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"Should Supreme Court Justices Fear Access to Their Papers? An Empirical Study of the Use of Three Archival Collections"

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SHOULD SUPREME COURT JUSTICES FEAR ACCESS TO THEIR PAPERS? AN EMPIRICAL STUDY OF THE USE OF THREE ARCHIVAL COLLECTIONS

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Abstract

U.S. Supreme Court justices typically donate their working papers to archives upon their retirement, often with lengthy embargoes.[1] Researchers have debated whether the justices should be required to retain and disclose their papers as government records, but there has been little study of how the papers are used in scholarly and journalistic discussions of the Court. This empirical study examines how the papers of Justices William Brennan, Thurgood Marshall, and Harry Blackmun are used via citations in books and academic law journal articles. We find that most citations to the papers support discussions of the justices' views on the law along with deliberations and negotiations when deciding cases, precisely the kinds of uses that show the value of transparency. To address constitutional objections to mandated disclosures, we propose an incentive grant program that benefits the archives receiving justices' collections. This program would encourage justices to donate their papers with relatively short embargoes, ideally fifteen years after retirement from the Court.

INTRODUCTION

In 1990, the U.S. Supreme Court handed down its decision in *Pennsylvania v. Muniz,* which carved out an exception to the requirement that *Miranda* warnings be given prior to custodial interrogation.[2] This exception allowed police to ask certain "routine booking questions" without triggering the arrestee's Fifth Amendment rights

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[1] In archives and libraries, the term "embargo" is used to mean restrictions on access to materials in a collection.
[2] 496 U.S. 582 (1990).

against self-incrimination and the need for *Miranda* warnings. For Supreme Court watchers and scholars, a particularly puzzling aspect of this decision is that it was authored by Justice William Brennan, who was known for his liberal views on most issues, including criminal procedure. Why would Justice Brennan write a majority opinion limiting the scope of *Miranda*'s protections? It was stunning that he would join, much less write, such an opinion.

Another puzzle with which legal scholars have struggled is learning what factors are most important for the Court when considering petitions for *certiorari* (hereinafter *cert.*).[3] Since the Court grants review for a miniscule percentage of appeals, and denials of *cert.* are generally made without comment, this screening process is a crucial but concealed part of the Court's work. Tax law cases offer an example. Researchers have noticed that the Court tends to grant review of more tax cases than would be expected, especially given these cases' reputation as technical and mundane.[4] Why does the Court review an elevated number of tax cases?

Answers to these questions are found in collections of the justices' papers.[5] Justice Brennan explained in a note to Justice Thurgood Marshall that his vote in *Miranda* was a strategic move, allowing him to author the opinion. As author, he could make the "booking questions" exception as narrow as possible while still satisfying the other justices in the majority. If he chose to dissent, leaving someone else to the majority opinion, he knew it would be worded in such a way that the exception would be considerably broader.[6]

As for grants or denials of *cert.* in tax law (or other) cases, researchers can look at the preliminary memoranda preserved in Justice Blackmun's papers at the Library of Congress. These memos show, unsurprisingly, that the justices tended to grant review in cases that would resolve circuit splits. What is surprising is that the memos also indicate that the justices looked for tax cases in which large amounts of public revenue were at stake, and for cases in which the Solicitor General supported review as the respondent even though the government had prevailed in the court below.[7] These two factors had not previously been acknowledged by the Court in published orders or opinions.

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[3] Petitions for *certiorari* are requests for review of a lower court's decision by the Supreme Court. They are the source of most U.S. Supreme Court decisions. The justices vote to determine whether to grant or deny each petition, with four yeas required for a "grant of *cert.*"

[4] Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFFALO L. REV. 889 (2004).

[5] Each justice decides for themselves whether and where to donate their papers. Many choose the Library of Congress, but academic institutions, think tanks, and historical societies have also been recipients of a justices' papers.

[6] FORREST MALTZMAN, JAMES F. SPRIGGS, AND PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME, at 94 (2000).

[7] Staudt, *supra* note 4.

These examples show how access to the justices' working papers enlightens us as to their views, the inner workings of the Supreme Court, and the development of the law. Prior articles have argued that access to these papers should be ensured to increase public understanding of how the Court reaches its decisions.[8] While the justices themselves have made little public comment on the matter, their preferences are revealed by a pattern of donating their papers but imposing long embargo periods. Further, when Justice Marshall's papers were opened earlier than many expected, Chief Justice Rehnquist, claiming to represent a majority of his peers, castigated the Librarian of Congress[9] and prompted a Senate hearing on the matter.[10] The Chief Justice's primary concern seemed to be that the release of Justice Marshall's papers so soon after his departure from the Court would interfere with the privacy and confidentiality that enable the Court to function. This concern is also evident in the justices' ongoing refusal to allow cameras in the courtroom during oral arguments.[11]

In addition to the justices' apprehension about openness, how exactly to ensure access to the justices' papers after their retirement is something of a conundrum. The justices seem disinclined to establish any rules or guidelines of their own, and Congressional action on the matter would likely present serious separation of powers issues, especially since Congress has placed no similar requirements on senators or representatives.[12]

In this study, we address both these concerns in the hope of prompting more consistent and predictable availability of the justices' papers—access within fifteen years of retirement from the Court. First, we investigate the actual use of the justices' papers through a context-based, qualitative citation analysis. The purpose of this investigation is to determine what information is conveyed by citations to the justices' papers. We conclude that, contrary to the justices' fears, their papers are almost exclusively used by researchers in ways that help readers better understand the development of constitutional law and the inner workings of our country's highest court. Most of the citations to these paper collections are quintessential examples of

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[8] Kathyrn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1165 (2013); Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787 (2016). The Supreme Court Opinion Writing Database, http://supremecourtopinions.wustl.edu/, created by Paul J. Wahlbeck, James F. Spriggs II, and Forrest Malzman in 2021 is an excellent indication of just how useful access to the justices' papers is for scholars and Supreme Court aficionados.

[9] *See, e.g.*, Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. TIMES, May 26, 1993, at A1; *The Papers of Justice Marshall*, CHIC. TRIB., MAY 29, 1993, at 1–18.

[10] *Public Papers of Supreme Court Justices: Assuring Preservation and Access, Hearing Before the Subcommittee on Regulation and Government Information of the U.S. Senate Committee on Governmental Affairs*, 103d Cong. 69 (1993).

[11] Vincent James Strickler, *The Supreme Court and New Media Technologies*, in COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE 61, 67 (Richard Davis, ed., 2014).

[12] *See* Justin Walker & Caroline Phelps, *Chilled Chambers: Constitutional Implications of Requiring Federal Judges to Disclose Their Papers Upon Retirement*, 47 U. MEMPHIS L. REV. 1169 (2017).

thorough and scholarly commentary, precisely the sorts of uses a justice would likely desire for their papers.

For the second concern regarding the constitutionality of a mandate regarding the justices' papers, we propose a grant system, established by Congress, that would provide incentives for justices to encumber donated collections with shorter embargoes.[13] The grant funds would benefit the institution receiving the papers and would be more generous for collections that have shorter embargo periods (with a floor of ten years) and fewer access restrictions. In short, the earlier a justice is willing to allow access to their papers, the greater the financial benefit to the receiving institution. Supporting the justices' archives in this way maintains the justices' agency and avoids any constitutional concerns over separation of powers or takings of the justices' property.

Section I of this article provides background information regarding the status of Supreme Court justices' working papers and the concerns that surround access to the papers. Section II offers a review of the citation analysis literature, with particular emphasis on qualitative rather than quantitative approaches. It also looks briefly at citation studies of archival materials plus citation-based work in legal scholarship. Section III covers the methods used in this study, and Section IV discusses our results. In Section V, we explore the idea of using Congressionally-created and federally-funded grants to incentivize the justices to allow earlier and more predictable access to their working papers.

Section I: Background on the justices' papers

Throughout the course of their employment with the federal government, the justices of the United States Supreme Court produce a tremendous number of documents, very few of which are official court documents preserved by the Court itself. The justices' working papers—correspondence, draft opinions, memoranda to the conference, bench memos—are not subject to any retention or preservation rules. Each justice can do with them as he or she pleases, even though these papers are created as part of their government employment.

As a result, there is unpredictability surrounding the justices' papers. There is no single location where all the papers are held. The Library of Congress holds many of the collections, but others are scattered across university libraries, historical societies, and institutes. There is no standard timeframe for availability. Justice Thurgood Marshall's papers were opened to the public shortly after his death, which occurred only fifteen months after his retirement. In contrast, Justice David Souter's papers will not open until fifty years after his death. At this point, the opening is likely to quite late in the twenty-first century, more than seventy years after his retirement

[13] This idea was originally proposed in Susan David deMaine, *Access to the Justices' Papers: A Better Balance*, 110 L. LIBR. J. 185 (2018). We give the idea more thorough treatment here.

from the Court. Some collections are restricted to "serious" researchers, while others are available to anyone interested.[14]

When Justice Marshall's papers were made available to the researching public within only a few years of his retirement, there was an outcry from other justices.[15] They feared an intrusion into the privacy of the inner workings of the Court—the back-and-forth over opinions, the free expression of views. There was talk of chilling effect. Nearly thirty years on, we can safely say that the Marshall papers held no terrible revelations about the Court or the characters of the other justices. Instead, they have been widely used for historical and legal research, and the gravitas of the Court is intact.[16]

Nonetheless, the justices are tending to set more restrictive terms over longer timeframes when they make arrangements for their papers. In response, and to extend other scholarship calling for preservation of and access to the justices' papers,[17] this study looks at the use of the papers of three justices—Justices Blackmun, Brennan, and Marshall—to determine if and how often they were used in a way that would reflect negatively on the Court or individual justices.

Section II: Background on citation analysis

Citation analysis has been used in a variety of ways to investigate scholarly impact, development and diffusion of ideas, and research trends. Citation analysis is particularly common in the sciences and is often quantitative, using counts of citations and mathematical manipulations of those counts to support conclusions. Citation analysis that is more qualitative in its approach, which generally incorporates analysis of the citations' contexts in some fashion, is somewhat less common.[18] The relative dearth of qualitative citation analyses is especially noteworthy because modern bibliometrics got its start in the *Science Citation Index,* which was heavily influenced by *Shepard's Citations.*[19] Part of what made *Shepard's* such a success in

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[14] *Id.* at 187–91.

[15] *See supra* text accompanying notes 9–10.

[16] Gallup polling shows very little difference in public opinion regarding the Supreme Court from 1998 to the present. *In-Depth Topics: A to Z: Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx (last visited Nov. 29, 2020).

[17] deMaine, *supra* note 13; Watts, *supra* note 8.

[18] The distinction between quantitative and qualitative citation analysis is fuzzy at best. Even a straightforward counting of citations is somewhat qualitative in that it may be used to signify, at least to some degree, the quality of a scholar's work. Meanwhile, a study that is qualitative in that it investigates the context of a citation may do so by counting keywords surrounding a citation's locus in the text. In this article, we are using "quantitative" to describe citation analyses that give little to no consideration to the context of the citation, and "qualitative" to describe studies that specifically focus on the content of the citation's context.

[19] NICOLA DE BELLIS, BIBLIOMETRICS AND CITATION ANALYSIS: FROM THE SCIENCE CITATION INDEX TO CYBERMETRICS 23–24, 35 (2009)

the legal realm is that it indicated the contextual purpose of each citation, e.g., a case was cited because it was followed, questioned, or distinguished from the present case. The contextual analysis aspect of Shepard's did not carry over into the science citators.

Nevertheless, some qualitative citation analysis has been done in mainstream bibliometrics. The limits of purely quantitative analysis were being discussed by the mid-1960s,[20] and research into ways of conducting qualitative citation analyses was being reported in the 1970s.[21] Bibliometric theorist Blaise Cronin urged adding an "externalistic" approach to citation studies:

> Citation is not something which happens in a void, and citations are not separable from the contexts and conditions of their generation ... Future studies should therefore concentrate on the content of citations, and the conditions of their creation and application.[22]

Terrence Brooks did just this when he began studying author motivations in citation. For example, his article entitled *Evidence of Complex Citer Motivations* investigated the citations of twenty scholars to determine where they fit along seven identified motives: currency, negative credit, operational information, persuasiveness, positive credit, reader alert, and social consensus. Brooks used author interviews to conduct this qualitative citation research.[23] Additionally, in his 1988 entry in the *Encyclopedia of Library and Information Science*, Brooks outlined numerous other motivation taxonomies and discussed some of the pitfalls in

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[20] *See* Norman Kaplan, *The Norms of Citation Behavior: Prolegomena to the Footnote*, 16 AM. DOCUMENTATION 179, 181 (1965) ("The fact that it will now become much easier to do a much more thorough job [of analyzing citation counts] should not detract from the equally important fact that it is all too easy to make quite unwarranted inferences from such analyses. And one of the reasons this is so is that we know so little about the actual norms and practices in citation behavior."). *See also* J. R. Cole and S. Cole, *Measuring the Quality of Sociological Research: Problems in the Use of the Science Citation Index*, AM. SOCIOLOGIST, 6 (1971), 23–29.

[21] *See, e.g.*, Michael J. Moravcsik and Poovanalingam Murugesan, *Some Results on the Function and Quality of Citations*, 5 SOC. STUD. SCI. 86 (1975); Henry G. Small, *Cited Documents as Concept Symbols*, 8 SOC. STUD. SCI. 327 (1978); Daryl E. Chubin and Soumyo D. Moitra, *Content Analysis of References: Adjunct or Alternative to Citation Counting?*, 5 SOC. STUD. SCI. 423 (1975).

[22] BLAISE CRONIN, THE CITATION PROCESS: THE ROLE AND SIGNIFICANCE OF CITATIONS IN SCIENTIFIC COMMUNICATION 86 (1984).

[23] Terrence A. Brooks, *Evidence of Complex Citer Motivations*, 37 J. AM. SOC'Y INF. SCI. 34 (1986).

attempting content analysis of citation contexts.[24] More recently, scholars interested in qualitative citation analysis have turned to tools such as text mining.[25]

This study of citations to the archival collections of Supreme Court justices also builds upon existing studies of citations to archival materials. Most archival citation analyses focus on quantitative questions such as what kinds of documents are used most often.[26] A quantitative focus is not surprising given its widespread use outside of archives, and it was the subject of the original call for citation analysis in archives by Clark Elliott in 1981.[27] Qualitative archival citation analyses exist but are rare. One example is Jacqueline Goggin's 1986 study of researchers' use of records in certain collections in the Library of Congress Manuscript Division. Goggin evaluated the quality of scholars' use by querying whether they "posed challenging new questions and advanced illuminating interpretations based upon exhaustive research in a variety of types of archival sources."[28] Goggin's evaluation of the quality of the use—did the use move scholarship forward?—is unusual in citation analysis generally but is present in discussions of archival user studies of the time.[29]

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[24] Terence Brooks, "Citer Motivations [ELIS Classic]," in ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCES 1038 (3d ed., 2010). *See also* Christine L. Borgman & Jonathan Furner, *Scholarly Communication and Bibliometrics,* in 36 ANNUAL REVIEW OF INFORMATION SCIENCE AND TECHNOLOGY 3 (Blaise Cronin, ed., 2002) (critiquing evaluative citation analysis when it presumes to understand citer motivation without interviews).

[25] *See, e.g.*, Chao Lu et al., *Understanding the Impact Change of a Highly Cited Article: A Content-Based Citation Analysis,* 112 SCIENTOMETRICS 927 (2017); Marc Bertin et al., *The Linguistic Patterns and Rhetorical Structure of Citation Context: An Approach Using N-Grams*, 109 SCIENTOMETRICS 1417 (2016); Kathy McKeown et al., *Predicting the Impact of Scientific Concepts Using Full-Text Features*, 67 J. ASS'N INFO. SCI. & TECH. 2684 (2016); Rey-Long Liu, *Passage-Based Bibliographic Coupling: An Inter-Article Similarity Measure for Biomedical Articles,* 10 PLOS ONE e0139245 (2015); Xiaozhong Liu et al., *Full-Text Citation Analysis: A New Method to Enhance Scholarly Networks*, 64 J. AM. SOC'Y INFO. SCI. TECH. 1852 (2013).

[26] *See, e.g.*, Diane L. Beattie, *An Archival User Study: Researchers in the Field of Women's History*, 29 ARCHIVARIA 33–50 (1989); Graham Sherriff, *Information Use in History Research: A Citation Analysis of Master's Level Theses.* 10 PORTAL: LIBR. & ACAD.165 (2010); Donghee Sinn, *Impact of Digital Archival Collections on Historical Research,* 63 J. AM. SOC'Y INFO. SCI. & TECH. 1521 (2012); Kris Bronstad, *References to Archival Materials in Scholarly History Monographs*, 6 QUALITATIVE & QUANTITATIVE METHODS IN LIBR. 247 (2017).

[27] Clark A. Elliott, *Citation Patterns and Documentation for the History of Science: Some Methodological Considerations*, 44 AM. ARCHIVIST 131 (1981).

[28] Jacqueline Goggin, *The Indirect Approach: A Study of Scholarly Users of Black and Women's Organizational Records in the Library of Congress Manuscript Division*, 11 MIDWESTERN ARCHIVIST 57 (1986).

[29] *See, e.g.*, Paul Conway, *Facts and Frameworks: An Approach to Studying the Users of Archives*, 49 AM. ARCHIVIST 393 (1986); Bruce Dearstyne, *What Is the Use of Archives? A Challenge for the Profession*, 50 AM. ARCHIVIST 76 (1987). *Cf.* Fredric Miller, *Use, Appraisal, and Research: A Case Study of Social History*, 49 AM. ARCHIVIST 371 (1986) (evaluating the extent to which the archival material was used more than the quality of the use).

The present study takes a less subjective approach than Goggin in that we do not attempt to determine the quality of the use, but we do evaluate the nature or effect of the use: What information is the cited material being used to convey? And, to a limited degree, does that information reflect negatively on the Court or a particular justice? Our evaluation is analogous to several citation practices so common in the American legal profession and legal academia as to be taken for granted. One such practice is the assessment of the status of cases and statutes in legal citators such as *Shepard's*. Another practice is judges' and lawyers' use of parenthetical explanations of cited materials in court opinions and briefs.[30] Legal scholars often evaluate the "whats" and "whys" of citation in court decisions when they investigate judicial decision-making and/or the development of the law,[31] although citations are not the primary object of study in most of these articles. It is more that investigating precedent and evaluating its use is part and parcel of legal scholarship. In short, reading the text at the locus of a citation and identifying how the cited information is being used is foundational to legal practice and scholarship.

Interestingly, quantitative citation analysis has gained a foothold in legal scholarship despite the field's tradition of evaluating cited material.[32] Typically, these studies investigate judicial opinions, studying everything from the influence of particular judges[33] to the use of particular materials such as amicus briefs[34] or even Wikipedia.[35] A few studies have combined a quantitative approach with some level of context analysis, as we do in this study. For example, Anderson used *Shepard's* signals to differentiate between citations that are positive, neutral, or negative.[36]

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[30] The legal research platform Casetext has mined parentheticals in court decisions to help determine the status of cited cases. Pablo D. Arredondo, *Harvesting and Utilizing Explanatory Parentheticals*, 1 LEGAL INFO. REV. 31 (2015–2016).

[31] *See, e.g.*, Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020); Jed Handelsman Shugerman & Gautham Rao, *Emoluments, Zones of Interests, and Political Questions: A Cautionary Tale*, 45 HASTINGS CONST. L.Q. 651 (2018); Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. Rev. 1165 (2016); Adam N. Steinman, *The Meaning of Mcintyre*, 18 SW. J. INT'L L. 417 (2012); Austen L. Parrish, *Storm in A Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007).

[32] *See, e.g.*, Frank B. Cross et. al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489 (2010).

[33] Linda L. Berger, Eric C. Nystrom, *"Remarkable Influence": The Unexpected Importance of Justice Scalia's Deceptively Unanimous and Contested Majority Opinions*, 20 J. APP. PRAC. & PROCESS 233 (2019); Christopher C. McCurdy & Ryan P. Thompson, *The Power of Posner: A Study of Prestige and Influence in the Federal Judiciary*, 48 IDAHO L. REV. 49 (2011).

[34] Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Tiffany Marie Westfall Ferris, Note, *Justices Hawking Jesus: Endorsement Through Citation to Religious Amici in Supreme Court Opinions*, 21 WM. & MARY BILL RTS. J. 1259 (2013).

[35] *See, e.g.*, Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1 (2010); Amber Lynn Wagner, Comment, *Wikipedia Made Law? The Federal Judicial Citation of Wikipedia*, 26 J. MARSHALL J. COMPUTER & INFO. L. 229 (2008).

[36] Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 MO. L. REV. 315 (2010)

Walsh distinguished between "strong" and "weak" citations in his study of the use of wrongful discharge cases.[37] Scholars have also examined citation practices to determine whether judges are more or less likely to engage with precedent depending on politics.[38] Our study takes a combined approach as well, not only counting citations to the Blackmun, Brennan, and Marshall papers but also identifying the use to which the material is put.

Section III: Methods

We selected the papers of Justices Blackmun, Brennan, and Marshall for several reasons. First, none of these three justices put excessively long restrictions on their papers, and the bulk of their collections all opened within an eleven-year span (1993 to 2004). In each instance, the papers were available within, at most, twenty years of the justice's death.[39] Justice Marshall's papers were, in fact, available shortly after his death. As mentioned earlier, the opening of his papers caused a tremendous outcry at the time, with Chief Justice Rehnquist publicly admonishing the Librarian of Congress.[40] Investigating the actual rather than feared use of Justice Marshall's papers is thus especially informative.

Second, all three collections are housed in the Library of Congress Manuscript Division. This ensures relatively equivalent access for researchers, thus avoiding any effects location and on-site assistance might have on use. The shared location also made retrieving responsive articles easier, as the search strings did not have to account for different holding institutions appearing in citations. Collections from roughly the same time period and with similar availability, such as the Lewis F. Powell collection at Washington & Lee, and the Potter Stewart collection at Yale University, were not selected for this study because of the potential complications posed by their locations.

Third, the three justices we selected all had long careers and donated sizeable collections of their papers. This provides a wide range of documents for authors to

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[37] David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC'Y REV. 337 (1997).

[38] Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 57 WM. & MARY L. REV. 1789 (2016); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008).

[39] Justice Marshall's papers opened in 1993, within two years of both his retirement and death. Justice Blackmun's papers opened to the public in 2004 (earlier to select researchers), five years after his death in 1999. This also happened to be ten years after his 1994 retirement, but that time period was not a foregone conclusion. Justice Brennan's restrictions were complex, with him releasing some early papers while he was still on the bench but then restricting them again under pressure from colleagues. In the end, most of his materials were opened in 2000, three years after his death in 1997. The exception was additional files of personal correspondence (outside that included in case files), which opened in 2017. deMaine, *supra* note 13, at Appendix.

[40] *See supra* text accompanying notes 9–10.

use. We excluded other sizeable collections, such as that of Justice William Douglas, which is also housed at the Library of Congress, in order to keep the study manageable.

For our investigation of citations in books, we began with all the biographies of Justices Blackmun, Brennan, and Marshall held in the two law libraries of Indiana University.[41] In each biography, we consulted the acknowledgements and bibliography for mention of the paper collections of these three justices. If any of the three collections were mentioned, we then proceeded to identify every note citing any of the collections, to read the text at the locus of the citation to determine the use made of the cited material, and to code the citation accordingly. This data was recorded in a spreadsheet for later analysis. Some books did not have bibliographic notes beyond a list of sources, preventing us from pinpointing any particular use of cited material.[42] These books were removed from the study.

In addition to the biographies, we inspected every book shelved in the Jerome Hall Law Library, Indiana University Maurer School of Law, between classification numbers KF 8742 .A5 and KF 8744 .W5, plus all items classified under KF 8748. These classifications cover various aspects of the Supreme Court and its jurisprudence. For these items, we initially checked the publication date; anything published prior to the opening of Justice Marshall's papers in 1993, the first of the three justices' collections to open, was considered irrelevant to the study and was removed. We then checked the acknowledgements and bibliographies to determine if mention was made of the three collections. Typically, an author includes acknowledgement of the Library of Congress Manuscript Division and/or lists the papers in the bibliography. If no mention was made of any of the three collections, the book was removed from the study.[43] If the acknowledgements and/or bibliography indicated use of the Blackmun, Brennan, or Marshall papers and the book contained foot-, end-, or inline notes,[44] we then proceeded to read the text at the locus of each note that cited any of the three collections and code the citation

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[41] The Ruth Lilly Law Library, Indiana University McKinney School of Law, in Indianapolis, and the Jerome Hall Law Library, Indiana University Maurer School of Law, in Bloomington. *See* Appendix A for a list of these books.

[42] An example is Linda Greenhouses' well-known biography *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (2006). Ms. Greenhouse acknowledges her use of several collections of the justices' papers but does not provide specific references.

[44] It is certainly possible that some authors included citations to the justices' papers in the foot- or endnotes without mentioning the collections in either the acknowledgements or bibliography (some listed only published items in the bibliography). In order to keep this study manageable, we decided to forego checking all notes in all books published since 1993, relying on acknowledgements and bibliographies as screening mechanisms.

[44] The necessity of notes kept us from using a tool such as WorldCat to determine the universe of useable books, and thereby how representative our sample is, as cataloging records typically indicate the presence of bibliographic material in a book but do not specify whether that is simply a list of sources or foot/endnotes.

accordingly. In the end, twenty-one books, including biographies, were included in the study and yielded 2,161 relevant citations.

For our search of the legal academic literature, we used the Law Reviews and Journals database in Westlaw. This database captures most U.S. academic law reviews and includes articles written after the Brennan, Marshall, and Blackmun collections became available to researchers. We found a variety of citation styles for citations to the same archival collections, so we had to resort to a relatively broad search: adv: [Justice's last name] /5 (manuscript or archiv! or papers) /5 lib!. The "lib!" term captured the Library of Congress and abbreviations thereof. This was appropriate since we knew all three collections are housed at the Library of Congress.[45]

As of November 2020, these searches resulted in 187 articles from the Blackmun search, 237 articles from the Marshall search, and 115 articles from the Brennan search. The Marshall search results in a known over-count because some of the results cited the John Marshall Harlan papers instead of the Thurgood Marshall papers. These false positives were, of course, eliminated. The results of all three searches also contained duplicates because numerous articles cite more than one collection of papers, and one justice may be mentioned near a citation to another justice's papers. For example, an article may cite both the Brennan and Blackmun papers, or a memo from Justice Brennan may appear in Justice Marshall's papers. We eliminated duplicates when selecting articles for further analysis.

Relying on Westlaw's relevance ranking, we selected the first twenty articles from each of the three searches after excluding articles that were merely reprints of materials from the paper collections;[46] symposium introductions or panel discussions since they tend to include few citations to any sources; and, as just mentioned, duplicate articles that had already been selected from one of the other searches and moved on to the next unique article.[47] The sixty resulting articles produced 1,328 relevant citations.

Categories for coding the use of cited material were developed iteratively. We began with a set of categories derived from prior study of the types of materials typically contained in the justices' papers. This *a priori* set included concepts such as "agreement with opinion," "disagreement with opinion," and "negotiation of opinion." As our research progressed, new categories were added to account for unanticipated uses. Books were more likely than articles to present these unanticipated uses, which included "relationships" and "historical/biographical

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[45] If a researcher wanted to search for other collections of justices' papers, the "lib!" term would need to be adjusted to reflect the holding institution. For example, to search for Chief Justice Rehnquist's papers, which are held by the Hoover Institute, one might use "hoover" instead of "lib!".

[46] Harry A. Blackmun, *Notes on a Somewhat Disappointing Book*, 15 GREEN BAG 2D 204 (2012) (reprinting Justice Blackmun's notes on a book he had read).

[47] *See* Appendix B for the list of articles used in the study.

detail," to give just two examples. We also decided to collapse certain categories, especially those surrounding opinion writing, in order to decrease informational clutter. For example, given the sheer number of citations studied, the distinction between agreement with an opinion and disagreement with an opinion began to retreat in importance, while the difference between deliberation, opinion negotiation (can include agreement or disagreement), and strategy emerged as more meaningful in representing the uses of the cited materials.

In coding the citations, we tagged each citation with up to three categories, so our results show 3,489 citations with 5,421 tags. Several of the categories tended to co-occur frequently, such as *Justice's views* and *Deliberation re: result, reasoning*, or *Management* and *SCOTUS inner workings*. The multi-tag approach was particularly necessary when coding the citations in books because numerous authors tended to use one citation per paragraph (at most), but multiple uses of cited material were present even in single sentences. For example, an author might write about the deliberation in conference, the justices' views, and the opinion assignment in a single sentence.

The following list explains the categories further. They are divided thematically first, and then listed alphabetically within each theme.

Core work of the Court

Deliberation re: result, reasoning – used for citations to conference deliberations as well as post-conference deliberations regarding both the reasoning and the result in a case. *Deliberation* differs from *Negotiation* in that we used it primarily for the pre-opinion writing stage, although some citations indicate that deliberation continues after negotiation regarding a draft opinion began, as justices reconsider their initial conclusions. It co-occurs often with *Negotiation* and *Justice's views*.

Development of the law – used for citations supporting specific developments in an area of the law. This category was most common in works that traced the history of a particular issue(s) such as abortion, affirmative action, or freedom of speech.

Justice's views – used for citations to an expression of a justice's views. This category is not limited to the justice whose papers are being cited, as the papers often contain correspondence to and from and notes regarding other justices. Neither is this category limited to a justice's views on a legal issue, though that is by far its most common application. Other applications range from Thurgood Marshall's views on poverty and race to, in one instance, the justices' views on cameras in the courtroom.

Negotiation re: opinion, rehearing, grant of *cert.* – used for citations to the back and forth between the justices regarding the substance and/or wording of an opinion. This category was used for the discussion and

negotiation stage even if the end result was a concurrence or dissent. It was also used for other negotiations between the justices such as whether to rehear a case and whether to grant or deny *cert.*

Opinion assignment – used for citations regarding the assignment of opinions by the chief justice or the senior justice among the dissenters. This category is often paired with a variety of other categories: *Workload, Management, SCOTUS inner workings, Deliberation,* and *Strategy.*

Strategy – used for citations indicating that a particular conference vote, opinion assignment, word choice, or other choice was specifically strategic. One example is a memo from Justice Brennan to the other justices who were going to dissent in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), suggesting that they all write separate dissenting opinions in order to draw extra attention to the majority's decision and its effect on a woman's reproductive rights. *Strategy* occurred frequently with *Negotiation* and/or *Opinion assignment.*

Work/role of clerks – used for citations to the work of Supreme Court clerks or to materials discussing the role of clerks, both in general and specifically within the chambers of certain justices.

Court logistics and functioning

Management – used for citations regarding the management style of the chief justice. This category often co-occurs with *SCOTUS inner workings.*

SCOTUS inner workings – used for citations covering a range of activities internal to the Supreme Court that keep the Court running smoothly. These activities include, for example, decisions about the press, the justices' obligation to report public speaking honoraria, the order of voting in conference, assigning of opinions by seniority, the responsibilities of the Legal Office, and even Thurgood Marshall's need for transportation when his eyesight began to fail.

Workload – used for citations regarding workload generally or an individual justice's workload. This category includes citations that range from Chief Justice Rehnquist's basing opinion assignments on completion of a justice's existing workload to a justice saying that he would like to join an opinion because his workload does not allow him to write a concurrence.

Personal and Historical

Health – used for citations regarding a justice's health, or, less often, the health of a family member.

Historical/biographical detail – used for citations that add interest, often by way of a direct quote, but do not particularly advance the substance of the author's work. Such citations are most common in biographies.

Justice's character – used for citations that speak to a justice's character and personality. Most of the citations tagged with "Justice's character" are positive as to the justice in question; some are more critical, e.g., indicating that a justice was difficult, irritable, or remote. Interestingly, it is evident when reading the books and articles that the same material can be used in different ways depending on the author's narrative.

Relationships – used for citations to materials elucidating the relationships between the justices and/or between a justice and other people, such as clerks, politicians, members of the press, family, and friends.

Justices as jurists

Criticism of justice as jurist – used for citations to criticisms of a justice as a jurist due to poor analytical skills. This category arose only in connection to a single justice who was not the donor of any of the three collections we tracked. Disagreements and critiques due merely to differing views were not included.

Justice's impact – used for citations indicating the lasting effect a justice had on the law or people. This category is often relevant to materials regarding landmark opinions, but it is also seen in letters from clerks or even the public.

Public/press input and response – used for citations to materials demonstrating input from members of the public, press, and even government officials. Sometimes this input was critical and even hostile (Justice Blackmun received a large amount of hate mail for decades following his authoring of *Roe v. Wade*), and other times supportive.

Section IV: Findings

As discussed earlier, the opening of Thurgood Marshall's papers shortly after his death angered several of the sitting justices.[48] Likewise, the opening of Blackmun's papers in 2005, only five years after his death, caused some grumbling among his former colleagues, though less than with Marshall's papers.[49] According to David M. O'Brien, however, Justice Brennan's release of papers from his early years on the Court while he was still serving was "[e]ven more unprecedented."[50]

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[48] *See supra* text accompanying note 9–10.

[49] Tony Mauro, *Lifting the Veil: Justice Blackmun's Papers and the Public Perception of the Supreme Court*, 70 MO. L. REV. 1037, 1039 (2005).

[50] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 123 (11th ed., 2017).

This upset some of his colleagues, and to appease them, Justice Brennan put some limits on access. Even so, Justice Brennan remarked that "'[w]orks published by scholars who have used my papers...have been uniformly substantive and, on the whole, worthwhile.'"[51] Our findings support Justice Brennan's statement as well as the assessment that the Marshall and Blackmun papers "reveal a Supreme Court that is extremely conscientious and dedicated to reaching the right answer. They discuss, they research, they agonize; they even change their minds...."[52] As Tony Mauro said in an essay published shortly after the release of the Blackmun papers, "to the extent that [the papers] affect the public perception of the Court at all, they do no harm to but, in fact, enhance it. Human frailties and even a dose of politics may enter into the Supreme Court's decision-making, yes, but by and large the Blackmun Papers reveal a serious, fair-minded and dedicated enterprise at work."[53]

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[51] *Id.* (quoting Memorandum for Conference, Dec. 9, 1990, Thurgood Marshall papers, Box 524, Library of Congress Manuscript Division).
[52] Mauro, *supra* note 49, at 1040.
[53] *Id.* at 1046.

Table 1: Results

As Table 1 shows, nearly three-quarters (72.8%) of the uses of the justices' papers fall into four of the "Core Work of the Court" categories: *Justice's views* (35.1%), *Deliberation* (15.9%), *Negotiation* (14%), and *Development of the law* (7.8%). Furthermore, nearly eighty-five percent (84.3%) of the citations to the papers occurring in law review articles fall into these four categories. These uses of the papers are valuable to people who want to better understand our most prestigious jurists and the work they do in arriving at decisions that affect our society and our lives in multiple, and sometimes very personal, ways.

Tag	Total occurrence	% of total	# from articles	# from books
Justice's views	1902	35.1	1022	880
Deliberation re: result, reasoning	860	15.9	404	456
Negotiation re: opinion, rehearing, grant of *cert.*	761	14.0	47	714
Development of the law	423	7.8	3	422
Historical/biographical detail	379	7.0	3	376
SCOTUS inner workings	255	4.7	87	168
Work/role of clerks	170	3.1	104	66
Justice's character	155	2.9	23	132
Strategy	143	2.6	48	97
Relationships between justices/others	126	2.3	6	120
Public/press input and response	65	1.2	1	64
Justice's impact on people and law	56	1.0	1	55
Opinion assignment	43	0.8	0	43
Management	34	0.6	1	33
Health of justices/family	26	0.5	0	26
Workload	12	0.2	0	12
Critique of justice as a jurist	9	0.2	0	9

Overall, *Historical/biographical detail* comes in fifth, at seven percent. Cited items in this category range from dinner invitations and thank you notes to jokes and

observations about the weather. The details gleaned from these documents often add a "personal interest" touch to the author's text. The number of citations coded with this tag is as high as it is because of the biographies included in the study. In fact, fifty-four percent (204) of the *Historical and biographical detail* citations come from Tinsley Yarbrough's biography of Justice Blackmun alone.[54] Justice Blackmun's papers contain many letters and diaries from his years in law school and practice prior to the Supreme Court, and Yarbrough used these extensively in recounting the first decades of Blackmun's life. Interestingly, the *Historical and biographical detail* citations outnumber those that speak to either a justice's character (2.9%) or impact (1%), which also occurred largely in biographies. The citations reflecting character and impact were almost entirely positive in their portrayal of the justices. The *Historical/biographical detail citations* were largely neutral, but a few recounted sharp words, testiness, or disgruntlement.

Three categories (*SCOTUS inner workings*, 4.7%; *Work/role of clerks*, 3.1%; *Strategy*, 2.6%) of the four that follow *Historical and biographical detail* turn back to the Court's core work. Like the top four categories, these three contribute to scholarly and public understanding of the Court's operations and how constitutional jurisprudence is constructed. Taking these seven categories together, over eighty percent (83.3%) of citations to the justices' papers relay firsthand information regarding the essential work of the Supreme Court. It is interesting to note that *Work/role of clerks* occurred more often in law review articles (104) than in books (66). Fifty-nine (56.7%) of the citations from law reviews that were tagged with *Work/role of clerks* were from a single article about the Court's decision in the antitrust case, *Illinois Brick Co. v. Illinois*.[55]

Along with *Historical and biographical detail*, *Justice's character* (2.9%) and *Relationships between justices/others* (2.3%) are the categories of citations that convey most about the justices as people. Citations regarding a justice's character use materials that indicate a range of traits: generosity, thoughtfulness, gregariousness, gruffness, aloofness, and so on. Citations regarding relationships refer to documents demonstrating particular acquaintanceships, friendships or, rarely, less-then-friendly relationships among the justices as well as with people outside the Court. Many of these citations appeared in biographies—for example, the early friendship between Justices Blackmun and Burger arose often in biographies of Justice Blackmun—but also appeared in books and articles exploring decision-making and jurisprudential developments.

Citations to the justice's papers regarding *Public/press input and response* are interesting because they shed light on how much criticism and pressure the justices sometimes receive, along with occasional support. Many of these citations

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[54] TINSLEY E YARBROUGH, HARRY A. BLACKMUN: OUTSIDE JUSTICE (2008).
[55] 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed.2d 707 (1977)

are to letters Justice Blackmun received in the wake of the *Roe v. Wade* decision, but the biography of Justice Brennan by Seth Stern and Stephen Wermiel[56] also contains nearly two dozen citations to letters or press clippings responding to Brennan's opinions.

Of the remaining six categories, which, when combined, represent only 3.3% of the total identified uses, only the *Management* and *Criticism of justice as jurist* categories point to anything that reflects poorly on the Court—Chief Justice Burger's purported inadequacies as both manager and jurist. It is not particularly surprising, however, to learn that a justice is not good at managing an organization; it is not what they are trained to do. It is also no secret that the Court has had its share of less-than-stellar legal minds. That Burger's shortcomings frustrated his colleagues is neither surprising nor scandalous.

Our close scrutiny of citations to the justices' papers gave rise to two additional observations that belie the justices' concerns. The first is that material related to or produced by one justice is often present in the papers of at least one other justice. Consider, as an example, a "memorandum to the conference" written by one justice and circulated to the other eight. Often, the recipients will have written notes in the margins or marked passages with exclamation points and saved it. Even if the memo's author restricts their papers upon donation, the memo—now with annotations—may well be available in another's collection, undermining the effectiveness of the restriction.

Second, access to the papers can help controvert negative stories about the Court. For example, Woodward and Armstrong's *The Brethren: Inside the Supreme Court* contains unflattering and controversial portrayals of some of the justices. Although Justice Brennan was generally praised in the book, his papers indicate that he was not pleased about what he viewed as misrepresentations made by Woodward and Armstrong.[57] It is only through access to Justice Brennan's papers that we know his view of events;[58] without access to the papers, we would have no reason to question *The Brethren*'s portrayal.

In sum, our research shows that when it comes to allowing access to their working papers, concerns the justices may have as to the reputation of the Court are contravened by the evidence. At worst, and rarely, the papers are used in ways that allow us to perceive the justices as mere human beings, with faults and foibles, who work hard at a demanding job that engenders a tremendous amount of public scrutiny. Most often, the justices' papers are used to produce works that enhance our understanding of the differing views held by the justices, the development of the law, and the consideration and exertion that go into the Court's work. By removing some

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[56] SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010).

[57] *See id.* at 464–69.

[58] *See id.* (citing various letters from Justice Brennan to former clerks and others).

of the mystery, the papers help us gain appreciation for the complexity, demands, and pressures of being of a Supreme Court justice.

Section V: Providing incentives to donate papers

An earlier work by deMaine briefly sketched out a proposal for a grant program, established and funded by Congress, to encourage justices to donate their papers.[59] Here, we modify and elaborate on this idea, proposing a Congressionally-created and funded grant program that would provide basic and add-on funding to the repository designated by a justice to receive their papers. These funds would support the repository's processing and preservation of the paper collection and encourage shorter embargoes.

Private donors, such as the justices, have a variety of motivations for donating their papers to an archive. Fisher suggests donors are motivated by ego (memorializing their life or career), commemoration and memory (marking other significant people and events), advocacy (ensuring their side of a story is preserved), physical space (free up space by donating to archive), and financial benefit (tax deduction for the donation).[60] When selecting a repository, donors may consider proximity, prestige, quality of care for the collection, expectation from their peer community, and trust in the repository.[61]

Our proposed grant program will encourage donations with shorter embargoes by leveraging donor motivations. Since the justices no doubt appreciate the important role they play in the development of our law and society, and they have strong views, it is safe to say that the top motivations in this instance are the ego, commemoration, and advocacy motivations. To illustrate this, consider that only six justices since 1900 have failed to donate at least some papers.[62]

The physical space and financial benefits motivations may play some part but seem less important here. The justices are always free to discard documents if they take up too much room in their home or office, and we have no access to data to support appraisals for tax deduction purposes. However, the grant proposed here adds a flip side to the financial benefit motivation. Via the grant, a justice provides a financial benefit to the institution they choose to receive their papers. This boon to the recipient institution arguably ties back into the ego and commemoration motivations inasmuch as the donor justice can do good for an institution of personal

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[59] deMaine, *supra* note 13, at 210.

[60] Rob Fisher, *Donors and Donor Agency: Implications for Private Archives Theory and Practice*, 79 ARCHIVARIA 91, 100–102 (2015). Although the justices produce these papers as part of their official duties, they have total discretion in the disposition of any documents other than official Court records. Thus they are functionally private donors.

[61] *Id.* at 103–105.

[62] Nancy S. Marder, *The Supreme Court's Transparency: Myth or Reality?*, 32 GA. ST. U. L. REV. 849, 876 (2016).

importance—an alma mater or a home-state historical society. Even the advocacy motivation can be tied to this flipside financial motivation, since a justice could donate their papers to a think tank that shares their views as Chief Justice Rehnquist did.[63]

Assuming, then, that justices will continue to be motivated to donate their papers for the foreseeable future, the remaining choices the grant program can influence are: (1) what papers to donate (rather than keep or destroy); (2) where to donate the papers; and (3) what access restrictions to impose. To encourage donating as complete a collection as possible, the grant's initial amount should be based on volume of materials. Larger collections will require more time and energy from trained archivists, more storage space, will likely attract more research requests, and thus should receive commensurate funding. A justice is unlikely to be selective in their donation simply out of concern for the repository's finances, but with the requisite funding, the repository would be able to assure the justice that even a voluminous collection would be well cared for.

While it is possible that justices already provide financial gifts along with their papers, our research has revealed no public information to this effect. Thus, institutions receiving important and potentially massive collections need to be funded sufficiently to pay for processing and securing the papers. At this time, most of the justices donate their papers to the Library of Congress, one of the largest cultural institutions in the world, or to elite law schools with relatively well-funded libraries. These choices may reflect, in part, the fact that these elite institutions may be the only ones able to accept collections on the scale of the justices' papers. Without accompanying funding, many other archives would be unable to accept large collections that are likely to be in high demand from researchers. By attaching a volume-based dollar amount, the grant program would thus expand the range of options for a justice looking for an appropriate repository. Institutions might even solicit or compete (as all nonprofits do for major philanthropic support) for a justice's papers, seeing them as both a prominent accession and a funding source rather than a drain on finite resources.

The base funding would be determined by the cubic feet (or a digital equivalent) of papers that will be made publicly available. To take a very small and simple example, if a justice donated one hundred cubic feet of materials but only authorized fifty cubic feet be open to the public, then the base funding of the grant would be for fifty cubic feet. This both encourages access and recognizes that embargoed materials require fewer resources to process and maintain.

Beyond offering baseline encouragement to donate and increasing the number of institutions that would have the resources to accept the gift of a justices' papers, our proposed grant program would encourage shorter embargo periods

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[63] Chief Justice Rehnquist's papers are at the Hoover Institution, a conservative think tank in California.

through add-on funding. In her earlier work, deMaine proposed incentivizing an embargo of fifteen to twenty years after the justice's retirement from the Court as a reasonable compromise between the public's interest in transparency and the justices' interests in avoiding any effects on pending or recently decided cases or law clerks' careers.[64] Given the justices' current attitudes about embargoes, it seems unlikely that anything less than ten years would be at all attractive. Furthermore, the repository will need time to process, organize, and prepare the paper collections for public access.

Our proposal would incentivize shorter embargoes by increasing the dollar amount of the basic, volume-based grant by two percent for every year less than fifteen the papers are released, with a maximum increase of ten percent for an embargo of only ten years. Conversely, the basic grant amount would be reduced two percent for every year of embargo beyond fifteen years post-retirement. The following table illustrates.

Table 2: Embargo incentive structure

Embargo, in years	Grant amount
10	Base + 10%
11	Base + 8%
12	Base + 6%
13	Base + 4%
14	Base + 2%
15	Base
16	Base – 2%
17	Base – 4%
18	Base – 6%
19	Base – 8%
20	Base – 10%
Etc.	

Given that there are simply not that many justices, this grant program would not be cost prohibitive. Only five justices have departed the Court in the last twelve years. As an example, if all five justices donated their papers, each collection would get a $2 million base grant for a total of $10 million. If all five agreed to a ten-year embargo, each grant would grow to $2.2 million. The total cost to the federal

[64] deMaine, *supra* note 13, at 210–11.

government would then be $11 million over twelve years, a pittance in the federal discretionary budget.

Conclusion

Supreme Court justices typically donate their papers after they retire, providing rich materials for academics, journalists, lawyers, and other researchers can use to better understand the development of the Court's jurisprudence. Some justices and scholars have expressed concerns that access to these records prior to the passage of a considerable amount of time will hurt the Court's reputation and prevent justices from candidly contributing to the Court's deliberations.

Our examination of how three major collections of justices' papers—those of Justices Blackmun, Brennan, and Marshall—have been cited and used by scholars should allay these worries. Citations to the justices' papers overwhelmingly tend to illuminate the development of the law and the justices' careful consideration of cases before them, rather than highlight embarrassing or frivolous details.

In light of these findings, it is worthwhile to consider ways of encouraging the justices to donate with shorter embargoes. We propose a grant program that would incentivize justices to continue donating their papers voluntarily (i.e., without Congressional mandate), and to do so with public release to occur fifteen or fewer years after the justice has retired. Such a program avoids constitutional separation of powers and takings issues, supports the processing and preservation of these important materials, and encourages shorter restriction on access by the American people.

APPENDIX A: BOOKS ANALYZED FOR CITATIONS

1. HOWARD BALL, A DEFIANT LIFE (1998)
2. HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR (1995)
3. PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT (2010)
4. JAMES DAVIDS, ERIK GUSTAFSON, SHERENA FLOWERS ARRINGTON, REHNQUIST VS. BLACKMUN: CLASHING WORLDVIEWS IN THE U.S. SUPREME COURT (2020)
5. DEL DICKSON, ED., THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (2001)
6. DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH (2018)
7. EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT (1999)
8. LEE LEVINE AND STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* (2014)
9. ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION (2012)
10. EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW (2016)
11. FORREST MALTMAN, JAMES F. SPRIGGS, AND PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000)
12. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (11th ed., 2017)[65]
13. TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006)
14. ROBERT D. RICHARDS, UNINHIBITED, ROBUST, AND WIDE OPEN: MR. JUSTICE BRENNAN'S LEGACY TO THE FIRST AMENDMENT (1994)
15. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995)
16. SETH STERN AND STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010)

[65] After comparing the Notes in the 4th thru 11th editions of Storm Center, we determined that the 11th edition had most if not all of the citations to the three collections under study that appeared in earlier editions. A 12th edition was published in 2020, but we did not have it available for this study, and it seems unlikely that additional material from the three collections would be added to new editions at this point.

17. MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991 (1997)
18. ISAAC UNAH, THE SUPREME COURT IN AMERICAN POLITICS (2009)
19. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998)
20. TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE (2008)
21. CHARLES L. ZELDEN, THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION (2013)

APPENDIX B: LAW JOURNAL ARTICLES ANALYZED FOR CITATIONS

Articles resulting from search for Brennan papers

1. John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749 (1998).
2. Michael R. Belknap, *God and the Warren Court: The Quest for a Wholesome Neutrality*, 9 SETON HALL CONST. L.J. 401 (1999).
3. Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of* Regents of the University of California v. Bakke, 19 YALE L. & POL'Y REV. 341 (2001).
4. Roy Lucas, *New Historical Insights on the Curious Case of* Baird v. Eisenstadt, 9 ROGER WILLIAMS U. L. REV. 9 (2003).
5. Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *From Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553 (2005).
6. Rebecca Schoff, *Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis*, 95 VA. L. REV. 627 (2009).
7. Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices*, 102 L. LIBR. J. 7 (2010).
8. Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 CATH. U. L. REV. 1057 (2010).
9. Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2012).
10. Lee Levine & Stephen Wermiel, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1 (2013).
11. Danieli Evans, *The Nixon Sabotage: The Political Origins of the Equal Protection Challenge to the Voting Rights Act*, 33 B.C. J.L. & SOC. JUST. 325 (2013).
12. Robert M. O'Neil, *A Tale of Two Greenmoss Builders*, 88 WASH. L. REV. 125 (2013).
13. Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014).
14. Josh Patashnik, Arizona v. California *and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1 (2014).
15. Lee Levine & Stephen Wermiel, *Behind the U.S. Reports: Justice Brennan's Unpublished Opinions and Memoranda in* New York Times v. Sullivan *and Its Progeny*, 19 COMM. L. & POL'Y 227 (2014).

16. Brian R. Gallini, *The Historical Case for Abandoning* Strickland, 94 NEB. L. REV. 302 (2015).
17. Harry First & Eleanor M. Fox, *Philadelphia National Bank, Globalization, and the Public Interest*, 80 ANTITRUST L.J. 307 (2015).
18. Lee Levine & Stephen Wermiel, *The Court and Cannonball: An Inside Look*, 65 AM. U. L. REV. 607 (2016).
19. Katy J. Harriger, *The Civil Rights Act of 1964 and School Desegregation: A Double-Edged Sword*, 6 WAKE FOREST J. L. & POL'Y 157 (2016).
20. Caleb Nelson, *Standing and Remedial Rights in Administrative Law*, 105 VA. L. REV. 702 (2019).

Articles resulting from search for Marshall papers

1. Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623 (1994).
2. Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748 (1995).
3. Michael Mello, *Defunding Death*, 32 AM. CRIM. L. REV. 933 (1995).
4. Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129 (1996).
5. Mark Tushnet, *"The King of France with Forty Thousand Men": Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163 (1996).
6. Michael R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65 (1998).
7. Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000).
8. Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV. 559 (2003).
9. L.A. Powe, Jr., *The Not-so-brave New Constitutional Order*, 117 HARV. L. REV. 647 (2003).
10. Jesse M. Feder, *Is Betamax Obsolete:* Sony Corp. Of America v. Universal City Studios, Inc. *in the Age of Napster*, 37 CREIGHTON L. REV. 859 (2004).
11. David Lane, Bush v. Gore, Vanity Fair, *and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863 (2005).
12. Helen J. Knowles, *From a Value to a Right: The Supreme Court's Oh-so-conscious Move from "Privacy" to "Liberty,"* 33 OHIO N.U. L. REV. 595 (2007).

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