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“OUR MOST SACRED LEGAL COMMITMENTS”:  
A DIGITAL EXPLORATION OF THE U.S. SUPREME COURT  
DEFINING WHO WE ARE AND HOW THEY SHOULD OPINE

Eric C. Nystrom and David S. Tanenhaus<sup>1</sup>

*The whole part, the whole point, the whole function, the whole duty of the Supreme Court is to teach. To give reasons for what we do. You could learn a lot. On the other hand we teach by keeping the press out. We teach that we are judged by what we write. We don't go around giving press conferences “how great my decision was” or “how bad the dissent was.” We are judged by what we write.*

-Justice Anthony Kennedy, 2013.<sup>2</sup>

Legal commentators have described the 6-3 decision in *Korematsu v. United States* (1944) as one of the worst decisions in the U.S. Supreme Court's history.<sup>3</sup> The Roberts Court, in fact, recently held that “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution’.”<sup>4</sup> The Court's language in *Korematsu*, however, is still

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2. Andrew Cohen, *The (Almost) Lost Speech of Justice Anthony Kennedy*, THE ATLANTIC (July 31, 2013), <https://www.theatlantic.com/national/archive/2013/07/the-almost-lost-speech-of-justice-anthony-kennedy/278094/>.

3. *Korematsu v. United States*, 323 U.S. 214 (1944); Scott Bombay, *The Supreme Court 'Worst Decision' Lives on in the 2016 Campaign*, CONST. DAILY (Dec. 18, 2015), <https://constitutioncenter.org/blog/the-supreme-courts-worst-decision-lives-on-in-2016-campaign>.

4. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) at 2423; *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting.)

worth investigating because it illuminates how the justices incorporate ideas about who “we” are into their decision-making, while simultaneously raising legal-historical questions about whether this practice has changed over time.<sup>5</sup>

“*Our task* would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice,” announced Justice Hugo Black for the U.S. Supreme Court in *Korematsu*.<sup>6</sup> Black argued, however, that the justices’ task was not so simple. “To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue,” he explained.<sup>7</sup> Justice Black continued:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of *our West Coast* and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in *our military leaders*—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that, at that time, these actions were unjustified.<sup>8</sup>

Not only did Justice Black repeatedly use “our” as a possessive noun, an adjective, and a reflexive pronoun, but the famous dissents in *Korematsu* by Justices Robert Jackson and Frank Murphy also used the word repeatedly. For example, Jackson began his opinion with the assertion that “Korematsu was born on *our soil*, of parents born in Japan.”<sup>9</sup> This simple sentence, of course, rested on an uneasy national

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5. There is a substantial literature about legal language creating and destroying shared cultural meanings. See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term--Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). (For a good example of how the justices build historical assumptions into their decisions); See also ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019) (Foner examines how the justices’ understanding of Reconstruction has shaped their interpretations of the Constitution from the late nineteenth century to the present.).

6. *Korematsu*, 323 U.S. at 223 (emphasis added). Justice Black also wrote the Court’s unanimous decision in an earlier *Korematsu* about whether the District Court’s order of probation, without having imposed a sentence, was a reviewable, final decision. *Korematsu v. United States*, 319 U.S. 432 (1943). Black’s opinion, which concluded with the statement “*Our answer* to the question is Yes,” set the stage for the Court to issue its more famous *Korematsu* decision the next year. *Id.* at 436 (emphasis added).

7. *Korematsu*, 323 U.S. at 223.

8. *Id.* at 223-24 (emphasis added).

9. *Id.* at 242 (Jackson, J., dissenting) (emphasis added).

history about birthright citizenship, immigration, and periodic ugly debates about who is an American.<sup>10</sup> Jackson also cautioned that the principle of *Korematsu* “then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in *our law* and thinking and expands it to new purposes.”<sup>11</sup> Justice Murphy contended that “Racial discrimination in any form and in any degree has no justifiable part whatever in *our democratic way* of life.”<sup>12</sup> He added:

To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by *our enemies* to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.<sup>13</sup>

As Risa Goluboff has shown in *The Lost Promise of Civil Rights*, during the late 1930s and 1940s legal thinkers and litigators were struggling to define what the term “civil rights” meant.<sup>14</sup> Cases such as *United States v. Gaskin* (1944) and *Korematsu* provided opportunities for the Supreme Court during wartime to reconsider constitutional claims about oppressive racial and economic systems of power that trapped African Americans in peonage in the rural South and left Japanese Americans such as Fred Korematsu imprisoned in horse stalls in the American West.<sup>15</sup> The above quotations from the justices’ opinions in *Korematsu* dramatically illustrate the rhetorical power of the word “our” to define “who” the justices think “we” are and how “they” should act. But is *Korematsu* representative of how the justices have used “our” from the launching of the New Republic to the present? Is the usage in *Korematsu* the product of a particularly fraught historical moment, or have justices used the word similarly since the founding era?

“Our” is a slippery word, and its slipperiness is one element of the appeal of attempting to measure its use. In a judicial opinion, “our” can mean very different things. For example, in *Chisholm v. Georgia*, the first time in American history that the justices extensively relied on the word

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10. For good introductions to these interconnected histories, see MARTHA JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018); KATHERINE BENTON-COHEN, *INVENTING THE IMMIGRATION PROBLEM: THE DILLINGHAM COMMISSION AND ITS LEGACY* (2018); MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941-1978* (2010).

11. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) (emphasis added).

12. *Id.* at 242 (Murphy, J., dissenting) (emphasis added).

13. *Id.* at 240 (Murphy, J., dissenting) (emphasis added).

14. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007).

15. *Id.*; *United States v. Gaskin*, 320 U.S. 527 (1944).

“our,” they used it thirty-one times and in two distinct ways.<sup>16</sup> The case raised the question of whether a private citizen could sue a state in federal court.<sup>17</sup> Georgia, the state in question, had asserted sovereign immunity and the litigation raised fundamental questions about the status of states under the new constitutional system.<sup>18</sup> By four votes to one, the justices rejected Georgia’s argument about sovereign immunity and instead held that Article III, Section II of the Constitution provided federal courts the affirmative power to hear disputes between private citizens and the states.<sup>19</sup>

First, Justice James Iredell, the lone dissenter, used “our” seven times to describe how the judicial process should guide the Court’s approach. This included statements about “our duty,” “our giving judgment,” “our directions,” and “our jurisdiction.”<sup>20</sup> Iredell’s court-centered, self-aware linguistic mode explicitly connected the Court’s ongoing existence, rules, and policies to its present and future work.<sup>21</sup> Over time, the Court has built on this “judicial process” usage that includes using “our” to describe the Court’s precedents, procedures, and practices.<sup>22</sup> For example, the justices have used the phrase “our decision” more than 5,300 times and referred to “our opinion” more than 3,000 times.<sup>23</sup>

Second, Justice James Wilson repeatedly used “our” to claim, create, and contest what we call “cultural markers” that could anchor the Court’s decision-making.<sup>24</sup> Before becoming a justice, Wilson had signed the Declaration of Independence, helped draft the proposed Constitution, and led the fight for its ratification in Pennsylvania. In his *Chisholm* opinion, he included several Iredell-like examples of judicial process. Significantly, Wilson also repeatedly used “our” to connect the American experience to the wider world. For example, he initially used “our” to frame his analysis of the case in terms of the “law of nations.”<sup>25</sup> As he explained, “By that law, the several States and Governments spread over *our globe* are considered as forming a society, not a NATION.”<sup>26</sup> He then

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16. 2 U.S. 419 (1793).

17. *Id.* at 429-30.

18. *Id.*

19. *Id.* at 464-66, 476-79.

20. *Id.* at 429, 429, 433, 434.

21. *Chisholm v. Georgia*, 2 U.S. 419, 429-34 (1793).

22. Our description of the procedural usage of our is similar to David A. Straus’s argument about the Supreme Court’s common-law approach to constitutional interpretation. The justices are consciously thinking about their decisions as part of a longstanding tradition. See DAVID A. STRAUS, *THE LIVING CONSTITUTION* (2010).

23. Eric C. Nystrom & David S. Tanenhaus, *Usages of 'our' by U.S. Supreme Court Justices, 1791-2011*, ZENODO (Nov. 18, 2020), <https://zenodo.org/record/4743965>.

24. See *infra* Section III.

25. *Chisholm*, 2 U.S. at 431.

26. *Id.* at 453 (emphasis added).

used “our” to emphasize what was new about the American experiment in governance, when he invoked “our union.”<sup>27</sup>

Wilson also used “our” to critique the assumption that “the states,” rather than “the people,” had created the United States. As he explained:

Sentiments and expressions of this inaccurate kind prevail in *our common*, even in *our convivial, language*. Is a toast asked? “The United States,” instead of the “People of the United States,” is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union: It presents only the second. It presents only the artificial person, instead of the natural persons, who spoke it into existence. A State I cheerfully admit, is the noblest work of Man: But, Man himself, free and honest, is, I speak as to this world, the noblest work of GOD.<sup>28</sup>

In this instance, Wilson was using his judicial opinion to try and correct a public misconception about the recent past that had tremendous consequences for constitutional interpretation.

Wilson also used “our” to remind his audience where “they” came from and who “they” were:

On the mention of Athens, a thousand refined and endearing associations rush at once into the memory of the scholar, the philosopher, and the patriot. When Homer, one of the most correct, as well as the oldest of human authorities, enumerates the other nations of Greece whose forces acted at the siege of Troy, he arranges them under the names of their different Kings or Princes. But when he comes to the Athenians, he distinguishes them by the peculiar appellation of the PEOPLE of Athens. The well known address used by Demosthenes, when he harranged and animated his assembled countrymen, was “O Men of Athens.” With the strictest propriety, therefore, classical and political, *our national scene* opens with the most magnificent object which the nation could present. “The PEOPLE of the United States” are the first personages introduced. Who were those people?<sup>29</sup>

As these multiple examples from Wilson’s opinion demonstrate, “our” could help a justice to connect the United States to the wider world, while simultaneously emphasizing the new nation’s unique system of government. A justice could also use “our” to correct the historical record. Much like Iredell’s “process” usage anticipated the language of later justices, so have Wilson’s “cultural” usages. Since *Chisholm*, for example, the Court has referred to “our society” more than 840 times.<sup>30</sup>

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27. *Id.* at 455.

28. *Id.* at 462-63 (emphasis added). For the significance of toasting in the New Republic, see DAVID WALDSTREICHER, IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM 1776-1820 (1997).

29. *Chisholm*, 2 U.S. at 463 (emphasis added).

30. *Supra* note 23.

This includes Justice Alito's recent dissent in *Bostock v. Clayton Cty., Ga.*, in which he noted, "For most 21st-century Americans, it is painful to be reminded of the way *our society* once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when they were enacted must take that into account the societal norms of that time."<sup>31</sup>

During the early 1790s, we should note, every justice of the Supreme Court of the United States wrote his own opinion about the case or controversy at issue. Later, under the commanding leadership of Chief Justice Marshall, the Supreme Court abandoned the practice of seriatim opinions.<sup>32</sup> Moreover, as the Supreme Court itself later noted in *Principality of Monaco v. Mississippi* (1934), their *Chisholm* decision had "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted."<sup>33</sup> This swift repudiation of the Supreme Court's decision by Congress and the States is a reminder of how fluid American constitutionalism was during the 1790s before the idea of the constitution itself became "fixed" by the decade's end.<sup>34</sup>

This Article focuses on uncovering the multiple meanings of the word "our" in the published opinions of the U.S. Supreme Court from *Chisholm* to modern times. To do so, we use a digital legal history approach, combining robust court data, text mining techniques, and expert word classification, using a set of custom open-source tools and open data.<sup>35</sup>

Section I discusses the Court, our sources, and our "our" sources. Tracking the usage of this word in the published opinions of the Court, we see that, like any word, its use changes over time, rising and falling both as part of broader linguistic uses and specific moments in the Supreme Court's history. This Article examines how this language reflected changes in the court's concerns over different periods of its history. This discussion then forms a framework and context for the next

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31. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1769 (2020) (Alito, J., dissenting) (emphasis added).

32. Ronald D. Rotunda, "The Fall of Seriatim Opinions and the Rise of the Supreme Court," *Verdict: Legal Analysis from Justia*, October 9, 2017, <https://verdict.justia.com/>, accessed on May 7, 2021.

33. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

34. JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE CONSTITUTION IN THE FOUNDING ERA* (2018).

35. See Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132 (2018); Stephen Robertson, *Searching for Anglo-American Digital Legal History*, 34 L. HIST. REV. 1047 (2016); Eric C. Nystrom & David S. Tanenhaus, *The Future of Digital Legal History: No Magic, No Silver Bullets*, 56 AM. J. LEGAL HIST. 150 (2016); Charles W. Romney, *Using Vector Space Models to Understand the Circulation of Habeas Corpus in Hawai'i, 1852-1892*, 34 L. HIST. REV. 999 (2016). For a good introduction to computational legal analysis, see MICHAEL A. LIVEMORE, *LAW AS DATA: COMPUTATION, TEXT AND THE FUTURE OF LEGAL ANALYSIS* (Daniel N. Rockmore ed., 2019).

two Sections.

Section II proceeds to tie together the linguistic data from Court opinions with a broader data set, which enables us to set the patterns of “our” cases in the context of the Court's work over time. Do these cases stand out in some fashion, or do they fit the broader patterns of the Court's ordinary operation? Here, we examine the cases from a number of angles—from the patterns of use under particular Chief Justices, to the habits of individual justices when they wrote majority opinions. Section II also looks at the legal areas and types of law, as well as voting coalitions, to gradually refine our understanding of the contexts in which “our” seems to be employed most by the Court.

Section III delves further into two broad categories of “judicial process” and “culture-constituting” uses that emerge from a close look at the uses of “our” and its surrounding words. We also examine a third category of indistinct, ambiguous, or other uses. Do certain uses occur over time in the same proportions, and at the same time periods, as all the others, or do they wax and wane in different cycles? Do particular justices deploy this language more frequently than others, or does it appear more commonly in particular types of law to the exclusion of others? We map keywords associated with the appearance of “our” in opinions to these broad categories, using the keywords as markers of these broad concepts. We then look at the process-oriented uses of “our” from a distance, to see if particular types of cases appear to use this language more than others.

Section IV closely examines those cases of “our” where the surrounding words are markers of a concern not with precedent or judicial reasoning, but the shared values, practices, and culture that collectively constituted the American body politic. Moving from this broad, data-driven view, we then closely examine two landmark cases, *Furman v. Georgia* (1972) and *Youngstown Sheet & Tube Company v. Sawyer* (1952), from two different periods we identified, that represented the culture-constituting use of “our” by the Supreme Court.

In our Conclusion, we return to our initial question: How representative is *Korematsu*? Answering that question—which requires understanding the use of the word “our” over time and in specific historical contexts—provides a fresh perspective for interpreting Supreme Court decisions, whether an early decision such as *Chisholm* or a contemporary one like *Bostock*. The Article closes by examining how Justice Sonia Sotomayor incorporates new voices into constitutional interpretation to reconsider our history and the Court's role in shaping our future.

## I. OUR “OUR” SOURCES

We begin with the published words of the United States Supreme



Court. As the highest court in the United States system of justice, its opinions invariably set precedent. Further, since the early days of the nation, Supreme Court justices have incorporated, to varying degrees in individual cases, a range of social and cultural understandings about the purpose of the law, the appropriate ways law should function, the duties of citizen and state to one another, and the best balance between timeless values and present-day social concerns.<sup>36</sup> The Court's decisions directly shape the law that governs Americans. While the U.S. Supreme Court might not be the only institution whose formal utterances can be understood as both reflective of and constitutive of American society at a particular time, it is undoubtedly important enough to examine.

Studying the Supreme Court also has some important practical advantages. The published opinions of the U.S. Supreme Court have all been digitized, making it seemingly straightforward to construct a coherent and inclusive corpus. Comprehensive, consistent, and generally excellent metadata about each case, including opinion author and the vote of each justice, has been created and made freely available.<sup>37</sup> The total number of substantive opinions—fewer than 40,000 in the Court's entire history<sup>38</sup>—comprise an easily manageable universe in an era of “big data.” With these resources, it is possible to confidently know quite a lot about the Court's words and actions.

We began by downloading the full text of the Court's published opinions. We would have preferred to use the texts of Supreme Court opinions that were recently made available to much fanfare by the Law Library of Congress, which were painstakingly hand-corrected by fifty

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36. Classic historical studies of how Supreme Court justices contemplated their role and the impact of social and cultural factors on their decision-making include G. EDWARD WHITE, *THE MARSHALL COURT & CULTURAL CHANGE: 1815-1835* (1991) MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1999); and MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

37. Harold J. Spaeth et al., *2019 Supreme Court Database*, WASH. U. L.: THE SUPREME COURT DATABASE, <http://supremecourtdatabase.org/data.php?s=2> (last visited Dec. 6, 2019).

38. As of December 6, 2019, Courtlistener includes 63,823 opinions in its U.S. Supreme Court dataset, but there are a number of duplicates. *Opinions*, COURT LISTENER, [https://www.courtlistener.com/?type=o&q=&type=o&order\\_by=score+desc&stat\\_Precedential=on&court=scotus](https://www.courtlistener.com/?type=o&q=&type=o&order_by=score+desc&stat_Precedential=on&court=scotus) (last visited Mar. 4, 2021). The Library of Congress notes 35,578 items in its *United States Reports* collection. *Collection Items*, LIBRARY OF CONGRESS, <https://www.loc.gov/collections/united-states-reports/> which covers through volume 542 (last visited Mar. 4, 2021). The Supreme Court Database (SCDB) includes 19,861 opinions in its “Legacy” data (v. 05) and 8,966 in its modern (2019-01) data, for a total of 28,827, but this total excludes a number of published decisions of smaller import, as noted below. CAP (data version Sept. 27, 2019) includes all opinions, including *per curiam* ones omitted by SCDB. They list 341,083 entries for the highest court, though it seems likely that this contains some errors. Within this data, 33,213 case citations appear once and only once, which might be considered a rough proxy measure for the substantive decisions recorded by SCDB, because multiple *per curiam* opinions are usually grouped under the same reporter citation.

volunteers.<sup>39</sup> However, despite the public domain status of these government documents, the Library of Congress has shortsightedly decided, due to the origins of this project in an agreement with William S. Hein & Co, Inc., to prohibit bulk downloading, making the type of analysis we conduct here impossible.<sup>40</sup> Despite these limitations, the Library of Congress collection was useful for manual use in double-checking the data we did use against scans of the original sources.

For the first iteration of our analysis, we used full-text opinions provided by CourtListener.com. Indeed, an early version of this work was presented based upon the CourtListener data, and many of our conclusions in this early draft remain sound in light of our later data practice.<sup>41</sup> However, CourtListener's full-text data was not structured to separate the majority opinion from any other dissenting or concurring opinions, and we developed some concerns about the completeness of the dataset. Given our hunt for changing language, these seemed like important requirements.

We thus later turned to a new source of full-text data, the Caselaw Access Project ("CAP"), which did separate distinct opinions. CAP data is offered for bulk download to registered researchers as a set of JSON files, each containing the full text and metadata from cases from a particular jurisdiction (broadly conceived). JSON is a structured text format which can be straightforwardly parsed using programming libraries available in most languages.<sup>42</sup>

We decided to look for the word "our" across all Supreme Court opinions and capture the context as well as other metadata describing each occurrence. We created a program that performed several steps on each opinion within each case, creating a spreadsheet of digested output that can be used in later stages. Once the text was extracted, the program removed unwanted non-alphabetic characters, converted it all to

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39. Andrew Hamm, *Law Library of Congress Digitally Releases U.S. Reports from 1791 to 2004*, SCOTUSBLOG (Mar. 13, 2018, 4:34 PM), <http://www.scotusblog.com/2018/03/law-library-congress-digitally-releases-u-s-reports-1791-2004/>; Press Release, Library of Congress, Historical Supreme Court Cases Now Online (Mar. 13, 2018), available at <https://www.loc.gov/item/prn-18-026/historical-supreme-court-cases-now-online/2018-03-13/>.

40. *Rights and Access*, LIBRARY OF CONGRESS, <https://www.loc.gov/collections/united-states-reports/about-this-collection/rights-and-access/> (last visited Dec. 6, 2019); Jennifer Gonzalez, *Historical U.S. Reports Online*, LIBRARY OF CONGRESS (Feb. 22, 2018), <https://blogs.loc.gov/law/2018/02/historical-u-s-reports-available-online/>; confirmed via email, question response #13896363, Sept. 26, 2018.

41. The toolkit we developed to work with CourtListener data is: Eric C. Nystrom, *cl-tools: Legal History Toolkit to Work with CourtListener Data*, GITHUB (Oct. 31, 2018), <https://github.com/ericnystrom/cl-tools> (providing software). It is written in Perl and makes use of Lib::JSON and other Perl libraries.

42. The case data can also be accessed via an API, though we chose not to utilize it because of the size of our requests.

lowercase, then looped over the text, looking for each instance of a specified keyword (“our”) surrounded by word-boundary markers (such as a space or punctuation character).<sup>43</sup> The words immediately before and after each matching keyword were saved for context, and a running count was kept of the number of keyword matches in each opinion. Additional data, such as case name, date, court name, citation, etc., was also captured and printed as part of each output record. The data thus generated initially served as the basis for a series of error checks.

We then turned to the venerable Supreme Court Database (“SCDB”) to give us additional metadata about each case.<sup>44</sup> The SCDB contains a subset of all U.S. Supreme Court opinions. The project’s documentation is somewhat unclear on what gets included—in one place, it notes that the database includes “each case decided by the Court,”<sup>45</sup> and elsewhere mentions that it contains every “argued case.”<sup>46</sup> In practice, the latter seems to be a more accurate description of the SCDB team’s procedure, which generally leaves out cases where the Court took little action (such as denial of certiorari).<sup>47</sup>

To use the SCDB metadata with the CAP full text of opinions, CAP cases needed to be matched to the appropriate SCDB record. We anticipated that a connection between CAP and SCDB data would be valuable beyond just our present study, so we purposefully addressed connecting every SCDB entry to its CAP equivalent, not just those in our preliminary word search results. We approached this work in two stages. First, we attempted to automatically match the records based on the U.S. Reports citation included in each entry. Since SCDB contains fewer records (because of exclusion of minor actions), we utilized the entire SCDB dataset and then, for each SCDB record, searched for the U.S. Reports citation in the CAP data. Ideally, we would find one, and only one, matching CAP case. If we found more than one, we marked the record as a “multiple” requiring further investigation. Similarly, if we did

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43. Specifying word-boundary markers allowed us to avoid false positives on words containing a keyword within them, such as “hours” or “pour.” It also excluded “ours” and “ourselves,” which would not have made a substantial impact on the analysis techniques we used here, as those terms did not typically have a following noun to categorize, but this may be a condition worth revisiting if future analysis uses more sophisticated techniques.

44. Spaeth, *supra* note 37. For details about loading this data, including variable labels, into a SQL database for use, see Eric Nystrom, *Supreme Court Database for the SQL-minded*, (Dec. 6, 2019), [http://ericnystrom.org/posts/Supreme\\_Court\\_Database\\_for\\_the\\_SQL-minded/](http://ericnystrom.org/posts/Supreme_Court_Database_for_the_SQL-minded/).

45. *Homepage*, WASH. U. L.: THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/> (last visited Oct. 3, 2018) (emphasis added).

46. *About*, WASH. U. L.: THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/about.php> (last visited Oct. 3, 2018), (emphasis added).

47. This rule does not strictly hold true, however, as some of the Legacy data, in particular, contains as separate records quite minor actions such as modifications of previous decisions, where the early decision and the modification are printed sequentially in the reporter without a break.

not find any matches at all, we again marked the record for manual investigation. Out of 28,827 records in SCDB, we immediately matched 23,262 cases in CAP (80.69%). Another 385 SCDB references matched multiple CAP records, and 5,180 cases did not find a successful automatic match.<sup>48</sup>

We then embarked on the second stage: correcting the data by hand to yield the maximum number of possible matches. First, a close look at the match data showed almost no matches at all after volume 567 of U.S. Reports, which ended midway through calendar year 2012, and contains up to the full 2011 term of the Court. From that point forward, the CAP data was largely missing, and what data existed showed internal metadata problems that suggested it should not be considered reliable.<sup>49</sup> As a result, we stopped our analysis after the 2011 Court term (which went through spring of 2012). This process removed 477 of the unsuccessful matches, leaving about 5,000 problematic entries.<sup>50</sup> We corrected these by hand, triangulating between the CAP metadata and full text, the SCDB data, and page images of the published U.S. Reports volumes available individually from the Law Library of Congress. We noted that the bulk of the corrections involved misleading or improperly converted nominal reporter citations. There were also a couple of missing volumes among the CAP data, one of which was found intact filed in another jurisdictional grouping.<sup>51</sup> Other mismatches were caused by reference typos. Still other missing entries stemmed from CAP and SCDB not dividing the data in the same way or failing to notice a transition to a new case. These latter issues were essentially impossible to resolve, but often involved only very minor court actions. Hand correction of the data took three weeks and was revisited after each update of CAP data. While not every SCDB entry could be matched to its CAP full text equivalent, we ended up matching all but 191 SCDB cases, for an overall success rate of 99.33%.<sup>52</sup>

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48. Reflecting SCDB Legacy 05 and 2019 release 01, with CAP, United States jurisdiction, rev. 20200303.

49. An additional, anticipated, problem with the recent cases was that U.S. Reports citations lag publication of opinions in the Supreme Court Reporter, meaning that cases might have been included in the datasets before they were issued a U.S. Reports reference. However, the initial automatic matching took this into account, attempting to match SCDB's "setCite" field if the U.S. Reports citation matching failed. Even with this technique, very few cases were successfully matched up beyond the 2011 court term.

50. 5,088, to be precise, with 385 of those being multiple-match hits.

51. 3 Howard or 44 U.S. Reports was inadvertently filed with the New York jurisdiction, and remains there as of rev. 20200302, but our tools are designed to incorporate these cases. Many thanks to Jack Cushman for pointing us to its hiding place. Jcushman, Comment to *US Reports (US Supreme Court) vol. 44 missing #801*, GITHUB (Feb. 27, 2019), <https://github.com/harvard-lil/capstone/issues/801>.

52. 191 unmatched, out of 28,304 SCDB cases up to and including the 2011 term. Of these, 108 are from a missing "catchall" volume in the 19th century (U.S. Reports vol. 131), leaving only 83 unmatched cases scattered throughout the rest of the data. An examination of each of those, in turn, suggests that many are minor case actions not distinguished by CAP but separated by SCDB, thus creating

We then applied this SCDB connection information to our search results, which narrowed our findings to the U.S. Supreme Court, and gave us a way to connect our results to other metadata from the SCDB as desired. Simultaneously, this weeded out minor and spurious cases, duplicates, and results from other courts.<sup>53</sup> Finally, connecting this data to the SCDB also gave us a clear baseline against which we could normalize our yearly results.

In all, searching across more than 28,000 full text U.S. Supreme Court cases from 1791 to 2011, we found 79,693 individual matches of the word “our” contained in 20,552 distinct opinions from 15,091 cases.<sup>54</sup> More than one-third of all cases (5270, 34.92%) had just a single use of “our.” The maximum number of “our” hits came in the opinion of *Furman v. Georgia*, a case decided on a 5-4 vote in 1972, which had 157 detected uses.<sup>55</sup> Table 1, showing the top twenty cases with the greatest number of uses of the word “our,” features a number of instantly recognizable cases. Further, a number of other well-known cases also feature substantial use of the term: *West Virginia Bd. of Ed. v. Barnette*, *Miranda v. Arizona*, and *District of Columbia v. Heller* all fall within the top 1% of opinions using “our.”<sup>56</sup>

*Table 1: Top 20 heaviest uses of “our” in published U.S. Supreme Court opinions, through 2011 term*

Case	U.S. Reports	“Our” Uses	Opinions	Year	CAP id	SCDB id
<i>Furman v.</i>	408 U.S.	157	10	1972	1782791	1971-170

a mismatch. The corrected data is available from: Eric C. Nystrom & David S. Tanenhaus, *Connecting U.S. Supreme Court Case Information and Opinion Authorship (SCDB) to Full Case Text Data (CAP), 1791-2011* ZENODO (Dec. 18, 2020), <https://zenodo.org/record/4344917>.

53. Unlike CourtListener, CAP has relatively few duplicate cases, but since they provide the U.S. Supreme Court data intermixed with other federal court jurisdictions, weeding out other courts becomes important. CAP provides two fields which can be used for this purpose, but there are at least a handful of errors, and even so, weeding in this fashion would leave the minor cases (e.g. *per curiam*) intact in the dataset, which is not desired here.

54. This and other statistics to immediately follow derived from data file “CURRENT-our-kwic-cap-scdb\_05202020.tsv” available from Nystrom & Tanenhaus, *Usages of ‘our’ by U.S. Supreme Court Justices, 1791-2011*, *supra* note 23.

55. *Furman v. Georgia*, 408 U.S. 238 (1972). Although the decision was only a one-page *per curiam* opinion about whether the imposition of the death in three specific cases violated the 8th and 14th Amendments, there were more than 200-page of concurrences and dissents about the constitutionality of death penalty more generally. The justices used the word “our” repeatedly in their dissents and concurrences but the Court did not use the word in the *per curiam* opinion. For more about the case, see DAVID M. OSHINKSY, *CAPITAL PUNISHMENT ON TRIAL: FURMAN V. GEORGIA AND THE DEATH PENALTY IN MODERN AMERICA* (2010).

56. All cases with 43 or more uses of “our” fall among the top 150 results (1%).

<i>Georgia</i>	238					
<i>Citizens United v. Federal Election Commission</i>	558 U.S. 310	152	5	2010	3639027	2009-012
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i>	343 U.S. 579	130	7	1952	11341177	1951-088
<i>Planned Parenthood v. Casey</i>	505 U.S. 833	129	5	1992	1480969	1991-117
<i>McConnell v. Federal Election Commission</i>	540 U.S. 93	127	6	2003	8897054	2003-006
<i>Hamdan v. Rumsfeld</i>	548 U.S. 557	125	1	2006	3500459	2005-086
<i>McDonald v. City of Chicago</i>	561 U.S. 742	124	5	2010	3644508	2009-091
<i>American Trucking Associations v. Smith</i>	496 U.S. 167	112	3	1990	12122336	1989-100
<i>Mitchell v. Helms</i>	530 U.S. 793	109	3	2000	9414276	1999-087
<i>Dennis v. United States</i>	341 U.S. 494	109	5	1951	1148067	1950-089
<i>County of Allegheny v. American Civil Liberties Union</i>	492 U.S. 573	108	5	1989	6217400	1988-151
<i>Regents of the University of California v. Bakke</i>	438 U.S. 265	105	2	1978	1769201	1977-147
<i>Roper v. Simmons</i>	543 U.S. 551	105	4	2005	5928574	2004-024
<i>Danforth v.</i>	552 U.S.	104	3	2008	3675901	2007-016

<i>Minnesota</i>	264					
<i>Boumediene v. Bush</i>	553 U.S. 723	104	1	2008	3674039	2007-053
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i>	551 U.S. 701	101	5	2007	3573087	2006-073
<i>Holder v. Hall</i>	512 U.S. 874	101	5	1994	39493	1993-094
<i>Smith v. Turner</i>	7 How. 283	100	3	1849	6139133	1849-018
<i>School District v. Schempp</i>	374 U.S. 203	96	5	1963	8318	1962-148
<i>United States v. Lopez</i>	514 U.S. 549	96	6	1995	1339171	1994-051

Generally, however, the average number of uses of “our” was modest—the median was 2, with a mean of 5.28, indicating a handful of cases with large numbers of uses skewed the average. Detected uses, like the data itself, spanned more than two centuries, from 1792 through the 2011 Supreme Court term, which ended in 2012. The most cases per decade using “our” appeared in the 1980s (1442), followed closely by the 1970s (1338). The single highest year was 1976 (157), followed by 1984 and 1973 (155). Eighteen of the top twenty-one years with the most cases were in the 1970s and 1980s.<sup>57</sup> Moreover, while the usage of “our” clearly varied, and was less common in the earliest years of the Court than later, there is a remarkable consistency to the term’s usage over time. Our search revealed only four years in the span from 1792 to mid-2012 which did not have a single published case using “our,” and those four all occurred more than two centuries ago.<sup>58</sup>

That the Supreme Court’s workload of cases has varied substantially over the course of its long existence is well known. In the Court’s earliest years, the limited scale and scope of the emerging nation’s economy helped keep the number of cases to a modest level, at least when

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57. The exceptions are the year of 1884 (132 cases, 17th place), and 1990 and 1894, both of which are tied for 19th place, along with 1978, with 130 cases each. It should be noted that this figure would be susceptible to skewing as a result of an increased or decreased court workload.

58. These were 1794, 1797, 1802, and 1811.

compared with later Court workloads. Judicial reform efforts in 1891 and 1925 attempted to streamline justice by creating the circuit courts of appeals and further limiting cases the Supreme Court was required to hear, permitting the justices greater latitude to select cases with precedential value.<sup>59</sup> Efforts by the justices to avoid thorny political issues also shaped the Court's caseload over time.<sup>60</sup> Therefore, a count of cases using the term "our" might fruitfully be compared with the total number of cases considered by the Court. As the line in Figure 1 below suggests, in the earliest years of the Court, "our" usage could vary substantially from year to year, depending on the issues at hand, even though the total number of such cases was commensurate to the Court's small workload.<sup>61</sup> The percent of cases using the term continued to vary dramatically through the first half of the 19th century, peaking during times of constitutional distress around 1850. From the late 1860s to the 1920s, the Court underwent three cycles of increasing usage followed by declining usage, though never so high nor so low as during the antebellum era. From 1925, "our" usage climbed steadily to a peak in the mid-to-late 1940s. Every year 1944-1950 inclusive saw more than 70% of opinions use the term, with only 1946 missing the benchmark by less than 3/10ths of a percent, and a peak in 1949 of more than 79% of cases using the term at least once—the highest rate of usage since 1853. Though this high-water mark stood for more than two decades (until bested by 1971's 81.6% use), the rate of usage of the term remained high through the mid-20th century. In 1973, the figure topped 82% again, and did not fall below 80% through the end of our data (2011 Court term), with peaks of over 97% in 1999, and 94% or above in 1989, 1991, 2000, and 2009.<sup>62</sup>

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59. DAVID C. FREDERICK, *RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891-1941*, at 16-17, 218-219 (1994); see also Felix Frankfurter & James Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928) (cited in FREDERICK, *supra*, at 219).

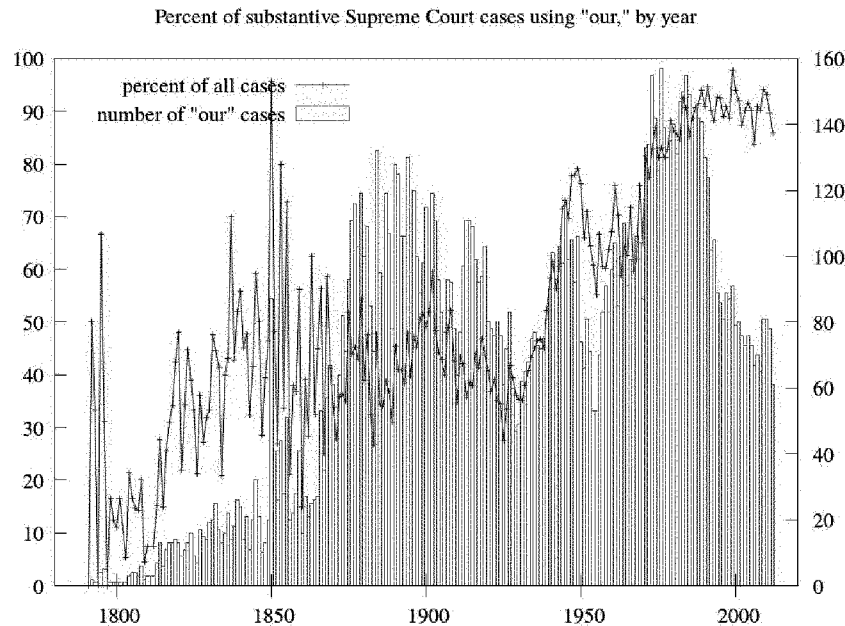
60. See LISA KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW* (2001).

61. The bars in Figure 1 represent the count of cases using "our" in each year, among those cases listed in the SCDB.

62. This analysis is based on data in the file "our-casecount-by-year\_normalized.tsv" which is derived from the CAP data connected to SCDB data mentioned above, normalized against casecounts by year from SCDB. Eric C. Nystrom & Tanenhaus, *Usages of 'our' by U.S. Supreme Court Justices, 1791-2011*, *supra* note 23. Intriguingly, though the data for this paper stops after the 2011 court term ends in 2012, CourtListener data suggests that there may be a significant drop in usage in 2012 and 2013. Though the data from CAP used for this paper cannot shed light on this question, and CourtListener data must be treated with caution until manually verified, this possible dip in usage may warrant further attention.



*Figure 1: Number and Percent of Supreme Court cases using “our” at least once, by year*

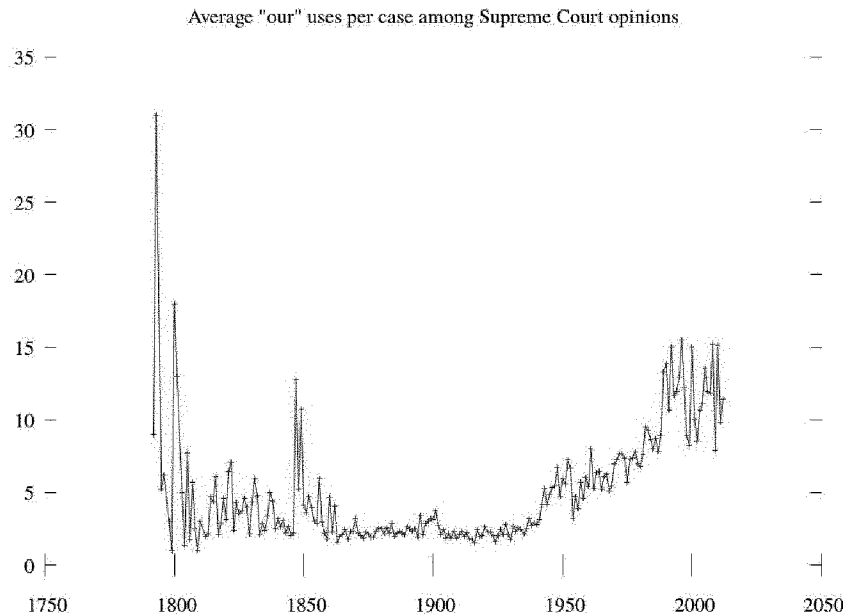


This normalized analysis is based on a subset of the total number of cases found in the CAP data—here, we only used those opinions that could also be tied to an entry in the Supreme Court Database, though CAP contains additional opinions that could not be linked. Other than a small handful of outright errors, this difference stems from how the SCDB decides what cases to include, as discussed above. Despite these quirks, the matching of SCDB cases with CAP data has been largely successful for cases from the 2011 term and before, meaning that we can safely limit the universe of our data to those cases that have an SCDB ID. By doing so, we open doors to other types of analysis through the examination of some of the many additional variables provided by the SCDB data, as discussed in the following Sections of this Article.

While a glimpse at the number of cases using “our” in their opinions shows that this number varied from the 19th century through the 20th century, we might also examine the number of times any particular Court opinion uses the term. Does this follow the trend of the number of cases, or suggest a different pattern? Figure 2 below shows the average uses of “our” per case, computed per year. In the early years of the republic, the average uses per year were frequently high due to a small number of cases using the term intensely. For example, 1793’s average of 31 uses is

attributable to a single case, *Chisholm v. Georgia*,<sup>63</sup> as is 1800's average of 18 (*Bas v. Tingy*<sup>64</sup>) and 1801's score of 13 (*Talbot v. Seeman*<sup>65</sup>). Even so, this suggests the importance of the “our” language in at least a few early cases. The years 1847 and 1849 show an average of more than ten uses per case with 10 and 20 cases featuring the term at least once. Across the 20th century, the average number of uses per case steadily crept up over time, despite the much larger number of cases that use it at least once. The figure reached an average of more than 13 uses per case in 1989, across the 141 opinions with that term that year. The recent pattern of intensive usage continues through the end of our study, with 19 of the final 24 years averaging over 10 uses per case.<sup>66</sup> Some used the term far more. For example, *National Federation of Independent Business v. Sebelius*<sup>67</sup> used “our” a whopping 94 times across four opinions, and *Perry v. New Hampshire*<sup>68</sup> used it 65 times over three opinions. Even in an era where use of “our” by justices in their opinions is common, those two cases stand out as intense users of the concept.

Figure 2: Average “our” uses per case, by year



63. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

64. *Bas v. Tingy*, 4 U.S. 37 (1800).

65. *Talbot v. Seeman*, 5 U.S. 1 (1801).

66. From 1989–2012 inclusive, excepting 1998, 1999, 2002, 2009, and 2011.

67. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

68. *Perry v. New Hampshire*, 565 U.S. 228 (2012).

## II. PATTERNS OF “OUR” USAGE

Distinguishing cases using “our” from those not doing so, and tracking the numbers of uses, gave us a broad overview of the use of this changing term in the previous Section. The next step in the analysis was to attribute those uses to particular justices. To do this, we correlated each case’s opinions, as presented in CAP, to SCDB’s “justice-centered” dataset, matching each opinion to its author (or, rarely, authors). Though this data required some hand-correction, and about one percent of entries have some kind of recognizable but unfixable problem, making this connection allows us to utilize metadata from the SCDB to delve further into the context of the use of this term by the Justices. In this Section, we look at the “our”-using cases through several lenses: the changing configuration of the Court, the apparent proclivities of individual Justices, topic areas, voting majorities, and its use in concurrences and dissents.

Scholars well recognize the division of the Supreme Court’s history into eras marked by who served as Chief Justice. Do particular Chief Justices impact the patterns of using “our” in opinions? Broadly speaking, any analysis of Court eras by Chief Justice should be consistent with the chronological patterns shown in the graphs in Section I, since there can be no more than one Chief Justice at a time. One must also note that voting coalitions within the Court can change over the long arc of a Chief’s career; for example, as occurred with the Rehnquist Court.

*Table 2: Uses of “our” per case, and cases using “our” at least once, and “our”-using cases as percent of all cases heard during Chief Justice term*

Chief	intensity (“ours” per case)	“our” cases	all cases	frequency (% of cases)	intensity rate	frequency rate
Jay	10.4	5	14	35.7143	heavy	light
Rutledge	11.25	4	5	80	heavy	heavy
Ellsworth	4.33333	6	41	14.6341	moderate	light
Marshall	3.89807	363	1277	28.426	moderate	light
Taney	3.61304	721	1653	43.6177	moderate	moderate
Chase	2.29184	490	1312	37.3476	light	light

Waite	2.29001	1531	3549	43.1389	light	moderate
Fuller	2.4982	2220	4963	44.731	light	moderate
White	2.03565	1038	2547	40.7538	light	moderate
Taft	2.1848	579	1616	35.8292	light	light
Hughes	2.58974	858	1894	45.301	moderate	moderate
Stone	4.85462	509	781	65.1729	moderate	moderate
Vinson	5.94876	605	812	74.5074	moderate	heavy
Warren	5.65379	1424	2205	64.5805	moderate	moderate
Burger	7.70883	2356	2805	83.9929	heavy	heavy
Rehnquist	11.5029	1869	2044	91.4384	heavy	heavy
Roberts	11.6823	513	571	89.8424	heavy	heavy

Table 2 examines the average number of uses of “our” per case (intensity) and the number of cases using the term at least once (frequency), grouped together by the term of each Chief Justice. The number of cases using “our” is also expressed as a percentage of all cases heard during each Chief’s tenure. We further characterized the frequency and intensity of use as “light” (among the lowest quartile of values), “heavy” (among the highest quartile of values), or “moderate” (in between). This information suggests that the approach toward “our” language may very well have varied significantly depending on which justice was chief. It seems especially noteworthy that both the average uses per case and the percent of cases using the term jumped dramatically during the term of Harlan F. Stone as Chief Justice (July 1941 to April 1946). This spike in “our” usage correlates with Cass Sunstein’s finding that the Court’s institutional culture of consensus broke down during Stone’s tenure. As a result, the Court began issuing more 5-4 decisions that included many concurring and dissenting opinions.<sup>69</sup>

What if we look at the “our” usage of individual justices? Did some individual writers prefer the term, or use the kind of reasoning that lent itself readily to using “our”? It seems reasonable that this could be true. We used a combination of automatic matching and manual correction to connect each full-text Court opinion in the CAP data to the authoring

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69. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769 (2015), available at <http://scholarship.law.cornell.edu/clr/vol100/iss4/2>

justice.<sup>70</sup> Considering simply the number of opinions attributed to particular justices, the justice with the most opinions including at least one use of “our” was John Paul Stevens with 1058, followed by William J. Brennan with 856, William O. Douglas with 792 and William H. Rehnquist with 707. To a degree this is not surprising, as each of these justices spent at least thirty years on the Court and would have had ample opportunity to compile a large number of “our”-using cases.

A better comparison might be to see what percentage of the opinions written by each justice featured “our” at least once. If we remove justices who published fewer than 100 opinions during their tenure on the Court included in our dataset (through the 2011 term),<sup>71</sup> then the average (mean) justice used “our” at least once in slightly more than half of their published opinions.<sup>72</sup> Justices using the term more than one standard deviation above and below the mean are shown in Table 3 below, with the heaviest and lightest users of the term, with a percentage usage more than 1.5 standard deviations above or below the mean, respectively, demarcated by a heavy line.

*Table 3: Percentage of opinions with “our”, 1 standard deviation above/below the mean, with heavy line marking 1.5 standard deviations above/below*

Justice	“Our” opinions	Total Opinions	Percentage
AMKennedy	397	471	84.2887
WHRehnquist	707	876	80.7078
AScalia	614	771	79.6368
EWarren	183	235	77.8723
SDOConnor	498	640	77.8125
DHSouter	260	347	74.928
WJBrennan	856	1145	74.7598

70. We also count co-authored opinions once for each writer.

71. Justices who did not meet this standard in our dataset, which ends after the 2011 court term, are: GDuvall, SChase, JWilson, TTodd, RTrimble, OEllsworth, BWashington, HBLivingston, WPaterson, SThompson, CEWhittaker, WCushing, JMcKinley, WHMoody, HEJackson, JFByrnes, HBaldwin, BRCurtis, PPBarbour, AFortas, AJGoldberg, SSotomayor, LWoodbury, FMVinson, JGRoberts, EKagan, and Jredell.

72. N = 82, and if the percentage of usage is analyzed, the mean is 50.36 and standard deviation 17.5.

CThomas	342	461	74.1866
LFPowell	436	598	72.9097
RBGinsburg	254	351	72.3647
TMarshall	565	782	72.2506
SFReed	251	352	71.3068
SAAlito	83	117	70.9402
JPStevens	1058	1495	70.7692
RHJackson	210	303	69.3069
FFrankfurter	454	658	68.997
SNelson	107	332	32.2289
DDavis	66	205	32.1951
CEHughesI	46	155	29.6774
NClifford	137	473	28.9641
LDBrandeis	151	523	28.8719
JMcLean	80	280	28.5714
percuriam	587	2118	27.7148
WHunt	41	155	26.4516
RBTaney	75	286	26.2238
SBlatchford	109	427	25.5269
ETSanford	35	138	25.3623
HGray	114	457	24.9453
SPChase	41	197	20.8122
JMarshall	99	539	18.3673
JRLamar	7	121	5.78512

Perhaps unsurprisingly, the top users of “our” all served during the

high-water mark of “our” usage in the late 20th century.<sup>73</sup> More intriguingly, two of the five top users were chief justices, and two of the three justices with the lowest usage rates were also chief justices. In the case of John Marshall and Salmon P. Chase, since they presided over the Court when many more relatively routine cases were heard, we might surmise that the chief justice ended up writing on behalf of the court frequently in relatively unimportant cases, which would lower the average use.

Does the picture change if we examine the number of uses of the term, rather than just its presence or absence in any particular case? In Table 4 below, we see the average number of “our” uses in each opinion containing at least one use of the term, grouped by the justice who wrote the opinion. Table 4 displays only those justices whose overall intensity of uses (that is, “ours” per opinion) is more than one standard deviation above or below the mean. Many of the most intense “our” users are from the recent era, which is not surprising given the overall intensity of use of this term since the 1970s. Perhaps most unexpected is the appearance of Justice James M. Wayne, who served from 1835 to 1867. This table, like Table 3 above, only contains justices who had written 100 or more opinions in our dataset (by the end of the 2011 term). Recently-added justices Elena Kagan (10.8333 per opinion), John Roberts (9.6338), Sonia Sotomayor (7.64286), and Samuel Alito (6.50602) would have also made this list had they had sufficient opinions to make the cutoff. Among light users, we find no justice that served after 1941, but the list includes two chief justices and Oliver Wendell Holmes, Jr.

*Table 4: Intensity of “our” uses per opinion, +/- 1 standard dev (1.5363) above/below mean (3.4687)*

Justice	“Our” Uses	Total Opinions	Avg. “our” Per Opinion
AMKennedy	3170	397	7.98489
AScalia	4061	614	6.61401
SDOConnor	3283	498	6.59237
JPStevens	6771	1058	6.39981
JMWayne	654	105	6.22857
CThomas	2075	342	6.06725

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73. In an example of the sorts of unusual patterns that also emerge when examining extremely small sample sizes, four of these five top users were Westerners. (Rehnquist, the most dubious Westerner of the four, went to Stanford and was in private practice in Phoenix for sixteen years.)

DHSouter	1531	260	5.88846
WJBrennan	4776	856	5.57944
WHRehnquist	3871	707	5.47525
RHJackson	1133	210	5.39524
EWarren	924	183	5.04918
MWFuller	702	368	1.90761
MRWaite	705	370	1.90541
NClifford	257	137	1.87591
WRDay	371	201	1.84577
JCMcReynolds	355	199	1.78392
OWHolmes	502	321	1.56386

Further, we might imagine that the rhetorical position of the justice writing the opinion could have some impact on the use of “our” language. Using CAP’s characterization of the stance of each opinion, we can see in Table 5 below that the presence or absence of “our” and the intensity of the usage of the term within a particular opinion, if present, varied depending on the type of opinion being written. Concurrences were the least likely form of opinion to use the term at least once, where dissents were most likely to see “our” invoked by the writer. For those opinions using the word, majority opinions had the fewest average uses per opinion, while opinions characterized as “concurring in part and dissenting in part” used the term most intensely.

*Table 5: “Our” usage by type of opinion (common types)*

Type	Total Uses	“Our” Opinions	Intensity (avg per opinion)	Total Opinions	Frequency (% “our”)
concurrence	7149	1817	3.93451	3882	46.8058
majority	53528	14536	3.68244	28121	51.6909
concurring-in-part-and-dissenting-in-part	2305	477	4.83229	833	57.2629
dissent	18564	3906	4.75269	6684	58.4381



The judicial proclivities, rank and position, personal writing style, and relationship to the majority coalition of individual justices clearly might impact the use of "our" in opinions. But what about more structural questions, such as the area of the law or the particular legal issue? The SCDB has helpfully categorized each case in its dataset by both area and legal issue.<sup>74</sup> A breakdown of the "our"-using opinions and comparison with the SCDB universe as a whole suggests that some areas of the law were much more likely to see "our" language employed by the justices. As seen in Table 6 below, more than 80% of all SCDB cases categorized as "First Amendment" cases used "our" in the opinion at least once. Privacy cases similarly used "our" 79% of the time, and 73% of cases about unions used "our" language as well. By contrast, other areas of the law saw much less usage of the "our" language in opinions. Many fewer private action cases did so, for example, and rates for interstate relations, federal taxation, and economic activity cases were likewise low. Perhaps surprisingly, the category of cases about judicial power was the third-lowest rate, which seems striking given the presumed opportunity of such cases for reflection upon practice, which might lend itself to using "our" language.

*Table 6: Legal issue area of cases*

Issue Area	"Our" Cases	SCDB Cases	"Our" as % of Total
First Amendment	639	797	80.1757
Privacy	107	135	79.2593
Unions	390	528	73.8636
Criminal Procedure	2129	3125	68.128
Federalism	571	889	64.2295
Civil Rights	1709	2686	63.6262

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74. Specifically, the project uses a general and a detailed breakdown for each. These are "issueArea," "issue," "lawtype," and "lawsupp" respectively. The SCDB documentation makes clear the judgement that went into constructing these variables, noting particularly that sometimes fitting early court actions into a framework of categories that were developed to describe activity since World War II is sometimes a challenge, but the database creators are guided by the idea of attempting to understand what kind of case today's court would consider each historic opinion. See WASHINGTON UNIVERSITY LAW, *Issue, The Online Code Book, THE SUPREME COURT DATABASE*, <http://scdb.wustl.edu/documentation.php?var=issue> (last visited Oct. 7, 2018).

Miscellaneous	70	111	63.0631
Due Process	631	1130	55.8407
Economic Activity	4234	8357	50.6641
Attorneys	161	333	48.3483
Interstate Relations	127	268	47.3881
Judicial Power	2386	5535	43.1075
Fed. Taxation	632	1485	42.5589
Private Action	1305	3332	39.1657
Uncategorized	0	116	0

If the SCDB's "issueArea" variable can help us analyze the areas impacted by the Court's decisions, as seen above in Table 6, the database's "LawType" category can similarly permit us to study the relative distribution of "our"-using opinions among different legal questions, as seen in Table 7 below. This variable, according to the SCDB, describes "the constitutional provision(s), statute(s), or court rule(s) that the Court considered in the case."<sup>75</sup> Though this is a broad picture, it is similarly suggestive that "our" language appears much more frequently in some kinds of cases than in others. Those considering constitutional amendments and federal statutes seem to have reached for "our" fairly frequently. By contrast, those considering state laws and regulations did so only rarely.

*Table 7: Legal Provision(s) considered by the Court*

Law Type	"Our" Cases	SCDB Cases	"Our" as % of Total
Const. Amendment	2341	2984	78.4517
Fed. Statute	2727	3966	68.7595

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75. WASHINGTON UNIVERSITY LAW, *Legal Provisions Considered by the Court*, Online Codebook, SUPREME COURT DATABASE., <http://scdb.wustl.edu/documentation.php?var=lawType> (last visited Oct. 7, 2018) (describing "lawType" variable). This was derived by SCDB from the "Summary" of the reported case in the Lawyers' Edition reporters. SCDB variables "lawSupp" and "lawMinor" express similar information with a more fine-grained categorization, which could be useful for further investigation of particular types of provisions. SCDB provides a number of caveats about the accuracy of this data for pre-1946 cases, *see id.*

Constitution	751	1133	66.2842
Court Rules	295	487	60.5749
Other	378	656	57.622
Infrequent Litigate (Code)	2724	5234	52.0443
(uncategorized)	644	1333	48.3121
State, local law or reg.	1034	2267	45.6109
No Legal Provision	4197	10767	38.9802

If the use of “our” in an opinion carries any meaning, as the authors of this study presume that it does, it might be logical to think that the language is deployed more in some circumstances more than others. Table 8, below, categorizes “our”-using cases specifically as well as all cases in the SCDB dataset by the number of minority votes the case received when considered by the Court.<sup>76</sup>

*Table 8: Votes in Minority position*

Minority Votes	“Our” Cases	SCDB Cases	“Our” as % of Total
0	8668	20225	42.8578
1	1448	2202	65.7584
2	1676	2246	74.6215
3	1862	2314	80.4667
4	1437	1840	78.0978

An examination of Table 8 seems to suggest a clear pattern: that “our” appears more frequently as the number of votes in the minority rises. Most of the work of the Court has been accomplished in unanimous decisions, with nearly ten times the number of unanimous decisions as any other type of voting pattern among the cases recorded in the SCDB data. However, 42% of those cases used the word “our” at least once. At the other end of the spectrum, cases that had four votes in the minority—

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76. We used minority vote only (SCDB variable “minVote”) rather than a vote pattern containing votes for and against (e.g. 9-0, 5-4) because there were sufficient variations on the latter, due to recusals, empty seats, and changes in the number of seats on the Court over time that the table would have been unduly lengthy.

representing a 5-4 vote and a deeply divided court—saw “our” language used more than 78% of the time. Those with three minority votes used “our” 80% of the time, which is the highest rate, perhaps suggesting a Court substantially divided, yet without such starkly drawn battle lines. Whether used to invoke the Court’s own precedent or argue for consideration of timeless values held by all Americans, the necessity for this kind of work—aimed perhaps at other justices, perhaps at the public, or both—clearly rose as the Court’s voting coalitions narrowed.

### III. CATEGORIZING CONTEXTUAL MARKER WORDS

To this point, our analysis of the use of “our” by Supreme Court justices has largely relied on very simple measurements of the opinion language: does the word “our” exist in the text of the opinion(s), and if so, how many times is it used? But “our” is a slippery word, and its slipperiness is one element of the appeal of attempting to measure its use. In an opinion, “our” can mean very different things. When the Court says “there is no doubt of *our jurisdiction* upon certiorari,”<sup>77</sup> or points a reader to “the principles declared in *our former decision*,”<sup>78</sup> they are using the term in a Court-centered, self-aware linguistic mode that highlights the Court’s judicial process.<sup>79</sup>

“Our” is used in a second way that differs markedly from this first. As highlighted in the Introduction of this Article, the Court also chooses “our” in situations that call, in the eyes of the opinion author, for the claiming or construction of American culture or values as a guide to court action. For example, in the flag-salute case of *West Virginia v. Barnette* (1943), Justice Jackson pointed out, “The case is made difficult not because the principles of its decision are obscure, but because the flag involved is *our own*.”<sup>80</sup> He added, “Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of *our institutions* to free minds.”<sup>81</sup> These usages of “our” set the stage for his famous proclamation: “If there is any fixed star in *our constitutional*

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77. *B. Fernandez & Bros. v. Ayllon Y Ojeda*, 266 U.S. 144, 146 (1924) (emphasis added).

78. *Appleby v. City of New York*, 271 U.S. 364, 385 (1926) (emphasis added).

79. Our description of the procedural usage of our is similar to David A. Straus’s argument about the Supreme Court’s common-law approach to constitutional interpretation. The justices are consciously thinking about their decisions as part of a longstanding tradition. DAVID A. STRAUS, *THE LIVING CONSTITUTION* (2010).

80. *West Virginia v. Barnette*, 319 U.S. 624, 641 (1943) (emphasis added).

81. *Id.* (emphasis added).

*constellation*, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”<sup>82</sup> “Our” can help contrast American ideals and traditions versus foreign ideals and traditions, refer to the American body politic, and even build a judicial heritage. We saw examples of this usage in Justice Murphy’s dissent in *Korematsu*.

To get at these questions, we built software tools to extract words before and after each usage of “our” in every opinion in our dataset, to show us the keyword “our” in its context. Initially, we focused on those words immediately following each “our” use. These were extracted into a spreadsheet and grouped by the number of uses. From the 79,693 uses of “our” found in Supreme Court opinions, we noted 6,599 distinct terms following “our.”<sup>83</sup> Then, much as in the apocryphal story of the famous sculptor who simply chiseled away all the marble that did not look like his statue,<sup>84</sup> our expert legal historian simply deleted all the words that were not “process” words when following “our” in this context. He then repeated this procedure, using a fresh spreadsheet, to save words that indicated “heritage” when following “our.”<sup>85</sup> In this first effort, concentrating on the most common words, we mapped 391 terms with 25 uses or more, representing almost 79% of the uses of “our” that we found.<sup>86</sup>

This initial effort suggested the fruitful potential of this technique but exposed some weaknesses. The largest problem was that the word following “our” was not always the word that actually represented the heritage or process meaning. For example, “our basic approach” was recognizably a statement about process, where “our basic freedoms” was clearly about heritage, yet the word to categorize, in this first technique, would have been simply “basic.”

Our second try, with rebuilt tools, relied on grammatical structures to help us identify the important terms. “Our” is a possessive pronoun, and

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82. *Id.* at 642 (emphasis added).

83. Numbers based on CURRENT-our-kwic-cap-scdb\_05202020.tsv (May 20, 2020), available from Nystrom & Tanenhaus, *Usages of 'our' by U.S. Supreme Court Justices, 1791-2011*, *supra* note 23. For a full discussion of our technique, see David S. Tanenhaus & Eric C. Nystrom, *What's Ours?: Qualitative Classification of Culture and Process in U.S. Supreme Court Opinion Language, 1793-2011* (data paper manuscript under preparation).

84. *You Just Chip Away Everything that Doesn't Look Like David*, QUOTE INVESTIGATOR (June 22, 2014), <https://quoteinvestigator.com/2014/06/22/chip-away/>.

85. As our thinking evolved thanks to repeated exposure to the case texts, we eventually settled on “culture” as a more accurate descriptor than “heritage.”

86. 62,926 uses. The top word was “decision,” with 4871 uses. Numbers based on CURRENT-our-kwic-cap-scdb\_05202020.tsv (May 20, 2020), available from Nystrom & Tanenhaus, *Usages of 'our' by U.S. Supreme Court Justices, 1791-2011*, *supra* note 23.

the noun it possesses follows “our” in a sentence. The original technique faltered when the noun possessed was actually a noun phrase, which is a series of adjectives modifying a noun. Using this insight, we fed each “our” hit and its context into an open-source tool which probabilistically determined and tagged the part of speech of each word.<sup>87</sup> With the part-of-speech information, we could computationally begin at each “our” hit, move through adjectives and other words (saving as we went), until encountering the noun that completed each noun phrase. Using noun phrases, instead of just the next word after “our,” allowed us to be much more specific about assigning meaning to particular uses. It also expanded the field of terms (really, phrases) to classify by almost a third, to 9,527 unique nouns and noun phrases.<sup>88</sup>

We employed a multilayered approach to classify the terms as extensively as possible. Over several rounds, our legal historian used his judgment to determine each term’s meaning. We first classified the most common terms and term phrases using the manual technique described before. Among the most common terms, if a word was not assigned to either the process or heritage categories, it was automatically labeled “uncategorized” and set aside for further processing.

Next, we used three methods to computationally assist further classification of less-common terms. First, to address examples where a phrase, which had not yet been categorized, contained a noun that had already been determined, we took the noun out of the noun phrase and compared it to our classified hits. If, for example, “our constitution” was labeled a culture use, the rarer phrase “our glorious constitution” could then also be provisionally dubbed culture. Second, we repeated this technique, but examined only the root of the noun in the noun phrase. Here, we could extrapolate that because “our government” was a culture marker use which we had classified manually, the rarer form “our governments” should also be labeled culture. Third, we used measures of similarity to find very close matches between existing labeled words and uncategorized terms. These measures sometimes corrected artifacts from the typesetting and OCR process. For example, “our certiorari” was a process use, so we could guess that “our certio-rari”—just one letter different—was essentially the same thing. These computerized guesses were all reviewed by our legal historian for accuracy, and any rejected guesses returned to the uncategorized pile.

We then reviewed the “uncategorized” terms from before, which

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87. We used the Perl Lingua::EN::Tagger library, v0.28. Aaron Coburn, *Lingua-EN-Tagger-0.28*, METACPAN (Dec. 23, 2016), <https://metacpan.org/pod/Lingua::EN::Tagger>.

88. Statistics computed from CURRENT-our-pos-cap-scdb\_05202020.tsv and RESULTS-our-kwic-followers-opinauth-chief\_071520.tsv (May 20, 2020), available from Nystrom & Tanenhaus, *Usages of ‘our’ by U.S. Supreme Court Justices, 1791-2011*, *supra* note 23.

seemed to have multiple meanings in some cases. For these words, our legal historian wanted to see each use in the context of its use, not just as a bare word. For each uncategorized term with five or more uses, we gathered the whole context of each specific use, and every individual use was classified as culture, process, or indistinct. Eventually, more than 5,800 uses were classified; though this work took much less time per term than classifying individual words, since the context was so helpful in seeing the term's particular use. These uses were then aggregated by term. If 80% or more of the uses were either “culture” or “process” uses, then the term was agreed to have that meaning. If the classifications revealed a more evenly-mixed rate of usage, the term was dubbed “ambiguous.” We then applied these categorizations, in a final round of application and checking, via the computational methods described above to the remaining uncategorized uses.

As a result, in addition to process-oriented uses and culture-constituting uses, our data suggests that “our” occasionally appeared in three additional modes. One of these, which we termed “indistinct,” featured words that were simply too difficult to accurately place as either cultural or process terms. This included uses such as “in the year of our lord,” and others where the meaning was not clearly part of either tradition, such as “our statute,” “our clients,” or “our invention.” We also noted that a small number of terms might hold distinct cultural or process meanings in specific instances, but that not all uses of the term reliably shared those meanings. Those terms whose meaning could shift between culture and process in the examples we examined were labeled “ambiguous.”

Finally, we had a last category containing “uncategorized” terms, for which we did not attempt to determine a meaning. These were terms which appeared no more than four times across the corpus of opinions (indeed, more than three-quarters of them appeared only once), and did not bear close enough relationship to an existing classified term to be able to be categorized that way. Due to their rarity and low proportion of the universe of “our” uses, we initially decided that any terms remaining unclassified after the efforts described above were not worth further efforts to classify. During the manual review, we also identified two terms, used once each, where OCR had inadvertently created what appeared to be an “our” phrase by breaking apart some non-“our” word. These were classified as OCR errors.

*Table 9: Nouns following "our" in Supreme Court opinions, classified by type*

Classification	Unique Terms	% of Terms	Uses	% of Uses
process	5025	52.7448	54865	68.8454
culture	2566	26.934	18856	23.6608
indistinct	1638	17.1932	3328	4.17603
ambiguous	246	2.58213	2576	3.2324
uncategorized	50	0.524824	66	0.0828178
ocerror	2	0.020993	2	0.00250963
<i>Total</i>	<i>9527</i>		<i>79693</i>	

Upon further reflection, however, we decided to have our legal historian double check all the 9,527 usages, which included classifying the remaining “uncategorized” terms. This final stage of classification required reading the relevant sections of hundreds of opinions. Immersing ourselves in the Court’s language from different eras helped us to understand more precisely the justices’ linguistic choices.<sup>89</sup> For example, we discovered that “our pen” is a process usage because it refers to the court’s metaphorical pen, whereas “our pencil” was indistinct because it referred to somebody else, not the justices, trying to use a pencil as a deadly weapon.<sup>90</sup> It also helped us to see instances where the Court included quotations with the word “our” embedded in them. Many of these usages fell into the indistinct category because they referred to neither American culture generally, nor to the Court itself.

We also learned that justices have used variations on time (e.g., first, recent, frequent, immediate, longstanding, and last), imaginary creations (e.g., family, statute, and observer), and location (e.g., standpoint or starting-point) to discuss the judicial process. Their cultural markers included formative events (“our revolution”), geography (“our shores”), foreign relations (“our treaties”), institutions (“our federal system”), and haunting images such as Justice Scalia lamenting “our half-born

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89. The finalized data is available from David S. Tanenhaus & Eric C. Nystrom, *Classification of Culture and Process in U.S. Supreme Court Language, 1793-2011* ZENODO (Nov. 18, 2020), <https://zenodo.org/record/4743988>. For the importance of historians immersing themselves in the past, see William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623 (2010).

90. *Skilling v. United States*, 561 U.S. 358, 423-24 (2010); *Scales v. United States*, 367 U.S. 203 (1961).



posterity.”<sup>91</sup>

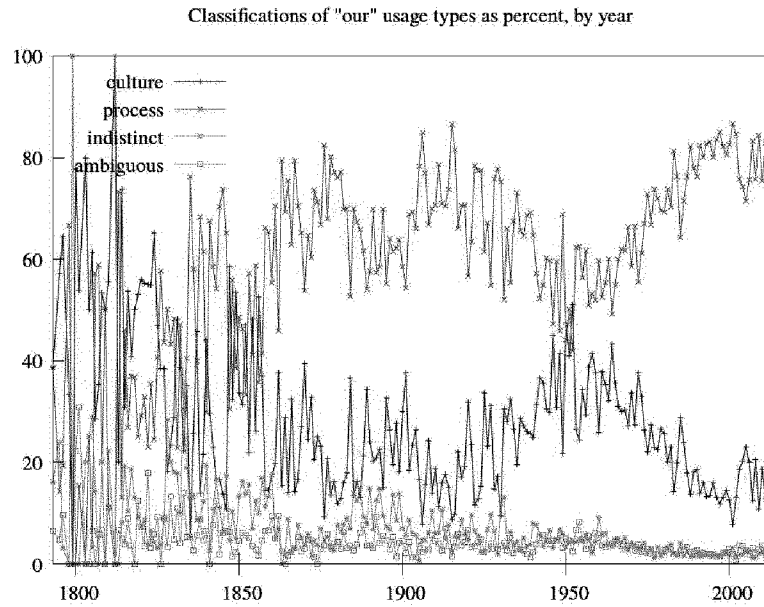
#### IV. TALKING ABOUT CULTURE

We might reasonably guess that the types of “our” uses—whether culture-framing, process-oriented, or otherwise—might vary over time. As Figures 4 and 5 below suggest, based on our categorization, the percentage of “our” cases in which the Supreme Court used the word in a potentially culturally constitutive manner began strong in the few cases heard in the court during the Early Republic period, extending into the 1820s. The Court’s usage began swinging back and forth between a predominance of process language and a predominance of cultural language during the antebellum era. After 1856, the predominance of process-oriented uses of “our” slowly and unevenly outpaced the culture-constituting uses of the term, until by 1915—a process-using spike—slightly more than 75% of all uses were process ones. From there, the use of culture-invoking “our” terms increased as a proportion of use. The years around World War II and its immediate aftermath showed a surge in cultural uses. In both 1950 and 1952, the justices’ proportion of cultural language exceeded the process language for the first time in nearly a century. Since then, even as use of “our” language became more common, the percentage of that language that was process-oriented increased as the century wore on. Even though the proportions of cultural and process uses have not been equal since mid-century, particular years show different patterns of usage.

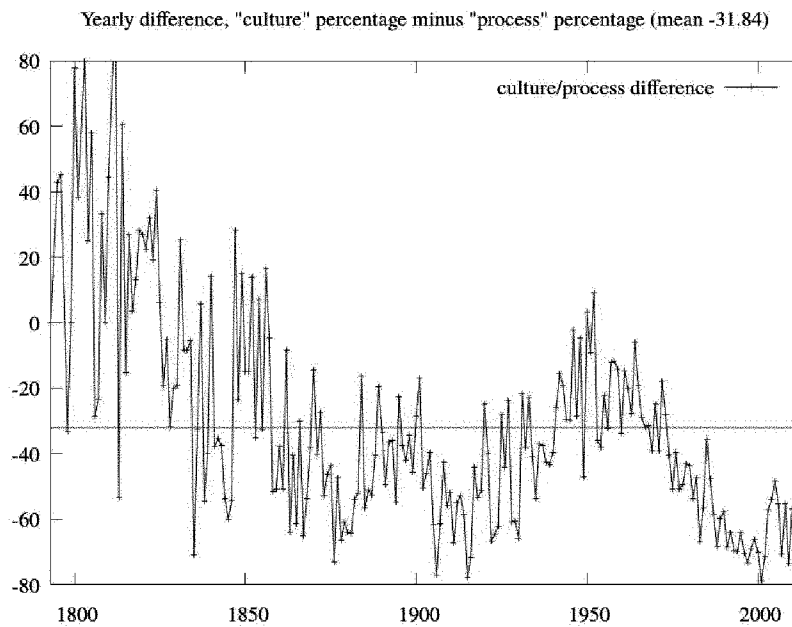
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91. *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

*Figure 4: Culture / Process / Indistinct / Ambiguous uses of "our," each year as percentage of yearly uses*



*Figure 5: Difference between culture (positive) and process (negative)*



*uses, by year*

Trends like cultural and process uses over time are comprised of individual case texts, and an examination of some of these opinions might be fruitful. In addition to finding historical periods of intense cultural usage, we also analyzed the Top 20 heaviest uses of “our” cases to see how the justices deployed the word in these cases. This is shown in Table 10 below. As a starting point, we might examine the culture / process / uncategorized / indistinct / ambiguous “our”-usage for the same cases as we saw in the beginning of this paper—that is, those whose text used “our” the most.

*Table 10: Top 20 heaviest “our” using cases, by type of usage*

Case	SCDB ID	“Our” Total Uses	% Culture	% Process	% Indist.	% Ambig.
<i>Furman v. Georgia</i>	1971-170	157	54.14	37.58	4.46	3.82
<i>Citizens United v. Federal Election Commission</i>	2009-012	152	26.97	65.13	0.66	7.24
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i>	1951-088	130	81.54	13.08	3.85	1.54
<i>Planned Parenthood v. Casey</i>	1991-117	129	27.13	68.99	3.1	0.78
<i>McConnell v. Federal Election Commission</i>	2003-006	127	29.13	62.2	2.36	6.3
<i>Hamdan v. Rumsfeld</i>	2005-086	125	45.6	49.6	1.6	3.2
<i>McDonald v. City of Chicago</i>	2009-091	124	48.39	41.13	5.65	4.84
<i>American</i>	1989-	112	0.89	99.11	0	0

<i>Trucking Associations v. Smith</i>	100					
<i>Mitchell v. Helms</i>	1999-087	109	2.75	92.66	0	3.67
<i>Dennis v. United States</i>	1950-089	109	64.22	26.61	3.67	5.5
<i>County of Allegheny v. American Civil Liberties Union</i>	1988-151	108	51.85	41.67	3.7	2.78
<i>Roper v. Simmons</i>	2004-024	105	30.48	63.81	0	5.71
<i>Regents of the University of California v. Bakke</i>	1977-147	105	30.48	60.95	3.81	4.76
<i>Danforth v. Minnesota</i>	2007-016	104	6.73	92.31	0	0.96
<i>Boumediene v. Bush</i>	2007-053	104	50.96	44.23	2.88	1.92
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i>	2006-073	101	41.58	51.49	2.97	3.96
<i>Holder v. Hall</i>	1993-094	101	10.89	84.16	0.99	3.96
<i>Smith v. Turner</i>	1849-018	100	73	20	5	1
<i>School District v. Schempp</i>	1962-148	96	60.42	31.25	0	8.33
<i>United States v. Lopez</i>	1994-051	96	34.38	59.38	3.12	2.08

The top three cases—*Furman*, *Citizens United*, and *Youngstown Sheet & Tube Company*—are all landmark decisions that sharply divided the

justices. *Furman* (1972) and *Youngstown* (1952), which were decided during periods of spiking cultural use, stand out for their especially high percentages of cultural usages (54% and 81%, respectively); whereas *Citizens United* (2010) used cultural markers (27%) much less than process language (65%). Accordingly, a closer look at *Furman* and *Youngstown* may reveal how the justices used “our” as a cultural marker during periods of high usage. We also need to consider whether cases with especially high percentages of cultural usage (say, more than 40%), such as *Smith v. Turner* (73%), *Furman* (54%), *Youngstown* (81%) and *Korematsu* (62%), are qualitatively different in meaningful ways from cases with lower percentages such as *Citizens United* (26%) or *Planned Parenthood v. Casey* (27%)?<sup>92</sup> If so, is there a potential canon of culture-constituting cases?<sup>93</sup>

The following analysis of *Furman* is illuminating because it reveals how all nine justices in one decision used the word “our” to make their arguments about who “we” are and how “they” should opine. For each use, we have indicated how this “our”-phrase was classified based on the following word: cultural uses are marked “C”, process uses are marked “P”, and any ambiguous, indistinct, or uncategorized uses are marked accordingly. Even though *Furman*, the longest decision in the Court’s history, is *sui generis*, it does hold clues to understanding whether there is a larger universe of culture-constituting cases worth studying collectively as a significant phenomenon or making into a canon of constitutional law.

The Court’s one-page per curiam opinion in *Furman* did not use “our,” but all the concurrences and dissents did (157 total usages). The first concurrence by Justice William O. Douglas used “our” to explain where the language of the Eighth Amendment comes from and to reinforce his conclusion that the death penalty has been administered unfairly.<sup>94</sup> To make the point that the death penalty is unfairly administered, he explained, “One searches *our chronicles* [C] in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb are given prison terms, not sentenced to death.”<sup>95</sup> His final use of “our”

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92. As Martha Jones notes in *Birthright Citizens*, Congress ordered 10,000 copies of the Court’s decision in *Smith v. Turner* (1849) to be printed in pamphlet form. MARTHA JONES, *BIRTHRIGHT CITIZENS* 200 n.5 (2018). As our data reveals, *Smith v. Turner*, more commonly known as “the Passenger Cases,” was the heaviest “our” user case before 1951. See also Alfred L. Brophy, *Louisa McCord and Antebellum Southern Legal Thought*, 5 *CARDOZO WOMEN’S L.J.* 33 (1998).

93. See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *HARV. L. REV.* 963 (1998). The relationship between law and the uses of history is an animating theme of Robert Gordon’s scholarship. See ROBERT W. GORDON, *TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW* (2017).

94. There is a large literature on capital punishment. See, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002).

95. *Furman v. Georgia*, 408 U.S. 238, 251-52 (1972) (emphasis added).

connected his understanding of history and practice to the procedural matter of how the court should make its decision in the present cases. He concluded:

We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet *our task* [P] is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws, no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.<sup>96</sup>

As the first opinion in the case, Douglas's concurrence previewed the use of "our" in *Furman* to constitute culture ("our chronicles") and to discuss judicial decision-making ("our task"). His brethren responded in kind and volume.

The next opinion, Justice William Brennan's long concurrence, is a tour de force of "our" usage. In the first three parts of his opinion, Brennan uses "our" to frame his overarching argument about the Court's responsibility to serve as a check against unconstitutional forms of punishment. In Part I of the opinion, he introduces "our" as a cultural marker, followed by a procedural use of a different form of the word embedded in a citation to an earlier decision, *Trop v. Dulles*:

The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to *our scheme* [C] of government. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, "[t]hat issue confronts us, and the task of resolving it is inescapably ours."<sup>97</sup>

In Part II of the opinion, he uses "our" to argue for applying the theory of evolving standards of decency to determine the meaning of the Eighth Amendment's prohibition of cruel and unusual punishments. Using "our" allowed Brennan to emphasize the agency of the justices because it was their duty, unlike the light cavalry in Lord Tennyson's poem, to ask why. "*Our task* [P] today is more complex. We know 'that the words of the [Clause] are not precise, and that their scope is not static.' We know,

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96. *Id.* at 253 (emphasis added). Douglas's footnotes also included usages of "our" that were similar his usage of the term in the text itself. *See, e.g., id.* at 247 n.10.

97. *Id.* at 258 (Brennan, J., concurring). Note that "ours" is uncategorized in this case because our software looked only for the word "our" and excluded any variations. Different techniques would have been necessary to find the noun phrase modified by different grammatical constructions. "Task," the noun possessed by "ours," is categorized as a process word in our data.

therefore, that the Clause ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’<sup>98</sup>

In Part III of the opinion, Brennan used “our” to situate the death penalty at the beginning of the nation’s history and at the heart of its moral conflicts. In the following passage, note the rhetorical power of “our” at the beginning of the first paragraph and the rhetorical impact of its rapid repetition near the end of the second paragraph:

From the beginning of *our Nation* [C], the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance, on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.

It is this essentially moral conflict that forms the backdrop for the past changes in, and the present operation of, *our system* [C] of imposing death as a punishment for crime. *Our practice* [P] of punishing criminals by death has changed greatly over the years. One significant change has been in *our methods* [A] of inflicting death. Although this country never embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly more humane methods of electrocution late in the 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased. *Our concern* [P] for decency and human dignity, moreover, has compelled changes in the circumstances surrounding the execution itself. No longer does *our society* [C] countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.<sup>99</sup>

Searching for the word “our” and culture-constituting usage got us to *Furman*. A close reading of the case reveals that Justice Brennan’s use of

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98. *Id.* at 269-70 (quoting *Trop v. Dulles*, 365 U.S. 86, 100-01 (1958)) (emphasis added).

99. *Id.* (emphasis added).

“ours,” “we,” and “us all” are variations on “our” that our distant reading techniques would not have picked up, but which added rhetorical power to the justice’s opinion.<sup>100</sup>

Like Justice Brennan, Justice Thurgood Marshall’s long concurrence in *Furman* called for the abolition of the death penalty and used “our” in similar culturally constitutive ways. Part I of Marshall’s opinion includes direct statements and quotations from primary sources to make a historical argument about tradition: “*our religion*” (A),<sup>101</sup> “*our founding*” (C) fathers,<sup>102</sup> “*our Bill [C] of Rights*,”<sup>103</sup> and “*our ancestors*” (C)<sup>104</sup>. Marshall’s Part II analysis of the case law, however, used “our” only once to remind his brethren of “*our knowledge*” (P) about the scope of the language in the Eighth Amendment.

In Part III of his opinion, Marshall then used “our” to contend that “a penalty that was permissible at one time in *our Nation’s* [C] history is not necessarily permissible today,”<sup>105</sup> and that when “[f]aced with an open question, we must establish *our standards* [P] for decision”<sup>106</sup>. He then chronicled “*our history*” (C) of capital punishment and abolitionist movements in Part IV,<sup>107</sup> and “*our criminal jurisprudence*”<sup>108</sup> (P) and “*our jurisprudence*”<sup>109</sup> (P) in his Part V. Justice Marshall then argued that the Eighth Amendment is a check on human nature. “At times, a cry is heard that morality requires vengeance to evidence society’s abhorrence of the act. But the Eighth Amendment is *our insulation* [A] from *our baser* [C] selves. The ‘cruel and unusual’ language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty, and a return to the rack and other tortures would be possible in a given case.”<sup>110</sup>

After establishing that the Court could act, Marshall presented mounting evidence that the death penalty did not have a deterrent effect on “crime in *our society*”<sup>111</sup> (C) and that these findings required the justice to assert themselves. As he explained, “We would shirk *our judicial responsibilities* [P] if we failed to accept the presently existing statistics

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100. For an introduction to the concept of “distant reading,” see MICHAEL A. LIVERMORE & DANIEL N. ROCKMORE, *LAW AS DATA* 3-19 (2019).

101. *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring).

102. *Id.* at 319.

103. *Id.* at 320.

104. *Id.* at 321.

105. *Id.* at 329.

106. *Id.* at 330.

107. *Furman v. Georgia*, 408 U.S. 238, 333-41 (1972) (Marshall, J., concurring).

108. *Id.* at 342.

109. *Id.* at 343.

110. *Id.* at 345 (emphasis added).

111. *Id.* at 353.



and demanded more proof."<sup>112</sup> He could not accept that "at this stage in *our history*, [C] the American people would ever knowingly support purposeless vengeance"<sup>113</sup> and the justices had to know that "the death penalty wreaks havoc with *our entire* criminal justice system"<sup>114</sup> (C).

Marshall's opinion concluded with a crescendo of heritage-constituting ours:

At a time in *our history* [C] when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for *our fellow* [C] citizens. But the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of *our democratic system* [C].

In striking down capital punishment, this Court does not malign *our system* [C] of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of *our fellow* [C] beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism" and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

I concur in the judgments of the Court.<sup>115</sup>

Among the five concurrences, Brennan's and Marshall's stand out as potential ideal types of a cultural genre in American constitutional law. But perhaps their opinions were only the last vestiges of the long 1960s revolution in constitutional law?<sup>116</sup> To answer that question, of course, we would have to examine cases from other eras, such as *Youngstown*, which were decided during different historical periods.

Before turning to *Youngstown*, we need to examine the four dissenting opinions in *Furman*. Chief Justice Burger wrote the first dissent, which Justices Harry Blackmun, Lewis Powell, and William Rehnquist joined. Justice Blackmun wrote a dissent to express his personal thoughts, which no other justice joined. Justice Powell wrote a separate dissent that Burger, Blackmun, and Rehnquist joined. Finally, Rehnquist wrote a

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112. *Id.*

113. *Id.* at 363 (emphasis added).

114. *Id.* at 364 (emphasis added).

115. *Id.* at 371 (emphasis added).

116. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016).

dissent that all the dissenters joined. Collectively, the four dissents used “our” as part of their arguments about judicial self-restraint. They used both cultural and process usages to do so. For example, after stressing that only Brennan and Marshall believed that the death penalty was unconstitutional “for all crimes and under all circumstances,”<sup>117</sup> Burger repeatedly used “our” to advocate for “*our traditional deference* [P] to the legislative judgment.”<sup>118</sup> As he explained at the outset:

If we were possessed of legislative power, I would either join with MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. *Our constitutional inquiry* [P], however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all *our fundamental guarantees* [C], the ban on “cruel and unusual punishments” is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today’s opinions reveal the haze that surrounds this constitutional command. Yet it is essential to *our role* [P] as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact *our personal predilections* [P] into law.<sup>119</sup>

Burger’s process-inflected usage included emphasizing the critical role that jurors played in death penalty cases. He noted, “It seems remarkable to me that with *our basic trust* [P] in lay jurors as the keystone in *our system* [C] of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them.”<sup>120</sup>

Blackmun, like Burger, emphasized that courts were not legislators. As he noted:

*Our task* [P] here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow *our personal preferences* [P] as to the wisdom of legislative and congressional action, or *our distaste* [P] for such action, to guide *our judicial decision* [P] in cases such as these. The temptations to cross that policy line are very great. In fact, as today’s decision reveals, they are almost irresistible.<sup>121</sup>

Justice Blackmun ended with a cautionary note to his fellow justices to remember the victims of crime and to hope that the Court’s decision to

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117. *Furman v. Georgia*, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting).

118. *Id.* at 385.

119. *Id.* at 375-76 (emphasis added).

120. *Id.* at 402.

121. *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting) (emphasis added).

suspend the death penalty would do no harm. He concluded:

[T]hese cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of *our cities* [C] today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it was visited, and that *our society* [C] will reap the hoped-for benefits of magnanimity.<sup>122</sup>

He added, “Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.”<sup>123</sup>

Justice Powell’s dissent incorporated “our” into a procedural argument for judicial self-restraint. Powell also used “our” to separate the present from the past. In response to concerns about racial injustice, he stated:

A final comment on the racial discrimination problem seems appropriate. The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of *our society* [C] in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in *our history* [C]. Because standards of criminal justice have “evolved” in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.<sup>124</sup>

This juxtaposition of “society” and “history” reveals a subtle cultural usage of “our” that requires a close reading to appreciate how it divorces present concerns about justice from past unjust practices.

The final dissenting opinion, authored by William Rehnquist, began with a clear heritage assertion: “The Court's judgments today strike down a penalty that *our Nation's* [C] legislators have thought necessary since *our country* [C] was founded.”<sup>125</sup> Rehnquist included quotations from case law that included “our,” but did not use the word again in his opinion that ended with a plea for “judicial self-restraint” as an implied part of the power of judicial review.<sup>126</sup> In this instance, his use of culture reads like a direct response to the culture-laden concurrences of Brennan and Marshall.

*Furman*, as we acknowledge, may be an outlier of a decision because

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122. *Id.* at 414.

123. *Id.*

124. *Furman*, 408 U.S. at 450 (Powell, J., dissenting) (emphasis added).

125. *Furman*, 408 U.S. at 465 (Rehnquist, J., dissenting).

126. *Id.* at 470.

of the combination of a short per curiam opinion, followed by every justice contributing his own take on the case. In addition, the case was also decided at a particularly turbulent time in the Court's history.<sup>127</sup>

For these reasons, we conclude this Section with a brief analysis of *Youngstown* (commonly referred as the *Steel Seizure Case*), the decision that declared President Truman's Executive Order 10340 unconstitutional. On April 8, 1952, President Truman directed Secretary of Commerce Charles Sawyer to take over the operations of the nation's steel mills temporarily to help resolve a labor dispute that threatened to disrupt production while the nation was fighting the undeclared Korean War. Truman's order repeatedly used "our" to justify his actions: "our national security," "our responsibilities," "our armed forces," "our defense efforts," "our military strength," "our national defense," and "our soldiers."<sup>128</sup> On April 29, federal district court judge David A. Pine granted a preliminary injunction, but his order was stayed until the Supreme Court could review the case. The justices granted review, heard oral arguments on May 12, and issued their 6-3 decision on June 2.<sup>129</sup>

*Youngstown* shares several similarities with *Furman*, including its more than 40% usage of "our" as a cultural marker. Indeed, *Youngstown's* uses were over 81% of the culture-constituting type. The case also includes seven opinions, which helps to account for its 130 total uses of "our." William O. Douglas, the longest serving justice in the Court's history, also contributed short concurrences in both cases that used cultural markers.<sup>130</sup> The major differences include the subject matters and that *Youngstown* included very few process-oriented usages of "our" (only 13% of the total).

Justice Black, who eight years earlier had authored the majority opinion in *Korematsu* that upheld President Roosevelt's executive order during wartime, once again wrote for the majority of the Court. He sprinkled "our" throughout his opinion including several heritage markers: "*our national defense*"<sup>131</sup> (C), "*our constitutional system*"<sup>132</sup> (C), "*our Constitution*,"<sup>133</sup> (C) and "*our economy*"<sup>134</sup> (C). After these culture

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127. For an introduction to the literature about the Burger Court, see L.A. Powe, Jr., *(Re)Evaluating the Burger Court*, 52 TULSA L. REV. 587 (2017).

128. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589-91 (1952).

129. MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

130. In *Youngstown*, for example, Douglas stated: "But *our history and tradition* rebel at the thought that the grant of military power carries with it authority over civilian affairs." 343 U.S. at 632 (Douglas, J., concurring) (emphasis added)

131. *Youngstown*, 343 U.S. at 583(emphasis added).

132. *Id.* at 587 (emphasis added).

133. *Id.* (emphasis added).

134. *Id.* at 588 (emphasis added).

uses, he concluded the opinion with a process usage that connected the nation’s founding to the Court’s current decision:

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power, and the hopes for freedom that lay behind their choice. Such a review would but confirm *our holding* [P] that this seizure order cannot stand.<sup>135</sup>

Black had used an argument about “our constitutional system” to explain why the justices had to exercise their power to strike down the president’s executive order. His opinion established the bright-line model for understanding separation of powers that clearly distinguishes between legislative lawmaking and executive law-enforcing powers.

Justices Felix Frankfurter’s and Robert Jackson’s concurrences contributed to the significance of *Youngstown* because they laid out two competing models for how courts and scholars have conceptualized separation of powers. But how did Frankfurter and Jackson respectively use “our” to support their competing approaches to this core constitutional problem?

Like Brennan’s concurrence in *Furman*, Frankfurter’s concurrence in *Youngstown* is chock-full of heritage language, both those classified by our technique as cultural markers and others only obvious with additional words of context. He included Truman’s entire executive order in his opinion and immediately afterwards launched into a discussion of “our” heritage. The following paragraphs outlined his understanding of separation of powers but also rehashed his argument about the limits of what courts could and should do:

Before the cares of the White House were his own, President Harding is reported to have said that government, after all, is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. *Our scheme* [C] of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For *our democracy* [C] implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

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135. *Id.* at 589 (emphasis added).

To that end, they rested the structure of *our central government* [C] on the system of checks and balances. For them, the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago, it was fashionable to find *our system* [C] of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in *our own day* [C] has made vivid the realization that the Framers of *our Constitution* [C] were not inexperienced doctrinaires. These long-headed statesmen had no illusion that *our people* [C] enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley.

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority. The Framers, however, did not make the judiciary the overseer of *our government* [C].<sup>136</sup>

Frankfurter's use of "our" allowed him to discuss what was distinctive about American constitutionalism, while using "our own day" to remind his readers of WWII and the rise of totalitarian forms of government and the wisdom of "the Framers of our Constitution." He then cautioned about the dangers of judicial supremacy to "our government." Ultimately, Frankfurter's opinion argued for a more pragmatic approach to questions about separation of powers than Black's bright-line approach. Frankfurter, however, had used cultural markers to frame his subsequent analysis.

Although Justice Jackson also used cultural markers, the beginning of his opinion questions whether quoting from such sources makes constitutional sense in the modern world. As he explained:

The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of *our Republic* [C].

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what *our forefathers* [C] did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each

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136. *Youngstown*, 343 U.S. at 593-94 (Frankfurter, J., concurring) (emphasis added).

side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under *our Constitution* [C] does not, and cannot, conform to judicial definitions of the power of any of its branches based on isolated clauses, or even single Articles torn from context.<sup>137</sup>

Much like the legal realist critique that one can cite precedent for either side of a legal question, Jackson made a similar argument about cultural markers as “more or less apt quotations from respected sources on each side of any question.” Instead, Jackson provided a three-part model for the kinds of separation-of-powers issue that presidential action could trigger. He did, however, use history, both early and modern, to emphasize that presidential power was not unlimited. This included his assertion:

[I]f we seek instruction from *our own times* [C], we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power, but regard it as an allocation to the presidential office of the generic powers thereafter stated.<sup>138</sup>

Although Jackson questioned the use of cultural markers at the beginning of his opinion, it closed with a discussion of the “essence of *our free Government* [C] is ‘leave to live by no man’s leave, underneath the law’—to be governed by those impersonal forces which we call law. *Our Government* [C] is fashioned to fulfill this concept so far as humanly possible.” “Such institutions,” he concluded, “may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”<sup>139</sup> This conclusion sounded similar to his argument in *West Virginia v. Barnette* that there is a “fixed star in *our constitutional constellation* [C].”<sup>140</sup>

Black’s, Frankfurter’s, and Jackson’s opinions in *Youngstown* all relied on the word “our” to frame their arguments about why the president’s order could not stand. Their collective reliance on cultural markers suggest that they lived and wrote during an era of acute historical consciousness. In this regard, *Youngstown* is similar to *Furman*. In *Furman*, the justices acknowledged concerns about violent crime threatening social order, while also trying to come to terms with the nation’s history of racial injustice and the arbitrary application of the

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137. *Youngstown*, 343 U.S. at 634-35 (Jackson, J., concurring) (emphasis added).

138. *Id.* at 641 (emphasis added).

139. *Id.* at 655.

140. *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943).

death penalty.

A close reading of these two cases suggests that our digital exploration of the word “our” is partly a tour of exceptionally long landmark cases. But further exploration may help us to rediscover forgotten cases and to understand the ebb and flow of the court’s diction from John Marshall’s time to our own. For example, we still do not know why during the Warren Court years and ever since process-oriented “our” usage has steadily eclipsed cultural usage.

## V. CONCLUSION

Our digital exploration of the Supreme Court’s use of the word “our” has revealed patterns of usage that changed over time, provided aggregate analysis of how the justices have used the word to make arguments about culture and process, and enhanced a close reading of two landmark decisions. These findings help to answer some of our initial questions about the representativeness of the language from World War II-era decisions, such as *Korematsu*, that included the famous dissents of Justices Jackson and Murphy. We now know that the 1940s and 1950s were, indeed, a period when cultural usages spiked and briefly exceeded process-oriented usages of the word “our.” The close reading of cases such as *Furman* and *Youngstown* also helped us to think about how to refine our tools to address the problem of high rates of initially uncategorized “our” usage, and how cultural rhetoric, in particular, could be mobilized in both concurring and dissenting opinions, albeit toward different ends. These close readings also revealed that specific usages of terms such as “our practice” confirm that our classification system can help scholars see larger usage patterns over time and to isolate cases meriting closer inspection. Such distant reading complements but does not replace the parsing of texts.

Although our data analysis concluded with the 2011 term of the Supreme Court, we have been struck by how Justice Sonia Sotomayor has used the word “our” in some of her memorable dissents since then. This includes her efforts to expand whose voices are featured in constitutional discourse and how the justices should remember their *Korematsu* decision. For example, in *Utah v. Streiff* (2016), a case about an unlawful police stop in Salt Lake City, Sotomayor explained:

Writing only for myself, and drawing on my professional experiences, I would add that unlawful “stops” have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk



treating members of *our communities* [C] as second-class citizens.<sup>141</sup>

As her dissent made clear, "our communities" include those communities of color who have had historically tense relationships with the police.<sup>142</sup>

Significantly, she omitted the word "our" in her subsequent description of those who have been disproportionately affected by policing. For example, note how she used "their" instead of "our" in the following passage:

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, *supra*, at 8, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. See M. Gottschalk, *Caught* 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, *The New Jim Crow* 95–136 (2010). For generations, black and brown parents have given *their children* "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e.g.*, W. E. B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015).<sup>143</sup>

She then invoked W.E.B. DuBois's famous idea of "double consciousness" from *The Souls of Black Folk* to set up her explanation of the powerful message that unrestrained policing sends:

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.<sup>144</sup>

In this passage, she connected the experiences of whites and blacks to make a general point about the erosion of constitutional rights and citizenship in a carceral state. In this framing, everyone becomes a subject instead of a citizen.

In her conclusion, Justice Sotomayor used "our" to drive home her

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141. 579 U.S. \_\_\_, 9–10 (2016) (Sotomayor, J., dissenting) (emphasis added).

142. For a synthesis of the historical literature on race and policing, see Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY. (forthcoming 2021), available at <https://www.annualreviews.org/doi/abs/10.1146/annurev-criminol-060520-033306>.

143. *Streff*, 579 U.S. \_\_\_, at 11–12 (Sotomayor, J., dissenting).

144. *Id.* at 12 (Sotomayor, J., dissenting).

point that “we” all need to listen to the voices of those who have had to give “the talk” to “their children”:

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, *The Miner’s Canary* 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all *our civil liberties* [C] and threaten all *our lives* [C]. Until their voices matter too, *our justice system* [C] will continue to be anything but.<sup>145</sup>

As the mass protests in the summer of 2020 in the wake of George Floyd’s murder have shown the world, Justice Sotomayor’s dissent was a prescient warning about the dangers of Americans thinking too narrowly about whose lives mattered.<sup>146</sup>

And, as Justice Sotomayor reminded her fellow justices two years later in *Trump v. Hawaii*, they needed to reconsider the Court’s role in *Korematsu*, as well as today. “In the intervening years since *Korematsu*, *our Nation* [C] has done much to leave its sordid legacy behind,” she explained.<sup>147</sup> And, as she pointed out, “Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as ‘gravely wrong the day it was decided.’<sup>148</sup> She added, “This formal repudiation of a shameful precedent is laudable and long overdue. . . . But it does not make the majority’s decision here acceptable or right,” she explained. “By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”<sup>149</sup> Her short conclusion included three powerful “our” usages:

“*Our Constitution* [C] demands, and *our country* [C] deserves, a Judiciary willing to hold the coordinate branches to account when they defy *our most sacred legal commitments* [C]. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.”<sup>150</sup>

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145. *Id.* (emphasis added).

146. On May 27, 2020, historian Ariela Gross explained why Floyd’s murder should be considered a lynching: “Lynching is defined by historians as a murder committed in public, by three or more perpetrators, for the purpose of ‘administering justice’ or punishing an alleged crime without trial. This was a lynching, pure and simple.” Ariela Gross (@arielagross), TWITTER (May 27, 2020, 8:11AM), <https://twitter.com/arielagross/status/1265661856389009409>.

147. *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting) (emphasis added).

148. *Id.* (Sotomayor, J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

149. *Id.*

150. *Id.* (emphasis added).

Perhaps future justices will draw on Justice Sotomayor's language to engage our history in order to fulfill their most sacred commitments.