same way, issue-to-issue, case-to-case.²³¹ Those scientists who adhere to the median Justice theorem contribute significantly to Supreme Court scholarship.²³² With that in mind, this Note proposes that the use of swing voter, swing Justice, and median Justice in works employing the median Justice theorem be just as technical, nuanced, and mathematical as the median Justice theorem itself. By distinguishing the median Justice linguistically and analytically from the swing voter and swing Justice, median Justice theorem can avoid the pervading ambiguity accompanying the phrases' uses, clouded by a variety of unknown and misunderstood connotations. Median Justice theorem is just a piece of a much more complicated discourse about the voting behaviors and practices of the Supreme Court, one that has been insufficiently attended to and an unrecognized contributor to the confusion surrounding what it really means to be labeled the Supreme Court swing voter.

CONCLUSION

The meaning of "swing voter" is not as straightforward as generally assumed. Using the crucial tools of historical etymology and intellectual history, this Note seeks to address swing voter's meaning conflation, confusion, and fluctuation between several distinctive and contradictory definitions. These tools allow us to see that the implications of such meaning conflation are severe.

The arbitrary use of these terms results in conceptual confusion for academics and the public at large. Academic research is specifically affected by a sheer lack of particularity and attention to detail, threatening the legitimacy and accuracy of research done about these actors. In addition, this confusion leads to increased public alienation and overall discontent and lack of participation in government. The specific use of swing

231. See *Mr. Justice Reed*, *supra* note 42, at 718 ("Are there two cohesive four-Justice blocs?").

232. See *Martin et al.*, *supra* note 75, at 1278; see also *Baker*, *supra* note 230, at 207 ("[D]oes the identity of the Court's median or most powerful Justice matter? . . . [T]he answer is likely 'yes.'").

voter to describe what is maybe more accurately described as swing Justice and/or median Justice serves as an example of the lack of a true distinction between law and politics and failure to accurately distinguish specific terms and the actors those terms seek to define. Through historical etymologies and intellectual histories, we might be able to better recognize, understand, and apply contested concepts, like swing voter, with increased awareness and clarity.