ARTICLES

THE SUPREME COURT AND THE PEOPLE: COMMUNICATING DECISIONS TO THE PUBLIC

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ABSTRACT

Although the individual Justices of the Supreme Court frequently speak to the public, the Court as an entity holds fast to the purportedly ancient principle that courts should speak only through their official written opinions— the meaning of which is for others to figure out. Over the years, the Court's decisions have become more complex, prolix, and fractured, making it difficult and time-consuming for anyone outside the professional elites to determine what the Court has held. Even journalists, who attempt to explain the Court's decisions to the public, struggle to make sense of the Justices' opinions under the pressures generated by new demands for instant news. As a result, the Court's interpretations of the Constitution remain shrouded in mystery and beyond the ken of many. The Court's approach is hard to square with its own teaching on the importance of an informed public to a democratic government, let alone with the Court's central obligation to expound the Constitution in a way that is intelligible to the people.

We therefore argue that the Court's communication practices are both unjustified and self-defeating. The underlying principle—that courts speak only through their written opinions—has never been categorically true. The early Court did not deliver written opinions at all, and Justices from the time of John Marshall have offered out-of-court defenses of their decisions. Some Justices have indeed recognized that the Court suffers when it fails to help the media understand and disseminate its decisions. But the Court has insistently maintained its aloofness. It has shown little concern for the changing needs of the press, and it has steadfastly rejected any suggestion that it should make its work more accessible to the people. Meanwhile, the constitutional courts of other countries— including Canada, Germany, and Israel—have risen to the challenge. These courts have adopted innovative procedures, such as press “lock-ups” and plain language opinion summaries, to ensure that their decisions are more intelligible, and they have not suffered the loss of dignity or respect that the Supreme Court apparently fears. These trends reflect a growing understanding that the legitimacy of constitutional courts depends on their ability to
make their decisions comprehensible to other participants in the political process—the executive, the legislature, and especially the people. Our Supreme Court is not immune from the realities to which other constitutional courts have responded, and, like them, it must find a way to make its decisions more easily reported and better understood.

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INTRODUCTION

On the morning of June 28, 2012, the last day of the last week of October Term 2011, the Supreme Court of the United States announced its much anticipated ruling in National Federation of Independent Business v. Sebelius. The case involved the constitutionality of the Patient Protection and Affordable Care Act, the controversial law that Congress had passed in 2010, in a predominantly party-line vote, to lower the cost of health insurance and

likely to be deeply divided both as to the outcome and the justifications.

Central to the constitutional challenge was the so-called “individual mandate” provision of the Act, which required those not otherwise covered by health insurance (through Medicare, Medicaid, or a group plan) to purchase a subsidized health-insurance policy or pay a penalty for failing to do so. The individual mandate was thought essential to the economic viability of the overall legislative scheme that was the signature achievement of the Obama administration.

The final weeks of the Supreme Court Term is the time of year when the Court customarily announces its most important decisions—those over which the Justices have wrestled the most, those on which they may have thought and debated and written the most, as the Court Term has ground on. Thus, the timing of the decision in Sebelius was not unusual. Because the case was argued late in the Term, and it was one in which the Justices were likely to be deeply divided both as to the outcome and the justifications for

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3 As Chief Justice John Roberts noted, the case involved challenges to the constitutionality of two provisions of the Act: “[T]he individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies.” Sebelius, 567 U.S. at 530–32. As part of the individual mandate, the Act also required small employers to purchase insurance for their employees to remedy a market defect in that area. See Tom Baker, Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act, 159 U. PA. L. REV. 1577, 1580 (2011).

4 Baker, supra note 3, at 1586 (“The individual mandate is an important part of the solidarity equation because it requires everyone to be in the health insurance risk pool, addressing the adverse selection problem that would follow from other provisions of the Act that make it possible for high-risk people to enter the health insurance pool.”). Opponents of the law claimed that Congress had exceeded its constitutional authority by requiring consumers to buy insurance or pay a penalty. See, e.g., Robert Moffit, Obamcare and the Individual Mandate: Violating Personal Liberty and Federalism, HERITAGE FOUNDATION (Jan. 18, 2011), https://www.heritage.org/health-care-reform/report/obamcare-and-the-individual-mandate-violating-personal-liberty-and [https://perma.cc/YD3S-7WKF]. Those who supported the individual mandate claimed that Congress was authorized to impose that duty under either the Commerce Clause or the taxing power. See U.S. CONST. art. I, § 8, cl. 3; id. art. I, § 8, cl. 1. The Court also considered and rejected a third claim, namely, that the challenge to the constitutionality of the Affordable Care Act was barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a). See Sebelius, 567 U.S. at 543–46.

it, Sebelius was expected to be one of the last cases to be decided before the Court rose for its summer recess. One way or another, the decision in Sebelius was likely to be momentous, and the case had been closely watched since the petitions for certiorari had been filed many months before. What did prove unusual, however, was the media drama that the announcement of the decision precipitated.

Because June 28 was the last day of the Term, there could be no further delay; the decision was certain to be handed down that day. Members of the news media presumably had done whatever they thought necessary to prepare for covering the decision, and millions of viewers, accustomed to receiving their news in “real time,” had tuned in—or gone online—to learn the result. The diligence of those viewers was to be rewarded by the spectacle of two major news outlets initially reporting that the outcome of the case was the very opposite of what it really was.

In a rush to report the decision, CNN and Fox News both originally informed their viewers that the Supreme Court had struck down the individual mandate. “The mandate is gone!” a Fox News correspondent announced from the courthouse steps, as a graphic pronouncing the mandate...
unconstitutional flashed on the screen. At the same time, CNN displayed a banner that read in all capital letters, “Breaking News: Supreme Ct. Kills Individual Mandate.” A couple of minutes later the network posted another headline, also in all capital letters, “Individual Mandate Struck Down: Supreme Court Finds Measure Unconstitutional.”

Among the millions of real-time viewers was President Barack Obama, who was watching several networks from the White House. Like so many others in that instant, the first word that President Obama received concerning the Court’s ruling was that his most significant legislative achievement had been struck down. The effect of the networks’ erroneous early reporting was also felt on Wall Street: several health care stocks spiked upward—moves that were rapidly reversed when the actual result, that the Court had upheld the individual mandate in a 5-4 decision, was reported a few minutes later.

The confusion that followed the erroneous reporting of the Supreme Court’s decision in Sebelius produced an admittedly rare moment for the Court and the press. Still, the error and the confusion it caused were not entirely surprising. The opportunities for significant reporting errors increase exponentially in connection with the coverage of particularly salient cases, when reporters may be required—within minutes of the Court’s announcement of its decision—to digest the contents of several complicated opinions (sometimes amounting to several hundred pages of text), grasp both the reasoning of the various Justices and the ways in which the opinions fit together, determine the bottom-line result in the case, and then prepare a

11 AMAR, THE CONSTITUTION TODAY, supra note 10, at 1; Stelter, supra note 9.
13 Id.
story.\textsuperscript{16} The challenges are even greater at the end of the Court’s Term,\textsuperscript{17} when the decisions in several important cases, each with numerous opinions, may be announced on the same day.\textsuperscript{18} Often the Court will announce the coming release of one or more opinions in argued cases only the evening before and without identifying which cases will be decided.\textsuperscript{19} To report accurately on the outcome and reasoning in such cases is challenging, not only because of the time pressure, or the number, length, and complexity of the opinions, but also because of the subtle ways in which concurrences and

\textsuperscript{16} Davis, The Symbiotic Relationship, supra note 8, at 12 (“[T]he reporters who regularly cover the Court lack the ability to analyze when faced with intense pressure to read an opinion, determine its outcome, and then write a story within a few minutes of the announcement of a decision.”).

\textsuperscript{17} At the end of October Term 2020, for example, the Court issued 20 decisions in the last two weeks of June 2021 (between June 14 and June 29, 2021).

\textsuperscript{18} See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 366 (1986) (noting that the Court handed down 21 decisions in about two hours on June 7, 1965); Linda Greenhouse, Telling the Court’s Story: Justice and Journalism at the Supreme Court, 105 YALE L.J. 1537, 1558 (1996); Paul J. Mishkin, The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 HARV. L. REV. 56, 56 (1965) (“In quite human fashion, the Supreme Court typically leaves decision of some of its most difficult and controversial cases until the last day of the Term. That day arrived a bit earlier this June than usual in recent years, but the end-of-Term pattern continued; June 7, 1965, witnessed the rendition of at least three opinions immediately recognizable as constitutional landmarks.”).

\textsuperscript{19} According to the Public Information Office, “During most of the Court Term, opinions are typically released on Tuesdays, Wednesdays or the third Monday in the cycle.” PUB. INFO. OFF., SUP. CT. U.S., https://www.supremecourt.gov/publicinfo/PIOServices.pdf [https://perma.cc/82N9-2VBP] (last visited Oct. 21, 2021). But the Court does not announce in advance which cases will be decided on a particular day. Reporters and the public therefore do not know which or how many opinions to expect. See, e.g., @SCOTUSblog, TWITTER [June 28, 2021, 4:05 PM], https://twitter.com/scotusblog/status/1409619001479634944?lang=en [https://perma.cc/J75F-L2LV] (“As of the close of business on Monday, the court remains mum about when it will next release opinions. Five argued cases remain outstanding. Traditionally, the court issues all opinions in argued cases by the end of June (though last year the court wrapped up in early July).”); Amy Howe (@AHoweBlogger), TWITTER [June 28, 2021, 5:58 PM], https://twitter.com/AHoweBlogger/status/1409647320811982848 [https://perma.cc/WG6T-PHT4] (“#SCOTUS *finally* announces that it will release one or more opinions in argued cases tomorrow at 10 am Eastern. Still waiting on 5 cases, including Arizona voting rights & California donor disclosure policies.”). Reporters are nonetheless invited to check with the Public Information Office late on Friday before a Court week or telephone over the weekend for a recorded message concerning the next week’s outlook, including the days opinions may be issued. PUB. INFO. OFF., SUP. CT. U.S., supra. Recently, Amy Howe has noted that reporters with a “hard pass”—a special credential to cover the Court—enjoy a privileged position compared to other reporters. Presidential Commission on the Supreme Court of the United States, Panel on Access to Justice and Transparency in the Operation of the Supreme Court [June 30, 2021] (Testimony of Amy Howe), https://www.whitehouse.gov/wp-content/uploads/2021/06/Testimony-of-AmY-Howe.pdf [https://perma.cc/4BQL-DZY2] [hereinafter Testimony of Amy Howe] (“The Court’s Public Information Office works hard to keep reporters with hard passes informed about issues such as emergency applications, the cases set for a particular conference, and the Court’s schedule.”).
dissents may be noted. It is not unusual for the Justices to note their agreement and disagreement on particular issues by concurring with, or dissenting from, particular parts of specific numbered or lettered sections or subsections of another opinion.20 When several Justices express their agreements and disagreements in that way, it can be difficult and time-consuming simply to ascertain the holding of the case.21 One additional complication in Sebelius, of course, was that the Chief Justice joined one group of four Justices to form a majority with respect to one of the two constitutional issues in the case, but joined an entirely different group of four Justices to form a majority as to the other.22

20 In his foreword to Joseph Goldstein’s The Intelligible Constitution, Burke Marshall gives as an example of this phenomenon the summary set forth in Arizona v. Fulminante, 499 U.S. 279 (1991):

WHITE, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN, and STEVENS, JJ., joined Parts I, II, III, and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C. J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III. O’CONNOR, J., joined Parts I, II, and III of that opinion; KENNEDY and SOUTER, JJ., joined Parts I and II; and SCALIA, J., joined Parts II and III. KENNEDY, J., filed an opinion concurring in the judgment.


21 See Cass R. Sunstein, CONSTITUTIONAL PERSONAE 141 (2015) (“If there is no majority opinion, and if a number of different justices write separately, it might be exceedingly difficult to know the content of the law. That is a genuine problem. The law cannot be certain if there is no opinion for the Court.”); see also Meg Penrose, Goodbye to Concurring Opinions, 15 DUKE J. CONST. L. & PUB. POL’Y 25 (2020) (criticizing the Supreme Court’s increased issuance of separate concurring opinions); Nina Totenberg & Eric Singerman, The Supreme Court’s Term Appeared to Be Cautious. The Numbers Tell a Different Story, NPR [July 9, 2021, 5:00 AM], https://www.npr.org/2021/07/09/1013951873/the-supreme-courts-term-appeared-to-be-cautious-the-numbers-tell-a-different-story [https://perma.cc/ER2A-GZL3] (“Though the court reached unanimity in 43% of cases, many of those cases saw the justices reach the same outcome, but for different reasons. In Fulton v. Philadelphia, for instance, the court reached a joint result in favor of a Catholic charity that refused to consider LGBTQ couples for foster care, but it generated four separate opinions. And in just two cases about the police and their ability to enter a home without a warrant, the justices wrote eight separate opinions, all coming to the same conclusion by different routes.”).

22 Indeed, the syllabus in Sebelius is somewhat misleading in that it begins by stating that:

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III—C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to Parts I, II, III, and IV, post, p. 589. SCALIA, KENNEDY, THOMAS, and ALITO, JJ., filed a dissenting opinion, post, p. 646. THOMAS, J., filed a dissenting opinion, post, p. 707.
What happened in the immediate aftermath of the Supreme Court’s announcement of its decision in Sebelius was unusual by any measure. Even on its worst days, the press has rarely reported that the Supreme Court reached a result that was the exact opposite of what the Court really held.\textsuperscript{23} On the other hand, the proper functioning of a democratic society requires the best possible reporting on the work of government, including the Supreme Court, and the obstacles to achieving that goal seem particularly formidable at the present time. Those obstacles include the twenty-four-hour news cycle and its insatiable demand for instant reporting; the increased balkanization of the news media along ideological lines; and the changing economics of the news media, which has broadly resulted in substantial

\textsuperscript{23} That is, of course, exactly what the press also did in connection with the Court’s 1935 decision in the “Gold Clause cases,” when the Associated Press “misinterpreted the majority opinion and transmitted a bulletin stating the opposite of the Court’s intent.” \textsc{David L. Grey, The Supreme Court and the News Media} 37 (1968). The press has had other bad days. For example, Corinna Barrett Lain has described the shortcomings of the press’s reporting on \textit{Engel v. Vitale}, 370 U.S. 421 (1962):

The first wire service reports on \textit{Engel} went out within five minutes of the decision’s announcement, feeding what would become the lead story in all news outlets by the end of the day and front-page news the following morning. Unfortunately, none of the reports stressed the limited nature of the Court’s ruling; indeed, the AP bulletin failed to note the state-sponsored nature of the prayer at all. . . . Newspapers sensationalized the ruling with headlines such as “No praying in Schools, Court Rules” and “Supreme Court Outlaws Prayers in Public Schools” that exaggerated the holding of the case and provided terse, oversimplified accounts of the decision that were at best incomplete. Radio and TV quickly followed suit.

Corinna Barrett Lain, \textit{God, Civic Virtue, and the American Way: Reconstructing Engel}, 67 Stan. L. Rev. 479, 517–18 (2015); see also \textsc{Stephen L. Wasby, The Impact of the United States Supreme Court: Some Perspectives} 95 (1970) (“In initial bulletins concerning \textit{Engel v. Vitale}, UPI reported that the freedom-of-religion clause rather than the establishment clause was involved. The error remained in subsequent releases.”); \textit{id.} at 96 (“[T]he papers, and radio and TV as well, portrayed a decision far broader than what the Court had in fact issued.”). Equally problematic was the press’s reporting of the controversy that followed. As “several news magazines noted at the time: \textit{Engel} was hated ‘not so much for what it said as for what people thought it said.’” Lain, \textit{supra}, at 519. Chester Newland has observed that the Justices’ split opinions were a significant source of the confusion in the press’s reporting of the \textit{Engel} decision. Chester A. Newland, \textit{Press Coverage of the United States Supreme Court}, 17 W. Pol. Q. 15, 24–25 (1964); \textit{id.} at 25 (“While separate opinions sometimes provide useful alternative expositions of legal concepts, the individual opinions in this case were such that apparently even the justices did not fully understand[] one another.”). Professor Newland has further noted that on June 25, 1962, the day the \textit{Engel} decision was handed down, the Court announced decisions in 16 cases with signed opinions and 257 memorandum cases. \textit{Id.} at 32.
reductions in staffing and resources.\textsuperscript{24} The press is more partisan, has fewer resources, and is under greater pressure to report more quickly than ever before. At the same time, the Court’s opinions are longer, more complicated, and more difficult to decipher.\textsuperscript{25} Generally speaking, the Court’s recent opinions fall far short of the ideal, which holds that, at least when courts speak to the nature of our constitutional system, the limits that the Constitution places on our elected officials, or the rights and duties of citizenship, they should speak in a way that can actually be heard and understood by those to whom the Court’s opinions necessarily are addressed.

As Joseph Goldstein has written,

\begin{quote}
[T]he justices, as members of a collective body, have an obligation to maintain the Constitution, in opinions of the Court and also in concurring and dissenting opinions, as something intelligible—as something that We the People of the United States can understand. Whether the justices be activists or passivists, they have a professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest. The Court’s goal is to render opinions, whether or not based on original understanding, that contemporary society can
\end{quote}


\textsuperscript{25} See, e.g., Meg Penrose, \textit{Supreme Verbosity: The Roberts Court’s Expanding Legacy}, 102 MARQ. L. REV. 167 (2018). The length of contemporary Supreme Court opinions may be attributable to the law clerks. LARRY KRAMER, \textit{THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW} 240 (2004) (“The detailed legal analysis is done almost exclusively by the clerks, recent law school graduates with at most a year or two of experience. Opinions are drafted by a single chamber, with minimal input from other chambers (except via conversations among the clerks). The Justices almost never meet to discuss a drafted opinion and they never work out their reasoning as a group. The veneer of careful deliberation is generated almost entirely by the law clerks, who draft most of the long opinions that constitute the Court’s only public statement.”); Barry Sullivan & Megan Canty, \textit{Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958–60 and 2010–12}, 2015 UTAH L. REV. 1005, 1071 (2015) (noting that the Supreme Court has increased its complement of law clerks, while reducing the number of cases on its merits docket, thereby permitting the law clerks to devote more time to each individual opinion).
understand—opinions in which the principles formulated are linked in an intelligible manner to the Constitution as amended.26

The Supreme Court has been largely oblivious to the perfect storm that these developments have left in their wake. The Court seems to have fallen into the trap of thinking that the quality of reporting on its work is the press’s problem, rather than a problem in which both the Court and the public are also heavily invested. If the press’s coverage of the Court is inadequate, it is the Court, and ultimately the public that will pay the price. The Court’s indifference is short-sighted. The Court is necessarily dependent on the press because, as the Canadian scholar Peter Russell has said, “Journalists are the managers of the political life of judicial decisions.”27 The Court’s apparent lack of concern is indeed surprising, and also self-defeating, at a time when many suspect that there is no distinction between law and politics, that the Justices are simply “politicians in robes,” and that judicial expertise consists simply in the “science” of using legal jargon to dress up political preferences.28

26 Goldstein, supra note 20, at 19; see also Tom Bingham, The Rule of Law 37, 42–43 (2010) (“The law must be accessible and so far as possible intelligible, clear and predictable. . . . The length, elaboration and proximity of some common law judgments (not just here [in England] but in other countries such as the United States, Canada, Australia, and New Zealand) can in themselves have the effect of making the law to some extent inaccessible.”); Joel K. Goldstein & Charles A. Miller, Brandeis: The Legacy of a Justice, 100 MARQ. L. REV. 461, 494 (2016) (“Brandeis believed that the Supreme Court was ‘a teacher to the nation of both scholarly and moral truths.’ That understanding of the institution shaped his conception of his duty as a justice. He sought to make his opinions instructive, not simply convincing, and he continued to rework them so they would teach, not simply persuade.”); Ralph Lerner, The Supreme Court as Republican Schoolmaster, 1967 SUP. CT. REV. 127, 180 (1967) (“By their decisions—and especially through a coherent explanation of the grounds of their decisions—the judges [of the early Republic] could partially introduce the language of the law into the vulgar tongue. What is more important, they could transfer to the minds of the citizens the modes of thought lying behind legal language and the notions of right fundamental to the regime. The political sophistication needed, then and now, for conveying these lessons is surpassed only by the sense of political responsibility that continues to set judges the task of being republican schoolmasters.”).

27 Florian Sauvageau et al., The Last Word: Media Coverage of the Supreme Court of Canada 8 (2006) (quoting Peter Russell, Comments at the Media–Supreme Court Research Workshop, Ottawa (Nov. 7, 2002)).

The Supreme Court’s apparent lack of concern is mystifying for another reason, namely, that some prominent constitutional courts in other countries have seized on the problem and have adopted new methods of communication aimed at helping journalists inform and educate the public about judicial decisions. More specifically, those constitutional courts have put aside the judiciary’s traditional view that judicial opinions must always speak for themselves, without further elaboration or explanation. Many constitutional courts have moved beyond the initial step of using basic press releases to guide public perceptions of their decisions. Some have chosen to...
issue brief, supplementary versions of their opinions that have been scrubbed of legal jargon; others have adopted press “lock-ups” in which reporters are allowed to review the opinions in a case, under secure conditions, before the opinions are officially released to the public. Still others make judges or a legal expert available to explain decisions to the press on the day the decisions are announced. Some courts, such as the Supreme Court of Canada, have adopted several of these techniques. If the Supreme Court of the United States had been open to any of these innovations, it likely would have been spared the circus that followed the announcement of its decision in Sebelius.

There is no shortage of sensible, possible innovations that would improve the Supreme Court’s communication of its decisions to the press and the people. The goal of this Article is not to suggest that the Court should adopt any specific menu of reforms. That is for the Court to decide. Our goal is to show that other constitutional courts have recognized the pressing need to reimagine the ways in which they communicate their decisions to the public, to demonstrate that those courts have successfully adopted a range of reforms to meet that need, and to suggest that the Supreme Court of the United States must do so as well, if it is to continue to merit the confidence of the people as it seeks to fulfill its constitutional responsibilities in a way that is consistent with the demands of a democratic society.

29 For example, the Canadian Supreme Court has adopted the practice of advance dissemination of judgments to selected media representatives, see Judgment Lock-Up Procedure, SUP. CT. CAN., https://www.scc-csc.ca/media/lu-hc-eng.aspx [https://perma.cc/P9XC-PWUQ] (July 22, 2021). Linda Greenhouse has noted that the New York Court of Appeals used a press lock-up in connection with its decision in the New York City bankruptcy case. Greenhouse, supra note 18, at 1544. But the practice has not caught on in the United States.

30 Such innovations have been suggested, but rejected. As Everette Dennis has pointed out, the Association of American Law Schools made several recommendations along these lines in 1963, and further proposals (including a proposed lock-up procedure) were made by reporters in 1969. Everette E. Dennis, Another Look at Press Coverage of the Supreme Court, 20 VILL. L. REV. 765, 786–90 (1975). The American Bar Association Journal also noted the need for improvement in 1967. Editorial, The Supreme Court and the Public, 53 A.B.A. J. 630 (1967). One proposed innovation—a publication in which law professors and others would offer expert pre-decisional analysis of cases on the docket—materialized and has persisted. See, e.g., AM. BAR ASS’N, DIV. FOR PUB. EDUC., ABA Supreme Court PREVIEW, https://www.americanbar.org/groups/public_education/publications/preview_home/ [https://perma.cc/9BVC-58Y9] (last visited Feb. 10, 2021). That publication does not depend on the cooperation of the Court. In recent years, another independent entity, SCOTUSblog, has detailed the daily workings of the Court. See Vincent James Strickler, The Supreme Court and New Media Technologies, in COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE, supra note 8, at 61, 74–77.
The argument unfolds as follows: we first discuss the ways in which the Supreme Court traditionally has approached its work and its relationship to the press and the public. We note that the Court has traditionally spoken, as a court, only through its formal (and, in modern times, written) opinions, although individual Justices, at least since the time of Chief Justice John Marshall, have sometimes defended their work in extra-cural statements. We also show that the Court’s approach to informing the public about its decisions has changed very little in recent decades, even as the length and complexity of its opinions have increased. We then discuss several ways in which three other constitutional courts—those of Canada, Germany, and Israel—have recently attempted to improve the public’s understanding of their decisions by working with the press to improve the quality of its reporting on judicial decisions. We suggest that these innovations reflect a growing institutional understanding that the political capital and legitimacy of constitutional courts depend on the ability of those courts to make their decisions intelligible to other participants in the political process—the executive, the legislature, and especially the people. Finally, we consider the possible application of these new approaches to the United States. We conclude that the Supreme Court’s longstanding reluctance to entertain even the possibility of such initiatives is inconsistent with the values and needs of a democratic society. It is also an extravagance that the Court and the public can no longer afford.

I. JUDICIAL OPINIONS, IN-COURT UTTERANCES, AND EXTRA-CURIAL STATEMENTS

Much of the judicial resistance to reimagining the ways in which the Supreme Court communicates its decisions to the public undoubtedly stems from the presumed sanctity of the formal, written opinion as the exclusive means whereby courts may explain their decisions. In this section, we discuss the history and role of the formal, written opinion in the American legal system, as well as the common understanding that courts are obliged in a democratic society to explain their decisions to the public. While it is generally believed that American courts communicate their decisions only

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through formal, written opinions, we show that the Supreme Court has not always delivered its judgments in that form; that the Court sometimes gives no written explanations at all for important decisions it takes; and that many individual Justices, beginning most notably with Chief Justice Marshall, have sought to defend their judicial work through extra-curial pronouncements, rather than letting their written opinions “speak for themselves.” Individual Justices have also expressed their personal opinions on important issues that have come before the Court, or seem likely to come before the Court in the future, on numerous occasions.

A. The Norm That Courts Speak Through Written Opinions

One obstacle to the Supreme Court’s willingness to consider new ways of communicating with the press and the public may be its attachment to the traditional view that courts should speak only through their formal, written opinions. That view is succinctly stated in the online “Journalist’s Guide to the Federal Courts,” which is published by the Administrative Office of the U.S. Courts and explains that “federal judges do not grant interviews about active cases. Judges ‘speak’ through comments made in open court or through written decisions. Reporters must rely on the official case proceeding as their primary information source.” The Journalist’s Guide accurately reflects the traditional view, namely, that courts speak only through their public, in-court utterances or through their written opinions. But the Justices have not always explained their decisions in written opinions, and they have not always abstained from extra-curial discussions of their work. Indeed, the Justices have defended their decisions in extra-curial interventions, at least occasionally, since the earliest days of the Court.

In the beginning, the practice with respect to written opinions was different. The filing of written opinions was not part of the judicial tradition that the American courts inherited from England. Nor did the Constitution

33 See KRAMER, supra note 25, at 158 (“Written opinions were practically nonexistent. Few judges published their decisions, and the only available sources of American case law consisted of handwritten manuscripts, which could be copied but were seldom widely available; partisan pamphlets; and unreliable newspaper accounts from a handful of notorious cases.”); id. at 159 (“Nor were there, as yet, treatises or systematic digests of American law to which lawyers and judges could turn in lieu of official reports. There was only Blackstone, who became important almost by
require that the courts prepare or publish written opinions. More broadly, the oral tradition persisted, even in the Supreme Court: the argument of cases was principally oral, with little or no written briefing, and the Justices mainly delivered their opinions orally from the bench, to be transcribed and made available to the public, if at all, by newspaper reporters and by a series of entrepreneurial court reporters who were not paid by the government, but depended for their profit on the sale of their reports. Those entrepreneurial

default.

The practice of announcing opinions orally was inherited from England. See William D. Popkin, Evolution of the Judicial Opinion: Institutional and Individual Styles 37, 82 (2007). “In England, the writing and reporting of opinions evolved gradually out of a practice of oral opinions that were unofficially reported through the initiative of expert legal professionals.” Gerald Lebovits, Alifa V. Curtin & Lisa Solomon, Ethical Judicial Opinion Writing, 21 Geo. J. Legal Ethics 237, 243 (2008) (noting that the American legal system was originally “speech-centered”); Kramer, supra note 25, at 161 (“The absence of published opinions was, of course, a major problem. When I came to the Bench,” recalled James Kent years later, “there were no reports or state precedents. The opinions were delivered in terum [orally]. We had no law of our own, and nobody knew what it was.”) (quoting a letter from James Kent to Thomas Washington (Oct. 6, 1828), in 1 Select Essays in Anglo-American Legal History 842–43 (Ass’n of American Law Schools ed., 1907)). American courts also initially followed the English tradition of seriatim opinions. See William H. Rehnquist, The Supreme Court 40 (2001); Sunstein, supra note 21, at 116–18; M. Todd Henderson, From Seriatim to Consensus and Back Again: A Theory of Dissent, 2007 Sup. Ct. Rev. 283, 292–321 (2007).


See Sullivan & Canty, supra note 25, at 1020–22 (discussing oral argument in the early years of the Supreme Court).

Elizabeth Feaster Baker described the arrangement in her 1937 biography of Henry Wheaton, the third Reporter of Decisions. Elizabeth Feaster Baker, Henry Wheaton, 1785–1848, at 26–27 (1937). Among other things, Baker notes that the position of Reporter of Decisions was “one of honor and importance,” and that the early reporters were people of accomplishment. Alexander J. Dallas, the first Reporter, later served as Secretary of the Treasury, and William Cranch, the second Reporter, served simultaneously as Chief Justice of the Circuit Court of the District of Columbia. Id. As an inducement for Wheaton to take up the position, “the justices agreed to furnish him alone, for his sole benefit, with all writings and memoranda that they made of their decisions to aid him in reporting the cases.” Id. Interestingly, it was not until 1834 that the Court required the reporter to deliver to the clerk for safekeeping the opinions that he had transcribed and published. See 131 U.S. at xvi (1888); Popkin, supra note 33, at 83; Joyce, The Supreme Court Reporter, supra note 34, at 1307. Wheaton, who also practiced before the Court, apparently took some liberties in the reporting of cases. See G. Edward White, The Marshall Court and Cultural Change, 1815–1835, at 392 (abridged ed. 1991) (“Wheaton’s professional ambitions and the discretion the Reportership permitted him in reproducing the arguments of others
court reporters remain well known to lawyers today because it is by their names—Alexander J. Dallas, William Cranch, Henry Wheaton, and Richard Peters, Jr.—that the early volumes of the United States Reports continue to be known.\textsuperscript{37} The early Justices not only delivered their opinions orally, they seem generally to have spoken from notes, rather than from a formal text,\textsuperscript{38} and the accuracy of the court reporters’ transcriptions obviously depended on what the person reporting on the decision was able to hear, understand, and write down.\textsuperscript{39} It seems fair to assume that much of what the Justices said was reported inaccurately or not reported at all, and that the ultimate preparation of the case report was itself a somewhat creative endeavor. Richard Peters, who succeeded Wheaton as the fourth Reporter of Decisions, is thought to have been the first reporter to have asked that the Justices review his transcriptions of their opinions before they were printed.\textsuperscript{40} The fact that the early reporters depended on sales of their work for their compensation affected the dissemination of the reports in various ways. Among other things, the market for the reporters’ work was limited, and the early reporters

\textsuperscript{37} See Craig Joyce, The Torch Is Passed: In-Chambers Opinions and the Reporter of Decisions in Historical Perspective, 3 RAPP’S IN-CHAMBERS OPINIONS, at vii (2004). Dallas served from 1791 to 1800; Cranch served from 1801 to 1815; Wheaton served from 1816 to 1827; and Peters served from 1828 to 1843. \textit{Id.} A dispute between Wheaton and Peters produced the first Supreme Court copyright case. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

\textsuperscript{38} \textbf{5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800,} at xxiv [Maeva Marcus ed., 1994]; Joyce, \textit{The Supreme Court Reporter}, supra note 34, at 1310 n.110 (observing that Cranch relied on the Justices’ notes, which were sometimes polished and sometimes not). The Justices may sometimes have issued written opinions in cases they considered to be particularly momentous. \textit{See} 131 U.S. at xv–xvi (1888) [J.C. Bancroft Davis’s hundredth anniversary retrospective appendix on reporting at the Supreme Court]; Ruth Bader Ginsburg, \textit{Communicating and Commenting on the Court’s Work}, 83 GEO. L.J. 2119, 2119 (1995) [hereinafter Ginsburg, \textit{Commenting on the Court’s Work}].

\textsuperscript{39} \textit{Id.} It is clear that some of the opinions reported by Dallas, Cranch, and Wheaton were delivered orally and transcribed by the reporter (or someone on whom the reporter relied).” \textit{Popkin, supra} note 33, at 382; see also Joyce, \textit{The Supreme Court Reporter}, supra note 34, at 1374 (quoting Wheaton). For example, it may well be the case that portions of Justice Iredell’s dissenting opinion in \textit{Chisholm v. Georgia}, 2 U.S. (2 Dall.) 419 (1793), were omitted from the published report. \textit{See} 5 \textit{THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, supra} note 38, at 164, 186.

\textsuperscript{40} Popkin, supra note 33, at 83 (“[T]t is not clear whether Peters provided the Justices with his own record of their opinions or gave them proofs of written opinions he had received from the Justices.”); Joyce, \textit{The Supreme Court Reporter}, supra note 34, at 1357–58.
therefore tended to delay publication of the Court’s opinions until they had a full book to publish.\footnote{Joyce, The Supreme Court Reporter, supra note 34, at 1301. Thus, there were wide variations in the amount of time that elapsed between the oral announcement of an opinion and its publication. For example, “between Chisholm v. Georgia, the last decision of the Supreme Court of the United States reported in Dallas’ second volume, and the publication of the volume itself in 1798, there was a gap of five years.” Id. Similarly, “[t]he first volume of Cranch’s Reports, including cases decided as early as the August 1801 Term, did not appear until June of 1804.” Id. at 1310. On the other hand, “Volume 3 of Dallas’ Reports appeared in late 1799, less than a year following the February 1799 Term with which it concluded.” Id. at 1301.}

The newspapers of the period provided more timely coverage of the Supreme Court’s activities, but even the Court’s most important decisions were sometimes reported in a summary fashion and the case reports that were published in newspapers were not always entirely accurate.\footnote{Even at the beginning of the twentieth century “there were no proofs of opinions available to the press. Newsmen had to write up stories about Court decisions without even having a text of opinions from which to work.” GREY, supra note 23, at 37.} Like the official reporters, the newspaper reporters were limited by what they were able to hear and write down.\footnote{For example, the newspaper coverage of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), on which the bench, the bar, and the public were forced to rely pending the publication of Cranch’s Reports, was skimpy. See Joyce, The Supreme Court Reporter, supra note 34, at 1310–11. Albert Beveridge observed that the decision “received scant notice at the time of its delivery. The newspapers had little to say about it. Even the bench and the bar of the country, at least in the sections remote from Washington, appear not to have heard of it…” \textit{3 Albert J. Beveridge, The Life of John Marshall} 153 (1919). Although Charles Warren noted that some newspapers “contained a very erroneous account of the point decided,” he also observed that the \textit{Marbury} decision was printed in full in several newspapers. \textit{1 Charles Warren, The Supreme Court in United States History} 245 n.2 (1922). Of course, \textit{Marbury} did not seem as salient to those who lived in the nineteenth century as it did to later generations. See, e.g., Keith E. Whittington & Amanda Rinderle, \textit{Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon}, 39 Hastings. Const. L. Q. 823, 825 (2012) (“It took time to convert \textit{Marbury} into a case primarily about judicial review.”); Davison M. Douglas, \textit{The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case”}, 38 Wake Forest L. Rev. 375 (2003). The problem persisted long after \textit{Marbury}. Cf. Pennekamp v. Florida, 328 U.S. 331, 371 (1946) (Rutledge, J., concurring) (“There is perhaps no area of news more inaccurately reported . . . than legal news. . . . [A] great deal of it must be attributed, in candor, to ignorance, which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With too rare exceptions, their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great.”).} Newspapers that wished to report on the Court’s decisions without having a reporter present in the Court faced an additional obstacle

\footnote{Id. at 1310–11.}
in that “[t]he government did not possess any formal scheme to disseminate the opinions of the Court [and] [t]he opinions themselves were published in a pamphlet under copyright and at a rather high cost (50¢).” Thus, in *Chisholm v. Georgia*, the clerk of the Court, “[r]ecognizing that the decision of the Court ‘may give umbrage to the Advocates of “State sovereignty,”’ . . . attempted to correct ‘erroneous’ reports circulating in the papers by sending a summary of the case to the local newspapers.” It may be that the deficiencies in such newspaper accounts helped to encourage the shift to written opinions.

As the *Journalist’s Guide* suggests, the tradition of written opinions is now well entrenched in American legal culture, and the practice of publishing these opinions has long been considered central to our justice system. In 1936, for example, Chief Justice Charles Evans Hughes wrote that, “it is the practice of the Supreme Court to hand down opinions in writing which are summarized orally from the bench.” Similarly, Robert Leflar has suggested that “[j]udicial opinions are the voices of our courts, . . . and so represent the judiciary to the public, but they are not voices merely. They are what courts

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46 2 U.S. (2 Dall.) 419 (1793).
47 BRADBURN, supra note 45; see also WASBY, supra note 23, at 87.
48 See POPKIN, supra note 33, at 83 (“[T]he practice of writing judicial opinions, at least in important cases, began as a way for the judge to deliver oral opinions efficiently (by reading from a manuscript) and as a response to concerns about reportorial accuracy.”).
49 See, e.g., James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 836–37 (1986) (“[A]nyone can vote his intuitions or biases or feelings . . . . The great contribution of the judicial mind is not the result but the judicial opinion, the text in which . . . competing lines of argument are developed fully and fairly, with the object of exposing to view what is most deeply problematic both in our resources of legal meaning and in the case upon which they bear.”).
50 See POPKIN, supra note 33, at 84 (“[W]riting opinions for official publication eventually became the norm in the U.S. Supreme Court, even though there is still no law or court rule that explicitly requires written judicial opinion.”); see also Surrency, supra note 34, at 55 (observing that no law requires the Justices of the Supreme Court to present their opinions in writing). While our study focuses on the Supreme Court, it warrants mention that lower courts increasingly have departed from the practice of opinion publication. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999) (discussing prohibitions on citation of unpublished opinions); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001) (noting that about 80% of federal circuit court opinions are unpublished); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004); Katrin Marquez, *Are Unpublished Opinions Inconsistent with the Right of Access?*, CASE DISCLOSED BLOG (Nov. 19, 2018), https://law.yale.edu/mfia/case-disclosed/are-unpublished-opinions-inconsistent-right-access [https://perma.cc/7E5V-SNFG].
51 CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 64 (1936).
do, not just what they say. They are the substance of judicial action, not just news releases about what courts have done, though they have that function too.”

And James Boyd White has written: “The opinion is not merely an epiphenomenon to the law, a slight adjunct to the real business of deciding cases and predicting what officials will do, but is central to the activities of mind and character of the law as we know and value it.” For all these reasons, written opinions are generally understood to speak for themselves—“only the words written and nothing else should be handed down as ‘the law’ in a case.”

Notwithstanding the importance of written opinions, it would be a mistake to think that the Court always explains its rulings, let alone that it does so in writing. For example, the Court declines to hear far more cases than it agrees to hear, and it rarely gives any reason for declining to exercise its jurisdiction. Moreover, some of the most important decisions that the

54 GREY, supra note 23, at 16; see also POPLUS, supra note 33, at 22 (“A binding judicial opinion is like legislation, purporting to contain the law within the four corners of a single document.”); Alan F. Westin, Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw, 62 COLUM. L. REV. 633, 633 (1962) (quoting Justice William Brennan, who observed in 1959 that judicial independence “require[s] that the opinions by which judges support decisions must stand on their own merits without embellishment or comment from the judges who write or join them”); William J. Brennan, Jr., The National Court of Appeals: Another Dissent, 40 U. CHI. L. REV. 473, 473 (1973) (“I came to appreciate the wisdom of some of my distinguished predecessors who believed that a Justice of the Supreme Court should speak only through his published opinions. . . . [W]ith one important exception, I have made no speeches, written no articles, and engaged in no outside activities. . . . [However,] those of my predecessors who declined to make speeches nevertheless believed, as I do, that a Justice should make known his views on proposals that would fundamentally alter the functions and procedures of the Court.”).
55 See, e.g., ROBERT L. STERN, EUGENE GREINER & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 264–65 (1986) (“Most orders of the Court denying petitions for writs of certiorari do no more than announce the simple fact of denial, without giving any reasons therefor. This practice reflects the highly discretionary nature of the Court’s certiorari jurisdiction, whereby each individual Justice is free to cast a negative vote for whatever reason he or she sees fit.”). In addition, some of the Court’s most controversial rulings in the last few years have come under the Court’s “shadow docket,” in which cases are not fully briefed or argued orally and decisions typically take the form of short, unsigned summary orders that do not fully explain the Justices’ reasoning or identify how each Justice voted. Furthermore, the Court has sometimes entered orders and opinions on emergency applications late at night—in one case, shortly before midnight on Thanksgiving eve. See William Baude, Foreword: The Supreme Court’s Secret Docket, 9 N.Y.U. J.L. & LIBERTY 1 (2015); William Baude, The Supreme Court’s Secret Decisions, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html
Supreme Court renders, from a practical point of view, are rulings on stay motions, recusal suggestions, and other interlocutory motions, which are not usually explained. Some of those rulings may be deeply impactful—sometimes even resulting in the imposition of the death penalty—but there is no law or court rule that requires reasons to be given, either orally or in writing.


See Barry Sullivan, Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet, 47 VAL. U. L. REV. 907 (2013) [hereinafter Sullivan, Supreme Court Recusals] (discussing the Justices’ practice of deciding recusal motions without giving reasons).

The Trump administration engaged in “emergency” motion practice in the Supreme Court to an unprecedented degree, and many important matters have been finally resolved, as a practical matter, on emergency motions. See Stephen I. Vladeck, How the Supreme Court Is Quietly Enabling Trump, N.Y. TIMES [June 17, 2020], https://www.nytimes.com/2020/06/17/opinion/supreme-courts-trump-relief.html [https://perma.cc/ESP7-PYM7] (“[I]n just three years, the Trump administration’s Justice Department has sought 29 emergency stays [compared to a total of 8 during the 16 years of the last two administrations] . . . including 11 during the court’s current term alone. And the justices, or at least a majority of them, have largely acquiesced, granting 17 of the applications in full or in part, rulings that have had significant and lasting ramifications on the ground—and that have often been quite divisive on the court. . . . [T]he court’s behavior in these cases gives at least the appearance of undue procedural favoritism toward the government as a litigant. . . . [I]t gives at least the appearance that the court is bending over backward to accommodate a particular political agenda—a message that, now more than ever, all of the justices should be ill inclined to send.”]; Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 HARV. L. REV. 123, 126 (2019) (“[T]he net effect of the Court’s actions in most of these cases has left the Solicitor General with most of what he has asked for . . . . [E]ven in the instances in which that has not been the case, the Court’s denial of relief has come summarily and with . . . no suggestion from the Court that the Solicitor General is abusing his unique position, taking advantage of his special relationship with the Court, or otherwise acting in a manner unbecoming
Written opinions may sometimes seem like an extravagance to busy judges, but they are central to the public’s understanding of how the judicial system is supposed to work. It is generally recognized that judicial decision-making should be transparent, and that judges must be accountable to the public for their rulings, which means that judges must give public reasons. The preparation of a written opinion is meant to assure the parties, the public, and the profession that the judges have undertaken a thorough and thoughtful review of the issues presented, which is essential to the perception that the judiciary is the branch of government most closely identified with reasoned decision-making, as opposed to the mere exercise of political will.

58 See Michael Wells, French and American Judicial Opinions, 19 YALE J. INT’L L. 81, 92 (1994) (“If judges do not give the real reasons for their actions, it is harder to determine whether they are acting properly. . . . Since the judicial process differs from other governmental action by its commitment to reason, again the reasons given must be real ones. Otherwise, the exercise of giving reasons becomes a hollow formality, thus eliminating any substantive difference between adjudication and legislation.”); Wade H. McCree, Jr., Bureaucratic Justice: An Early Warning, 129 U. PA. L. REV. 777, 780 (1981) (“We expect the judge, like no other public official, to justify his decisions with reason.”); but see Mathilde Cohen, Sincerity and Reason-Giving: When May Legal Decision Makers Lie?, 59 DE PAUL L. REV. 1091, 1097–98 (2010) (distinguishing between “motivating” and “justificatory reasons).

59 See GREY, supra note 23, at 28 (1968); Marla N. Greenstein, Judicial Ethics, Impartiality, and the Media, JUDGES’ J., Summer 2019, at 39, 39; Leffar, supra note 52, at 810. Lord Coke wrote that, “Nihil quod est contra rationem est licitum [Nothing that is against reason is lawful]; for reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man’s natural reason.” 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON 97b (London, Luke Hansard & Sons, Francis
Judges have several different audiences, but, with respect to each of them, it is through their opinions that judges demonstrate that they have heard and considered the parties’ evidence and legal arguments, and that they have taken seriously what they have heard. It is also through opinions that the reasons supporting judicial rulings are opened to intellectual critique; and

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60 One audience comprises the parties to the dispute immediately before the court as well as the lawyers who represent them; another consists of those members of the business community or other segment of the public whose activities might be particularly affected by the opinion as precedent, as well as the lawyers who represent such clients; another consists of the judges who may have to decide future cases with varying degrees of similarity to the decided case; and a final audience consists of the scholars who study the particular area of law to which the decided case belongs. In his tribute to Judge Augustus N. Hand, Judge Charles E. Wyzanski, Jr. famously observed that Judge Hand thought of his “intended audience” not as “the bench, bar, or university world in general, but the particular lawyer who was about to lose the case and the particular trial judge whose judgment was being reviewed and perhaps reversed." Sanford Levinson, *The Rhetoric of the Judicial Opinion, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 197 (Peter Brooks & Paul Gewirtz eds., 1996) (quoting CHARLES E. WYZANSKI, JR., WHEREAS—A JUDGE’S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW 71 (1965)); see also EUGENE V. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 87–89 (1962) (“The written opinion is of course a technical document, settling a law suit. It is designed to explain to the litigants why their rights were determined as they were, and to guide lawyers in their practice as to the relationship between the future of a particular branch of law and its past. The courts' opinions are the heart and soul of the common law method of legal growth. . . . Beyond that function, the opinion is a piece of rhetoric and of literature, intended to educate and persuade. In the clearest possible way, it represents the conception of the judges speaking directly to the people, as participants in an endless public conversation on the nature and purposes of law in all its applications . . . .” [F]inally, the reasoned judicial opinion bespeaks a concept of political responsibility in the process of lawmaking and judicial administration.”).

61 See Barry Sullivan, *Just Listening: The Equal Hearing Principle and the Moral Life of Judges*, 48 LOY. U. CHI. L.J. 351, 355 (2016) (“One answer to these questions . . . is that we expect judges to listen, to listen carefully, and to take seriously what they hear. By ‘listening,’ we mean something more than the physical act of hearing. We mean to say that judges should engage the litigants’ arguments rigorously and respectfully, reflecting on the issues presented in the case as seriously as they would if their own interests were at stake. Indeed, we expect more than that. We expect a judge to try and see the parties’ dispute, not solely from the judge’s vantage point, but also from the perspectives of the parties and those of the individuals and institutions that may be affected by the judge’s decision.”); FED. JUD. CTR., JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 1 (2d ed. 2013) [hereinafter JUDICIAL WRITING MANUAL] (“[T]he preparation of a written opinion imposes intellectual discipline on the author, requiring the judge to clarify his or her reasoning and assess the sufficiency of precedential support for it.”).

62 Sir McCree, supra note 5b, at 790–91 (“Little need be said about the desirability of opinions. All of us have had seemingly brilliant ideas that turned out to be much less so when we attempted to put
it is through such opinions that judges demonstrate they were not moved by favoritism, tribalism, or other factors that have no place in a legitimate system of adjudication.63

Of course, judges may have strong initial intuitions about how a particular case should be decided, and that may be especially true of experienced judges; but intellectual openness is an essential characteristic of the judicial office, and it is through the process of opinion-writing that such initial intuitions are tested, and final decisions reached.64 As Eric Berger has

them to paper. Every conscientious judge has struggled, and finally changed his mind, when confronted with the ‘opinion that won’t write.’ We can only guess at the number of decisions ‘affirmed without opinion’ that might have been reversed had a judge attempted to write an opinion explaining the announced result,65; see also JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 241 (1985) (“The hearing is the heart of the law, and that is true; but the hearing reaches its fullest significance only where it is coupled with the obligation to explain. Then the judicial opinion becomes a form with wonderful possibilities for meaning.”). Interestingly, it was only in the late eighteenth century that American state courts were required to file written opinions in support of their judgments. See Surrency, supra note 34, at 55 (noting that Connecticut was the first state to impose this requirement in 1785, while other states soon followed suit, with one state (Kentucky) actually memorializing the requirement in its constitution); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 118 (1971) (noting that Connecticut was the first state to require judges to file written opinions). Another important innovation was the institution of the position of official reporter, a step that Massachusetts took in 1804, with the Supreme Court of the United States following suit in 1817. See Surrency, supra note 34, at 56.

63 See ROSTOW, supra note 60, at 86-87 (“Jefferson himself, as President, affronted by the overpowering influence of Marshall, urged that the Justices of the Supreme Court be required to write individual opinions in each case . . . . Every judge should write his own opinion, Jefferson urged, to ‘prove by his reasoning that he has read the papers, that he has considered the case, that in the application of the law to it, he uses his own judgment independently and unbiased by party views and personal favor or disfavor.’”) (quoting 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, supra note 44, at 113–14); Richard M. Re, “Equal Right to the Poor”, 84 U. CHI. L. REV. 1149, 1151 (2017) (“In the Judiciary Act of 1789, the First Congress required that all federal judges ‘solemnly swear or affirm’ that they would, among other things, ‘do equal right to the poor and to the rich.’ That statutory oath requirement . . . remains in place today. Remarkably, the language . . . long predates the United States.”).

64 Judge Posner has written that, “The judicial opinion can best be understood as an attempt to explain how the decision, even if (as is most likely) arrived at on the basis of intuition, could have been arrived at at the basis of logical, step-by-step reasoning.” RICHARD A. POSNER, HOW JUDGES THINK 110 (2008). In addition, Judge Posner observes that,

[M]ost judges do not treat a[n] [impression] vote, though nominally tentative, as a hypothesis to be tested by the further research conducted at the opinion-writing stage. That research is mainly a search for supporting arguments and evidence. Justificatory rather than exploratory, it is distorted by confirmation bias—the well-documented tendency, once one has made up one’s mind, to search harder for evidence that confirms rather contradicts one’s initial judgment. . . . The published opinion often conceals the true reasons for a judicial decision by leaving them buried in the judicial unconscious. Had the intuitive judgment that underlies the decision been different, perhaps an equally
noted, “The writing process... can involve not just the articulation of thought, but also the ‘transformation of thought.’ Occasionally, a Justice realizes that an opinion ‘will not write’ and changes his vote or legal rationale.” In addition, judges write opinions with the necessary expectation that their decisions will be closely scrutinized by other judges, the legal academy, the bar, and the public.

The most obvious purpose of a judicial decision is to resolve and explain the parties’ respective legal rights and duties, and, hopefully, to put an end to their dispute. As Justice Antonin Scalia frequently observed, dispute resolution is the central purpose of adjudication. If the most immediate purpose of the judicial opinion is to decide a particular controversy and to explain the judge’s reasons and reasoning to the parties before the court, the purpose of the judicial opinion is to decide a particular controversy and to put an end to the party’s respective legal rights and duties, and, hopefully, to put an end to their dispute.

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65 Eric Berger, The Rhetoric of Constitutional Absolution, 56 Wm. & Mary L. Rev. 667, 725 (2015) (quoting Chad M. Oldfather, Writing, Cognition, and the Nature of the Judicial Function, 96 Geo. L.J. 1283, 1306, 1315, 1331 (2008)). Professor Berger also notes that, “Sometimes... Justices conceal the parts of the opinion that ‘will not write’ and overemphasize the parts of the opinion that will write. As Professor Chad Oldfather explains, the writing process sometimes encourages writers to overemphasize the verbalizable aspect of an explanation, producing arguments that sound more ironclad than they really are.” Id.

66 In multi-member courts, that professional scrutiny begins with the decisional process itself. See Harry T. Edwards, The Effects of Collegiality on Judicial Decision Making, 151 U. Pa. L. Rev. 1639, 1645 (2003) (“[J]udges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.”). But the concern extends beyond the particular panel to the judiciary as a whole, to the legal profession, and to the public. See, e.g., Thomas S. Morawetz, The Epistemology of Judging: Wittgenstein and Deliberative Practice, 3 Can. J.L. & Juris. 35, 59 (1990) (“[J]udges are constrained individually by a particular way of addressing and understanding interpretive questions and they are constrained collectively by the fact that the shared practice embraces a limited range of ways of proceeding. This limitation is mutually understood and recognized.”).

67 See, e.g., United States v. Windsor, 570 U.S. 744, 781 (2013) (Scalia, J., dissenting) (“[D]eclaring the compatibility of state or federal laws with the Constitution is not only not the ‘primary role’ of this Court, it is not a separate, free-standing role at all. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us.”). See also JUDICIAL WRITING MANUAL, supra note 61, at 1 (“[W]ritten opinions communicate a court’s conclusions and the reasons for them to the parties and their lawyers.”).
however, an equally important function of written opinions, at least in common law countries, is to contribute to the body of precedent that serves to guide conduct and provide the basis for deciding future cases. In a legal system built on the notion of *stare decisis*, this law-announcing function, which sets opinions as precedents, is constantly scrutinized. “For while the

See, e.g., Rostow, supra note 60, at 84 (“[T]he common law is no more than a library of judicial decisions and opinions and the methods by which they are written. Through these opinions, judges seek to perceive, to express, and to enforce the customs and aspirations of the communities they serve. They do this in the course of settling disputes among people, and between people and the state.”); Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 Cardozo L. Rev. 43, 62 (1993) (“[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did. The primary significance of these essays for non-judicial actors is the guidance they provide in predicting future judicial behavior.”); Jeremy Waldron, Principles of Legislation, in The Least Examined Branch: The Role of Legislatures in the Constitutional State 15, 22 (Richard W. Bauman & Tevi Kahana eds., 2006) (“[L]egislation is not the only means by which law is made or changed. Law is also made or changed by the decisions of judges as they interpret existing legal materials, including the work of other judges. This is unavoidable and no doubt in some cases it is also desirable. But it has drawbacks. . . . [J]udicial decision making does not present itself in public as a process for changing or creating law. . . . Courts perform their lawmaking function under partial cover of a pretense that the law is not changing at all. . . . Judge-made law, according to John Austin, is an ‘oblique’ form of lawmaking. The judge’s ‘direct and proper purpose is not the establishment of the rule, but the decision of the specific case. He legislates as properly judging, and not as properly legislating.’”); Randy J. Kozel, Precedent and Constitutional Structure, 112 Nw. L. Rev. 789 (2017) (discussing the importance of judicial precedent as constitutional lawmaking); Barry Sullivan, Precedent and Constitutional Adjudication, 3 Warsaw U. L. Rev. 141 (2004) (noting special issues concerning *stare decisis* in constitutional cases); see generally Michael J. Gerhardt, The Power of Precedent (2008) (exploring theories and functions of judicial precedent); cf. Vincy Fon & Francesco Parisi, Judicial Precedents in Civil Law Systems: A Dynamic Analysis, 26 Int’l Rev. L. & Econ. 519 (2006) (suggesting that precedent plays a lesser but not insignificant role in civil law countries).

See Lawrence M. Friedman, A History of American Law, at xxi (4th ed. 2019) (”‘The Law’ in France and Germany is above all the law of the great codes—statutes, in other words. ‘Common law,’ on the other hand, was ‘unwritten law,’ as Blackstone called it. ‘Unwritten’ was not meant literally; English and American laws are, if anything, overwritten. Blackstone meant, however, that the ultimate, highest source of law was not an enactment, not a statute of Parliament; rather, it was ‘general custom,’ as reflected in decisions of the common-law judges. . . . As a general rule, [therefore,] common law adhered to precedent. Precedent is commonly considered one of the basic concepts of the common law.”); Elin McClain, The Evolution of the Judicial Opinion 7 (1902) (”[D]ecisions of courts under the civil law are regarded as of very slight consequence in determining what are the general rules and principles to be recognized in the administration of justice, while under the common law, precedents are of controlling importance.”); Popkin, supra note 33, at 21–23 (noting that in England the doctrine of binding precedent, in the sense that a single case has the force of law, is a 19th-century phenomenon and that it was likely a reaction to the dominance of legislation as the quintessential form of law); Roscoe Pound, The Spirit of the Common Law 63 (1921) (describing the doctrine of precedent as “one of the three distictively characteristic institutions of the Anglo-American legal system”); Leflar, supra note 52, at 810–11 (discussing the importance of precedent and *stare decisis*); Ryan Whalen, Brian Uzzi &
judgment could only have reference to a state of law and facts existing at the
time of or prior to its rendition,” the Iowa law professor and Chief Justice
Emlin McClain rightly said, “it is plain that the reasons announced could be
of no importance or significance save as furnishing prospectively some
guidance in the adjudication of other cases. . . . The judicial opinion
remains, notwithstanding the[] efforts at reform, as the common and
convenient embodiment of the principles of the law, through which they are
announced and to which reference is made for the purpose of ascertaining
what they are.”

Or, as Professor White has put it, “in every case the court
is saying not only, ‘This is the right outcome for this case,’ but also, ‘This is
the right way to think and talk about this case, and others like it.’ The opinion
in this way gives authority to its own modes of thought and expression, to its
own intellectual and literary forms. . . . The opinion thus engages in the
central conversation that is for us the law, a conversation that the opinion
itself makes possible.”

Undeniably, it is this function of the written opinion
that is most important in the everyday work of judges, lawyers, and
academics, as they study opinions in order to ascertain what the law is on one
point or another. And, at least in a democratic society, a judicial opinion

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70 McClain, supra note 69, at 12, 18; see also Posner, supra note 64, at 111 (“[Judicial opinions]
facilitate the consistent decision of future cases. The first decision in a line of cases may be the
product of inarticulable emotion or hunch. But once it is given articulate form, that form will take
a life of its own—a valuable life that may include binding the author and the other judges of his
court (along with lower-court judges) and thus imparting needed stability to law through the
doctrine of precedent, though a death grip if judges ignore changed circumstances that make a
decision no longer a sound guide. Opinions create, extend, and fine-tune rules; they are
supplements to constitutional and other legislative rules.”).

71 White, Judicial Opinion Writing, supra note 55, at 1366–68; see also Rostow, supra note 60, at 85 (“In
England, in the United States, and in the countries of the British Commonwealth, the judges write
long, personal opinions—essays on the law—good or bad as the case may be, but highly individual
and often illuminating. They dissent quite freely from majority judgments. Their opinions
frequently provide a revealing view of the process by which the law grows, in its common law way,
from case to case.”).

72 See Friedman, A History of American Law, supra note 69, at xxi–xxii (“In the common law,
many basic rules of law are found nowhere but in the published opinions of judges. . . . What
lawyers study in law school is a body of high court cases.”); Grey, supra note 23, at 11 (“Until the
courts act, there are only opinions and guesses as to what the law is.”); William F. Fox, Jr., The
may also serve as the authoritative voice of the community with respect to the articulation and allocation of values.\textsuperscript{73}

In the American judicial system, the art of opinion writing has often reached its highest level, and certainly its most significant impact, in the constitutional decisions of the Supreme Court.\textsuperscript{74} Almost inevitably, such decisions reach beyond their immediate contexts to shape the general contours of our constitutional law.\textsuperscript{75} It is unsurprising, therefore, that the Court should frown on offering public statements or giving further explanations for its decisions. Even when its opinions are misreported, the

\textsuperscript{73}See Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1089 (1984) ("Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals. We turn to the courts because we need to, not because of some quirk in our personalities. . . . I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame.").


\textsuperscript{75}See Leflar, supra note 52, at 819; White, Judicial Opinion Writing, supra note 53, at 1367 ("One can have law of a certain kind without the judicial opinion . . . . But with the opinion, a wholly different dimension of legal life and thought becomes possible—the systematic and reasoned invocation of the past as precedent. With this practice, in turn, there can emerge an institution that simultaneously explains and limits itself over time. It is here, in the creation of legal authority, rather than in the facilitation of prediction, that the opinion performs its peculiar and most important task. . . . It is also the invocation of the authority of prior texts to shape and constrain what may be done in the present.").
Court will not normally correct the inaccuracies publicly. As Lord Denning has said, “All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.”

The problem arises, of course, when the Supreme Court’s opinions—taken to be the only way in which the Court may communicate with the public—become so technical, fragmented, and prolix that they no longer serve that function. There was a good reason for Chief Justice Earl Warren’s insistence that the Court’s opinion in Brown v. Board of Education should be short enough to be published in full in the daily newspapers and simple enough in its language that it could be understood by the newspapers’ readers. When opinions are not written in a way that makes them accessible to the general public, the Court fails in its fundamental obligation, not only to “say what the law is,” but to do so in a way that is intelligible to citizens. Other steps must then be taken if the Court’s democratic duty is to be satisfied.

B. The Justices Have Often Engaged in Extra-Curial Speech

The tradition that judges speak only in open court or through their written opinions may be well-established, but it has not invariably been followed. It might be closer to the truth to say that the Justices speak about specific cases only in open court or in written opinions, but even that would not be entirely accurate. It would be better to say that the Supreme Court speaks—as a court—only in open court or through its opinions. In this respect, there may be some difference between what the Court must

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76 See GREY, supra note 23, at 19; LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 19 (1988) (“For the most part, judges release their opinions and remain silent. If executive officials and legislators are criticized in the press, they can respond in kind. Judges, with rare exceptions, take their lumps without retaliation.”); cf. HENRY CECIL, THE ENGLISH JUDGE 35 (1970) (“It is right that a judge’s conduct should be subject to public and private criticism, but it is not always remembered that no judge may reply to such criticism. If something which he has said is misreported, he may refer to the matter in open court, but that is all he may do, and when people write to The Times complaining about his conduct, he does not write a letter of explanation. There is no law to prevent him from doing this, but it is traditional that he should not and tradition plays a very big part in the English judicial system.”).

77 R. v. Metropolitan Police Commissioner, ex parte Blackburn (No. 2) [1968] 2 All E.R. 319, 320.


79 See EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 3 (1977) [hereinafter WARREN, MEMOIRS].
invariably be seen to do and what the Justices may sometimes do individually. At all events, it seems clear that many Justices have not been content simply to let their opinions speak for themselves.\textsuperscript{80}

Perhaps the best early example of a Justice’s extra-curial judicial speech is to be found in the essays that Chief Justice Marshall published in 1819 in defense of \textit{McCulloch v. Maryland}.\textsuperscript{81} In \textit{McCulloch}, of course, the Court upheld Congress’s establishment of a national bank, despite the absence of any specific constitutional authorization, under the Necessary and Proper Clause.\textsuperscript{82} The \textit{McCulloch} decision was unpopular with those who opposed a strong national government, and some of them criticized the opinion in anonymous essays published in the \textit{Richmond Enquirer}.\textsuperscript{83} Chief Justice Marshall published his rebuttals (also anonymously) in the \textit{Philadelphia Union} and the \textit{Alexandria Gazette}.\textsuperscript{84} The Chief Justice apparently feared that his critics’ essays, if left unanswered, might provoke the Virginia legislature to condemn the \textit{McCulloch} decision and call on other states to do the same.\textsuperscript{85}

\textsuperscript{80} See, e.g., Christopher W. Schmidt, \textit{Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech}, 88 CHI.-KENT L. REV. 487, 490–91, 494 (2013) (arguing that the Justices have sometimes contributed to public discussion through extra-curial speech). Several Justices cooperated with Bob Woodward and Scott Armstrong in connection with \textit{The Brethren}, the \textit{Washington Post} reporters’ “inside account” of decision-making at the Supreme Court. \textit{BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT} 3 (1979) (“Most of the information in this book is based on interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court. Chief Justice Warren E. Burger declined to assist us in any way.”); see also David J. Garrow, \textit{The Supreme Court and the Brethren}, 18 CONST. COMMENT. 303, 304–305 (2001) (describing Justice Stewart’s initial contact with Bob Woodward and his central role in the genesis of \textit{The Brethren}, as well as the cooperation of several other Justices).

\textsuperscript{81} 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{82} U.S. CONST. art. I, § 8, cl. 18.

\textsuperscript{83} The news media of the early Republic were not neutral and objective purveyors of information but partisan players, funded and supported by the political parties. Their purpose was not necessarily to inform the public, but to persuade and mobilize an elite audience. The \textit{Richmond Enquirer} was a Republican newspaper closely allied with the Jeffersonian agenda. \textit{BROOKHISER, supra} note 74, at 165; \textit{KIRBY GODEL, CRAIG FREEMAN & BRIAN SMENTKOWSKI, MISREADING THE BILL OF RIGHTS} 52 (2015).


\textsuperscript{85} See \textit{BROOKHISER, supra} note 74, at 167; Gunther, \textit{supra} note 84, at 452–53.
Although the Justices have generally refrained from the kind of public jousting with critics that Chief Justice Marshall practiced (albeit anonymously) in the aftermath of *McCulloch*, others have felt the same need to defend their opinions. On May 27, 1935, the Court handed down three major decisions that rejected significant aspects of the New Deal. Chief Justice Hughes arranged the delivery of these unanimous opinions with an eye toward achieving the maximum dramatic effect in what has come to be known as “Black Monday.” The unanimity of the three decisions was distressing to President Franklin D. Roosevelt and left him bewildered. President Roosevelt took them as a personal affront, and talking to journalists, he heavily criticized the Court. In response, Justice Louis Brandeis departed from his customary reticence in discussing judicial business by giving a press interview in which he defended the Court’s rulings. Justice Brandeis added to the President’s dismay by stating that the day on which the three decisions were announced was “the most important day in the history of the Supreme Court and the most beneficent.”

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88 See id. at 98, 103; ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN’S LIFE 620 (1946) [hereinafter MASON, BRANDEIS].
89 See KAMMEN, supra note 18, at 360.
90 MASON, BRANDEIS, supra note 88, at 620. As Professor Mason notes, Justice Brandeis admired Roosevelt, but the Justice’s main concern was with bigness, and he thought that businesses should be broken up so that the states would be able to regulate them. Id. at 621. In addition, Marian McKenna has noted that Justice Brandeis had a message for two of Roosevelt’s key advisors who met him in the robing room following the announcement of the decisions: “This is the end of this business of centralization, and I want you to go back and tell the President that we’re not going to let this government centralize everything. It’s come to an end . . . . The President has been living in a fool’s paradise.” MCKENNA, supra note 87, at 104. The three decisions, Justice Brandeis added, meant that everything the administration had been doing must change. Id. See also MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 705 (2009) (“Why Roosevelt should have expected [Brandeis] to support the NRA is puzzling. Throughout 1933 and 1934, Brandeis had made clear to a number of top New Dealers and to the president himself that he considered the program wrongheaded as well as impossible to administer.”)
Similarly, in 1968, Justice Potter Stewart defended his opinion for the Court in *Jones v. Alfred H. Mayer Co.*, which the *Wall Street Journal* had criticized as judicial legislation. Justice Stewart’s letter to the *Journal* was published under the headline “Justice Stewart Dissents.” In the letter, Justice Stewart explained the facts of the case, insisted that the Court’s reading of the relevant statute was valid, and suggested that Congress could amend the statute if it disagreed with the decision. Justice Harry Blackmun often spoke publicly in defense of his opinion in *Roe v. Wade,* and Justice Tom Clark gave a vigorous public defense of the Court’s opinion in *Engel v. Vitale.* As Christopher Schmidt has noted, Justice Scalia also often aggressively defended his opinions in speeches. More recently, Justice Samuel Alito has defended certain “shadow docket” decisions in a speech at Notre Dame Law School. Justice Alito has also publicly criticized the Court’s century-old decision in *Jacobson v. Massachusetts,* which upheld the constitutionality of mandatory vaccination in a public health emergency.

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91 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 (which was originally enacted during Reconstruction) had not been rendered irrelevant by Congress’s enactment of the Fair Housing Act of 1968).


93 Potter Stewart, Letter to the Editor, *Justice Stewart Dissents*, WALL ST. J., July 3, 1968, at 6; see also Schmidt, *supra* note 80, at 507 (describing Justice Stewart’s defense of *Jones*).

94 Stewart, *supra* note 93.


99 197 U.S. 11 (1905).
thereby pronouncing on a highly controversial issue that may require resolution by the Court.\textsuperscript{100} In a slightly different vein, Justice Lewis Powell responded to press criticism concerning the number of cases in which he recused himself by preparing a memorandum explaining his recusal policy, which he authorized the Court’s press officer to share with the media—but only with those reporters who regularly covered the Court.\textsuperscript{101}

Some Justices have chosen to write or speak in extra-curial settings about their general jurisprudential views. For example, Justice Joseph Story wrote a series of important treatises on various areas of law while on the Court.\textsuperscript{102}

\begin{footnotes}

\item[101] See \textit{John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 272–81} (1994); Sullivan, \textit{Supreme Court Rulings}, supra note 56, at 913 n.12. Every now and then, as David Grey has noted, “newsmen have . . . found a note from a member of the Court saying something to the effect, ‘You didn’t read page 6 of my opinion.’” Grey, supra note 23, at 51. Similarly, Everett Dennis has noted that, “Justice Thurgood Marshall once sent a note to reporters explaining why he had not taken part in a decision.” Dennis, supra note 30, at 773.

\item[102] See, e.g., \textit{JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES} (Boston, Hilliard, Gray & Co. 1833); Justice Story also wrote a series of anonymous articles on legal topics for the Encyclopaedia Americana in the 1830s, see R. Kent Newmyer, \textit{Supreme Court Justice Joseph Story: Statesman of the Old Republic} 275 (1985); and he apparently assisted Henry Wheaton in writing up Wheaton’s reports of cases in which he had participated as a member of the Court, see G. Edward White, \textit{The Marshall Court and Cultural Change}, 1815–1835, at 390–95 (abridged ed. 1991); Gerald T. Dunne, \textit{Justice Joseph Story and the Rise of the Supreme Court} 199, 323–24 (1970). In addition, Justice Story was outspoken in his opposition to the Missouri Compromise, breaking “his political silence, for the first and only time in his years on the bench, with a long and passionate speech [at a public meeting in Salem, Massachusetts, in December 1819]” insisting “that the spirit of the Constitution, the principles of our free government, the tenor of the Declaration of Independence, and the dictates of humanity and sound policy, were all directly opposed to the extension of slavery.” Id. at 195; see also id. at 195–98 (detailing Story’s further efforts in opposition to the Missouri Compromise); Paul Finkelman, \textit{Supreme Injustice: Slavery in the Nation’s Highest Court} 117–30 (2018) (detailing the apparent evolution of Story’s views on slavery). Justice Story also prepared draft federal legislation and served as Chair of a Massachusetts commission on the codification of state law. Newmyer, supra, at 103, 277–80.
\end{footnotes}
Such activities took on greater significance, however, in the later decades of the twentieth century. In the wake of the Court’s decision in *Brown v. Board of Education*, much criticism was leveled at the Court for its “activism,” and that criticism eventually gave rise to more general concerns about the Justices’ interpretive theories and analytical methods. The airing of those concerns provided the impetus for some Justices to give extensive, and sometimes controversial, interviews. Justice Blackmun (much to the chagrin of Chief Justice Warren E. Burger) gave lengthy print and television interviews to the national media in 1982. But he was not the first to do so. In 1968, Justice Hugo Black agreed to sit for a full-length television interview, in which he discussed cases that had been decided during his long tenure on the Court.


105 In recent years, only Justice David H. Souter has maintained the virtually monastic passion for anonymity espoused by some earlier Justices. See Chad M. Oldfather, *The Inconspicuous DHS: The Supreme Court, Celebrity Culture, and Justice David H. Souter*, 90 MISS. L.J. 183, 187 (2020) (“[F]or as much as he was out of step with the world of thirty years ago [when he was appointed to the Court], he is almost inconceivably so today. This is true with respect to his lifestyle, with respect to his resolutely apolitical professional style, and with respect to his complete lack of interest in, indeed disdain for, the trappings of celebrity that have come to accompany a seat on the Court.”); cf. Bill Barnhart, Justice John Paul Stevens and the Press: Extra! Extra! Read All About It!, in *Covering the United States Supreme Court in the Digital Age*, supra note 8, at 238, 238 (noting that Justice Stevens had no relations with the press until near the end of his more than three decades on the bench). Indeed, some earlier Justices had no relations with the press at all and have said nothing whatsoever about their work to outsiders. See Rorrie Spill Solberg & Eric N. Waltenburg, *The Media, the Court, and the Misrepresentation* 12 (2015) (“Historically, the justices have been loath to make themselves available to the Fourth Estate or to interact with the mass public”). Today, however, video interviews of several Justices are available on the C-SPAN website. *The Supreme Court: An Unprecedented Look at the Traditions and History of the Home to America’s Highest Court*, C-SPAN, [https://www.c-span.org/series/?theSupremeCourt [https://perma.cc/GH9U-YFRN] (last visited Feb. 4, 2021).

106 See Hutchinson, supra note 95, at 317–20.

107 See Paul R. Baier, *Hugo Black and Judicial Lawmaking: Forty Years in Retrospect*, 14 NEXUS 3 (2009); Schmidt, supra note 80, at 489–91, 501, 506. Justice Black also agreed to deliver the Carpenter Lectures at Columbia Law School in 1968, specifically to answer the criticism that he was becoming more conservative. Id. at 489. Justice Black also broke with his usual practice and responded to letters criticizing the Court’s decision in *Engel v. Vitale*, 370 U.S. 421 (1962). See James E. Clayton, *The Making of Justice: The Supreme Court in Action* 21 (1964); Grey, supra note 23, at 18.
Criticism of the Court’s analytical methodologies, together with the Justices’ efforts to defend themselves, has also led to a never-ending battle over competing theories of constitutional interpretation, thereby producing a surfeit of extra-curial judicial discussions. Attorney General Edwin Meese’s insistence that the Justices should adopt a jurisprudence of “original intent” by writing an article championing living constitutionalism. After Justice Scalia joined the Court, he wrote and spoke extensively about his theory of interpretation, which he called “original understanding.” Eventually, Justice Scalia and Justice Stephen Breyer would each write books explaining their theories of interpretation, and they even debated each other publicly on the subject. Recent Justices have also been unselfconsciously outspoken in expressing their views to friendly audiences, such as the Federalist Society and the American Constitution Society.

Formal, written opinions are a central and indispensable feature of American law. In a democratic society, it is particularly important that the least democratic institution of government offer reasoned explanations for the binding judgments that it issues. The reality, however, is that the Supreme Court has not always issued written opinions, that it sometimes fails to give any explanation whatever for important decisions, and that individual Justices have often offered extra-curial defenses of their work since the earliest days of the Republic. In these circumstances, the formal, written opinion should not be fetishized or used as an excuse for the Court’s failure to communicate its decisions to the public in a way that the public can understand.

II. THE SUPREME COURT, THE PRESS, AND THE AMERICAN PUBLIC

On the whole, it is safe to say that the Supreme Court continues to speak as a body only through its official written opinions. It is the official written opinion—the opinion that commands the agreement of a majority of the Justices—that is the controlling document; it is through that opinion, and only through that opinion, that the Court performs its central duty of

115 The holding in a case may not be obvious when no single opinion speaks in its entirety for a majority of the Court. For example, see Hughes v. United States, 138 S. Ct. 1765 (2018); Marks v. United States, 430 U.S. 188 (1977).
“say[ing] what the law is.”

Moreover, even as the Court’s opinions have become longer and more complex, and changes in the economics and practice of journalism have made their timely mastery more challenging for working journalists, the Court’s method of disseminating its opinions has remained largely unchanged.

As in the past, the Justice who wrote the Court’s opinion will read a summary of it aloud in the courtroom and refer those present to the full written opinion that will be made available at the same time. Dissenting and concurring Justices may also read summaries of their opinions, with those opinions also being made available in writing. In addition, the written opinions (“slip opinions”) begin with a “syllabus,” or set of headnotes, to help the reader grasp more quickly the essence of the Court’s ruling and supporting reasons. According to a recent Reporter of Decisions, “in this modern age, preparing a syllabus largely involves taking a digital copy of the principal opinion and boiling it down and down and down until all that remains is the opinion’s essence, its bare bones.”

116 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); see also Fox, supra note 72, at 153; Ginsburg, Commenting on the Court’s Work, supra note 38, at 2119. In the long term, of course, a dissenting or concurring opinion may take on greater importance than the opinion of the Court. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

117 For many years, the Supreme Court did not even provide the text of announced opinions. Only after press demands, and instances of inaccuracy in reporting, did the Justices begin to release full texts of opinions when they announced them. According to Tony Mauro, the only recent changes in the practice of opinion announcements have been “behind the scenes.” Mauro, Opinion Announcements, supra note 11, at 481.

118 See id. at 480 (“Even as late as . . . 1968 and 1969, the reading of opinions [in full] took up entire days on the court’s calendar. Justices William O. Douglas and Hugo Black tried to limit opinion announcements, advocating a return to the older practice of the chief justice briefly announcing the outcomes and the lineup of justices on both sides. ‘That aroused Felix Frankfurter’s vehement opposition,’ Douglas later wrote.”). Justice Frankfurter “maintained that the oral announcements put the public on a wavelength with the justices and gave them a better idea what kind of persons the justices are. The arguments on this were long and passionate, and a majority took Frankfurter’s view.” CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 116 (2011). Chief Justice Burger failed in his efforts to end the practice of oral announcements altogether, but he did persuade the Justices to read summaries of their opinions. See Mauro, Opinion Announcements, supra note 11, at 481. A recent innovation has been the electronic dissemination of opinions at the time decisions are announced in open court. See Davis, The Symbiotic Relationship, supra note 8, at 13; Ginsburg, Commenting on the Court’s Work, supra note 38, at 2119.


note the existence of concurring and dissenting opinions, but it will give no account of the reasoning contained in such opinions except in the case of a concurring opinion that is essential to the creation of a Court majority, and, thus, to the holding of the case. For that reason, the syllabus does not purport to describe all that was at stake in the case. It tells the story of the case from the viewpoint of the prevailing Justices.

The practice of including such a syllabus or headnotes is longstanding. Since 1906, however, the slip opinions have carried a disclaimer to the effect that, “The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.”

The portion of Detroit Timber to which the citation refers responds to a party’s reliance in that case on an erroneous headnote contained in Hailey v. Diller. The relevant portion of Detroit Timber states that, “The headnote is not the work of the court, nor does it state its decision . . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports.”

Interestingly, the current form of the disclaimer (unlike the original language in Detroit Timber) recognizes that the Court’s audience extends beyond the profession to the public. In either formulation, however, the Court’s point is that the headnotes are not authoritative and should not be relied on. But

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122 A syllabus has accompanied Supreme Court opinions since the earliest days of the Court. For example, see Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).
124 178 U.S. 476 (1900).
125 United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337 (1906). The statement is not entirely accurate, however. A recent Reporter of Decisions has noted that the syllabus does not reflect only the individual work of the Reporter. According to that Reporter of Decisions, the precise nature of the syllabus in each case reflects the preferences as to length and detail of the Justice who wrote the majority opinion, and the draft syllabus prepared by the Reporter of Decisions will not be published unless it has been approved by the chambers of the writing Justice. Wagner, supra note 120, at 153–54. In fact, Justice Ginsburg said that the disclaimer is untrue or “a legend”; Justice Ginsburg noted that she helped edit the headnotes to her opinions. Ginsburg, Commenting on the Court’s Work, supra note 38, at 2120 (stating that the syllabus may be edited by the Justice who wrote the opinion—and that she in fact follows this practice invariably, “mindful that busy lawyers and judges may not read more”).
126 See Davis, The Symbiotic Relationship, supra note 8, at 12.
neither the Justices nor any representative of the Court will offer any further official comment on the decision.\textsuperscript{127}

The Justices are elusive. They appear only briefly in open court—to question lawyers at oral argument and to announce their rulings in merits cases—and then retreat into the secrecy that otherwise permeates all that they do. Because the Court has chosen in recent years to hear far fewer cases than it did in the past, even these brief appearances in the courtroom have become less frequent.\textsuperscript{128} Moreover, as Everette Dennis wrote in 1974, the Court’s press officer is “not a spokesman for the Court in any sense of the word” and “carefully avoid[s] answering any questions that involve a Court opinion or judgment.”\textsuperscript{129} Almost a generation later, New York Times correspondent Linda Greenhouse observed that, “The Court’s habits present substantial obstacles to conveying the work of the Court accurately to the public.”\textsuperscript{130} Now, as in earlier times, professional journalists and other information brokers are left with official written opinions as their primary information source, supplemented, perhaps, by the brief sound bites they have time to collect from experts and interest groups who typically have strong opinions about the outcomes of cases—if not always for the fine points of law that the Court has addressed.\textsuperscript{131} As far as official, authoritative

\textsuperscript{127} See Richard Davis, The US Supreme Court and the Journalists Who Cover It, in JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE 281, 281 (Richard Davis & David Taras eds., 2017). Justice Ginsburg has noted that the Justices cannot properly “spell out the real world impact” of their decisions because a judicial decision is usually only one part of a continuing dialogue encompassing the “other branches of government, the States, or the private sector.” Ginsburg, Commenting on the Court’s Work, supra note 38, at 2125.

\textsuperscript{128} See, e.g., Sullivan & Canty, supra note 25, at 1006 (noting a decline in Supreme Court caseload).

\textsuperscript{129} Dennis, supra note 30, at 778–79.

\textsuperscript{130} Greenhouse, supra note 18, at 1558.

\textsuperscript{131} Interest groups seek to influence media coverage of the Court’s decisions. One of the strategies these groups employ is to act as a source for the media reporting on the Court’s decisions, and as sources, such groups attempt to put those decisions in the most favorable light to their objectives. See SOLBERG & WALTERNBURG, supra note 105, at 5; SAUVAGEAU ET AL., supra note 27, at 12 (discussing the reaction of interest groups to several rulings of the Canadian Supreme Court); Greenhouse, supra note 18, at 1554 (recounting partisans’ efforts to influence reporting on Planned Parenthood v. Casey). Richard Davis notes that following the Engel v. Vitale case, press reporting devoted less attention to the Court’s decision than to interest group reaction, which exaggerated the decision’s effect. RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 11 (1994) [hereinafter DAVIS, DECISIONS AND IMAGES]; see also Robert A. Kagan & Gregory Elinson, Constitutional Litigation in the United States, in CONSTITUTIONAL COURTS IN COMPARISON 25, 44–45 (Ralf Rogowski & Thomas Gavron eds., 2016) (claiming that much constitutional litigation is brought by interest groups).
analysis is concerned, the Justices’ written opinions, no matter how many or how complicated, stand alone. There is nothing else.

The attitude that journalists should largely fend for themselves is time-honored. Until the late 1920s, as David Grey noted, “Newsmen had to write up stories about Court decisions without even having a text of opinions from which to work.”132 That was the case because, some sixty years before, the dissenting Justices in Dred Scott v. Sandford133 had released their dissent before Chief Justice Roger B. Taney had completed his majority opinion, and the Chief Justice had thereafter mandated that “official opinions were to be released only after they had appeared in the official compilation of the Court.”134 In the late 1920s, Chief Justice William Howard Taft altered that practice, so that “proofs [of the opinions] were finally [allowed to be] distributed” to the reporters covering the Court as soon “as the opinion had been completely read or announced in the courtroom.”135

While Chief Justice Taft’s innovation permitted some improvement in the quality of the media’s reporting on the Court, it also “led to...[reporting] mistakes...and to a tendency for the press to make sometimes inaccurate inferences from lengthy opinions.”136 Such a mistake occurred in 1935 in connection with the Associated Press’s coverage of the very important “Gold

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132 GREY, supra note 23, at 37; see also Davis, The Symbiotic Relationship, supra note 8, at 12.
133 60 U.S. (18 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.
134 Dennis, supra note 30, at 770. In Dred Scott, Chief Justice Taney read a lengthy opinion from the bench, as did several other Justices, including Justices Benjamin Curtis and John McLean, the two dissenters. Don Fehrenbacher recounts what happened next:

Whereas McLean and Curtis promptly released the full texts of their opinions for newspaper publication, the Chief Justice withheld his manuscript for revision. The public had access only to a summary of the opinion, taken down in court by an Associated Press reporter and printed in major newspapers throughout the country. This gave Republicans a definite advantage in the war of words. Taney found the situation embarrassing and he nursed his resentment of the action taken by the two dissenters, which seemed not only improper and disrespectful but deliberately intended to encourage the violent partisan outcry against the decision.

DEN E. FEHRENBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 315–16 (1978). Chief Justice Taney continued to withhold his opinion from publication and apparently made substantial additions to it, presumably in response to the dissenters’ opinions. That led to an acrimonious exchange of correspondence between the Chief Justice and Justice Curtis, who soon resigned from the Court. Id. at 316–21. “In virtually forcing his younger associate off the bench, the Chief Justice was undoubtedly venting his hostility to the antislavery movement and his resentment of the personal abuse to which he had been subjected since the announcement of the Dred Scott decision.” Id. at 319.

135 GREY, supra note 23, at 37.
136 Id.
Clause Cases.” As Professor Grey has written, “the Associated Press misinterpreted the majority opinion and transmitted a bulletin stating the opposite of the Court’s intent. Byron Price, who was bureau chief at the time, admitted that the AP ‘made a serious error as a result of too much haste.’” The error was soon corrected, but the erroneous report had already gone out to news outlets around the country. It was after that error that the Court began the practice of giving reporters proofs of opinions as the Justices began to read them aloud. As of 1968, that remained the Court’s practice, with the full text of the majority opinion being handed out to the press as soon as the writing Justice had begun to read it from the bench, with concurring and dissenting opinions coming later. Until 1973, some reporters occupied a privileged physical space in the courtroom, which allowed them to process the distribution of the Court’s opinions more quickly, but that space was eliminated when the bench was redesigned in that year.

Additional improvements in the Court’s communication practices have been modest. Justice Ruth Bader Ginsburg began making available the text

\footnotesize{\textsuperscript{137} Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935). These cases, which upheld the government’s power to reduce the gold content of United States currency and nullify the gold clause in private contracts, were among the most important of the era. \textit{See}, e.g., \textit{William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt} 86–88 (1995); \textit{Cushman, Rethinking the New Deal Court}, supra note 86, at 33–34; \textit{James F. Simon, FDR and Chief Justice Hughes} 253–55 (2012). Recognizing that the cases were being closely watched, Chief Justice Hughes twice took the highly unusual step of issuing post-argument statements to the effect that the Court was not yet ready to rule on the issue, as opinion days approached. \textit{Id.} at 253.}

\footnotesize{\textsuperscript{138} GREY, supra note 23, at 37.}

\footnotesize{\textsuperscript{139} Id. According to Byron Price, who was then the AP bureau chief, the change came about after a visit that he paid to Chief Justice Hughes. \textit{Id.} Price wrote: Mr. Hughes asked many questions about the physical and technical aspects of [the innovation of making the entire text of an opinion available to the press as soon as the reading of the opinion began]. He also dwelt at length on the difficulty of obtaining agreement among the Justices for reversals of procedures so firmly established by long precedent. . . . In the end he stated his conclusion: So far as he himself was concerned, he was in total agreement with me. He had to deal, however, with eight tough minded colleagues, as well as precedents, and he was not at all certain his views would prevail. But he would try. \textit{Id.} at 38 (quoting a letter from Byron Price to David L. Grey, May 24, 1965).}

\footnotesize{\textsuperscript{140} \textit{Id.}}

\footnotesize{\textsuperscript{141} \textit{See} Dennis, supra note 30, at 768–69 (“Until 1973, the pressroom was linked to the courtroom by pneumatic tubes through which reporters could send copies of opinions, orders, and handwritten notes. The tubes were attached to four news desks which were just below the bench and hidden from view.”); Ryan C. Black, Timothy R. Johnson & Ryan J. Owens, \textit{Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court’s Bench Reduced Interruptions During Oral Argument}, 43 J. SUP. CT. HIST. 83 (2018).}
of her opinion announcements to the press in the mid-1990s, and Justice Scalia adopted the practice shortly thereafter. “In both instances,” as Tony Mauro has explained, “the Court stressed that this release was for the convenience of the press in reporting on their remarks from the bench, and not for publication. As with the syllabus prepared by the Court’s Reporter of Decisions for each ruling, the Court did not want anyone to be citing the oral summaries as if they were part of the decision.”\footnote{Mauro, Opinion Announcements, supra note 11, at 482.} In 1998, the Court began piping the oral opinion announcements into the Court’s Public Information Office, so that reporters with short deadlines could hear the Justices’ oral summaries while they read the written opinions.\footnote{Id. at 481.} More recently, the Court has disseminated the opinions electronically, rather than relying exclusively on the old-fashioned method of distributing printed copies.\footnote{Davis, The Symbiotic Relationship, supra note 8, at 13.} Opinions are posted today on the Supreme Court’s official website\footnote{The Court’s website contains information such as order lists, oral argument calendars, occasional press releases, and texts of speeches by the Justices. The Court normally makes oral argument transcripts available on its website on the day of the argument, and audio recording is normally released at the end of the week.} and disseminated through Project Hermes to the news media and other institutional subscribers, within minutes after they are issued.\footnote{Slip opinions remain on the Court’s website until the opinions of the entire Term are published in the bound volumes of the United States Reports. The Court’s website contains this cautionary note: “In case of discrepancies between the print and electronic versions of these bound volume materials, the print versions control. Only the bound volumes of the Unites States Reports contain the final, official text of the opinions of the Supreme Court.” Information About Opinions, SUP. CT. U.S., https://www.supremecourt.gov/opinions/info_opinions.aspx [https://perma.cc/BA9B-FLPR] (last visited Feb. 4, 2021). In 2014, Richard Lazarus showed that the Court had been changing the text of previously published opinions without providing the public with notice that such changes had been made. Richard J. Lazarus, The (Non)Finality of Supreme Court Opinions, 128 HARV. L. REV. 540 (2014). According to Amy Howe, the Court thereafter began flagging such revisions. Testimony of Amy Howe, supra note 19.} Another aspect of the Court’s communications policy relates to oral argument. Although the Justices have consistently refused to permit the live broadcasting of oral arguments, they agreed, after the Covid-19 pandemic required closure of the Supreme Court building, to hear oral arguments via teleconference and allow for live audio broadcasting of the arguments for the first time.\footnote{See, e.g., Adam Liptak, Virus Pushes a Staid Supreme Court into Revolutionary Changes, N.Y. TIMES, https://www.nytimes.com/2020/05/03/us/politics/supreme-court-coronavirus.html} Amy Howe has observed that “[t]he live audio of oral
arguments at the Supreme Court was an overwhelming success. Although it is difficult to arrive at exact numbers because the oral arguments were streamed on multiple platforms, it appears that hundreds of thousands of people tuned in to listen to some of the high-profile arguments. And the live audio served as a jumping-off point for a national civic lesson of sorts.\footnote{148} In fall 2021, when the Court resumed in-person oral arguments (albeit without opening the courtroom to the public), it continued the live audio broadcasting of oral arguments to allow the public to hear the exchanges between the Justices and counsel in real time.\footnote{149}

Nonetheless, it remains the case, as Professor Dennis has observed, that “[r]eporters in this Spartan setting must be quite self-sufficient as they receive no assistance in the form of briefings, press conferences, or mimeographed releases.”\footnote{150} He has also called attention to the Court’s “traditionally oblivious attitude toward the deadline problems of the media.”\footnote{151} That obliviousness has manifested itself in various ways, but, perhaps most importantly, in the number of highly salient decisions the Court announces at one time. The Court previously announced its decisions on only one day a week, making it difficult for reporters to give thoughtful or thorough

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\footnote{148} Testimony of Amy Howe, supra note 19.
\footnote{149} Cushman & Duff, supra note 147; Press Release, SUP. CT. U.S. (Sept. 8, 2021), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-08-21 [https://perma.cc/V5AM-VR34] (“Courtroom access will be limited to the Justices, essential Court personnel, counsel in the scheduled cases, and journalists with full-time press credentials issued by the Supreme Court. Out of concern for the health and safety of the public and Supreme Court employees, the Courtroom sessions will not be open to the public.”). C-SPAN remarked on its official Twitter account that, “The Court’s live audio throughout COVID pandemic leads to a more informed American citizenry. Still hope for #SCOTUS video one day.” @cspan, TWITTER (Sept. 8, 2021, 2:50 PM), https://twitter.com/cspan/status/1435691955661443088 [https://perma.cc/ZJ5F-FD9E].
\footnote{150} Dennis, supra note 30, at 769.
\footnote{151} Id. at 771. In recent years, of course, the Justices have tended to be seen as public figures in a way that was not previously the case. See Barry Sullivan & Cristina Carmody Tilley, Supreme Court Journalism: From Law to Spectacle?, 77 WASH. & LEE L. REV. 343, 390 & n.184 (2020).}

treatment to all of the decisions rendered on that day. The Court abandoned that practice in 1965, but even now the Court may announce several important decisions at the same time, particularly near the end of the term. Linda Greenhouse notes that she once suggested to Chief Justice William H. Rehnquist, Jr. that the press might do a better job of reporting on the Court’s decisions if several important cases were not announced on the same day. According to Greenhouse, the Chief Justice replied, “Just because we announce them all on one day doesn’t mean you have to write about them all on one day. . . Why don’t you save some for the next day?” “On one level,” Greenhouse writes, “this was harmless, and cost-free, banter. On another, it offered a dramatic illustration of the gulf between us.” While Chief Justice Rehnquist obviously took Greenhouse’s suggestion as special pleading for journalists, her point was that “the decisions would all be reported on the day they were released in any event, and that a slight change in the Court’s management of its calendar could substantially increase the odds that the decisions would be reported well, or at least better—an improvement the Court might see as serving its own interest as well as the interest of the press.” But the Court has generally agreed with Chief Justice Rehnquist that this is the press’s problem to solve, and that the press should simply take as much time as it needs to get the story right, notwithstanding the public’s expectation that the press will provide real-time reporting on the Court, just as it does in other areas.

The Court may well view its adherence to traditional limitations on communications as essential to maintaining public respect for the Court as an institution, protecting its independence, integrity, and gravitas, and endowing the Court with a certain sense of mystery and air of detachment.

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152 See GREY, supra note 23, at 35–36.
153 That was the case, for example, in the last week of October Term 2019, when the Court announced two important decisions on July 6, two important decisions on July 8, and three important decisions on July 9. On July 6, the Court announced the decisions in Chiafalo v. Washington, 140 S. Ct. 2316 (2020), and Barr v. Am. Ass’n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020). On July 8, the Court announced the decisions in Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020), and Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049 (2020). On June 9, the Court announced the decisions in Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020), Trump v. Vance, 140 S. Ct. 2412 (2020), and McGirt v. Oklahoma, 140 S. Ct. 2452 (2020). See also supra note 17.
154 Greenhouse, supra note 18, at 1558.
155 Id.
156 Id. at 1558–59.
from the affairs of the everyday world.\textsuperscript{157} In the Court’s view, there may be something to be gained from being perceived as a “remote and mysterious oracle”\textsuperscript{158}—nine Justices who are thought to be cool, cloistered, disinterested, and dispassionate,\textsuperscript{159} and who do most of their work behind closed doors.\textsuperscript{160}

\textsuperscript{157} See Ginsburg, Commenting on the Court’s Work, supra note 38, at 2122 (“[T]he Supreme Court press corps still lacks the inside information that is grist for reporters’ mills in other places. Because confidentiality is vital to the way the Third Branch works, that lack of information is likely to persist as long as the Court exists.”); Schmidt, supra note 80, at 510, 512 (“[T]he assumption of reticence is bolstered by the common belief that the dignity of the Supreme Court, that essential requirement of judicial legitimacy, depends on a certain perception of detachment from the roiling waters of American political life... The trope of the justice as standing above public controversy has long been and remains today a powerful ideal.”); see generally Dahlia Lithwick, The Supreme Court and New Media, in COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE, supra note 8, at 187, 189; John R. Schmidhauser, Larry L. Berg & Justin J. Green, Judicial Secrecy and Institutional Legitimacy: Max Weber Revisited, 22 BUFF. L. REV. 867 (1973). In some states judges are elected officials who campaign for office. In California, the judicial ethics rules were recently amended to permit judges to defend their decisions in connection with a judicial election or recall election. See Maria Dinzeo, California Supreme Court to Decide if Judges Can Speak Out on Their Decisions, COURTHOUSE NEWS SERV. (Nov. 10, 2019), https://www.courthousenews.com/california-supreme-court-to-decide-if-judges-can-speak-out-on-their-decisions/ [https://perma.cc/7UB9-6BNR]. Of course, the Incompatibility Clause of the federal Constitution prohibits legislators from holding positions in the Executive Branch, but it does not prevent members of the judiciary from undertaking assignments for the Executive. U.S. CONST. art. I, § 6, cl. 2; Harold H. Bruff, The Incompatibility Principle, 59 ADMIN. L. REV. 225, 235 (2007) (“The new Constitution contained no bar against joint judicial-executive service, probably because the judiciary was only beginning to be separated clearly from its executive roots in England.”); id. at 235 (“[In Mistretta v. United States, 488 U.S. 316 (1989), the Court] noted that although the Incompatibility Clause would forbid policymaking by a combination of congressional and executive officers, judges were not forbidden to perform executive functions when not sitting on the bench, and many had done so.”). Indeed, several Justices have done so. See, e.g., Joseph J. Ellis, American Creation: Triumphs and Tragedies at the Founding of the Republic 197 (2007) (noting Washington’s appointment of Chief Justice John Jay to negotiate with Great Britain); R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court 141 (2001) (noting Chief Justice Marshall’s simultaneous service as Secretary of State); William Domnarski, The Great Justices 1941–54: Black, Douglas, Frankfurter & Jackson in Chambers 27 (2006) (noting Justice Jackson’s service as lead prosecutor at the Nuremberg trials); Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court—A Judicial Biography 425–26 (1985) (noting Chief Justice Warren’s appointment to investigate the assassination of President Kennedy).

\textsuperscript{158} Greenhouse, supra note 18, at 1538.

\textsuperscript{159} Fox, supra note 72, at 155.

\textsuperscript{160} Solberg & Waltensburg, supra note 105, at 12 (“[T]he operation of the Supreme Court is far from transparent. Many of its most consequential actions... occur out of the view of the press and public.”); Davis, The Symbiotic Relationship, supra note 8, at 4; Dennis, supra note 30, at 771. However, the notion that the Court exists separate and apart from the affairs of the everyday world is far from the truth. See William H. Rehnquist, Constitutional Law and Public Opinion, 20 SUFFOLK U. L. REV. 751, 768 (1986) (“The Judges of any court of last resort, such as the Supreme Court of the United
That sense of secrecy gives authority to the Court’s work and promotes the notion, as Richard Davis has observed, “that the Court is separated from the ongoing political process and the forces that determine the outcomes of the process.”

To be sure, some Justices have realized the importance of accurate communication with the press and the link between such communication and public understanding of—and respect for—the Court’s decisions. They have understood, in other words, that the Court does not operate in a

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161 Justice Frankfurter once said that: “The secrecy that envelops the Court’s work is not due to love of secrecy or want of responsible regard for the claims of a democratic society to know how it is governed. That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court.” Felix Frankfurter, Mr. Justice Roberts, 104 U. PA. L. REV. 311, 313 (1955); see also Hirsch, supra note 72, at 3 (“The secrecy protecting the Court’s deliberations and the reverential awe usually accorded by the general public to both the Court and its decisions have helped shroud the members of the Court in a mystery almost as black as their robes.”).

162 Davis, Decisions and Images, supra note 131, at 6 (noting, however, that historically such aloofness has not been constant, and that some Justices have been involved in partisan politics, political appointments, congressional lobbying, and presidential decision-making); see also Alexander M. Bickel, The Least Dangerous Branch 197 (1962) (“The Justices have their being near the political marketplace, in which the effects of their judgments are felt. But the system embodies elaborate mechanisms for their insulation.”); Grey, supra note 23, at 21 (observing that the administration of justice demands objectivity and independence); Solberg & Waltenburg, supra note 105, at 1–3 (“The ‘myth of legality’ is the belief that the law, precedent, and fidelity to the Constitution alone guide the Supreme Court’s decisions. . . . According to the myth, the justices arrive at their decisions impartially, free of influence of political and/or ideological biases. In short, the justices operate ‘above’ the bare knuckles of the political process. . . . In addition, the press’s heavy use of the Court’s own language in its reports of the Court’s actions (a mode of press behavior consistent with a media norm of reliance upon ‘official,’ authoritative sources) helps to ensure the Court is presented as an institution separate from politics.”); Martin Shapiro & Alec Stone Sweet, On Law, Politics, and Judicialization 3 (2002) (“In democratic states most government officials achieve legitimacy by acknowledging their political rule and claiming subordination to the people through elections or responsibility to those elected. Judges, however, claim legitimacy by asserting that they are non-political, independent, neutral servants of the law.”).

163 See Davis, Decisions and Images, supra note 131, at 10; see also Fred Graham, Foreword to Mathewson, supra note 84, at xii (“What seems to have happened in recent years is that the Justices have realized that, given the growing importance of the Court’s work, the Court needed to become more transparent in its dealings with the outside world. The result has been an evolution in the relationship between the Court and the media toward more openness.”).
vacuum, and that the public’s perception of the wisdom—or at least the integrity—of the Court’s rulings depends in part on how decisions are reported. Justice Oliver Wendell Holmes apparently once took pity on a young reporter who could not understand one of the Justice’s opinions. According to the reporter’s much later account, Justice Holmes was expecting guests when the reporter arrived unannounced at his home, but the Justice led the reporter to his study, where he “patiently and clearly spelled out the story to the scribe, literally dictating much of the article in newspaper language. It ran . . . a couple of columns in the [Louisville] Courier-Journal and was esteemed as a clear and intelligible newspaper story.”

Chief Justice Harlan Fiske Stone also was more aware than others about the extent to which the Court depends on the press for the public’s understanding of its work, and he was “really shocked” by some of the press’s “misleading, not to say completely inaccurate, statements” about the Court’s decisions. For example, then-Justice Stone was apparently astonished that the press had not understood the importance of the Court’s 1938 decision in *Erie Railroad Co. v. Tompkins*—holding that federal courts lack the power to create general federal common law in diversity cases—and had not written about it in the days following its announcement. Justice Stone therefore wrote privately to Arthur Krock, the Washington bureau chief for the *New York Times*, calling *Erie Railroad* “the most important opinion since I have been on the Court.” By the time he became Chief Justice, he had come to realize that inaccuracies in reporting arose from “the fact that the Court is constantly dealing with more and more technical and complex questions

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164 See, e.g., Ginsburg, *Commenting on the Court’s Work*, supra note 38, at 2121 (“Mass media reporters are the people in fact responsible for translating what courts write into a form the public can digest.”). As Stuart Hampshire has written, “No one is expected to believe that [the Supreme Court’s] decisions are infallibly just in matters of substance; but everybody is expected to believe that at least its procedures are just because they conform to the basic principles governing adversary reasoning: that both sides in a conflict should be equally heard.” *Stuart Hampshire, Justice is Conflict* 95 (2000).

165 Greenhouse, supra note 18, at 1560.

166 ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 626 (1956) [hereinafter MASON, HARLAN FISKE STONE]; see also Greenhouse, supra note 18, at 1544 (“[Other courts] are similarly reticent about speaking directly to the public, but judges of lower federal courts and state courts are at times willing to help reporters understand opinions.”).

167 304 U.S. 64 (1938).

168 MASON, HARLAN FISKE STONE, supra note 166, at 476–77 (quoting Louis Lusky); see also Ginsburg, *Commenting on the Court’s Work*, supra note 38, at 2121 (“[Justice Stone’s] message took hold, and the next day, Krock devoted his column to the ‘Momentous Decision.’”); Greenhouse, supra note 18, at 1549–50.
than perhaps ever before in its history, and the layman who undertakes to comment on it is often undertaking to write about something which he does not understand.”169 As an antidote, Chief Justice Stone urged newspapers to retain a competent professor of constitutional law to read and criticize their stories before publication.170

Similarly, Justice Felix Frankfurter expressed his concern for the public’s understanding of Supreme Court decisions in a column he wrote in the New York Times years before he joined the Court: “The evolution of our constitutional law is the work of the initiate. But its ultimate sway depends upon its acceptance by the thought of the nation. The meaning of Supreme Court decisions ought not therefore to be shrouded in esoteric mystery. It ought to be possible to make clear to lay understanding the exact scope of constitutional doctrines that underlie decisions...”171 After joining the Court, he famously compared press coverage of the Court to sports coverage and challenged the press to cover the Court’s decisions at least as well as it covered the World Series.172 Justice Frankfurter was instrumental in persuading the New York Times to hire a Supreme Court reporter trained in law.173

Chief Justice Warren wrote that, “The importance of a proper understanding of the Court’s work can hardly be overemphasized. The decisions of the Court, spanning as they do almost the entire spectrum of our national life, cannot realize true fulfillment unless substantially accurate accounts of the holding are disseminated.”174 In that vein, he endeavored to speak directly to the public in Brown v. Board of Education,175 by announcing the Court’s decision in a unanimous opinion that was sufficiently short and

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169 MASON, HARLAN FISKE STONE, supra note 166, at 626.
170 Id.
171 Felix Frankfurter, A Notable Decision: The Supreme Court Writes a Chapter on Man’s Rights, N.Y. TIMES, Nov. 13, 1932, at 1E (writing about Powell v. Alabama, 287 U.S. 45 (1932) (Scotusboro Boys case)); see also Bridges v. California, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting) (emphasizing that the Court should not be “a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed”).
173 Id.; GREY, supra note 23, at 52 (citing an interview with James Reston of the New York Times who apparently was Justice Frankfurter’s friend).
simple that it could be published in full in newspapers throughout the country and be readily understood by the public.  

Justice Powell took a somewhat different approach in Regents of the University of California v. Bakke, in which a badly splintered Court delivered opinions amounting to 151 pages. In his announcement of the decision, Justice Powell attempted to connect all of the opinions together, explaining at length what the points of agreement and disagreement were. As Joseph Goldstein has written:

> Apparently, the justices in Bakke recognized that their many opinions, totaling 151 pages, failed as a communication to and for We the People. Justice Powell drafted and circulated a “Proposed Statement from Bench,” which he gave orally in announcing the Bakke decision. In an accompanying memo, he wrote, “My primary purpose was to assist the representatives of the media present in understanding ‘what in the world’ the Court has done!” It was as if he were acknowledging that the Court’s public is to be informed not primarily by the opinions of the Court, but by the media, and that professional law correspondents cannot, by reading the opinion alone, be expected to understand what the Court has decided and why.

Justice Powell’s oral statement is the kind of communication that would satisfy the demand placed on the justices not to forget that it is a constitution they are expounding. Yet it has no authoritative value. It was not even published. One can only wonder why it did not find a place in (or take the place of) his official opinion announcing the Court’s two judgments.

These examples from Brown and Bakke are unusual, to say the least. The Court’s attitude towards the public and the press is not usually so


178 Goldstein, supra note 20, at 97–98.

179 However, even Chief Justice Burger, who was not known as a friend of the press [see, e.g., New York Times v. United States, 403 U.S. 713, 750 (1971) (Burger, C.J., dissenting); Al Kamen, Warren
mindful of their needs nor of the Court’s real self-interest in ensuring that its decisions are understood. This general attitude was exemplified by the observation of Banning Whittington, a previous Public Information Officer of the Court, who stated that, “the Court does not and should not give the press much help—that the institution is a Court of law, not a legislature.”  

In 1968, David Grey concluded that the Court was making “a deliberate effort to avoid appearing to be in the business of widespread dissemination of judicial opinions.” In other words, the Court thought that it “should be above the commonplace of image-making or of forcing its opinions on others.”

Over the course of time, most of the Justices—and the Court as an institution—have shown little interest in the plight of journalists who must attempt to deal with increasingly complex (and often prolix) written opinions within time constraints and in circumstances that have become increasingly challenging. To do so, the Court apparently believes, would risk descending into the realm of everyday affairs and forfeiting the aura that comes from being an institution set apart. The Court’s attitude to the press might be summed up by a statement that Chief Justice Rehnquist apparently made to an informal gathering of journalists: “The difference between us

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180 GREY, supra note 23, at 47. Whittington served as the Court’s Public Information Officer from 1947 to 1973. See also Max Freedman, Worst Reported Institution, 10 NIEMAN REPS. 2 (1956) (“A judge’s vanity may be ruffled for an hour or so by some indignant blast from somebody’s editorial page but basically the Court is indifferent because it feels that the editor has failed to pay the intellectual dues of hard work which should precede the right to an opinion.”).

181 GREY, supra note 23, at 21. Professor Grey based his conclusion on interviews with two Justices, Mr. Whittington, and two other court officials. He further noted that “the general policy of the Court staff is that it should not take the initiative in disseminating information about the Court.” Id.

182 Id.

183 See Greenhouse, supra note 18, at 1558-59.
and the other branches of government is that we don’t need you people of the press.”

In truth, public confidence in the Court is essential, and it requires that the public understand what the Court is doing, and why the Court is doing what it does. For most Americans, that does not mean understanding the Court’s opinions; it means understanding what the press says about the Court’s opinions. In other words, Chief Justice Rehnquist could not have been more wrong. As Professor Russell has rightly observed, “Journalists are the managers of the political life of judicial decisions.” Nonetheless, the Court has continued to act as if the understanding of the press—and the public—does not matter. As we shall see, other constitutional courts have not been blind to the wisdom expressed by Professor Russell. These courts have understood the challenge, and they have acted accordingly.

III. CONSTITUTIONAL COURTS ACROSS THE WORLD HAVE ADOPTED NEW STRATEGIES FOR COMMUNICATING DECISIONS TO THE PUBLIC

For a long time, the assumption among scholars and professional observers was that courts should speak for themselves only by speaking as courts do, that is, through their formal, written opinions or judgments. Too often, indeed, we have thought of courts as fulfilling their proper role when they are silent, defending their legitimacy by confining their speech to the dry, technical language of judicial opinions. But faced with fast-changing media and the emergence of populist politics that distrust expertise and frequently call for restrictions on judicial power, many constitutional courts

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184 Mathewson, supra note 84, at 8; but cf. Rehnquist, Constitutional Law and Public Opinion, supra note 160, at 769 (“Judges need not and do not ‘tremble before public opinion’ in the same way that elected officials may, but it would be remarkable indeed if they were not influenced by the sort of currents of public opinion which were afoot in the Steel Seizure Case.”).

185 Sauvageau et al., supra note 27, at 8 (quoting Peter Russell, Comments at the Media–Supreme Court Research Workshop, Ottawa (Nov. 7, 2002)).


have acknowledged the vital importance of correct, complete, and timely accounts of their work. These courts, showing an increased awareness of developments in technology and the social transmission of knowledge that not infrequently lead to the distortion of truth, have adopted new means of communicating with the public through the press and across the contemporary information ecosystem. Three simultaneous forces are at play: first, an attempt to make it easier for the representatives of the mainstream media to understand and broker judicial decisions; second, a desire to reach out directly to the general public and to make judicial determinations more accessible; third, a strategic use of new channels of communication to signal which cases are more important and which are less so and thus shape the way in which decisions are received.

In this section we explore these important contemporary developments, detailing the various practices that some other constitutional courts have adopted to improve the accuracy of the press’s coverage and the public’s understanding of their rulings. Considered together, they reflect a greater degree of openness and a growing recognition that the constitutional courts of democratic societies are institutionally and professionally obliged to make
their judgments more intelligible to the rest of us. These emerging trends also seem to reflect a judicial awareness that a proactive stance with respect to the media is desirable to protect the perceived legitimacy of the judiciary at a time when public debate over the proper role of the courts is especially heated and polarized.189 Interestingly, the various constitutional courts differ in terms of the precise measures they have undertaken, but they all seem to have manifested a determination to make their decisions more transparent and intelligible by reforming the ways in which they communicate those decisions to the press and the public.

A. The Supreme Court of Canada—The Most Open Court

The Supreme Court of Canada has long been a leader in terms of its conscious effort to better organize—some would say orchestrate—its relationship with the media.190 The Canadian Court still communicates its binding decisions through classic written opinions, but, as Chief Justice Beverley McLachlin has acknowledged, “the news media is the principal means” through which Canadians can come to understand the Court and its work.191 Likewise, Justice Frank Iacobucci has pointed out that the legitimacy of the Canadian Court, and indeed the democratic process, depends, at least to some degree, on the Court’s ability to get its message out: “The danger... is that if the media are inaccurate in conveying the information to the public, you are dealing with a misinformed public.”192 According to Justice Iacobucci, “Decisions are enforced because people accept the decisions as the law. If confidence is eroded, then we worry about the


190 SAUVAGEAU ET AL., supra note 27, at 12–13; McLachlin, The Relationship Between the Courts and the Media, supra note 189.


legitimacy of the court and the role of the court to settle disputes through the rule of law in our country and that’s an absolutely priceless commodity in a constitutional democracy. So those are the stakes.”

Doctrinally, the Canadian Court sees its willingness to accommodate the news media as an important element in realizing the principles of “open court” and freedom of expression. The Canadian Court has construed these constitutional principles to encompass a general obligation to provide the public with all the information necessary to understand its decisions: “The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.”

As Professor Sauvageau and his co-authors have observed, the Supreme Court of Canada’s decision to enter the world of media relations and address the issue of accuracy in reporting was made incrementally and in slow, halting steps. Further, as Susan Harada has noted, these steps “can be categorized in two ways: those aimed at making it easier for journalists to report on the court’s business—the hearings and decisions; and, those aimed at opening up the court as an institution.” Chief Justice Brian Dickson, who held that position between 1984 and 1990, broke down some of the old taboos and lifted the curtain that hid the Canadian Court from the public. He created the position of the Executive Legal Officer (ELO), a senior lawyer or legal academic whose duties include briefing journalists who cover the Court. Chief Justice Dickson also began the practice of meeting with

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193 Id. at 10.
196 SAUVAGEAU ET AL., supra note 27, at 12, 199.
197 Harada, supra note 191, at 86.
198 Id. at 89.
199 SAUVAGEAU ET AL., supra note 27, at 12, 200–01 (discussing the origin and role of ELOs); id. at 201 (“ELOs are appointed for a term of no more than five years and are normally drawn from law faculties.”); Harada, supra note 191, at 87; see also ROBERT J. SHARPE & KENT ROACH, BRIAN
newspaper editorial boards, giving interviews, and releasing texts of his speeches in advance.\textsuperscript{200} In addition, the Chief Justice ensured that the Canadian Court would space out the announcements of its decisions so that reporters would not be overwhelmed.\textsuperscript{201} He also invited, for the first time, a documentary camera crew into the Canadian Court’s inner sanctum: the hallways, offices, and conference and dining rooms to which the public had previously been denied access.\textsuperscript{202}

Chief Justice Dickson’s colleague, Justice John Sopinka, expressed the sentiment that drove the Canadian Court to move away from deep-rooted tradition and experiment with new channels of communication. Justice Sopinka believed that, “A judge can and ought to speak on the work of the court. It is absolutely essential that the workings of the court be demystified. Otherwise how can the public have confidence in it?”\textsuperscript{203} He thought “that there should be no ‘absolute rule that prevents a judge from explaining his or her decision to the public if failure to do so has led or may lead to confusion or misunderstanding.’”\textsuperscript{204} Chief Justice Antonio Lamer, who held the position from 1990 to 2000, opened up the Canadian Court even further.\textsuperscript{205} During his tenure, cameras were allowed into the courtroom and oral arguments were televised live on the Canadian Parliamentary Affairs Channel (CPAC).\textsuperscript{206} To ease the work of reporters, the Court also decided, under Chief Justice Lamer’s leadership, that judgments would be released over a two-day period when a nest of decisions was scheduled to be handed down during a particular week.\textsuperscript{207}

In the last two decades, the Supreme Court of Canada has continued to foster a modern communication environment aimed at ensuring the accurate and complete reporting of its judicial decisions. First, the Canadian Court set a goal of making its “judgments as clear as possible.”\textsuperscript{208} Professor Sauvageau and his colleagues note that “there is little doubt that for crucial decisions... the court trie[s] to anticipate the needs and reactions of

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\textsuperscript{200} DICKSON: A JUDGE’S JOURNEY 285–96 (2003) (discussing Chief Justice Dickson’s efforts to modernize the Court, including the improvement of its media relations).
\textsuperscript{201} Id; Harada, supra note 191, at 87.
\textsuperscript{202} SAUVAGEAU ET AL., supra note 27, at 200; Harada, supra note 191, at 89.
\textsuperscript{203} SAUVAGEAU ET AL., supra note 27, at 12.
\textsuperscript{204} Id. at 12–13.
\textsuperscript{205} Id. at 200.
\textsuperscript{206} Id. at 13, 200; Harada, supra note 191, at 87.
\textsuperscript{207} SAUVAGEAU ET AL., supra note 27, at 13, 200.
\textsuperscript{208} McLachlin, The Relationship Between the Courts and the Media, supra note 189.
\end{flushleft}
reporters by writing its decisions in language that [may] be easily understood.”

As part of this initiative, the Court provides “head-notes that summarize the essential points of each decision.”

Second, the ELO frequently briefs journalists before sessions begin and provides them with briefings on every important judgment released by the Canadian Court. These briefings are normally held a day or two before the release of the judgment, are off the record, and serve as a great source of information for the media. “The ELO . . . provide[s] a capsule summary of the facts of the case at hand,” the legal issues presented in the case, the parties’ arguments, and the Court’s reasoning. The ELO, however, is not a spokesperson or apologist for the Court and does not spin its rulings. Rather, the explicit goal of the media briefing is “to assist members of the media to understand the reasons for [a] decision.”

Third, to help reporters get the news out in a timely way, the Canadian Court allows so-called lock-ups in which journalists accredited by the Canadian Parliamentary Gallery can receive advance access to the Court’s decision, under carefully secured conditions, before its official release. During the lock-up, the ELO conducts an off-the-record briefing on the decision and allows the journalists to ask questions or seek clarifications.

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209 SAUVAGEAU ET AL., supra note 27, at 205.
210 McLachlin, The Relationship Between the Courts and the Media, supra note 189.
211 SAUVAGEAU ET AL., supra note 27, at 13.
212 Harada, supra note 191, at 87.
213 McLachlin, The Relationship Between the Courts and the Media, supra note 189.
214 Id.; Harada, supra note 191, at 87; Judgment Lock-Up Procedure, supra note 29.
216 SAUVAGEAU ET AL., supra note 27, at 201.
217 “Before entering the lock-up, [the participating journalists] must surrender all phones and other electronic communication devices to a Court staff member for the duration of the lock-up,” Judgment Lock-Up Procedure, supra note 29. Journalists must also “sign a written undertaking [to comply with certain contractual requirements, including a duty of pre-release non-disclosure] prepared by the Court for the media.” Id. In addition, reporters are not allowed to leave the lock-up room, contact their newsrooms, or report anything about the ruling until the judgment is released to the public. Id.; Undertaking for Media Lock-Up at the Supreme Court of Canada (SCC), SUP. CT. CAN., https://www.scc-csc.ca/media/um-em-eng.pdf [https://perma.cc/EE8K-S5G4] (last visited Feb. 10, 2021).
218 SAUVAGEAU ET AL., supra note 27, at 203; Harada, supra note 191, at 88.
coverage that is accurate and gives the public a sense of the finer points of the decision.

Clearly, the Supreme Court of Canada has acknowledged its dependence on the press.219 “The fundamental problem for the justices,” according to the Sauvageau study, “is that their messages cannot get through to society without being altered by the journalistic lens. In a sense, journalists have the last word.”220 Professor Sauvageau and his colleagues further argue that the Canadian Court “has carefully constructed a system which ensures that not only are its points of view clearly communicated to the public but that it can play a role in setting the agenda and enhancing its prestige. While the court is engaged in what is clearly an important public service, it is also a political institution that is attempting to ensure that its judgments are understood by journalists.”221

In the past three years, the Canadian Court has increased its efforts to reach out directly to the public and make its work more accessible and transparent to all Canadians. In 2018, the Canadian Court introduced what it calls “Cases in Brief”—“short summaries of the Court’s written decisions drafted in reader-friendly language, so that anyone interested can learn about the decisions that affect their lives.”222 The Cases in Brief are prepared by the Court’s communications staff to help lay people better understand the Court’s judgments. They are published on the Court’s website and shared on the Court’s official Facebook and Twitter accounts.223 According to a press release recently issued by the Canadian Court, “Cases in Brief have been viewed almost a million times on the Court’s website.”224 Even so, Chief Justice Richard Wagner has noted that, “We discovered that we don’t seem to be reaching as many Canadians in smaller communities as we would like. We know that not everyone is online, or wants to get their news online. We know that people rely on, and very much want to support, their local news sources. And while we are always looking for new ways to reach out to

219 A media committee meets periodically with the Supreme Court of Canada and members of the Bar about improving media access to the Canadian Court. See SAUVAGEAU ET AL., supra note 27, at 13, 234.
220 Id. at 30.
221 Id. at 31.
people, ‘new ways’ doesn’t have to mean ‘new technology.’”

The Court therefore decided that local newspapers could republish its Cases in Brief free of charge. According to Chief Justice Wagner, “Letting these papers republish our Cases in Brief will bring the Court’s daily work closer to all Canadians. And it will help the public better understand how our decisions affect their daily lives.”

In a similar vein, the Canadian Court recently decided to “ride circuit,” hearing oral arguments outside of Ottawa for the first time. Hundreds of local people were able to see the Canadian Court in action in Winnipeg, Manitoba, as the Justices heard two appeals—one on the right to a trial within a reasonable time, the other on minority language education rights. On the same occasion, the Canadian Justices spoke to thousands of high school students, met with members of Indigenous groups and the francophone community, and participated in a public event at the Canadian Museum for Human Rights, where members of the public were able to speak one-on-one with the Justices. In its annual Year in Review publication for 2019, the Canadian Court observed: “The judges of the Supreme Court of Canada believe it is important for Canadians to see how our justice system works, and who its judges are. This is why the Court decided to hear cases outside of Ottawa. It gave more people the opportunity to see Canada’s highest court in person.”

B. The Federal Constitutional Court of Germany—A Popular Court

The German Federal Constitutional Court (Bundesverfassungsgericht) is a specialized court empowered to determine the constitutionality of legislation and executive actions under the Constitution—the Basic Law (Grundgesetz)—and to adjudicate disputes between the other branches of the federal government or between the federal government and the states. The Court

225  Id.
226  Id.
227  Id.
228  Id.
was founded in the post-War period and was influenced by the models of the Supreme Court of the United States and of the Constitutional Court of Austria as originally devised by Hans Kelsen. Over time, the Federal Constitutional Court has gained a central position in the German governmental system and has become the most powerful constitutional court in Europe. These facts have led Franco-German political scientist Alfred Grosser to call it “without doubt the most original and most interesting instance of the German constitutional system.” The German Court has been referred to as a popular court because it is open to the complaints of all citizens who feel that their constitutional rights have been violated. The result, according to John Ferejohn and Pasquale Pasquino, is a unique dialogue between the Federal Constitutional Court and the German people about the meaning of their Constitution. Similarly, the German Court’s President Andreas Vosskuhle has pointed out that “[t]his proximity to citizens’ everyday life is the foundation of Germans’ evident trust in the Federal Constitutional Court.” Thomas Hochmann has added that the Court has been very sophisticated—and successful—in using methods of communication to develop public support.

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231 See Vanberg, supra note 229, at 61.


234 Id. at 314.

235 Bumke & Vosskuhle, supra note 230, at 27–28. Ironically, secrecy surrounds both the manner in which Justices are chosen and the ways in which certain operations of the Court are performed. See Thomas Hochmann, La Communication de la Cour Constitutionnelle Allemande [The Ways in Which the German Constitutional Court Communicates], 33–2017 Annuaire International de Justice Constitutionnelle 17, 18 (2018) (Fr.).

236 Hochmann, supra note 235, at 18–19.
others, the Federal Constitutional Court is often described as one of the most important courts in the world; it has served as a model for newer constitutional courts, such as those of Spain, Portugal, South Africa, and South Korea.237

The Federal Constitutional Court has traditionally been cautious with respect to the press and has preferred to speak for itself through its written decisions.238 It should be noted that the German Court’s written decisions compete in terms of length with those of the United States Supreme Court, as Donald Kommers and Russell Miller have pointed out.239 Although the German Court is not required to deliver its opinions in open court, it sometimes does so in cases that it deems to be particularly important, and its rules permit the announcements to be recorded as well.240 But the German Court has a particular difficulty to overcome in that its opinions are very detailed, as well as long, and they are written in a style that is difficult for a general audience to comprehend, so that only a summary can be read in the context of an oral announcement.241 “We cannot expect that these decisions, which sometimes go on for hundreds of pages, will be understood without providing some assistance by way of explanation,” President Vosskuhle has stated.242 This recognition has led the German Court in recent years to modify its communications policy to try and help as many people as possible make sense of its decisions. But the German Court has attempted to walk a fine line—to find a middle ground between the inaccessible doctrinal language usually used in its decisions and the language common in ordinary

238 Oral arguments before the German Constitutional Court as well as public readings of judgments are rare. See KOMMERS & MILLER, supra note 229, at 27; BUMKE & VOSSKUHLE, supra note 230, at 24; Hochmann, supra note 235, at 20–21; Meyer, Explaining Media Coverage of Constitutional Court Decisions, supra note 237, at 432.
239 See KOMMERS & MILLER, supra note 229, at xxi.
241 Hochmann, supra note 235, at 22.
242 Id.
speech. To achieve this goal, the German Court has relied on a method of communication with the public that is rather indirect and focuses to a large extent on enhancing its relationship with the media. This attitude has been underscored by Vice-President Winfried Hassemer who has acknowledged that “[t]he media are the mouthpiece of the judiciary.”

In 1996, the German Constitutional Court centralized its public relations activities and established a press office that regularly prepares press releases with detailed descriptions of selected decisions and also handles inquiries from the media. This innovation occurred at a time when the German Court’s popularity had suffered because of a series of controversial decisions. The German Court’s press releases, written by the press office in collaboration with the reporting Justice, remain relatively complex and technical. But for the most part they fulfill their purpose: they allow

243 Id. at 24 (noting the opinion of some that inaccessibility enhances authority).
245 See Holtz-Bacha, supra note 232, at 108 (noting that the press office distributes about 100 press releases per year); Meyer, Explaining Media Coverage of Constitutional Court Decisions, supra note 237, at 433; Philipp Meyer, Communicating Judicial Decisions: Court Press Releases and Their Effect on the News Media 34 [Jan. 29, 2021] (Ph.D. dissertation, Leibniz University Hannover) (on file with authors) [hereinafter Meyer, Communicating Judicial Decisions] (explaining that the German Court’s public relations department is headed by a press officer who is typically a trained judge seconded from a lower court for a four-year term).
246 See Holtz-Bacha, supra note 232, at 108; Hochmann, supra note 235, at 24; Meyer, Communicating Judicial Decisions, supra note 243, at 5 (“According to the judges involved, this crisis was the result of poor communication on the part of the Court, judicial secrecy, and the comparatively considerable leeway for journalists in their reporting on courts.”).
247 See Meyer, Communicating Judicial Decisions, supra note 243, at 34–35 (“These press releases explain and summarize decisions and are structured in a standardized way: (1) a summary of the decision’s general theme and principles, which is written in layman’s terms in order to provide the public with a basic understanding of the decision; (2) a description of the decision’s circumstances and the arguments of the disputing parties; and (3) detailed elaborations on the Court’s considerations. These press releases are summaries of the decisions and entail large sections of verbatim copies.”). The German Court’s press releases are also available in English and French on the Court’s website. For example, see Press Release No. 31/2021: Constitutional Complaints Against the Federal Climate Change Act Partially Successful (Re: Order of Mar. 24, 2021, 1 BvR 2656/18), FED. CONST. CT. (Apr. 29, 2021), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemeldungen/EN/2021/bvg21-
journalists who are well-versed in constitutional law to quickly understand the decisions in order to thoughtfully communicate their meaning to the public.\textsuperscript{248} And there is some evidence that this tool has proven effective. For example, a recent study found that the media are more likely to cover a decision when the Federal Constitutional Court calls attention to it in a press release.\textsuperscript{249} Christoph Engel has noted that “[a] press release indicates that, in the Court's perception, the wider public has an interest in the particular case, or in the reasons for deciding it.”\textsuperscript{250} Hence, the German Court has learned to use this powerful institutional tool to increase the visibility of a decision and, therefore, the likelihood that it will be covered by the media.\textsuperscript{251} As President Vosskuhle explained: “Today, good press releases are indispensable for serious press coverage. Specialized legal journalists are rarely found even in national daily newspapers. It is all the more important therefore to reduce the risk of misunderstandings or even false news reports by formulating clear press releases.”\textsuperscript{252}

\textsuperscript{248} See Meyer, Communicating Judicial Decisions, supra note 245, at vii (“[T]he strategic use of press releases enables courts to increase media coverage and, therefore, facilitate public scrutiny.”); Hochmann, supra note 235, at 24.

\textsuperscript{249} Meyer, Explaining Media Coverage of Constitutional Court Decisions, supra note 237, at 439–441; see also Meyer, Communicating Judicial Decisions, supra note 245, at vii (“[T]he likelihood of media coverage of FCC decisions is higher for those that were promoted with a press release and had high news value.”).

\textsuperscript{250} Christoph Engel, Does Efficiency Trump Legality? The Case of the German Constitutional Court, in SELECTION AND DECISION IN JUDICIAL PROCESS AROUND THE WORLD: EMPIRICAL INQUIRIES 261, 270 (Yun-Chien Chang ed., 2020); see also Meyer, Communicating Judicial Decisions, supra note 245, at vii (“The findings of my dissertation confirm that press releases help a court communicate its policy agenda to the public.”).

\textsuperscript{251} We should note, however, that the studies cited here tested only the likelihood that the media would report on the German Constitutional Court’s decisions. Of course, this says nothing about the details of the content, the tone, or the framing of a news story.

The German Court also allows members of the Judicial Press Conference of Karlsruhe (JPK) to receive access to information about important judgments ahead of their official pronouncement. In some cases, this select group of journalists can pick up the press release in person from the German Court’s building on the evening before the oral announcement of a decision; in other cases, they will be notified the day before a written decision is posted online and will receive the press release an hour before the decision is made public. Either way, journalists who receive the advance information are not allowed to publish anything until the judgment is officially released. The time advantage given to the members of the JPK to read and process the press release is meant to facilitate a more accurate and nuanced immediate reporting of the German Court’s decisions. Furthermore, to provide
additional background on the German Court’s deliberative process and explain the jurisprudential basis of highly sensitive decisions, the Justices may provide members of the JPK with confidential off-the-record briefings.257

There is another feature in the German Court’s decisions themselves that makes those decisions more accessible to a wide audience of the legal community and public officials. The German Court’s decisions are preceded by several sentences, sometimes taking up several pages, which summarize the main doctrinal bases for the Court’s opinion.258 Craig Smith has explained it well:

The opinions begin with an admirable, lawyer-friendly feature: the Leitsätze, or literally “leading sentences.” These court-written statements give readers a boldly stated, extremely concise, and accurate account of the binding rules that the court has articulated in the opinion. They are thus far more satisfying and useful than the rambling reporters syllabus that, alongside an explicit warning that it “constitutes no part of the opinion,” typically precedes and simply summarizes a [U.S.] Supreme Court opinion. American lawyers can appreciate the FCC’s Leitsätze best if they recall the hours of work they must spend tracking down and searching through lengthy cases, only to see their German colleagues progress more quickly through a comparable research task simply by pulling the (Grundgesetz), a few commentaries, and a Leitsatz or two off the shelf.259

As Professor Smith further notes, “[s]he FCC also speaks with a remarkably coherent, authoritative voice. Moreover, the opinions have an organizational and rhetorical similarity that suggest a firm unanimity of purpose among the justices.”260 In addition:

Such unanimity seems stunning in light of both the unabashedly political process by which the Republic selects the justices and the court’s crucial, unavoidably political function. The court’s capacity for consensus is likewise striking. Unlike in the U.S. Supreme Court, decisions are not rendered with

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257 See Holtz-Bacha, supra note 232, at 111–12, 115.

258 See KOMMERS & MILLER, supra note 229, at xxi; Hochmann, supra note 235, at 22; Engel, supra note 250, at 269. The Leitsätze is not an element unique to the Federal Constitutional Court, but rather an element common to German decisions, especially federal court decisions.


260 Id.
five different opinions, in which Justice X joins Justice Y only in Parts I.B. and III.C. of her opinion and then, with a feisty rhetorical scalpel, unapologetically slices to bits the ideas of Justice Z. Nor will a German judge singlehandedly and openly put forth an official opinion that—despite a nearly complete refusal of fellow justices to join that opinion—nonetheless becomes widely accepted as constitutional law. That of course is what Justice Powell did when his solo opinion in the Bakke case set parameters for racial preferences in state university admissions that only now, more than two decades later, courts are gradually supplanting.261

To be sure, there is an ongoing debate in Germany as to the desirability of “popularizing” the German Court’s opinions—or making them more accessible to the public. Some believe that the German Court’s concern with public relations contributes to its special position in German society and to the acceptance of its decisions by the German public. In fact, some have called for even greater openness on the part of the Federal Constitutional Court and for a further adaptation of its work product to accommodate current realities.262 Others, however, have expressed the view that the German Court’s media initiatives are unnecessary and potentially damaging to the Court’s image. According to those critics, it is the formal, esoteric language of the law—and the distance that separates the German Court and the public—that accounts for the prestige of the judiciary and is the reason that the public holds the Court in high regard: “The opacity gives the Court its dignity, and its dignity is the foundation of its legitimacy.”263 Finally, some criticism of the German Court’s media practices emanates from politicians who feel that the Court has become too effective in media relations, so that the Court oversteps its boundaries and competes with the politicians for public attention.264 In other words, some German politicians resent the fact that opinion polls indicate that the Federal Constitutional Court is the most trusted governmental institution.265

Notwithstanding these criticisms, recent developments indicate that the German Court remains strongly committed to adopting a proactive approach to communicating and transmitting information about its decisions to the press and the public. The German Court published a detailed annual report for the first time in 2021, noting that: “With this new format, the Court

261 Id.
263 Hochmann, supra note 235, at 24.
264 See, e.g., Holtz-Bacha, supra note 232, at 115 (discussing a particular incident in which politicians criticized the FCC president).
265 See Hochmann, supra note 235, at 18–19.
aims to reach out to the public and to domestic and foreign institutions in particular, seeking to provide information about the Court’s role and its work, its structure and the different types of proceedings. Going beyond the publication of mere statistical data, the Court has created the annual report to make it easier to access and comprehend the information provided and to put it in context.”

The 100-page report, which provides an accessible and comprehensive account of the German Court and its work, was made available in both German and English versions on the Court’s website.

Besides providing general information about the German Court’s structure, its institutional role in the overall constitutional order, and the Court’s daily work, the report contains a detailed overview of several important judicial decisions that were rendered in the previous year, together with short summaries of other decisions in a section entitled “Cases in Brief.” The report concludes with an outlook on cases expected to be decided by the German Court in the following year.

More recently, on the 70th anniversary of the founding of the Federal Constitutional Court, the Court launched a series of short films aimed at the general public. These films, which feature the Justices themselves, along with dramatic music and advanced cinematic techniques, are sophisticated and highly professional examples of public relations work. The first film, “Behind the Justices’ Decisions—An Inside Look at the Federal Constitutional Court,” takes viewers behind the scenes at the Court, showing how judgments and orders are prepared; introducing the Justices, the law clerks, and other members of the Court’s staff; explaining the Court’s role in the German constitutional scheme as well as its internal procedures; and providing a unique glimpse inside the Court’s building in Karlsruhe. Another film presents a compilation of news broadcasts by German television channels on major decisions issued by the German Court over the years.

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This film includes audio-visual footage of the German Court’s judgment concerning the prohibition of the communist party KPD in 1956 as well as a news report on the German Court’s 2021 order concerning climate change. At bottom, the publication of the annual report and the new “corporate videos” represent the most obvious attempt by the German Court to find new ways to reach out to the public and to additional audiences, and it exemplifies President Vosskule’s emphatic assertion that “courts . . . must repeatedly confront themselves critically with the question of how the law can be made clearer and more understandable.”

C. The Supreme Court of Israel—The Citizens’ Court

The Supreme Court of Israel has been regarded since its inception as a strong, independent, and prestigious institution within the Israeli polity. Israel’s Supreme Court wears two hats: it is the highest Court of Appeals and it also sits as the High Court of Justice (Bagatz). Like several other formerly British-ruled territories, Israel inherited the British common law and continues to function without a formal, integrated document known as “the constitution.” Instead, the legislature (Knesset) has enacted several Basic Laws that the Supreme Court of Israel proclaimed—in a landmark
decision in 1995—to enable it to review the constitutionality of ordinary laws.\(^{273}\) Thus, in its capacity as the HCJ, the Israeli Court functions today as a court of first instance, the original jurisdiction for all constitutional review cases in the country: petitions are brought to it directly, rather than coming up on appeal from lower courts.\(^{274}\) Moreover, access to the HCJ is extremely easy.\(^{275}\) The Israeli Court has virtually eliminated judicial access doctrines,

\(^{273}\) CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221 (1995) (Isr.), translation at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/United%20Mizrachi%20Bank%20v.%20Migdal%20Cooperative%20Village_0.pdf [https://perma.cc/N66Y-4VHS]; see also NAVOT, supra note 271, at 42–50 (discussing the “constitutional revolution” that ensued from the United Mizrahi Bank decision); id. at 166 (“In a manner similar to the American ruling in Marbury v. Madison, it was the constitutional status of Israel’s basic laws that provided the basis for the Court’s power to judicially review laws that contradicted basic laws.”); ZEMACH, THE JUDICIARY IN ISRAEL, supra note 272, at 103–04 (discussing constitutional review in Israel); Daphne Barak-Erez, From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective, 26 COLUM. Hum. Rts. L. Rev. 309 passim (1995) (providing an historical overview of the political and legal circumstances leading up to the United Mizrahi Bank decision); Rivka Weill, Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care, 30 BERKELEY J. INT’L L. 349, 350 (2012) (“[I]n the 1995 United Mizrahi Bank decision, the Israeli Supreme Court seized upon this opportunity to declare not only the existence of a formal Constitution in the form of Basic Laws, but also the resulting Court power of judicial review over primary legislation.”); Rivka Weill, Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power, 39 HASTINGS CONST. L.Q. 457 (2012) (analyzing the revolutionary effect on Israeli constitutional law of the United Mizrahi Bank decision); Adam Shinar, Israel’s External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction, 57 VA. J. INT’L L. 735, 738–40 (2018); providing a brief overview of Israeli constitutional law and explaining the significance of the United Bank Mizrahi decision); Ginsburg, Economic Analysis and the Design of Constitutional Courts, supra note 272 (“The Israeli system illustrate how judicial review can also be adopted in established democracies as political configurations change.”).

\(^{274}\) NAVOT, supra note 271, at 168–69.

\(^{275}\) See AHARON BARAK, THE JUDGE IN A DEMOCRACY 298–99 (2006) (“Our point of departure in Israel has been that the doors of the Supreme Court . . . are open to anyone wishing to complain about the activities of a public authority. There are no black holes where there is judicial review. The open door approach is expressed in a number of ways. First, it is very rare that the court would close its doors on the ground of non-justiciability. . . . Second, the court opens its doors to anyone claiming that civil rights have been violated. Everyone is standing.”); YOAV DOTAN, LAWYERING FOR THE RULE OF LAW 29 (2014) (“I doubt whether there is any other Supreme Court around the world to which access is as easy as the HCJ.”); ZEMACH, THE JUDICIARY IN ISRAEL, supra note 272, at 75 (noting that the court fees for filing a petition are low and that the procedure is simple and flexible); MAUTNER, supra note 270, at 57 n.12 (explaining that an application to the HCJ is inexpensive, representation is not needed, and there are no witnesses or regular trial procedures).
such as standing and justiciability, and it has severely curtailed or softened other procedural barriers. Today, therefore, as Yoav Dotan observes, "whenever a petition raises an issue of important constitutional merit, or when there is a suspicion of serious governmental violations of the principle of the rule of law, any person is entitled to bring the petition into court, regardless of their personal interest in the outcome of the litigation." Professor Dotan further asserts that "there is hardly a political controversy, an issue of public importance, or a contemporary moral dilemma that does not find its way, sooner rather than later, as a subject of a petition to this judicial forum." Robert Bork has been more critical in his assessment: "Pride of place in the international judicial deformation of democratic government goes not to the United States, nor to Canada, but to the State of Israel. The Israeli Supreme Court is making itself the dominant institution in the nation, an authority no other court in the world has achieved."

The growing role of the Supreme Court of Israel and the ensuing criticism from politicians and academics has been accompanied by an increase in coverage of legal affairs by the press. These developments have pushed the Israeli Court to acknowledge over the years that it has something to gain from a more open communications approach. To be sure, judicial distance from the media and an ethos of letting the decisions "speak for themselves" still dominate the attitude of the Justices on the Israeli Supreme

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277 DOTAN, supra note 275, at 37.

278 Id. at 41. If there is one thing that epitomizes the activism of Israel’s Supreme Court, it is a saying by Justice Aharon Barak, the Court’s Chief Justice for twelve years and the person most closely identified with the Court’s current jurisprudence: “The whole earth is full of law. Any human conduct is the object of a legal norm.” MAUTNER, supra note 270, at 3.


280 See MAUTNER, supra note 270, at 166–69 (“References to the Supreme Court in insulting and offensive terms, unimaginable in any Western country, began to appear as a matter of routine.”); Bryna Bogoch & Yifat Holzman-Gazit, Mutual Bond: Media Frames and the Israeli High Court of Justice, 33 LAW & SOC. INQUIRY 53, 54 (2008) (“In Israel, as elsewhere, there has been an expansion of the role of the Supreme Court and a growing media concern with rights consciousness, alongside a shift to a more aggressive style of journalism.”); Bogoch & Peleg, supra note 276, at 166–68 (finding that the Supreme Court of Israel’s increased activism was accompanied by an increase in media coverage of the Court’s activities).
Indeed, the Code of Judicial Ethics, which several Justices helped to draft, includes ethical canons that underscore the fact that judges should avoid all direct interactions with the media. The Code states, for example, that “a judge speaks only through written judgments and decisions. As a rule, a judge should not grant interviews or give any sort of information to the media.” The Code further provides that “a judge should refrain from appearing or giving interviews to the media. An appearance or interview of a judge in the media—including in the press, radio, television, internet, at a press conference, or in any other way—must get a prior approval of the President of the Supreme Court.”

Perhaps most notably, the Code of Judicial Ethics requires that “a judge should refrain from publicly expressing an opinion on a matter that is essentially non-legal and is publicly controversial.”

But it seems that the Israeli Supreme Court, as an institution, is refusing to stay passive in light of attacks against it and is beginning to test new ways of communicating its work to the media and the public.

Cameras and audio recordings—except on very rare occasions—are banned from all Israeli courtrooms. Aside from photographing the judges entering the courtroom, or broadcasting ceremonial occasions such as when a judge reads his or her last decision before retiring, there is a strict prohibition on any type of broadcast from any courtroom. In 2014, Court, Indeed, the Code of Judicial Ethics, which several Justices helped to draft, includes ethical canons that underscore the fact that judges should avoid all direct interactions with the media. The Code states, for example, that “a judge speaks only through written judgments and decisions. As a rule, a judge should not grant interviews or give any sort of information to the media.” The Code further provides that “a judge should refrain from appearing or giving interviews to the media. An appearance or interview of a judge in the media—including in the press, radio, television, internet, at a press conference, or in any other way—must get a prior approval of the President of the Supreme Court.”

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however, the Israeli Court decided for the first time to allow the live broadcasting of oral arguments in a constitutional case. This was part of an experiment to test the viability of televising cases deemed to be of special public interest. There was some speculation at that time that the only reason the Israeli Court permitted this broadcast was to forestall the enactment of proposed legislation that would have allowed unrestricted radio and television broadcasts of hearings at the HCJ. After that bill failed to gain momentum, and until recently, it seemed that the 2014 broadcast was indeed a one-off. However, at the beginning of 2020, Justice Esther Hayut, the President of the Supreme Court of Israel, announced her support for a more open communications approach and set out a tentative plan for streaming proceedings from the HCJ. This announcement came at a time when strict restrictions and lockdowns went into effect due to a widespread surge in Covid-19 infections. President Hayut emphasized the significance of allowing the public a chance to tune in to live broadcasts from the HCJ, given the limits that were imposed on large gatherings. While the pandemic that restricted the access of journalists and citizens to courtrooms

https://www.gov.il/he/departments/news/spokemenmessage040122


Bogoch & Peleg, supra note 276, at 172; Maanit, First Television Broadcast from the Supreme Court, supra note 289.

See Yair Sheleg, Live Broadcasts from the Supreme Court Will Shine Sunlight on Proceedings, JERUSALEM POST (May 14, 2020, 11:00 PM), https://www.jpost.com/israel-news/live-broadcasts-from-the-supreme-court-will-shine-sunlight-on-proceedings-628085 [https://perma.cc/X93L-6JHR] (“The decision of the chief justice of the Supreme Court, Esther Hayut, to allow live broadcasts of the court’s recent proceedings may prove to be one of the most important rulings in the history of the court.”); Bandel, supra note 290.

was a notable catalyst, it should be noted that plans to allow television broadcasts from the Supreme Court of Israel had long been contemplated.

The Israeli Court has since authorized the broadcasts of hearings in several constitutional cases. Perhaps most prominent was the challenge that the HCJ heard to then-Prime Minister Benjamin Netanyahu’s leading a new government while facing criminal indictments for potential bribery and fraud. Interestingly, President Hayut offered at the beginning of each hearing day an introduction to the issues in ordinary language. This had never been done before, and it surely was intended to help the national audience better understand the case. The ratings were exceptional. The overall viewing across the range of broadcasting platforms during the two days the hearing took place was estimated at about one and a half million views. Nitza Chen, the Director of the Government Press Office who orchestrated the recent broadcastings from the HCJ, has noted that “it was an unforgettable, fascinating, and historical learning experience.” Chen believes that “the ratings show that we may have spotted a real need in the Israeli society to understand the legal debate not through intermediaries but directly. Until today, only journalists would come to the hearing. There is something in this new development that can be taught in journalism and media schools. The quality of journalistic reporting has definitely improved thanks to the broadcasts.” Jacob Turkel, a retired Justice, has objected in the past to the idea of allowing cameras inside the Supreme Court’s courtrooms. But after watching the live broadcast, he acknowledged that he might have overlooked its merits: “When I saw the hearings on television, I realized that there might also be a positive educational side to it, that the public can see that a discussion can be conducted with civility. It can also affect the way other debates are handled, not necessarily in the Court.”

Furthermore, the Israeli Court is trying to facilitate timely and accurate news reporting through short summaries of important decisions, which are distributed to reporters at the same time that the decisions are released to the public. This facilitates the work of journalists and helps them grasp more quickly the finer points of the decisions. Indeed, these summaries are often

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295 Id.
296 Id.
297 Id.
used in the hours after a decision is announced when reporters are searching for the quintessential excerpts from the Justices’ opinions. It is noteworthy that each Justice is allowed to write his or her own outline of the opinion to be included in the summary. While this means that summaries still make use of complex legal jargon, it maintains the autonomy of the Justices and their distinctive views on the matters at issue. More recently, the Israeli Court took the unusual step of releasing a Q&A document shortly after the announcement of a major constitutional ruling on the right to citizenship for foreigners who converted to Judaism in non-Orthodox communities within the state of Israel.298 The document was written in plain language, with the deliberate purpose to better explain the reasons for the long-awaited and contested decision to reporters and the public.299 Furthermore, at the end of each year the Israeli Supreme Court prepares and publicizes reviews of its most important decisions divided into the various areas of law. In contrast to the summaries mentioned above, the reviews are drafted in reader-friendly language with “ready-to-use” information that is routinely reprinted by the press. This technique enables the Israeli Court to encourage the media to report on the decisions in more mundane cases and thereby draw more attention to the work of the Justices that affects the daily lives of citizens.

In recent years, some Presidents of the Supreme Court of Israel have reportedly consulted public relations experts. Justice Dorit Beinisch, who served as the President of the Israeli Court from 2006 to 2012, was reported to have secretly consulted with a private public relations firm that volunteered to plan a campaign against reforms that were proposed by the Minister of Justice and would have purportedly constrained the Court’s jurisdiction.300 In 2018, President Hayut also reportedly hired a public relations advisor whose main task was to build a digital media strategy and improve the Israeli


299 The Q&A document was republished verbatim in several newspapers and contained such questions as: Why did the Court have to decide the issue of non-Orthodox conversion? Did the Court consider the religious validity of non-Orthodox conversion? Is there legal novelty in the decision? What was the law before the decision, and what is the binding law after the decision? Does the ruling close the door for other political arrangements? What did the concurring opinion suggest?

300 Bogoch & Peleg, supra note 276, at 177.
Court’s public image.\(^{301}\) One reporter recently noted that, “President Hayut’s decision to hire a professional communications consultant was largely at odds with the Supreme Court’s ethos—an ethos in which the Justices, distanced from the people, ‘speak’ to the public only through the written decisions. Hayut has apparently come to the conclusion that the old-fashioned ethos is no longer relevant, and that it can no longer exist in a world of social networks, frenetic public discourse, and weekly attacks on the Supreme Court’s Justices and their rulings by highly-regarded politicians.”\(^{302}\)

The reporter went on to say that “the President realized that times had changed, that the Justices could no longer afford the luxury of sitting in the ivory tower and treating the media as a nuisance—a luxury that led the Supreme Court to become the punching bag of right-wing politicians looking to gain sympathy in their electoral base.”\(^{303}\) Taken together, these recent developments seem to reflect the Israeli Supreme Court’s understanding that it must engage in “the media wars” or suffer the consequence of a diminished public image.\(^{304}\)

IV. THE SUPREME COURT OF THE UNITED STATES CAN BENEFIT FROM THE STRATEGIES THAT OTHER CONSTITUTIONAL COURTS HAVE ADOPTED

As constitutional courts across the world have come to play a more pivotal role in their respective democracies,\(^{305}\) citizens have become more interested

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303 Id.

304 Cf. Ayala Procaccia, Media, Law, and the Court, in ELYAKIM RUBINSTEIN BOOK 1297 (Aharon Barak et al. eds., 2021) (arguing that the judiciary should play a larger role in strengthening its relationship with the media and the public).

305 See, e.g., THEUNIS ROUX, THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW 1 (2018) (“The adoption of a system of ‘strong-form’ judicial review poses the perennial question of law’s relationship to politics in a particularly stark form… . Unless and until judicial review is disestablished, the judiciary may assert final decision-making power over aspects of public policy formerly reserved to the political branches. Political actors, in turn, may either embrace this move, cognizant of judicial review’s legitimating potential, or push back against it, arguing that the judiciary has overreached its authority.”); GAROUPA & GINSBURG, JUDICIAL REPUTATION, supra
in the judgments of these courts and in the ways in which the courts’ activities may affect their lives and livelihoods. As we have seen, some constitutional courts have met this challenge by demonstrating a more proactive approach in their communications with the press and the public. The judicial trend toward greater and more effective communications seems consistent with the fundamental values of a modern democratic society and shows that the United States Supreme Court’s hard line against change cannot be justified on grounds of principle.

At the most basic level, what makes the judiciary unique is its institutional obligation to explain its decisions. As we have shown, it is the essence of the judicial office that judges must explain the reasons for their actions. Truly, “the legal mind must assign some reason in order to decide anything with spiritual quiet.” As Alexander Hamilton wrote in *Federalist 78*, “The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment.” And, as Herbert Wechsler famously wrote, “The virtue
or demerit of a judgment turns . . . on the reasons that support it.”308 Justice Ginsburg made the same point when she observed that, “A judgment expressing no reasons presents the appearance of arbitrariness.”309 Most important, as Joseph Goldstein has pointed out, “[t]he notion that the so-called counter-majoritarian branch of the government need not tell all the reasons or the ‘real’ reasons for its decisions is a form of secrecy that offends democracy.”310

But it is not enough that reasons be given in some form that might be decipherable by some citizens having specialized knowledge. Courts should not only explain the reasons for their decisions, they should do so in a way that can be understood by those whose lives are affected by them.311 This is especially important in the case of the Supreme Court, which “makes independent and impartial decisions about issues that matter to everyone. This is a crucial task. That’s why it is important that people understand how and why a given decision was reached.”312 And it is most important when


310 Goldstein, supra note 20, at 115; see also Rostow, supra note 60, at 83 (“In the climate of a democracy, I hope it will never be enough for those whom we have chosen to govern us to say: ‘Obey us, for we are the law. Hold your peace, and do what you are told to do by a policeman, a judge, or a legislature.’ We are a law-abiding people. . . . But we want to know—‘we have the right to know—why the law we must obey is what it is.”); Gerard Brennan, The Third Branch and the Fourth Estate, 32 IRISH JURIST (N.S.) 62, 67 (1997) (“By sitting in public and by publishing their reasons for judgment, the judges give an account of the exercise of their judicial powers.”).

311 See Brett M. Kavanaugh, The Judge as Umpire: Ten Principles, 65 Cath. U.L. Rev. 683, 690 (2016) (“[T]o be a good judge or a good umpire, you have to be clear in explaining why you have made the decision you made.”).

312 Year in Review 2019, supra note 227 (emphasis removed); see also Garoupa & Ginsburg, Judicial Reputation, supra note 31, at 6–7 (noting Justice Sonia Sotomayor’s particular interest in the intelligibility of her opinions, as evidenced by the clarity of her dissent in Schuette v. Coalition of Defend Affirmative Action); David Fontana, The People’s Justice, 123 YALE L.J. 447, 447 (2014) (observing Justice Sonia Sotomayor’s distinctive approach “to communicate outside of [her] judicial opinions with average Americans” in order to make her “liberal perspective on the Constitution more known, more liked, and more comprehensible.”); Barry Sullivan, The Honest Muse: Judge Wisdom and the Uses of History, 60 Tul. L. Rev. 314, 325 (1985) (discussing Judge Wisdom’s view that judicial opinions should be comprehensible to the public); Brennan, The Third Branch and the Fourth Estate, supra note 310, at 62 (“In a democracy, the rule of law is not achieved by raw power but by public acceptance of the law and by public confidence in the institutions which promulgate and administer it.”).
the Court is deciding constitutional questions.\textsuperscript{313} In \textit{McCulloch v. Maryland}, Chief Justice Marshall emphasized that “only [the] great outlines [of a constitution] should be marked, its important objects designated,” because, otherwise, the Constitution would require the “prolixity of a legal code” and “could scarcely be embraced by the human mind. It would, probably, never be understood by the public.”\textsuperscript{314}

The written Constitution was intended, as Michael Kammen has observed, to be accessible and fully comprehensible to the American people.\textsuperscript{315}

\textsuperscript{313} Justice Joseph Story believed, for example, that it was his “duty” in constitutional law cases “to give a public expression of [his] opinions, when they differed from that of the Court,” explaining that “upon constitutional questions, the public have a right to know the opinion of every judge who dissents from the opinion of the Court, and the reasons of his dissent.”\textsuperscript{316} Briscoe v. Bank of the Commonwealth of Kentucky, 36 U.S. (11 Pet.) 257, 329, 350 (1837) (Story, J., dissenting); see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 223 (1824) (Johnson, J., concurring) (“I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way.”); Kramer, supra note 25, at 248 (“[W]e should refuse to be deflected by arguments that constitutional law is too complex or difficult for ordinary citizens. Constitutional law is indeed complex, for legitimating judicial authority has offered an excuse to emphasize technical requirements of precedent and legal argument that necessarily complicated matters. But this complexity was created by the Court for the Court and is itself a product of judicializing constitutional law.”).

\textsuperscript{314} 17 U.S. (4 Wheat.) 316, 407 (1819). It could not be otherwise because “[t]he government of the Union, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”\textsuperscript{317} C. материалов District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (“[T]he Constitution was written to be understood by the voters.”) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)); Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 1 (1991). President Franklin Roosevelt also emphasized that the Constitution “was a layman’s document, not a lawyer’s contract” in his 1937 Constitution Day Address. Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937) (transcript available at https://www.presidency.ucsb.edu/documents/address-constitution-day-washington-dc [https://perma.cc/SC7X-XU8V] last visited Jan 23, 2021]). Interestingly, Roosevelt made that observation in a speech that he delivered shortly after a series of adverse Supreme Court decisions and the defeat of his “court-packing” plan. See, e.g., Cushman, Rethinking the New Deal Court, supra note 86, at 11–32 (discussing Roosevelt’s court-packing plan); Leuchtenburg, supra note 137, at 82–154 (same). One historian has described the speech as “a scorching Constitution Day speech . . . [in which he] blast[ed] those who cried ‘unconstitutional’ at every effort he made to improve the condition of the American people.” Susan Dunn, Roosevelt’s Purge: How FDR Fought to Change the Democratic Party 13 (2010). In his First Inaugural Address, President Roosevelt had stated that, “Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. That is why our constitutional system has proved itself the most superbly enduring political mechanism the modern world has produced. It has met every stress of vast expansion of territory, of foreign wars, of bitter internal strife, of world relations.” Franklin D. Roosevelt, Inaugural Address, Mar. 4, 1933, in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11, 14–15 (compiled by Samuel I. Rosenman, 1938). The Supreme Court, of course, did not share that vision of the Constitution. See, e.g., Leuchtenburg, supra note 137, at 132–33.
people.\textsuperscript{315} And Eugene Rostow has noted that, “the people cannot do their part in the constitutional process unless they understand it. It is therefore a matter of the utmost importance that the people know about the Constitution and its history, and about the way in which it has been interpreted and applied, decade after decade, as the basic law of a vast, complex, and dynamic society.”\textsuperscript{316} For that reason, as Professor Goldstein emphasized, “the justices, as members of a collective body, have an obligation to maintain the Constitution, in opinions of the Court and also in concurring and dissenting opinions, as something intelligible—as something that We the People of the United States can understand. Whether the justices be activists or passivists, they have a professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest. . . . It is to ensure the continuing accessibility of the Constitution to the People.”\textsuperscript{317} It is important that constitutional decisions be intelligible to the public, but it is equally important that they be intelligible to the other branches of government, which are responsible both for enforcing those decisions and for acting in conformity with them.\textsuperscript{318}

The current, widespread availability of judicial decisions and other forms of juristic commentary in electronic form might lead some to conclude that citizens can easily acquaint themselves with the content of those materials.\textsuperscript{319} The reality, however, is more complicated. The meaning of the Constitution

\textsuperscript{315} KAMMEN, supra note 18, at 3; see also H. J. FENTON, CONSTITUTIONAL LAW 22 (rev. ed. 1914) (“[T]he Federal Constitution can be read through in less than half an hour. It was made short for a purpose. It was intended to be a people’s Constitution, easily to be read and understood.”).

\textsuperscript{316} ROSTOW, supra note 60, at 83; see also Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring) (“Those who won our independence believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”).

\textsuperscript{317} GOLDSTEIN, supra note 20, at 19, 112; see also Lerner, supra note 26, at 180.

\textsuperscript{318} See, e.g., VANBERG, supra note 229, at 48–49 (“The more clearly an opinion enunciates the constitutional principles that sustain the decision, as well as the implications of the decision for policy, the easier it is to verify whether a legislative response complies with the ruling. . . . Specificity of judicial language may be a response to the problem of transparency.”); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 6 (1998) (“[P]roponents of expanded judicial protection for rights should not place all hope in judges or constitutional reform but should provide support to rights-advocacy lawyers and organizations. . . . [F]or they establish the conditions for sustained judicial attention to civil liberties and civil rights and for channeling judicial power toward egalitarian ends.”).

\textsuperscript{319} Roberts, supra note 176, at 2 (suggesting that the posting of an electronic copy of a lengthy decision is helpful to readers in the same way that Chief Justice Warren intended for the Court’s brief opinion in Brown v. Board of Education to aid readers in understanding that decision.).
is not always obvious; nor is “the law of the Constitution,” that is, the jurisprudence or body of judicial opinions expounding the meaning and proper application of the Constitution, which build one upon another. Indeed, in our tradition of common-law constitutionalism, precedents

320 See, e.g., John Paul Stevens, Judicial Restraint, 22 SAN DIEGO L. REV. 437, 437 (1985) (“The Constitution of the United States is a mysterious document. The wisdom that created the Constitution is evidenced not only by the handful of clues that are set forth in its text, but also by what the document does not say.”); Clarence Thomas, Judging, 45 U. KAN. L. REV. 1, 5–6 (1996) (“[J]udging is a difficult challenge because the Constitution itself is written in broad and sometimes ambiguous terms. Unfortunately, the Constitution does not come with Cliff’s Notes or a glossary. When it comes time to interpret the Constitution’s provisions, such as, for instance, the Speech or Press Clauses of the First Amendment, reasonable minds can certainly differ as to their exact meaning.”); Antonin Scalia, Is There an Unwritten Constitution?, 12 HARV. J.L. & PUB. POL’Y 1 (1989) (“Many, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the historical background in which they were adopted.”); THE FEDERALIST NO. 37, supra note 307, at 236 [James Madison] (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”); ROSTOW, supra note 60, at 93 (“The political content of the judge’s work is therefore to interpret and enforce the broad intention of the Constitution. That task is rarely easy, since few provisions of the Constitution are beyond ambiguity.”); GREENE, supra note 72, at 91 (“The U.S. Constitution is not a code. Many of the rights Americans hold most dear, and nearly all the rights we argue about, are absent from the text. . . . [And] most of its rights provisions are surprisingly vague.”); Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 1 (1979) (“The values that we find in our Constitution—liberty, equality, due process, freedom of speech, no establishment of religion, property, no impairments and unusual punishment—are ambiguous. They are capable of a great number of different meanings.”).

321 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); Felix Frankfurter, The United States Supreme Court Molding the Constitution, 32 CURRENT HIST. 235, 240 (1930) (“In good truth, the Supreme Court is the Constitution.”); Robert G. McCloskey, Principles, Powers, and Values: The Establishment Clause and the Supreme Court, 2 RELIGION & PUB. ORD. 3, 3 (1964) (“American constitutional history has been in large part a spasmodic running debate over the behavior of the Supreme Court.”).

322 See, e.g., Kenneth F. Ripple, On Becoming a Judge, 34 FED. B. NEWS & J. 380 (1987) (“Continuity is a constitutional character of the federal judiciary.”); Arthur S. Miller, Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron, 38 U. DET. J. URB. L. 573, 583–84 (1981) (“To expect a ‘coherent’ body of constitutional law from a telocratic Supreme Court is to ask for the impossible. Law is a process, not a set of internally consistent principles; it is Darwinian, not Newtonian.”); cf. Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1381 (2006) (“One lesson of American constitutional experience is that the words of each provision of the Bill of Rights] tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question.”).

323 See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 5 (1991) (“The ways in which Americans interpret the Constitution could have been different; indeed the forms of constitutional discourse are very different in other societies. For Americans, however, these ways have taken the form of common-law argument, those forms prevailing at the time of the drafting and ratification
necessarily accumulate, and the Justices speak about the cases they decide in terms of analogies to previous cases, more often than they resort to the text, which may be incapable of providing an unambiguous answer in any event. As former Solicitor General Charles Fried has noted, “Argument from precedent and by analogy . . . allow[s] the Constitution to be applied to changing circumstances. . . . Even in constitutional cases, precedent and analogy are the stuff of legal argument, and . . . legal argument is what moves the Court—or moves it when all involved are doing their work right.” It is clear, therefore, that a case decision seldom stands on its own, conveying the whole of the relevant law. Each judicial opinion must be understood in its context and case law antecedents. This requirement creates complexity of the US Constitution.”); Rostow, supra note 60, at 84 (“[T]he common law is the matrix of our constitutional law, providing its atmosphere, its modes of action, and the creative vigor with which it defines the role of judges.”); David A. Strauss, The Living Constitution 3 (2010) (“Our constitutional system . . . has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself.”); William H. Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693 (1976) (discussing the concept of a “living Constitution” and tracing the origin of the term to Howard Lee McBain’s 1927 book The Living Constitution); K. N. Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1, 3 (1934) (“A recanvas of the nature of any working constitution, and especially ours, as being in essence not a document, but a living institution built (historically, genetically) in first instance around a particular Document, would make clear both the fact of and the reasons for the major vagaries of the Court’s action.”); see also Edwards v. Canada (Attorney General) [1930] AC 124, 1929 UKPC 86 [44] (appeal taken from Can.) (articulating the Canadian “living tree” constitutional doctrine); Arthur W. Machen, Jr., The Elasticity of the Constitution (part 1), 14 Harv. L. Rev. 200, 204–05 (1900) (rejecting the view that the Constitution “ought to prove elastic and adaptable to changed conditions; . . . [And that it is] not dead but living.”); Yaniv Roznai, Unconstitutional Constitutional Amendments 147 (2017) (“[E]ven if we conceive of the constitution as a living tree that must evolve with the nation’s growth and develop with its philosophical and cultural advancement, it has certain roots that cannot be uprooted through the growth process. In other words, the metaphor of a living tree captures the idea of certain constraints: ‘trees, after all, are rooted.’”); see generally Vicki C. Jackson, Constitutions as “Living Trees”? Comparative Constitutional Law and Interpretive Metaphors, 75 Fordham L. Rev. 921 (2006).

Sometimes the Court’s decisions differ considerably from the language of the text of the Constitution. The Eleventh Amendment is, of course, a prime example of this phenomenon. See, e.g., Louis H. Pollak, Judging Under the Aegis of the Third Article, 51 Case W. Res. L. Rev. 399, 408–12 (2001) (discussing Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), as an example of the Supreme Court’s deviation from constitutional text).


See Missouri v. Holland, 232 U.S. 416, 433 (1914) (Holmes, J.) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by
because the task of integrating new judicial opinions into the story of past decisions and other legal sources is only occasionally straightforward. And this complexity is especially difficult for lay people—including journalists. As Akhil Amar has said, journalists “may well be unaware of the deep wisdom of the past. . . . Many journalistic writers who lack extensive legal expertise may not be up to the task of a detailed and critical appraisal of judicial opinions and judicial practices.” Thus, one veteran journalist has referred to the Court as “the worst reported and worst judged institution in the American system of government.”

Against this background, the Supreme Court’s apparent lack of concern for the press, and its reluctance to take steps to make it easier for the press to report on the work of the Court, seem especially rigid, if not self-defeating. The Court’s basic posture ignores the critical role of professional journalists as information brokers as well as the fact that it is through the press that judicial decisions are communicated to the public. As Justice Brennan said, “the Court has a concomitant need for the press, because through the press the Court receives the tacit and accumulated experience of the nation, and—because the judgments of the Court ought to instruct and inspire—the Court needs the medium of the press to fulfill this task.”

Correspondingly, Professor Amar has pointed out that while the Supreme Court’s current
communication practices may not literally abridge freedom of speech, they are inconsistent with the Court’s own teaching about free expression and the role of public discourse in a democracy; they violate the presumption of governmental openness that should generally apply to American institutions; and they are contrary to the practices of every comparable court in the land.  

Professor Amar rightly argues that the Court’s practices inhibit the kind of robust and timely public discourse that, according to the Court’s own doctrine, lies at the heart of the First Amendment and at the core of our constitutional values.

Moreover, the Supreme Court’s unbending position overlooks the fundamental changes that journalism in the United States has experienced in recent years. As we have noted, the ownership of traditional media has passed to conglomerates, hedge funds, and other corporate interests that are often more interested in profit than in journalism. Certainly, these owners have little cause to be interested in the well-being of the local communities in which they happen to have invested. At the same time, newspaper readership has fallen, together with advertising revenue. Traditional newsrooms have been decimated in efforts to cut costs, and only a few news outlets are able or willing to pay for specialized reporting such as international news, sophisticated financial reporting, or reporting on the courts. Professor Amar may have understated the case when he observed that, “[I]n the complex encounter between journalism and constitutionalism, professional journalists generally lack the time, the temperament, and the training to do all that needs to be done to keep the constitutional system honest.”

Traditional media have also become more ideologically differentiated and more closely identified with a particular political party, faction, or belief system; and diversified media companies have concentrated on developing the more profitable aspects of their businesses—a trend that often privileges entertainment over journalism. As politics in the United

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332 AMAR, THE CONSTITUTION TODAY, supra note 10, at 113–14, 119; see also Gravel v. United States, 408 U.S. 606, 661 (1972) (Brennan, J., dissenting) (noting the importance of the public being informed “about matters relating directly to the workings of our Government.”).

333 AMAR, THE CONSTITUTION TODAY, supra note 10, at 119; see also Thomas I. Emerson, Legal Foundations of the Right to Know, 1976 WASH. U. L. Q. 1, 2 (1976) (“It is clear . . . that the right to know fits readily into the [F]irst [A]mendment and the whole system of freedom of expression.”); Barry Sullivan, FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,” 72 Md. L. REV. 1, 39 (2012) (“What . . . would be the use of giving to American citizens freedom to speak if they had nothing worth saying to say?”) (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 102 (1948)).

334 AMAR, THE CONSTITUTION TODAY, supra note 10, at 111.
States has become more polarized, and facts more relativized, the traditional media have followed suit. The world of journalism has also become more fragmented, with traditional media sharing the market for news with various electronic platforms to which many actors contribute information and opinion, often with little or no editing, fact-checking, or curation.\textsuperscript{335} In addition, powerful political figures have sought to discredit mainstream news outlets as purveyors of “fake news.”

Indeed, the appearance of new forms of media may seem to have moved the goal posts. The need to interact with web-based media like online blogs, Twitter, Facebook’s News Feed, and other similar platforms put today’s courts to the test.\textsuperscript{336} These new media constitute powerful means to provide information to the public about judicial decisions, but they also enable the rapid spread of false and misleading information.\textsuperscript{337} In that regard, Chief Justice John G. Roberts, Jr. has warned about the dangers of misinformation in the internet era, saying that “[i]n our age, when social media can instantly spread rumor and false information on a grand scale, the public’s need to understand our government, and the protections it provides, is ever more vital.”\textsuperscript{338} Similarly, Justice Neil Gorsuch has recently written about the changing media landscape and the possible dangers of new online platforms.\textsuperscript{339} “The bottom line,” Justice Gorsuch observed, “[i]s that

\textsuperscript{335} See GREENE, supra note 72, at 142–43 (“The reasons for polarization are many. . . . [And the] trend is amplified by broader, and independently challenging, changes to the media environment. Even as technology has made it easier for us to get around and to connect with others, our lives have become Balkanized. We are segregated, both residentially, subdivided into ‘communities’ and ‘developments,’ and socially, hived off into online networks whose members share our background and values. Trusted intermediaries, the Walter Cronkites of old, are increasingly hard to come by, leaving us with personalized Facebook and Twitter feeds and citizenship in either a Fox News America or an MSNBC America. They are easy to mistake for two different countries.”).

\textsuperscript{336} HESS & HARVEY, supra note 187, at 21, 34 (explaining that the dissemination of the content of judicial proceedings through social media “means that anyone may ‘report’; anyone may act as a journalist without being one by profession. Such new possibilities also raise the question of whether there is a need to distinguish more clearly between professional journalists, who are generally subject to their own codes of conduct, and members of [the] general public sitting in the audience”).

\textsuperscript{337} See McLachlin, The Relationship Between the Courts and the Media, supra note 189.

\textsuperscript{338} Roberts, supra note 176, at 2.

\textsuperscript{339} Berisha v. Lawson, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting) (asserting that the Court should have heard a challenge to its 1964 landmark holding in New York Times v. Sullivan) (“Since 1964, however, our Nation’s media landscape has shifted in ways few could have foreseen.”); id. (“[T]hanks to the revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world.”) (citing David A. Logan, Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 739,
publishing without investigation, fact-checking, or editing has become the optimal legal strategy.... Combine this... with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.”

But the Court’s practices seem contrary to Chief Justice Roberts’s and Justice Gorsuch’s exhortations and are lagging considerably behind what would be required to make judicial decisions more accessible and understandable to the public in today’s world.

The public’s perception that the Supreme Court, like other constitutional courts, has now become an important player in the political system, with vastly greater power and influence, only enhances the Court’s need to be more attentive to its communications policy. Indeed, the trend exemplified by the Canadian, German, and Israeli courts’ efforts to engage more effectively with the press and the public is not unrelated to the fact that constitutional courts in liberal democracies have sometimes found themselves under attack by various groups across the political spectrum. Being called upon to resolve highly sensitive and significant issues in the context of sometimes fraught politics, constitutional courts will often disappoint one faction or another, sometimes earning its genuine, lasting enmity. It is not enough for courts to pretend that their judgments have no effect on political or economic life. Indeed, these courts have increasingly recognized the need to tell their side of the story. President Vosskuile of the German Court has recently argued that the public’s increased skepticism toward legal institutions “can only be counteracted through offensive public relations

803 (2020); id. (“No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation.”) (citing Logan, supra, at 804).

340 Berisha, 141 S. Ct. at 2428 (Gorsuch, J., dissenting).

341 See GAROUPA & GINSBURG, JUDICIAL REPUTATION, supra note 31, at 49 (“If judges are having a greater impact on matters of political and social importance, it is only natural that there will be greater interest in the operation of the judiciary and demands for greater judicial accountability.”).

342 See, e.g., Wojciech Sadurski, Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Government Enabler, 11 HAGUE J. ON RULE L. 63 (2019); Tomasz Tadeusz Koncewicz, The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux, 43 REV. CENT. & E. EUR. L. 116, 122 (2018) (noting political attacks against the Polish Constitutional Court).
work.” He has further argued that “ultimately, there must be a rethink in the judiciary when it comes to communication. Judges can no longer retreat to the traditional position of speaking only through their decisions, not about their decisions. In particular, it is essential that the president of the court come out and, on appropriate occasions, explain how the judiciary works beyond the individual decisions.” If courts are unable to tell their side of the story successfully, they may well lose public confidence and find themselves unable to function effectively or at all.

American democracy has not been spared from these dynamics; nor has our constitutional system escaped the consequences of growing polarization and political conflict, to say nothing of a more general skepticism and distrust of government and its institutions. In this context, the Supreme Court of the United States has become a focal point for partisan battles that threaten to undermine public confidence in its independence and legitimacy.

Some of the Supreme Court’s critics have even called for “massive resistance” to its

343 Vosskuhle, supra note 252.
344 Id.
345 See, e.g., Wojciech Sadurski, Poland’s Constitutional Breakdown (2019) (detailing the erosion of press freedom as well as judicial independence).
347 See, e.g., Devins & Baum, supra note 114, passim (suggesting that the rise of ideology in judicial appointments has had negative effects in voter attitudes toward the Supreme Court); Grove, supra note 189, passim (examining recent attacks on the Supreme Court and arguing that in politically divisive moments like today the Court faces a legitimacy problem); see also Bruce Ackerman, Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court, L.A. TIMES (Dec. 20, 2018, 3:15 AM) [https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html] (suggesting that “[t]he Supreme Court has taken some serious hits to its reputation for independence and impartiality in these polarized times,” and that absent reform, political partisanship “will predictably destroy the court’s legitimacy in the coming decade”); Erwin Chemerinsky, With Kavanaugh Confirmation Battle, the Supreme Court’s Legitimacy Is in Question, SACRAMENTO BEE [https://www.sacbee.com/opinion/california-forum/article219317565.html] (Oct. 5, 2018, 10:50 AM) (discussing “the cloud over the court’s legitimacy”); Michael Tomaszky, The Supreme Court’s Legitimacy Crisis, N.Y. TIMES (Oct. 5, 2018) [https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html] (suggesting that several Justices are less legitimate because they were placed on the bench by a President and a Senate who represent the will of a minority of the American people).
decisions. Hence, it might be helpful for the Court to look at the ways in which constitutional courts in other liberal democracies have responded to the challenge.

One of the primary functions served by constitutional courts, including the United States Supreme Court, is to articulate limits to what the political branches can and cannot do under their constitutions. Because constitutional courts lack their own coercive powers, however, they depend on public opinion to encourage the political branches to comply with their decisions. Justice Sandra Day O’Connor was straightforward in

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351 See, e.g., Jay N. Krehbiel, The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court, 60 AM. J. POL. SCI. 990, 1002 (2016) (“By enhancing the public’s ability to observe and evaluate instances of potentially unconstitutional behavior, hearings serve as a valuable institutional [tool] for courts tasked with holding governments accountable for breaches of their constitutional obligations.”); see also VANBERG, supra note 229, at 13–14: “Do legislators have reason to respect a [constitutional court] ruling, even when doing so is contrary to their immediate interest in the continuation of a policy that has been struck down? A number of alternative enforcement mechanisms have been proposed in response to this question. I focus on one particular central mechanism: the role of popular support. I argue that the principal inducement for governing majorities to comply with high court decisions is the threat of a loss of public support for elected officials who refuse to be bound by them. That is, governing majorities will be motivated to respect court decisions primarily when they are concerned about the electoral consequences of not doing so.”

352 See Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”); FRIEDMAN, THE WILL OF THE PEOPLE, supra note 114, at 375 (“The most telling reason why the justices might care about public opinion, though, is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court’s institutional power, about having their decisions enforced, about not being disciplined by politics.”); STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 7 (2021) (“The Court’s ability to punish or to provide rewards or benefits it limited. Its ability to act justly, at least in my view, does play a major role in obtaining the public’s respect and consequent obedience.”); Jack Goldsmith & Daryl Levinson, Laws for States: International Law, Constitutional Law, Public Law, 122 HARV. L. REV. 1791, 1814 (2009) (“The Court’s ability to settle constitutional disagreements
explaining that “[w]e don’t have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That’s why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.”

For that reason, several scholars have pointed out that public relations efforts can provide constitutional courts with an effective institutional tool capable of giving force to their judgments in the face of possible noncompliance. In other words, improving their communication practices can provide constitutional courts with the means for promoting governmental compliance with their decisions and for effectively constraining governing majorities. Justice William O. Douglas expressed his understanding of this imperative when he wrote that, “A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.”

The media are critically important to that endeavor. As Jeffery Staton has argued, media relations allow courts to publicize decisions, increasing the people’s awareness, and, as a consequence, raising the costs for the other branches of government to resist a judicial ruling (out of a fear of losing some

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354 See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 16 (2d ed. 2008) (“If the separation of powers, and the placing of the power to enforce court decisions in the executive branch, leaves courts practically powerless to insure that their decisions are supported by elected and administrative officials, then they are heavily dependent on popular support to implement their decisions. If American citizens are aware of Court decisions, and feel duty-bound to carry them out, then Court orders will be implemented. However, . . . survey data suggest that the American public is consistently uninformed of even major Supreme Court decisions and thus not in a position to support them.”); FRIEDMAN, THE WILL OF THE PEOPLE, supra note 114, at 375 (“When the public has a view, its elected officials tend to heed it. The Court has to be attuned to aroused public opinion because it is the public that can save the Court in trouble with political leaders and likewise can motivate political leaders against it.”).

public support).\textsuperscript{356} Chief Justice McLachlin of the Canadian Court has also observed that “a free press and an independent judiciary must work together to foster a society committed to the rule of law. The rule of law cannot exist without open justice and deep public confidence in the judiciary and the administration of justice. And the media is essential to building and maintaining that public confidence.”\textsuperscript{357} Similarly, Stephen Wermiel, a former legal correspondent for the \textit{Wall Street Journal}, has argued that at “a theoretical level [the] news media coverage of the United States Supreme Court, by creating an informed public that extends beyond the organized bar, is an essential element in the goal of guaranteeing respect for the United States Supreme Court and of fostering compliance with its decisions, which are the hallmarks of judicial independence.”\textsuperscript{358} At the very least, this all suggests that the Supreme Court could benefit from ensuring that its opinions make the constitutional bases for decisions understandable to the press and, through the press, to the people.\textsuperscript{359}

We should emphasize, however, that these suggestions for improving the Supreme Court’s communications with the press should not be taken as an

\textsuperscript{356} JEFFERY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO 7, 14–17 (2010) (”Because the media is not an arm of the judiciary, courts cannot fully control what is reported about them. For that reason, the tension is not easily resolved, and courts under serious political constraints may confront a power trap: promote transparency and risk undermining legitimacy or do not promote transparency and risk political irrelevance.”); see also Meyer, Communicating Judicial Decisions, supra note 245, at vi (”Judicial authority depends on their reputation and support within the public, as they are unable to enforce their decisions and sanction noncompliance. Only if the public is aware of the courts and their actions and lends them their support, elected politicians will more likely comply with court decisions. To create awareness and to enable public scrutiny, courts have several tools. Among others, a proactive strategy to communicate and transmit information on court decisions and, thus, to increase transparency and openness is perceived to be an essential tool that courts have at their disposal.”).

\textsuperscript{357} McLachlin, The Relationship Between the Courts and the Media, supra note 189.

\textsuperscript{358} Stephen J. Wermiel, News Media Coverage of the United States Supreme Court, 42 ST. LOUIS U. L.J. 1059, 1059 (1998); see also Richard L. Vining, Jr., & Phil Marcin, Explaining Intermedia Coverage of Supreme Court Decisions, in COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE, supra note 8, at 89, 89 (“This lack of understanding can have significant consequences for the judiciary, especially if it is seen as biased or overtly political, because its authority depends largely on public and elite acceptance of its legitimacy. News about courts, including the Supreme Court of the United States, is central to the elite discourse that influences public attitude about them.”).

\textsuperscript{359} See FISHER, supra note 76, at 222 (“One source of noncompliance is poor communication of judicial opinions. Scholars have found that most people do not know or understand decisions rendered by the courts. Instead, they receive abbreviated interpretations, often erroneous, from the media and local officials. For various reasons, the media has difficulty providing adequate coverage of the courts.”); cf. Or Bassol, The Supreme Court’s New Source of Legitimacy, 16 U. PA. J. CONST. L. 153 (2013) (arguing that the Supreme Court in recent times has partly lost the ability to base its legitimacy on its legal expertise and adopted instead public support as its basis of legitimacy).
alternative or substitute for conscientious, independent, and thorough reporting. Although the Supreme Court clearly can do a better job of helping the press understand its decisions, and thereby better communicate its decisions to the public, the press must be careful not simply to defer to the Court’s interpretation of what has been decided. Journalists must continue to do their own work, seeking out a variety of independent interpreters and commentators on the Court’s decisions, and come to their own understanding of those decisions.\footnote{A quarter century ago, Chief Justice Gerard Brennan of the High Court of Australia expressed his opposition to earlier versions of some of the reforms discussed in this article. Among other things, Chief Justice Brennan feared that judges might take advantage of the opportunity to place a favorable “spin” on their decisions, and that the press might fail to discharge its proper responsibilities, if the courts adopted such innovations. Accurate reporting and critical analysis of the work of the courts require some legal skills and experience. Who should provide them? Public confidence in the rule of law is not to be won by the issuing of media statements nor by background briefings that might be suspect as putting a favourable spin on the work of the courts. The media would abandon their responsibility if they were to publish uncritically summaries of cases or other media releases issued with the authority of the courts. The media must themselves probe and analyse the reasons for judgments of public importance. The basic justification for freedom of the press is the employment of an informed and critical faculty and the employment of that faculty is a source of pride to the competent journalist. If the courts were to furnish digests of information for the media to publish, they would abandon the independence which both must assert and defend in the public interest. Better by far that the media should sense that there are stories of vital public interest in the dramas of a trial, ... in the priorities of tensions between the organs of government, constitutional rights or immunities, in the interplay of legal rules and in the exposition of principles under which society lives. Brennan, The Third Branch and the Fourth Estate, supra note 310, at 75. Chief Justice Brennan was correct to note these dangers. Certainly, additional assistance from the Court should not take the place of independent reporting. It is essential, as Chief Justice Brennan noted, that the press continue to “probe and analyse the reasons for judgments of public importance.” On the other hand, the complexity and proximity of judicial opinions, at least in the Supreme Court of the United States, has increased greatly since Chief Justice Brennan was writing, and journalists now have a far greater need for assistance than previously was the case.} If the Court has done its job, however, journalists will be better able to evaluate the interpretations of other commentators from a position of greater knowledge and understanding as to what the case involves and what is at stake. It also goes without saying that the Court’s additional communications and interactions with the press must be candid and truthful. Indeed, the Court and the press must both be alert to the possibility of developing too close and uncritical a relationship with each other; but there may be little reason to believe, either in theory or based on the experience of other constitutional courts, that that danger is likely.
The essential relationship between the Court and the press is—and likely will remain—one that is properly adversary.\textsuperscript{361}

Finally, while the trend among constitutional courts toward greater judicial engagement with the press and the public is clear, there is little consensus as to which methods should be used or to what extent they should be used, let alone how much such courts should abandon their traditional practices to accommodate the needs of the press and the public. Different courts have given different answers about where the line should be drawn. It is beyond the scope of this Article to suggest which of these various mechanisms would be best suited to our specific conditions. On the other hand, none of them should be dismissed out of hand.\textsuperscript{362} It might be argued, for example, that our judicial culture, which gives voice to each of the Justices who chooses to write separately, and also encourages each to express his or her unique views of the relevant law, would make it impossible for the Court to agree on a synthesis or summary of its opinions. But the United States Supreme Court’s judicial culture is neither unique nor exceptional in that respect.\textsuperscript{363} The Canadian and Israeli Courts share that aspect of judicial culture and have adopted changes to the way they communicate with their respective citizenries. Furthermore, creating a better communication environment, as Professor Goldstein said, is not intended to deprive the

\textsuperscript{361} See id. at 65 (“It is tempting to say that the third branch — the judiciary — and the Fourth Estate — the media — share a responsibility to create or maintain confidence in the work of the courts. But that would cast the media in the role of apologists for the courts and thus undermine the independence of the media and their proper relationship with the public. The media’s function is quite different from the court’s. The court’s function, entrenched in public expectation, is to decide cases and, in doing so, to apply the law competently and impartially. The media’s function is to report and critically to analyse the work of the courts. So we are speaking in the present context of disparate but interlocking functions which, if properly performed by both institutions, should produce public confidence in the maintenance of the rule of law by the courts.”).

\textsuperscript{362} For example, Justice Abe Fortas once suggested that “he would, if he could convince his brethren on the Court, make law professors provided by the [Association of American Law Schools] more available to newsmen to explain decisions immediately after they were handed down. . . . [And] he would suggest some radio and TV coverage of delivery of judges’ decisions from the bench.” WASBY, supra note 23, at 87. In a similar vein, Amy Howe has recently proposed that the Court consider allowing the live coverage of opinion announcements to prevent confusion and mischaracterization of the Court’s decisions. Testimony of Amy Howe, supra note 19.

\textsuperscript{363} Cf. Newland, supra note 23, at 26 (“[T]he justices may be expected to concentrate attention on the Court as an institution, or, when impelled to express separate opinions, to exercise individual restraint. Such self-limitation by individual justices may be especially necessary on an activist Court. This attitude may be impossible for the justices. If so, this research suggests, it may be equally impossible for the press and the people to understand this key political institution, intelligently communicate about it, and provide it with essential popular support and reasoned criticism.”).
Justices of their individualist ways or to achieve either unvarying unanimity or exceptional harmony.364 “Rather, it is meant to cultivate greater recognition on their part that each opinion in a constitutional law decision is also to be viewed as part of a whole, as one communication. The goal is not simply that each opinion be coherent by itself, but that, taken together, the opinions in a single case constitute a comprehensible message about the Constitution.”365 Why, then, should the Supreme Court of the United States not consider improving the way in which it communicates with the people? In the end, it all seems to be a matter of complacency—an attitude that reflects a bygone era that has yet to adapt to modern times.

CONCLUSION

The Supreme Court of the United States keeps faith with a notion that judges must speak only through their written opinions, which must then speak for themselves. The Justices enter the courtroom, deliver a short summary of their opinions, and leave. At the same time, the Court publishes online the full texts of the decisions, sometimes running to hundreds of pages and often with multiple voices. It is only in this way that the Court, as an institution, discharges its duty to “say what the law is” and communicates its understanding of the Constitution to the people and to the other branches of government. The Court’s aloofness generates an air of mystery around itself, and it promotes the idea that the judiciary, unlike the elected branches, is far removed from everyday life and all that that entails. More important, given the proximity, complexity, and nuance of its opinions, the Court has sometimes generated a similar air of mystery around what it understands the Constitution to mean. Since few people read the Court’s opinions, and fewer still can understand them without help, most people rely on the press for what they know about the Court’s pronouncements. But reporters who cover the Court are invariably left to their own devices as they attempt to decipher the Court’s opinions and write stories about them under strict time constraints. The Court’s seeming indifference hinders the people’s understanding of their Constitution and distances us from the ideal of a republican government.

364 GOLDSTEIN, supra note 20, at 110–11.
365 Id. at 110; see also LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 110 (1992) (“The Court is under no duty to announce Delphic rules or to leave the country guessing about its intentions. On the contrary, it has some responsibility to give lower courts guidance and to permit the American people to order their affairs with confidence in the lay of the legal land and to seek a constitutional amendment if there is overwhelming consensus that the Court is wrong.”).
But the Court has steadfastly refused to consider innovations that might make its opinions more accessible and easier for the press to translate to the public.

The Court’s uncompromising stance not only interferes with its expounding of the Constitution in a way that the people can understand, it is hardly inevitable. As we have shown, the notion that the Court has always spoken only through the Justices’ written opinions and in-court utterances is something of a myth. In the beginning, the Justices mainly delivered their decisions orally. Furthermore, since the earliest days of the Supreme Court, the Justices have from time to time ignored the convention that the Court speaks only through its opinions, thereby suggesting an acknowledgment that the Court’s aloofness is self-defeating. Starting with Chief Justice Marshall, the Justices have often sought to defend their decisions in a variety of extracurial settings—in the pages of newspapers, in television interviews, in lecture halls, and even in Zoom meetings with like-minded partisans. These Justices and others have understood the importance, in a democratic society, both of the public’s understanding of the Court’s work and the press’s invaluable role in informing and educating the public. In other words, the legitimacy of the Court depends in part on the way in which its decisions are reported and how they are understood beyond the realm of professional elites.

It is hard to square the Court’s apparent lack of concern about the way in which its decisions are communicated to the citizenry with the needs and values of a modern democratic society. As we have demonstrated, some other constitutional courts have taken a proactive approach to their relationships with the press and the public. Faced with a changing media environment and the rise of populist politics (which renders institutions as well as professional and scientific knowledge suspect), these courts have taken the initiative to increase transparency. The practices that the apex courts of Canada, Germany, and Israel have adopted reflect their recognition that constitutional courts in democratic societies must make their decisions more intelligible to the public and to the other branches of government. Moreover, these developments point to a growing judicial awareness that harnessing the power of the media to inform the public about the courts’ decisions is also an important tool for encouraging the political branches to respect and comply with those decisions. We offer this account of what some other constitutional courts have done, not to recommend any specific steps for our Supreme Court to take, but to suggest that more can—and must—be done
to ensure that We the People understand what the Court has decided, why it has done so, and to what effect.\textsuperscript{366}

\textsuperscript{366} See Lerner, supra note 26, at 179 ("In a Government founded on opinion, it is necessary that the People should be satisfied with judicial decisions.") (quoting 2 REG. DEB. 1100 (1826) (statement of Rep. Kerr)).