

Essay

Telling the Court's Story: Justice and Journalism at the Supreme Court

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INTRODUCTION

The relationship between the fairness and accuracy of political journalism and the health of electoral politics in the United States has been the subject of frequent study and comment. Both scholars and journalists have expressed alarm at the corrosive effect that cynical, adversarial, or sensationalistic reporting has had on the process of running for office and governing the country.¹

But the relationship between the quality of legal journalism and the vitality of our judicial institutions has received much less attention, with perhaps the sole exception of the continuing debate over permitting live television coverage of proceedings such as the O.J. Simpson murder trial.²

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1. See, e.g., JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* (1996); HOWARD KURTZ, *MEDIA CIRCUS: THE TROUBLE WITH AMERICA'S NEWSPAPERS* (1993); THOMAS E. PATTERSON, *OUT OF ORDER* (Vintage Books 1994) (1993). Patterson, a political scientist at Syracuse University, observes that "the change in the tone of election coverage has contributed to the decline in the public's confidence in those who seek the presidency." *Id.* at 22. Kurtz, the press critic for the *Washington Post*, reviews the performance of the press during the 1992 election cycle and concludes: "[I]f our professed goal during the primaries was to keep the public spotlight on important issues, the verdict is clear: We failed miserably." KURTZ, *supra*, at 262. Fallows, Washington editor of the *Atlantic Monthly*, offers this grim appraisal: "Step by step, mainstream journalism has fallen into the habit of portraying public life in America as a race to the bottom, in which one group of conniving, insincere politicians ceaselessly tries to outmaneuver another." FALLOWS, *supra*, at 7.

2. For articles discussing the impact and implications of the television coverage of the Simpson trial, see, e.g., Lyle Denniston, *Camera's Eye on Blind Justice: Simpson Trial Spells Trouble for Cause of TV Coverage in Court*, BALTIMORE SUN, Oct. 1, 1995, at 1F; Max Frankel, *Out of Focus*, N.Y. TIMES, Nov. 5, 1995, § 6 (Magazine), at 26; Stephen Labaton, *Lessons of Simpson Case are Reshaping the Law*, N.Y. TIMES, Oct. 6, 1995, at A1.

This Essay starts from the premise that press coverage of the courts is a subject at least as worthy of public concern and scholarly attention as press coverage of politics, perhaps even more so. Political candidates who believe that their messages are not being conveyed accurately or fairly by the press have a range of options available for disseminating those messages. They can buy more advertising, speak directly to the public from a talk-show studio or a press-conference podium, or line up endorsements from credible public figures. But judges, for the most part, speak only through their opinions, which are difficult for the ordinary citizen to obtain or to understand. Especially in an era when the political system has ceded to the courts many of society's most difficult questions, it is sobering to acknowledge the extent to which the courts and the country depend on the press for the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society.

My focus in this Essay is journalism about the Supreme Court of the United States, which I have covered since 1978 as a correspondent in the Washington Bureau of the *New York Times*. Fortunately, the environment at the Court, both for its life-tenured occupants and for the several dozen reporters who chronicle its work, remains considerably more civil than that of the campaign trail. But neither the Court nor its press corps exists in a bubble, immune to the broader political culture that in recent years has included Supreme Court confirmation battles of intense and lasting bitterness as well as a general skepticism about the perquisites of high office and, indeed, about the exercise of government power generally.³

Furthermore, every generalization that can be made about the barriers to public understanding of the judicial system is particularly true of the Court: To the public at large, the Supreme Court is a remote and mysterious oracle that makes occasional pronouncements on major issues of the day and then disappears from view for months at a time. The nine individuals who exercise power in its name are unaccountable and essentially faceless. The Court looms so large in the consciousness of readers of this journal that it may be helpful

3. For a recent newspaper article that captures the cynical mood about the perquisites of office, see Paul M. Barrett, *During Court's Recess, Justices Do Seminars With Supreme Style*, WALL ST. J., Aug. 14, 1995, at A1. The article reports that soon after the Court recessed for the summer, Justice Antonin Scalia "jetted to the French Riviera," with his expenses paid by a law school program at which he was lecturing, and "popped up at posh parties in Cannes and Monaco, where he had cocktails with Prince Albert." *Id.* Justice Ruth Bader Ginsburg "sampled the fare at outdoor beer gardens in cozy Innsbruck, Austria," where she was lecturing in a law school program that paid her expenses. *Id.* Chief Justice William H. Rehnquist, meanwhile, attended the tennis matches at Wimbledon, his expenses to England paid by two law schools with summer sessions in Cambridge at which he lectured. *Id.* While the article stated that "these summer journeys by the justices don't run afoul of any ethical or legal constraints on perks," *id.*, the tone and the use of the word "perks" at least invites comparison with articles about recent abuses of privileges of office involving the bank and post office operations of the House of Representatives, see, e.g., Dan Hofstadter, *Antipolitics '94: The Soul of the Old Machine*, N.Y. TIMES, Oct. 16, 1994, § 6 (Magazine), at 52; David Johnston, *Investigator Finds Evidence of Crimes in House Bank Use*, N.Y. TIMES, Dec. 17, 1992, at A1; Stephen Labaton, *Grand Scale of Abuse Depicted in Indictment*, N.Y. TIMES, June 1, 1994, at B6.

to note, as the *Washington Post* did last fall, that while fifty-nine percent of the public, in a sample of 1200 randomly selected adults, could name the Three Stooges, fifty-five percent could not name a single Supreme Court Justice.⁴ Given such widespread ignorance, and in light of the Court's role as an important participant in the ongoing dialogue among American citizens and the various branches and levels of government, journalistic miscues about what the Court is saying and where it is going can have a distorting effect on the entire enterprise.

Not surprisingly, the segment of the public that does follow the work of the Court often cares intensely how the Court is covered and monitors journalism about the Court very closely, in recognition of the fact that today's journalism about the Court is in many respects tomorrow's history of the Court. What is being played out in debates and criticism about contemporary reporting on the Court is a battle over history's eventual verdict on the Court and the Court's role during this period.

My thesis is that there exist conventions and habits both within the press *and* within the Supreme Court itself that create obstacles to producing the best possible journalism about the Court, journalism that would provide the timely, sophisticated, and contextual information necessary for public understanding of the Court. Some of the habits and traditions I identify as obstacles are unlikely ever to change, and I do not necessarily think that they should; I do not expect to see Justices holding news conferences to explain and elaborate on their written opinions, however appealing or even titillating that prospect might be to journalists. Nor do I expect newspapers to call up reserve troops and open up page after page of shrinking news holes to accommodate the flood of late-June opinions. I also recognize that the interests of these two vital and powerful institutions, the Court and the press, can never be entirely congruent; the press is always going to want more information than the Court is ever going to want to share. But I hope that the process of identifying where the obstacles lie may nonetheless foster some fruitful discussion—within the press, within the Court, and, radical as the thought may be, even between the two—of those problems that can be solved and of those mutual concerns that can be addressed without threatening the identity or integrity of either institution.

I. GETTING THE STORY

Covering the Supreme Court is such an unusual form of journalism that it may help to describe the process itself. Sources, leaks, casual contact with

4. Richard Morin, *Unconventional Wisdom*, WASH. POST, Oct. 8, 1995, at C5. According to the survey, conducted by the Luntz Research Companies, 16% of the sample could name one Justice, 11% could name two, and 17% could name at least three. *Id.*

newsmakers—none of these hallmarks of Washington journalism exists on the Court beat, leaving even experienced reporters baffled and disoriented, as I was when I began my job there.

Before I began covering the Court, I was a member and eventually chief of the *New York Times* bureau in Albany that was responsible for covering the New York State government. The mid-1970s in Albany was a chaotic and cacophonous period of fiscal crisis and public policy innovation. The press room in the state capitol was located on the third floor, fittingly between the Assembly and Senate chambers. The two houses of the State legislature were controlled by different parties, and, in the process of shuttling back and forth in search of the latest developments, reporters inevitably became messengers between the leadership of the two houses and between the legislature and the office of the Governor on the floor below. The press, in other words, was very much part of the process in Albany, as witnessed by the location of the press seats in the well of the two legislative chambers, in direct view of the members. Once, as I tried to keep myself awake during a midnight session of the State Assembly by eating a candy bar, an assemblyman walked across the chamber to my seat, told me to stop eating junk food, and handed me an apple.

Occasionally, my job required me to cover decisions of the New York Court of Appeals, the state's highest court, which is down the hill from the capitol. The judges of that court, who in those days ran for election, made a point of getting to know the reporters, and some would stop by the press room when business brought them to the capitol.

When I arrived in Washington, D.C., to take up my new assignment at the Supreme Court, I was met by silence. The contrast with my past life could scarcely have been greater. The press room at the Court is far from the action, in a ground-floor location that is actually a kind of half-basement, with small windows high up on a few walls. The Court's newsmakers, the Justices, are rarely seen on that floor, except for the few who eat an occasional meal in the public cafeteria down the hall. The Justices are visible, of course, on the bench whenever the Court is in session, but opportunities for casual or unscheduled contact are almost nonexistent. The journalist's job is almost entirely paper-dependent, defined by the endless flow of conference lists, order lists, petitions for certiorari, and opinions. While most politicians will cheerfully or angrily critique any story in which their name has appeared, Justices rarely respond to public comment, or even to rank error.

The press corps at the Court is a small one, with about three dozen accredited correspondents representing organizations ranging from the *Wall Street Journal* to the Cable News Network to *USA Today*. Many additional reporters show up and receive one-day press passes to the courtroom on the days of major arguments and toward the end of the Term, when important decisions are expected. But on a typical day during the Term, when the Court is not on the bench and when the business at hand consists of reading certiorari

petitions and briefs on the merits in granted cases, the numbers are much smaller. It would be unusual to find more than a half-dozen reporters at work at their desks on such a day, fewer now than when I began reporting on the Court.

The reason is that the commitment of the media to full-time coverage of the Court is shrinking, and most of the reporters assigned to the Court are also responsible for covering the Department of Justice, other courts, perhaps the Judiciary Committees in Congress, or, often, legal developments in the country at large. The television networks have cut back sharply on the attention they pay to the Court, a very unfortunate development considering the number of people who rely on television as their primary news source. One of the country's biggest newspaper chains, the Scripps-Howard chain, last year reassigned its experienced and respected Supreme Court reporter to another beat and left the job unfilled.

Developments like these represent a major failure of journalistic responsibility and pose a significant obstacle to achieving excellence in writing about the Court. Major decisions will be covered, one way or another. What is lost to the reader or viewer is the texture and flavor of the Court's day-to-day work, particularly its performance in its case-selection function—the circuit conflicts left unresolved, the open questions left unanswered for another Term. Reporters who do not have the luxury of making the Court beat their full-time job cannot possibly pay attention to the thousands of certiorari petitions that are denied or to the decisions in cases that may not qualify for page-one status.

II. TELLING THE STORY: WHAT HAPPENED?

So what's the story at the Supreme Court? That's what my editors and colleagues want to know when I get back to the office after a busy morning at the Court. My job is to answer that question. What did the Court do?

A. *"The Supreme Court ruled today . . ."*

The question is relatively straightforward, but the answer is not. It sometimes appears to be almost completely discretionary, even random. At the very least, the answer is deeply invested with editorial judgment—value judgment, to use a more loaded term; news judgment, to use a less loaded one. Which, if any, of fifty or more denials of certiorari are worth reporting in a limited space—perhaps 1200 words for a round-up Court story in the *New York Times*, significantly less for most of my colleagues on the Court beat. Which of several decisions should be the focus of the story? Is a second, or even a third story warranted? What about the oral arguments that morning? More than in many other beats, the reporters tend to make these calls because

editors have no independent means for evaluating the importance of the dozens of discrete events that may constitute the Supreme Court's activities on a given day. While this circumstance offers an unusual amount of freedom to the reporter, it also means there is unlikely to be much informed discussion with colleagues and editors back at the office.

The most consequential judgment call of all is probably that of evaluating the meaning and importance of a Supreme Court decision on the merits. A few examples from the 1994 Term may suffice to illustrate what may be involved in completing the sentence: "The Supreme Court ruled today that . . ." I offer these examples to illustrate the process, not because I am sure that I was right; the articles that resulted simply represented my best judgment by deadline time.

First, was affirmative action dead in the wake of *Adarand Constructors v. Peña*?⁵ It was obvious both to me and to my editors that this was the question I needed to answer. On the face of the decision, it appeared so, because the Court for the first time held that federal affirmative action programs must be narrowly tailored to achieve a compelling state interest—in the equal protection context, the constitutional standard of strict scrutiny, which sets a hurdle nearly impossible to overcome. But what did it mean when the author of the *Adarand* opinion, Justice Sandra Day O'Connor, wrote for the five-to-four majority that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'?"⁶ What kind of strict scrutiny was this?

So my lead the next day did not declare federal affirmative action to be dead: If the Court blinked at the last minute, so did I. The first paragraph of my story, which led the paper under a three-column headline, read as follows: "In a decision likely to fuel rather than resolve the debate over affirmative action, the Supreme Court today cast doubt on the constitutionality of Federal programs that award benefits on the basis of race."⁷

That was an easy call compared to the decision two weeks later in *Miller v. Johnson*,⁸ striking down a majority-black Georgia congressional district as a racial gerrymander. What was the story there? Were dozens of majority-black legislative districts around the country now presumptively unconstitutional? Had the Court dropped the other shoe it had been holding over the new majority-black districts since its decision in *Shaw v. Reno*⁹ two years earlier? It looked that way to me, and I was in the middle of crafting just such a lead in mid-afternoon on the final day of the Court's Term when I got a call informing me that the Court had just announced that it would hear two new

5. 115 S. Ct. 2097 (1995).

6. *Id.* at 2117.

7. Linda Greenhouse, *Justices, 5 to 4, Cast Doubts on U.S. Programs that Give Preferences Based on Race*, N.Y. TIMES, June 13, 1995, at A1.

8. 115 S. Ct. 2475 (1995).

9. 113 S. Ct. 2816 (1993).

redistricting cases in the coming Term.¹⁰ This announcement, which was completely unexpected—ordinarily, the Court would have remanded those cases back to the lower courts for disposition in light of the newly announced standard in the Georgia case—suddenly made sense of the unusual and cryptic comment that Justice Ruth Bader Ginsburg, one of the dissenters in the Georgia case, had made from the bench that morning to the effect that the Court had not yet spoken its “final word” on the role of race in redistricting. Suddenly, things did not appear to be quite so conclusively decided. I pushed the delete button on my computer and erased the sweeping implications I was in the process of drawing, substituting instead a more conditional verb tense and tone. My lead paragraph read: “In a bitterly contested decision that *could* erase *some* of the recent electoral gains made by blacks in Congress and state legislatures, the Supreme Court ruled today that the use of race as a ‘predominant factor’ in drawing district lines should be presumed to be unconstitutional.”¹¹

So what's the story? These examples demonstrate a singular feature of journalism about the Court: the impossibility of using one obvious journalistic technique for fathoming the Court's actions, that of interviewing the newsmakers to ask them what they meant. I would have given a great deal last April to have been able to call Justice John Paul Stevens when, in *McIntyre v. Ohio Elections Commission*,¹² he wrote a majority opinion holding that there is a First Amendment right to distribute anonymous campaign literature. This holding would appear to call into question various core provisions of federal election law, which require certain kinds of disclosure of the identities of those who give money to and speak on behalf of candidates. The Stevens opinion contained some rather sweeping language with potentially broad application, as Justice Antonin Scalia pointed out in his dissent,¹³ as well as some other language that appeared to qualify the holding.¹⁴ How far did the

10. See *Bush v. Vera*, 115 S. Ct. 2639 (1995), *noting prob. juris. in Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994); *Shaw v. Hunt*, 115 S. Ct. 2639 (1995), *noting prob. juris. in 861 F. Supp. 408* (E.D.N.C. 1994).

11. Linda Greenhouse, *Justices, in 5-4 Vote, Reject Districts Drawn with Race the “Predominant Factor,”* N.Y. TIMES, June 30, 1995, at A1 (emphasis added).

12. 115 S. Ct. 1511 (1995).

13. See *id.* at 1530–31 (Scalia, J., dissenting) (“[T]he Court invalidates a species of protection for the election process that exists, in a variety of forms, in every State except California, and that has a pedigree dating back to the end of the 19th century.”). Justice Scalia went on to suggest that the majority opinion cast doubt on the Court's continued adherence to *Buckley v. Valeo*, 424 U.S. 1 (1976): “We have approved much more onerous disclosure requirements in the name of fair elections. . . . If *Buckley* remains the law, this is an easy case.” *McIntyre*, 115 S. Ct. at 1536–37 (Scalia, J., dissenting).

In his majority opinion, Justice Stevens sought to distinguish *Buckley*: “Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests.” *Id.* at 1523. Nonetheless, the rhetorical if not analytical core of the opinion was its ringing defense of anonymous political speech: “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.” *Id.* at 1524.

14. See *McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting).

author of this majority opinion mean to take the Court, and how far would other Justices follow him? It would have been unthinkable simply to call him up and ask him. So all I could say in my story was that “the ruling appears likely to prompt a new round of challenges to the disclosure requirements contained in Federal and numerous state election laws.”¹⁵

As Justice Ginsburg pointed out in a recent talk at Georgetown Law School on how the Court communicates, not only does the Court speak to the public solely through its opinions, but the case law process itself precludes the Court from including, even if Justices were so inclined, a “‘practical effects’ section in which [the Justices] spell out the real world impact of the opinion” because a Supreme Court decision is usually only one segment of a continuing public dialogue with or among “other branches of government, the States, or the private sector.”¹⁶

We are all so accustomed to these journalistic facts of life that we rarely think about them. Yet they underscore the importance of the role of the press in conveying the meaning of the Court’s work. Other courts, of course, 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. Informal arrangements under which these judges make themselves available, on background, for this purpose are not uncommon. I recall one decision by the New York Court of Appeals that I covered during my tenure in Albany.¹⁷ The court rejected a constitutional challenge to a piece of the solution to New York City’s fiscal crisis, and the judges were highly aware of the importance to the financial markets of accurate reporting about the ruling. The court invited reporters to participate in a “lock-up,” an arrangement under which those willing to take part could come to the court early in the morning, perhaps an hour before the decision was to be publicly announced, to read the opinion at leisure. Once in the room, no one was permitted to leave until the time of announcement. One of the judges then made himself available by telephone for the rest of the day as a resource, not to be quoted, that reporters could contact to verify their understanding of the decision and its implications. I availed myself of this offer. To my knowledge, none of the reporters who took part in this episode broke the rules or betrayed the court’s confidence.¹⁸ If it did nothing else, the exercise underscored, for each reporter who took part, the need for care and accuracy, forcefully reminding us that we were doing the *public’s* business. Although I was intimately familiar with the fiscal

15. Linda Greenhouse, *Justices Allow Unsigned Political Fliers*, N.Y. TIMES, Apr. 20, 1995, at A20.

16. Ruth Bader Ginsburg, *Communicating and Commenting on the Court’s Work*, 83 GEO. L.J. 2119, 2125 (1995).

17. *See Wein v. City of N.Y.*, 331 N.E.2d 514 (N.Y. 1975).

18. My report on the *Wein* case is contained in Linda Greenhouse, *A Finance Agency for City Upheld*, N.Y. TIMES, May 28, 1975, at 1.

crisis as a legislative issue, I had had no legal training at that point, and little experience with judicial opinions. The experience was sobering.

It is obvious from the earlier examples that a useful story about a Supreme Court decision, in my view, is necessarily interpretive. It entails more than an accurate statement of the holding, even when the holding is indisputably clear. Readers also need to know the context of the decision, what the decision means, how the case got to the Court in the first place, what arguments were put to the Justices, what the decision tells us about the Court, and what happens next. Not all of these elements are necessary in each story, and not all of the questions can be answered in every case. There are ways—conditional verb tenses or outright confessions of ignorance—of telling the reader “I don’t know” or “I don’t know yet,” and thus of preventing the story from pretending to be more definitive than it could possibly be under the circumstances.

B. *What Did Not Happen*

In telling the story, I think it is also important to respect the reader’s intelligence, on the one hand, and to acknowledge, on the other, the limits of the reader’s knowledge of Supreme Court procedure. The story sometimes lies in what the Court, or a particular Justice, did not do, and that has its own journalistic perils. Exaggerating the meaning of a denial of certiorari is a common journalistic error. While denials of certiorari can certainly be important and newsworthy in their own right, the reader should be reminded in each such story that the denial does not represent a judgment by the Court on the merits of the case. The Court’s recent denial of certiorari in a case challenging the constitutionality of the new federal law to protect abortion clinics against violent protest¹⁹ was widely reported as an “upholding” of that law or, somewhat more subtly but no less incorrectly, as a survival of the law in a major Supreme Court test.²⁰ Much of the public is now substantially misinformed about the legal status of the law, which continues to be challenged on a variety of constitutional grounds and which may yet be reviewed on the merits by the Supreme Court, where the outcome is by no means preordained.

Every time I think I have seen it all when it comes to denials of certiorari, I find a new example. Early in the current Term, the Court denied a petition

19. *American Life League, Inc. v. Reno*, 116 S. Ct. 55 (1995), *denying cert. to* 47 F.3d 642 (4th Cir. 1995).

20. *See, e.g.,* Lyle Denniston, *Supreme Court Backs New Law Protecting Abortion Clinics*, BALTIMORE SUN, Oct. 3, 1995, at 3A (reporting in lead paragraph that law protecting abortion clinics “withstood a major challenge in the Supreme Court yesterday”); *What’s News—World-Wide*, WALL ST. J., Oct. 3, 1995, at 1 (reporting that Court’s refusal to hear case, “although not a ruling and therefore not necessarily the definitive word on the law’s validity, was a big setback for antiabortion activists” (emphasis omitted)).

for certiorari challenging a ruling by the Supreme Court of Wisconsin. The state court had remanded a custody dispute between two lesbians who had shared the raising of a child before an acrimonious breakup, interpreting the state law on visitation not to preclude the woman who was not the child's biological mother from establishing a legal right to visit the child. The biological mother's appeal from a nonfinal judgment on a question of state law hardly presented the Court with a certiorari-worthy case, and, predictably, certiorari was denied without comment.²¹ But if the Court did not comment, *USA Today* certainly did. Its story the next day began as follows: "The U.S. Supreme Court on Monday helped reshape the definition of the American family in a case on gay parents' rights."²²

Any time I err on the side of self-righteousness on this subject, I am likely to be betrayed by my own copy desk. It happened most recently as this Essay was being edited, in connection with an appeal by Christian Scientists from a state court judgment of liability for the death of a child who was treated by prayer instead of medicine.²³ A story of mine about the denial of certiorari in the appeal appeared on page one of the *New York Times* under this headline: "Christian Scientists Rebuffed in Ruling By Supreme Court."²⁴ Since the lead paragraph said that the petitioners "failed today to persuade the Supreme Court to hear their appeal," I knew that I was not responsible for the headline's error, but I was abashed nonetheless. In a brief article revisiting the case the next week, I tried again to make myself clear: "The non-ruling set no legal precedent, but perhaps it set an example."²⁵ I also discussed the issue with two editors, who were appropriately dismayed, but I know that, under deadline pressure and the need to make headlines fit in tight spaces, a similar mistake will happen again someday.

Justice John Paul Stevens has adopted the commendable practice—I can only assume in reaction to incidents such as this—of occasionally writing opinions "respecting the denial of certiorari" that serve as explicit reminders that "an order denying a petition for certiorari expresses no opinion on the merits of the case."²⁶ Most recently, he wrote such a memorandum when the Court denied certiorari in a highly visible California death penalty case. He explained that, while the case raised "a novel and important constitutional

21. *Knott v. Holtzman*, 116 S. Ct. 475 (1995), *denying cert. to In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

22. Debbie Howlett, *Supreme Court Reaffirms Gay Parents' Rights*, USA TODAY, Nov. 14, 1995, at 3A.

23. *McKown v. Lundman*, 64 U.S.L.W. 3161 (U.S. Jan. 22, 1996), *denying cert. to* 530 N.W.2d 807 (Minn. Ct. App. 1995).

24. Linda Greenhouse, *Christian Scientists Rebuffed in Ruling By Supreme Court*, N.Y. TIMES, Jan. 23, 1996, at A1.

25. Linda Greenhouse, *A Court's Loud Silence*, N.Y. TIMES, Jan. 28, 1996, § 4, at 2.

26. *Carpenter v. Gomez*, 116 S. Ct. 488 (1995) (memorandum of Stevens, J., respecting denial of certiorari), *denying cert. to In re Carpenter*, 889 P.2d 985 (Cal. 1995).

question," it arguably did not present a final judgment for the Court to review.²⁷

If it is important not to exaggerate the meaning of a Court action, it is also important to resist oversimplifying. When a decision turns on a concept like state action or standing or some other threshold jurisdictional issue, this can be explained to the reader quite explicitly, so that the disposition makes sense, and not simply swept under the label of "for technical reasons."²⁸

Court coverage should also not overlook the minutiae that offer some insight into the life of the institution. If I can figure out, from whatever clues might be available, that a Justice has changed his or her vote during the course of deliberations on a case, I will include that information in the story of the decision. It is interesting gossip, of course, but, more than that, it sheds some useful light on a process in which Justices really do struggle with the cases in the course of reaching a decision. Last June, for example, it appeared obvious to me that Justice Stephen Breyer had changed his vote during the Court's five-month course of deliberations over the First Amendment issue presented in the Florida Bar lawyer-solicitation case, *Florida Bar v. Went For It, Inc.*²⁹ This five-to-four decision was the last to be handed down of the eleven cases the Court had heard during its January sitting. It was Justice O'Connor's third opinion from the January sitting, leaving Justice Anthony M. Kennedy with none—a strong indication that he had lost the opinion. Justice Kennedy's dissent took a wry dig at Justice Breyer, a member of the majority, by means of an otherwise gratuitous discussion of the Federal Sentencing Guidelines,³⁰ of which Justice Breyer is an author. Based on the public views of the other members of the majority on lawyer advertising, Justice Breyer was the only one likely to have switched sides. In my story, I explained this chain of reasoning as the basis for concluding that there was "strong evidence" that the Court had initially voted to strike down the thirty-day moratorium on

27. *Id.* at 489.

28. *See, e.g., Kevorkian Vows to Keep Fighting Laws Barring Assisted Suicide*, N.Y. TIMES, Dec. 18, 1994, § 1, at 43 (describing Michigan Court of Appeals decision as having found state law banning assisted suicide "unconstitutional for technical reasons"); Seth Mydans, *Free Speech Is at Issue as a Palestinian in U.S. Fights Deportation*, N.Y. TIMES, Dec. 8, 1991, § 1, at 34 (describing federal district court's order blocking deportation as having been "overturned for technical reasons on appeal").

29. 115 S. Ct. 2371 (1995).

30. *See id.* at 2384–85 (Kennedy, J., dissenting). Noting that the solicitation ban "applies with respect to all accidental injuries, whatever their gravity," Justice Kennedy wrote that

[t]he Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, but making such distinctions is not important in this analysis. Even were it significant, the Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, *see, e.g., United States Sentencing Commission, Guidelines Manual* § 1B1.1, comment., n. 1(b), (h), (j) (Nov. 1994), and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement.

Id. (additional citations omitted). Perhaps Justice Kennedy's dig at his colleague should be described as deadpan rather than wry.

solicitation that was at issue in the case, but that an original member of the majority, probably Justice Breyer, had changed sides.³¹

Some might object that this kind of speculative reporting conveys little information of value and results in diminishing respect for the Court. I actually think the reverse is true. The decisional process is such a black box that the public rarely has a chance to see the Justices working through the difficult problems posed by close cases. Yet it hardly diminishes the Court to suppose that this process is often neither tidy nor the result of a set of unexamined premises and foregone conclusions. The occasional vote switch is a window, albeit a very partial and hardly satisfying one, on how the Court works.

C. *Choices and Values*

Some of the guidelines I have given here beg the deeper question of how a reporter decides what is important. I have argued for an approach to writing about the Court that is inherently analytical, or at least not limited to reducing the holding to jargon-free English prose. Is this not an inherently value-laden process?

What journalism is not value-laden, after all? As Jon Katz, media critic for *Wired* magazine, recently wrote: “[A]nyone who writes (or reads) knows that all stories aren’t covered, all questions aren’t asked, all answers aren’t included. Journalists present facts not laterally but in sequence of importance. This is in itself a subjective process.”³² That is a useful perspective for any discussion of journalistic “objectivity”—a goal that should command respect without inviting paralysis.

Those who cover the Court, to be sure, have views and find themselves more sympathetic to some results and to some Justices than to others. The question is, how germane are those views to the work we do? I have found that years of reading conflicting lower court opinions and hearing arguments on both sides of every question have made me much less certain of the right answers than I was in the simple days when I covered real politics. I am not trying to say, as Justice Clarence Thomas did during his confirmation hearing, that I have shed all ideological baggage and “stripped down like a runner,”³³ but rather that the nuances and complexities of the issues before the Court are my constant companions when I sit down to write. What I want from the Court on a day-to-day basis, as I sit down to face my deadline, is clarity, coherence, and reliability. And compared with covering politics, although it would certainly be rewarding to have behind-the-scenes discussions with the Justices

31. Linda Greenhouse, *High Court Backs Florida Restriction on Solicitation of Accident Victims by Lawyers*, N.Y. TIMES, June 22, 1995, at A22.

32. Jon Katz, *Guilty*, WIRED, Sept. 1995, at 128, 130.

33. Linda Greenhouse, *The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Questions of What He Is*, N.Y. TIMES, Sept. 13, 1991, at A19.

about the Court's work, there is a certain liberation in not having the kind of personal, mutually beneficial relationships that many political journalists have with the people they cover. I don't have to worry about losing access.

Of course, deciding what is important among the thousands of individual Court actions, which will be reported, and what pattern will be discerned from them can never be value-free. Those who make these judgments are the products of what they care about and also what they know. I am still chagrined that it took me until the late 1980s to understand and write about the revolution in habeas corpus jurisprudence that had been taking place in the Court right under my nose. I simply had not understood either the subject or its importance. I failed a few years ago to appreciate the import of a Tenth Amendment decision³⁴ that anticipated the regrouping and rebirth of a majority on the Court concerned with state sovereignty in the federal system.³⁵ In retrospect, I think I was so mesmerized by the school prayer³⁶ and abortion³⁷ decisions that came down during the same Term that I was unable to take account of a major opinion that looked, at least to some degree, in an opposite or at least nonconforming direction. I have missed the significance of other important cases as well, from *Pennsylvania v. Union Gas Co.*,³⁸ a major Eleventh Amendment decision (which the Court appears likely to overrule someday soon, so perhaps it is just as well that I spared my readers the burden of learning about it³⁹) to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁴⁰ an administrative law landmark that tilted the playing field toward the executive branch and had substantial political consequences during the Reagan and Bush years of divided government.

Inattentiveness or lack of sophistication on the part of those who cover the Court, myself included, is surely an obstacle to good journalism about the Court. In her speech at Georgetown, Justice Ginsburg recounted the classic story that when the Court handed down *Erie Railroad v. Tompkins*,⁴¹ the 1938 landmark decision that created a revolution in federal jurisdiction by ruling that there is no universal common law and that federal courts must

34. *New York v. United States*, 505 U.S. 144 (1992).

35. *See United States v. Lopez*, 115 S. Ct. 1624 (1995).

36. *Lee v. Weisman*, 505 U.S. 577 (1992).

37. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

38. 491 U.S. 1 (1989).

39. In *Union Gas*, the Court held that Congress could invoke its Commerce Clause power to abrogate a state's Eleventh Amendment immunity. The case was decided by a plurality, in an opinion written by Justice Brennan. With dissenting votes by Justices Scalia, O'Connor, Kennedy, and Chief Justice Rehnquist, the decision was vulnerable at the outset and, at least in tone, appears to be out of step with the Court's newly circumscribed view of the commerce power, as expressed last Term in *United States v. Lopez*, 115 S. Ct. 1624 (1995). The state of Florida, the respondent in a case argued on October 11, 1995 and now awaiting decision, has asked the Court to overrule *Union Gas* in the context of an Eleventh Amendment challenge to the Indian Gaming Regulatory Act. *See Seminole Tribe v. Florida*, 115 S. Ct. 932 (1995), *granting cert. to* 11 F.3d 1016 (11th Cir. 1994).

40. 467 U.S. 837 (1984).

41. 304 U.S. 64 (1938).

apply state law in diversity cases, every newspaper in New York failed not only to understand but even to report the case.⁴² Not until Justice Stone complained a week later to Arthur Krock, the chief of the *New York Times* Washington Bureau, and prodded him to write about what Krock was finally persuaded to call a “transcendentally significant opinion,” did the lay public know anything about this development.⁴³ It should not surprise us that in the absence of anything resembling a real press corps covering the Court in 1938, a decision about something so remote and obscure as federal jurisdiction was overlooked. I would not offer any guarantees, unfortunately, that it would not be overlooked today.

A variety of journalistic needs and practices also pose obstacles to good journalism about the Court. Newsprint is expensive, and space is tight in newspapers and getting tighter all the time. On a busy decision day in June, when the Court issues four, five, or six major decisions, the news hole does not expand correspondingly. Nor do presses start later. Deadlines remain deadlines, no matter how much news there is to process. On the final day of the 1988 Term, the Court not only decided an important abortion case, *Webster v. Reproductive Health Services*,⁴⁴ but also granted certiorari in *Cruzan v. Director, Missouri Department of Health*,⁴⁵ portending a major ruling on the right to die.⁴⁶ Although I had prepared the *Cruzan* case on the basis of the certiorari petition, which the Court had held for some months pending the disposition in *Webster*, I ran out of time and the paper ran out of space. The *Times* used a wire-service story for the grant in *Cruzan*.⁴⁷

I am always a little uncomfortable with the convention that calls for wrapping up the Term with a sweeping analysis that discerns and proclaims a theme, a movement from some point to another. Is this really accurate? Suppose the Justices just think they are deciding cases, one at a time. What's the story, after all? In an interesting recent essay entitled *Spin Doctoring Darwin*, Stephen Jay Gould offered a wry comment on the human need to see evolution not as a random process but as a glorious story that led inevitably onward and upward to producing homo sapiens.⁴⁸ When I read that essay, I had just finished wrapping up the Court's last Term in a 4000-word piece with the following headline (which, I hasten to add, I did not write): “Farewell to the Old Order in the Court: The Right Goes Activist and the Center Is a

42. Ginsburg, *supra* note 16, at 2121.

43. *See id.* at 2121–22; *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 377 n.13 (5th ed. 1994) (describing lack of immediate press coverage of *Erie* and Justice Stone's response to Arthur Krock).

44. 492 U.S. 490 (1989).

45. 492 U.S. 917 (1989), *granting cert. to* 760 S.W.2d 408 (Mo. 1988).

46. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

47. *See Court to Rule on Right to Die in Case of Brain Injury Victim*, N.Y. TIMES, July 4, 1989, at A14.

48. Stephen Jay Gould, *Spin Doctoring Darwin*, NAT. HIST., July 1995, at 6, 6, 8.

Void.”⁴⁹ What, I wondered, would Darwin, Stephen Jay Gould, and the Justices think about that?

Stuart Taylor, Jr., of the *Legal Times* recently made the observation that the Supreme Court press corps has been writing for years about the Court's imminent shift to the Right, a pattern he views as just so much crying wolf when the Court remains near the center or even slightly left of the center of public opinion on many major issues. He wrote: “There is, of course, one perspective from which this Court looks unambiguously—and alarmingly—‘conservative’: the personal views of the (predominantly liberal) journalists who so characterize the Court, and of the other journalists, law professors, and big-city practitioners whom they talk to.”⁵⁰ Taking his point, at least to some degree, I'm still not quite bold enough to flout the basic journalistic convention that requires me to find something thematic to say at the end of every Term, something other than “Court decides many important cases and recesses for the summer.”

III. TELLING THE STORY: WHO WON?

In addition to whatever oversimplification is involved in adhering to the journalistic convention of finding a yearly theme of the Court's calendar cycle, the convention also inherently requires the designation of a winner. The conservatives “won” last Term. While I wrote that⁵¹ and believe it to be true, I am often uneasy about the binary won-lost approach to reporting on the Court. To what extent do stories like these, even the most nuanced and sophisticated, mislead readers and risk overly politicizing discourse about the Court and its work?

A. *Wrapping It Up*

One point the sweeping end-of-Term wrap-up usually overlooks is that every Term is more a work-in-progress than a finished story. And while it may be dramatically inviting to portray the Court as the venue for an ongoing Manichean battle, the reality is, of course, quite different. Of the eighty-two signed opinions last Term, thirty-five, or forty-three percent, resolved cases by nine-to-zero votes. Yet, because the Term's most consequential decisions tended to be the closely divided ones, the overwhelming impression that journalism about the Court—including my own—probably conveyed to the

49. Linda Greenhouse, *Farewell to the Old Order in the Court: The Right Goes Activist and the Center Is a Void*, N.Y. TIMES, July 2, 1995, § 4, at 1.

50. Stuart Taylor, Jr., *Looking Right at the Justices*, LEGAL TIMES, Oct. 2, 1995, at S27, S33.

51. See Greenhouse, *supra* note 49, at 1 (“An ascendant bloc of three conservative Justices with an appetite for fundamental, even radical change drove the Court on a re-examination of basic Constitutional principles.”).

casual reader was of an institution locked in mortal combat, where sheer numbers rather than force of argument or legal reasoning determined the result. This is not an argument for not reporting conflict at the Court, but simply a note of concern about the consequences to public understanding about the Court of an unrelenting diet of conflict when the reality is often otherwise.

We take so much for granted about the essential health of our system that it is instructive to look at how new democracies are struggling to give birth to judicial systems that the public will accept as legitimate. In South Africa, for example, a major dispute has erupted over the press coverage of the first important decision of that country's new constitutional court, which in June unanimously struck down the death penalty.⁵² The 130-page decision included the seriatim opinions of all eleven judges, who relied on various sources of law, including the right to life and the right to dignity contained in the South African Constitution, as well as on an evolving South African common law based on tribal notions of community.⁵³ This was a decision with obvious political significance and profound implications for constitutionalism and judicial review in the new South Africa. The South African press covered the decision as a political act, pure and simple. One prominent member of the court, Judge John Didcott, then did something that a member of our Supreme Court would be most unlikely to do: He criticized the "lamentable" performance of the reporters, who, he said, "had not thought it necessary to tell the public what the court's reasons for the decision actually were."⁵⁴ Essentially challenging the press to debate its role in the nation's future, Judge Didcott said that the performance of the press raised the "extremely disturbing" question of whether effective constitutional government could exist if the press did not perform its "elementary duty" of enlightening the public about the reasoning behind the court's decisions.⁵⁵

Shifting to another part of the world, last fall I attended an interesting session at Freedom House, a private, Washington-based organization that

52. *State v. Makwanyane*, 1995 (3) SA 391 (Const. Ct.).

53. The first opinion contained the judgment of the court and the reasoning of the judge who wrote that judgment. *See id.* at 401 (opinion of Chaskalson, P.) (relying on Section 11(2) of South African Constitution, prohibiting "cruel, inhuman or degrading treatment or punishment"). The ten other judges concurred in the judgment. *See id.* at 453 (opinion of Ackermann, J.) (finding death penalty to be unconstitutionally arbitrary); *id.* at 461 (opinion of Didcott, J.) (relying principally on right to life guaranteed by Section 9 of Constitution); *id.* at 469 (opinion of Kentridge, A.J.) (citing Section 35 of Constitution, requiring promotion of "the values which underlie an open and democratic society based on freedom and equality"); *id.* at 475 (opinion of Kriegler, J.) (relying principally on right to life guaranteed by Section 9 of Constitution); *id.* at 478 (opinion of Langa, J.) (same); *id.* at 483 (opinion of Madala, J.) (citing "traditional African jurisprudence"); *id.* at 487 (opinion of Mahomed, J.) (relying principally on right to life guaranteed by Section 9 of Constitution); *id.* at 498 (opinion of Mokgoro, J.) (citing "indigenous South African values"); *id.* at 504 (opinion of O'Regan, J.) (relying on Section 10 of Constitution, which provides: "Every person shall have the right to respect for and protection of his or her dignity."); *id.* at 510 (opinion of Sachs, J.) (citing traditional and textual sources).

54. Carmel Rickard, *Judge Blasts "Lamentable" Press*, SUNDAY TIMES (Johannesburg), Aug. 13, 1995, at 21 (quoting Judge John Didcott).

55. *Id.*

monitors press freedom around the world. The meeting was convened by the Rule of Law Consortium, a group of U.S. academics and government officials working to strengthen emerging judicial institutions in the independent states of the former Soviet Union. The meeting focused on how this group could help the press in Russia and the other countries to enhance public understanding of the courts and the rule of law. There are many obstacles to accomplishing that goal, most notably the vulnerability of the press itself in these shaky democracies and deep public cynicism about a judicial system long crippled by corruption and a lack of independence. That this discussion is taking place at all, however, underscores that the press and the courts must have a healthy relationship for democratization to succeed.

Our own obvious distance from these struggling systems should not be an occasion for smugness. The week before the current Term opened, I was a guest on a National Public Radio talk show.⁵⁶ One caller asked for comment on the numerous five-to-four decisions from the Supreme Court. He said it was distressing that such important issues were decided by such narrow margins. I answered that question as I usually do, by saying that I find it neither surprising nor particularly distressing that issues that have divided the country, and in most cases have also split the lower courts, should prove divisive on the Supreme Court. The next caller found this answer inadequate. Why don't we just cut out the pretense that these people are anything more than politicians, he said, placed on the Court by other politicians to carry out a political agenda? According to this caller, it was simply naive to talk about the Court in any other way.

Even if I believed that to be the case, and I do not, I would find that view disquieting for the long-term health of our democracy. In fact, I told my caller that I disagreed with him. While the Justices naturally draw on their own values and perspectives in approaching cases, most of them, most of the time, act not as politicians but as judges, working within the constraints of precedent and of the judicial enterprise to give judicial answers to the problems that people bring to the Court.

The answer is not, of course, quite that easy. While I do not think that "low" politics plays a major role at the Court, "high" politics certainly does. I do not believe that partisan advantage or the fate of Newt Gingrich's *Contract With America* was a factor in the Court's invalidation last Term, with one five-to-four stroke, of the state-imposed congressional term limits of twenty-three states.⁵⁷ But in what turned out to be a fascinating debate about state sovereignty and the sources of the federal government's authority, the Court surely exercised "high" political power. And there is no denying that fault lines exist on the Court these days over the most profound questions

56. *Talk of The Nation* (NPR radio broadcast, Sept. 26, 1995).

57. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

about the structure of our political system and the relationship of the individual to the state. Nearly forty years ago, during another tumultuous time in the Court's relationship with the political system, political scientist Robert Dahl wrote that "Americans are not quite willing to accept the fact that [the Court] is a political institution and not quite capable of denying it; so that frequently we take both positions at once."⁵⁸ Our cognitive dissonance, in other words, is hard-wired into our system.

Furthermore, with gridlock elsewhere in the political system, the Court happens to be the battleground on which some of the major political wars of our time are being fought. I remember the day in 1992 when the Court decided *Planned Parenthood v. Casey*,⁵⁹ the Pennsylvania abortion case that trimmed the margins but reaffirmed the essentials of *Roe v. Wade*.⁶⁰ By the time I got back to my office, there were two huge stacks of faxes on the floor by my desk, one pile generated by the right-to-life side and the other by the pro-choice side. Both sides were claiming defeat, surely an interesting variant on the usual Washington spin control. The right-to-life reaction was understandable on the face of the decision. The pro-choice reaction had more to do with institutional politics: The pro-choice groups, anticipating a loss of *Roe v. Wade* in its entirety, had planned a major political campaign on that premise and were simply unable to switch gears as quickly as the Court had appeared to. I remember one of the lawyers on that side calling me with her statement. I became exasperated. "You're telling me you lost this case, and I'm telling you that you won it and I'm going to tell my readers that you won it," I remember saying to the startled lawyer. That was an unusual day and an unusual case, but efforts to influence public perceptions of important cases are quite common, and at times like these I have found that there are relatively few honest brokers. That is understandable. For political purposes, at least in the short term but often longer—witness the continued misunderstanding about the Court's school prayer decisions of the 1960s⁶¹—what the Court is perceived to have done is often as important as what the Court actually did.

58. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279 (1957).

59. 505 U.S. 833 (1992).

60. 410 U.S. 113 (1973).

61. See *School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); see also *Wallace v. Jaffree*, 472 U.S. 38 (1985). In political discourse, the Court is often depicted as having banished God from the classroom and as having outlawed not only organized, audible prayer but also voluntary, silent prayer. See, e.g., Walter Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631, 1640 (1986) (describing Senate report issued in support of proposed school prayer amendment to Constitution as "erroneously stating that the Supreme Court had 'effectively outlawed' silent prayer"). Recently, Patrick J. Buchanan, a candidate for the Republican presidential nomination, offered a critique of the school prayer decisions while speaking at the Heritage Foundation in Washington: "Look . . . our Founding Fathers, if you had told them that they could not pray in their schools and the order came from London, you would have heard three little words: 'Lock and load.'" James Bennet, "Judicial Dictatorship" *Spurns People's Will, Buchanan Says*, N.Y. TIMES, Jan. 30, 1996, at B7.

B. *The Struggle for History's Verdict*

Because the Court is so important and is being asked to carry so much weight, a fierce battle is being fought across the political spectrum over the Court's story—over which ideas will prevail and how history will judge this period. It is a battle of public perception as well as reality, and journalism about the Court matters a great deal to the combatants. “A [s]truggle for the [s]oul of the Court,” Robert H. Bork called it in an acerbic op-ed article that appeared in the *New York Times* the week after the *Casey* decision.⁶² Aiming his sarcasm at the three authors of the plurality opinion, Justices Kennedy, O'Connor, and Souter, he said that the opinion was “intensely popular with just about everybody Justices care about: The *New York Times*, The *Washington Post*, the three network news programs, law school faculties and at least 90 percent of the people Justices may meet at Washington dinner parties.”⁶³

I do not have the luxury of ignoring this struggle, because I am aware that my own coverage of the Court is subject to minute scrutiny from both the left and the right. A few years back, I wrote that the expected conservative counterrevolution at the Court was stalling because of the moderating influence of Justices O'Connor, Kennedy, and Souter.⁶⁴ I then was criticized by liberals for failing to convey the full extent of the conservative dominance at the Court⁶⁵ and by conservatives for trying, through what some of these commentators have dubbed the Greenhouse effect, to confer on these Justices the blessings of the liberal establishment and hence to inspire them to stray even further from the true path.⁶⁶

When this started happening, I was nonplussed to find myself part of the Court's story. My previous assignment in Albany, as the *Times* bureau chief in the midst of the fiscal crisis, had placed me in a somewhat visible position. But never did I attract the kind of personal attention that I find myself getting these days. Just to cite a few recent examples, I read this summer in a publication by the National Legal Center for the Public Interest, a group on the conservative side of the spectrum, that I displayed “hysterical anguish” at how

62. Robert H. Bork, *Again, A Struggle for the Soul of the Court*, N.Y. TIMES, July 8, 1992, at A19.

63. *Id.*

64. See Linda Greenhouse, *Changed Path for the Court?; New Balance is Held by 3 Cautious Justices*, N.Y. TIMES, June 26, 1992, at A1; Linda Greenhouse, *Slim Margin; Moderates on Court Defy Predictions*, N.Y. TIMES, July 5, 1992, § 4, at 1.

65. See, e.g., Stephen Reinhardt, *The First Amendment: The Supreme Court and the Left—With Friends Like These*, 44 HASTINGS L.J. 809 (1993). Judge Reinhardt, of the Ninth Circuit, criticized me for having managed erroneously to “persuade most of the nation that the Court had changed its stripes” and was now under the control of “three born-again moderates” rather than, as Judge Reinhardt saw it, of an essentially solid conservative bloc. *Id.* at 814–16.

66. See, e.g., Judge Laurence Silberman, Address to the Federalist Society (June 13, 1992), in LEGAL TIMES, June 22, 1992, at 14, 17 (“It seems that the primary objective of the *Times*' legal reporters is to put activist heat on recently appointed Supreme Court justices.”).

close the Court came to upholding congressional term limits.⁶⁷ This was apparently a reference to an article, labeled “news analysis,” in which I wrote that it is only a slight exaggeration to say that the Court, in the term limits case, had come within a single vote of reinstalling the Articles of Confederation.⁶⁸ I knew when I wrote that line that it was a provocative image, and my purpose was to give my readers a handle on the dimensions of the debate that had engaged the Court. I was even more surprised to read in an op-ed column in the *Dallas Morning News*⁶⁹ that I was unhappy with the whole Term but “particularly distraught” over the decision in *United States v. Lopez*,⁷⁰ which invalidated a federal gun law on Commerce Clause grounds. This observation was apparently based on another news analysis in which I had said that the Court seemed ready to reassume a role as an “activist policeman of the Federal-state boundary.”⁷¹ In contrast to my deliberately provocative analysis of the term limits decision, in the *Lopez* piece I thought that I was simply stating the obvious.

I was fascinated by both of these decisions, but hardly upset or distraught over either one. Quite the opposite, I thought it was exciting to be writing about such interesting debates over such important ideas. I asked my colleagues whether I had seemed particularly unhinged, and they all said that they remembered me as quite cheerful during that period. But that is obviously beside the point. I have learned how much it matters to the Court’s various interested publics what the *New York Times* has to say about what the Court does because, in contrast to a legislature or some other public institution, there are so few significant paths of information from the Court to the public. In some respects, it is part of the continuing battle over the Bork nomination and the legacy of Judge Bork’s rejection by the Senate.⁷² More fundamentally, it is a battle over the judgment of history.

For the past decade, conservatives rather than liberals have expressed the most concern about journalistic judgments about the Court, a fact that I interpret as reflecting frustration with the fitful nature of the vaunted conservative revolution at the Court and a search for an explanation as to why it has not proceeded more smoothly. Judge Bork’s 1992 op-ed article, cited

67. Theodore B. Olson, *Supreme Court Roundup*, in JUD/LEGIS. WATCH REP. (National Legal Ctr. for the Pub. Interest, Wash., D.C.), Aug. 1995, at 1.

68. Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1.

69. Tom Pauken, *Supreme Court Tilts Toward Constitution*, DALLAS MORNING NEWS, July 14, 1995, at 23A.

70. 115 S. Ct. 1624 (1995).

71. Linda Greenhouse, *Justices Step In as Federalism’s Referee*, N.Y. TIMES, Apr. 28, 1995, at A1, A23.

72. There is a large literature on the 1987 debate over President Reagan’s nomination of Robert H. Bork to the Supreme Court. See, e.g., ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); MARK GITENSTEIN, MATTERS OF PRINCIPLE (1992); MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION (1989).

above, is one example.⁷³ David Bryden of the University of Minnesota Law School offered an explanation in a 1992 article, asserting that “the liberal positions on cultural-social issues . . . are the positions of the most powerful elites in the media, academe, and the practicing bar.”⁷⁴ Consequently, he said, “[t]he reputations of the Justices, the warmth of their welcome on their frequent visits to law schools, and their places in history, depend chiefly on the evaluations of their work by liberal journalists and scholars. . . . [T]hey would not be human if it did not occasionally affect some of them.”⁷⁵

Any discussion of factors bearing on the judgment of history and on public perceptions of the Court's legitimacy cannot ignore recent confirmation battles like the struggle over Judge Bork's nomination. There is a direct trajectory between my cynical caller on the public radio program and some of the political battles over nominations to the Court. While keeping my journalistic distance, I think it is safe to say that a President who nominates an individual who is not supported by the existing political consensus risks labeling his nominee a political tool, regardless of whether the nominee is ultimately successful.

This perception was reflected in a recent discussion at my newspaper over whether to require identification, in all articles that name federal judges in the course of describing court decisions, of the President who appointed those judges. For a time last year, such a rule was, in fact, in force. Several of my colleagues and I objected that the rule placed the *Times* in the position of insinuating that all federal judges are simply carrying out the agendas of their political sponsors; in other words, that they are acting as politicians and not as judges. After further consideration, the rule was dropped. Federal judges will be identified by the Presidents who named them only if such identification makes sense as a news judgment in the context of the specific story. The fact that the rule existed even for a short time at the *Times* tells us something disquieting about the legacy of the confirmation battles of the Reagan and Bush years. I do not mean to single out the *Times*. I have a pile of commentary on the Court from a range of publications, much of it making the unstated or explicit assumption that some of the Justices are just politicians in robes. Anyone who has evidence that such is the case should of course document it and write it. But to incorporate the untested assumption into journalism about the Court disserves the goal of increasing public understanding.

73. See Bork, *supra* note 62, at A19.

74. David P. Bryden, *Is the Rehnquist Court Conservative?*, PUB. INTEREST, Fall 1992, at 73, 84.

75. *Id.*

IV. TELLING THE STORY: DOES THE ORACLE SPEAK?

There is also the question of the Court's own responsibility for telling its story. The Court's habits present substantial obstacles to conveying the work of the Court accurately to the public. To cite one example, on June 29, 1995, the final day of the Court's last Term, the Court handed down opinions in two voting rights cases,⁷⁶ two important religious speech cases,⁷⁷ and a major statutory case construing the Endangered Species Act.⁷⁸ Together, these decisions take up nearly eighty pages in the tiny type of *United States Law Week*.⁷⁹ Even for a paper like the *Times*, with a commitment to opening up some extra space and giving me help on excerpting text, and even with a colleague on the environmental beat to whom I could farm out the Endangered Species Act case, this was pressing the limits of the possible. The Court had issued no opinions at all on the preceding two days, a Tuesday and Wednesday. Perhaps none of these decisions was ready for release until Thursday morning. Perhaps, as I suspect, there was a lack of desire on the Justices' part to interrupt their mornings earlier in the week by going on the bench to announce those opinions that were ready.

That closing day was relatively easy compared with some others. The last day of the 1987–1988 Term was a journalistic nightmare that has attained the status of legend. The Court issued nine decisions that filled 446 pages in the *United States Reports*,⁸⁰ including a number of important cases⁸¹ and one, the decision that upheld the independent counsel statute, of landmark significance.⁸²

I once mentioned this problem to Chief Justice Rehnquist, suggesting the Court make a greater effort to spread out the decision announcements in the last weeks of the Term. He received my suggestion cordially and made a counterproposal of his own. "Just because we announce them all on one day doesn't mean you have to write about them all on one day," he said. "Why don't you save some for the next day?" On one level, this was harmless, and cost-free, banter. On another, it offered a dramatic illustration of the gulf between us. It appeared to me that the Chief Justice understood my comment

76. *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States v. Hays*, 115 S. Ct. 2431 (1995).

77. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995).

78. *Babbitt v. Sweet Home Chapter of Communities*, 115 S. Ct. 2407 (1995).

79. See 63 U.S.L.W. 4665–742 (U.S. June 29, 1995).

80. See 487 U.S. at 589–1035 (1988).

81. The decisions issued on June 29, 1988 and reported in Volume 487 of the *United States Reports* are as follows: *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Morrison v. Olson*, 487 U.S. 654 (1988); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *United States v. Kozminski*, 487 U.S. 931 (1988); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); and *Coy v. Iowa*, 487 U.S. 1012 (1988).

82. See *Morrison v. Olson*, 487 U.S. 654 (1988).

to be a form of journalist's special interest pleading. My point, rather, 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.

A recent episode offered another illustration of the Court's unwillingness to bend, even a bit, in the direction of facilitating better journalism. Alderson Reporting Company, the outside contractor that transcribes the Court's argument sessions, recently informed the Court that current technology would enable it to provide same-day transcripts, eliminating the two-week delay that makes the transcripts all but useless as an aid to accurate renditions of the debate during oral arguments. A group of reporters wrote to the Chief Justice, explaining the benefit of having same-day transcripts and asking the Court to take Alderson up on its offer. After some weeks of consideration, the proposal was rejected without explanation. Those of us who had made a proposal we thought was sensible and hardly radical were taken aback by the response, which guarantees that quotations in argument stories will not be as accurate as they could be.

CONCLUSION

One recent book about Supreme Court journalism, one of the few scholarly studies on this subject, concluded that the Court has developed an elaborate apparatus to keep itself mysterious and remote, thus maintaining "public deference and compliance."⁸³ In the view of the author, political scientist Richard Davis, "the press is a public relations tool for the Court specifically for the task of reinforcing deference toward its decisions."⁸⁴ That is not the Court and not the press corps I have observed for these last eighteen years. Rather, I see a Court that is quite blithely oblivious to the needs of those who convey its work to the outside world, and a press corps that is often groping along in the dark, trying to make sense out of the shadows on the cave wall. The public enlightenment that this process does provide is a testament to the essential strength of our institutions, but we must guard against complacency on the part of the press, the Court, and those of us who care about both.

Is there a model for press-Court interaction that would serve the needs of both and, ultimately, lead to greater public understanding of the Court? A story from long ago offers a starting point for looking ahead. In 1932, following his retirement, Justice Oliver Wendell Holmes received a letter of congratulations and gratitude from a journalist to whom, sixteen years earlier, he had extended

83. RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* 8 (1994).

84. *Id.* at 16.

a hand in an hour of great journalistic need. As the letter writer, George Garner of the *Manufacturers Record* in Baltimore, recounted the incident to Justice Holmes, Mr. Garner had been a young Washington reporter for the *Louisville Courier-Journal* when he found himself suddenly assigned to report on an opinion by the Justice. Not knowing where else to turn, he presented himself late in the afternoon at the Justice's home. Mr. Garner's letter (referring to both himself and his addressee in the third person) described their meeting:

Called to the door, Justice Holmes explained to the correspondent that he was entertaining guests at tea and might not very well desert them; but, if the scribe would drop around later, he would be glad to help. Then, spontaneously: "No; come upstairs with me now, and we'll go over it." For an hour, this Justice of the Supreme Court of the United States patiently and clearly spelled out the story to the scribe, literally dictating much of the article in newspaper language. It ran, as one recalls, a couple of columns in the *Courier-Journal* and was esteemed as a clear and intelligible newspaper story. Never has the correspondent forgotten that great kindness and courtesy by Justice Holmes. Often he has related it to friends.⁸⁵

I obviously could not offer this charming and quaint episode as a model for today; for one thing, Mr. Garner's need for emergency assistance reflected an ignorance of the Court's docket and a lack of preparation that I certainly do not advocate on the part of the Supreme Court press corps. Nor should busy Justices be expected to interrupt tea parties or other endeavors to give a helping hand to what would soon become an endless stream of deadline-panicked journalists.

But neither is this incident completely irrelevant. It reflects, on the part of Justice Holmes, an openness and a willingness to step out of the institutional role that would be quite unthinkable under similar circumstances today. There is a loss there, surely.

It is clear that the interests of the press and the Court can never be consonant. To cite just one example, it would greatly simplify my life if, in addition to receiving the weekly conference list of new petitions for certiorari that are ready for the Justices' action, I could also see the "discuss list" of those cases, culled from the larger list, that are the only actual candidates for a grant of cert. Yet I cannot imagine the Court permitting press access to the

85. Letter from George Garner to Justice Holmes (Jan. 13, 1932) (available in the Oliver Wendell Holmes, Jr., Papers at Harvard Law Library). Quoted by permission. I am grateful to Justice Hiller B. Zobel of the Massachusetts Superior Court for bringing this document to my attention.

The decision discussed in the letter is unidentified. Justice Zobel believes that the case was probably *Louisville & Nashville R.R. v. Stewart*, 241 U.S. 261 (1916).

discuss list, for the reason that all of the cases not on the discuss list would thereby be publicly identified, in advance, as "cert. denied" in all but name.

Yet despite our divergent interests—the press corp's interest in accessibility and information, the Court's in protecting the integrity of its decisional process—I am naive enough, and out of step enough with the prevailing journalistic culture, to think of these two institutions as, to some degree, partners in a mutual democratic enterprise to which both must acknowledge responsibility. The responsibility of the press is to commit the resources necessary to give the public the most accurate and contextual reporting possible about the Court, its work, its members, and its relationship with other branches of government. The Court's responsibility is to remove unnecessary obstacles to accomplishing that task.

I recognize that the word "unnecessary" assumes shared premises that may simply not exist. Nevertheless, it should be easy to define some practices, such as lack of timely argument transcripts or the refusal to space opinions during a given week, as unnecessary. Begin there and who knows? Might clearer, more straightforward opinions follow? I do not expect the impossible. I simply propose a mutual journey of self-examination from which the press, the Court, and, ultimately, the public can only benefit.

