

REPORTING COMPLEX LEGAL ISSUES: AN EXAMINATION OF THE REPORTAGE ON
CITIZENS UNITED AND ACA

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by

SCOTT SNIPKIE

Dr. Charles Davis, Thesis Supervisor

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The undersigned, appointed by the dean of the Graduate School, have examined the thesis entitled

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CITIZENS UNITED AND ACA

presented by Scott Snipkie,
a candidate for the degree of master of journalism,
and hereby certify that, in their opinion, it is worthy of acceptance.

Dr. Charles Davis

Dr. Earnest Perry

Dr. Ryan Thomas

Professor Christina Wells

DEDICATION

So many people have helped me along so much with this project from professors to peers and family to friends. Luckily, for many of you, the school includes a mandatory acknowledgements page for that sort of thanks. So if you are looking for your names, flip the page, you will find them there. There is only one person to whom I can dedicate this work, and even though I love my mother very much, it is not she.

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ABSTRACT

This study looked at the reportage of *Citizens United v. Federal Election Commission* and *National Federation of Independent Business v. Sebelius* from the *New York Times*, the *USA Today* and *The Washington Post*. Through the analysis of the sample, more than 80 articles in total, the researcher found that each of the news outlets from the sample provided adequate coverage of the decisions and the prior litigation leading to those decisions. The study concluded that research into accuracy with respect to this sort of reportage should look at the accuracy of the sample cumulatively, and also with consideration for the difficult and confusing nature of Supreme Court jurisprudence.

This paper also found conflict to be a major theme of the coverage of at least *Sebelius* and recommended that future research investigate the ways in which court decisions are used tangentially in reference to other cases. This study also recommended that future researchers expand their analysis with a third case or fourth news outlet.

Chapter 1

Introduction

The media comprise a functioning arm of the government meant to police the government on behalf of the governed and drive the government to function correctly and fairly. Reportage on the executive branch is vast and extensive. Indeed, it was the reportage on the executive branch that chased Richard Nixon from the White House in shame. Reportage on the legislature is equally extensive. As it were, this is good; it is important. A review of the literature shows that journalists may cover the third branch, the judiciary, too little, and that when they do, may do so inaccurately.

The standards by which scholars judge accuracy, until recently, only applied to quantitative studies. Scholars created lists that contained factors, and when a journalist mention something that falls into a category on that list of factors researchers tick it off. At the end of the article, scholars sum up the tick marks and decide whether the article was “accurate” given the factors. These factors and their analysis do little to effectively critique the overall narrative or the cumulative nature of the coverage in general. Coverage of a major court case is rarely one singular article, and as such, analysis of individual articles can say little about the coverage in general.

Citizens need a complete representation of their government so that they might have a complete understanding of it. In that sense, that means that reporters

need to provide both accurate and extensive reportage on the judiciary. The legislature creates the laws, and the executive enforces the laws, but the judiciary interprets the laws. A complete government makes, enforces and provides an explanation of what the law is. Without extensive and accurate reporting on what the law is, citizens can never be sure of the legality of their conduct. A part of saying what the law is also entails creating rules for the branches of government. Without accurate and extensive reportage on the judiciary, citizens can never be sure of the legality of the conduct of their government. Incomplete coverage of the judiciary is therefore incomplete service to the governed.

This study examines the reportage around two Supreme Court cases:

National Federation of Independent Business v. Sebelius and *Citizens United v. Federal Election Commission*.

In the course of this examination, the study considered the factual accuracy of the reportage around the Supreme Court cases in light of the interpretation of the decisions, as well as the accuracy of the reportage on the legal issues, if any. Focusing on the shortfalls in the coverage, if any, the examination hoped to identify any themes therein, and critically analyze the themes in the coverage shortfall from both a factual and legal perspective.

In recent years, reportage on legal issues in both print and broadcast created significant anecdotal evidence of a possible shortfall in the industry. Discussions about misstatements of the law or exaggerations of holdings in their own right prompted this study. As recently as the early summer 2012, Fox News and CNN each misstated the Supreme Court ruling in *National Federation of Independent*

Business v. Sebelius by communicating to their viewers that the Court had struck down major portions of the high-profile Patient Protection and Affordable Care Act (ACA) and the Health Care and Education Reconciliation Act (HCERA). The misstatements went beyond simple confusion or convolution, rather the reportage incorrectly identified the holding by communicating a ruling in exact contravention to the actual outcome. Journalists reported that the Supreme Court struck down the ACA as an overreach of Congress' Commerce Clause powers when in fact the act had been specifically upheld on the grounds that it constituted a tax meaning the legislation thus fell under Congress' taxation powers.

A review of the literature seems to reveal that for nearly as long as courts have published decisions, reporters have misstated holdings or outcomes. In that sense, Fox News' and CNN's mistakes were common in the realm of legal reportage. According to the literature, reporters make mistakes of omission, transcription and misinterpretation regularly with respect to coverage of legal issues, and in some cases they fail to cover them at all.¹

Scholars determined that newsmagazine coverage of cases roughly delivers the most complete coverage of individual cases, but covers only a very limited scope of the cases decided.² Newspapers give coverage to a larger number of cases, but

¹ D Ericson, "Newspaper coverage of the Supreme Court: A case study," *Journalism Quarterly*, 54, no. 3(1977): 605-607, S Maier, "Getting it right? Not in 59 per cent of stories," *Newspaper Research*, 23, no. 1 (2002): 10-24, H Marshall, "Newspaper accuracy in Tucson," *Journalism Quarterly*, 54, no. 1 (1977): 165-168, P Meyer, "A workable measure of auditing accuracy in newspapers," *Newspaper research Journal*, 10, no. 1 (1988): 39-51, J O'Callaghan, and J Dukes, "Media coverage of the Supreme Court's caseload," *Journalism Quarterly*, 69, no. 1 (1992): 195-203, M Solomine, "Newsmagazine coverage of the Supreme Court's caseload," *Journalism Quarterly*, 57, no. 4 (1980): 661-663, D Tarpley, "American newsmagazine coverage of the Supreme Court, 1979-1981," *Journalism Quarterly*, 61, no. 4 (1984): 801-826.

² See note 1

the completeness of the coverage is lacking by comparison. Finally, in terms of realistic presentation of the docket or the totality of cases in general, neither outlet does a very comprehensive job, instead focusing on civil rights cases and those cases most directly related to media in their own right (First Amendment cases, libel, etc.).³ This is all to say that only the most diversified of media consumers are likely to have a relatively complete understanding of legal news in the country, though even then the knowledge of that consumer may be skewed.

All of the above noted, there are flaws with the quantitative measurement of accuracy. As noted above and discussed at length below, scholars refined a measure of accuracy until it comprised a number of factors that seemingly entail the essential criteria for accuracy. While the factors are not incorrect, they are incomplete. In being incomplete, the factors fail to provide a fair depiction of the coverage with respect to accuracy. Furthermore, the process of quantitative analysis possesses a weakness with respect to the analysis of accuracy.

Quantitative analysis measures the presence or absence of the information deemed by the creators of the list of factors. From that measurement, researchers determine whether or not the article is accurate. What the measurement fails to take into account, beyond the incomplete nature of the list, is the cumulative nature of the narratives themselves. The quantitative analysis looks at each article individually, or as a set of independent trials, and seeks to make a statement about the overall accuracy of a narrative. In this sense, it seems that quantitative analysis is incompetent to make those judgments.

³ See note 1

Regardless of the method of analysis, accurate coverage of courts and legal issues is incredibly important, and, in that sense, analyzing it is important. Perhaps understated, the legal system is at least one third of American Democracy. If the oft stated maxim, paraphrased here, that good democracy needs good reporting is to hold true, then surely failing to cover a full third of that democracy is a failing.

Accurate coverage of courts and legal issues is important for other reasons as well. Citizens in the United States are presumed to have notice of any law published in the public record. Whether this principal is impractical or not, journalists ought, and to the degree they do not already are delinquent in their duty to, play a part in keeping people on notice of those laws for the benefit of their readership.

Furthermore, the legal system in the United States is, for the most part, transparent or at least operates with that intention. Transparency within the legal system exists to maintain its legitimacy. Democracy can not exist without the perception of legitimacy of government. This is not to say that the media have a job in establishing the legitimacy of government. This is to say though that the media have a job in presenting the citizenry with information sufficient to adjudge for themselves that legitimacy or lack thereof so that they can react accordingly. This is an ancillary function of the good democracy ideal.

Investigations into the accuracy of reportage on legal issue are helpful in that the investigations can provide useful information about the problems that plague the reportage and insight into measures that can correct the failings. The end goal of any investigation of journalism being better reporting, an ongoing critique of the job done is necessary.

In brief, the following thesis will discuss the literature around accuracy describing the factors and measures used to determine it as well as the historical findings with respect to different media outlets and accuracy. The thesis then discusses the facts, issues and holdings of the cases noted above. Finally, the methods section deals with data selection and collection along with methods for interpretation and consideration followed by findings.

Important to note is that during this research, the researcher found the most current factors comprising accuracy to be insufficient, at least as to the quantitative analysis of the greater narrative. As such, the researcher amended the factors to include others described above. In general, accuracy is poorly defined, and there appears to be something of a cumulative or contextual nature inherent in it not yet addressed in any scholarship. Readers of the news tend to be repeat players rather than one-time consumers, and there is evidence from the construction of the narratives in the samples below that reporters seem to write with that in mind.

Literature Review

The concept of accuracy has been defined and used in previous studies related to both news media in general, and, specifically, some of those studies related to the coverage of issues of the courts, or, in this case, the Supreme Court specifically.

Accuracy – In General

A review of the literature about accuracy as a concept generally is somewhat fruitless. An examination of key conceptual terms within academic search engines, specifically “Academic Search Complete” revealed very little discussion or treatment of the concept of accuracy in the social sciences. The main areas of scholarship that tend to use accuracy as a measure are in studies about image reproduction or use, specifically medical imaging, or manufacturing.

In the *European Journal of Cardio-Thoracic Surgery*, scholars evaluated the accuracy of PET/CT scans in locating or identifying certain cancers in specific patients. The article dealt specifically with the accuracy of specific scans, though the authors spent little time on the explication of the concept of accuracy.⁴

That an article in the physical sciences might not take time to explicate accuracy is not necessarily uncommon. In this sense, as noted, the authors discussed the accuracy of a piece of machinery finding something, in this case, a cancerous growth in a human body.⁵ Explication might be so obvious as not to need it. One might assume safely that the accuracy of the process or the machinery is determined by the number of times that it located the desired matter over the number of total trials. Here, accuracy is a bare statistic or percentage similar to a

⁴ A Billè, L Okiror, A Skanjeti, L Errico, V Arena, D Penna, and E Pelosi, "Evaluation of integrated positron emission tomography and computed tomography accuracy in detecting lymph node metastasis in patients with adenocarcinoma vs. squamous cell carcinoma," *European Journal of Cardio-Thoracic Surgery*, 43, no. 3 (2013): 574-579.

⁵ See note 4

batting average in baseball, though even simpler to understand than baseball for the uninitiated.

An article in Rapid Prototyping Journal discusses accuracy in the sense of refining a process for 3d printing. Here, the authors discuss refinements to the stereolithographic process respective to refinements made on the UV laser scanning head. In this article, the concept of accuracy seems to refer to an assessment made respective to the original. Here, the authors promise an increase in accuracy, in reproduction, based on the adjustment made to the technology and processes.⁶

Again, this article is another example of the use of accuracy as a concept within the physical sciences. Here again, the concept of accuracy is somewhat self-explanatory in that it is process driven. Where a concept is process driven, accuracy is the resultant outcome of the process. In this case, the process is recreation of an object. Accuracy is a quantitative measure of how well the process replicates the original. As noted above, there are few examples of accuracy in the more abstract, qualitative sense outside of journalism.

A final, and interesting example of accuracy outside of the realm of journalism is that of accuracy in sports. David Hancock and Diane Ste-Marie examined the accuracy of decision-making among higher and lower level ice hockey referees in relationship to their gaze behaviors, which refers generally to the way they look at or watch the game.⁷ They found that, not surprisingly, high-level

⁶ C Yi, L Dichen, and W Jing, "Using variable beam spot scanning to improve the efficiency of stereolithography process," Rapid Prototyping Journal, 19, no. 2 (2013): 100-110.

⁷ D.J. Hancock, and D.M. Ste-Marie, "Gaze behaviors and decision making accuracy of higher- and lower-level ice hockey referees," Psychology of Sport & Exercise, 14, no. 1 (2013): 66-71.

hockey referees tend to be more accurate than their lower-level colleagues, though this is independent from their gaze behaviors.⁸

This is, again, another example of accuracy as a concept explicated as a quantity of times something is done set against the whole. In this case, the specific measure is the number of times a foul is called correctly in hockey. This bears some consideration when noting that even below, accuracy appears as a somewhat quantitative concept. There is very little discussion of accuracy as an overall impression or idea. This is fair, though accuracy need not necessarily be a number of occurrences out of a total number of trials either.

Accuracy - Journalism

Marshall's study deals almost exclusively with specific factual inaccuracies, but in this case, factual inaccuracy only seems to matter as one component of overall inaccuracy.⁹ Here, or at least in this case, the expectation is that reporters will get the facts of major cases correct. In support of this Blevins and Barclay noted very little factual inaccuracy was detected and that inaccuracy detected was attributable mainly to transcription failures.¹⁰

Furthermore, the possibility of factual inaccuracy, while possible, is less likely considering the limited facts that court decisions present and their prominent,

⁸ See note 7

⁹ H Marshall, "Newspaper accuracy in Tucson," *Journalism Quarterly*, 54, no. 1 (1977): 165-168.

¹⁰ K Blevins, and C.A. Barclay, "A discourse analysis of Supreme Court case coverage in news magazines and newspapers: *Morse v. Frederick* as a case study." (unpublished manuscript, 2010).

obvious placement. That is to say that, while the facts may not be entirely accurate when taken in comparison to earlier reportage done on cases at their inception (i.e. a murder case in which the reporter is on scene and interacting with police officers and following the investigation), when considered in the context of the decisions themselves, the facts are brief and plain and hence omission thereof would seem both unlikely and egregious.

Some studies have identified factors related to higher accuracy in reporting on court decisions. For instance, Marshall fact-checked daily local news stories, and researchers sent questionnaires to the actual newsmakers in the story.¹¹ "Accuracy for this study is defined as a situation in which the respondent news source makes no statement to the effect that the story is in some part inaccurate."¹²

Marshall denoted two types of error, subjective and objective, most notably omissions were adjudged to be subjective while misquotations were classified as objective.¹³ Interestingly, Marshall noted that omission of facts accounted for the highest percentage of errors according to the newsmakers questioned.¹⁴ Marshall's notation made sense considering that news sources would likely be sensitive to an incomplete accounting of their statement.

Use of the press release as the source for the article ranked as the source with the greatest level of accuracy, while personal attendance at an event also related to greater accuracy.¹⁵ Marshall's finding here also followed considering that

¹¹ See note 9

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

his method for validating accuracy was comparison against the news source that would, in this case, either be the press release or the author thereof.¹⁶

While not necessarily addressing issues of measurement with respect to accuracy, Meyer discusses the problems related to accuracy measurement in general.¹⁷ Meyer further addresses the value in considering and studying accuracy with respect to media in general.¹⁸ "Quantifying a problem provides... a way to build improvement into the reward system."¹⁹ Meyer's methodology does not differ starkly with that used by Marshall in determining accuracy, which is to say each still sent questionnaires to newsmakers adjudging the journalists accuracy, just that there are differences in returns based upon the party conducting the research.²⁰ Meyer notes that returns tend to differ as to a paper's measured accuracy depending on whether the survey conducted came from the newspaper editor himself or an academic source noting lower accuracy ratings for academic researchers.²¹

Viewed in conjunction with Marshall's research, which is to say that reporters tend to achieve the greatest overall accuracy when the news source is in the nature of a press release, Meyer's continuation of the use of the methodology of checking accuracy directly against the source seems most applicable with respect to issues of legal reportage based on legal decisions.²² This is to say that considering a

¹⁶ Ibid

¹⁷ P Meyer, "A workable measure of auditing accuracy in newspapers," *Newspaper research Journal*, 10, no. 1 (1988): 39-51.

¹⁸ Ibid

¹⁹ Ibid

²⁰ H Marshall, "Newspaper accuracy in Tucson," *Journalism Quarterly*, 54, no. 1 (1977): 165-168, P Meyer, "A workable measure of auditing accuracy in newspapers," *Newspaper research Journal*, 10, no. 1 (1988): 39-51.

²¹ See note 17

²² See note 20

court decision to be in the form or somewhat similar to a press release, one can safely assert that checking the accuracy of legal reporting against such a source is the most sensible method for an accuracy check. Furthermore, one would assume a high level of accuracy resultant from the use of such a source as it is, in this case, the verbatim commentary from the newsmaker, here, the Court.

Maier's study, some 25 years after the Marshall research, revealed different results.²³ Whereas each study employed a manner of accuracy testing similar to the other, which is to say that each looked for subjective inaccuracies and objective or "factual" inaccuracies as Maier called them, Maier found in his 2002 study that factual inaccuracies far outnumbered any other, accounting for over half of the inaccuracies found.²⁴ Maier still noted a high rate, roughly 25 percent of subjective inaccuracies by omission though, which is in concurrence with Marshall's earlier findings.²⁵

Maier's study differs from previous studies in that he looks at newsmaker perception of error.²⁶ Maier notes, probably intuitively, that newsmakers perceived subjective errors to be far more egregious on the whole than they did objective errors.²⁷ Maier further found a relationship between errors and perceptions of story credibility as adjudged by newsmakers.²⁸

²³ S Maier, "Getting it right? Not in 59 per cent of stories," *Newspaper Research*, 23, no. 1 (2002): 10-24.

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ *Ibid*

Maier's study concentrates mainly on what appears to be accuracy in relation to specific, interactive news sources.²⁹ That is to say that the newsmakers who took Maier's survey appear to have had enough of a stake in the outcome, with respect to the issues noted in news stories, that they are more likely to perceive any lack of accuracy as less credible. Maier asserts that what newsmakers want is for journalists to present balanced and fair journalism given in context and with perspective.³⁰

Accuracy – Legal Reportage

Respective to judges as newsmakers, there's nothing yet to show that judges or justices have a stake in the outcome of media coverage to the same degree. It might be fair to say that with respect to viewing judges as newsmakers, their main concern might be for legal practitioners to understand case outcomes, and considering that decisions are written for practitioners, one could wonder if, in the minds of judicial newsmakers, news media simply serve to fulfill a secondary role to these specific newsmakers' primary goal.

Ericson looked at newspaper coverage of the Supreme Court during its 1974 term.³¹ Ericson's study was brief, and determined that coverage in even the best of the three newspapers selected (in this case the New York Times out of a group also

²⁹ Ibid

³⁰ Ibid

³¹ D Ericson, "Newspaper coverage of the Supreme Court: A case study," *Journalism Quarterly*, 54, no. 3(1977): 605-607.

including the Detroit News and the Ann Arbor News) was inaccurate.³² Ericson suggested that a daily reader of the New York Times would be likely to possess a poor understanding of any Supreme Court decision based on Times coverage in roughly 3 cases out of every 4 that the Court decided.³³ Ericson established an exemplar article for each story's quality based on the syllabi, short summaries of the facts legal issues and holding published at the beginning of each case, he found in the US Supreme Court recorder.³⁴ Only 32 times out of 112 did any of the Times articles meet the standard.

Keeping within a similar vein Solomine, Tarpley, and, Bowles and Bromley looked at newsmagazine coverage of the Supreme Court in three separate, independent studies to determine how well they kept subscribers informed at varying time periods.³⁵ Solomine examined the 1975 -1977 terms of the Court.³⁶ Tarpley looked at the 1978 - 1981 terms of the court.³⁷ Bowles and Bromley covered 1981 – 1989.³⁸

Solomine found that newsmagazines only generally report on about one case in five that the Supreme Court hears.³⁹ With respect to those cases that the court

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ D Bowles, and R Bromley, "Newsmagazine coverage of the Supreme Court during the Reagan administration," *Journalism Quarterly*, 69, no. 4 (1992): 948-959, M Solomine, "Newsmagazine coverage of the Supreme Court's caseload," *Journalism Quarterly*, 57, no. 4 (1980): 661-663, D Tarpley, "American newsmagazine coverage of the Supreme Court, 1979-1981," *Journalism Quarterly*, 61, no. 4 (1984): 801-826.

³⁶ M Solomine, "Newsmagazine coverage of the Supreme Court's caseload," *Journalism Quarterly*, 57, no. 4 (1980): 661-663.

³⁷ D Tarpley, "American newsmagazine coverage of the Supreme Court, 1979-1981," *Journalism Quarterly*, 61, no. 4 (1984): 801-826.

³⁸ D Bowles, and R Bromley, "Newsmagazine coverage of the Supreme Court during the Reagan administration," *Journalism Quarterly*, 69, no. 4 (1992): 948-959.

³⁹ See note 36

heard and magazines reported on, Solomine looked for the same six variables of measurement that Ericson did: 1) background facts and litigative history, 2) probable or expected impact of the decision, 3) explanation of the decision process, 4) balance (respective to coverage of the dissent or reactions critical of the result), 5) contextualization with relevant law and 6) reportage of outside reaction to the decisions.⁴⁰ These variables as listed would represent the bulk of the information contained within a standard published court decision. As such, these variables would necessarily encompass the accuracy per se of a court decision.

Ericson found that when he controlled for reportage of the decision, the number of variables covered dropped off to nearly zero, which is to say that newspapers addressed nearly none of the variables he was looking for as noted above.⁴¹ Solomine, on the other hand found much greater depth in coverage of the variables he was looking for noting that the combined average for all three magazines was over 2, and that Time and Newsweek shared an average of 3.6 variables.⁴²

Tarpley added to Solomine's study by examining to what degree newsmagazines tend to cover media-related court decisions with greater frequency than they do non-media decisions.⁴³ Rather than over-specifying in his coding,

⁴⁰ D Ericson, "Newspaper coverage of the Supreme Court: A case study," *Journalism Quarterly*, 54, no. 3(1977): 605-607, M Solomine, "Newsmagazine coverage of the Supreme Court's caseload," *Journalism Quarterly*, 57, no. 4 (1980): 661-663.

⁴¹ See note 31

⁴² See note 36

⁴³ See note 37

Tarpley broke all Supreme Court decisions down into only three varieties respective to their legal focus: First Amendment cases, Civil Rights Cases, and everything else.⁴⁴

Tarpley also used Ericson's six variables to assess the quality of the stories.⁴⁵

Tarpley found that the court decisions receiving the most frequent coverage in the newsmagazines dealt with First Amendment issues and civil rights issues, accounting for about half of all the stories, while newsmagazines over this span covered roughly as many court decisions as in Solomine's study.⁴⁶ Overall though, newsmagazines covered decisions that were unrelated to perceived media related with greater frequency than they did media related stories, and Tarpley rejected the hypothesis that newsmagazines would be partial to media centric stories.⁴⁷

Regardless of his failed hypothesis, Tarpley concluded that newsmagazines are still missing a great deal of coverage insofar as civil rights issues and First Amendment issues make up only a small amount of Supreme Court Cases.⁴⁸

Bowles and Bromley replicated and expanded the previous studies by Solomine and Tarpley by looking at roughly triple the content; in a change, they also added three variables.⁴⁹

In Bowles and Bromley's study, newsmagazine readers learned about fewer than 10% of the cases decided by the Supreme Court, down from previous studies.

⁴⁴ Ibid

⁴⁵ D Ericson, "Newspaper coverage of the Supreme Court: A case study," *Journalism Quarterly*, 54, no. 3(1977): 605-607, D Tarpley, "American newsmagazine coverage of the Supreme Court, 1979-1981," *Journalism Quarterly*, 61, no. 4 (1984): 801-826.

⁴⁶ M Solomine, "Newsmagazine coverage of the Supreme Court's caseload," *Journalism Quarterly*, 57, no. 4 (1980): 661-663, D Tarpley, "American newsmagazine coverage of the Supreme Court, 1979-1981," *Journalism Quarterly*, 61, no. 4 (1984): 801-826.

⁴⁷ See note 37

⁴⁸ Ibid

⁴⁹ See note 35

In another departure, the researchers discovered a drastic improvement in quality, by comparison to previous studies, though the variables measured changed to some degree.⁵⁰ Bowles and Bromley concluded that a portion of the drop off in overall coverage was attributable to the shifting face of the court.⁵¹ The researchers posited that allowances in the news hole for legal affairs may well have been engulfed by discussions about confirmation of justices, etc. or was perhaps the result of a changing habit of focusing on personalities.⁵² Bowles and Bromley differ with Tarpley's finding that the media doesn't have a predisposition to cover media cases in their findings, and cite Tarpley's finding thereof as a seeming outlier.⁵³ The above-discussed literature seems to hint that there is a good deal of variance in perceptions of court coverage respective to its accuracy and as such creates a certain amount of room for research in the area.

In 1992, O'Callaghan and Dukes seemingly combined the studies of Ericson and Solomine et al. by simultaneously looking at three newspapers and three newsmagazines while adding in the coverage of three television networks.⁵⁴ O'Callaghan and Dukes hoped to address issues about how well these outlets cover

⁵⁰ See note 38

⁵¹ Ibid

⁵² Ibid

⁵³ D Bowles, and R Bromley, "Newsmagazine coverage of the Supreme Court during the Reagan administration," *Journalism Quarterly*, 69, no. 4 (1992): 948-959, D Tarpley, "American newsmagazine coverage of the Supreme Court, 1979-1981," *Journalism Quarterly*, 61, no. 4 (1984): 801-826.

⁵⁴ D Ericson, "Newspaper coverage of the Supreme Court: A case study," *Journalism Quarterly*, 54, no. 3 (1977): 605-607, J O'Callaghan, and J Dukes, "Media coverage of the Supreme Court's caseload," *Journalism Quarterly*, 69, no. 1 (1992): 195-203, M Solomine, "Newsmagazine coverage of the Supreme Court's caseload," *Journalism Quarterly*, 57, no. 4 (1980): 661-663.

the Court's caseload, as well as to gain greater insight into the unsatisfied question of disparate coverage of media-centric events.⁵⁵

O'Callaghan and Dukes found that newspapers seem to cover civil rights cases at a rate of about 1 in 5 stories, while they appear on the docket less than 1 time in 10 and that First Amendment cases are indeed disproportionately represented.⁵⁶ The New York Times still covers more of the goings on of the court than any other newspaper measured.⁵⁷ Newsmagazines devote a disproportionate amount of space to civil rights issues than any other stories, but only civil rights as First Amendment cases were represented proportionally.⁵⁸ Further, the researchers again found that newsmagazines cover a substantially low percentage of decisions leading to a drastic misconception about the real goings on of the court.⁵⁹

Television findings didn't stray far from the other media in this study. Television news overplays Civil Rights and First Amendment issues, though it would seem that television news caught more of the caseload than newsmagazine leading to less of what the researchers call "distortion" which is to say misrepresentation of the court's docket.⁶⁰

Most of what is available about accuracy in media is relatively fact related. To be sure that Meyer and Marshall discussed subjective and objective accuracy in

⁵⁵ J O'Callaghan, and J Dukes, "Media coverage of the Supreme Court's caseload," *Journalism Quarterly*, 69, no. 1 (1992): 195-203.

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ *Ibid*

⁵⁹ *Ibid*

⁶⁰ *Ibid*

their works, but this review needs more research in that area.⁶¹ The prospect of the subjective inaccuracy through omission is especially interesting, but with respect to complex issues of law (i.e. legal reasoning, precedent, the sometimes scattered and sometimes esoteric holding of a case), one wonders if characterization of all omissions as necessarily subjective or if objective ignorance could be the cause.

The vast amount of scholarship, not completely addressed here, clearly notes that for completeness of coverage respective to the docket, which is to say a complete understanding of the caseload of the court and the types of cases that the court hears, newspapers have traditionally been and remain the superior medium.

Discussion of Legal Decisions

This study looks at two renowned cases in the recent American legal landscape. First, this study will look at the 2010 Supreme Court decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Next, this study will look at the 2012 Supreme Court Decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

⁶¹ H Marshall, "Newspaper accuracy in Tucson," *Journalism Quarterly*, 54, no. 1 (1977): 165-168, P Meyer, "A workable measure of auditing accuracy in newspapers," *Newspaper research Journal*, 10, no. 1 (1988): 39-51.

Citizens United v. Federal Election Commission

Citizens United is a free speech case that comes out of the 2008 Presidential Campaign, in this case the Democratic Party Primaries.

Citizens United was a non-profit corporation interested in airing a documentary film entitled “Hillary: The Movie.” Citizens United screened the film in movie theaters prior to this request and released it on DVD, but in an attempt to increase its audience the group hoped to pay a cable provider to present the film via cable television in a video-on-demand format. Citizens United hoped to show the film at no charge. In an attempt to maximize viewership, Citizens United produced several advertisements for the film.⁶²

The film is, as noted above, in documentary format, and it focuses mainly on then Senator Hillary Clinton. Clinton made a bid for the Democratic nomination for President in the United States. For some time, Clinton received widespread support. The implication of the film was that Clinton would make a poor choice for President of the United States. The majority described the film as a “feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.”⁶³ Much of the movie’s content was about Senator Clinton’s character, which it portrayed negatively, and implications of wrongdoing by the Ms. Clinton during former President Clinton’s administration.⁶⁴

⁶² *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

⁶³ *Ibid* at 324

⁶⁴ *Ibid*

Citizens United hoped to avoid sanctions under federal election laws. The group filed for injunctive relief and declaratory judgment before it made the film available to audiences. Citizens United specifically sought relief from the McCain-Feingold act. The McCain-Feingold Act prohibited unions or corporations from using their general treasury funds to create any electioneering communications within 30 days of a primary or 60 days of a general election.

The McCain-Feingold Act broadly defined “electioneering communication.”⁶⁵ The Court in *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449(2007), held the phrase “electioneering communication” to mean that a communication amounted to “express advocacy or its functional equivalent.”⁶⁶ The majority in *Wisconsin Right to Life* further clarified this with a test stating that express advocacy or the functional equivalent thereof is essentially where the communication in question can not be interpreted in any other reasonable way except as an entreaty to vote one way or another for a person or an issue.⁶⁷

The major issue in this case was whether the McCain – Feingold Act unconstitutionally proscribed the speech of corporations and unions by preventing them from spending general treasury funds on electioneering communications. The threshold issue of the case was whether or not the act in question applied to the movie “Hillary.” Here, this question meant the answering of two separate questions which were: 1) whether “Hillary” was an electioneering communication as defined by the act, which is to say an as-applied challenge; and 2) whether or not the court

⁶⁵ *Bipartisan Campaign Finance Reform Act of 2002*. Public Law 107-155, *US Statutes at Large* 107, (2002):116.

⁶⁶ *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 481 (2007).

⁶⁷ *Ibid*

could overrule the line of precedent beginning with *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and entertain a facial challenge of the act's validity. The second issue in this case was whether the act could require unions and corporations to disclaim or disclose their involvement with such electioneering communications. Citizens United decidedly did not come to any conclusion about corporate contribution limits directly to candidates. Citizens United decided only the issues noted above.⁶⁸

The 5-4 majority in *Citizens United* held on the threshold issues that, first, Citizens United's as-applied challenge failed, and second, the court could and would overrule *Austin* and consider the facial challenge. With respect to the first issue, Citizens United made a two-pronged argument that "Hillary" was neither publicly distributed, as required by the act, nor express advocacy. Citizens United argued that distribution through video on demand format was not public distribution because it failed to meet an audience size requirement; however, the Court rejected this argument pointing to overall subscribership numbers as the appropriate measure of audience size. Citizens United further argued that "Hillary" is not express advocacy, but is in fact a documentary examining historical facts. The Court rejected this argument as well noting, as pointed out above, that the film was roughly a 90-minute commercial in opposition to Ms. Clinton's candidacy.⁶⁹

The majority, finding no narrower grounds to resolve the issue, turned to the issue of the barrier that the *Austin* line of cases created. *Austin* was the precedent that allowed Congress to criminalize corporate speech based on the rationale that

⁶⁸ See note 62

⁶⁹ *Ibid*

the money that feeds corporate speech would distort the marketplace of political ideas.⁷⁰ The majority overruled *Austin*, noting that previous Courts had been reluctant to uphold it and had done so by the slimmest of margins, and that *Austin* impermissibly chilled speech. The importance of overruling *Austin* can not be understated in that Citizens United's as-applied challenge failed and only by going back on *Austin* could the Court entertain Citizens United's claim.⁷¹

Once the Court overruled *Austin*, the analysis of the McCain-Feingold Act required the government to show a compelling interest for the proscription of the speech under the act. The government was unsuccessful in its attempts to show that compelling interest. As a result, the Court held that the electioneering provision was unconstitutional on its face and that corporations and unions could spend general treasury funds on electioneering communications without restriction.⁷²

On the final issue, disclosure and disclaimer requirements, the court entertained an as-applied challenge. Citizens United and some of the amici argued that disclosure requirements could have a chilling effect on speech. Citing then recent issues with disclosure of supporters of California's Proposition 8, a state constitutional amendment that banned "same-sex" marriage, Citizens United and amici asserted that fear of reprisals by people in opposition to a viewpoint could chill a corporation or individual's willingness to engage in speech. Citizens United proposed an allowance for anonymous speech.⁷³

⁷⁰ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

⁷¹ See note 62

⁷² *Ibid*

⁷³ *Ibid*

Citing *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court drew back from striking the disclosure requirement. The Court's rationale in *Buckley* was that the government had an interest in informing the electorate of sources of election spending.⁷⁴ Here, the Court agreed and noted that they could find no chilling effect as mentioned by Citizens United or amici. Justice Thomas disagreed on this; however, and as such he wrote a short dissent as to the issue of disclosure. Noting the issues in the political battle over California's Proposition 8, Justice Thomas attempted to validate the arguments of Citizens United and amici conjuring up ideas of assault and intimidation in response to protected speech.⁷⁵

In the end, it bears repeating that *Citizens United*, while extending the protection of the First Amendment to corporations, decided only the issues noted above. Specifically, *Citizens United* decided only that the *Austin* line of cases was bad law, that there was no compelling government interest in McCain – Feingold's electioneering limitation, and that disclosure requirements were still constitutional. Justice Kennedy goes out of his way in the majority to note that the case in no way disturbs limits based on direct contribution or other campaign finance limitation. Any jurisprudence to the contrary is wholly separate from *Citizens United*.⁷⁶

⁷⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁷⁵ See note 62

⁷⁶ *Ibid*

National Federation of Independent Business v. Sebelius

National Federation of Independent Business v. Sebelius was, or at least to some degree appears to be, the culmination of a long and spirited debate about healthcare in the United States. As noted elsewhere in this paper, the healthcare debate in America is long-lived, beginning in the 19th Century with an act to provide for the mentally disabled, continuing through the FDR administration and running right up to the abovementioned case. *Sebelius* was the conglomeration of three separate appeals, from two different cases, each presenting a single separate issue. Each case and appeal dealt specifically with a landmark piece of legislation, the Patient Protection and Affordable Care Act of 2010, known simply as the Affordable Care act or ACA.⁷⁷

ACA provided in its more than 900 pages, among other things, expanded medical coverage for children on their parent's medical insurance, an expansion to Medicaid and the creation of health care exchanges for the purchase and comparison of medical insurance.⁷⁸ ACA also mandated that medical insurers cover pre-existing illnesses, and to find a palatable way for companies to do this hopefully without raising the cost of coverage, the bill also enacted a system of penalties to incentivize people without health care and with the means to so purchase it to purchase health care.⁷⁹ Much of the public debate about ACA revolved around the

⁷⁷ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

⁷⁸ *Patient Protection and Affordable Care Act*. Public Law 11-148, *U.S. Statutes at Large* 110 (2010): 2033.

⁷⁹ *Ibid*

expansion and funding of Medicaid and the system of penalties intended to incentivize the purchase of health care.

The rough plan for the expansion of Medicaid was to increase the income limit that provided coverage under the entitlement from varying levels hovering around the poverty line to a blanket income of 133% of the poverty line. Federal support for the state-administered system would be funding to the tune of 100% through 2016 with that number gradually dwindling to 90% over the years that would follow. The act allowed for states to opt in on the new Medicaid expansion plan and accept the funding levels and their part in the provision of funds, or to opt out and lose all federally allocated funds for Medicaid.⁸⁰ Much of the debate surrounding the expansion of Medicaid was about the general opposition to the expansion of entitlements as well as major concerns about where states, who when signing on do so with the express agreement that their end will be 10 per cent of the bill, will come up with these new funds.

People, from legislators to the Solicitor General of the United States, referred to the incentive to purchase health care by the healthy as an individual mandate. The plan for the individual mandate, as mentioned briefly above, was to create a source of reliable funding for health insurers to use to absorb the financial hit that the bill created by requiring companies to insure the already sick. The bill created an incentive to buy health care whether a person believed they needed it or not, and

⁸⁰ Ibid

the mandate imposed a penalty of sorts for non-compliance. That penalty was monetary.⁸¹

The Internal Revenue Service would collect the monetary penalty along with the violators' taxes, and, once collected, the penalty would go into the government's coffers. The idea the bill hoped to create was that non-compliance was fiscally unsound in the sense that there was an equivalency between the cost of healthcare and the cost of the penalty. Violators would have essentially thrown their money away by not purchasing health care because they would receive nothing since the money would be earmarked for either the purchase of health care or the payment of the penalty.⁸²

Specifically which appeal presented which issue is far less important than what those issues were in their own right. The case heard by the Court presented questions about the Constitutionality of the Mandate, the Expansion and a third, but supremely important issue of whether the court could even hear the case. The first issue before the court was a threshold issue, which is to say that the court could in fact avoid the merits of the case by deciding that the case did not yet meet the requirements for review. The existence of a threshold issue in cases is not uncommon, and the case of *Sebelius*, the threshold is was whether a plaintiff to the case was barred from bringing an action by the Anti-Injunction Act.⁸³

The Anti-Injunction Act exists to limit the ability of a taxpayer in challenging a tax and therefore preventing its collection. The idea is that taxpayers could

⁸¹ See note 77

⁸² Ibid

⁸³ Ibid

potentially avoid the payment of a tax by bringing an action in court to delay the government from levying it on them until the outcome of the case is resolved.⁸⁴ The Anti-Injunction Act specifically applies to any suit prosecuted to “restrain the assessment... of any tax.”⁸⁵ With respect to this issue, if the court found that the individual mandate, described above, was a tax, then the suit fails in its entirety as the Anti-Injunction Act bars its prosecution until AFTER the government levies the tax.⁸⁶ Next the court took up the issue of by what power Congress, if any, created and imposed the personal mandate.⁸⁷

The federal government, as the Court notes extensively and as Constitutional Law professors throughout the land teach with great fervor and consistency, is one of limited, enumerated powers. The Constitution sets up the structure by which government exists as well as the powers that government has in furtherance of its ends. Governments have only powers, and in our Constitutional system only those powers specifically provided for in the document. The general idea of enumerated powers is in some part based on a textual canon of construction known by its Latin phraseology, “*expressio unius est exclusio alterius*,” roughly meaning the mention of one is the exclusion of others. If the Constitution provides that the Congress has the power to tax, spend, and regulate commerce, then those are the powers of the Congress. No judicial body can countenance the exercise of other powers by Congress in this hypothetical situation, as they are limited to what the document lists.

⁸⁴ Anti-Injunction Act. *U.S. Code* 23 (1793) § 2283.

⁸⁵ See note 77

⁸⁶ See note 84

⁸⁷ See note 77

In *Sebelius*, the government asserted that Congress' power to enact the individual mandate existed under Congress' power under the Commerce Clause as enabled by the Necessary and Proper Clause or alternately under Congress' power to Tax, again enabled by the Necessary and Proper Clause. The Court in *Sebelius* considered whether the Commerce Clause or Taxation allowed congress to impose the individual mandate. The final issue in *Sebelius* was whether the imposition of the expansion of Medicaid was beyond Congress' power under the Spending Clause.⁸⁸

The jurisprudence of the Spending Clause is such that the federal government can use the promise of some federal funds to incentivize the several states to certain behaviors, but only within certain boundaries. As an example, the court held in *South Dakota v. Dole*, 483 U.S. 203 (1987), that a five per cent reduction in funding to a state in response to non-compliance with a federal directive (in this case increasing the state's legal drinking age to 21) was within the spending power of Congress; the Court's main concern being that Congress' incentives not amount to undue influence. In an example of going too far, the Court held in *New York v. United States*, 505 U.S. 144 (1992), that the federal government could not force a state to regulate through federal legislation (in this case, the federal government could not force a state to either enact a specific scheme of regulations related to nuclear waste disposal or alternately to make them take title to the waste). The boundaries of what is and what is not coercive with respect to federal action as it applies to the states is not exactly clear, but as noted above there are outer boundaries.

⁸⁸ Ibid

The concern with respect to federal control over state governments is two-fold. Primarily, the concern with the exercise of federal power over state control is one of federalism, that structure by which the states and federal governments maintain their respective statuses as separate sovereigns within a unified system. If the federal government can dictate policy to the state governments, then the idea of residual state sovereignty, that sovereignty retained by the states upon their entrance into the union, is a farce. The secondary concern is political accountability. If the federal government can prompt policy action at the state level, then the federal government can enact all manner of regulation nationally under the guise of state regulation, and might well enjoy broad immunity from public recourse through the ballot.⁸⁹

In summary, the three major issues before the court were: the applicability of the Anti-Injunction Act, Congress' power to enact the mandate and Congress power in expanding Medicaid. In turn, the court handled the three issues as follows below, and to further complicate matters, there was no consistent vote as to what the court held when.⁹⁰

As to the first issue, the Court held that the Anti-injunction Act did not apply in this suit. The vote with respect to this issue was 5-4, though no justices asserted that the act applied, but rather they differed on why it did not apply. The rationale of the court with respect to this issue was somewhat confusing though for reasons more obvious later than just now. The majority held that although the penalty appeared to be in the form of a tax in that the Internal Revenue Service collects the

⁸⁹ Ibid

⁹⁰ Ibid

tax, Congress did not intend for the penalty to be treated as a tax for purposes of the act. The idea was that Congress enacted the Anti-Injunction Act with certain verbiage referring to when it applies; in this case, it applies in the case of a tax. Had Congress intended for the act to apply to the ACA, then Congress would have called the penalty a tax.⁹¹

The mental gymnastics required to understand this are not too onerous. Here, Congress created the legislation and the legislation governing the legislation. In this case, Congress is the absolute arbiter as to whether or not the one applies to the other, and the Court would do well to take the statute at its plain meaning. Language, according to the Court, would not have the same affect in issues of Constitutionality.⁹²

As to the second issue, the Court held, again 5-4, that the individual mandate was within the power of the Congress to levy. Beneath a seemingly simple statement of fact laid a much more complex web of confusion.⁹³

As to whether the power to levy the mandate fell under the Commerce Clause, the argument found no purchase. A simple majority of the Justices felt that the Commerce Clause argument was a bridge too far, but for disparate reasons, which is to say that of those in agreement with Chief Justice Roberts' opinion as to the mandate and the Commerce Clause, none of Justices Scalia, Kennedy, Thomas or Alito joined him, though there is very little between the readings of their opinions.

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

As to whether the power to levy the mandate fell under the Taxing Powers of Congress, the Court ruled 5 -4 that it did.⁹⁴

The majority wrote that though the Congress described the penalty as a penalty, very important above though less so here, that the penalty actually imposed a tax. The Court employed a functional approach to determine whether the mandate was a tax or not and as such labeling was not dispositive. Here the court considered that because the payment was not so high that it eliminated the choice as to whether to buy health care, and that because the payment had no scienter requirement (it did not apply solely to intentional violators of the law), that the mandate was a tax.⁹⁵

This holding is, of course, very confusing in light of the initial holding respective to the Anti-Injunction Clause. In one breath, Chief Justice Roberts, writing for the majority, says that the mandate is not a tax, and in another, very shortly thereafter, he says that it is. The explanation here goes back to the descriptions of the holdings above. Roberts says in the first instance, Congress is the arbiter of when something is in violation of its legislation by virtue of the fact that it has the power to craft its language. In the second instance, Roberts asserts that issues of conflict between the Constitution and run of the mill legislation are the sole province of the Court, and in concert with a duty to find a saving construction and varying methods of acceptable jurisprudence, the Court selects its method by which to create the statutes construction. Here, that method is more of a feel test.⁹⁶

⁹⁴ Ibid

⁹⁵ ibid

⁹⁶ Ibid

This holding presents something of a question of a sub-issue regarding direct taxes. In a strange turn of events, and this is paraphrasing of course, both the majority, as written by Chief Justice Roberts, and the dissent, as written by the occasionally combative Justice Scalia, avoid the issue. That is to say, Roberts says that the mandate isn't a Direct Tax because it does not fall under the precedent of other direct tax cases heard by the court, of which there are terrifyingly few. Scalia too mentions direct taxation in passing, but only to note that prior jurisprudence on the subject is incredibly unclear even to the point of noting that this would be a case of first impression and that perhaps the issue deserves more consideration.⁹⁷

The issue of the direct tax bears noting here not because of its treatment by the court or the media. The Court devoted less than one page to this in the majority and dissent combined, and as such, there would be no reason to cover this. Rather, this bears noting because the Chief Justice of the United States was able to garner only such weak, cursory support for his supposition that the mandate did not violate the provision, and that the notoriously venomous Justice Scalia would have no meaningful response. Such light and confused treatment by the Court is uncommon.

The final holding presented the instance of the broadest support. Only Justices Ginsburg and Sotomayor would have upheld the Medicaid expansion as outlined in the bill. The Chief Justice along with two others would have held that the expansion was constitutional if it included the option to opt out without losing

⁹⁷ *ibid*

current funding. Justices Scalia, Thomas, Kennedy and Alito would have struck down the section including Medicaid expansion along with the rest of the bill.⁹⁸

There is something of an unanswered question as to whether or not the Chief Justice and his group in conglomeration with those who would have upheld the expansion in its entirety constitute some sort of a compromise holding, though this issue is unresolved. As it stands, the major holdings of *National Federation of Independent Business v. Sebelius* are: the individual mandate does not implicate the Anti-Injunction Act, the Individual Mandate is a valid exercise of Congress' Taxation powers, and the Medicaid expansion is an impermissible exercise of Congress' Spending powers.⁹⁹

⁹⁸ Ibid

⁹⁹ Ibid

Chapter 2

Method

This examination intends to look at the newspaper coverage of two specific court cases in order to evaluate newspaper coverage for accuracy. In general, this examination seeks to answer the question of whether or not, when the news media cover legal issues, they do so accurately with respect to certain outlined parameters.

Based on previous scholarly works in this vein, as well as recent high-profile mistakes within the news media at-large (i.e. CNN and Fox News coverage of the Supreme Court decision on the Affordable Care Act), this examination expects to show that media coverage of court decisions is likely to be inaccurate in general. Most previous studies have found, implementing variations on a general group of factors that determine accuracy, that coverage is inadequate.

This examination also intends to examine how, if at all, newspapers cover or address the more complex parts of court decisions, namely legal issues. In general, the examination seeks to find out whether newspaper coverage of Supreme Court decisions correctly identifies the complex legal issues if at all, and what failings arise if any.

Based on reviews of the literature and the overall difficulty that experienced legal analysts have in the identification and discussion of complex legal issues, this examination expects to find that newspaper coverage of court decisions will fail to

identify the complex legal issues under consideration in the cases when they mention them at all. That is to say that where journalists are most likely to be wrong seems intuitively to be the areas where they simply do not grasp the subtleties and intricacies of an issue, and by virtue of the reasoning identifying when they are most likely to be wrong logic should dictate that they would likely omit those areas altogether.

As an example with both recent journalistic and legal pedigree, in the Court's ruling on ACA journalists and analysts at specific outlets misreported the Court's holding due in part to length and complexity of the opinion. In this case, the issue went to the very essence of the decision and as such, could not be avoided; however, in other cases, more complex and multi-faceted ones, it stands to reason that journalists might entirely ignore certain issues believing them to be non-essential or missing them entirely due to their complexity.

Finally, the examination intends to examine any themes in the failures or successes in the coverage with respect to the selected cases. The examination hopes to uncover any trends or ideological structures that may emerge as a result of the previous two considerations and provide some critical analysis about them if any indeed appear.

Unlike previous similar examinations, this examination will be a birth-to-death examination of two specific cases. Examining each from inception to legal resolution differs from previous studies because previous studies simply looked at all of the articles written about any decisions in a specific Supreme Court session.

While this gives an overview of quality and accuracy, it fails to provide information

about where the breakdown in the process begins and fails to identify where, if at all, newspapers are, for lack of a better term, learning within the process and making corrections. That is to say, in the end product, with respect to any specific final article about a case at resolution, anything that previous researchers measured as correct may once have been missing or misstated. Likewise, anything once correct could have at some point been correct. The overall view of the process therefore provides more useful analysis for any repair if necessary.

Sample

The researcher selected articles selected for examination from the *New York Times*, *USA Today* and the *Washington Post*. Articles selected were news stories strictly. This paper considered only the reportage of the above-noted complex legal issues, and nothing else. As such, the researcher excluded from the sample any article within a newspaper's editorial section, any letter to the editor or any opinion-editorial piece. The rationale for this decision was that this examination consisted of news reportage. Editorial pieces, opinion pieces and letters to the editor are not new pieces as such. None of the aforementioned media are traditionally bound by the same principles as news reportage.

Any of the aforementioned works are more likely than news articles to concentrate unduly and deliberately on certain specific aspects of a case. Furthermore, any of the aforementioned pieces are crafted with the primary

purpose of persuading. News pieces are not nominally constructed with the goal of persuading, but instead to inform.

The search range of articles for each case began at the inception of coverage of the case itself. That is to say that, for example, in the case of coverage of *Citizens United*, there was some coverage of the group Citizens United, and there was some coverage of the film “Hilary” that the group produced, but this was not necessarily of the case itself, and that coverage was on the order of a single article. Respective to *Citizens United*, there was very little coverage in the *New York Times* until the fall of 2008 when the Supreme Court decided that it would hear the case. In examining the timing of the articles and the number of articles, all articles written in 2008 were included in this study if they existed.

With respect to the beginning of the search range for *National Federation of Independent Business v. Sebelius*, the sample began in early 2010 in the *New York Times*. Coverage of *Sebelius* in the media began much earlier in the process with much greater frequency than did *Citizens United*. Here, the *New York Times* began its coverage of the case at the district court level, and the searches began returning articles when the National Federation of Independent Labor itself joined the case. As above, the *New York Times*’ coverage preceded both other outlets by some time. Also as above, based on the number of articles present in the search, all articles written in 2010 were included in the sample, though 2010 was not a very active timeframe for articles similar to 2008 above.

The collection of articles was through key word searches within ProQuest’s newspaper database wherein the recent archives for the *New York Times*, the USA

Today and the Washington Post were available. Those articles that failed to meaningfully address the case in any way were excluded, which is to say, those articles that use the object case in reference to another case, i.e. mentioning the cases only in passing and in no other way, fail to qualify. Articles that considered the case substantively were retained for examination. Whether the article substantively addressed the case was determined by reading the article to determine whether the article actually discussed the case directly, or merely mentions it in passing or reference with respect to another case.

The researcher justified the cutoff of the sample based on the theory of news waves. The theoretical basis of news waves is that media coverage, in terms of its frequency, is tied directly to important events.¹⁰⁰ With respect to the *Citizens United* sample, coverage dropped off in June of 2010. Coverage of *Sebelius* dropped off significantly in July 2012. In each case, the researcher extended the “deadline” for articles for the sample to the last day of the month.

Based on all of the factors noted above, the initial sample, including both the coverage of *Citizens United* and the coverage of *Sebelius*, was well over 125 articles after imposing a firm beginning and end time. A cursory examination of the New York Times articles allowed for the quick elimination of several opinion pieces, editorial and letters to the editor thanks in large to part to a very detailed and very generous listing of subjects, locations within the paper and identification of genre of writing. USA Today and Washington Post possessed no such data. The researcher

¹⁰⁰ D.L. Carter, R.J. Thomas, and S.D. Ross, "You are not a friend," *Journalism Studies*, 12, no. 4 (2011): 456-473, H.M. Kepplinger, and J. Habermeyer, "The impact of key events on the presentation of reality," *European Journal of Communication*, ³⁹10, no. 3 (1995): 371-390.

made further eliminations of articles through the evaluation of article abstracts. Elimination by abstract trimmed the sample to a more manageable 94 articles.

Final eliminations came after a full reading of each article. Of the first and second culling, some inappropriate articles, based on their non-news nature, unrelated nature, or duplicate nature remained. After a complete reading and a final cull, the final sample was 87. Of the remaining 87 articles, the coverage of *Citizens United* contained 59 and the coverage of *Sebelius* yielded 28. Of the 59 from the coverage of *Citizens United*, the New York Times provided 28 articles, the USA Today nine articles and the Washington Post 22. Of the 28 articles from *Sebelius*, 13 came from the New York Times, eight from the USA Today and seven from the Washington Post.

Analysis

Analysis in this case employs a method used by Blevins and Barclay in analyzing newspaper and newsmagazine coverage of *Morse v. Frederick* (Blevins & Barclay, 2010). Blevins and Barclay employed critical discourse analysis coupled with specific methods of textual analysis used in previous attempts to qualify coverage of Supreme Court decisions, namely, those employed by Fairclough with respect to critical discourse analysis and Bowles and Bromley with respect to analysis of stories covering Supreme Court decisions.¹⁰¹

¹⁰¹ See note 10

Overall analysis of the articles came from the three-step procedure for critical discourse analysis denoted by Fairclough. Step one in Fairclough's method was to identify and frame the text. Identification and framing occurred through examination of the coverage's thoroughness. Data counting and quality assessment composed thoroughness.

To best ascertain quality of coverage, Bowles' and Bromley's method developed over several similar, but previous, iterations was helpful.¹⁰² The model employed by Bowles and Bromley considered nine factors in the examination of quality with respect to coverage of the courts, a model that they employed specifically for examination of Supreme Court coverage.¹⁰³ The Bowles and Bromley method addresses issues of ideological framing with respect to the functioning of power structures in textual presentation.¹⁰⁴

The researcher examines the document to determine the presence of these data or any data sufficient to satisfy the call of these factors.¹⁰⁵ The factors include: (1) whether the story denotes the case name or provides identifying information, (2) whether the story provides background facts of the case or litigation history (also procedural history of the case), (3) whether the story provides the specific vote of the Court, (4) whether the story mentions the reasoning of the Court or in some way discusses the Court's reasoning, (5) whether the story mentions the dissent or outlines the dissent's argument in some way, (6) whether the story discusses applicable statutes or precedent with respect to the case at hand, (7)

¹⁰² See note 38

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

whether the case discusses expected effect of the decision or impact in general, (8) whether the story describes any reaction to the court's decision, and finally (9) whether the court properly attributes the source of the reaction as coming from legal experts, parties, people in the street, etc.¹⁰⁶ As noted above in the Literature Review, most of the factors noted here include the bulk of the information contained in a court's opinion. As such, these factors would relate directly to accuracy. The remaining unrelated factors go to general newsworthiness.

Bowles and Bromley employed these factors in the examination of single articles that came out after decisions.¹⁰⁷ As such, though these factors were not deficient, they proved to be somewhat incomplete. As noted below in greater detail, the nine factors tended toward the final decision, which would result in the adjudication of articles written before the final decision, a focus here, as inaccurate. Furthermore, the factors as created by Bowles and Bromley fail to address several factors arguably important to the case prior to its decision, and some equally important after the decision.¹⁰⁸ As such, the researcher determined to count incidents where an article noted the issue(s) of the case, the argument of the appellant, the argument of the appellee and the holding of the case. In total, the researcher reviewed each article for the presence of 13 factors.

Fairclough's second step in the critical discourse analysis method is interpretation of relationships between the defined text and situational context.

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

Analysis in step two is nominally a legal analysis relative to the accuracy of the reporting with respect to the legal issues of the case.

For step two the researcher read and analyzed the decisions of the court and identified legal issues important in the process of the Court's decision making. That is to say, the fate of any specific case before the court hinges on multiple discreet legal issues any of which could be the impetus behind the court's decision, but in the event that the court selected certain specific issues and chose to base its decision on them those issues of course were relevant and all other issues fall away. Once identified, the researcher compared the legal issues as denoted within the opinion of the court with those, if any, as reported by the media and evaluates the accuracy thereof. As the analysis of legal issues was necessary, it further justified the decision discussed above to track the discussion of issues. As an aside, issues discussed within the coverage were rarely incorrect.

The final step in the Fairclough analysis was critical explanation of themes and ideological structures observed. Through the process of ascertaining the quality of the coverage in terms of Bowles' and Bromley's nine factor analysis in step one and the legal issue interpretation and analysis in step two, a theme emerged. When the themes emerged, it opened for critical explanation.

The process of satisfaction of the abovementioned questions included an overall examination of accuracy. Research began with the consideration of accuracy of individual cases along with some consideration of means and medians in an attempt to explicate the accuracy of the coverage in general. Very quickly this idea devolved into simply an accounting for later analysis in total. That is to say that the

researcher counted and considered factors of individual articles, but rather than attempting to assess the coverage on an average, the researcher quickly realized, through examination of the text, that coverage is cumulative.

What that means specifically is this. There is very little value in assessing the “average number of factors covered” in each story. The knowledge of the reader is not anchored to such an assessment; therefore, the metric does not possess the same sort of meaning in a qualitative analysis. If a reader read the bulk of the coverage of the USA Today on the case *National Federation of Independent Business v. Sebelius*, she would not have the average of six-factor knowledge on the subject for example.

Presumably, readers do not experience a loss of knowledge respective to an issue between reading one article in a narrative and another. More likely, when a reader imbibes the second, third and fourth articles in a series, she is adding that knowledge that does not previously exist and reinforcing information already known. This assessment seems intuitive; however, for the researcher, the tallying of the factors as well as the reading of the narratives themselves were the triggers for this intuition.

Continuing on, the researcher intended initially to assert that failure to include legal issues was prima facie evidence of inaccuracy. Also prima facie evidence of inaccuracy under the researchers original plan was misstatement of issues. As noted above, the researcher noted no significant occurrences of the misstatement of issues. Also, once the researcher thoroughly examined the articles

of the sample, accuracy seemed more of a cumulative issue than an individual or average of individuals.

Research Question

RQ: Whether newspaper reporters accurately cover complex Supreme Court decisions.

Chapter 3

Discussion of Findings

The following section addresses the findings of the research laid out above. The discussion begins with some ideas and observations about the concept of accuracy in general, the application and modification of the factor analysis and then finally the observations of the specific newspapers. The newspaper discussions begin with the coverage of *Citizens United* and proceed from one paper's coverage to the next alphabetically and then begin again with the reportage of *Sebelius*.

Accuracy

As noted above, Bowles and Bromley discussed a nine-factor analysis for legal reportage.¹⁰⁹ This paper examined two full sets of data using the nine factors noted above. An entire string of articles related to *Citizens United v. Federal Election Commission* and another separate set of articles related to *Sebelius v. National Federation of Independent Business*. Each set of data looked at coverage from the *New York Times*, *USA Today* and the *Washington Post*. In each case, each paper can

¹⁰⁹ See note 38

be said to have provided its readers with accurate coverage of each Supreme Court decision.

During the course of the analysis of the sample, it became apparent that Bowles and Bromley's factors were not, in their own right, sufficient.¹¹⁰ In this case, the factors tend to miss a few key points necessary for the examination of the coverage at varying points throughout the life cycle of the case. Among those points were four noted factors: issues, the argument of the appellant, the argument of the appellee and, oddly, the holding.

As noted above, the Bowles and Bromley factors cover a wide range of important pieces of legal reportage, and indeed, they are the latest incarnation of an evolving set of factors, though that set is neither widely regarded nor widely known.¹¹¹ Here though, the factors relating to reasoning of the majority and reasoning of the dissent fail to actually get at the heart of the holding by themselves. That is to say that while the reasoning behind the decision is of great importance in the understanding of a case, that information rather describes the point of the case without actually making the point, and it cannot replace the actual statement of the holding.

Of course, there is a great deal of value in reporting the holding of the case. This of course seems obvious, though it would seem previous researchers felt that factors four and five (noted above) got at the heart of the holding. In much of the research for this paper, multiple instances of a newspaper's treatment of the Court's rationale or the dissent's rationale existed without any overt reference to the actual

¹¹⁰ Ibid

¹¹¹ Ibid

holding of the case. As an example, *USA Today's* Joan Biskupic does this on two occasions during the narrative of *Citizens United* on February 8 and March 30 of 2010.

Moreover, at several times during the research, journalists noted the holding of a case, or some variant thereof without actually making any clear reference to the rationale behind it. Indeed, on at least seven occasions during the construction of the narrative of the *Citizens United* case, Adam Liptak and other *New York Times* writers included holdings with partial or no reference to the reasoning of the court.

The holding of the case is, in a very real sense, the point of the case. The holding of a case states the Court's ruling on the issues before it, or in some cases the issues as the Court sees them. The holding of the case gives an indication as to what the law is at the conclusion of the decision in that it answers the important questions posed by the parties and tends to tell the reader how broadly applicable the proposition is. Of course, this is not always the case. Some holdings are more nebulous in their meaning or applicability.

Consider as an example of confusing or murky decisions the Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). In *Bush*, the Court held that although there was an Equal Protection violation based on standards used for counting votes in the Florida recount, that there was essentially no remedy they could award, and that the holding was limited to its facts.¹¹² It was this very realization coupled with the murky nature of the specifically chosen cases served as the impetus for this research. Still, in its ability to do so much, the holding is arguably the essence of the

¹¹² *Bush v. Gore*, 531 U.S. 98 (2000)

case, or at least a major part of it. As such, its specific inclusion is an absolute necessity.

Issues within the case are what create holdings. Issues are the questions that parties present to the Court, or they are the questions that the Court sees. The Court interprets those issues and the adjoining law to decide roughly what the law is, at least with respect to the questions at hand and the principles at the heart of those questions. So as an example, the recent Supreme Court case dealing with the Defense of Marriage Act and marriage equality might end in a decision with a holding that states could not forbid citizens from marrying based simply on gender. If the case led to that decision, then it would necessarily be because the case presented the question as to whether the laws of the United States allowed that sort of a ban. In court cases, issues are guideposts that help the reader know where the case is going and why, and, in that sense, the issue presented dictates the holding to come. If the holding, in a sense, becomes the law, a reader can only know what will be at stake in a case if she knows what the issues of the case are.

Bowles and Bromley's factors in this sense are ill suited, through no fault of their own, to the examination of legal coverage before the Court hands down a decision. Failure to examine the issues as proposed in a developing case prevents the reader from understanding the context of the case as it develops, but as Bowles and Bromley developed their factors from a line of scholarship that examined coverage of decisions after the fact, they could have ill expected an attempt to fit

these factors to this square peg. They did provide an excellent framework, albeit the only starting point.¹¹³

In the same sort of way that the research uncovered the unaccounted-for holdings, the research noted the lack of discussion of legal issues in the sense of the nine-factor analysis. The issues frequently came in the form of the familiar (more so to lawyers than anyone else) “whether” statement. The “whether” statement is a sufficient, but not necessary condition for the statement of an issue, and as it frequently indicates the formulation of an issue, it becomes something of a red flag for the legally trained. Very frequently, the whether statement indicates what is to be decided in a case, i.e. whether the several states can deny a person a marriage license based on the gender of her proposed spouse would indicate that the decision, as noted above, will relate to marriage equality for lack of a better phrase.

The research uncovered a multitude of whether statements in stories. “The question for the court is whether the McCain-Feingold campaign finance law of 2002 applies to the broadcast of a feature-length film and television advertisements for it.”¹¹⁴ “The court raised the stakes when it announced in June that it would use the case to decide the more consequential question of whether to strike down past decisions that generally permit regulation of corporate spending in elections.”¹¹⁵

Many of these whether statements came from authors with formal legal training such as Adam Liptak and Joan Biskupic, but Robert Barnes and others used them as well. While a layperson may not read the word “whether” as a stop sign the

¹¹³ See note 38

¹¹⁴ A. Liptak. “Justices agree to hear case on anti-Clinton film.” The New York Times, Late Edition, sec. A, November 15, 2008.

¹¹⁵ J. Biskupic. “Court hears pre-term case on Clinton film.” USA Today, sec. A, September 8, 2009.

way that the legally trained do, the very sentence as frequently used is enough to explain to anyone what is about to come. Indeed, recognizing issues is not some magic talent of a person licensed to practice law, rather it is a traumatic reaction that comes to most from hours and hours of attempting to digest case after case akin to the way a batter ignores the sting of a base hit or an electrician can pick out the imperceptible flicker of a light.

Frequently, in the incipient stages of a case, the research uncovered the coverage of appellant and appellee arguments. That is to say that early coverage also, aside from the nine factors and issues, tended to focus to a degree on arguments litigants made to the court. “The lawyer, Malcolm L. Stewart, said Congress has the power to ban...”¹¹⁶ “The laws, former Solicitor General Theodore B. Olson told the court...”¹¹⁷ Whether the cases by the litigants is of great enough import to justify its inclusion in the set factors for analysis may be debatable, but this paper makes the case for their value and thus their inclusion.

Bowles and Bromley included in their nine-factor analysis as points seven, eight and nine, roughly stated, impact, reaction and attribution.¹¹⁸ Now, while certainly at any stage of the coverage a reporter can speculate as to the impact of the decision, get a reaction to the case or decision, or attribute the reaction, it seems reasonable that the arguments of the litigants are in those veins, and of great enough import to justify their own place at the table.

¹¹⁶ A. Liptak. "Justices consider interplay between First Amendment and campaign finance laws." The New York Times, Late Edition, sec. A, March 25, 2009.

¹¹⁷ R. Barnes. "High court's conservatives skeptical of election law." The Washington Post, sec. A, September 10, 2009.

¹¹⁸ See note 38

At the incipient stage, discussion of the impact of the possible decision is speculative and therefore only as useful as the source of that speculation; however, the speculation does not exist in a vacuum. The speculation as to the impact of the case usually comes from the analysis of the precedent, the underlying statute at issue and the arguments of the litigants. The arguments of the litigants are also at alternating times and to alternating degrees attempts to create and rehabilitate narratives about the issues before the court. “‘The commerce clause gives Congress the power to regulate existing commerce,’ Clement said. ‘It does not give Congress the far greater power to compel... commerce...’”¹¹⁹ Finally, the arguments of the litigants serve, to a certain degree, to create the issues the Court will decide. “Government lawyers have argued it is a tax because Congress is given broad authority under the Constitution to levy taxes.”¹²⁰

Considering the value of the arguments of the litigants during the early stages of the case as noted above, they deserve at least some treatment. Furthermore, in an effort to fit factors into an analysis that is more inclusive of a broader range of coverage, analysis should include important portions of a case at varying points in the case. This analysis of the reportage came to the conclusion about the inclusion of these factors at least in part because of the great deal of treatment that the authors gave to the arguments of the litigants.

This research also noted something of merit as well with respect to the examination of news stories about legal issues worth noting as it relates to story

¹¹⁹ R. Barnes. “Justices express doubts about healthcare law.” The Washington Post, sec. A, March 28, 2012.

¹²⁰ K. Sack. “Challenging health law, suit advances.” The New York Times, Late Edition, sec. A, October 15, 2010.

selection. This assessment is about story selection and not sample selection per se, though.

Previous scholarship tended to analyze the accuracy of coverage of legal issues in a very specific manner. Usually, previous research selected a sample and then, using whichever set of factors was at their disposal, counted or documented occurrences of specific factors in each article. The data were then, in most cases, collated into a larger rating system and used to describe accuracy, i.e. newspapers are more accurate than TV news because x% of all news articles reviewed included x number of factors whereas TV news included only y number of factors in y% of stories reviewed.

There is, of course, nothing wrong with this scholarship. Analyzing the quantity or frequency of the occurrence of something has great value and is incredibly informative. In the sense that it has value, so too does a greater and more expansive reading.

What the quantitative analyses miss is the story arc that is a part of both the understanding of and the expectation of the author and the reader. In a perfect world, any reader would sit down, pick up a newspaper and find an article that covers all of the aspects of the case necessary for understanding. That perception of course fails to consider the reality of space, time and context

That is to say that not all articles that refer to a case refer to them in a primary sense. Consider that factor six of Bowles and Bromley's analysis considers whether an article identifies statutes and precedents relative to the case at hand.¹²¹

¹²¹ See note 38

In this case though, it must be understood that the mention of those cases as non-subject cases relegates them to a position less deserving of full treatment in the factor analysis. Alas, mention of a case precedent would count as incomplete coverage in a quantitative sense even though, it would be contextually inappropriate, and indeed quite impossible to discuss all nine factors of that case within the article especially because that would require a discussion of all of its precedent and then full treatment thereof. As you can see, research cannot adhere slavishly to the factor analysis.

Respective to time and space, each relates back to context to some degree as well as the practical considerations of the news industry and genuine expectations of journalists and readers. That is to say that journalists possess a certain expectation as the amount of prior knowledge that a reader has as a base or context for the information they provide just as most readers who possess that information expect journalists to know this and move on to developments and beyond deep treatment of history. As noted above, journalists cannot devote the sort of time or space to each and every case as the nine factors might, at first glance require. Furthermore, outside of even those constraints, the real issues of how much time a journalist can devote to a story will limit what she can know about it, write about it or edit into or out of the story. Furthermore, space is a constant concern in print journalism for obvious reasons.

The level of knowledge that a reader has likely varies based on the news cycle. As a result, issues extensively covered in the news out of which court cases would later evolve would require journalists presumably to provide less

background information to their readership than would those that appeared less frequently in the news. This is to say that there is a logically inverse relationship between journalistic time and space devoted to a greater issue and journalistic time and space devoted to a case that evolves out of a story.

This study found that when analyzing nearly any individual article related to a court case, the article was deficient in multiple categories. When viewed as a narrative, though, the coverage was rich and nuanced and covered all that Bowles and Bromley asked for and more. This seems to imply that the journalists involved in the authorship of the work might generally view the work more as a creation of a longer narrative than as the staccato assemblage of individual explanations.

The forgoing discussion will attempt to examine the sample and discuss notable findings in multiple manners. The paper will give equal treatment to each news outlet reviewed for each case with a discussion of the backgrounds of the major authors, the factors noted and the most complete articles in each. Then, again within each news outlet, the paper will discuss the overall coverage as noted just above which is to say in total as opposed to considering them individually. Then, within each outlet for each case the paper will look at the themes noted, if any in the coverage. The paper will also discuss what cause might exist for differences in coverage as noted if any.

- Citizens United v. Federal Election Commission

- New York Times

Adam Liptak is currently, and was during the sample period, the Supreme Court correspondent for the New York Times. As such, Liptak crafted the overwhelming majority of the pieces about *Citizens United*. The sample yielded 28 articles from the *New York Times* related to *Citizens United* of which Liptak authored 21 articles. Of the other seven pieces, the authors were varied and, of course, had a minor effect on the overall coverage in comparison to Liptak.

Liptak has a phenomenal pedigree. He attended Yale University as an undergraduate, edited the school magazine, worked as an intern at the New York Times and returned to Yale for law school.¹²² Liptak worked in private practice as an attorney specializing in First Amendment litigation.¹²³ Liptak took over writing about the Supreme Court for the New York Times in 2008, and has taught Media Law in some of America's finer learning institutions.¹²⁴ Liptak seemingly possesses all of the tools one might imagine are necessary to intelligently and effectively work as the liaison between the Supreme Court and the readers of the Times, and Liptak's work bears out that assessment. When viewed overall, Liptak's complete coverage of the Citizens United case misses no detail of import as denoted by Bowles and Bromley.

¹²² The New York Times, "Columnist biography: Adam Liptak." Accessed January 30, 2013. <http://www.nytimes.com/ref/us/bio-liptak.html>.

¹²³ Ibid

¹²⁴ Ibid

As noted above, this coverage is not, taken in individual pieces, stellar in each example. Indeed, only one article from the Times, a Liptak piece covering the decision, specifically covers all of the factors that Bowles and Bromley, but viewed in total, the Times misses nothing.

Most commonly noted were case identification, litigation/procedural history, applicable statute/precedent treatment, possible effects of the decision, reactions to the decision or upcoming decision, and attribution for those reactions. Less noted within the coverage was coverage of a specific vote, the reasoning of the majority, or the reasoning of the dissent. Also less noted, and added to the examination as noted above were treatment of the legal issues, argument of the appellant, argument of the appellee, and the holding of the court.

As noted above, there is a clear reason that most of these factors are not present in all of the coverage throughout. Simply put, they cannot exist throughout. The reasoning of the court, either of the majority or the dissent, cannot exist until the court has reached a decision. This also applies to the vote. As for the added factors, there are no apparent reasons to omit these things from coverage so in this sense, insofar as they appear somewhat infrequently in the Times coverage, it might be fair to characterize the coverage as lacking in a sense, but in no way lacking entirely. As mentioned, the *Times* coverage when viewed in its entirety misses no factors.

As for the most exemplary piece of coverage, Liptak's article of January 22, 2010, a piece on the decision in *Citizens United*, misses none of the nine factors necessary for accuracy. Liptak begins with a brief mention of precedent and moves

on to a summarized holding in his lede sentence, “Overruling two important precedents about the First Amendment rights of corporations, a bitterly divided Supreme Court on Thursday ruled the government may not ban political spending by corporations in candidate elections.”¹²⁵

While Liptak’s assessment of the Court’s ruling is somewhat simplistic, and fails to get at the exact ruling, which is that the Court struck down a law barring corporations and unions from spending general treasury funds on electioneering communications, his treatment of the holding is not necessarily factually nor fundamentally incorrect, but is rather simply unspecific. This is not unreasonable given the strictures of this reportage, though if one sought to venture to criticize Liptak at some point, here would likely be the sturdiest ground from which to attack.¹²⁶

Liptak’s restatement of the holding makes the holding seem, at first blush, much broader than it is, or rather it can make it seem that way. As noted above, the holding was more specific in how it related to corporate spending in campaigns. Corporations did not, as a result of this case, enjoy the ability to donate unlimited amounts of money directly to candidates. That is to say, when read a certain way, one could misinterpret Liptak’s lede to imply a broader grant of power. Admittedly, that reading is narrow and limited. To call this criticism of Liptak’s piece nitpicky might be to go too far, as there is a legitimate concern regarding specificity, but to assert that Liptak is within the acceptable bounds of error is not overly generous,

¹²⁵ A. Liptak. “Justices 5-4, reject corporate campaign spending limit.” The New York Times, Late Edition, sec. A, January 22, 2010.

¹²⁶ Ibid

and Liptak's lede is the last point of contention in the piece. Also, Liptak goes on throughout the piece to clarify what exactly the holding is and is not, as in here, "The majority opinion did not disturb bans on direct contributions to candidates..." and "(e)ight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements..."¹²⁷

Liptak did excellent work including reactions from the president and campaign finance lawyers, both of differing opinions by the way, and noting the effect the case would have on future elections. Of even greater importance though is the treatment that Liptak gave to the reasoning of the opposing sides. Quoting Justice Kennedy, Liptak explains the majority's assertion that among the major purposes of the First Amendment is to ensure that Congress cannot take punitive actions against citizens for political speech. Liptak goes on to explain the dissent's rationale with the perspective of Justice Stevens who argued that the restrictions in place were modest and sensible as well as necessary to avoid corrupting democracy.¹²⁸

The reasoning of the both sides of the decision is important. Knowing the law is one thing. That is to say, one can simply say that the First Amendment prevents a list of government actions. That knowledge in and of itself has some, albeit limited value. Knowledge of a list of behaviors that a party can and cannot engage in provides guidance in the event of similar circumstances, or in this case, knowing what a government can and cannot restrict its citizens from saying is important, but of course, those instances are limited and specific. Knowledge of

¹²⁷ Ibid

¹²⁸ Ibid

those circumstances hints at the reason why if one were inclined to extrapolate. A fuller explanation of the rationale for the rules at hand allows people to better understand what they can expect though. A citizen who knows what the government can and cannot prevent them from saying or doing is armed, but a citizen who also knows why is well-armed. The latter citizen is more prepared to understand when her government has wronged her and her fellow citizens. An informed citizen becomes a watchdog, and if the role of media is as a fourth estate, then these circumstances are surely exactly those intended by that idea, and if the media are intended to police the government, surely the creation of more officers to those ends is a part of those duties.

In this sense then Liptak gave fairly frequent and prominent treatment to the reasoning of the Court in this piece. That seems to be the real triumph of the coverage. Certainly Liptak went over the other factually important bits of the case such as the procedural history and the votes on the various issues, but as noted above, answering “why” is the important thing. “The dissenters said that allowing corporate money to flood the political marketplace would corrupt democracy,” wrote Liptak.¹²⁹ Liptak went on to quote Justice Kennedy at length capturing here, at least in part, the majority’s concern, “If the First Amendment has any force it prohibits Congress from fining or jailing citizens , or associations of citizens , for simply engaging in political speech.”¹³⁰ Explaining why keeps citizens connected to

¹²⁹ Ibid

¹³⁰ Ibid

the workings of their government, especially the traditionally misunderstood and uncovered Supreme Court.

With respect to the noting of themes within the Times coverage, they were difficult to locate. There was some concern about the treatment of the case by writers for whom the Court was not their beat and the way that they tended to cover the case. This is to say that Liptak's coverage was most complete and the coverage of the other reporters tended to be poorer comparatively. Note the inclusion of the qualification comparatively, though, because it is important.

When considering the coverage of the Court in the other seven articles, the authors addressed each of the factors discussed by Bowles and Bromley with the noted exception of the reasoning of the majority and the dissent. Though noted above how important the rationale of the court is in coverage, it is also important to note that some of the same reasons noted above for missing factors are equally as valid here such as want of a decision. Some of these pieces ran prior to the January 2010 decision of *Citizens United*. Another very valid reason for the omission of the rationales in the presence of the decision is that Adam Liptak covered the rationale of the court. If Liptak's piece covers the rationale of the majority and the dissent, and the coverage of the case is generally a continuing narrative, then there is no real need to continuously describe the narrative.

Less a theme than an observation really is also the nature of the coverage of *Citizens United* by authors other than Liptak. To be sure, Liptak wrote about *Citizens United* in every manner, which is to say he covered it directly and tangentially in relation to other cases. Other authors spent more of their energies covering *Citizens*

United in the latter manner, though. When any author covered *Citizens United* in the more limited, relational manner, it certainly got far less treatment and as a result the coverage when viewed individually was incomplete.

There is the possibility that there is some greater connection to conflict here, with respect to the type of coverage, but it feels tenuous. That is to say, one might surmise that court decisions get covered more frequently in relation to each other because there is some greater sense of interest or excitement that occurs as a result of the collision of the two cases, but there is simply isn't enough data here from which to draw a conclusion. That question likely lends itself to extensive quantitative analysis and would be a fine idea for future study.

- USA Today

Joan Biskupic, like colleague Adam Liptak above, has an incredible pedigree as a Supreme Court reporter. Biskupic began covering the Supreme Court in 1989 for *Congressional Quarterly*, moved on to the Washington Post in 1992, and then USA Today.¹³¹ Biskupic graduated from Georgetown Law School, and authored a number of books about the Supreme Court).¹³² Like Liptak, Biskupic also resides in Washington.¹³³ Of the nine articles from USA Today reviewed for this paper, Biskupic authored eight of them.

Viewing Liptak's coverage in the narrative sense led to the conclusion that his, and the *New York Times'* coverage was complete. Biskupic's and *USA Today's*

¹³¹ USA Today, "Joan Biskupic bio." Last modified July 24, 2000. Accessed January 31, 2013. <http://usatoday30.usatoday.com/news/e98/bios/biskupic.htm>.

¹³² Ibid

¹³³ Ibid

coverage are complete as well when considered similarly. When compared to each other, though, Liptak's coverage is superior.

Biskupic's coverage included all nine factors noted by Bowles and Bromley for accuracy when viewed in total; however, no single piece specifically possesses all nine factors. Most frequently covered in Biskupic's pieces were most of the factors noted above in Liptak's pieces: case identification, statutory discussion or precedential discussion related to the case, impact or possible impact of the decision, reactions to the decision or the case in general, and attribution for those reactions. Many of the frequently missing factors noted in Liptak's pieces were also noticeably absent in Biskupic's coverage, factors such as the reasoning of the court and the vote, and for many of the same reasons. Biskupic did not and could not note anything related to the vote of the court, the reasoning of the majority or the reasoning of the dissent for much of the duration of the coverage because, as noted above, the case had yet to be decided. This of course leads back to the criticism of Bowles' and Bromley's factors that they neatly apply only to that coverage following a decision and not prior to the decision.

Notably absent as well were most of the factors added by the researcher upon the first reading of the *New York Times* piece: legal issues, argument of the appellant and argument of the appellee. Biskupic only twice mentioned legal issues in the case in her coverage, only once the argument of the government, and never the argument of Citizens United. Almost religiously though, Biskupic included the holding in some manner in pieces written following the Court's decision.

There may be a simple explanation for the inclusion of the holding in the decision in Biskupic's coverage though. Of the cases Biskupic penned, several were very brief, round-up type articles. The main thrust of the pieces was to note that there was a case called *Citizens United v. Federal Election Commission*, and the court held such and such. In the one article Biskupic did not write, the author noted the holding, but insofar as the discussion of Citizens United was relevant, it was in only in reference to other pending campaign finance cases.

Most prominently absent from Biskupic's pieces was the second factor noted by Bowles and Bromley, procedural history, though Biskupic does not appear to be totally at fault for this omission.

USA Today has a much different method for providing context than does the New York Times. Many, though not all articles seem to include text boxes that in some way reference the procedural history and background of the case or cases mentioned in the articles. As it were, in one sense, the articles with these text boxes possess the information set out in the procedural history background, but in another sense, these are not necessarily journalistic endeavors. Either way, condemning the Biskupic pieces that possessed text boxes, but no textual mention of procedural history would not be totally fair.

Identifying Biskupic's most complete piece is difficult as there are two likely candidates, one before the decision and one after. The article from before the decision comes from September of 2009 and addresses the oral arguments before the court. Biskupic identifies the case, notes the procedural history in text, the precedent and statutory background, the possible impact of the decision, provides

reaction, attributes reaction, notes the issues to a degree and notes the argument of the government and Citizens United. Biskupic writes, “The legal case developed during the presidential campaign when Citizens United sought to offer Hillary: The Movie... and the Federal Election Commission said it was subject to campaign finance law.”¹³⁴ She further noted that the McCain-Feingold Act prohibited “... ads financed with corporate or labor union money that refer to a candidate 30 days prior to a primary or 60 days prior to a general election.”¹³⁵

In the case of this pre-decision piece by Biskupic, it even has advantages over Liptak’s article cited above. Biskupic describes the issue before the court as one that “tests the regulation of corporate and labor union spending on candidates,” and later goes on to further clarify the issues as they related to the question of precedent, featured prominently in *Citizens United*, and electioneering.¹³⁶ Biskupic gives thorough treatment to the statute and precedent as well. The article describes the reasoning of *Austin v. Michigan Chamber of Commerce* and the specific electioneering provisions of the McCain-Feingold Act.

Biskupic’s post-decision piece also identifies the case, discusses the possible impact of the case, provides reaction to the case and attributes, but it also includes the vote of the court as well as the reasoning of the majority and the dissent.

There are some general observations to make with respect to Biskupic’s coverage in reference to Liptak’s coverage. Biskupic tends to write more simply than does Liptak. This is not to imply that Biskupic fails to adequately address the

¹³⁴ See note 115

¹³⁵ Ibid

¹³⁶ Ibid

cases in any way, but simply to point out that the styles of the two authors tend to vary. There is no immediate reason why this might be the case. Liptak studied English as an undergraduate at Yale,¹³⁷ while Biskupic has a Master's Degree in English from the University of Oklahoma,¹³⁸ which is to say that both are more than adequately trained. The only apparent reason is difference in outlet. The *New York Times*, in comparison with the *USA Today*, tends to provide a different sort of product in terms of prose. Again, in no way is this meant to disparage. This is simply an observation of a difference that the authors' styles are different, and that the authors' publications tend to pursue different styles.

As one might guess from simply observing the numbers, Liptak presents a richer narrative in the cumulative sense. The *New York Times* searches returned over 3 times as many results for review as did the *USA Today*. Liptak himself wrote twice as many articles as did Biskupic. Plainly put, Liptak enjoyed the luxury of space and therefore the ability to build a richer narrative. Where the Times seems to possess the advantage of column inches, *USA Today* attempts to address the issue with text boxes, which, as noted above, are not necessarily works of journalism for the purposes of this research and as such it would be unfair to make a judgment as to the adequacy of their use as substitution for full journalistic treatment. One statement worth making though is that text boxes read less conversationally than does actual structured writing.

Most of the differences between Liptak and Biskupic seem to be editorial in nature though. Seasoned a reporter as Biskupic is, she still must work within the

¹³⁷ See note 122

¹³⁸ See note 131

constraints of her newspaper's style and space constraints. Biskupic possesses a great deal of experience and insight in terms of Supreme Court coverage, and her writing is more than adequate.

In terms of themes, as in the case above, not many seem to emerge. One possible theme that begins to emerge in the reading, though, is conflict. Here, conflict presents itself in that a fairly large portion of the treatment of *Citizens United* comes from its juxtaposition with other cases. This is to say that direct treatment of *Citizens United* is not rare per se, but is much more prevalent in the discussion of emergent issues and other cases. Also, while not the first time that appellant and appellee arguments are noted together in the same article, the appearance here of one incident features more prominently in that it represents a slightly higher frequency. Still, that depiction of conflict does not appear to be the dominant thematic presentation.

- Washington Post

Of all of the outlets' coverage of *Citizens United*, that of the *Washington Post* was most intriguing. After ruling out opinion and profile pieces, the Post sample is 22 articles, of which Robert Barnes wrote 13 and Dan Eggen wrote 6. Neither Barnes nor Eggen is a law school graduate. Barnes' Washington Post Web site biographic page describes him as once having an aspiration to attend law school, but not having done so because of his interest in journalism.¹³⁹ Barnes began as a Post reporter and editor in 1987, began covering the Court in 2006 and continues to

¹³⁹ The Washington Post, "Robert Barnes: The high court." Accessed January 31, 2013. http://www.washingtonpost.com/robert-barnes/2011/05/20/AFZRhx7G_page.html.

cover it. Eggen began at the Post 10 years after Barnes and wrote for the Metro section.¹⁴⁰ Eggen moved on to cover the Justice Department, the White House and finally campaign finance, a beat he still writes about.¹⁴¹

All of this information about the education of the primary authors of the narrative of the *Post* may, further down, serve to explain the noted differences between this outlet's coverage and that of the *Times* and *USA Today*. Suffice it to say to this point though that formal legal training brings with it its advantages and disadvantages.

With respect to the overall coverage by the *Washington Post*, when viewed cumulatively, the narrative is relatively complete. Not entirely complete, but relatively complete. The narrative in total covers most of the factors noted by Bowles and Bromley, and all of the factors as crafted in the examination of the sample by the researcher.

The most noticeably included factors were the issues, arguments of the appellant, arguments of the appellee and the holding of the case along with reactions and attributions thereof. Indeed, of the 22 articles, only one article failed to address at least one of the four additional factors. To be sure, many of the articles also identified the case, discussed its history, noted the vote of the court or the impact of the case, but none of those were as remarkable as the factors described above. As an example, Barnes' article of September 6, 2009 gave significant treatment to the arguments, noting that the deputy solicitor general argued that the

¹⁴⁰ The Washington Post, "Dan Eggen: Reporter." Accessed January 31, 2013.
http://www.washingtonpost.com/dan-eggen/2011/02/28/ABg0isM_page.html.

¹⁴¹ Ibid

act allowed the government to ban books, and the attorney for Citizens United railed against criminalization of speech. In the same article, Barnes laid out many of the issues before the court. Notably though, Barnes never actually identified the case by its name.¹⁴²

Noticeably absent from the Post's narrative was the reasoning of the majority, which, of course, should be troubling based on the discussion of its seeming importance above as well as the simple recognition that a great deal of the majority opinion is devoted to its rationale. A subject that receives so much treatment in the decision certainly has a place in the narrative.

Neither Barnes nor Eggen wrote one particularly or obviously complete piece. Each had several pieces of varying degrees of completeness in terms of Bowles' and Bromley's factors. As noted above, each author gave extensive treatment to those factors developed for the purpose of this study.

Rather than giving treatment to either author's pieces individually, suffice it to say that of all of the authors reviewed for this research, only Liptak presented a piece that was complete based on the nine original factors. Moreover, the same realities in coverage and construction of a narrative as noted above applied to the construction of the narrative within the Post by Barnes and Eggen. That is to say that some factors were absent in coverage before the decision by virtue of the fact that they did not exist yet, and some factors were absent after the fact by virtue of the fact that they received extensive treatment early on in the construction of the narrative.

¹⁴² R. Barnes. "Election financing is revisited; justices to consider issue of corporate campaign spending limits." The Washington Post, sec. A, ⁶⁹September 6, 2009.

More interesting than anything about individual stories constructed by Eggen and Barnes is the obvious, or more obvious than previous, theme developed in the *Post* narrative. Noted above within the discussion of Biskupic's and the *USA Today's* narrative was that of conflict. In *USA Today* though, the conflict seemed more apparent in the sense that *Citizens United* appeared most frequently in comparison with other cases or other principles. That is to say, there was no apparent conflict in a classical or obvious sense – that of two counterpoints squaring off – but rather in the sense that one was context or scenery for another.

In Eggen's and Barnes' narrative, the constant presentation of appellant, appellee arguments reads like a point-counterpoint argument. Within the narrative of the lead up to the decision, 6 articles, 3 articles contain quotes denoting the arguments of the appellant and the appellee. Moreover, within the rest of the narrative, the reactions frequently come from opposing positions on the issue of campaign finance.

None of this of course is to say that the coverage by Eggen and Barnes is poor or incorrect, simply different. Eggen and Barnes are journalists by trade. As noted above, Barnes began work at the *Washington Post* in 1987, more than 20 years before the *Citizens United* decision.¹⁴³ Likely, Barnes worked in journalism for some time before that as well. Eggen too worked over a decade at the *Post* alone before the *Citizens United* decision.¹⁴⁴ These people are dyed-in-the-wool news writers.

Biskupic too worked as a journalist before become a reporter for the courts, but attended law school and went on from that to write mainly about the Court and

¹⁴³ See note 139

¹⁴⁴ See note 140

the law.¹⁴⁵ Liptak was a practicing attorney with a much smaller pedigree as a journalist.¹⁴⁶

Barnes and Eggen also tend to write differently than do Biskupic and Liptak. Barnes and Eggen tend to move from ledes into blocks of quotes in a more traditional news writing fashion than do Biskupic and Liptak.

Noting the differences in writing style and the theme, along with the differences in education seems to reveal something about the nature of the coverage. Simply put, authors with different educational backgrounds might lead them to value different information or its delivery methods differently. This is not a condemnation of either method. Except to say that Barnes and Eggen seem not to have addressed the reasoning of the court in its decision, Barnes' and Eggen's coverage was just as accurate as the other narratives. Also, it does bear noting that none of Barnes' nor Eggen's pieces was complete in the sense that it included all nine of Bowles' and Bromley's, but it would then bear noting that neither did any of Biskupic's.

The only possible absolute assessments that anyone can draw from the information within the sample respective to the coverage of *Citizens United* is that in only one instance did any news article satisfy all of the nine original factors and that viewed cumulatively as narratives each of the outlets did an adequate job of informing its readers. The review of the sample does lead to a question about how varying educational or professional backgrounds affect coverage.

¹⁴⁵ See note 131

¹⁴⁶ See note 122

- *National Federation of Independent Business v. Sebelius*

- *New York Times*

Unlike the sample for *Citizens United*, Adam Liptak did not write the majority of the articles in the sample for *National Federation of Independent Business v. Sebelius*. This thesis examined 13 articles for *NFIB v. Sebelius* and, of the 13, Adam Liptak wrote six. Kevin Sack wrote another six articles on *Sebelius*. Having noted Liptak's pedigree above, Sack's gets its treatment below.

Sack worked for the *New York Times* until 2002 before leaving for the *Los Angeles Times* where he would share a Pulitzer Prize for national reporting.¹⁴⁷ Sack returned to the *New York Times* in 2007¹⁴⁸ where he has worked since as an Atlanta-based health care correspondent.¹⁴⁹

Sack attended Duke University where he graduated with a degree in history.¹⁵⁰ Sack also studied in South Africa on a post-graduate fellowship.¹⁵¹ Sack did not obtain any formal legal education.

Sack's involvement in the coverage of the case makes sense when one looks at the chronology and the circumstances of the case. When viewed chronologically the reader sees that Sack's coverage of this case came entirely before Liptak's, the earliest part, and there is some logic to this. Sack is based out of Atlanta, and the

¹⁴⁷ The Pulitzer Prizes, "The 2003 Pulitzer prizes: National reporting." Accessed February 1, 2013. <http://www.pulitzer.org/biography/2003-National-Reporting>

¹⁴⁸ Reich, K. Take Back the times, "Kevin Sack rejoins the New York Times." Last modified May 14, 2007. Accessed February 1, 2013. <http://takebackthetimes.blogspot.com/2007/05/kevin-sack-rejoins-new-york-times.html>.

¹⁴⁹ Muckrack, "Kevin Sack national health reporter." Accessed February 11, 2013. <http://muckrack.com/ksacknyt>.

¹⁵⁰ See note 147

¹⁵¹ Ibid

case that eventually became *National Federation of Independent Business v. Sebelius*, the case that NFIB joined, was out of nearby Jacksonville, Florida. Furthermore, Sack is the health care correspondent for the *Times*. That Sack would cover a health care case in a district court in the nearby American South is sensible for both its content and logistics. Liptak handled the second half of the coverage of *Sebelius*, and this too makes sense. Liptak is the Washington-based, Supreme Court correspondent and the case had moved north to the Supreme Court.

As to the coverage in total, again, as in *Citizens United*, when the reader views the coverage in a cumulative sense, the coverage is complete. At some point, throughout the coverage, the authors manage to fill in all of the Bowles and Bromley factors. The authors also manage to cover all of the factors added by the researcher as well.

One odd thing noted in the review of these articles is that case-name identification of the subject here seems to occur at a much lower level than it did in the *Times* and other newspapers in the coverage of *Citizens United*. That is to say that in only four of the 13 articles did the author note the case by name (*National Federation of Independent Business v. Sebelius*) or something nearly as specific. There could be a few reasons for this seeming omission, though.

First, the case under the heading *National Federation of Independent Business v. Sebelius* is actually a conglomeration of three separate cases brought in three separate federal district courts by different parties and presenting somewhat

different issues.¹⁵² As such, in the incipient stage of the coverage, newspapers frequently make mention of the case in much more vague terms.

Another possible reason for the seeming case identification omission permeates the coverage of *Sebelius* in general. Coverage of the *Sebelius* case seems broader than that of *Citizens United* in a general sense, and when one considers the idea of the presentation of a grander, cumulative narrative in total, that sheds some light on the rationale.

The overall national narrative seems as though it would be much deeper and broader than that of *Citizens United*. To be sure *Citizens United* is a landmark case in the history of American free speech jurisprudence, but future studies will or could likely show that in comparison to the coverage to ACA and health care in America in general at the time surrounding *Sebelius*, there likely is no comparison. With a greater depth and breadth of coverage about the issue in general, journalists would and could expect readers to possess a greater extant contextual understanding of the issues, the debate and the case. As such, while greater specificity in coverage is frequently a valid criticism in media, here there is likely a reasonable explanation for some vaguery.

Adam Liptak's most complete individual piece was indeed absolutely complete in the sense that it encompasses all nine of Bowles' and Bromley's factors and the four additional factors included in this study. Liptak's piece dated June 29, 2012 mentions the holding respective to the so-called individual mandate in its lede and the vote in the immediately following sentence. Liptak followed with the

¹⁵² See note 77

reasoning of the majority and went immediately thereafter into the other holdings and their respective votes. Liptak noted the issues of the case along with the arguments of each side, and filled the article with reaction and possible effects.¹⁵³

Of every article reviewed for either case, none was nearly this complete. Liptak quoted Chief Justice Roberts' reasoning in the majority as to why the Court decided this was a tax, "Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."¹⁵⁴ He also touched on the dissent's perspective quoting Justice Kennedy's assertion that the decision was "a vast judicial overreaching."¹⁵⁵ Liptak also noted each individual holding and their individual votes. Liptak's piece could have served as a stand-alone syllabus for the decision.¹⁵⁶

An earlier Liptak piece stands out for its completeness in the absence of some information. As noted frequently above, the nine Bowles and Bromley are a somewhat ill fitting group in terms of their application to stories about cases that appear before the decisions. As noted, the questions of the vote and the reasoning of the decision and the dissent necessarily cannot appear. That being said, Liptak's November 15, 2011 piece included every possible aspect of coverage included in the nine factors with the exception of precedent, and every possible factor of the four

¹⁵³ A. Liptak. "Justices, by 5-4, uphold health care law; Roberts in majority; victory for Obama." The New York Times, Late Edition, sec. A, June 29, 2012.

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ Ibid

recently added metrics.¹⁵⁷ Taken together, Liptak's story from November 2011 and his story from June 2012 tell a complete story of the case in their own right.

Sack's coverage is somewhat of a departure from Liptak's. As noted above, the coverage shifted to Liptak when the Supreme Court took on the case. As such, no story by Sack could be entirely complete by the standards of the nine factors. Of course, as noted frequently, this is understandable under certain circumstances, and one of those circumstances is that which Sack finds himself in: an as yet unfinished case. Sack's coverage presents one very complete story from September 15, 2010.

In terms of Bowles' and Bromley's factors, Sack mentions the case history, the statute, the possible effect of an upcoming decision, reactions to a possible decision and attribution. Notably absent here is the omission of case identification, but the explanation above may explain this omission. Sack also includes the issues of the case along with the arguments of appellant and appellee.¹⁵⁸

All told, Sack's most complete piece is also very complete, and there is no indication that if Sack had the benefit of Liptak's post-decision information that his piece would be any less exemplary. Sack addresses the issues at hand deftly if not a little broadly, "... is the federal government's power so broad that Congress can require citizens to purchase a commercial product like health insurance?"¹⁵⁹ He later goes on to clarify this issue as, at the time, a Commerce Clause question. Sack also considers the issue of the standing of the states to challenge the act anticipating

¹⁵⁷ A. Liptak. "Justices to hear health care case as race heats up." The New York Times, Late Edition, sec. A, November 15, 2011.

¹⁵⁸ K. Sack. "Suit on health care bill appears likely to advance." The New York Times, Late Edition, sec. A, September 15, 2011.

¹⁵⁹ Ibid

the issue of the Anti-Injunction Act. Sack closes his article with several column inches devoted entirely to the arguments of the litigants.¹⁶⁰

This leaves the question of themes now with respect to the coverage, and in that vein there appears to be something notable. There are six articles from each of our main authors and a total of 13. Seven of those articles notably give treatment to the opposing arguments of the appellant and appellee. This is a much higher frequency than in any of the cumulative narratives reviewed for the *Citizens United* decision. Of the 13 articles, only two completely ignore the arguments of the appellant or the appellee. Of those two articles that give no treatment to the arguments, one of the articles discusses the decision after it occurred in the context of another legal battle while another discusses the decision about to come in terms of its long and winding history, which is to say that it was a procedural/historic review.

One might argue with a relative degree of safety that the narrative here, while maybe not dependent upon, certainly leans heavily on the interaction between the opposing sides of the case, and that as such the major theme of the narrative as written by the *Times* is conflict. Above, in the *Citizens United* analysis, information and research presented the possibility that the tendency of one news outlet, the *Washington Post*, to present conflict thematically might be explicable through the variance in educational backgrounds of the various reporters. Here, that just is not the case.

¹⁶⁰ Ibid

Of course there is variance between the educations of Liptak and Sack;¹⁶¹ however, what there is not is variance in theme. Liptak and Sack each give treatment to the arguments of the litigants at roughly the same rate though, which means there must be another explanation as to why.

One possible explanation is that the grander narrative for health care was and still is so politicized. This may seem an odd notion given the nature of *Citizens United* and that it is a first amendment case about political speech. On the other hand, it seems to be the case that *Citizens United* was a narrative unto itself and never received the traction of as broad and far-reaching an issue as health care.

Consider that *Citizens United* came out of the 2008 primary election. At best, from start to finish, the narrative around *Citizens United* had fewer than three years to fully develop. Health care is another story entirely. The history of health care reform in America is long and winding, starting in the 19th Century with proposed reforms for the care of the mentally handicapped and winding through reforms and attempted reforms in the 20th Century like Medicaid and Roosevelt's proposals for public health care.¹⁶² This paper is neither a treatise on health care nor its reform, and these points come up only to emphasize that health care in America is a long and oft-debated subject.

In that the narrative is much older and broader surrounding health care, one might argue that there is both an expectation that the media will present that conflict and that media members themselves expect that conflict. As such, perhaps authors perceive that conflict is the heart of any health care story or are more likely

¹⁶¹ See notes 122, 147, 148 and 149

¹⁶² C. Couch. "Health care: Reform and rhetoric."⁷⁸ UVA Lawyer, Spring 2011, 16-27.

to view this case in the grander context of conflict between reformers and advocates of the status quo while perhaps *Citizens United* is more easily viewed as a singular incident or stand alone occurrence.

- *USA Today*

As above in the *Citizens United* case, Joan Biskupic is largely responsible for the narrative construction in the USA Today. Biskupic is the author of five of the eight articles reviewed for this paper. The other articles are split evenly between three other authors. Biskupic's pedigree is available above, and its inclusion here would be duplicative.

One hesitates to call the narrative of *USA Today* incomplete. The sampled articles overall were notably missing the factors of vote, and the rationale of the majority and the dissent. Furthermore, no article in the sample addresses the holding of the case. Deficiencies in the sample might explain the omission, or perhaps the coverage was indeed incomplete. In either case, *USA Today's* coverage per the sample for this report is still, when viewed in total, fairly inclusive respective to the factors noted throughout. That is to say, though the sample shows there are several missing factors, the cumulative narrative overall still addresses the vast majority. Indeed, of the total 13 factors, there are at least nine factors present, which, in comparison to the studies by scholars mentioned above regarding accuracy places the narrative higher than most.

Biskupic's most complete story came before the decision itself. Biskupic included the procedural history, precedent and statutes, possible effects, reactions

to the impending decision and attribution of the nine factors of Bowles and Bromley. Of the latter added factors, Biskupic included issues, and the arguments of each side.

Like the coverage of the *New York Times* above, the narrative rarely included a specific mention of the case name. In fact, only twice throughout the *USA Today* sample did the author mention the case name specifically. Likely reasons for that are similar to those noted above for the *New York Times* coverage: a generally confused idea about who the litigants may be in the case upcoming as well as an expected contextual understanding of the subject of the story by the author of the reader.

Thematically, conflict in this narrative seems to be somewhat thinner, though hardly non-existent. Half of the articles give treatment to the arguments of the litigants, and in each case in which they are mentioned, both are mentioned. In similar circumstances to the above *New York Times* coverage, both Biskupic and another *USA Today* reporter, Richard Wolf, gave treatment to the arguments of the parties.

According to his *USA Today* biographical snapshot, Wolf covers the White House as well as economic and domestic policy.¹⁶³ Whether Wolf attended law school is another matter. Wolf does not maintain an extensive biographical history online; however, considering that Wolf started at USA Today in 1987, and worked for Gannett newspapers in New York covering local politics before, one might safely assume that his professional experience left little time for attending law school.

¹⁶³ USA Today, "Press room: Press kit: Reporter bios." Accessed February 11, 2013. http://usatoday30.usatoday.com/marketing/media_kit/pressroom/reporter_bios.html.

If Wolf never attended law school as Sack above did not, and Sack, Wolf, Biskupic and Liptak all felt compelled to include the conflict of the parties as a major theme of the narrative, then it would seem plain that variance in education is an unlikely factor in whether or not an author is drawn to the stricter narrative of the legal issues or other themes. As noted above, *Citizens United*, though not a one off, certainly does not exist within the same sort of grand socio-political narrative that health care does. Based on these observations, one might surmise that the extant social narrative might have a bigger influence over how a story gets covered than does a specific kind of training.

- *Washington Post*

The *Washington Post* sample yielded seven articles of which Robert Barnes, previously discussed, authored five. As noted above, Barnes did not receive any formal legal education, though as noted in his *Washington Post* biographical contribution, he did have aspirations to become a lawyer.¹⁶⁴

The overall coverage of the *Post* is complete in the sense that of the nine original factors and the four additional factors, no factors are omitted. Though, as noted in each of the above samples, one of the most frequently omitted factors was case identification. As mentioned above, there are several plausible explanations as to why this is the case: complex procedural history leading to uncertainty about future litigants, and a possible heightened expectation among authors of the reader regarding the context of the case.

¹⁶⁴ See note 139

Barnes' most complete article, dated June 29, 2012, rivals Liptak's decision piece, mentioned above, for completeness. Barnes' article includes eight of all 13 factors, and one of the factors added in this study. Barnes omitted only reaction to the decision, which in turn necessarily means that Barnes also omitted any attribution thereof. Barnes omitted statements of issue and arguments of the litigants in this piece as well. Barnes' treatment of the rationale of the majority was somewhat weak though. Barnes notes that the majority agree that the mandate is permissible as a tax, and then he goes on to cite Chief Justice Roberts as noting that it recognizes no new federal power. Barnes' treatment of the issue simply read as luke warm.¹⁶⁵

Barnes quotes Chief Justice Roberts as drawing a line between ordering citizens to buy health care and taxing those without health care, and later that the decision creates no new federal power. These points touch on some of the reasoning behind the decision of the court, though somewhat cursorily. Barnes' treatment of the dissent is much more sound. He quotes Justice Kennedy's dissent pointing out that "caution, minimalism and understanding that the federal government is one of limited powers" as well as his criticism of the question of whether the mandate is a tax for purposes of Congress' Taxation powers, but not the Anti-Injunction Act.¹⁶⁶ When read together, the treatment of the opposed reasoning seems to tilt in favor of the dissent if for no other reason than poor quote selection. Criticism aside, Barnes' piece on the decision was his most complete, and the most complete of the Post.

¹⁶⁵ R. Barnes. "Justices limit Medicaid provision." The Washington Post, sec. A, June 29, 2012.

¹⁶⁶ Ibid

Thematically the *Post* was also not immune to the draw of using conflict in the narrative of the story of the case. Four of the seven articles reviewed in the sample make heavy use of the arguments of the litigants in the case. Of course, this is neither new nor unexpected considering the similar occurrences in other outlets. In this case, we do not have two authors, one with a legal education and one without, to compare to each other; however, observations in the previous outlets seem to indicate that the education of the authors is unlikely to be cause for a variance.

Chapter 4

Conclusion

Before the reader delves too far into the conclusion, it bears pointing out that the study above has limitations. Obvious from the sample is that the study is somewhat limited in scope in that it only addresses two court cases. Furthermore, the study is limited in reach in that it addresses only newspaper coverage, and only three newspapers at that, while the studies noted in the literature review looked at varied sources of media. With all that in mind, the findings still have value.

Accuracy seems to be a rather fluid and dynamic concept. Bowles and Bromley refined a factor analysis of accuracy over the course of multiple studies.¹⁶⁷ In the case of this study though, some factors fit better than others at times and factors previously not included needed to be added to capture important information usually present in decisions of the court.

Preliminary stories about cases cannot cover factors such as the vote of the court, the reasoning of the majority or the reasoning of the dissent, and as such, failure to include these can in no way be a mark against a reporter. Furthermore, respective to the factors added for this analysis, no preliminary story can include a holding for obvious reasons and no reporter should be penalized for the exclusion of that in such a story either.

¹⁶⁷ See note 38

Accuracy is better measured in the observation of the cumulative narrative of the story than in individual trials. While one might expect the fullest coverage to come in the story of the decision, and this would not be unreasonable, the expectation that one story can or should possess every single factor of a Supreme Court decision is somewhat inconsiderate of the real factors of journalism. Writers and editors need to expect that readers are attuned to stories and that there is a degree of understanding of historical context that they possess. Writers and editors have neither the time nor the space to write each individual article as if it will be the only information a reader imbibes on a topic. Newspapers need to make considerations for their limited amount of space in terms of the physical copies. Competing for that limited amount of physical space within the copy are dozens of other articles about equally important information.

The research did not uncover too many themes within the reportage on these cases. One theme noted though was conflict. Reporters, regardless of their education or experience, seemed very interested in the arguments of the litigants in the Health Care decision. There are a number of possible reasons for conflict as a theme in the coverage of any complex Supreme Court decision. One of them, frankly, is that the legal system is not exactly action packed. This is not to say that it is boring, but it can be overly complicated and procedural. Legal issues are the meat and drink of lawyers and legal analysis, but the presentation of solutions, and the derision of alternatives by the lawyers through oral argument is far more sexy than the ponderous questions of whether this or whether that.

The law can be and frequently is quite dry. Reading the law is not often something someone does for fun, and when someone reads decisions the facts tend to be the most exciting part. The story of Paul Cohen is much more interesting when presented as the story of a teenage dissident gallivanting through a courthouse with a jacket that says “Fuck the Draft” on it than when you sell it as the epic battle over what is speech and what is conduct, or whether a law is too vague.¹⁶⁸ Perhaps it all relates back to conflict. The stories of court cases are usually the most interesting part because they are the stories of some sort of conflict. Cohen and the Draft, Citizens United and Hillary Clinton, everyone who supported health care and everyone who opposed it. There is conflict in issues, but given the scale of the issues such as the draft, an election or health care, questions of vagueness, corporate citizenship or the tax status of a penalty respective to the Anti-Injunction Act seem remarkably small.

Cases come with different pedigrees. *Citizens United* is a case about political speech and campaign finance. The Framers certainly had political speech in mind when they drafted the First Amendment to the constitution. In that sense, it is unreasonable to say that national debate about political speech is a new affair. Of course, it is plain that the discussion about political speech is of a different type entirely, and of a different temperature than the national health care debate, at least currently. In that sense, one might understand some allowances for both the creeping of certain themes, as well as the omission of some of the aforementioned factors of accuracy. Likely this explains some of this in the sample, and perhaps that

¹⁶⁸ *Cohen v. California*, 403 U.S. 15 (1971).

is because each decision itself exists within a greater framework, with a more broadly understood context.

This review of reportage on complex Supreme Court decisions does not show a press broken or spreading misinformation. This review shows a press, at least with respect to the sample, competently keeping pace with difficult-to-grasp legal issues amid tight deadlines and shrinking news holes. The coverage is not perfect, indeed if this research revealed perfect coverage there would be a whole host of other questions, but it is more than adequate.

This review does appear to show that there is a moderate advantage to a classic legal education in the reporting on legal issues, but really this could be an issue of experience as well. That is to say, journalists who wish to cover the high court ought not necessarily run out and incur the cost of juris doctorate just yet. Perhaps equally effective is working alongside of experienced, excellent reporters and self-study. Like anything else, practice makes perfect, or at least, practice makes less awful.

Supreme Court justices rarely compose straight-forward, simply-worded, easy-to-understand decisions. There are few Hemingways among the wise souls in robes, and their decisions often read more like stereo instructions than the rules they purport to be. No one, and though broad generalizations are often dangerous this one feels quite safe, can snatch up a court decision and nail down all of the nuance and minutiae on the first shot out of the box. If those people existed in any significant numbers, law professors would be a dying breed and law schools a quaint and distant memory.

Given all of the ins and outs along with the limitations and realities, legal journalism appears to be on the right track.

What appears to be off track is the analysis of legal reporting. Quantitative analysis is a fantastic method for many things, and works in many instances. Quantitative methods do a poor job here, at least as previously applied to legal reporting. The previous studies seem to point to a singular moment in the narrative that is more important than any other: the decision article. Of course, the article following the decision is very important, but the samples above show that in at least two cases there are dozens of articles both before and after the decision that help create the narrative. If readers read only one article about any given Supreme Court decision, then passing judgment on the quality of the reporting based on those articles would make more sense, but the likelihood that most people take in their news that way seems low.

Future studies might consider the expansion of cases to include a third or fourth. Perhaps just as helpful might be the expansion of sources. While the selection of the sample for this review presented some challenges, specifically the ambiguity of the identification of the health care case presented difficulty in isolating articles for review, it would seem this occurred as a result of its existence in a greater narrative. This problem makes expansion of this study somewhat difficult. While one could avoid cases such as these, those very cases seem to present the most opportunity to spot thematic development or encroachment.

As noted briefly earlier in the discussion of the *Citizens United* reportage, someone might do well to look at the frequency with which court cases are

mentioned as stand alone subject matter, or alternatively in reference to other cases. The research seems to indicate that the pervasive theme of the coverage of court cases is conflict. That is to say, in this specific case, the researcher noted that some outlets or writers featured conflict within the grander narrative. This of course is valuable to note in the sense that it helps us understand what factors affect the construction of the narrative and thus the narrative itself. Investigating how the cases themselves are used, as stand-alone pieces of reportage or as a part of another story about another case, might provide another aspect of the narrative's construction.

This study looks only at newspaper coverage, as noted above. Future studies might consider applying the qualitative method to other media. An application of this method to broadcast journalism might provide drastically different results or themes. Similarly, there are a number of specialty Web sites and blogs devoted to covering legal issues. Many people get their news from these media as well, and more research in that area would be beneficial.

A final thought for future research involves how consumers get their legal news. As stated frequently above, the narrative of the legal reporting seems to be cumulative in nature and the journalists who write about the law seem to conduct themselves with that in mind to a degree. Whether there is a great deal of repeat readership would be highly complementary to accuracy for the reasons noted above.

In the interest of disclosure this section should include a discussion about expected findings, and part of that discussion must necessarily include a brief

statement on the history of this research. The impetus for this research came from the eyewitness confusion of the researcher at the broadcast news coverage of the Supreme Court's decision regarding health care. Anecdotal evidence and, as noted above in the review of the literature, actual scholarship supported an initial conclusion that journalistic coverage of legal issues in general was myopic, misguided and frequently unreliable.

With this in mind, the researcher embarked on the review of the actual coverage of the two cases chosen with an expectation, perhaps even an anticipation, that journalists were ill-equipped to handle the complexities of the law and would provide poor coverage that would doom readers to a muddling and incoherent understanding of the maze of laws in which they live.

The research for this paper and the conclusions drawn herein do not support that expectation, as the reader has no doubt concluded from all of the above discussion. Indeed, if anything, this study quickly proved the adage that the plural of "anecdotal" is not "data."

If the researcher left the confines of this academic exercise with any feelings whatever regarding the coverage of court decisions they are as follows. First, the law is thick reading, and that assessment is generously made by someone with something of an affinity for the law. As noted above, legal decisions can be difficult to grasp and navigate, and in recent years they seem not to be getting any easier. Second, journalism is often unpleasant and frequently thankless work that puts tremendous strain on a person's ability to juggle multiple complex concepts in an attempt to meld them into one cohesive unit that will inform, entertain and, in some

cases, even inspire readers. As a job description, that alone might drive away a third of would-be reporters. Third, justices take weeks to craft decisions, and those justices frequently have clerks who are the best and brightest graduates of the finest law schools in America. No journalist stands a chance against that regardless of how hard she works to keep up with the case; the deck is stacked against her in terms of whipping out copy at the break neck pace demanded by today's news cycle. Finally, people simply can not rely on one writer or one outlet for their legal news. In the discussion, the researcher took great pains to point out that each of the outlets covered each of the cases more or less completely when viewed as a whole. That is not to say that all coverage is the same. Each of the narratives is slightly different and each of the outlets covered different things at different times and certainly in different ways. Again, each outlet covered the cases more or less completely, but in the aggregate, all three of the narratives combined to create fantastic treatment of the cases.

In the end, the quality of journalistic coverage of the Court is adequate when considered in total, at least in this case. Of course, as noted above, these cases are exceptionally complex. One must hope that if the media are getting these cases generally right, that the simpler cases would have similar, perhaps better results. All that said, if the media get the cases they cover right, but cover only a third of the cases, the picture is still incomplete. The literature review for this research discussed previous holes in coverage with respect to the amount of coverage or preference for certain cases. It is for further research to decide if there have been any improvements in the quantity of the coverage. Greater coverage along with the

quality noted above would provide a remarkably complete picture of the legal system in the United States.

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