

# A NEW REPORTER CONFRONTS THE SUPREME COURT'S UNPUBLISHED DECISIONS\*

Peter W. Martin†

In late January 2021, the Supreme Court of the United States issued a long list of orders. It concluded with a single sentence: “It is ordered that Rebecca Anne Womeldorf be appointed Reporter of Decisions of this Court . . . , effective January 25, 2021, . . . charged with the duty of reporting the decisions of the present Term which have not been reported prior to January 25, 2021.”<sup>1</sup> The order was silent about the immense challenge facing the new Reporter in the form of unpublished decisions from prior terms. Actions taken by Ms. Womeldorf and her staff, in the three years since, demonstrate a clear awareness of that challenge and a serious effort to address it.

## I. REPORTER OF DECISIONS: AN HISTORIC ROLE

For over 200 years, the United States Supreme Court has been served by an officially designated “Reporter” charged with overseeing the publication of its decisions. The first, Henry Wheaton, was appointed to that role by the Court pursuant to legislation enacted by

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†Jane M.G. Foster Professor of Law, Emeritus, and cofounder, Legal Information Institute, Cornell Law School, Ithaca, New York.

1. SUPREME COURT OF THE UNITED STATES, ORDER LIST: 592 U.S., at 8–9 (2021), [https://www.supremecourt.gov/orders/courtorders/012521zor\\_3f14.pdf](https://www.supremecourt.gov/orders/courtorders/012521zor_3f14.pdf).

Congress in 1817.<sup>2</sup> Although in effect for only three years, the statute established a framework that endured until 1922.<sup>3</sup> In essence, it created a federal procurement contract with one major contingency. Under its terms, Wheaton was promised an annual stipend of \$1,000, conditioned on his delivery of 80 copies of the Court's decisions to the Secretary of State, printed and published, at no further charge, for distribution within the federal government.<sup>4</sup> The contingency lay in the statute's stipulation that to qualify delivery had to occur no later than six months after the end of the Court's term.<sup>5</sup> (Reports being compiled and published by William Cranch, Wheaton's predecessor, who lacked Congressional recognition or financial encouragement, were, at that point, well over a year behind.)<sup>6</sup>

The title "Reporter" reflected a core aspect of Wheaton's role. He was induced to accept by an assurance that the Justices would "furnish to him any written opinions they might prepare, or notes they might make in connection with their oral opinions."<sup>7</sup> No rule or convention required, as a few states then did of their high courts,<sup>8</sup> that Supreme Court opinions be delivered in writing.<sup>9</sup> Quite literally, Wheaton had to function as a journalist, assembling accounts of the Court's decisions and their grounds from diverse sources. He attended sessions at which cases were argued and decisions

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2. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294, 1312, 1347 (1985).

3. See Act of July 1, 1922, ch. 267, 42 Stat. 816.

4. See An Act to provide for reports of the decisions of the Supreme Court, ch. 63, 3 Stat. 376.

5. See *id.*

6. See Joyce, *supra* note 2, at 1310–11.

7. *Id.* at 1321.

8. Connecticut led, having, as early as 1784, required to its judges "to give in writing the reasons of their decisions upon points of law, and lodge them with their respective clerks." *Id.* at 1297–98 (quoting An Act Establishing the Wages of the Judges of the Superior Court, 3 State Rec. May Sess. 1784 at 9).

9. This was consistent with judicial practice in England during this era. See Alden I. Rosbrook, *Art of Judicial Reporting*, 10 CORNELL L.Q. 103, 105 (1925).

announced.<sup>10</sup> He relied on the Justices' notes, to the extent he could obtain them.<sup>11</sup> He consulted with counsel who had argued a case and, in some instances, invited a Justice to review and revise his account of the basis for the decision.<sup>12</sup> From a present vantage point, two centuries or so later, it is extremely difficult to determine the accuracy of Wheaton's accounts of specific cases or how many he did not report; his first volume acknowledged omitting decisions that he judged to be of little general interest.<sup>13</sup>

There is a second sense in which Wheaton functioned as a journalist assigned to cover the Court. His reports did more than pass along judicial conclusions and their stated grounds. For each case he summarized the prior proceedings and the arguments of counsel (sometimes at great length), categorized the issues before the court, and provided editorial notes explaining their resolution.<sup>14</sup> For good reason, the volumes Wheaton prepared were registered for copyright in<sup>15</sup> and carried his name. Contemporaneous references to cases Wheaton reported cited them by volume number, an abbreviation based on his name, and page. *McCulloch v. Maryland* was, in accordance with this convention, cited to 4 Wheat. 316; *Gibbons v. Ogden*, to 9 Wheat. 1.

A growing population, in an expanding country, created demand for back issues of these reports that a changing cast of official Reporters and their publishers had difficulty meeting. As the string of Reporters lengthened, adherence to a consistent set of abbreviations for their reports also proved a challenge. In 1875, a new Reporter of Decisions, William Tod Otto,

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10. See Joyce, *supra* note 2, at 1321 n.184.

11. See *id.* at 1321.

12. See *id.* at 1322.

13. See 14 U.S. (1 Wheat.) iv (1816) (acknowledging the omission of "cases turning on mere questions of fact, and from which no important principle, or general rule, could be extracted").

14. See Joyce, *supra* note 2, at 1331.

15. His copyright in them led to the Supreme Court's first copyright decision. In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), the Court held that Wheaton's copyright did not extend to the Justices' opinions.

responded. He began the practice of treating the volumes containing Supreme Court decisions as a single continuous series, counting them from the very first. Otto labeled his first volume "91 U.S." His system redesignated Wheaton's volumes as "14 U.S." through "25 U.S."

The appearance of two unofficial alternatives to the Court's official volumes in the latter part of the nineteenth century reinforced this innovation. The first offered a full republication of all prior Supreme Court reports, while also carrying them forward. Titled "Lawyers' Edition," it was published by the Lawyers Co-operative Publishing Company of Rochester, New York (Lawyers Co-op). *Lawyers' Edition* volumes included the original reporter's notes on decisions sufficiently distant that their copyright term had expired. Because they displayed the official volume numbers and pagination within opinion texts, they offered a full substitute for the originals. They did, however, provide more. All decisions carried Lawyer's Co-op headnotes applied consistently. Volumes of later editions also provided annotations that detailed the treatment of each decision in subsequent state and federal cases.

A second alternative, but only for decisions from the 1882 October Term forward, was the *Supreme Court Reporter* published by the West Publishing Company. Its principal attraction was editorial integration and consistency with West's *Federal Reporter*, the only comprehensive source for decisions of the federal District Courts, Circuit Courts, and Circuit Courts of Appeals.

Neither unofficial series waited for the appearance of an official report volume before distributing their own in preliminary form. Their "advance sheets" established a model on which the "preliminary print" version of the official reports was later based.

## II. THE LATEST REPORTER'S TWENTY-FIRST CENTURY CHALLENGE

The press release announcing Ms. Womeldorf's selection as Reporter of Decisions provided a brief description of the duties she would be assuming.<sup>16</sup> It explained that the Supreme Court's Reporter prepared a "syllabus or summary of the Court's opinions for the convenience of readers," oversaw a professional staff that edited opinions for "accuracy and uniformity" of style, and was responsible for "supervising their printing and official publication in the United States Reports."<sup>17</sup> Like the order of appointment, it said nothing of the massive backlog of not-yet-published decisions the new Reporter would have to address or the difficulty that it would pose in editing current ones. When she took office in 2021, the most recent edition of Supreme Court decisions available from the government extended only through January 20, 2016, a full five years prior. Worse yet, that was only a preliminary paperbound version of the first segment of a full volume. The complete volume did not appear until 2023, a delay of seven years.

The statute under which Ms. Womeldorf was appointed, like that of 1817, focuses the Reporter's duties upon the production of printed books.<sup>18</sup> Since 1922 it has called for publication in two stages: first, "advance copies . . . in pamphlet installments" and then, "bound volumes" holding the permanent record of the Court's decisions.<sup>19</sup> The Reporter is no longer responsible for securing a publisher nor is the Reporter's compensation contingent on timely publication.<sup>20</sup>

For the past century, the Reporter of Decisions has been a Court employee and responsibility for publication

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16. See *Rebecca Anne Womeldorf Named Reporter of Decisions of the Supreme Court of the U.S.*, SUP. CT. OF THE U.S. (Dec. 28, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_12-28-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_12-28-20).

17. *Id.*

18. See 28 U.S.C. § 673.

19. See Act of July 1, 1922, ch. 267, 42 Stat. 816.

20. See 28 U.S.C. § 673.

of the *U.S. Reports* has been lodged with a Congressional agency, the GPO. (For most of that agency's history, those initials stood for "Government Printing Office." In 2014, because of the diminished importance of print to its mission, Congress performed a simple search-and-replace and renamed the agency the "Government Publishing Office."<sup>21</sup>) Currently, the Reporter's tasks, laid down by statute, are preparation of the Court's decisions for publication and, subject to the Court's approval, setting the standards for "the quality and size of the paper, type, format, proofs and binding" of the volumes containing them.<sup>22</sup> The GPO is then charged with delivering copies for distribution within the government "as soon as practicable after rendition," the number and recipients being set by the Joint Committee on Printing of Congress.<sup>23</sup> The GPO is also authorized to "print such additional bound volumes and preliminary prints of such reports as may be required for sale to the public."<sup>24</sup>

Over the three years since Ms. Womeldorf's appointment as Reporter, there has been little improvement in the pace of *U.S. Reports* print publication. She has, though, succeeded in bypassing that bottleneck by means of dramatic, although largely unnoticed, changes in the electronic dissemination of the Court's decisions via the Court website.<sup>25</sup> Those changes promise to mitigate and may, ultimately, remove the adverse consequences that currently flow from the delayed appearance of those same decisions in a government-published print volume.

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21. See 28 U.S.C. § 411(c).

22. 28 U.S.C. § 673(c).

23. 28 U.S.C. § 411(a).

24. 28 U.S.C. § 412.

25. See generally *U.S. Reports*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/opinions/USReports.aspx> (last visited Mar. 28, 2024).

### III. HOW SUCH DELAYS COULD HAVE DEVELOPED AND WITHOUT OUTCRY FROM THE JUSTICES OR THE MANY OTHERS WHO MUST WORK WITH THE COURT'S OPINIONS

Immediately following the 1922 transfer of publication responsibility to the GPO and throughout the balance of the 20th century, “as soon as practicable”<sup>26</sup> translated into the appearance of *U.S. Reports* bound volumes within a year or two after the date of their most recent contents. Publication of a volume’s segments in paperbound “preliminary print[]”<sup>27</sup> format occurred more rapidly. Volume 529, containing decisions through May 25, 2000, was published the following year.<sup>28</sup>

An innovation introduced by Reporter of Decisions Walter Wyatt in 1950 allowed page numbers to remain constant between preliminary print segments and the final bound volume. Borrowing a practice from commercial law reports,<sup>29</sup> Wyatt placed an arbitrary pagination gap between opinions and orders in each preliminary print. It was set sufficiently wide to allow preparation of the subsequent bound volume with all opinions in sequence and all orders following, the two separated by a range of non-existent pages. Wyatt’s editorial note in volume 340, directly following its page 622, explained what this achieved:

The next page is purposely numbered 801. The numbers from 623 to 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or “preliminary prints” of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.<sup>30</sup>

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26. 28 U.S.C. § 411(a).

27. *Id.*

28. See generally 529 U.S., at I (1999), <https://www.supremecourt.gov/opinions/boundvolumes/529bv.pdf>.

29. See generally Kendall F. Svengalis, *The Rhode Island State Law Library: Meeting Patron Needs in a Technological Age*, R.I. BAR J., OCT. 1995, at 19.

30. Editorial Note, 340 U.S. [on the undesignated page between 623 and 801] (1950) (emphasis original).

The scheme recognized the importance of swift attachment of enduring official citation markers to each decision and its elements, and reflected Wyatt's understanding that, even then, volumes of the *U.S. Reports* were not books designed to be read through, from first to last page. Instead, as a set they comprised but one component of a print database (law library) in which content, retrievable by official citation, was stored. So long as a volume's pages were arrayed in order, a gap in pagination was not likely to cause either confusion or inconvenience to researchers referred to a case by another judicial decision, an annotation, citator, journal article, or treatise.

By the time the current century got underway, use of and demand for the GPO-published volumes of both types had undergone profound change. In law, as in other domains, digital transmission and full-text search had deeply eroded the importance of print as a medium of document storage and retrieval. Supreme Court decisions could be located online in full text on the day of their release. (Initially, that was through the effort of others,<sup>31</sup> but when the Court's own website debuted in April of 2000 it offered decisions of the then current term in slip opinion form.<sup>32</sup>) An academic institute emailed free, nearly instantaneous, bulletins containing the Reporter's summaries.<sup>33</sup> Lawyers, judges, and judicial clerks had, by then, grown accustomed to reading decisions and other legal texts on a screen, employing software that allowed the reader to follow their citations (whether to statute, regulation, or another judicial

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31. See *infra* VII. Author's Note.

32. See *Opinions*, SUP. CT. OF THE U.S. (June 29, 2000), <https://web.archive.org/web/20000706233722/http://www.supremecourtus.gov/opinions/opinions.html>. As the site explained, these slip opinions were compiled versions of the bench opinions released earlier in the day via the Court's direct feed to the news media and legal publishers. It warned that the slip opinions would be taken down when, within a few months, they were published in a paginated preliminary print version. See *Information about Opinions*, SUP. CT. OF THE U.S., [https://web.archive.org/web/20000711013746/http://www.supremecourtus.gov/opinions/info\\_opinions.html](https://web.archive.org/web/20000711013746/http://www.supremecourtus.gov/opinions/info_opinions.html) (Apr. 17, 2000).

33. See *infra* VII. Author's Note.



opinion) with a mouse-click. Major legal research services provided readers of Supreme Court decisions with direct and well-marked pathways to subsequent cases that applied, interpreted, or distinguished them.

Those at the Court responsible for the prompt distribution of its work to the general public had been swift to recognize the power of computers. During the early 1980s, they installed Atex, a computer-based publishing system as a replacement for hot lead composing. Widely adopted by the nation's newspapers, Atex sped and simplified the production of the printed copies of individual decisions made available to the press, law publishers, and interested members of the public directly following their announcement. These copies took two forms. The first termed "bench opinions" presented the Reporter's summary of the case (the Syllabus) and all opinions (majority, concurring, and dissenting) as separate documents.<sup>34</sup> A second version, the "slip opinion," followed some days later and consisted of all the bench opinion components of a case compiled into a single document.<sup>35</sup>

A natural, although hardly inevitable, next step occurred a decade later when Court staff offered a direct feed of Atex-generated data to a limited number of newspapers, the principal commercial publishers of the Court's decisions, the GPO, and a non-profit consortium.<sup>36</sup> One member of the latter proceeded to place the files online, making them accessible to an expanding number of others.<sup>37</sup>

More slowly, computers altered how the Justices, themselves, and their law clerks went about their work. Chief Justice Roberts acknowledged his colleagues' cautious approach to technology in his *2023 Year-End*

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34. See *Information about Opinions*, *supra* note 32.

35. See *id.*

36. Those selected included the Associated Press, United Press International, Commerce Clearing House, West Publishing (Westlaw), Mead Data Central (LEXIS), the Thompson Group, the Justice Department, and a consortium of non-profits including Case Western Reserve University. See *Questions and Answers*, 83 LAW LIBR. J. 409, 410, 410 n.9 (1991).

37. See *infra* VII. Author's Note.

*Report on the Federal Judiciary*.<sup>38</sup> The report concedes that the Justices were, time and again, slow to adopt new methods and devices.<sup>39</sup> His examples include typewriters, copy machines, and personal computers.<sup>40</sup> Even after computers had moved into the Justices' chambers, Roberts writes, "paper remained the rule of the day."<sup>41</sup> Law clerks and law librarians were still called upon to "pull" cases from hardbound case reporters."<sup>42</sup> Nonetheless, according to his account, by the turn of the century that had changed. Legal research at the Court had moved online.<sup>43</sup>

At the Supreme Court, as elsewhere, print volumes of the *United States Reports* had ceased to be essential tools of research and close textual analysis. Powerful and comprehensive online data systems had displaced them, transforming these and other official law reports into officially prepared and maintained archival copies.<sup>44</sup> Their production and preservation may still have warranted government expenditure, but radically diminished demand undercut existing arrangements for their publication. Undercut them, because those arrangements were premised on levels of revenue from sales to state bodies, legal professionals, libraries, and overseas buyers that had ceased to exist and called for skills and production methods that were, by then, in rapid decline.

Other official federal publications were affected by these changes. The GPO's publication of bound volumes of the *Congressional Record* and *U.S. Statutes at Large* experienced comparable delays. As of January 2024, the

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38. See generally SUP. CT. OF THE U.S., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2023), <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf> [hereinafter 2023 YEAR-END REPORT].

39. See *id.* at 3–4.

40. See *id.*

41. *Id.* at 4.

42. *Id.*

43. See *id.*

44. See *id.*

most current full volumes of both those publications cover portions of 2017.<sup>45</sup>

#### IV. CONSEQUENCES OF THE MULTI-YEAR PUBLICATION DELAY FOR ALL WHO WORK WITH THE SUPREME COURT DECISIONS, INCLUDING THE REPORTER

On questions of federal law, the Court's rulings hold immediate importance for all judges, state and federal, and for the lawyers who represent clients before them. In his year-end report, Chief Justice Roberts counted only 55 Supreme Court decisions with full signed opinions for the term that concluded in 2023.<sup>46</sup> A small number, perhaps, but, as binding precedent, those few decisions produce serious waves. By the end of the year, one had already been cited 307 times by lower federal courts.<sup>47</sup>

Year upon year, such effects accumulate. One 2018 decision of the Court had, by the end of 2023, been cited in over 1,200 subsequent judicial opinions.<sup>48</sup> The case, *Epic Systems Corp. v. Lewis*,<sup>49</sup> with a majority opinion by Justice Gorsuch, concurrence by Justice Thomas, and dissent by the late Justice Ginsburg with Justices Breyer, Sotomayor, and Kagan joining,<sup>50</sup> illustrates both the consequences of the lengthy delay in official publication of decisions and a logistical problem the Court's new reporter of decisions confronted in January 2021. The *Epic Systems* case had not, at that point, been published in an official form to which lawyers and

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45. See generally *Congressional Record (Bound Edition)*, GOVINFO, [https://www.govinfo.gov/app/collection/crecb/163\\_crecb](https://www.govinfo.gov/app/collection/crecb/163_crecb) (last visited Apr. 12, 2024); *2017 United States Statutes At Large Volume 131 Volumes I And II*, U.S. GOV'T BOOKSTORE, <https://bookstore.gpo.gov/products/2017-united-states-statutes-large-volume-131-volumes-i-and-ii> (last visited Mar. 27, 2024).

46. 2023 YEAR-END REPORT, *supra* note 38, at 8.

47. *Jones v. Hendrix*, 599 U.S. 465 (2023) (see LEXIS citing decisions tab documenting the citing frequency of lower federal courts).

48. See *Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018) (see LEXIS citing decisions tab documenting the citing frequency of other courts).

49. *Id.*

50. *Id.* at 500.

judges, desiring to refer to specific language within any of its opinions, could cite. Court rules and deeply embedded professional norms directed citation to the *U.S. Reports* whenever possible. In January 2021, that was still not possible. Not even the government's paperbound "preliminary print" edition covering the end of the Court's term in 2018 had, at that point, been issued.

The lengthy delay in government publication forced judges, lawyers, scholars, and others working from Supreme Court precedent to rely on and cite to an unofficial, commercially prepared, version. Of these, principally, there are two, with one of them holding a clearly dominant position. Reflecting over a century of history, both proprietary alternatives are, like the official *U.S. Reports*, cited to numbered and paginated print volumes, even when they have been accessed online. However, their respective volume and page numbers are attached to decisions only one month or so after they have been released by the Court. Once attached, they are included in their proprietors' online data services: Westlaw and LEXIS. Neither of those services retains the slip opinion pagination that decisions carry upon release. Both substitute their own numbered divisions and print-based pagination. An April 2023 decision of the U.S. Court of Appeals for the First Circuit quoted from the majority opinion in the *Epic Systems* case.<sup>51</sup> It identified the source as volume 138 of the *Supreme Court Reporter* published by Thomson Reuters, the page in that copyrighted volume where the *Epic Systems* decision began, and the page on which the quoted passage appeared. Compressed the reference read simply: *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Opinion details reveal that the author, like nearly all federal judges, did his case research using Westlaw, the Thomson Reuters database.

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51. See *Ribadeneira v. New Balance Athletics, Inc.*, 65 F.4th 1, 15 n.8 (1st Cir. 2023).

Widespread judicial use of *Supreme Court Reporter* citations, forced by the lack of official ones, has compelled other legal research services that seek to compete with Westlaw to license *Supreme Court Reporter* citation data from Thomson Reuters, owner of that publication and Westlaw, or to acquire *Supreme Court Reporter* volumes in print and digitize them in order to extract their pagination. In sum, delay has allowed one commercial publisher and data provider to become the Court's de facto official publisher, thereby placing its competitors at a serious disadvantage. The contents, volume numbers, and pagination of the *U.S. Reports* all end up in the public domain, but their delayed arrival forces the use of a commercial alternative.

Ten of the subsequent citations of *Epic Systems* appear in more recent opinions of the Supreme Court itself.<sup>52</sup> Unlike other federal court judges, the Justices do not cite to the Thomson Reuters publication. Adhering to its own non-proprietary form, the Court cites its prior decisions using their *U.S. Reports* volume and page numbers. As a result, the lengthy delay in publication has introduced a compounding problem, for the Justices and the Reporter. When the full *U.S. Reports* citation for an opinion, referred to in a later one, is not yet available, the missing components are left blank for later completion by the Reporter.<sup>53</sup> So long as the reference simply points to a case or accompanies a quotation, completion is a relatively straightforward task. But often when the blank is part of a pinpoint citation, making reference to an interior page of an opinion, the intended target may not be self-evident. Some guidance will be furnished by temporary slip opinion page references customarily provided in parentheses by the citing opinion's author. There is, though, no direct correspondence between slip opinion pages and those in

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52. See, e.g., *Dubin v. United States*, 599 U.S. 110, 120 (2023); see also *Biden v. Missouri*, 595 U.S. 87, 102 (2022) (Thomas, J., dissenting); *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 177 (2019).

53. See, e.g., *Dubin*, 599 U.S. at 120 (providing an incomplete citation to the *U.S. Reports*: “*Epic Systems Corp. v. Lewis*, 584 U. S. \_\_\_, \_\_\_ (2018)”).

*U.S. Reports* format. As a result, filling in blank citations must surely, at times, be a challenge for the Reporter. The greater the number of blanks to fill and the elapse of time, the greater that challenge. To the degree that obtaining approval from the authoring Justice's chambers is entailed, one can be fairly confident that is the case.

Delay also encourages revision. Within a system that does not treat the official text of an opinion as fixed and final until it has been published in a bound volume, opinion authors, often, no doubt, prompted by others, can be tempted to make minor corrections or improvements. Historically such post-release revisions have posed little, if any, risk of substantive effect. Inevitably, though, there have been exceptions.<sup>54</sup> Having been called out in 2014 for substituting a revised slip opinion without notice, the Reporter's office began flagging all editorial changes made during the long period decisions remained in slip opinion form at the Court website. In recent years, post-release revisions posted to the site have averaged over six a year. Most have appeared within a few days of release, a few, several months later. Catching those changes and incorporating them into their own online data and print publications is a challenge that the commercial research services have addressed with varying degrees of success.<sup>55</sup>

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54. At least this has been true in recent years. It was not always so. See generally Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540 (2014). For an example of an initial typographical error, corrected in the permanent edition of the *U.S. Reports*, but not in the commercial reporters or their online descendants, that led to pernicious consequences, see generally Michael Allan Wolf, *A Reign of Error: Property Rights and Stare Decisis*, 99 WASH. U. L. REV. 449 (2021).

55. For an example of inconsequential revisions that have not (yet) been picked up by the various online collections of Supreme Court decisions, compare the version of *Dupree v. Younger* at the Court website, which is followed by a Reporter's Note listing six revisions with the version offered by any of the alternative sources. See 598 U.S. 729, 729–39 (2023), [https://www.supremecourt.gov/opinions/22pdf/598us2r29\\_k5fm.pdf](https://www.supremecourt.gov/opinions/22pdf/598us2r29_k5fm.pdf). As of the end of January 2024, BloombergLaw, Fastcase, Google Scholar, LEXIS, and Westlaw all offered the decision as originally released, without the revisions. That was true even of those that had by then picked up the decision's official report pagination.

## V. THREE YEARS IN: WHAT THE NEW REPORTER AND HER STAFF HAVE ACCOMPLISHED

At the point of Reporter transition in 2021, production and distribution of electronic copies of the Court's decisions in the form they would carry into print were tied to the GPO's pace of publication. Decisions were placed at the Court website in slip opinion form and remained there in that temporary format until they were published in a bound volume of the *U.S. Reports*. Upon print publication of a full volume, and only then, would a digital file of its contents be loaded on the Court's site. At that point, the slip opinions corresponding to the cases within the volume would be removed. The site acknowledged the existence of the intermediate "preliminary print" edition but provided no electronic access to it.<sup>56</sup> Nor was a digital file of its contents offered to the large number of entities endeavoring to maintain comprehensive and up-to-date collections of Supreme Court opinions. They were put to a choice between waiting for the bound volume to obtain official citation parameters together with any post-slip-opinion revisions and expending the time and resources to digitize preliminary print volumes as they emerged from the GPO.

The first visible change made by the Court's new Reporter was placement of six PDF files containing preliminary print volumes at the Court website.<sup>57</sup> In March 2021 the first two parts of volumes 575, 576, and 577 holding decisions of the Court's 2014 October Term appeared at the Court website, available for download.<sup>58</sup> All were, at that point, available in print.

Next, at the start of the Court's term in 2022, the Court site announced a major decoupling from print.

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56. See *Information about Opinions*, SUP. CT. OF THE U.S., [https://web.archive.org/web/20210118215726/https://www.supremecourt.gov/opinions/info\\_opinions.aspx](https://web.archive.org/web/20210118215726/https://www.supremecourt.gov/opinions/info_opinions.aspx).

57. See *U.S. Reports*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20210318000308/https://www.supremecourt.gov/opinions/USReports.aspx>.

58. See *id.*

Beginning with that term, preliminary print segments would be made available as electronic files as soon as they were ready for print publication.<sup>59</sup> Until actually published, they would be labeled “page proof.”<sup>60</sup> Once available from the GPO, their designation would change to “final form.”<sup>61</sup>

An even more significant change was posted at the Court’s website prior to the announcement of the 2022 Term’s first decisions. The site explained that in the future decisions would remain in slip opinion form, only “until replaced with opinions edited to reflect the usual publication style of the United States Reports, including final pagination that will carry forward unchanged in the corresponding preliminary prints and the bound volumes of the United States Reports.”<sup>62</sup> Two decisions, released by the Court on January 23, 2023, were the first to be put through this new cycle. By early March they had been converted from slip opinion format to preliminary print format and watermarked “Page Proof Pending Publication.”<sup>63</sup> Their PDF files contained the volume number (598) and pagination that they will presumably, on some distant day, carry into print.<sup>64</sup>

Throughout the balance of the 2022 Term this two-step process continued. Decisions were initially loaded on the Court’s site in slip opinion format, to be replaced some weeks later by preliminary print versions. Predictably, the end-of-term surge of opinions slowed conversions. In early July, the most recent reformatted decision was dated May 11. By early September, all but the last three decisions of the term were available with

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59. See *U.S. Reports*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20221031214349/https://www.supremecourt.gov/opinions/USReports.aspx>.

60. See *id.*

61. See *id.*

62. *Opinions of the Court—2022*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20230312200712/https://www.supremecourt.gov/opinions/slipopinion/22>.

63. See, e.g., *Arellano v. McDonough*, 598 U.S. 1, 1 (2023), [https://web.archive.org/web/20230310123832/https://www.supremecourt.gov/opinions/22pdf/598us1r1\\_qol1.pdf](https://web.archive.org/web/20230310123832/https://www.supremecourt.gov/opinions/22pdf/598us1r1_qol1.pdf).

64. See *Opinions of the Court—2022*, *supra* note 62.



permanent volume and page numbers.<sup>65</sup> Finally, as the 2023 October Term got underway, those, too, were at the site in preliminary print format.<sup>66</sup> And that term's first decision, handed down on December 5, was online, in revised format, approximately one month later.<sup>67</sup>

Conversion of the multi-year backlog of slip opinions was also well underway. On the third anniversary of the new Reporter's appointment, all slip opinions from the Court term that began in October 2021 had been converted,<sup>68</sup> as had nearly two-thirds of those from the year before.<sup>69</sup>

Finally, by early January 2024, a complete volume 578, the second of three covering the Court's 2015 term, was available online bearing the watermark "Page Proof Pending Publication."<sup>70</sup>

## VI. NEXT STEPS — SOME ESSENTIAL, OTHERS SIMPLY POSSIBLE

As 2024 began, two full years of decisions (those from the Court's terms beginning in 2018 and 2019) and part of a third (2017) remained in slip opinion format. Converting them will likely pose a greater challenge than more recent ones. Included are opinions by the late Justice Ginsburg, and retired Justices Stephen Breyer

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65. See *Opinions of the Court—2022*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20230906115046/https://www.supremecourt.gov/opinions/slipopinion/22>.

66. See *Opinions of the Court—2022*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20231004115043/https://www.supremecourt.gov/opinions/slipopinion/22>.

67. See *Opinions of the Court—2023*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20240115195441/https://www.supremecourt.gov/opinions/slipopinion/23>.

68. See *Opinions of the Court—2021*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20240124184808/https://www.supremecourt.gov/opinions/slipopinion/21>.

69. See *Opinions of the Court—2020*, SUP. CT. OF THE U.S., <https://web.archive.org/web/20240114201846/https://www.supremecourt.gov/opinions/slipopinion/20>.

70. See 578 U.S., at I (2015), <https://web.archive.org/web/20240112185132/https://www.supremecourt.gov/opinions/boundvolumes/578BV.pdf>.

and Anthony Kennedy. The passage of time will, even for the rest, complicate the tasks of reconstructing the precise targets of pinpoint citations and consulting with an author over possible factual or citation errors. Yet, because of the many citation links between more recent decisions and those earlier ones, this step must be finished before the cases already converted to preliminary print format can truly be declared complete.

One case decided during the Court's October 2022 term illustrates the point. By virtue of its conversion to preliminary print format, *303 Creative LLC v. Elenis*, can now be cited "600 U.S. 570."<sup>71</sup> References within its opinions to prior decisions of the same term have been rendered in the same final and complete form. But citations in *Elenis* to decisions from not-yet-converted prior terms, and even to one decision from the term immediately before, a decision that has also now been put in preliminary print format, remain in the following skeletal format (with the author's original slip opinion page references removed):

- "National Institute of Family and Life Advocates v. Becerra, 585 U. S. \_\_\_, \_\_\_ (2018)"<sup>72</sup>
- "Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U. S. \_\_\_, \_\_\_ – \_\_\_ (2018)"<sup>73</sup>
- "Shurtleff v. Boston, 596 U. S. \_\_\_, \_\_\_ – \_\_\_ (2022)"<sup>74</sup>

All but two of last year's decisions contain at least one such empty reference. Because of the conversion effort of this past year, fewer decisions of the term now underway should have to.

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71. *Opinions of the Court—2022*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/opinions/slipopinion/22> (last visited Mar. 29, 2024).

72. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023), [https://www.supremecourt.gov/opinions/22pdf/600us1r58\\_7khn.pdf](https://www.supremecourt.gov/opinions/22pdf/600us1r58_7khn.pdf) (last visited Mar. 29, 2024).

73. *Id.* at 581.

74. *Id.* at 587.

Only after the remaining three years of slip decisions have been addressed and volume and page numbers have been attached to the Court's orders on writs of certiorari can all such blanks in later ones be filled. At that point, the Reporter will need a designation beyond "Page Proof Pending Publication"<sup>75</sup> to signal full completion of the official editorial process to those republishing the Court's decisions.

The citation of grants of certiorari introduces a much broader issue, one not yet fully addressed by the Reporter: what to do with the Court's orders. By convention, every Supreme Court opinion that follows a grant of certiorari cites the earlier Court order agreeing to hear the case (using the volume and page number in the *U.S. Reports* where it is recorded).<sup>76</sup> Until all the orders for the relevant term have been assembled and assigned volume and page numbers, such references must contain blanks. If the standard opinion format were to replace that citation with a simple recital of the grant of certiorari, coupled with a date and any other important details, opinions could be released in complete final form far more rapidly.

A more complex and broader question is how best to preserve a public record of all the Court's orders in the modern era. Including them in citable form in printed volumes or even complete digital ones imposes serious delay and other costs, including, one must suppose, a significant burden on the Reporter and her staff. Orders fill nearly as many pages as opinions in the most recently released volume of the *U.S. Reports* (volume 577).<sup>77</sup> Its nearly 200-page Table of Cases is clogged with summary dispositions of petitions seeking a grant of certiorari, motions to proceed in forma pauperis, motions seeking to file a brief amicus curiae, requests for reconsideration,

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75. See *supra* text accompanying notes 62–70.

76. See, e.g., *Zivotofsky v. Kerry*, 576 U. S. 1, 9 (2015), <https://www.supremecourt.gov/opinions/boundvolumes/576BV.pdf> (last visited Mar. 29, 2024) ("This Court again granted certiorari. 572 U. S. 1059 (2014).").

77. See *generally* 577 U.S. 1 (2015), <https://www.supremecourt.gov/opinions/boundvolumes/577BV.pdf>.

suspensions and disbarments from practice before the Court, and so on.<sup>78</sup> To what end are these actions included, following an arbitrary pagination gap, at the rear of each volume of *U.S. Reports*? The importance of preserving an accessible and enduring public record of the Court's orders is not to be doubted. The issue is not whether but how that should be done. Cataloging them in the pages of the *U.S. Reports*, print or electronic, no longer appears the best solution.

A still more provocative question is whether production of a series of print volumes containing all Supreme Court opinions still warrants public expenditure. In the current era, one can imagine a comprehensive collection of carefully curated and regularly archived electronic copies taking their place. A fair number of state courts have made that switch.<sup>79</sup> Some have taken the further step of authenticating their electronic case reports by means of a digital signature, once they have become final.<sup>80</sup> That measure, now employed by the GPO in its digital publications, including the federal court rules,<sup>81</sup> provides important

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78. See *id.* at IX–CCII. The problem is especially pronounced in the first volume of a term.

79. Examples include Illinois, New Mexico, and Oklahoma. See, e.g., *Opinions and Rule 23 Orders*, ILL. CTS., <https://www.illinoiscourts.gov/top-level-opinions/> (last visited Mar. 27, 2024); see also N.M. COMPILATION COMM'N, <https://www.nmcompcomm.us/> (last visited Mar. 27, 2024); *New Decisions*, OKLA. ST. CTS. NETWORK, <https://www.oscn.net/decisions/> (last visited Mar. 27, 2024). In Nebraska, where the reporter of decisions moved to electronic publication, a statute now designates the Nebraska Appellate Courts Online Library as the official repository for the published opinions of the state's supreme court and intermediate court of appeals. See NEB. REV. STAT. § 24-209(1) (2024).

80. Under the Uniform Electronic Legal Material Act (UELMA), now adopted by 22 states, authentication, maintenance of a permanent archival copy, in print or electronic form, along with public access are core components of any effective program of official publication substituting electronic for print publication of official court reports, statutes, rules, or regulations. See *Electronic Legal Material Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=02061119-7070-4806-8841-d36afc18ff21> (last visited Mar. 27, 2024). Illinois has taken those steps in reporting the decisions of its appellate courts. See *Opinions and Rule 23 Orders*, *supra* note 79.

81. Each year, the Committee on the Judiciary of the House of Representatives publishes a pamphlet containing each of the Federal Rules of

assurance that downloaded copies are what they purport to be.<sup>82</sup>

At present, an out-of-date federal statute calls for print publication of the *U.S. Reports* on terms that no longer work. For some years, the situation appears to have paralyzed the public body ultimately responsible, the GPO, and the joint committee of the U.S. Congress that oversees it.<sup>83</sup> The Supreme Court's new Reporter of Decisions has begun shaping a process of electronic publication that should, in time, succeed in bypassing that clogged channel. The development offers a measure of immediate and direct benefit to those members of the general public who seek greater understanding of the Court's decisions at its website. Even greater indirect benefits may accrue. Some will flow if and when the Reporter's reforms make it possible for the full range of legal information intermediaries to offer the Court's recent opinions promptly in their final, official, citable form. More may result if the Reporter's model, once fully realized, influences others.

## VII. AUTHOR'S NOTE

The research underlying this paper was carried out without access to a single physical volume of the *United States Reports*. Faithful digital reproductions of the books prepared by the Supreme Court's long line of Reporters are now available in online archives. Thanks to them, I was able to examine a comprehensive

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Procedure (Appellate, Bankruptcy, Civil, Criminal, and Evidence). They are produced by the GPO by means of authenticated PDF files. Those files and all prior sets dating back to 2004 are archived at the website of the Administrative Office of the U.S. Courts. See *Current Rules of Practice & Procedure*, U.S. CTS., <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure> (last visited Mar. 27, 2024).

82. See *Authentication*, GOVINFO, <https://www.govinfo.gov/about/authentication> (last visited Mar. 27, 2024).

83. According to its website, the Joint Committee on Printing, meets regularly but once per Congress, to organize. See *Joint Committee on Printing*, CONGRESS.GOV, <https://www.congress.gov/committee/joint-committee-on-printing/jspr00> (last visited Mar. 27, 2024).

collection of the originals. The virtual shelves from which I pulled the volumes relied upon here include those of HeinOnline,<sup>84</sup> the HathiTrust Digital Library,<sup>85</sup> and the Library of Congress.<sup>86</sup>

A fourth online archive proved critical to the paper's account of the sequence of recent measures taken at the Court website to address the *U.S. Reports* publication delay. For nearly a decade, I had loosely monitored that delay.<sup>87</sup> In March 2021, I noticed the first appearance of preliminary print volumes at the Court site. That alone did not prompt me to monitor the site so regularly or consistently as to be able to catch and log the further developments detailed here. Thanks to the Internet Archive's WayBack Machine,<sup>88</sup> I did not have to. The footnotes that link to the Court's website as of specific dates display my reliance on the WayBack Machine. It allowed me to trace developments at the site looking back from the early days of 2024.

While the WayBack Machine does indeed go "way back," its reach doesn't extend to the first appearance of the Court's decisions online. As the paper reports, Case Western Reserve University, one of the participants in the program (code-named "Hermes") that distributed electronic files of decisions on the day of release, placed those files online at an FTP site. There they sat when Thomas R. Bruce and I launched Cornell's Legal Information Institute (LII) in 1992. Mr. Bruce created a front-end to the Case Western repository, first via a Gopher server (a web precursor) and then on the LII's

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84. HEINONLINE, <https://home.heinonline.org/> (last visited Mar. 29, 2024).

85. HATHI TRUST, <https://www.hathitrust.org/> (last visited Mar. 29, 2024).

86. LIBR. OF CONG., <https://www.loc.gov/> (last visited Mar. 29, 2024).

87. See Peter W. Martin, *The First Supreme Court Opinion Rendered in 2018 Is Now Out—How Many Years Before It Will Be Published in Final, Official Form?*, CITING & ACCESSING U.S. L. (Jan. 11, 2018, 7:34 PM), <https://citeblog.access-to-law.com/?p=1016>; Peter W. Martin, *Better Never Than So Very Late?*, CITING & ACCESSING U.S. L. (Sept. 22, 2016, 6:48 PM), <https://citeblog.access-to-law.com/?p=652>; Peter W. Martin, *Costs of the (Increasingly) Lengthy Path to U.S. Report Pagination*, CITING & ACCESSING U.S. L. (Jan. 27, 2014, 9:31 PM), <https://citeblog.access-to-law.com/?p=93>.

88. INTERNET ARCHIVE: WAYBACK MACH., <https://web.archive.org/> (last visited Mar. 29, 2024).

initial website. Mr. Bruce also devised software that detected the arrival of new files at the Case Western Reserve site and reformatted the syllabi into the email-delivered liibulletin.

By the time the Internet Archive began crawling the web, including the LII servers, in 1997, the institute had secured its own Hermes feed and the LII Bulletin was reaching over 10,000 subscribers. A 1998 description of that history and the challenges of converting Hermes data to HTML is available by way of the WayBack Machine.<sup>89</sup>

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89. See generally *The LII and Hermes: Overview and Recent Developments*, LII HERMES, <https://web.archive.org/web/19980109024149/http://supct.law.cornell.edu/supct/> (as of Jan. 9, 1998).

