PANEL 2: PERSPECTIVES ON SULLIVAN*: THE JUSTICES, THE PARTIES, AND THE PUBLIC*

SCANDAL! EARLY SUPREME COURT NEWS COVERAGE AND THE JUSTICE-JOURNALIST DIVIDE

Amy Gajda[*]

TABLE OF CONTENTS

[*] Associate Professor of Law, Tulane University Law School. Thank you to Richard Davis, the editors of the *Georgia Law Review*, and the symposium participants for very helpful comments. Thanks also to Tulane law students Mia Lindell, Justine Geiger, and Micah Zeno for research assistance.

I. INTRODUCTION

In January of 1900, United States Supreme Court Associate Justice Henry Brown (author of *Plessy v. Ferguson*) had apparently just about had it with the press. He gave what was called "[t]he principal address" before members of the New York State Bar Association in Albany and focused not principally on law, but on what he called journalism's sensationalistic methods.[1] "Ugly stories are told," he told the gathered attorneys, "of spies put upon houses to unearth domestic scandals or upon the steps of public men to ferret out political secrets," including early reports of court decisions.[2] The greatest of the cruelties done by journalists, in Justice Brown's estimation, were their "assaults upon private character."[3] The worst of the publications, he complained, were those newspapers that published Sunday editions.[4]

The spying and the invasions of privacy of which Justice Brown complained presumably included incidents involving members of the Supreme Court and others who were well-placed politically. "No man," Justice Brown complained during his talk, "occupies a political position . . . who cannot be driven from it by a combined attack of two or three influential journals."[5] Brown's media-focused speech must have been at least somewhat personal. Not only did the literally and figuratively colorful Sunday editions of newspapers annoy him ("[i]f there be another worse than these, the mind of man hath not hitherto conceived them"[6]), but the papers' use of illustrations was a particular irritation. "The next step in their downward career," he complained, included the use of "[p]ictures of current events, of battles, of murders and sudden deaths, sometimes copied from photographs, oftener drawn from imagination."[7] Much of his talk before New York's gathered attorneys seemed to echo language and arguments from *The Right to Privacy*, the influential *Harvard Law Review* article written by Samuel Warren and Louis Brandeis that similarly condemned

---

[1] *Scores Yellow Press*, WASH. POST, Jan. 17, 1900, at 3.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

newspaper sensationalism and had been published a decade before.[8]

But he also seemed directly inspired by the push-the-envelope Pulitzer newspapers of the day, known for their sensationalism; their use of color and other illustrations; and, notably, their Sunday supplements. Pulitzer used the Sunday editions to experiment with "new features and approaches,"[9] including an insert that smelled of perfume.[10] Pulitzer newspapers were also some of the very first to focus on scandal and celebrity.[11]

Justice Brown's anti-media speech received coverage in multiple newspapers, including the *Washington Post*,[12] the *New York Times*,[13] and the *Baltimore Sun*.[14] The *Sun* perhaps put it best when it reported simply that the Justice had "severely denounced what he termed sensational journalism."[15] Biographers would later call Brown a "reflexive social elitist,"[16] and his opinions regarding the journalism of the day seem to be in line with that description. The common person may have enjoyed the Sunday supplement's sensationalism; Justice Brown did not.

The Justice-journalist divide during this period was not limited to Justice Brown's harangue outside the courtroom. It was a time when he and the other Justices had very precise rules for those who covered the Supreme Court's proceedings from inside the Court. First, it was suggested that no one observing the Supreme Court, including journalists themselves, could take notes on what was being said.[17] Second, and foreshadowing today's refusal to allow cameras in the courtroom, it was also suggested that no one

---

[8] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) ("The press is overstepping in every direction the obvious bounds of propriety and of decency. . . . [C]olumn upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.").

[9] CHRISTOPHER B. DALY, COVERING AMERICA: A NARRATIVE HISTORY OF A NATION'S JOURNALISM 116 (2012).

[10] *Id.* at 122.

[11] *Id.* at 123.

[12] *Scores Yellow Press*, *supra* note 1, at 3.

[13] *State Bar Association*, N.Y. TIMES, Jan. 17, 1900, at 4.

[14] *Sensational Journalism*, BALT. SUN, Jan. 17, 1900, at 6.

[15] *Id.*

[16] FRANCES GRAHAM LEE, EQUAL PROTECTION: RIGHTS AND LIBERTIES UNDER THE LAW 29 (2003) (quoting Frances Helminski, *Henry Billings Brown*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 93 (Kermit Hall ed., 1992)).

[17] *God Save the Court*, CHI. DAILY TRIB., Jan. 4, 1891, at 6.

was allowed to sketch the Justices as they sat during oral argument.[18] The punishment for those who disobeyed must have been severe. As a Chicago paper explained, "Woe be to you if you violate any of the rules."[19] The Justices apparently so valued their privacy during the turn of the twentieth century that they even attempted to veto the now larger courtroom because it would accommodate a larger audience.[20] Given that sort of history, it is not surprising that Justice Brown would find the more Court- and Justice-interested journalism of the day utterly unsatisfactory and invasive.

This Essay explores some of that early press coverage of the Supreme Court, particularly of its Justices, and it attempts to explain what could have so provoked Justice Brown. The story is personal to Justice Brown, who was of some interest to journalists of the time, but it is also much broader. A Supreme Court press corps that had once been at least somewhat compliant and respectful of the Court became more critical of both the Justices and their decisions, and more interested in them as personalities. Ultimately, this Essay argues that such a history—one that began with at least partial quiet deference and turned distinctly toward sensationalism—laid the groundwork for Justice Brown's anti-journalism speech and the distrust shown to media by today's Justices.

II. THREE SENSATIONAL MATTERS: LEAKS, COURT CRITICISM, AND FAMILY COVERAGE

The very first coverage of the Court was mundane enough. "Yesterday," the *New-York Daily Gazette* reported on February 3, 1790, "the Supreme Court of the United States met agreeable to adjournment."[21] Commissions of Justices were read in front of gathered members of Congress and interested citizens.[22] There was not much else. "As no business appeared to require

---

[18] *Id.*
[19] *Id.*
[20] *Wants No New Building*, N.Y. TIMES, Dec. 17, 1893, at 13.
[21] *New-York*, N.Y. DAILY GAZETTE, Feb. 3, 1790, at 2.
[22] *Id.*

immediate notice," the article further explained, "the court was adjourned . . . ."[23]

Curiously, that quickly adjourned call to order was apparently not the first scheduled meeting of the Court. Other newspapers reported matter-of-factly that a meeting of the Justices had been scheduled for February 1 (the day before) but that things did not go as planned. "[A] sufficient number of the Judges not being present to form a quorum, the same was adjourned till [February 2]," the *New Jersey Journal* explained without any sort of criticism or detail, even though the courtroom "was uncommonly crouded [sic]," in anticipation of the first meeting of the United States Supreme Court.[24]

The third day of the Court proceedings, therefore, was comparatively exciting. The Justices accepted the Seal of the Court, one that would contain the "Arms of the United States, cut upon steel, of the size of a dollar" with words around the margin reading, "[t]he Seal of the Supreme Court of the United States of America."[25] They also agreed upon other court seals. Then they adjourned.[26]

In other words, not much was happening in the early days of the Court, which may well be why much early coverage was straightforward when the decisions were of no particular interest to a partisan press. When the *New York Daily Gazette*, for example, reported on a case before the Court in 1791, *West v. Barnes*[27] (one of the first examples of fuller Court coverage), the article read much like a transcript of what had happened in the courtroom, with no added analysis or commentary.[28] A few months later, a story in another newspaper focused a bit more on the Justices themselves, but only to laud them: "A CORRESPONDENT observes, that he was highly pleased to-day, with the appearance of the Judges of the Supreme Court of the United States in their ROBES OF JUSTICE, the elegance, gravity

---

[23] *Id.*
[24] *New-York*, NEW JERSEY J., Feb. 10, 1790, at 3.
[25] *New-York*, N.Y. DAILY GAZETTE, Feb. 4, 1790, at 2.
[26] *Id.*
[27] 2 U.S. 401 (1791).
[28] *Supreme Court of the United States*, N.Y. DAILY GAZETTE, Aug. 13, 1791, at 2.

and neatness of which, were the subject of remark and approbation with every spectator."[29]

When journalists offered their opinions about the proceedings themselves in these early years, some did so in a similarly laudatory fashion, especially when the newspaper was of the same political persuasion as the Justice at issue. One credited Chief Justice John Jay in 1793 with "deliver[ing] one of the most clear, profound, and elegant arguments" ever in the history of judicature,[30] a history that was, at the time, not really all that long. Even society coverage of the Justices seemed quite deferential. In 1794, a newspaper published a report from a gathering of lawyers in New York during which the Justices were toasted with the wish that their opinions would be "fountains of honor to them."[31]

Finally, when a new Justice joined the Court in 1800, in remarkable contrast to the continuing analysis of today's appointments, the newspaper coverage was quite succinct: "ALFRED MOORE, of North Carolina, is appointed one of the Associate Judges of the Supreme Court of the United States, to supply the place of James Ledell, deceased."[32] And that was it. The article contained no speculation about Moore's potential effect on the Court and its decisions, or even who he was or how he had ascended to the Court. Moreover, no previous available coverage could be found that focused on Moore. It appears that it was to the journalists of the day as if someone had switched out one hotel porter for another. It could well be that the turnover rate for the Court was so high—Justice Rutledge, for example, "failed to attend the Court's meetings and resigned in 1791"[33] to sit on a South Carolina court—that a new appointment lacked what the journalists of the day considered news value.

Or it could be that journalists did not fully understand the appointment's significance. Later that year, for example, a Supreme Court reporter for Baltimore's *Federal Gazette* included

---

[29] ARGUS (Boston), Feb. 24, 1792, at 2.

[30] *Supreme Court of the United States*, NEWPORT MERCURY, Mar. 11, 1793, at 2.

[31] *From a* Late *New-York Paper*, W. STAR (Stockbridge), July 8, 1794, at 4.

[32] UNIVERSAL GAZETTE (Philadelphia), Jan. 16, 1800, at 3.

[33] *December 15, 1795: Chief Justice Nomination Rejected*, U.S. SENATE HISTORICAL OFFICE, http://www.senate.gov/artandhistory/history/minute/A_Chief_Justice_Rejected.htm (last visited Feb. 17, 2014).

in his coverage of the Court the honest assessment that he was "not well acquainted with the merits" of a particular case that he had been assigned to cover and admitted that his reporting was merely "an imperfect outline of the leading features" in the case.[34] Another journalist the next year openly deferred offering his own analysis or additional information about a case, preferring instead to wait for the Court's own decision.[35] Richard Davis, author of *Justices and Journalists*, describes Court coverage this way: "From the origins of the Court, the justices have received press coverage when newspapers felt the Court was newsworthy."[36] That meant, at least initially, not all that often, because "news coverage [of the early Court] . . . was overshadowed by that of other institutions."[37]

This does not mean that the partisan early press failed to cover the Court and its Justices. There was press interest after the congressional repeal of the Judiciary Act of 1801, for example, leading a prescient editorial writer of the day to suggest that "the eyes of the substantial and reflecting citizens of the United States" would be directed at the Justices and that many would look to them with "anxiety and strong expectations."[38] There was also negative coverage during the eventually unsuccessful impeachment of Justice Samuel Chase who, it was alleged, had revealed improper judicial allegiances when he presided over a grand jury.[39] And the politics and the political interests of the Justices too—Richard Davis has noted that these early Justices were "as much politicians as jurists"[40]—were of interest to early journalists.[41] But when Chief Justice John Marshall's attempts to

---

[34] *Supreme Court U. States: Law Report*, FED. GAZETTE (Baltimore), Aug. 19, 1800, at 3.

[35] *Supreme Court of the United States*, N.Y. EVENING POST, Dec. 23, 1801, at 3.

[36] RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 34 (2011).

[37] *Id.*

[38] *To the Judges of the Supreme Court of the United States*, REPUBLICAN (Baltimore), Apr. 12, 1802, at 2.

[39] *See The Answer and Pleas of Samuel Chase*, ALBANY GAZETTE, Feb. 28, 1805, at 2 (discussing the charges against Justice Chase in depth and noting the need for new penal laws to restrict what Justices can say from the bench); CONN. COURANT, Feb. 20, 1805, at 2 (noting surprise at the "conviction of [Justice Chase's] innocence" having read the details given by the court of his conduct).

[40] DAVIS, *supra* note 36, at 35.

[41] *See, e.g.*, ABBEVILLE MERIDIONAL, May 25, 1896, at 2 (noting that the only dissenting opinion in *Plessy v. Ferguson* was that of Justice Harlan, "a well-known negrophilist and a believer in social equality").

convince the public and the papers that the Court itself was apolitical seemed to take some hold,[42] coverage in what might be considered more mainstream newspapers became less political and more mundane.

In the 1840s, however, half a century after the Court's start and in the earliest days of the more sensational penny press, coverage and tone decidedly turned. First, the volume of news stories, at least as found in various historical newspaper databases, increased. From 1790 until the 1830s, fewer than fifty articles are available that mention "United States Supreme Court" and "Justices" in the same piece. In the 1840s, however, more than 3,000 do, and that number increased to more than 7,000 throughout the 1850s.[43]

Second, and as might be imagined as news coverage shifted to become of greater interest to the masses, the tone of the stories changed. Journalists more freely criticized the Court and the men who sat on it, and the journalism of the day, once nearly exclusively focused on politics and business, shifted toward more sensational topics like crime and human interest stories.[44] Had things continued on their earlier, more deferential and disinterested course—one in which the more politicized Justices understood well that a partisan press would attack their partisan viewpoints—Justice Brown would likely have had little about which to complain. But there began in this period a more generalized strident critique of Court opinions,[45] more interest in

---

[42] DAVIS, *supra* note 36, at 42–44.

[43] For this Essay, intentionally more qualitative than empirical, two databases were primarily relied upon in searches for articles: "ProQuest News and Newspapers" and "Readex's America's Historical Newspapers." Within those databases, the searches were limited by date as noted in the text, but all searches were limited to articles appearing before 1910, with a special focus on articles appearing before the time of Justice Brown's speech in January 1900. The main search, as indicated above, included " 'United States Supreme Court' [and variations of that phrase] and Justices," in an attempt to find those articles that addressed issues involving the Justices specifically. That search realized thousands of articles and, as with later searches that realized an unwieldy number, hundreds were read in full for relevance, including especially those with headlines that seemed most promising. As will be addressed later in this Essay, additional limiting searches were then used that included the main phrase "United States Supreme Court" and its variations along with words such as "scandal," "gossip," or "rumor" in an attempt to find those news articles that used that phrase and those words precisely.

[44] DALY, *supra* note 9, at 60–61.

[45] *See, e.g.*, *infra* notes 59–61 and accompanying text.

breaking down the walls of secrecy at the Court,[46] and a greater interest in the personal lives of the Justices themselves.[47]

Though not the first critical coverage, it could well be that the dreadful *Dred Scott* decision[48] helped to break things loose and helped to change the course of Supreme Court reporting. The Court's majority opinion, written by Chief Justice Roger Taney, held that African Americans were not citizens of the United States and that Dred Scott, a slave who had made his way to free states, was still a slave.[49] The public uproar at that decision was reflected in the newspapers of the time.[50]

More than a decade before the *Dred Scott* decision, however, and perhaps not surprisingly given his politics, Chief Justice Taney had been one of the first Justices to be the focus of personally critical reporting by newspapers (though the very first may have been Acting Chief Justice Rutledge, who partisan newspapers in the late 1700s had suggested was mentally ill; the Senate later refused to confirm his appointment as Chief Justice[51]). One journalist in 1844 suggested that Taney, though Chief Justice, was not the brightest judge on the bench and could be easily bested by attorney Daniel Webster's "magnificent intellect."[52] Another criticized his demeanor and his looks: "Alas! the [sic] dignified one ceased with [Chief Justice] Marshall," the newspaper wrote, suggesting both boldly and impishly that it would be "an immense improvement" if Chief Justice Taney

---

[46] *See, e.g.*, *infra* notes 62–66 and accompanying text.

[47] *See, e.g.*, *Justice Gray's Engagement: Some Gossip About the Distinguished Jurist and His Pretty Fiancee*, PHILA. INQUIRER, Mar. 22, 1889, at 4 (discussing Justice Gray's engagement as well as his fondness for pretty girls, sweetmeats, and bonbons).

[48] Scott v. Sandford, 60 U.S. 393 (1857).

[49] *Id.*

[50] *See, e.g.*, Editorial, N.Y. DAILY TRIB., June 10, 1857, at 4 (stating that through its *Dred Scott* decision, the "slaveholding majority" of the Supreme Court told America that "however contradictory [slavery] may be to humanity, reason and historical truth[, it is] the law").

[51] *See* DAVIS, *supra* note 36, at 41 ("Distraught about the Senate's rejection of his nomination for a permanent position as chief justice, Rutledge reportedly attempted to drown himself in the Potomac. News accounts were not reticent about covering the chief justice's personal problems."); *Chief Justice Nomination Rejected*, *supra* note 33 ("On December 15, 1795, the Senate administered a stinging blow to one of the nation's most distinguished 'founding fathers.' By a vote of 10 to 14, it rejected President George Washington's nomination of South Carolina's John Rutledge to be Chief Justice of the United States.").

[52] N.Y. HERALD, Jan. 3, 1844, at 2.

"would but dress his hair, and let it be elongated."[53] A third paper confirmed that Chief Justice Taney's head was "surmounted with an uncomfortable wad of tangled black hair" and also criticized two others on the court for not being of the same intellectual ability as their peers, but noted in a seemingly backhanded compliment that both were likely "well thought of by their personal friends."[54]

It was also a time of leaks to the press. Three years before the *Dred Scott* decision was released, several newspapers had reported that Chief Justice Taney would soon be resigning from the Court.[55] That proved not to be true, but it was one of the first times that newspapers would report similar "rumors" regarding the Justices and their retirement plans.

The leak regarding the outcome of the *Dred Scott* decision itself was far more accurate. On January 5, 1847, three months before the Supreme Court would announce its decision, the *New York Daily Times* reported that a decision in the case had been reached, quoting a report from the *Washington Union* newspaper.[56] The newspapers accurately reported the Court's decision and its 7–2 split, noting that such information had been received early from the Court itself and that such a leak was "certainly unusual."[57] "Slavery will thus become, not only a *national* institution," journalists predicted based upon the leaked information, "but the only one with which sovereign states may not interfere."[58]

When the Justices did in fact decide as much, many were outraged at the outcome—one that journalists attributed to the Court's "slaveholding majority" and one that many suggested should be rejected as willful misrepresentation of the law.[59] Even southern papers quoted opponents who found the opinion and the Justices who wrote it "infamous, rank, and smell[ing] to Heaven."[60]

---

[53] *A Glimpse at the U.S. Supreme Bench*, WKLY. OHIO ST. J., Feb. 19, 1845, at 1.

[54] *A Glimpse at the Supreme Judges*, GLOUCESTER TELEGRAPH, Feb. 22, 1845, at 1.

[55] *See Souther Mall Arrival—Chief Justice Taney*, N.Y. DAILY TIMES, Apr. 30, 1853, at 1 (referencing a "Washington rumor" that Chief Justice Taney intended to resign).

[56] *The Dred Scott Case*, N.Y. DAILY TIMES, Jan. 5, 1857, at 4.

[57] *Id.*

[58] *Id.*

[59] N.Y. DAILY TRIB., June 10, 1857, at 4.

[60] *Col. Hatton Joins the Abolitionists in Denouncing the Decisions of the Supreme Court of the United States*, MEMPHIS DAILY APPEAL, July 9, 1857, at 2.

The *New York Daily Times*, predicted that the decision would have a profound impact both on society and on the way Americans felt about the Supreme Court and its Justices: "[T]he circumstances attending the present decision," the *Times* wrote about *Dred Scott*, "have done much to divest it of moral influence, and to impair the confidence of the country."[61] Newspaper coverage of the decision and the aftermath, of course, facilitated that impaired confidence.

The decision in the *Dred Scott* case was, then, not only appalling generally, but offered the perfect storm for coverage of the Court: an opinion that many disrespected, written by a Justice who had already turned newspapers against him, leaked to media by someone within the Court before the official hand-down. It helps to show that the journalists of the day covered the Court more confidently and more critically. It also shows that by the 1840s, journalists had started to attempt with some success to receive early word of the Court's decisions, and that they had started to follow with interest the careers and the personal lives of the Justices. This became a pattern.

First, the leaks regarding case outcomes: from at least 1857 until the time of Justice Brown's speech to the New York Bar Association, there were additional significant leaks from the Supreme Court reported by journalists of the day. A later newspaper described these leaks as "frequent" and suggested that they had created a "serious scandal" at the Court.[62] The insider who had allegedly leaked a decision regarding railroads in the 1873–1874 term, for example, was an unnamed Justice, one who, one newspaper reported, had met in the Supreme Court clerk's office after oral argument with the railroad attorneys who had argued the case and had been plied into revelation with cigars, crackers, cheese, and "fine brands of liquor."[63] An article reporting on the railroad leak hinted that the investigating Chief Justice

---

[61] *The Personnel of the New Cabinet—The Decision of the Supreme Court in the Case of* Dred Scott, N.Y. DAILY TIMES, Mar. 10, 1857, at 1.

[62] *Supreme Court Secrets: How Do They Leak Out? Suit Brought in New York Statement by the Clerk of the Court*, BOS. DAILY J., Nov. 19, 1897, at 2.

[63] *Supreme Court Leaks: Instances of Decisions Becoming Known in Advance of their Announcement*, BALT. SUN (Baltimore), Mar. 27, 1888, at 1.

might well find out who had revealed the information, "if he inquire[d] in the right direction."[64]

The leak in that railroad case was more like a strong stream: other newspapers had suggested that "a certain clique in Wall street [sic]" had also known what the decision would be and reported that there had been official efforts to cover up the scandal.[65] In the meantime, the Court exhibited what seemed like a willful blindness. Though the *Washington Post* reported that the decision had been known two days in advance of the official announcement,[66] the Chief Justice continued his incredulity, telling the *Post* that "[i]t was not possible for any positive information to get out" of the Court.[67]

Seven years after the railroad case, important decisions involving Bell Telephone were also leaked to media, also allegedly the work of the same unnamed Justice.[68] Before the Court announced its decision in those cases, the *Wisconsin State Journal* reported that the leaked information was very specific and, therefore, seemed to be based upon more than mere speculation.[69] Other leaks had even greater proof: one report suggested that the advance sheets of a decision involving the federal income tax had been leaked in advance.[70] The *Philadelphia Inquirer* suggested that this was not the first time that there had been such a revelation and that an exchange of money had been involved:

> It has for some time been a scandal attaching to the highest judicial tribunal of the land that information of the decisions before they were rendered in open court could be obtained by paying for them. . . . It is an undeniable fact that opinions of the court, some of them affecting the stock market, have been known to

---

[64] *The Supreme Court Scandal*, LOUISVILLE COURIER- J., Mar. 27, 1880, at 10.

[65] *A Bad Scandal, In which the Partisan Supreme Court is Involved*, TIMES-PICAYUNE (New Orleans), Mar. 29, 1880, at 2.

[66] *A Supreme Court Sensation, What Chief Justice Waite Says of the Alleged Leak*, WASH. POST, Apr. 7, 1880, at 1.

[67] *Id.*

[68] *Supreme Court Leaks*, *supra* note 63, at 1.

[69] *Court Scandal*, WIS. ST. J., June 17, 1887, at 1.

[70] *The Income Tax Opinion*, PHILA. INQUIRER, Apr. 8, 1895, at 1.

> interested persons in advance of their official announcement.[71]

The *Chicago Daily Tribune*, reporting on the tax case leak, confirmed that the information was true and later interviewed a Justice who suggested that only another Justice could have leaked such precise information.[72] Further, when a decision involving a gas company was leaked in 1896, the information caused the company stock to fall.[73] "For a number of years," a St. Louis newspaper reported, "it has been suspected that there was an employee of the court who communicated inside intelligence regarding decisions to certain Board of Trade men in New York" and that the gas decision leak had "revived these rumors."[74] One Justice dismissed the notion, even though it later turned out to be correct,[75] and suggested that "it was not the custom," presumably of the Court and its Justices, "to pay any attention to newspaper stories."[76]

Perhaps not coincidentally, at the same time that the Justices were supposedly paying little attention to media and blinding themselves to apparent leaks, journalists had become increasingly confident in their criticism of the Justices and their authority. The year following *Dred Scott*, for example, the *New York Times* railed against a new Justice, writing that he was a "weak man" without character and would cause the country to lose what had already become wavering respect for and confidence in the Court.[77] A few years later, the *New York Tribune* wrote that the Justices were "capable of making decisions from political bias," suggesting that as a group of nine they could more easily make mistakes than would a larger group.[78] *The New York Times* suggested in 1881 that it was "a weak and overworked court [sic]" that had struggled

---

[71] *Id.*

[72] *Admits it is Correct: Supreme Court Justice Verified* Tribune*'s Tax Story*, CHI. DAILY TRIB., Apr. 8, 1895, at 1.

[73] *A Judicial Leak Causes Laclede Gas Stock to Tumble*, ST. LOUIS REPUBLIC, Dec. 1, 1896, at 1.

[74] *Id.*

[75] *See infra* notes 113–123 and accompanying text.

[76] *Supreme Court Secrets*, *supra* note 62, at 2.

[77] *The Confirmation of Mr. Clifford*, N.Y. TIMES, Jan. 14, 1858, at 5.

[78] *The Supreme Court*, N.Y. TRIB., Jan. 18, 1868, at 4.

along in a "crippled condition" because of incapacitated Justices and a backlog of cases that had necessitated the "scandal" of switching out one Justice for a retired Justice who had not himself heard the arguments in the case before the Court.[79] The *Boston Journal* called the Court and its players a "farce."[80] Newspapers condemned those who had been suggested for appointment to the Court as "unfit"[81] and criticized one as more like a law student than a judge.[82] A Chicago paper humorously suggested that the "vain" Justices being fitted for their robes were similar to blushing debutantes who had visited their dressmakers with pride and exultation.[83] And the *Los Angeles Times*, in a feature on the Justices that contained numerous anecdotes about their head sizes and their tendency to dog-trot while walking, suggested that Supreme Court Justice was such a cushy job that "a skeleton appointed to the Supreme bench is liable to fatten up and last a generation."[84]

Some of these anecdotes also help show the shift toward interest in the Justices as personalities or, as one 1899 article in the *Washington Post* had suggested, "celebrities."[85] Much of the coverage would be perceived as quite mundane today. That a Justice wed,[86] or that he was "tall and rather spare,"[87] and maybe even that he had shaved his beard,[88] are all examples of coverage that a Justice would likely expect in 2014. Perhaps today's Justices know that an accounting of their salaries and their personal wealth will routinely occur, but a similar revelation in one newspaper likely pushed things a bit too far in 1895 when the newspaper reported the Justices' salaries ($10,500 for the Chief Justice and $10,000 for Associate Justices) and sub-headlined the

---

[79] *A Weak and Overworked Court*, N.Y. TIMES, Dec. 13, 1881, at 4.

[80] *The Block in the Supreme Court*, BOS. J., Dec. 19, 1881, at 2.

[81] *An Unfit Man*, N.Y. TRIB., Sept. 5, 1887, at 4.

[82] *The Supreme Court Not a Law School*, KAN. CITY TIMES, Oct. 6, 1889, at 2 ("[T]he supreme court [sic] of the United States is neither a charitable institution nor a school for backward adults.").

[83] *God Save the Court*, *supra* note 17, at 6.

[84] Frank G. Carpenter, *Our High Court: Gossip about Hornblower, Shiras, and Others*, L.A. TIMES, Oct. 8, 1893, at 9.

[85] *Street-Car Snap Shots*, WASH. POST, Feb. 5, 1899, at 14.

[86] *Justice Edward D. White Married*, N.Y. TIMES, Nov. 6, 1894, at 1.

[87] *The United States Supreme Court*, BALT. SUN, Oct. 11, 1892, at 1.

[88] *Personal*, N.Y. TRIB., Nov. 18, 1890, at 6.

article, "Highe$t Honor Within the Reach of the American Lawyer."[89]

Newspaper coverage of that time also extended even more deeply into critical personal descriptors, including, for example, that Chief Justice Morrison Waite was "a stubbed, short man," with "uneasy eyes" and a woman's mouth.[90] He also had an "invalid wife" and a "somewhat strong-minded daughter."[91] The same paper also reported that two named Justices, "often [took] quiet dozes under the soporific effect of some fledgling lawyer's arguments."[92] Another paper suggested that a Justice had been "incurably ill," "ha[d] passed into a state of senile disability," and should have retired several years earlier.[93]

Coverage of the Justices of the day also extended into what was likely seen as embarrassing and private matters. Justice Gray, for example, had become engaged while sitting on the Court and, the *Philadelphia Inquirer*, in its reporting on the romance reported that the Justice had a fondness for pretty girls, sweetmeats, and bonbons, and that he had earlier meant to install "a charming young mistress" in his rooming house, a woman once connected in a presumably illicit way with President Grover Cleveland.[94] Another rumor, said to be a "toothsome scandal" regarding the Court, was that an unnamed Justice had "lost a large sum at faro in a public place at a common green table, [gambling his savings] among common gamblers."[95] The Justice had apparently tried to gamble inconspicuously, likely because, it was reported, he had lost thousands, including cash that he had repeatedly received from the establishment's banker after writing multiple checks.[96] Another story reported on the conversation between Justice Harlan and the Governor of Kansas while the two sat onboard a streetcar, seemingly oblivious that they were being monitored.[97]

---

[89] *The Supreme Bench*, TRENTON EVENING TIMES, May 22, 1895, at 6.

[90] *Life in Washington*, CHI. DAILY TRIB., Dec. 12, 1879, at 9.

[91] *Id.*

[92] *Id.*

[93] *United States Supreme Court*, ST. ALBANS DAILY MESSENGER, Mar. 17, 1881, at 2.

[94] *Justice Gray's Engagement*, *supra* note 47, at 4.

[95] *A Mysterious Scandal*, PLAIN DEALER (Cleveland), Dec. 20, 1882, at 4.

[96] *Id.*

[97] *Gossip from the Capital*, OMAHA WORLD HERALD, Dec. 31, 1899, at 3 (noting that the Justice was overheard remarking, "I only want to live long enough to see the United States of South Africa established").

And all Justices were implicated in a news story that reported that they had "a black bottle" in the Court's consultation room that they would share by passing it around, "a sideboard filled with the finest liquors," and a bartender on staff at the Court ready to take their drink orders.[98] Such reporting of embarrassing, private matters extended to family members of the Justices. The wife of an unnamed Justice, for example, was said to enjoy "libations to Bacchus" too much and that her presumed drunkenness had led "her to behave in rather a remarkable manner."[99] In one such instance, "[a]fter she had promenaded around and made sundry excursions into the supper room," one newspaper reported, "her gait became very unsteady, and in a vain effort to recover her equilibrium she at last sank contentedly into the arms of one of our stalwart army officers."[100] She had, the journalist wrote with humorous distain, "as the boys say, 'a roaring good time' when she goes to entertainments."[101]

Other close family members of the Justices suffered similar press attention. A daughter of Chief Justice Fuller was said to have initially run away to be married but thereafter had filed for divorce after the "chagrin and sorrow" of recognizing her husband's "flagrant excesses" and "liquor habit."[102] The married granddaughter of Chief Justice Chase was apparently involved in an illicit romance with a married man; newspaper coverage of the affair, apparently the talk of Washington, had called him her "Adonis lover."[103] A second newspaper had suggested that the affair had provoked the unfavorable comments of many in society "and [of] newspaper correspondents in particular."[104]

This increase in what might be considered scandalous coverage of the Justices can be seen anecdotally in a search of newspaper articles available on historical newspaper databases. A search for "United States Supreme Court" and the word "scandal" or "gossip" or "rumor" produced only eight articles from the late 1700s through the 1830s. By the 1840s and 1850s, that number had

---

[98] *Exploding a Scandal*, KAN. CITY TIMES, Dec. 30, 1885, at 4.
[99] *A Supreme Court Scandal*, KAN. CITY STAR, Jan. 22, 1887, at 2.
[100] *Id.*
[101] *Id.*
[102] *Mrs. Aubrey Sues for Divorce*, N.Y. TIMES, Mar. 12, 1895, at 9.
[103] *The Moral of the Sprague-Conkling Affair*, CHI. DAILY TRIB., Aug. 22, 1879, at 4.
[104] Editorial, CHI. DAILY TRIB., Aug. 16, 1879, at 4.

increased to more than 550. And in the 1890s, the decade before Justice Brown gave his talk that was critical of the press, approximately 2,500 articles mentioned the Court and scandal or gossip or rumor basically in the same report.[105]

It is, perhaps, not all that much of a coincidence that a *Washington Post* gossip column published in 1889 included both a report on Chief Justice Fuller's trip to a Pennsylvania resort to care for a sick daughter—note the potentially invasive information regarding both personal travel and a family member's health[106]—and the rumor that former Secretary of State Bayard's second wedding would be a quiet affair "as the family . . . [is] seriously opposed to all publicity in the matter, and have made strenuous efforts to keep all mention of the engagement out of print."[107] Secretary Bayard was the father-in-law of Samuel Warren, the principal author of *The Right to Privacy*, a law review article that would be published just one year later that promoted the right to be let alone from newspaper enterprise.[108] It was clearly a time when the privileged craved privacy because the press had become far more interested in political and judicial personalities than it had been in the early days.

III. THE TROUBLE WITH JUSTICE FIELD

When considering complaints of press excesses involving the Court, it is important to consider as well the legacy of Justice Stephen Field. He was one of the longest serving Justices and was also one of the most newsworthy.

Justice Field attracted media attention for a variety of reasons. First, he had lived an exciting life before, during, and after his years on the bench. A man he had earlier held in contempt of court, for example, had attempted to kill him, thwarted only by United States Marshals who had shot the man dead.[109] Justice Field was said to have been "a fighter from the beginning" and was

---

[105] *See supra* note 43.

[106] *Away for the Summer*, WASH. POST, Aug. 11, 1889, at 5 ("Both the Justice and his attractive wife, with their daughter Mary, who recently returned from abroad in ill health, are at present trying the benefits of the waters at Cresson Springs, Pa. . . .").

[107] *Id.*

[108] Warren & Brandeis, *supra* note 8.

[109] *The Killing of Terry*, N.Y. TIMES, Aug. 16, 1889, at 4.

so worried about threats upon his life, that he had practiced shooting through his clothing while serving as a judge in California just in case of an assassination attempt.[110]

Second, he had had a very public falling out and long running feud with President Grover Cleveland.[111] "For years," newspapers reported, "these two distinguished personages did not speak as they passed by."[112]

But third and most important, Justice Field had apparently spoken a little too openly to members of the press corps and had freely shared some sensational—and many would say importantly secret—information with them. In an article published by the *New York Times* in 1877 that began pointedly with the illuminating sentence, "Justice Field has been talking again," the venerable paper thanked the Justice for the information he had shared.[113] "[U]ntil lately," the *Times* reporter wrote, "we had supposed that the Judges were themselves free of a tendency to blab. We evidently overlooked Mr. Justice Field."[114]

Among other things, the "loose tongue[d]" Justice Field had apparently revealed precisely what had happened in the Supreme Court's consultation room during discussion of a case involving a Florida election.[115] He had revealed other Justices' impressions of the matter and had explained that a Justice had changed his mind after hearing from others, information that apparently ran parallel to what had also been reported by another paper.[116] "He likes to talk," the *Times* noted, "and when the fountains of speech are unlocked by the generous influences of a good dinner he is as fluent as a river."[117]

In the end, the reporter lauded the Justice for opening a door that, to his knowledge at least, "no vulgar reporter, no tattling raconteur" had ever before entered.[118] "We are indebted to Mr.

---

[110] *Supreme Justice Field*, L.A. TIMES, Sept. 26, 1897, at 13.

[111] *Justice Field Relents*, BALT. SUN, Dec. 16, 1895, at 2 ("Mr. Cleveland . . . offended Justice Field because he did not concede to the jurist as much control in the dispensation of the federal patronage in California as the latter thought he was entitled to.").

[112] *Id.*

[113] *A Garrulous Judge*, N.Y. TIMES, Aug. 29, 1877, at 4.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

Justice Field," the *Times* article read, "for an entertaining account of what was said in the consultation-room . . . concerning the decision to be given on the Florida election case."[119] As for why Justice Field apparently leaked what he had, it may have been that he felt a certain kinship with reporters; his brother, at least one newspaper reported, worked as a journalist[120] and Justice Field himself had once had political ambitions and, therefore, may have purposefully courted the press.[121]

It is not too much of a stretch, therefore, to imagine that Justice Field could well have been the weak link at the Court—the Justice who had revealed much to the media about the railroad case, the tax case, and a handful of other cases. Justice Field served from 1863–1897, a time when many of the leaks outlined above occurred.

Moreover, in an 1895 story that focused in part on leaks at the Court, a reporter for the *New York Tribune* wrote that the Justices were physically and mentally large, but that no single one of them was infallible and that it would have been possible for a clever individual to "talk out" of a Justice certain information.[122] Once key information had been obtained from a Justice, the reporter explained, an individual could easily guess the extreme of an issue.[123] The next sentence of the article reads, "Justice Field is extremely feeble," perhaps the reporter's subtle hint at his source of Court leaks.[124]

---

[119] *Id.*

[120] *The Supreme Bench*, *supra* note 89, at 6.

[121] *See id.* (noting that Justice Field had previously served on the California legislature); William G. Ross, *Legal Scholarship Highlight: Presidential Ambitions of Supreme Court Justices*, SCOTUSBLOG (Apr. 9, 2012, 12:39 PM), http://www.scotusblog.com/2013/04/legal-scholarship-highlight-presidential-ambitions-of-supreme-court-justices/ ("Justice[ ] Stephen Field . . . [was a] perennial candidate[ ] during the late nineteenth century.").

[122] *Capital Personalities: A Glimpse at the Members of the Supreme Court*, N.Y. TRIB., May 6, 1895, at 4.

[123] *Id.*

[124] *Id.*

IV. JUSTICE BROWN'S PRIVACY CONCERNS: HEALTH, HOME, AND HARLAN

In 1900, when Justice Brown spoke before the New York Bar Association and condemned the press for its sensationalism,[125] he had served on the nation's highest bench for ten years. He was also losing his eyesight, his wife was quite ill, he and his wife were apparently unable to have children, and he had once killed an intruder. In other words, unlike Justice Field, Justice Brown had good reason to try to keep reporters out of his life. And yet, each of these bits of information had been reported, sometimes repeatedly, by the media.

Three years before Brown's speech, for example, the *Baltimore Sun* reported that Justice Brown's eyesight was in peril.[126] His doctor, the article stated, had told him to leave the Court for a year to try to stave off blindness, but the Justice refused.[127]

At the same time, Caroline Pitts Brown, Justice Brown's wife, had become ill with an undisclosed medical condition. It is not clear when Mrs. Brown became an "invalid"—the term several newspapers used to describe her. When Justice Brown arrived in Washington to take his seat on the Court, things appeared at least somewhat positive; multiple society columns reported on parties the Justice and his wife had attended.[128] In 1892, too, Mrs. Brown had told a reporter who covered the Court that she wished to have her own home in Washington, that there were plans for one, that she did not concern herself with what others thought of her tastes, and that while moving to Washington was a "wrench," she generally liked the city and its people.[129] But the following year, tragedy struck at the couple's partially completed house when Justice Brown was seriously injured by flying glass during a storm; Mrs. Brown was said to have made only partly successful efforts to stop the bleeding and Justice Brown nearly died.[130] One

---

[125] *See generally Scores Yellow Press*, *supra* note 1.

[126] *Justice Brown's Eyesight Impaired*, BALT. SUN, Dec. 17, 1897, at 2.

[127] *Id.*

[128] *See, e.g.*, *Social Incidents in Washington*, N.Y. TRIB., Jan. 22, 1891, at 7 (describing a luncheon held in honor of Mrs. Brown); *Mid Roses and Palms*, WASH. POST, Feb. 17, 1892, at 5 (reporting on the dinner at the White House attended by Mrs. Brown).

[129] Frank G. Carpenter, *Washington Homes*, ATLANTA CONST., Apr. 16, 1892, at 9.

[130] *Justice Brown Injured*, WASH. POST, Oct. 14, 1893, at 1.

year later, the *Washington Post* described her as "somewhat of an invalid"[131] and a later article suggested that by 1898, the new house had been "closed to society for the greater part of the season,"[132] presumably because of Mrs. Brown's mysterious illness.

Newspapers of the day also seemed somewhat preoccupied with the couple's apparent childlessness. The *Washington Post* wrote, for example, that "all of the Justices have families," but later clarified that Justice and Mrs. Brown were childless.[133] A later article from a New Orleans newspaper about the Justices and their children put it a bit more harshly: "Justice and Mrs. Brown have no family."[134] Finally, just one year before Justice Brown would speak against the media before the New York Bar Association, the *Washington Post* reported in an article titled "Wives of the Justices of the Supreme Court," that "it is a great disappointment to [Mrs. Brown] that she has no children."[135] The article later reminded the reader that "ill health has prevented [Mrs. Brown] from an attendance upon her social duties."[136]

Justice Brown's confrontation with an intruder, and how he killed the intruder with a gun kept under his pillow apparently for just such a purpose, similarly captivated the press. After his appointment to the Court in 1890, there was a quick mention of the killing in the *Washington Post*.[137] Three years later, a *Los Angeles Times* article about the Justices' lives reported that Justice Brown had awakened to the robber, who told the Justice that he wanted the Justice's watch.[138] Justice Brown then reportedly agreed, put his hand under his pillow, grabbed his gun, and promptly shot the man.[139] The reporter suggested, however, that the story as reported may not have been precisely correct because, admittedly, he had not spoken with the Justice about it

---

[131] Augusta Prescott, *Our Modern Daniels*, WASH. POST, May 6, 1894, at 12.

[132] *Social and Personal: Receptions at Homes of Supreme Court Justices*, WASH. POST, Jan. 4, 1898, at 8.

[133] Prescott, *supra* note 131, at 12.

[134] *Justice White's Wedding: And Other Supreme Court Matrimonial Gossip*, DAILY PICAYUNE (New Orleans), Mar. 27, 1894, at 2.

[135] *Wives of the Justices of the Supreme Court*, WASH. POST, Mar. 5, 1899, at 17.

[136] *Id.*

[137] *Capitol Chat*, WASH. POST, Dec. 27, 1890, at 4.

[138] Carpenter, *supra* note 84, at 9.

[139] *Id.*

directly.[140] Curiously, a third article that mentioned the killing suggested that the Browns' baby was in the house at the time of the robbery.[141] Perhaps the baby later died or perhaps the reporter was incorrect. Either way, it seems potentially an emotionally harmful mention.

There was other, more lighthearted coverage. One reporter assigned the task of reporting on the personal lives of the Justices had included information about the Browns' new home in Washington, suggesting that Justice Brown was not beyond fads, and then humorously adding that "the fireplace is Justice Brown's fad."[142] Another article reported somewhat mockingly on the Justice's daily trek from the Capitol to his home; he walked.[143]

But the coverage that could well have pushed Justice Brown over the edge highlighted quips he made during a Yale reunion dinner.[144] The Justice, perhaps oblivious to media or media sources in the room, had initially joked that all the Justices who had graduated from Yale had been put on the Court to look after each other.[145] He then joked about his wife, in a year in which she was described as an invalid by newspapers: "I feel like the man who was told at his wife's funeral that he would have to ride to the graveyard with his mother-in-law. He . . . would do it if he had to, but it would destroy all the pleasure of the occasion."[146] That coverage was in the *Washington Post*, where Mrs. Brown would presumably have had access to it.

Finally, when Justice Brown complained in his speech before the New York Bar Association about drawings in the newspapers of the Justices,[147] his complaints could well have been personal. There are tens of drawings of the Justice in the newspapers of the day, most of them unflattering and bordering on cartoonish. One

---

[140] *Id.*

[141] Frank G. Carpenter, *Game Men These: Gossip About Famous Public Characters*, L.A. TIMES, Mar. 6, 1898, at 15.

[142] *The Supreme Court: Men Who Sit on Its Bench*, N.Y. TRIB., Jan. 26, 1896, at 15.

[143] *President at His Play*, CHI. DAILY TRIB., Jan. 18, 1897, at 7 ("Members of the United States Supreme Court . . . are noted at Washington for their pedestrianism, and after court adjourns . . . can be seen taking a constitutional on Pennsylvania avenue.").

[144] *Sons of Yale Dine*, WASH. POST, Jan. 17, 1894, at 2.

[145] *Id.*

[146] *Id.*

[147] *Scores Yellow Press*, *supra* note 1, at 3 ("The Next step in [the press's] downward career was the illustrations, and such illustrations!").

shows him with what look to be scouring eyes,[148] another with a very broad face,[149] and a third with a very small mouth.[150]

When Justice Brown, then, complained about newspaper sensationalism, he did so from personal experience. Through his ascension to the bench, he had opened his personal life and his wife's personal life to coverage, he had served on a Court that had fought leaks of its decisions to media that freely reported on those leaks, and he had likely been embarrassed by coverage and drawings of himself and of his fellow Justices.

Within five years of his speech, Mrs. Brown would die on a trip in Italy while accompanied by Justice Brown and Mrs. Brown's cousin,[151] a woman Justice Brown would marry three years later.[152] In 1900, Justice Brown's home would again be robbed by an intruder.[153] We know these things, of course, because newspapers covered each of those events in some detail.

V. FROM JUSTICE BROWN TO JUSTICE SOTOMAYOR: THE LASTING EFFECTS OF EARLY COVERAGE

Justice Brown may have ultimately had his way regarding media coverage of the Supreme Court, at least partially. At the dawn of the twentieth century—the time of Justice Brown's speech—journalism was again shifting: it had moved from political to sensational and, this time, was becoming more professional. Today, Supreme Court Justices benefit from a press corps that has a sense of ethics, one that prevents its reporters from reporting some of the more intrusive details regarding the Justices' and their families' personal lives. During a panel discussion at the

---

[148] *Our Modern Daniels*, *supra* note 131, at 12.

[149] Carpenter, *supra* note 141, at 15.

[150] *The Supreme Court*, *supra* note 142, at 15. What could have been the media's most impactful coverage of Justice Brown, however, was surprisingly non-existent. Justice Brown was the author of *Plessy v. Ferguson*—the now-infamous separate-but-equal case—but, unlike strong criticism of the *Dred Scott* decision in its day, there is little criticism of *Plessy* to be found in mainstream newspaper databases.

[151] *Justice Brown's Wife Dead: Had Been an Invalid for Some Years and the End Came in Italy*, WASH. POST, July 12, 1901, at 3.

[152] *Justice Brown Weds*, CHI. DAILY TRIB., June 26, 1904, at 1 ("Justice Henry B. Brown, one of the oldest members on the bench . . . figured in a romance today, when he and Mrs. Josephine Bunting Tyler . . . were married . . . .").

[153] *Rob Justice Brown's Home*, WASH. POST, Dec. 20, 1900, at 2.

November 2013 *Georgia Law Review* symposium at which this paper was originally presented, for example, David Savage, reporter for the *Los Angeles Times* who covers the Court, suggested that he and his colleagues would have no interest in reporting on the Justices' personal lives and, even more certainly, no interest in their family members' personal lives.[154] He strongly criticized much of the 1800s coverage of the Justices and their families that, in his opinion, delved too deeply.[155] Thus, ethical considerations among the modern Supreme Court press corps—internal and external ethical constraints—have created more boundaries in coverage than existed in Justice Brown's day.

Today, to be sure, journalists assigned to cover the Court are able to take notes regarding oral argument[156] and can sketch images of the Justices as they interact with attorneys,[157] but there remain significant restraints on certain Court coverage. No cameras are allowed inside the courtroom, and the Court only releases limited and after-the-fact audio of oral arguments. Further, though the Supreme Court press corps may have friendly business-inspired relationships with the Justices, it would be shocking to learn that a Justice had leaked information to the press, as Justice Field likely had. Moreover, as David Savage's discussion of ethical considerations suggests, the tone of coverage of the Court in modern mainstream media is mainly deferential.[158] Thus, the current Justices rarely open a mainstream newspaper and read the decidedly irksome or privacy-invading coverage that Justice Brown faced when he served on the Court.

And yet, despite these protections and apparent boundaries, there remains a significant level of media distrust at the Court. While it would surely be unusual for a Justice today to take such an overtly strident and single-minded public stand against newspaper coverage as did Justice Brown, there is little open embrace of media by the Justices today and similar criticisms.

---

[154] David Savage, Supreme Court Reporter, *L.A. Times*, Address at the Georgia Law Review Symposium: Lunch & Learn (Nov. 6, 2013).

[155] *Id.*

[156] Tony Mauro, *Supreme Court Erases Proscription Against Note-Taking by Spectators*, N.J. L.J., May 5, 2003, at 30.

[157] Art Lien, *A Sketch Artist's Day at the Court*, SCOTUSBLOG (June 5, 2013, 3:30 PM), http://www.scotusblog.com/2013/06/a-sketch-artists-day-at-the-court/.

[158] Savage, *supra* note 154.

One recent example is a talk given by Justice Sonia Sotomayor in 2013 at a "Freedom to Write" lecture series, one somewhat paradoxically described, given her comments there, as being devoted to freedom of expression and First Amendment rights to "protect those who risk their lives . . . to defend free speech."[159] She told a New York audience that she had started to "voluntarily and scrupulously censor[ ]" herself after she had joined the nation's highest bench and, in large part, blamed the press.[160] She criticized members of the media for the "sport" and "facile drama" inherent in their Court-related predictions and misguided attempts "to read newsworthy drama into every word of oral argument."[161] She explained that those missteps had led her to question her once pro-camera stance. Such media behavior, she said, "leads even those of us who value transparency over tradition to think carefully about welcoming cameras into the courtroom."[162] Moreover, the Justice had specific concerns about the "televised press" and criticized broadcast media as "chang[ing] the dynamic" of an event.[163]

Such a response is hardly surprising given today's media culture, one that includes both mainstream ethics-abiding journalists—such as David Savage and the journalists he suggests would have little interest in the personal lives of the Justices—and others who post things on the internet with little consideration of ethics. To be a Supreme Court Justice today, then, means to step into the glare of the spotlight in a way that did not exist in Justice Brown's day, with at least the potential that the Justices' lives will be opened to an even greater and arguably more interested readership.

Consider, therefore, the similarities in Justice Brown's and Justice Sotomayor's seeming attempts to gain some control and their complaints regarding their perceived lack of it.[164] Today's

---

[159] Justice Sonia Sotomayor, *The Arthur Miller Freedom to Write Lecture*, PEN AMERICA (May 7, 2013), http://pen.org/audio/Sonia-sotomayor-arthur-miller-freedom-write-lecture.

[160] *Id.* at 11:08.

[161] *Id.* at 7:55.

[162] *Id.* at 8:04.

[163] *Id.* at 20:11.

[164] *See generally supra* note 159 and accompanying text. *See also Scores Yellow Press*, *supra* note 1, at 3 ("[W]e are confronted by the fact that in tis free country there has grown up a despotic, irresponsible power, which holds our reputations at its mercy.").

prohibition on cameras in the Supreme Court courtroom is akin to early rules that disallowed notetaking and drawing. Consider too Justice Sotomayor's complaints about broadcast journalism and her realization regarding celebrity, and Justice Brown's complaints about drawings of events in the newspaper. Both seemed to crave greater anonymity and seemed to suggest that they deserved it, despite their places on the nation's highest court. Both also seemed to blame the media for their increasing celebrity. Finally, both seemed to have a growing awareness of perceived and potential media missteps as their tenure on the Court grew.

Justice Sotomayor may not have been as overtly critical of the media as was Justice Brown, but her complaints show that more than 100 years later, the same concerns about media coverage exist at the Court. Any calls for privacy from Justices, therefore, are not so new; they parallel complaints springing from the strained relationship that the Court has had with the media for much of the Court's history, sparked by an increasing interest in the Court, its Justices, and the scandalous coverage that arose during a time of press sensationalism.

VI. CONCLUSION

There is a rich apprehension-of-media tradition in the United States Supreme Court, built upon some news coverage that many would consider necessary and newsworthy, and some news coverage that many would consider sensational and scandalous.

Even though much of the latter occurred in the early days of the Court, the Justices remain skeptical of media, worrying and warning even in their written opinions that if courts did not take proper evidentiary care, they would become media partners in generating material that would "promote public scandal" through the publication of personal and private information.[165]

Scandal and sensationalism, then, are ideas that are abhorrent to the Justices for a multitude of reasons, many of which seemingly stem from the news coverage that Justice Brown had complained about a century before, and some of which occurred as early as the very beginning of the Court itself. Moreover, scandal

---

[165] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978).

and sensationalism have been very personal issues for some Justices, especially those who found themselves described in print or otherwise in a way they found mocking, harmful, or invasive. Such coverage was especially pronounced during Justice Brown's time, a time in which journalists failed to abide by ethical considerations and a time in which many seemingly delighted in a Justice's or a Justice's family member's downfall.

It could, of course, be argued that we are, again, in just such a time—one in which anyone can instantaneously publish anything to the entire world without an ethical concern. That fact, along with such a prickly history between the Justices and the journalists who cover them, suggest that a greater openness at the Court is unlikely anytime soon.