THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

VOLUME 20/NUMBER 2
FALL 2019

ARTICLES

BOOK REVIEW

WILLIAM H. BOWEN SCHOOL OF LAW
UNIVERSITY OF ARKANSAS AT LITTLE ROCK

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

VOLUME 20/NUMBER 2
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Subscriptions: Published semi-annually, *The Journal* is available for $25.00 per year to subscribers in the United States and for $30.00 per year to subscribers in other countries. Orders for back issues of *The Journal* should be directed to William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068, or to periodicals@wshein.com.

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Postmaster: Send address changes to Editor, *The Journal of Appellate Practice and Process*, William H. Bowen School of Law, University of Arkansas at Little Rock, 1201 McMath Avenue, Little Rock, Arkansas 72202-5142. Postage paid at Little Rock, Arkansas, and additional mailing offices.

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FOREWORD

AVE ATQUE VALE

I have always been a planner. That means, of course, that I have been thinking about this foreword for years. It is my last.

I notice as I pack up my things and begin to take stock that I have used this space to catalogue my professional life (and on more than a few occasions, my personal life as well). I have confessed to you how easily distracted I am whenever my work takes me to the library,[1] how much time I spend reading for pleasure,[2] and how readily I give in to the summons of a why-is-that if one happens to catch my eye.[3] I have let you see how closely I follow the legal news,[4] and you have perhaps deduced that I would follow it closely even if doing so were not an essential part of this job.

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1. Nancy Bellhouse May, *Now and Then at the Supreme Court*, 7 J. App. Prac. & Process v, v (2005) (referring to books about the Supreme Court that I "couldn't resist perusing when I was supposed to be at work on something else").

2. Nancy Bellhouse May, *Book Smart*, 19 J. App. Prac. & Process v, vi (2019) (describing the joys of reading); Nancy Bellhouse May, *Two Books, Ten Days*, 13 J. App. Prac. & Process v, v (2012) (reporting that I "lunched with a book every day" while my husband and son were on a wilderness trip); Nancy Bellhouse May, *Three Giants*, 13 J. App. Prac. & Process v, v (2012) (confessing to a "bookish past"); Nancy Bellhouse May, *Justice Frankfurter, Books, and the Law*, 10 J. App. Prac. & Process v, vi (2009) (referring to "a new read and a re-read" then recently added to "the stack on my bedside table").

3. Nancy Bellhouse May, *The First and the Last*, 14 J. App. Prac. & Process v, v–vi (2013) (discussing the state supreme courts that are among the oldest in the country).

4. Nancy Bellhouse May, *Where We Are*, 19 J. App. Prac. & Process v, vi–vii (2018) (comparing Supreme Court nomination hearings of the late 1960s and early 1970s to those of today); Nancy Bellhouse May, *Who We Are*, 9 J. App. Prac. & Process v, v (2007) (referring to then-unfolding demonstrations by lawyers in Pakistan demanding reinstatement of their country's chief justice and restoration of its constitution); *Now and Then*, *supra* note 1, at v (referring to a "few months" in which Supreme Court watchers saw "a resignation, a death, three nominations, and two confirmation hearings").

I have made it clear that, among the Justices, I admire Robert Jackson most of all,[5] and you have probably figured out that I was born so long ago that I can hardly believe in the existence of Justices O'Connor, Ginsburg, Sotomayor, and Kagan.[6] I have also let you know how much I admire the writing of Thomas Jefferson,[7] the work of the Founders,[8] and the courage of Margaret Chase Smith.[9] I have told you a little about my parents,[10] and you cannot have failed to notice that my outlook has been shaped in part by my lifelong connection to Maine.[11]

You may not have realized, however, that I always pictured you—a curious, intelligent, and well-informed reader—as I began to write. I hoped each time I started that you might already share, or would come to share, at least some of my interests and enthusiasms. And I hoped by the end of every foreword to have left you thinking about something new.

My plan for this final foreword reminded me to note toward its end that I hoped someday to meet you, to shake your hand, to thank you for reading, and to suggest that we go get a cup of coffee—doubtless in some little place where there was always a line and never more than a couple of open seats. But those ways are behind us. That world is gone. And of course I knew even in the best of times that we were unlikely to meet in real life. So

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5. Nancy Bellhouse May, *Justice, Jackson and Otherwise*, 17 J. APP. PRAC. & PROCESS v, v–vi (2016).

6. Nancy Bellhouse May, *The Picture*, 20 J. App. Prac. & Process v, v–vi (2019); Nancy Bellhouse May, *The Past as Prologue*, 16 J. APP. PRAC. & PROCESS v, v–vii (2015). I am reminded as I type that the line marked "Ambition" next to my senior photo in the 1974 edition of *The Valley Echo* says "Supreme Court Justice." But of course that wasn't my aim in life. I was smarting off. I knew it was impossible. And yet, impossibly, there they are.

7. Nancy Bellhouse May, *What Little I Know*, 18 J. APP. PRAC. & PROCESS v, vi (2017).

8. *Two Books, Ten Days*, *supra* note 2, at v (referring to "the gentlemen in knee breeches whose discussions were about to change the world"); *Who We Are*, *supra* note 4, at v (acknowledging that this country "owes much to the lawyers among its founders" who understood that "a call to the law is also a call to lead").

9. *Where We Are*, *supra* note 4, at v–vi.

10. *What Little I Know*, *supra* note 7, at v; Nancy Bellhouse May, *Astaire. Baryshnikov. Brandeis*, 17 J. APP. PRAC. & PROCESS v, v (2016).

11. *Where We Are*, *supra* note 4, at v–vi (pointing out that Margaret Chase Smith represented Maine in Washington for more than thirty years and describing her presence on the national stage); Nancy Bellhouse May, *From Away*, 18 J. APP. PRAC. & PROCESS v, v (2017) (noting that "childhood on the coast of Maine offers both a sense of place and a sense of one's place in the world"); Nancy Bellhouse May, *The Maine Idea*, 15 J. APP. PRAC. & PROCESS v, v–vi (2014) (describing the national influence of Judge Frank M. Coffin, Judge Edward T. Gignoux, and Chief Justice Vincent L. McKusick).

please understand from this foreword that I appreciate your sticking with *The Journal*—and with me—for all these years.

Trusting that you will indulge me one last time, I close by telling you that my plan called for me to address just one of my readers here at the end. To tell him that he will understand years from now that whatever story I set out to share each time I used this space, I was writing to him, always to him. And the plan was also for me to say straight out that no matter how distinguished the rest of *The Journal*'s readers, it was his take on every foreword that mattered most to me.

THE ISSUE

The weight of this issue is concentrated in a rhetorical-computational analysis of Justice Scalia's majority opinions, but it also includes a report on judges' assessment of the ways in which lawyers approach oral argument, a guide for judges interested in best practices for the use of social media, an update on the end of abstracting the record in one of the few states that carried an abstracting requirement into the twenty-first century, and a review of Justice Stevens's autobiography. As has always been the case, I think that this issue's contents will speak in some way to every appellate reader.

A NEW HOME FOR *THE JOURNAL*

Some of you know already that *The Journal* will by the time you read this foreword have wrapped up its twenty-year run at the University of Arkansas at Little Rock's William H. Bowen School of Law. It will continue under the auspices of the James E. Rogers College of Law at the University of Arizona. We on *The Journal*'s team here at Bowen wish the best for the new team at University of Arizona Law and hope that its members find that they can count on the same loyalty and encouragement that we have known throughout our many years with you.

NBM
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THE JOURNAL OF
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MAY IT PLEASE THE COURT—OR NOT: APPELLATE JUDGES' PREFERENCES AND PET PEEVES ABOUT ORAL ARGUMENT

Margaret D. McGaughey*

There was a time when the only way to plead a case was orally. King Solomon decided between two women claiming to be the mother of the same baby based only on their oral representations, made without briefs (and, for that matter, without lawyers).[1] In the early 1800s, cases in the United States Supreme Court required no briefs, and oral arguments occasionally lasted as long as ten days.[2] By the twenty-first century, only one fifth of cases in the federal courts of appeals are decided on the basis of both briefs and oral argument.[3] The rest are resolved on the pleadings alone. Even those appeals that are heard orally are given only thirty minutes per side in the

*The former Appellate Chief of the United States Attorney's Office for the District of Maine, Ms. McGaughey argued 450 appeals before the United States Court of Appeals for the First Circuit.

1. 1 Kings 3:16–28 (Revised Standard).

2. John W. Davis, *The Argument of an Appeal*, 26 ABA J. 895, 895 (1940).

3. Jay Tidmarsh, *The Future of Oral Argument*, 48 Loy. U. Chi. L.J. 475, 478 n.16 (2016).

Supreme Court[4] and fifteen per side, or even less, in the federal courts of appeals and state supreme courts.[5]

With so little time to make their case, but so much at stake, what should lawyers do during oral argument to capture the judges' attention?

Lawyers have frequently written on this topic. Helpful to fellow advocates as such works may be, what matters is less what lawyers think about oral argument than what resonates with judges.

This article is the product of in-person interviews with nineteen state and federal appellate judges to ascertain what they find to be effective at oral argument and what they deem counter-productive or even annoying.[6] Ten of the interviewed jurists are active or senior members of the United States Court of Appeals for the First Circuit.[7] Eight are current or former justices of the highest courts of Maine,[8] Massachusetts[9], New Hampshire,[10] and Rhode Island.[11] One jurist was formerly Chief

4. Sup. Ct. R. 28.3 (July 1, 2019) (providing that "[u]nless the Court directs otherwise, each side is allowed one-half hour for argument").

5. *See, e.g.*, 1st Cir. Loc. R. 34(c) (providing that "[n]ormally the court will permit no more than 15 minutes per side for oral argument"); Me. R. App. P. 11(b) (providing that "[e]ach side will be allowed up to 15 minutes for argument" in the Supreme Judicial Court).

6. Former First Circuit Chief Judge Frank M. Coffin's classic guide to oral advocacy prompted many of the questions posed during the interviews and added much to the discussion in each. *See* FRANK M. COFFIN, A LEXICON OF ORAL ADVOCACY (Nat'l Inst. for Trial Advocacy (1984)). In the interest of disclosure: this author served as Judge Coffin's law clerk.

7. Sincere thanks go to Chief Judge Jeffrey R. Howard and Judges David J. Barron, Michael Boudin (Chief Judge from 2001 to 2008), Kermit V. Lipez, Sandra L. Lynch (Chief Judge from 2008 to 2015), William J. Kayatta, Jr., Bruce M. Selya, Norman H. Stahl, O. Rogeriee Thompson, and Juan R. Torruella.

8. The author is grateful to three former members of the Supreme Judicial Court of Maine: Chief Justice Leigh I. Saufley, Associate Justice Donald G. Alexander, and Chief Justice Daniel E. Wathen.

9. Chief Justice Ralph D. Gants, Associate Justice David A. Lowy, and Associate Justice Scott L. Kafker, who previously sat on the Massachusetts Appeals Court, graciously consented to interviews. Andrea Breier, the law clerk to Justices Kafker and Lowy, was also helpful in explaining that court's practices.

10. Recently retired Chief Justice Robert J. Lynn of the New Hampshire Supreme Court made significant contributions to this dialogue.

11. Chief Justice Paul Suttell kindly agreed to add his thoughts.

Judge of the First Circuit and now is an Associate Justice of the Supreme Court.[12]

With respect to some aspects of oral argument, the judges were in complete accord. Regarding others, there were significant differences of opinion. The objective of this article is to identify the points of agreement and disagreement so that oral advocates can avoid what judges see as common pitfalls and be aware of differences from court to court and judge to judge that will inform their oral advocacy.

I. PURPOSE AND SIGNIFICANCE OF ORAL ARGUMENT

The judges all agreed that the most important part of the appellate process is not oral argument, but the briefs. On paper, lawyers can carefully shape their legal theories, chose their words precisely, incorporate accurate supporting record references, edit and revise repeatedly, and bring the insights of colleagues to bear on the final product. Oral arguments, by contrast, are one-person shows, more spontaneous, occasionally unpredictable, and often lacking the careful scripting that attends the briefs.

There was no unanimity among the judges, however, regarding the significance, or even the utility of oral argument. The cost to litigants can be significant, for oral argument often entails travel, not to mention the legal fees associated with preparing for and appearing in the appellate court. There is also a cost to judges, who must spend their own and their law clerks' time getting ready for and hearing argument when they could be writing opinions instead.

Whether oral argument should be ordered less frequently was the subject of much debate among the judges. First Circuit Judge Torruella suggests that oral argument is a carryover from the English legal system, where briefs are literally brief, but oral

12. Having sat on both the First Circuit and the Supreme Court, Justice Stephen G. Breyer contributed a unique perspective.

The reader should note that this article refers to each judge or justice by the title appropriate to his or her highest judicial office. Thus, although some of Justice Breyer's comments refer to his experience on the First Circuit, he appears throughout as "Justice Breyer," Dean Saufley of the University of Maine School of Law appears throughout as "Chief Justice Saufley," and so on.

argument can last hours or even days. Many judges share his view that too many cases are set for argument, and the few truly complex appeals where oral argument will assist in the decisionmaking process are given too little time. Other judges, however, favor granting oral argument liberally because even if the outcome of a case appears clear, it can be difficult to predict what will arise during argument.

First Circuit Chief Judge Howard has come to believe that because his is a "paper court" and its members are very well prepared, "the federal circuit courts could get by without oral argument, but I think we would make a lot of mistakes." He finds educational value in having judges face the lawyers who have thought about the cases longer than the judges have and are willing to probe the limits of a possible ruling and what its impact would be. Whereas when he came to the First Circuit in 2002, forty percent of cases were set for argument, after a short-term increase in criminal filings, the number has settled at thirty-five percent. One concern Chief Judge Howard has about the declining number of oral arguments is institutional: that there are fewer opportunities for lawyers to appear before appellate courts and gain the experience needed to improve their advocacy. He favors adding a case or two to each argument list simply to allow lawyers—particularly young lawyers—to develop their skills.

The consensus of the judges was that although oral argument changes the outcome of an appeal only between ten and twenty percent of the time, it alters the reasoning more frequently. For Justice Breyer, for example, oral argument at the Supreme Court changes the result five percent of the time, but can refocus the reasoning in thirty percent of cases. Oral argument can shed light on issues that have been inadequately addressed in the briefing, for example procedural bars or mootness. Maine Chief Justice Saufley's view is that a good advocate whose brief has not quite captured the court's attention can bring the case to life at oral argument. First Circuit Judge Lipez tells students—and by extension lawyers—that they should always assume that oral argument will make a difference because "often enough, it does."

Even the non-believers conceded that oral argument serves a public function. Judging is a relatively solitary pursuit, and

what judges do can appear to the general public to be largely a mystery. Courts issue opinions that have significant impact not only on individuals, but on the nation as a whole, yet how they arrive at those opinions seems almost clandestine. In addition, the media does not always accurately portray the courts. In all but the most sensitive cases, however, oral argument is open to the public and this allows citizens a window into the appellate process and the judges' thinking. It also gives the litigants and their lawyers the sense that their arguments have been considered and they have literally had their day in court.

Judges offered varying insights into what, apart from winning, an advocate's purpose at oral argument should be. Everyone agreed that a principal function is to answer questions and thereby educate the court. First Circuit Judge Lynch summarizes the view of a number of jurists that an exceptional advocate will deliver an oral argument that amounts to an outline of how an opinion in that lawyer's favor would read. According to First Circuit Judge Boudin, lawyers should never present the extreme version of their position, but should guide judges to a result that will appear to both the court and the general public to be reasonable and legitimate. New Hampshire's Chief Justice Lynn describes an advocate's objective as persuading the court not only that a given position is correct, but also that it will lead to a proper development of the law and will not produce an outlier that the court will have to deal with in the future. Many appellate judges, five of the seven justices of the Massachusetts Supreme Judicial Court (SJC) among them, have previously sat on the trial bench, which makes them especially attentive to giving trial judges clear guidance. Those judges' trial experience makes them want to explore at oral argument the breadth of an opinion and any caveats that should be attached.

For some judges, oral argument is an opportunity to learn their colleagues' perspectives on a case. As a matter of court culture, many judges do not confer with their colleagues in advance of oral argument. A thorough discussion among the judges comes only in the semble, the conference of judges, which in most courts is held immediately after a day's argument

session is completed.[13] Questions to the lawyer during oral argument may thus be for the purpose of teasing out another judge's leanings or using the lawyer's answers as the basis for the semble discussion. Communicating with other jurists through questions to the lawyers is especially common at the Supreme Court, where, by virtue of having voted to grant or deny certiorari, the Justices are already aware of their colleagues' tentative views. The same is true of *en banc* hearings in the federal courts of appeals, where a majority of judges in active service who are not otherwise disqualified will have voted to hear the case.[14]

Although different jurists put it different ways, they all agreed that there are three basic ingredients of an effective oral argument:

- preparing;
- listening; and
- answering the question when it is asked.

II. PREPARATION

There was no dispute among the judges that the best oral advocates know their cases better than anyone else in the world. That includes opposing counsel and the judges themselves. In the state courts, it is typical for judges to hear twenty to twenty-four appeals in a one-month term. Panels of the First Circuit generally hear twenty-four cases per month, or more when there is a two-week session. In the Supreme Court, up to twenty-four cases can be heard in each of the two-week terms held between October and June. The sheer number of cases means that a well-prepared advocate can be of considerable assistance to any appellate court.

13. During semble, the judges cast tentative votes to affirm, reverse, or order some other relief. Except for jurisdictions where the author of an opinion is selected in advance, writing assignments are generally given at semble.

14. Fed. R. App. P. 35(a).

A. Judges' Preparation

Because judges have differing methods of preparing for argument, a lawyer expecting to appear in an unfamiliar court may want to research the backgrounds and opinions of the jurists who will decide their case. It may also be useful to contact experienced advocates in that jurisdiction or former law clerks to gain insight into how the judges ready themselves for argument.[15] Although the composition of a bench should not matter to the outcome of an appeal, the reality is that it often does. The more a lawyer knows about judges' predilections and how they prepare, the better equipped the lawyer will be to answer questions or correct misunderstandings.

1. The First Circuit

The First Circuit sits in three-member panels, with two panels occasionally sitting on the same day. Because the composition of panels generally changes, not all members of the First Circuit hear all cases that are scheduled for that session. Each panel typically hears six cases a day over four days, sitting for one or two weeks each month.[16]

Briefing can be complete a month to six weeks before oral argument is scheduled. The members of the panels generally have time to read the briefs and lower court opinion, examine critical parts of the record, order exhibits from the trial court if necessary, and, for those who use law clerks before argument, direct the preparation of bench memos. Many federal appellate judges discuss the cases they will hear not only with the clerk who writes the bench memo, but with all of their clerks as a group. The clerks debate the merits of the cases and often develop questions for the judge to put to counsel at argument. This reliance on law clerks should serve as a warning to the unwary. It is law clerks' unarticulated job description to find facts in the record that the advocates have overlooked, relevant cases that have not been cited, or precedent that has been mischaracterized, contorted, or discredited.

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15. While an active practitioner in the First Circuit, this author fielded such inquiries.

16. UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, RULEBOOK 118 (Jan. 13, 2020) (outlining schedule for sessions and their locations in I.O.P. VII(C)).

Justice Breyer reports that when he sat on the First Circuit, the issues could generally be resolved by established precedents, which enabled him to "skate" through the briefs. He contrasted his experience on the First Circuit, where the focus is on the case, with the Supreme Court, where the emphasis is on the issue. A major function of intermediate appellate courts is error correction, which makes procedural bars important. At the Supreme Court, however, the certiorari process seeks to eliminate any case in which such an obstacle will prevent the Justices from deciding an issue cleanly.

2. The Supreme Court

Justice Breyer's means of preparing for argument in the Supreme Court is more akin to his former colleagues' approaches in the First Circuit. He receives the briefs several weeks in advance of an argument session. In any given case there can be eight to fifteen briefs—for the parties, the Solicitor General, and any amici, plus reply briefs—and sometimes as many as eighty (which he remembers in a right-to-die case) or a hundred (in an affirmative action case).

Whereas his clerks read the certiorari petitions and write memoranda, Justice Breyer reads all the briefs personally. He starts with the opinion below because if there is a claim of error in the legal reasoning, he feels "at sea" unless he knows what that reasoning is. Among the briefs, he may begin with the Solicitor General's, if there is one. He tends to read a petitioner's reply brief before the principal brief because the reply "makes the same argument and it's in twenty-five pages," not the forty to sixty pages of a principal brief. He puts the amicus briefs in order of who he thinks are the better lawyers, and reads those briefs according to his ranking. When the amicus briefs begin to be repetitive, he may skim the tables of contents to see if they raise any new points. He can become interested in a particular set of amicus briefs if those representing the same types of clients take opposite positions—for example, one nursing association favoring a constitutional right to die and another opposing it. It takes him an entire day to read two sets of briefs. Justice Breyer then talks to his four law clerks, dividing that session's cases among them. After reading

the assigned clerk's bench memo, he discusses the cases with the clerks as a group once, or sometimes twice, before argument.

3. State Supreme Courts

State court appellate judges have different ways of preparing. They generally have less time to grapple with a greater number of cases, and also fewer law clerks. This means that advocates should be alert to any possible misapprehensions regarding the facts or the record. Indeed, some justices use their law clerks only to research discrete issues.

a. Maine

In the Maine SJC, the initial assignment for drafting an opinion is made in advance of oral argument. The assigned justice's law clerk prepares a bench memo that is circulated among the other members of the court. Because the entire record is now available to all seven justices through a Google drive, analysis by the law clerk writing the bench memo focuses on the legal arguments. Although lawyers think they are able to tell at a Law Court[17] argument who will be the author of an opinion because of the number and detail of the questions that justice asks, this perception can be deceiving. As Justice Alexander points out, the assigned justice's law-clerk bench memo and well written briefs often spark the other justices' interest in an issue.

b. Massachusetts

The seven justices of the Massachusetts SJC receive briefs one month before oral argument.[18] Because of the press of producing opinions on the previous month's cases, however, many justices are able to turn to the new set of briefs only at the end of the week in which they have conferenced about opinions.

17. When sitting as an appellate court, Maine's Supreme Judicial Court is known as the Law Court. *Supreme Court*, ST. OF ME. JUDICIAL BRANCH, https://www.courts.maine.gov/maine_courts/supreme/index.shtml ("The Supreme Judicial Court is the governing body of the Judicial Branch. Sitting as the Law Court, it is the court of final appeal.").

18. Massachusetts is the only northern New England state to have a two-tiered system of appellate review.

This may mean having only two or three working days to prepare for the next set of arguments.

The justices read the briefs themselves, and occasionally also read parts of the record and salient cases. The writer of an SJC opinion is not assigned in advance. One justice, however, is chosen to be the "reciting judge" and can be expected to go into greater depth with respect to the record and the caselaw, and tends to lead the discussion at semble.

c. New Hampshire

In New Hampshire's five-member Supreme Court, the writer of an opinion is assigned randomly, generally a month in advance of argument. Some, but not all, justices tend to focus more extensively on the cases they are assigned to write. The justices generally prepare cases alone; only one of them uses bench memos frequently. Before argument, law clerks may perform spot research. It is after argument, at the opinion-writing stage, that the law clerks become more involved.

d. Rhode Island

Rhode Island's five Supreme Court justices hear appeals that fall into two categories. Show-cause cases, which have been filtered for review, must be heard by at least three justices, although in practice, the full court hears them unless one justice is recused.[19] The lawyers in show-cause cases are entitled to ten minutes per side at oral argument with two minutes for rebuttal.[20] In contrast, the lawyers in full cases can expect to be allotted thirty minutes per side with ten minutes for rebuttal.[21] Briefs are filed approximately thirty days before argument. As soon as one set of oral arguments finishes, the justices begin work on the next month's cases. Law clerks in Rhode Island write bench memos only for their own justice.

19. Criminal cases must be heard by the full court. R.I. SUP. CT. R. 12A.

20. R.I. SUP. CT. R. 24.

21. *Id.*

B. Lawyers' Preparation

1. Who Should Argue

One issue that sparked considerable discussion among the jurists is who should handle the appeal: the trial lawyer or an appellate specialist. A trial attorney has lived with the case from beginning to end. First Circuit Judge Kayatta points out that, especially as pertains to error correction, the trial lawyer may be able to make the appellate court "feel the hit" in a way new counsel cannot. However, trial lawyers may be less sensitive to procedural bars or less well-versed in the standards of review that often determine the outcome of an appeal. Trial counsel may also be tempted to treat the appellate court like a jury and make the mistake of giving impassioned pleas about the equities rather than measured answers to questions about the law or record. This was a common complaint among the judges. When the trial lawyer's own conduct is in question—for example, when the lawyer failed to object at trial—there can also be awkwardness for that lawyer at oral argument.

Some judges, Rhode Island's Chief Justice Suttell among them, see value simply in having a new pair of eyes view the record and precedents. However, a lawyer who did not handle the trial may be tempted to dodge a difficult question by saying "I was not trial counsel." This response was one of the highest on the judges' list of pet peeves. First Circuit Judge Stahl and Chief Justice Gants of the Massachusetts SJC warn that there is also a danger associated with senior partners stepping in at the last minute to argue orally. Even though the client may want the named partner to argue, an associate who has read the record, written the brief, and perhaps even tried the case may be better equipped to answer questions from the bench.

In the Supreme Court, the increasing trend is for a small cadre of specialists—most of them in Washington, D.C.—to handle the cases. An advantage of these specialists is that they have become accustomed to what in the federal courts of appeals would amount to an *en banc* hearing every day. In the Supreme Court, there are nine individualistic personalities who, as Justice Breyer puts it, cannot even agree where to go to lunch. Supreme Court specialists also are mindful that the emphasis in the Court is not on the case, but on the issue. A difficulty for the bar in

general is that the increasing specialization at the Supreme Court level means that fewer lawyers acquire the experience needed to maximize their effectiveness in that court. Not every client whose case reaches the Supreme Court, however, wants to abandon counsel who has represented them ably up to that point. Moreover, in cases that are extremely technical in nature—tax or bankruptcy cases, for example—the best advocate may be a lawyer who is familiar with that specialty.

The consensus of the judges was that lawyers who regularly appear in appellate courts generally make better oral advocates. Lawyers who work for institutions—the United States or a public defender agency—tend to be effective, in part because those organizations have internal training, review, and moot court processes. In Judge Lynch's view, lawyers for institutional clients may also have a better eye for balancing the long-range impact of a decision against the outcome of the individual case. The principal concern judges have with choosing between trial counsel or an appellate specialist is that the advocate be able, as First Circuit Judge Barron puts it, to "speak the language of appellate law." By that they mean, for example, that lawyers understand and apply established standards of review instead of ignoring them or wasting time urging the judges to change them.

2. What to Prepare

A common theme of the judges was that good preparation means knowing the case better than the judges do. Preparation requires mastery of the record[22]—having read it personally from cover to cover—and the ability to answer any question about, for example, whether there was an objection at trial and what its basis was. Questions of law may be readily handled in the briefs, but at oral argument, the record—and a lawyer's grasp of it—are critical. An oral advocate must be able to correct any misunderstanding about a record fact, whether by opposing

22. Parties do not always agree on the contents of the record appendix. In jurisdictions that have electronic filing, experienced counsel for the appellee will review the docket and supplement the appendix with any documents or transcripts the appellant may not have included that the appellee deems necessary.

counsel or one of the judges. Ideally, this is done by being able to cite a record reference.

Preparation also means understanding the standards of review and being fully familiar with the significant authorities—including the authors of those opinions, whom counsel may be addressing at oral argument. It is important to know which cited cases have been discredited, questioned, or targeted for Supreme Court review. Case research should thus be updated to and including the day of argument. Judge Stahl warns that lawyers should never allow themselves to become flummoxed by being asked about a dispositive case that was decided after the briefs were filed.

According to Chief Judge Howard, in criminal cases especially, it is important to be fully conversant with the facts. They can make the difference between a search and seizure that is reasonable and one that is not. Judge Barron's view is that where a statute, regulation or case precedent is in issue, the advocate should be able to quote the operative language during oral argument and direct the judges in how to read it.

Whether the bench that will hear argument has had weeks to prepare or only days, the judges uniformly agreed that oral argument should never be simply a second presentation of the briefs. Instead, the advocate should view the case through the different prism of how the judges or any other objective observer would see it. Some judges believe that oral advocates should lead with their strongest argument. The same is true of an argument that is difficult, but could be dispositive. Massachusetts Justice Lowy points out that, especially when faced with a "hot bench," if a lawyer does not begin with a winning or potentially dispositive argument, the time constraints of oral argument and questions from the judges may make it impossible ever to reach that claim. Maine's Chief Justice Wathen notes that in multiple-issue cases, there is generally a "jugular, make-or-break argument" and good lawyers will focus initially on that argument.

According to Justice Breyer, however, because "you are no stronger than your weakest point," experienced advocates will be able to segue quickly to their weaknesses. One means of achieving this result is by presenting the affirmative case, acknowledging that some aspect of it may be problematic, and

then addressing the problem. The judges made clear they appreciate lawyers who candidly recognize the flaws in their cases and avoid even the appearance of trying to hide anything. Whether handled from the outset, or in response to questions from the bench, having ready answers to weaknesses in a case is one of the most important aspects of preparation. Justice Breyer pointed out that Chief Justice Roberts was known as a practitioner to make a written list of all the difficult questions he anticipated, rank the answers, and then all but memorize the list.

Good preparation often means being able to offer multiple reasons for reaching the result the advocate wants. Chief Justice Wathen deems this the "belt and suspenders" approach. As Judge Coffin explains, the "even if" technique runs along the lines of "Even if there is appellate jurisdiction and even if the objection was preserved below and even if the trial judge erred in his ruling, nevertheless the error was harmless because ____, ____, and ____."[23] Although perhaps best laid out in detail in the briefs, this technique can protect a lawyer from becoming cornered during oral argument. If, for example, the judges appear unpersuaded by a procedural challenge, the advocate can quickly shift to the merits or from there to a claim of harmless error.

Most of the judges favored a lawyer—whether for the appellant or the appellee—whose remarks begin by identifying what issues have been raised and then explaining which one or two issues will be the focus of the presentation. Because argument time is short, this approach signals to the judges that the lawyer is not ignoring any of the issues, but is concentrating on what appears likely to be of greatest interest to the bench or most significant to the outcome. Identifying from the outset a lawyer's view of what is central helps to orient the judges. It also gives, in effect, a roadmap to the argument that allows the judges to redirect the advocate to another issue that the judges may consider more important. Oral advocates given this hint should seize it and pivot immediately to the issue the court has identified. An introduction that identifies what issues will be covered also encourages the court to remind the advocate as

23. COFFIN, *supra* note 6, at 79.

time is expiring that the moment has come for addressing any other issues listed at the start.

As an aside, several judges complained that lawyers tend to raise too many issues on appeal in the idle hope that one of them will be meritorious. Judge Boudin holds law schools partly responsible for this penchant. In law school, students are graded on their ability to identify every possible argument, including the most extreme ones. Good advocates, however, know to focus only on a few meaty issues. Justice Alexander's view is that raising too many issues diverts the court's attention and can suggest a lack of credibility or judgment on the lawyer's part. A case with a large number of issues can also be frustrating for courts, such as the Massachusetts SJC, that publish all of their opinions. This is because even though some issues may be clearly frivolous, the judges must still spend time and effort addressing them. Especially at oral argument, lawyers should emphasize only the arguments that are critical to a successful outcome.

The judges also consistently advised against preparing an argument that begins with a lengthy summary of the facts or procedural history of the case. The judges found this to be a surprisingly common mistake, especially on the part of young lawyers. A lengthy introduction can irritate judges by suggesting that they are not prepared and it is almost always a waste of precious argument time. What experienced lawyers do instead is plunge immediately into the issues. Of course, if a judge seems confused or asks about the facts or procedure, the lawyer should explain. Otherwise, however, the judges agreed that counsel should presume that the court is conversant with the case. If a lawyer is unsure, one approach First Circuit Judge Thompson recommends is to begin with something along the lines of "I assume the court is familiar with the facts."

3. Procedural Bars

One frequently overlooked issue that counsel should always anticipate is possible procedural bars that will heighten the standard of review. These include a failure to object at trial; offering the trial court one theory, but advancing another theory on appeal; adverting to an issue on appeal, but not developing it adequately; or raising an issue for the first time in a reply brief

or at oral argument. The judges had different reactions to how strictly procedural bars should be enforced.

Some judges believe that appellate courts invoke procedural bars too frequently and may use them to duck thorny issues. Other judges see the failure to preserve an objection at trial as a sign of sloppy lawyering or occasionally an effort on the part of a cagey lawyer to sandbag a trial judge by failing to object, all the while hoping that the plain error rule will save the day.[24] What may present the greatest difficulty for Judge Barron is when a novel or complex argument is raised in a brief, but just barely—in a sentence or two. The concern is in part fairness to the trial judge, who may view it as unreasonable to be reversed on a ground that the judge was never asked to consider. There is also the question of fairness to the opposing party, who may not grasp the import of a claim that is buried in the briefs. Perhaps most significant to Judge Barron is that the appellate court needs the benefit of full advocacy before deciding important issues.

Most appellate courts have a discretionary right to overlook forfeitures and waivers to avoid a miscarriage of justice. Judges may thus choose to entertain issues for the first time during oral argument or even raise *sua sponte* issues that have not been briefed or argued at all. Because some courts—and some judges on those courts—are especially unforgiving with respect to forfeitures and waivers, however, lawyers should research in advance the proclivities of that court. Even more important, lawyers should not wait for the court to raise a procedural bar, but should address any such issue directly, both in the briefs and at argument.

4. Crutches

In an ideal world, lawyers would be well enough prepared to be able to argue with no notes. After all, actors can speak from memory sometimes for hours. For most lawyers, however, preparing for oral argument means taking some form of crutch to the podium to enable the advocate, for example, to quote the

24. *United States v. Olano*, 507 US. 725 (1993) allows courts to consider an unpreserved claim when there is (1) error; (2) that is plain or obvious; and (3) affects substantial rights; and (4) if, absent reversal, a miscarriage of justice would result or the integrity of the judicial system would be undermined. *Id.* at 732–36

precise language of a complex statute or regulation. The judges appear not to care especially—or in some cases even notice—whether lawyers bring to the podium black notebooks (as is advised in the Supreme Court),[25] legal pads, iPads, notecards, or scraps of paper.[26] As First Circuit Judge Selya joked, a lawyer "could bring six generations of his family to the podium."

The universal concern is that whatever material the lawyer takes to the lectern should not be so voluminous as to interfere with the presentation and should be well-enough organized that the lawyer can refer to it easily, quickly, and without wasting time. A lawyer who thumbs through briefs and appendices in the middle of an argument can appear to be fumbling or to have become sidetracked. The sound of paper rustling against the microphone can also be distracting to the judges.

In the Supreme Court, reliance on a legal pad is actively discouraged.[27] One problem with iPads, which Massachusetts Justice Kafker identified, is that the advocate may be tempted to focus on the tablet, lose eye contact with the judges, and even stop listening. If a lawyer anticipates needing computer access to the record or cases during argument, Justice Kafker suggests having an associate at counsel table who has a tablet, can find the necessary information, and can pass a note to the arguing lawyer without interrupting the flow of the dialogue.

Even experienced lawyers tend to take a few notes to the lectern, although in practice they rarely even glance at them. Notes at the podium can provide a measure of comfort against nerves. Having something small in hand can also guard against excessive gesticulating.

Many judges notice when lawyers bring nothing to the podium, although some find that practice to be purely a matter

25. CLERK OF THE COURT, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 6 (Oct. 3, 2019), *available at* https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf.

26. This appellate advocate's crutch of choice was five-inch by seven-inch notecards—one or two cards per issue—which could be re-ordered while the argument was taking place to accommodate the direction of the discussion. The name of a judge who made a helpful point with opposing counsel could be noted on the cards so that point could be reinforced during the appellee's arguments. The judges say they generally are not averse to an argument that refers to a judge's remarks to either counsel.

27. "Please note that a legal sized pad does not fit on the lectern properly. Turning pages in a notebook appears more professional than flipping pages of a legal pad." GUIDE FOR COUNSEL, *supra* note 25, at 6.

of the lawyer's personal pride. Arguing without notes can be impressive because, as Judge Kayatta points out, it creates a professional appearance and suggests that the advocate has total command of the law, facts, and record. Arguing without notes does not impress the judges, however, if the argument is not buttressed by adequate knowledge of the case. Judges would prefer to hear a good argument delivered with notes than a bad argument presented note-free. The takeaway is that lawyers should bring to the podium as little as possible, while being sure that they have what they need.

Of greater importance to the jurists than what type of crutch a lawyer uses is that the advocate not be tied to it. In courts that exempt the first few minutes of argument from questions,[28] it may be more acceptable to adhere closely to a prepared script at first. Even then, however, the remarks should be well-enough rehearsed that the advocate does not read them.[29] Although some judges are prepared to accept following a written text as the product of nerves, it causes the lawyer to lose eye contact with the bench and severely limits the ability to engage in dialogue. Reading an argument can also cause judges to lose interest because they generally have read the briefs and do not need them to be reiterated aloud. The judges agreed that excessive reading by counsel for the appellee is especially ineffective because what that lawyer should do instead is seize on what the court has said to the appellant. In sum, although crutches may be helpful, or even necessary, they should not become a ball and chain.

28. In New Hampshire and Maine, court custom dictates that appellate judges will not interrupt lawyers for the first three minutes of argument. That practice was also recently adopted in the Supreme Court of the United States. GUIDE FOR COUNSEL, *supra* note 25, at 7 ("The Court generally will not question lead counsel for petitioners (or appellants) and respondents (or appellees) during the first two minutes of argument. The white light on the lectern will illuminate briefly at the end of this period to signal the start of questioning.")

29. Excessive reading is indeed discouraged by both the Federal Rules of Appellate Procedure and the Supreme Court Rules. Fed. R. App. P 34(c) ("Counsel must not read at length from briefs, records, or authorities."); Sup. Ct. R. 28.1 ("Oral argument read from a prepared text is not favored.").

5. Moot Courts

One way of ferreting out the strengths and weaknesses of an advocate's position is by holding moot courts. Department of Justice policy requires moot courts in any appeal in which the United States is the appellant and strongly encourages them in any case involving the United States that presents a novel or complex issue. Holding moot courts is also a frequent practice in the offices of many state attorneys general and public defenders. For younger lawyers, a mock oral argument at which more experienced lawyers act as judges is good practice because it gives the novice a chance to receive constructive criticism about reacting under fire. More experienced advocates tend to prepare not by holding dress rehearsals, but by discussing with their colleagues the questions they are likely to be asked and answers they might give. Justice Breyer offers this suggestion: "Know your case and explain it to your spouse, teenaged daughter, somebody prepared to listen. When they understand it, you've got it."

III. LISTENING

Perhaps the most common complaint the judges have about under-performing lawyers is that they become so engrossed in their prepared remarks that they fail to listen: they do not listen to the questions put to opposing counsel; they do not listen to opposing counsel's answers; and they sometimes do not even listen to the questions put to them while they are at the podium. Listening to what the judges ask opposing counsel is critical because those questions may spark the interest of other judges or provide information that can be used in response or rebuttal to stress key points. Listening to opposing counsel's answers is equally important because those answers may raise significant issues or amount to concessions that can also be emphasized in response or rebuttal. Listening to judges when being questioned at the podium is essential because lawyers who do not listen can wind up answering questions the judges never asked.

Justice Breyer warns against this bad habit of failing to listen. "You're not there to prove to some person how clever you are," he says. "You're there to win the case. So listen to what the

other side is saying." He recalled having been given similar advice when preparing for his Supreme Court confirmation hearings: "You're not in a confirmation hearing to show you're clever. You're in a confirmation to get confirmed. The way you will get confirmed is to listen to the question. Think about it. Then take your time and answer—fully."

The judges agreed that counsel for the appellee has a tremendous advantage at oral argument. First, the burden is on the appellant, not the appellee. A second advantage is that the appellee argues after the appellant and thus has the opportunity to hear the judges' questions to opposing counsel and that lawyer's responses. Counsel who listens to that exchange can adapt the appellee's argument on the spot to correct mistakes, seize upon concessions, and hammer home whatever points the bench has made that the opponent left unanswered. The judges noted that experienced counsel for appellees will generally put aside their prepared remarks, focus initially on the issues that have dominated the discussion with the appellant, and then turn to the issues they believe should be addressed. Judge Barron's view is that unless the dialogue between the judges and opposing counsel is completely off track, picking up where the court left off is generally effective, among other reasons because it demonstrates to the court that the lawyer has been paying attention.

Listening is also key because it tells the advocate when to stop talking. Inexperienced lawyers sometimes think that because they have been given fifteen minutes to argue, they should use every second of that time. In the judges' estimation, however, a good lawyer will take the court's pulse, assess when all of the necessary ground has been covered, and end before the red light begins to flash. If the judges have additional questions, they will not be shy about asking them. Judges may even encourage a lawyer to end before time has run by thanking the lawyer, as was Chief Justice Saufley's practice. Good lawyers take the hint. Occasionally, counsel for an appellee will recognize that the best course is to waive argument altogether. Chief Justice Wathen quotes his predecessor Vincent McKusick's saying: "God bless the man who has nothing to say and knows enough to say it."

Judge Boudin reinforces the point with a story about his colleague Judge Selya as a practitioner. Representing the appellee, Judge Selya appeared before a panel of the First Circuit that included Judge Bailey Aldrich. In person, Judge Aldrich could be "so sweet and charming," but on the bench, he was "noticeably stern with lawyers." During the argument, Judge Aldrich looked at then-advocate Selya, who was seated at counsel table, and barked, "Wipe that smirk off your face. You're next." Counsel for the appellant promptly ended his argument. Judge Selya then "rose from his chair, walked to the podium . . . put his arms on the edge and said, 'Judge Aldrich, I think that everything that needs to have been said in this case has been said' and sat down." In Judge Boudin's view, this was "true genius."

Justice Breyer tells a similar story about Justice Clarence Thomas. After one lawyer argued, his opponent rose, said, "I don't think I have anything to add, Your Honor," and returned to his seat. Justice Thomas reportedly commented, "I have heard many arguments, but I think that's the only time I've heard the perfect argument."

IV. ANSWERING QUESTIONS

Framed in various ways, the judges uniformly say that oral argument should not be a speech, but a conversation. Judge Kayatta's view is that eighty-five percent of lawyers who appear before the First Circuit do not understand that the purpose of oral argument is to engage the court in, as he puts it, the same type of robust discussion one would have around a dinner table. Chief Judge Howard advises that to the extent a lawyer can create the atmosphere of "just sitting in the office talking about these issues, . . . it's a win." He urges lawyers to force themselves into a conversational tone that will allow them to discover why the brief may not have convinced the court and address that flaw. Body language should communicate that the lawyer has anticipated the questions and not only is able to answer them, but is eager to do so.[30]

30. In addition to themselves communicating with body language, lawyers should be alert to the body language of the judges. Judge Coffin comments that "[a] keen observer at

Lawyers should answer questions from the bench immediately after they are asked. Too often, the judges agree, oral advocates say "I'll get to that later." When they do, the judges stop listening and become increasingly frustrated as they wait for the answer. A lawyer who refuses to respond to a question at all will have difficulty avoiding the inference that an answer would disadvantage the lawyer's case. How to handle certain kinds of questions, however, can present a challenge.

A. Handling a Question That the Lawyer Does Not Understand

The judges admitted that they occasionally ask long questions that may be difficult for the lawyer to understand. A question may also have four or five component parts, which leaves the lawyer wondering what the focus of the question is. It is dangerous for a lawyer to answer the wrong question. The judges were unanimous in saying that lawyers should not be embarrassed to acknowledge that they do not understand a question from the bench.

Although one way to handle this situation is by asking that the question be repeated, doing so may use up valuable argument time. It may also give the impression that the judge does not know how to ask a question or, as Chief Justice Saufley points out, produce a reframed question that is even longer and more incomprehensible than the original inquiry. If the lawyer thinks he or she understands the question, but is unsure, the lawyer could reframe the question in a way the lawyer does understand and say, "If I understand you correctly, here is my response." If the reframing is inaccurate, the court will redirect the lawyer. This approach is also generally better than giving an answer that is not responsive at all because the retort from the bench likely will be "that's not my question." Chief Judge Howard suggests that reframing the question may be useful even if the lawyer does understand what was asked because it gives the judge credit for posing a complex or sophisticated question. Some judges, however, find this approach to be dangerous

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court would take note of the subtle signs of quickening interest—judges leaning forward, making notes, listening intently, perhaps even glancing at a colleague." COFFIN, *supra* note 6, at 13.

because it suggests a lack of attention. Even the judges who approve of it agree that it should not be used routinely, in an effort to twist the question into something the lawyer wants to answer, or as a means of dodging the question.

Occasionally, having responded to a judge, a lawyer will follow up by asking, "Does that answer your question?" Although some judges think this inquiry signals the lawyer's sincere effort to understand and respond to the judge, others think it is another waste of time. This, too, should never be a rote practice.

B. Handling a Question When the Lawyer Does Not Know the Answer

Attempting to respond to a question when the lawyer does not know the answer is difficult and can be unpleasant if the advocate should know what to say. Nevertheless, the judges offered ways to handle this situation. If the question concerns an issue that in the lawyer's judgment is insignificant, the lawyer can simply apologize for not knowing the answer, but explain why the matter is not important. If the question pertains to something that is significant, the judges said the best course is to ask permission to file a statement of supplemental authorities.[31]

What the judges agreed that a lawyer caught off guard should never do is bluff. Judges' law clerks can research and expose a fudged answer, and judges themselves are likely to catch lawyers' mistakes in the process of circulating and editing draft opinions. Faking an answer, citing cases for the wrong proposition, exaggerating the holding of a case, or misstating the facts affect a lawyer's credibility. Especially in small jurisdictions, the judges know the regular appellate advocates. As Chief Judge Lynn says, "you don't forget if somebody gets caught with his pants down." A lawyer's dishonesty can also

31. In the federal courts of appeals, filing of the statement is authorized by Rule 28. *See* Fed. R. App. P. 28(j) (referring to the submission of a letter addressing supplemental citations that refers either to a specific page in the brief or to "a point argued orally"). Many state courts have analogous rules. *See, e.g.*, Mass. R. App. P. 16(l) (providing that "[w]hen pertinent and significant authorities come to the attention of a party . . . after oral argument but before decision, a party may promptly advise the clerk of the court, by letter setting forth the citations").

result in a published opinion with the lawyer's name attached to it. Even if it embarrasses the lawyer to admit ignorance, Judge Lipez advises, "Do not dissemble. Do not fake. Do not make it up." In Chief Judge Howard's view, "there isn't a better lesson you can learn than you have to be candid because there are some judges who are never going to forget. Unfortunately, I'm one of them."

C. Correcting a Judge

As Chief Justice Suttell acknowledges, it can feel awkward—even presumptuous—for an advocate to point out that a judge labors under a misunderstanding. Nevertheless, all of the jurists agreed that when it is done politely, an advocate not only can correct a judge, but should do so. Allowed to stand, a mistake can steer oral argument in the wrong direction. It may be more difficult to correct a judge's seeming confusion about the holding or import of an opinion, especially when the opinion was written by one of the jurists hearing oral argument. When it comes to misapprehensions about the record or the facts, however, the judges are generally grateful for a lawyer's polite efforts at clarification. A lawyer can say, for example, "if I thought the record showed that, I would agree, but the record shows. . . ." A caveat is that lawyers should not begin to correct a judge by saying, "with all due respect." According to Judge Thompson, although that preface takes the lawyer's remarks "out of the spectrum of rudeness," it may signal that the lawyer is "getting ready to punch you in the eye." Judge Barron points out that the key to correcting a judge is to be confident and direct, but polite.

D. Handling a Judge Who Appears to Filibuster

In the matter of dealing with judges who will not allow advocates to make their case, the judges offered little comfort. Judge Lipez summarized the consensus:

> I think you're really pretty defenseless in that situation. . . . In many ways, it's not really a fair fight between judges and the lawyer. Judges have all the advantage. I think you just have to suffer the indignity of hearing a judge going on

> and on. After all, the only other option is to interrupt and say, "Listen, Judge, you're not giving me a chance to make my case." I think that would probably not be well received. . . . [P]articularly if you're talking about a visiting judge, the home judges may sense what's going on and as long as it's done politely, they would be sympathetic to that kind of response on the part of the advocate.

But he notes that "[i]f it's one of our own judges who's doing that, I think it makes it a little more difficult."

Judge Barron comments that if the judge who prevents the lawyer from talking is on the right track, argument time is not being wasted because the judge is simply making the case for the lawyer. If the judge is not focusing on the right issue, however, and the lawyer is not given the chance to respond, Judge Barron recognizes that it can be quite frustrating, especially when the lawyer has a good answer. Filibustering by one judge can also be challenging for the other judges, who may have different perspectives they are prevented from exploring.

One option is for the lawyer to try to make eye contact with the other judges to encourage them to enter the fray. However, this strategy carries risks, for it may produce resentment on the part of the filibustering judge. An advocate can also try saying courteously, "If I could just respond . . .," although there may not be any opportunity to say even that much. Chief Justice Saufley admits that a lawyer's only option may be to endure the soliloquy, think up a quick, direct answer, and give it at the slightest opening.

Occasionally, other members of the bench may sense that one of their colleagues has commandeered the argument or has focused on the wrong issue. They may interject to suggest that the lawyer answer the dominating judge's question or themselves redirect the argument. In Judge Selya's view, waiting for another judge to come to the lawyer's rescue is the best solution to filibustering. Presiding judges say they may acknowledge that the court has used up the lawyer's time and give the lawyer an extra minute or two to reply.[32]

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32. The practice in the Massachusetts SJC is to allow lawyers to continue to argue so long as there are questions from the bench. Before Chief Justice Gants's time, this was not the case. As he describes it, after a question was posed, if an advocate "hesitated a moment, it was like *Jeopardy*. . . . It would be somebody else asking the question and the tendency became to need to interrupt because if you waited for the end of the answer, somebody else

If the court does not offer additional time, the lawyer can ask permission to finish a thought. Like other techniques, however, this one has drawbacks. Judge Lynch occasionally suspects that advocates ask permission to continue after the red light has come on simply because the client is in the courtroom and the lawyer feels compelled to put on a show.

E. When One Judge Appears Adverse and the Others Remain Silent

A "hot bench" can sometimes consist of one judge who, although allowing the lawyer to argue, gives the appearance of being unpersuaded while the rest of the judges remain silent. It can be hard for an advocate to read the other judges in this situation because there may be many reasons they choose to participate or not.

Some judges may be more vocal than others simply because they know more about the case. In the Massachusetts SJC, for example, it is common for the "reciting judge" to ask more questions than others. A judge may assume control of the discussion in order to communicate with another judge, set up the argument of opposing counsel, or test the arguing advocate. Judges are also aware that oral argument can be a rare opportunity for lawyers and some, like Judge Lipez, may be active simply in order to make the argument a meaningful experience. Judge Lipez realizes that it can be depressing for a lawyer to work hard preparing an argument, present it in front of colleagues, the client, or both, but meet with noticeable disinterest from the bench. As Justice Alexander points out, a vocal judge may also ask what seem to be damning questions even though that judge is actually inclined in the advocate's favor. An elementary rule of appellate advocacy is that lawyers should never assume that a question is hostile. An especially active judge may simply enjoy playing the devil's advocate.

Some judges tend by nature to be quieter at oral argument than others.[33] Judge Stahl, for example, says he often prefers to

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would be asking a question and you wouldn't get your question in. [The lawyer's] time would be up and you'd have an unanswered question."

33. Justice Thomas, for example, rarely asks questions during oral arguments in the Supreme Court. *See, e.g.*, Laura Wagner, *Clarence Thomas Asks 1st Question from*

concentrate on what the lawyers have to say. In especially active courts, it may be unnecessary for every judge to ask questions because someone else likely will do so. Silent judges also may or may not share the outspoken judge's view. Eye contact may help the advocate sense whether quiet judges understand the issue. Even if the outspoken judge is off target, lawyers should never gamble that the silent judges will not make the same mistake. Judge Thompson advises lawyers never to give up on a judge or think that judges' silence suggests their leanings. In Judge Coffin's view, "a lawyer who is a gifted listener will have a sense as to whether he should concentrate his remaining fire on the difficult judge or on his more silent and possibly more open colleagues."[34]

A final reason to persevere even when faced with resistance by one judge is that most appellate courts consist of an odd number of judges. Even if one jurist appears hostile—or, in larger courts, if more than one appears hostile—it is still possible for the advocate to win a majority. Regardless of how hard any single judge presses, an advocate should welcome difficult questions because absent an opportunity to address them, the advocate likely would lose. Judges expect lawyers to push back against aggressive questioning, and indeed say they respect lawyers who stand their ground, as long as it is done politely.

F. Reminding a Judge About Authorship of an Opinion

One subject of disagreement among the judges was whether an oral advocate should identify who was the author of a principal opinion. Judge Howard says this practice "makes my

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Supreme Court Bench in 10 Years, NPR.ORG (Feb. 29, 2016), https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years. As Justice Breyer explains Justice Thomas's view, it is this:

> The point of a good question is
>
> A. The judge doesn't know the answer,
>
> B. It's likely to make a difference—or it could, and
>
> C. The lawyer knows more about it.

That Justice Thomas believes the result is "the null set" may explain his characteristic silence at oral argument.

34. COFFIN, *supra* note 6, at 78.

skin crawl" because it conjures up images of Eddie Haskell, the two-faced flatterer in the 1950's television show *Leave It to Beaver*."[35] Some judges view the technique as distasteful, pandering, or even somewhat insulting because, as Judge Lynch points out, it suggests that the author has not prepared adequately for argument or does not know their own opinions. According to Chief Justice Saufley, attaching excessive weight to authorship of an opinion also reflects a lack of understanding of how a collegial court operates. No matter who writes an opinion, it likely has benefitted from comment by the writing judge's colleagues.

Other judges are not bothered by being reminded that they wrote a principal opinion so long as there is no appearance of apple-polishing. Occasionally, if it appears at argument that a judge is deviating from a position that judge has taken in a written opinion, it may even be helpful to point out who was its author. What is generally best, Chief Justice Gants suggests, is to focus not on authorship of an opinion, but instead on its reasoning.

G. Concessions

One purpose of oral argument is to identify which matters are contested and which are not. Concessions can help judges because they narrow the issues that must be decided. Some matters should be conceded without prompting because they are so easy to verify—whether there was an objection at trial, for example. Concessions about the policy implications of a position can be trickier. Although well-considered concessions can be a sign of the lawyer's integrity, concessions not thought out in advance can be dangerous because the lawyer may not appreciate the consequences. Oral advocates should thus be reticent about making concessions at oral argument that they have not anticipated. Occasionally, however, lawyers refuse to

35. A little background for readers too young to remember Eddie Haskell: His character was, as Wikipedia puts it, "an archetype for insincere sycophants." *Eddie Haskell*, WIKIPEDIA (Jan. 30, 2020 19:36 UTC), https://en.wikipedia.org/wiki/Eddie_Haskell; *see also, e.g.*, *Leave It to Beaver: Eddie's Girl* (ABC television broadcast Oct. 9, 1958), *available at* https://www.dailymotion.com/video/x4pvd47 (advance scrubber bar to 00:49 to view the scene ending at 1:59 in which Ward Cleaver describes Eddie as "so polite, it's almost un-American").

concede points that are unnecessary to the result; they would win even with a concession. This can backfire. As Chief Justice Lynn notes, a lawyer who fights too hard over something that makes no difference may be in danger of suggesting that the case is not as strong as the lawyer would otherwise have the court believe.

One problem with concessions can be the lawyer's relationship with the client. A lawyer may want to avoid saying anything during argument that will result in an opinion noting that the lawyer conceded a point. For that reason, some judges, including Judge Boudin, believe that that pressing a lawyer to concede can be embarrassing and so will not insist on a concession. Nevertheless, Judge Coffin explains that "[t]he discipline of preparation for oral argument should include a conscious inventory of facts, inferences, arguments, and issues which counsel *can* fairly concede without jeopardizing his client—and those which counsel *should* take the initiative in conceding."[36]

IV. COUNSEL'S DEMEANOR, CONDUCT, AND MANNER

Although, as Chief Justice Gants emphasizes, form in oral argument should never be elevated over substance,[37] some matters of form make a difference. Judge Coffin explains that, "[m]anner without substance will not do; but manner and substance will do better than substance alone."[38] He defines manner as "the composite of language, posture, pace, tone, facial expression, eye contact, gestures . . . all the ways in which an advocate's thoughts and emotional intensities become conveyed to others."[39]

36. COFFIN, *supra* note 6, at. 27 (emphasis in original).

37. Judge Lynch says that appellate advocacy "is not just a matter of how good you are at your own legal skills. Some cases you can't win and you shouldn't feel badly when you lose."

38. COFFIN, *supra* note 6, at 37.

39. *Id*.

A. Conduct at the Podium

Judges are accustomed to lawyers gesticulating vigorously or pacing around the podium because they are nervous. Nevertheless, oral advocates should avoid wandering too far from the microphone because it distracts the judges from following the argument and may compromise the quality of any audio recording. Excessive athleticism can also give the impression that the lawyer is addressing a jury, not appellate judges, which was a common complaint. Any repetitive physical behavior—pointing pens, wagging fingers, pounding the podium—at a minimum is distracting and can come across as unduly aggressive. Judge Thompson encourages advocates to "leave the weapons at home."

Judge Thompson also says that when a judge asks a question, the lawyer should look at the judge who asked it, not at the other members of the bench. To do otherwise suggests that the lawyer has not heard, does not understand, or is simply ignoring the interrogating judge.

Justice Breyer cautions against clock-watching during oral argument, which can be interpreted as discourteous. This is especially the case if it appears that the advocate is trying to will the argument to come to an end.

Chief Judge Howard advises that volume and tone must be controlled during oral argument. Although oral advocates should speak audibly, they should not shout. Neither should they raise their own decibel level to match that of opposing counsel, or even the judges.

Judge Kayatta reminds advocates to breathe. He views oral argument as not only a mental exercise, but a physical one as well. Lawyers can become so nervous that they stop breathing and speak so quickly that their anxiety is palpable. In a related vein, Chief Judge Howard urges lawyers to relax. He says, "We're not ogres. . . . People are just way too stressed out about argument. . . . If you can just get to the point where we're having this discussion . . . you're going to fare so much better. And you're going to enjoy it more."

Certain words and phrases are over-used during oral argument, ineffective, annoying, or all three. According to Judge Selya, every appellate judge will agree that saying "'I wasn't

trial counsel' sets his teeth on edge." Judge Coffin interprets the phrase to suggest "Someone else made a botch of this. I haven't got much to work with on appeal."[40] Filler words and phrases such as "er," "um," "you know," "okay, "as I was saying," and "let me repeat" should be eliminated from a lawyer's vocabulary, as should phrases bearing a whiff of arrogance like "as I said before" and "let me repeat."[41] As Chief Justice Saufley explains, argument time is short and should not be wasted with words that have no meaning. Judge Coffin wryly comments that phrases like "honestly," "in all candor," and "frankly" should be avoided because they "signify that most of the time the advocate speaks with forked tongue."[42] The phrase "I am court-appointed counsel" can undermine the lawyer's credibility because it can often be translated to mean "I am just doing my job. I didn't choose this client or case."[43]

Judge Selya advises lawyers to adopt an argument style that is consistent with their skillset and personality. Although inexperienced lawyers can learn by watching veterans, they should not try to copy anyone. Chief Justice Wathen echoes that view:

> You've got to be authentic. . . . You may not be the most polished person in the world but if you're authentic, if it's really you and you're speaking from the heart, it's going to come through. If you're pretending that you're somebody else, it isn't ever going to come through.

B. Conduct at Counsel Table

The jurists all agreed that, when seated at counsel table either waiting to argue or having just argued, lawyers should give no visible reaction to anything. There should be no shaking of heads, grimacing, scowling, or rolling of eyes.[44] Judge Lipez

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40. *Id.* at 26.
41. *Id.* at 22.
42. *Id*. at 103.
43. *Id*. at 26.
44. Judge Coffin includes in this category of behavior to avoid:

> The Violently Confirming Nod (after a judge asks his adversary a question) meaning "That's precisely right, Your Honor. You've hit the nail right on the head."

explains that even when the judges' focus is on the lawyer at the podium, opposing counsel is visible and signaling disapproval detracts from the lawyer's professionalism and credibility.

Occasionally, opposing counsel will make an assertion of fact that is plainly wrong. Some judges, Chief Justice Gants among them, will tolerate a gentle shake of the head, especially on the part of a lawyer with a reputation for trustworthiness. However, all of the judges discouraged facial expressions that demean opposing counsel. To quote Judge Barron, "the right face is a blank face." When they are not arguing, lawyers should behave like congregants in a house of worship: be still, silent, and attentive.

C. Demonstrative Aids

Demonstrative aids are seldom used in appellate courts and no judge encouraged them. Judge Coffin describes demonstrative aids as "devices suitable for a salesmen's meeting, but seldom for an appellate argument."[45] Most judges find them not only ineffective, but a nuisance, especially because technology has made it possible for color copies of exhibits and audio and video recordings to be included in the record appendix.

Appellate courts generally have at least three members, and sometimes as many as nine, which makes visibility an issue almost no matter where a demonstrative aid is placed. Set in the middle, the aid cannot be seen by the public. Putting an exhibit at one end of the bench or the other means that the judges at the opposite end cannot see it. Often the print on demonstrative aids

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> The Emphatic Shake (after a statement by his adversary at the lectern) meaning "Your Honors, that's what *he* says but that isn't the way it happened.
>
> The Look of Scorn meaning "This lawyer is to be pitied; his client is such a contemptible liar."
>
> The Home Free Look (after an exchange between his adversary and a judge) meaning "Well done, Your Honor. You've certainly seen through his case."
>
> Seismic Shock (after a particularly telling argument of his adversary) meaning "Incredible that he could stoop so low." This response can range from lifting one brow skeptically, lifting both brows, opening wide the mouth, lifting both hands palms up, to turning to the rear of the courtroom and waving a clenched fist for the benefit of his client.

Id. at 22–24.

45. *Id*. at 51.

is so small that no judge can read it. The rare case in which a demonstrative aid might be useful is a land dispute, where geography matters and a visual aid will help the court to understand the facts. In general, however, even when demonstrative aids are allowed by permission of the court, they should not be used.

D. Confidence

One of the qualities of oral advocacy that judges find most persuasive is confidence: the conviction that the lawyer truly understands the case, the record and the pertinent area of law. Judge Coffin describes confidence as "a quality which, however manifested by counsel, if it stems from hard analysis, stands a good chance of spreading its benign influence to the court."[46] True confidence is often the product of experience. Although polish and professionalism probably should not play a role in oral advocacy, they do, and a lawyer's confidence can help, especially, in Judge Kayatta's view, in cases that are at the margins.

All of the judges distinguished between confidence that is the product of being well prepared, and bravado or swaggering. Judges are put off by lawyers who suggest that they know the law better than the judges. As Judge Coffin explains, "[a]rrogance is bad, not because it is unmannerly, but because it tempts judges to be unjudicial. It stimulates a devilish—or is it merely human?—desire to rule against the party because of the lawyer's communicated sense of superiority."[47] Chief Justice Wathen proves the point with a story about his predecessor, Chief Justice McKusick. During one oral argument in the Maine SJC, a lawyer from a large, out-of-state, big-city law firm began his argument by saying that he, like Justice McKusick, had been editor-in-chief of the *Harvard Law Review*. Otherwise unfailingly civil toward lawyers, Justice McKusick "pummeled him, climbed all over him . . . just bombarded this guy every chance he got." As Justice Lowy summarizes, "it's great to come into court like a colossus, but not like an arrogant twit."

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46. *Id*. at 35.
47. *Id.* at 21.

At the other end of the spectrum is the lawyer who is too hesitant. Some judges find it difficult to evaluate a lawyer's degree of conviction in their argument because good lawyers tend also to be good actors, or perhaps good poker players. Other judges, however, can sense by a lawyer's hang-dog appearance and apologetic tone that they have no confidence in their case and believe such behavior undermines the lawyer's effectiveness. As Judge Lipez explains, "If you don't believe in your case, how can you ever expect us to believe in your case?"

Some jurists are willing to excuse a lack of conviction on the part of a lawyer with little experience. Tentativeness that is the product of not being prepared, however, is dangerous. Out of a duty to their clients, some lawyers may need to make a point they know will not prevail. This is especially true of counsel for indigent criminal defendants. Chief Justice Saufley's view is that good lawyers in this position will acknowledge to the court that they have an uphill battle, but will mount it as best they can. Judges tend to appreciate *pro bono* or court-appointed counsel and will generally try to avoid embarrassing them.

E. Client in the Courtroom

Part of a lawyer's job is retaining clients, and clients have a right to hear their lawyers present oral argument. Nevertheless, the judges advised lawyers to exercise extreme caution in this regard. A client's presence may be problematic because the client may have a visible reaction to the presentation that confirms a weakness in the lawyer's argument or may engage in disruptive histrionics. Judge Coffin explains that a client does not help the cause by "deep frowning, violent head shaking, mutual comforting, and even the frenetic sending of notes down to the counsel table."[48] The only benefit Justice Breyer sees to having the client present for argument is that it may help the parties to settle the case.

Many judges think an appellate advocate should never inform the court that the client is present at argument. To introduce the client amounts to treating the appellate court as if it were a jury and can be seen as in poor taste, especially if the

48. *Id.* at 33.

client is a victim in the litigation. Clients should never sit with their lawyer at counsel table. Neither, the judges agree, should the lawyer tailor an argument to satisfy the client. A lawyer's job is not to please the client, but to win the case. Clients should be warned not to scoff, frown, smile, or engage in any conduct that gives the appearance of trying to lobby the judges from the gallery.

Some judges are able to tell who the client is by looking out at the spectators. Even when clients are emotionless, lawyers should be careful about appearances. Judge Lynch advises that the governor of a state who is a party to litigation should sit in the gallery, not in front of the bar. Well-known figures should avoid giving any sign of being entitled to preferential treatment.

As potentially problematic as the client in the courtroom can be the client's supporters. Judge Selya tells a story from his own days as a practitioner when he represented a young woman who had been sued for workplace harassment. To then-advocate Selya's dismay, the young woman's mother appeared at oral argument dripping in diamonds and furs. Fearful of the judges' reaction, but certain he could not persuade the mother to leave, Judge Selya settled on his best alternative: he seated the mother in the gallery behind opposing counsel.

F. Rebuttal

When it is allowed under court rules, appellants' lawyers frequently ask permission to reserve a portion of their allotted time for rebuttal. Many judges, including Judge Lipez, recommend this practice because it gives the appellant the chance to have the last word. Other judges find rebuttal to be generally a waste of time because counsel—especially inexperienced counsel—tend to use rebuttal simply to regurgitate their opening arguments. For a time, the Massachusetts SJC experimented with allowing rebuttal, but abandoned the practice because so few lawyers used it wisely.

The best use of rebuttal the judges identified is as a pointed response to the appellee's argument. It is the appellant's opportunity to do what appellees are able to do: listen to the colloquy between the court and opposing counsel and emphasize

the most helpful points. Judge Lynch sees rebuttal as especially appropriate when there is a dispute about the record.

It can be an effective tactic for the appellant to reserve time for rebuttal but not use it. Just as an appellee's counsel who finishes early communicates a sense of confidence in the outcome, the same is true of an appellant who relinquishes reserved rebuttal time.

G. Dress Code

One surprise in the interviews was certain judges' reactions to how advocates dress for oral argument. Although informal dress may be expected of *pro se* litigants, one judge expressed dismay when remembering a lawyer who argued in a track suit. In some courts, such as the Massachusetts SJC, incarcerated defendants whose cases are scheduled for argument appear by video conference and they necessarily wear prison uniforms. For better or worse for lawyers, however, clothes make a statement and for some judges, sloppy appearance can suggest sloppy work.

To the extent they expressed an opinion on the subject, most judges recommended dressing in a manner that is appropriate for any serious occasion.[49] For men, a dark suit, white shirt, and red or blue tie is customary and always acceptable. Themselves women, Judge Lynch and Chief Justice Saufley acknowledge that female lawyers' attire can be more challenging. Chief Justice Saufley frequently advises groups of young lawyers that oral argument is not a fashion show, but a serious professional environment. She agrees with Judge Lynch that female lawyers should avoid mini-skirts, revealing fabrics, plunging necklines, or any other suggestive or flamboyant attire that draws attention away from the argument and toward the lawyer.

49. *See also, e.g.*, GUIDE, *supra* note 25, at 3 (advising lawyers to wear "conservative business dress in traditional dark colors (*e.g.*, navy blue or charcoal gray)" for oral argument in the Supreme Court).

H. Humor

Most judges think there is some place for humor at oral argument, but lawyers should be cautious about efforts to be funny. Humor is often at someone else's expense and can easily offend. As Judge Torruella points out, there is nothing humorous about what appellate courts do, and telling jokes can give the public the wrong impression that there is. Although a spontaneous, tasteful quip may be appropriate, lawyers should never plan comedy as part of their prepared remarks.[50] Oral argument should not be funereal in tone, but when in doubt, humor should be avoided.

V. A FINAL WORD ABOUT CIVILITY

All of the judges expressed concern about civility. Although few of them witness discourtesy in their appellate courtrooms, they often detect it in the trial record or occasionally in the briefs. To a person, the judges see no place or reason for name-calling, *ad hominem* attacks, or any other form of rudeness. They can tell from the record that the parties are tense and the litigation has been difficult. Denigrating another party or opposing counsel is never acceptable and according to Chief Justice Suttell, may even result in the imposition of sanctions. Chief Judge Howard is also put off by oral advocates' efforts to disparage the trial judge by suggesting that a trial ruling was the result of chicanery, partiality, or incompetence.

Judge Thompson disapproves of even the seemingly lesser incivility of "snarkiness." She acknowledges that "You can't stop to have a street fight while court is in session," but encourages counsel who has been attacked to respond, if at all, only briefly, and to "keep the hiss to yourself." In general, a lawyer who is the subject of a personal affront should try to rise above it.

Some judges think that mannered conventions like referring to opposing counsel as "my brother" or "my sister" have become

50. One judge mentioned an otherwise brilliant oral argument that collapsed when the lawyer told what was clearly a rehearsed scatological joke.

antiquated and prefer "opposing counsel," "counsel for the appellant," or using the other lawyer's name. Other judges see the reference to "my brother" or "my sister" as an effort to return to a bygone era of greater civility. Customs such as beginning an argument by saying, "may it please the court" may be unnecessary, but remain traditions.[51] As a matter of deference to their colleagues, many judges begin opinions that disagree with the majority by using the established form: "I respectfully dissent." Judges tend to notice and appreciate lawyers who show each other respect by shaking hands at the end of an argument.[52] This recurring theme—courtesy, politeness, respect, civility in general—may be the feature of effective oral advocacy that is most commonly overlooked.

51. According to Judge Coffin, this phrase is not intended to mean "May what I say tickle your fancies." Instead, it is among those "expression[s] of respect" that are "not only genuine but also stem[] from one who respects himself." COFFIN, *supra* note 6, at 102.

52. The judicial interviews on which this article was based all took place before COVID-19 appeared. Whether the handshake will survive the pandemic is uncertain as of this writing, but judges are certain to appreciate lawyers' use of any gestures of civility and good will that may emerge to replace it.

THE ROBED TWEETER: TWO JUDGES' VIEWS ON PUBLIC ENGAGEMENT*

Stephen Louis A. Dillard**
Bridget Mary McCormack***

For most of American history, the judge has been viewed as a different type of public servant. Unlike other public officials, judges are typically (and correctly) not considered politicians, and they are far less likely to interact with their constituents on a regular basis. Instead, they toil away in cloistered courthouses in relative anonymity, making decisions in civil and criminal matters of the utmost importance. But every so often, judges venture out into the real world to speak to the public about what they do. And while many of these public appearances are unquestionably motivated by a commitment to civic responsibility, elected judges feel a unique pressure to stay connected to the people they serve.

But there is a big difference between a judge speaking to lawyers at a CLE or community leaders at a chamber of commerce meeting, and a judge appearing at a campaign rally. Our sense is that the vast majority of elected judges intensely dislike campaigning. This is understandable. There is—at least at first blush—something unseemly about nonpartisan interpreters of the law campaigning in much the same way as candidates running for a legislative or executive office. The view that campaigning is antithetical to holding a judicial office is one iteration of a broader view that judges shouldn't be

*The authors thank David Arnold, Nick C. Daly, and Tiffany D. Gardner for their significant contributions in editing and finalizing this article.

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***Chief Justice, Michigan Supreme Court. *See Chief Justice Bridget Mary McCormack*, MICH. CTS., https://courts.michigan.gov/Courts/MichiganSupremeCourt/justices/Pages/Chief-Justice-Bridget-Mary-McCormack.aspx (2020).

actively engaging the public except in limited circumstances. And unsurprisingly, judges are far less inclined to engage the public than other elected officials.

But it doesn't have to be this way, and it shouldn't be. Now, more than ever, citizens are interested in understanding and following the judiciary; and technology has given judges unique, cost-effective tools to engage and educate the public. We hope to make the case that judges should take advantage of these technological advances and drastically rethink the role of a judge in the modern age.

To put it plainly, we think judges are making a serious mistake by continuing to stay largely disengaged from the people they serve. Our sense is that many judges do so because they believe "being out there too much" is unbecoming of a judge. But why? Doesn't the nature of a judge's public activity matter? If a judge is educating the people he or she serves about the judiciary or frequently engaging them in a way that promotes confidence in the judicial branch, how is that inappropriate?[1]

In our view, it is long past time for judges to reimagine how they participate in their communities. They can (and we think should) engage and educate the people they serve on a regular basis. We judges need to shed our collective image as "stuffy, technologically challenged, and light on personality,"[2] and step out of our courtrooms and into the light of day. We are public servants, not disengaged robed philosophers, and the public has a right to know who we are and what we do.[3] And in our view, one of the best ways for judges to effectively engage the people they serve is to embrace the ubiquitous social-media platforms other citizens use to communicate and interact with one another.

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1. S*ee* In re Slaughter, 480 S.W.3d 842, 841 (Tex. Spec. Rev. 2015) (finding that a judge's social-media post was intended to educate the public about events occurring in the courtroom, which was consistent with the Preamble to the Code of Judicial Conduct).

2. David Lat, *Judges on Twitter: Is this a Problem?* ABOVE THE L. (Sept. 30, 2014), https://abovethelaw.com/2014/09/judges-on-twitter-is-this-a-problem/.

3. John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 FAULKNER L. REV. 131, 154 (2016) (pointing out that "unless we want them to be philosopher-priests cloistered in their jurisprudential temples, judges need to be connected to society, with their work reflecting accessibility to the citizens they serve").

Some judges will surely disagree with us. Many judges are deeply uncomfortable with, and skeptical of, their colleagues using social media. We understand this apprehension and we will respond to it in this article.[4] We will start with a judge's role as digital citizen before making the case for judicial engagement through social media, answer the common objections, and end with our own ideas about best practices. In doing so, we hope to persuade some of our dissenting colleagues to embrace social media as a means of communicating with and engaging the public.

I. THE JUDGE AS A DIGITAL CITIZEN

The judiciary is, in many respects, "the least understood branch of government."[5] And yet, it is the branch most people directly interact with and are personally impacted by on a daily basis. For example, Michigan's district courts hear about three million cases each year,[6] as do Georgia's trial courts.[7] Needless to say, each of those cases has at least two parties directly impacted by the litigation, and many others who are affected by the case outcome because those parties have families and neighbors. Nowhere near that many people interact directly with the other branches of government. Nevertheless, there is a troubling disconnect between the judiciary and the people it serves.

Suffice it to say, law and legal process can be intimidating, and even frightening to many people.[8] Judges don't always make it less so; in fact, judges have "long been criticized for

4. The high ethical standards imposed upon judges create "narrow confines" within which judges may operate, specifically in the context of social media. Agnieszka McPeak, *The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors*, 55 IDAHO L. REV. 205, 217 (2019).

5. Stephen Louis A. Dillard, *#Engage: It's Time for Judges to Tweet, Like, & Share,* 101(1) JUDICATURE 10, 11 (2017), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature_101-1_dillard.pdf.

6. *See 2018 Court Caseload Report*, MICH. CTS., (2018), https://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf (scroll down eleven pages to "Statewide District Court Summary").

7. Judicial Council of Georgia Administrative Office of the Courts, *Annual Report FY 2018*, *available at* https://georgiacourts.gov/wp-content/uploads/2019/12/FY18.pdf (providing 2017 statistics for all classes of trial courts in Georgia).

8. Dillard, *supra* note 5, at 11.

being inaccessible and a source of mystery to the public they serve."[9] The common view of the judiciary is that of "a wise but entirely detached body of individuals who sit on elevated benches, adorn themselves in majestic black robes (with gavels in hand), and dispassionately rule on the various and sundry disputes of the day (and do so largely out of the public eye)."[10]

We concede that this is a fair, broad-strokes assessment of the judiciary's relationship with the public;[11] but we know our branch can and must do better. Judges are public servants, and we have a duty to educate the public about the judiciary's unique role in our democracy, its decisionmaking processes, and what the public has a right to expect in our courthouses.[12] But to do this effectively, judges need to rethink how we (and our courts) engage with the public, get past our unease with technology, and fully embrace the social-media platforms those we serve use every day.[13] The public wants, indeed craves, this greater engagement by the judiciary.[14]

There are, of course, many ways for judges to interact with the public outside of the courtroom. And the traditional methods of engagement remain worthwhile; it is important for judges to be actively involved in their local communities by speaking to schools and community organizations, as well as attending events where they will have an opportunity to stay connected to the people they serve. Judges will also, naturally, spend a significant amount of time with law students and lawyers. This is all time well spent. Judges can and should be leaders in their local and legal communities.

But there are only so many events a judge can attend, only so many hands a judge can shake, and only so much time in the

9. Browning, *supra* note 3, at 131.

10. Dillard, *supra* note 5, at 11.

11. *See id.*

12. *Id.*

13. *Id.*

14. *Id.* In 2017, sixty percent of respondents to polling by the National Center for State Courts agreed with the following statement: "Too many judges in (STATE) courts don't understand the challenges facing people who appear in their courtrooms and need to do a better job of getting out into the community and listening to people." *The State of State Courts*, NAT'L CENTER FOR ST. CTS. 7 (2018), https://www.ncsc.org/__data/assets/pdf_file/0029/16985/ncsc_sosc_2018_presentation_final.pdf (showing in addition that the results had dropped to a still unacceptably high fifty-two percent in the 2018 survey).

day. After all, a judge's job is already difficult and time consuming. So, how can a judge make his or her court widely accessible to the public and effectively communicate and build relationships with as many of his or her constituents as possible? Or, harder still: How can an appellate judge—a statewide public official—meaningfully engage with millions of constituents? This is where technology and social media can be a tremendous benefit. Indeed, the ability of a judge or court to use technology and social media to communicate with the public is revolutionary.[15]

But let's back up a bit: a judge's primary responsibility as a "digital citizen" begins with making sure that his or her court is as accessible as possible to the people it serves.[16] And this starts with a court's website providing "citizens with increased access to the judicial process . . . through . . . effortless access to court records,"[17] implementing an "effective digital marketing strategy" to ensure that "people find a court's website when they need it,"[18] and making the website easy to navigate.[19] A modern and easily accessible court website benefits judges and court staff, as well as the public, and informed litigants make legal processes more efficient and effective.

But one of the most important things a court can do to promote confidence in the judiciary is to open the virtual doors

15. To get an idea of just how revolutionary this technology can be, consider that Facebook had approximately 1.5 billion users worldwide by 2016 and Twitter was by then processing approximately one billion tweets every forty-eight hours. Browning, *supra* note 3, at 131.

16. *See* ABA Standing Committee on Ethics & Professional Responsibility, *Formal Opinion. 462: Judge's Use of Electronic Social Networking Media* 4 (2013), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf [hereinafter *ABA Opinion 462*] (recognizing social media's "utility and potential as a valuable tool for public outreach"); *see also* Browning, *supra* note 3, at 154; Elizabeth Thornburg, *Twitter and the #So-Called Judge*, 71 SMU L. REV. 249, 259 (2018) (discussing social media's role in judicial elections).

17. *Court Website Design Resource Guide*, NAT'L CENTER FOR ST. CTS., https://www.ncsc.org/Topics/Media/Court-Websites/Resource-Guide.aspx (n.d.).

18. *JTC Resource Bulletin, Marketing a Court Website: Helping the Pubic Find the Court Online*, NAT'L CENTER FOR ST. CTS. 1 (July 22, 2018), https://www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2018-08-30%20Marketing%20a%20Court%20website_final.ashx.

19. *See generally, e.g.*, *Navigation and Design*, NAT'L CENTER FOR ST. CTS., https://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Technology/Web-Best-Practices/Navigation-and-Design.aspx (n.d.) (collecting and discussing illustrative screen shots showing navigation features of several court websites).

of the courthouse to the public by livestreaming trial proceedings and appellate oral arguments. Both of our courts do this, and also make the proceedings available for later viewing on YouTube and Vimeo channels.[20] The response from trial judges, lawyers, and the public has been overwhelmingly positive. To be sure, there are times when only twenty or thirty people are viewing one of our oral arguments; but the number of people watching our courts on any given day is not important. What matters is that Georgians no longer have to drive to Atlanta to see the judges and justices of the appellate courts in action, and Michiganders no longer have to drive to Lansing to see its high court at work. Instead, they can sit in the comfort of their homes, offices, or anywhere else, and watch our oral arguments, understand what issues their courts are considering, and determine for themselves whether the judges and justices honor them with their service.

Although user-friendly court websites and livestreaming judicial proceedings have fairly broad support from judges, there is less enthusiasm for more direct engagement with the public via social-media platforms. Even so, social-media platforms have dramatically altered the way public officials and political candidates engage with the public. Judges, unsurprisingly, have been slow to embrace this new technological frontier.[21] We hope to persuade our skeptical colleagues that the benefits of judges directly engaging the public on social-media platforms substantially outweigh the costs.

II. MAKING THE CASE FOR ENGAGEMENT

We have become two of the more outspoken advocates for judges engaging those they serve on social-media platforms. Our primary reasons are transparency and public education. Judges owe the citizens they serve information about

20. *See View Archived Oral Arguments*, CT. OF APPEALS OF GA., https://www.gaappeals.us/oav/oral_arguments.php (2019); *View Archive of Oral Arguments*, MICH. CTS., https://courts.michigan.gov/courts/michigansupremecourt/oral-arguments/video-archive/pages/default.aspx (2020) (including link to court's YouTube channel).

21. *But see* Katrina Lee, *Your Honor, on Social Media: The Judicial Ethics of Bots and Bubbles*, 19 NEV. L.J. 789, 790 (2019) ("Increasingly, judges sitting in county, state, and federal courts in the United States have joined the ranks of social media users.").

> the role of the judiciary in our tripartite system of government (as well as the separation of powers), our system of appointing and electing judges, the training judges receive, the structure and operation of our judicial system, the judicial decision-making process, and what rights "we the people" have in relation to the judicial system.[22]

The judiciary plays a critical role in the daily lives of the people of our states, and we believe they are entitled to this information. By engaging citizens on social-media platforms we can demystify the judicial branch and give the public direct access to their government.[23] And when we do it well, we can increase the public's confidence in the judiciary.

Social-media platforms are an effective way to educate the public—in our cases primarily Georgians and Michiganders—about the judiciary. We each regularly use social media platforms to advise the public when our courts are hearing oral arguments, and provide links to the livestreams and case descriptions.[24] We provide links to press releases issued by our courts. We educate the public about our courts' deadlines and processes. We highlight job openings at our courts, and post photos and information about events we attend in our official capacities. We post links to our opinions, scholarly articles and essays, and other informative writings. All of this, it seems to us, enhances the public's understanding of and respect for the work of our courts. In this regard, social media becomes a "high-octane tool to boost civic awareness."[25]

The boost to transparency and public education is reason enough to engage those we serve, but we have been surprised and delighted by the tremendous additional benefits we derive from our online presences. For example, we have built

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22. Dillard, *supra* note 5, at 11.

23. Thornburg, *supra* note 16, at 259 ("[Social media] . . . provides judges with a higher profile, allows outreach to voters, helps make judges (and thus courts) seem more accessible, and (if desired) allows judges to announce their positions on legal issues.").

24. We both have professional Twitter accounts, Facebook pages, LinkedIn pages, and Instagram accounts. Our courts and many of our colleagues also have a presence on some of these social-media platforms.

25. Shoshana Weissmann, *Online and On the Bench, the "Tweeter Laureate of Texas" Is All About Judicial Engagement*, WASH. EXAMINER (Sept. 17, 2015), https://www.washingtonexaminer.com/weekly-standard/online-and-on-the-bench-the-tweeter-laureate-of-texas-is-all-about-judicial-engagement.

meaningful friendships with judges in other jurisdictions and been given opportunities for learning that were not otherwise available to us. Specifically, we have benefited from online and offline discussions with our colleagues in other jurisdictions, discovering new and more efficient ways of doing some parts of our work, which we have incorporated in our own courts to provide better service to those we serve. Put another way, judicial relationships developed through social-media platforms have created a live national learning lab.

And the opportunity to mentor young lawyers and law students through social media is also uniquely rewarding. Because social media interaction and reach is scalable to infinity, it creates opportunities for mentorship that are otherwise not achievable. For example, we can highlight articles that provide helpful information to students and young lawyers. We can also hold question-and-answer sessions on a general topic of interest (*e.g.*, legal writing or oral-argument tips), and countless young lawyers or law students benefit tremendously from this direct engagement with judges. We have also each had the opportunity to answer unsolicited, appropriate public questions from students and lawyers, as well as private messages from students and lawyers seeking academic or career advice. We both believe that judges have a duty to mentor law students and young lawyers, and social-media platforms allow us to do this in ways we never could have imagined before.

Social media also provides a platform for professionalism and nonpartisan issues we care deeply about. For example, our views about civility and kindness receive far broader airing and engagement when expressed on Twitter than in any single, in-person public appearance. And these views are then echoed by others who share them with new audiences. Likewise, positive stories about what our courts are doing can reach far more people far more efficiently through social media.

Moreover, we are convinced that engagement in social media enhances our ability to do our jobs. That is, there is a basic competency reason for engaging the public on social-media platforms. Indeed, given the plethora of technological issues before our courts and the pervasive use of social media by most Americans, how can a judge effectively do his or her job

without having some basic understanding of how social media works?

Finally, for elected judges there is simply no substitute for the connections and relationships social media allows you to form with the people you serve. Voters who follow judges on these platforms feel closer to them and more invested in their judicial careers. And a judge's participation on social media enhances and amplifies other public appearances and outreach that he or she makes. Speeches, podcasts, and articles by judges can all be promoted in a more effective way via social-media platforms.

Judges who engage the public on social media are also more likely to establish a national presence. Judge Don Willett of the United States Court of Appeals for the Fifth Circuit is currently on hiatus from social media,[26] but before his nomination to the federal judiciary, he was the most prominent judge on any social-media platform.[27] Or, as he was fond of saying, the "most avid judicial tweeter in America," which he likened to being "the tallest munchkin in Oz."[28] His tweets were "smart, humorous, and informative"; and he "quickly established a national reputation on social media as a result of his ability to strike the proper balance between accessibility and appropriate judicial decorum."[29] As a justice on the Supreme Court of Texas, then-Justice Willett had around 105,000 followers on Twitter.[30] These are staggering numbers for a state judge, even one serving on the highest civil court of Texas; and he has retained a sizeable following on both Twitter (102,000) and Facebook (20,000) during his hiatus.[31] Importantly, this

26. *See* Ken Herman, *Herman: Twitter Silence from Texas Tweeter Laureate*, STATESMAN (updated Sept. 25, 2018, 8:53 AM), https://www.statesman.com/news/20171017/herman-twitter-silence-from-texas-tweeter-laureate.

27. *See* Thornburg, *supra* note 16, at 299–300.

28. Dillard, *supra* note 5, at 12.

29. *Id.*

30. Thornburg, *supra* note 16, at 260 n.49.

31. *See* Judge Don Willett (@JusticeWillett), TWITTER, https://twitter.com/JusticeWillett/followers; Justice Don Willett (@JusticeDonWillett), FACEBOOK, https://www.facebook.com/JusticeDonWillett/.

exposure gave Judge Willett a national platform that he could use to promote civics education.[32]

After Judge Willett, the follower count for non-celebrity judges drops precipitously. In fact, the threshold is so low that we are among the judges with the most followers.[33] And even at these levels, we can have a national voice on nonpartisan issues that we care about, like civility, professionalism, judicial transparency, and, of course, the benefits of judges using social media to engage with those they serve. In fact, because federal judges generally do not engage in social media,[34] state judges can and do occupy the field. As a result, we state judges are far more likely than our federal counterparts to have national voices on issues of great importance to the legal profession.[35]

III. ANSWERING THE CONCERNS[36]

One of the objections to judges using social-media platforms is the possibility (or even likelihood) of a gaffe or misstep being amplified.[37] Fair enough. But a viral moment can happen to any public official, regardless of whether that person

32. Chuck Lindell, *Texas Judge Laments Civic Illiteracy*, MIDLAND REP. TELEGRAM (Jan. 14, 2017), https://www.mrt.com/news/education/article/Texas-judge-laments-civic-illiteracy-10856651.php.

33. Judge Dillard has 17,600 followers, Judge Stephen Dillard (@JudgeDillard), TWITTER, https://twitter.com/JudgeDillard/followers, and Chief Justice McCormack has over 8000, Chief Justice McCormack (@BridgetMaryMc), TWITTER, https://twitter.com/BridgetMaryMc/followers.

34. *See generally* Douglas Nazarian & Barbara Berensen, *To Tweet or Not to Tweet*, 101(4) JUDICATURE 70, 70 (2017) (suggesting that federal judges are discouraged from social media engagement by Advisory Opinion No. 112 of the Judicial Conference Committee on Code of Conduct, issued in April 2017); *see also* Committee on Codes of Conduct, *Advisory Opinion No. 112: Use of Electronic Social Media by Judges and Judicial Employees in* 2B GUIDE TO JUDICIARY POL'Y 224 (2017), *available at* https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

35. *See* Thornburg, *supra* note 16, at 272–73 (recognizing that state judges generally maintain greater flexibility in commenting on, or responding to comments about, allegations concerning the judge's conduct in different contexts).

36. *See id.* at 288 (providing an overview of concerns associated with a judge's use of social media).

37. *Id.* at 269 (detailing three primary limitations on judicial speech—based on the code of conduct for federal judges—that translate to limitations and concerns for social media use).

is on social media.[38] Indeed, given the ubiquitous nature of cellphones, we're all likely to end up on social-media platforms whether we want to be there or not; and it will not always be positive when others are doing the posting.

So, avoiding social media won't save you from technologically amplified missteps; those just come with the modern territory. The question for judges, then, is how best to handle an unflattering or unfair post when it happens. And we believe the best way to stop any attempt to take our words or actions out of context is to have an established, positive presence on social media. That is, the best defense is a good offense. A strong social-media presence allows you to help control and protect your reputation and image as a public official.

Another common objection to judges having an active social-media presence is that it is demeaning to the office.[39] We think this objection misunderstands the platforms. It is not the medium, but rather the content on the medium, that can be demeaning. Judges control their own platform content, just as they control what is said during their own in-person appearances. If that content is substantive and genuine, it will enhance the office and the public's confidence in the judiciary, just as a substantive and genuine in-person appearance would.[40]

A variation on this concern is that having a social-media presence somehow undermines the public perception that a judge is impartial. Put differently, by social media superstar David Lat, no less: "Judges who are formal, dry, and tight-lipped off the bench convey a strong sense of objectivity to the public and the litigants who appear before them."[41] To this concern too our answer is, once again: it depends on the content. An impartial and independent judiciary is critical to our system

38. *Id.* at 290–91 (citing John C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 59–60 (2004)).

39. Browning, *supra* note 3, at 135 (observing that courts have warned that certain conduct, especially on social media, "can easily be misconstrued and create an appearance of impropriety") (quoting State v. Thomas, 376 P.3d 184, 198 (N.M. 2016)).

40. *Id.* at 154 ("[T]here is nothing wrong with a judge sharing true and publicly available information about proceedings via social media, so long as the judge otherwise adheres to judicial canons and refrains . . . from making any comment that might call into question the judge's impartiality.").

41. Lat, *supra* note 2.

of government, and any remark that undermines that value is costly. And there are plainly topics that judges should avoid altogether.[42] But posting about issues that do not compromise impartiality and independence can enhance public trust in judges and the judiciary.[43] Social media is just another (and far more effective) means for judges to communicate with the public; and if the substance of a judge's remarks is positive and informative, we fail to see why these platforms should be shunned.[44] To do so is to reject a primary means of communication used by most citizens, and that would be a serious mistake.[45] Judges are different, but they're not special. In our view, judges need to be directly accessible and accountable to the people we serve; and social-media platforms allow us to do this in a unique and efficacious way.[46]

IV. BEST PRACTICES

So, let's assume that we have convinced every judge reading this article to begin the process of establishing a social-media presence. How do you decide what to post and how to interact with the public online? What are some rules of thumb for engaging those you serve? What are the pitfalls to avoid? These are all common and valid questions asked by colleagues who are interested in joining ever-growing online communities.

When we created our judicial Twitter accounts, neither of us gave much thought about how to use this platform—or others, like Facebook and Instagram—beyond informing the

42. Thornburg, *supra* note 16, at 269 ("While there are few [judicial] rules [of ethics] that specifically address social media use, the rules governing judicial speech apply to digital media just as they would to a speech to the local chamber of commerce.").

43. Browning, *supra* note 3, at 154 (pointing out that "there is nothing wrong with a judge sharing true and publicly available information about proceedings via social media, so long as the judge otherwise adheres to judicial canons and refrains from commenting on the evidence, parties, witnesses, or counsel, or from making any comment that might call into question the judge's impartiality").

44. *Id.* at 153–54 (detailing a case study of a Special Court of Review's order recognizing that "communications and interaction via social media are no different . . . than more traditional forms of communication" (quoting *In re* Slaughter, 480 S.W.3d 842, 847 (Tex. Spec. Ct. Rev. 2015))).

45. *Id.* at 133 (noting that "[p]unishing judges for reaching out to and connecting on social media with the community they serve is not the answer").

46. *Id.* at 154.

public about speaking engagements and court-related events.[47] We were apprehensive in all the ways some of our colleagues continue to be. We worried about being misconstrued and upholding the dignity of the offices we hold. As a result, our approaches to social media have been works in progress. But we have developed some rules that guide our online engagement. Some are firm, some less so.

A. Stating the Obvious: Abiding by the Canons of Judicial Conduct

It makes sense to start with the obvious: the canons of judicial conduct apply to judges engaging the public online just as they do "in real life."[48] As a result, some of our decisions are easy.[49] For example, we do not discuss pending cases or issues that might come before us.[50] Just as in any other setting, judges should not directly or indirectly comment on matters before them or likely to come before them.[51] Relatedly, judges should

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47. *See, e.g.*, Judge Stephen Dillard (@JudgeDillard), TWITTER (Apr. 15, 2011, 8:56 p.m.), https://twitter.com/JudgeDillard/status/59057475231563776 ("[I am] looking forward to speaking to the West Metro GTLA on April 28th.").

48. Thornburg, *supra* note 16, at 269.

49. The ABA has opined that a judge "may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety." ABA Opinion 462, *supra* note 16. The California Supreme Court recently added the following commentary to Canon 2A of its state code of judicial ethics:

> A judge must exercise caution when engaging in any type of electronic communication, including communication by text or email, or when participating in online social networking sites or otherwise posting material on the Internet, given the accessibility, widespread transmission, and permanence of electronic communications and material posted on the Internet. The same canons that govern a judge's ability to socialize and communicate in person, on paper, or over the telephone apply to electronic communications, including use of the Internet and social networking sites. These canons include, but are not limited to, Canons 2B(2) (lending the prestige of judicial office), 3B(7) (ex parte communications), 3B(9) (public comment on pending or impending proceedings), 3E(2) (disclosure of information relevant to disqualification), and 4A (conducting extrajudicial activities to avoid casting doubt on the judge's capacity to act impartially, demeaning the judicial office, or frequent disqualification).

CAL. CODE OF JUD. ETHICS Canon 2A cmt. (amended 2018) (footnotes omitted).

50. Thornburg, *supra* note 16, at 269.

51. *Id.*

not discuss cases they have already decided, or any other internal deliberations related to a specific case or controversy.[52] If judges do this on social-media platforms in violation of numerous judicial canons, it unquestionably would cause the public to lose confidence in the judiciary.[53]

Judges should also not engage in partisan politics. We understand that some states require judges to affiliate with a political party (not our states, and we are thankful), but even then, a judge should make every effort to avoid being perceived as a political actor. This is not always easy.[54] Indeed, even in states with nonpartisan judicial elections (like Georgia and Michigan), judges still have to campaign, network, and seek the support of voters across the political spectrum. But most importantly, judges want the lawyers and citizens who come before them to have confidence that they are going to be given a fair shake, regardless of any political affiliation they might have. And the public wants the same.[55] In our view, it is critical to convey to the people we serve that we are not beholden to any political party or special-interest group. So, how can a judge effectively communicate this to the public?

First, we never directly or indirectly comment on political issues or critique politicians. We believe judges should stay as far away as possible from politics and the issues that animate partisan politics. Offering a personal opinion on issues that divide the public—abortion, immigration reform, the death penalty, and the like—in especially partisan ways is entirely out

52. *Id.* at 271–72. In addition to not responding to commentary about our own cases, we also strongly caution judges against highlighting articles or other online commentary about them. *Id.* at 272–73 ("It is safer, perhaps, for one judge to defend another than for the judge under attack to exercise digital self-defense."). We believe that a judge's opinions should speak for themselves.

53. *Id.* at 288.

54. Browning, *supra* note 3, at 135 (observing that courts have warned that certain conduct, especially on social media, "can easily be misconstrued and create an appearance of impropriety," especially in the context of judicial election campaigns (quoting State v. Thomas, 376 P.3d at 198).

55. *See* Mem. from GBA Strategies to Nat'l Ctr. of St. Cts., *2018 State of the State Courts—Survey Analysis* 2 (Dec. 3, 2018), *available at* https://www.ncsc.org/__data/assets/pdf_file/0020/16157/sosc_2018_survey_analysis.pdf (stating in a summary of its polling that "State Courts remain a trusted institution across party lines"); *see also The State of State Courts*, *supra* note 14 (noting that the number of respondents who said that "fair and impartial" describes state courts well or very well increased seven percentage points from 2017 to 2018).

of bounds.[56] We also avoid controversial legal topics like "court packing," confirmation hearings for nominees to the Supreme Court of the United States, or whether a particular case heard by the Court was correctly decided.

There is still plenty of room for commentary on nonpartisan issues that matter to the legal profession. But even then, judges must be careful in what we say and how we say it.[57] For example, one hotly contested issue among lawyers and judges is whether the Supreme Court of the United States should televise its oral arguments. Because we strongly believe judges are public servants and that our proceedings should be as open and accessible as possible, we have spoken out in favor of the Supreme Court changing its policy and livestreaming its oral arguments.[58] But before we did so, we carefully considered whether it was appropriate to express an opinion about how another court—especially one that reviews our "homework"—operates. Ultimately, we decided to use our social-media platforms to respectfully urge the Supreme Court to reconsider its policy because the overwhelming transparency and educational benefits from airing such proceedings justified doing so. Other judges might make a different choice, but we are confident that our commentary on this issue fell well within the expectations of the judicial canons.

Second, we recommend a neutral policy for following people on Twitter or accepting friend requests on Facebook or similar social-media platforms. Although we think it is illogical for anyone to believe that we would treat someone more favorably in a case because that person is a Twitter follower or Facebook friend, there are things a judge can do to further diminish the notion that such an online connection is worthy of concern. For example, anyone can follow our official Facebook pages and we follow back any Twitter follower from our home

56. Thornburg, *supra* note 16, at 290.

57. Browning, *supra* note 3, at 154.

58. We feel the same way about the federal courts of appeals and the federal district courts too, and in fact, Chief Justice McCormack submitted written testimony to the U.S. House of Representatives in support of such a change in policy. *See* Letter from Hon. Bridget M. McCormack, C.J., Mich. Sup. Ct., to U.S. House Comm. on the Judiciary (Sept. 24, 2019), *available at* https://docs.house.gov/meetings/JU/JU03/20190926/110028/HHRG-116-JU03-20190926-SD002.pdf.

states.[59] As the saying goes, if everyone is special, then no one is special.[60] We also use this home-state policy for political and nonprofit groups; our Twitter followers come from both major

59. If a judge has a personal Facebook or Instagram account, our recommendation is that it should either be relatively private and limited to family members and close friends or used to accept all requests from people who live in your area of representation. The latter is Judge Dillard's policy. He accepts friend and follow requests on Facebook and Instagram from any Georgian.

60. It is this single issue that most judges worry about. *See generally* John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487 (2014). Many of our colleagues assume that having a lawyer as a Facebook friend would require a judge to recuse from a case in which that lawyer appears. *Id.* at 490 (comparing social media interactions—such as adding friends on Facebook or following on Twitter—to ex parte communications and concluding that rules of judicial conduct should cover improper communications made in cyberspace just as they cover those made in real life). That is almost never correct. As with any friendship, it is the nature of the relationship that determines whether a judge should disclose the connection or recuse from the case. But judges in certain states should be aware of the ethics and judicial opinions on this subject. Different judicial ethics committees have given different advice about whether judges may connect on social-media platforms with attorneys who are likely to appear before them in court. Cynthia Gray, *Social Media & Judicial Ethics: Part 1*, 39 JUD. CONDUCT REP. 2, 12–14 (2017), *available at* https://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Spring_2017.ashx (noting that "the committees in Connecticut, Florida, Massachusetts, and Oklahoma have advised that judges should not add lawyers who may appear before them as 'friends' on Facebook or permit those lawyers to add them as 'friends,'" but also noting that "the judicial ethics advisory committees in California, Kentucky, Maryland, New Mexico, New York, Ohio, and Utah concluded that whether a judge may connect on social media with a lawyer who appears before her depends on an analysis of the nature and scope of the specific relationship"); *see also id.* at 17–20 (concluding that disqualification based on a social-media connection between the judge and a lawyer in a case is not automatically required, but that the connection is a factor that the judge should take into account when considering whether there might be a question about her impartiality, and also recognizing that other actions like disclosure of the relationship and un-friending the attorney might be required).

State appellate courts have also cautioned against judges using social media improperly. *See, e.g.*, State v. Thomas, 376 P.3d 184, 198 (N.M. 2016) (noting that "[w]hile we make no bright-line ban prohibiting judicial use of social media, we caution that 'friending,' online postings, and other activity can easily be misconstrued and create an appearance of impropriety"); *see also* Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n, 271 So. 3d 889, 899 (Fla. 2018) (disagreeing with state ethical committee's 2009 opinion that judges cannot add attorneys who practice before them as "friends" on Facebook and concluding that such a relationship standing alone does not warrant disqualification). *But see id.* at 899–900 (Labarga, J., concurring) (agreeing with the majority opinion, but encouraging judges to forego using Facebook at all because maintaining Facebook friendships with attorneys appearing before the judge is "quite simply, inviting problems"); *id.* at 900 (Pariente, J., dissenting) (asserting that "a judge's involvement with social media is fraught with risk that could undermine confidence in the judge's ability to be a neutral arbiter," and advocating for a strict rule that judges must always disqualify themselves from cases in which an attorney with whom the judge is Facebook friends appears before her or him).

parties and groups on opposite sides of issues. We want to be accessible to as many Georgians and Michiganders as possible, and to let them know that we proudly serve them all.[61]

Third, we are careful about what we "like" on social-media platforms. In most cases, when you like a tweet or post, your like is broadcasted to the public.[62] Your impartiality can be called into question by liking political tweets or posts, even if you are not making partisan or controversial comments. We also recommend periodically checking to see that you have not accidently liked a political or controversial statement on social media, which is easy to do.[63]

B. Best Practices and Authenticity

Now that we have covered what judges should not do on social-media platforms, let's discuss what judges can and should do with their online presences. In our view, it is crucial for judges' social-media accounts to be accurate reflections of who they are in real life. Authenticity resonates. That said, there is nothing wrong with putting your best foot forward. You can care deeply about civility and treating others with kindness and compassion, even when you occasionally lose your temper. Sometimes we emphasize being kind and charitable because we need the reminder too.

One way to be authentic is to discuss your interests outside of the law. The people you serve are interested in knowing what kind of person you are when you take off the robe; so share your hobbies and passions with them. We recognize that some of our colleagues may find it unusual or even unseemly for a judge to disclose aspects of his or her personal life to the public, but we think doing so humanizes judges and makes us more accessible to the people we serve. In our view, accessible judges and courts promote greater confidence in the judiciary.

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61. We take this approach with national accounts too. For example, we follow and are followed by the Federalist Society and the American Constitution Society.

62. Browning, *supra* note 3, at 136 ("Judges are also cautioned to regard all social media postings as public communications and not be lulled into complacency by reliance on privacy settings." (citation omitted)).

63. *See, e.g.*, *How to Like a Tweet*, TWITTER, https://help.twitter.com/en/using-twitter/liking-tweets-and-moments.

Our accounts model this approach to social media. For example, Judge Dillard's Twitter presence benefitted greatly from follower feedback. Early on, a law student sent him a direct message that went something like this: "I think it's great that you're a judge with a fairly active presence on Twitter, and you seem like a really nice person, but your account is a bit dull. You haven't asked for my advice, but I am going to give it to you anyway: Tell us more about who you are as a person off the bench." The message was received, and Judge Dillard began more personal engagement with his followers. Similarly, Justice McCormack has found that some of her most personal posts are the ones that people respond to most enthusiastically; they like knowing when her children have reached some milestone or that her dad is a Marine.

So, in addition to tweets about livestreaming of proceedings, unique aspects of our respective courts, oral-argument tips, and pleas for civility and professionalism, you will also see frequent tweets on our feeds about various non-legal subjects. We regularly feature Samford University (Dillard) and the University of Michigan (McCormack) and their respective athletic programs. Our families also occasionally make appearances—including humorous quips from our spouses and children. We post photographs of our beautiful houses of worship, pets, and landmarks from around Georgia and Michigan. We also debate grammar and typography issues with followers (and with each other). And we share our views on music, books, films, and television programs.

We also each have recurring Twitter habits that have developed over time. Judge Dillard takes "judicial notice" of birthdays, often highlights his "chambers music" for the day, and posts the following tweet every Friday at 5:00 p.m. (EST): "I hope that all of you have a wonderful and relaxing weekend. And please, be good to each other." Justice McCormack highlights upcoming oral arguments with a link to the live feed and a reminder that the court belongs to the public, promotes treatment-court success stories, and will also occasionally comment on matters related to pop culture.[64]

64. For an entertaining example of a tweet relating to pop culture that caught the interest of Chief Justice McCormack's Twitter followers, see her inquiry about the fashion status of the fanny pack. Chief Justice McCormack, TWITTER, https://twitter.com/Bridget

Again, we understand that some of our colleagues may be hesitant to share this kind of personal information with the public. But the reality is that we live in a radically different world than we did even ten years ago. In any other electoral context, you will see public officials and candidates sharing aspects of their lives in the hope that voters will feel personally connected to them. They do this for a reason: It is political malpractice not to do so. But beyond the political benefits of giving your constituents a glimpse into who you are off the bench, it also humanizes a branch that is called upon to make life-changing decisions that impact people's lives every day. We believe the judiciary benefits greatly from having thoughtful and caring judges directly engage with the public on the social-media platforms that citizens use on a daily basis.

That said, there is a downside to being on social media, and judges need to know this at the outset. It's not always going to be a positive and uplifting experience online. You will (and we do) occasionally receive a nasty tweet or critical message. When that happens, our advice is simple: do not reply or engage that person in any way. Don't get into fights with your critics. It's exactly what they want, and there is little chance that you or your court will come out of the exchange looking good. Even so, we strongly recommend that you do not block anyone (especially from your home state).[65] Once again, that's exactly what they want you to do. Rather, we suggest that you mute them instead. If you really want to disappoint a "troll"—a bad-faith actor—ignore him or her. But you do need to draw a distinction between a troll and someone who is asking a genuine question or offering constructive criticism that you can address (e.g., why your court's website isn't easy to navigate). If you're unsure which category that person falls into, you will usually find out during the initial exchange. And if someone starts to

MaryMc/status/1162763766657929216 (Aug. 17, 2019, 11:30 AM EDT) (generating thirteen retweets and 585 likes).

65. In fact, some federal courts of appeals have held that doing so violates the First Amendment—at least in some contexts. Vera Eidelman, *Court Rules Public Officials Can't Block Critics on Facebook*, ACLU (Jan. 9, 2019, 12:00 PM), https://www.aclu.org/blog/free-speech/internet-speech/court-rules-public-officials-cant-block-critics-facebook; Jonathan Peters, *Public Officials: Beware Blocking Critics on Social Media*, ABA (July 22, 2019), https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2019/blocking-social/.

become rude, you have every right to disengage from the conversation.[66] Judges should be accessible to the public, but they are not required to be unfairly abused for doing so.

V. CONCLUSION

Technology has dramatically changed the way that public officials communicate with the people they serve. Judges have, unsurprisingly, been the slowest to adapt to this reality. It's time for that to change, and it is changing rapidly. Once again, judges are different, but we are not special. Just like our friends in the executive and legislative branches, we are public servants and we are accountable to the people we serve. This is not to say that the differences between judges and other elected officials are unimportant or that the judiciary doesn't have a unique role in our tripartite system of government. Indeed, these differences are so important that we think they are worth highlighting on social-media platforms. And as long as we do that within the bounds of the judicial canons, we believe our engagement with the public is a net positive. Social media allows us to reach more people about these crucial differences, along with other important information about the judicial branch.

The courts belong to the people, and they play a unique role in the public's government. Giving the people we serve direct access to the judges who serve them is good government and, when done well, promotes confidence in the judiciary. We are both proud to play a small role in this reimagining of how judges engage with the people we are so fortunate to serve. We hope more of our colleagues will join us.

66. Thornburg, *supra* note 16, at 272–73 ("It is safer, perhaps, for one judge to defend another than for the judge under attack to exercise digital self-defense.").

THE END OF AN ERA? ABOLISHING THE ABSTRACT REQUIREMENT FOR ARKANSAS APPELLATE BRIEFS

Jessie Wallace Burchfield*

I. INTRODUCTION

For more than a century, the Arkansas Supreme Court has required the appellant to prepare and file a condensed version of the record—an abstract—when initiating an appeal.[1] Not surprisingly, that abstracting requirement has often been a source of frustration for appellate attorneys and judges in Arkansas.[2] Indeed, members of the Arkansas appellate bar have tried to change or abolish the abstracting requirement over the decades, but those efforts always failed.[3]

Yet the time for change might finally be here. On June 6, 2019, the Arkansas Supreme Court published for comment proposed rules that would eliminate the abstract and addendum

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1. *See generally* § II *infra*.

2. *See, e.g.*, George Rose Smith, *Arkansas Appellate Practice: Abstracting the Record*, 31 ARK. L. REV. 359, 359–60 (1977) (acknowledging that the abstracting rule "creates more problems for the court and for the appellate bar than all the court's other rules put together").

3. Peter G. Kumpe, Jess Askew III & Andrew King, *The Insider's Guide to the Arkansas Appellate Courts*, *in* 1 APPELLATE PRACTICE COMPENDIUM 431, 442 (Dana Livingston ed., 2012). Those failures might have been influenced by the fact that some judges have defended the abstracting process. *See, e.g.*, Smith, *supra* note 2, at 360 (noting that Justice Smith supported the court's practice of requiring an abstract because "[n]o member of the court has been able to find a better alternative").

requirements. The court's order simultaneously announced a pilot project authorizing parties to immediately proceed under the proposed rules in cases with electronically filed records.[4] The announcement was met with praise by many in the Arkansas legal community.[5] This article examines the history of the abstracting requirement, including both problems arising from the rule and prior reform efforts, and then discusses the pilot project and proposed new rules.

II. HISTORY OF THE ABSTRACTING REQUIREMENT

The Arkansas Supreme Court began requiring an abstract in Rule IX of its 1885 rules.[6] Rule X of those rules provided that appellant's failure to comply with Rule IX would result in either dismissal of the appeal upon appellee's motion or affirmance of the ruling below.[7] Prior to this rule change, appellants were required to file only a copy of the record.[8]

Arkansas was not an outlier in 1885; requiring an abstract was once a common practice in many jurisdictions.[9] Before

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4. *In Re Acceptance of Records on Appeal in Electronic Format and Elimination of the Abstracting and Addendum Requirements*, 2019 Ark. 213 [hereinafter *2019 Announcement*].

5. *See, e.g.*, Andy Taylor, *Hallelujah! (In other words, the Arkansas Supreme Court is abolishing the abstract and addendum requirement.*), ARKANSASAPPEALS.COM (June 6, 2019), https://arkansasappeals.com/2019/06/06/hallelujah-in-other-words-the-arkansas-supreme-court-is-abolishing-the-abstract-and-addendum-requirement; ArkBar President [Brian Rosenthal], *Hallelujah!* (June 6, 2019 5:57 PM) (replying to Justice Rhonda Wood). Justice Wood's tweet announcing the proposed change was liked forty times and retweeted thirteen times. *See* @JudgeRhondaWood, *HUGE News from Arkansas Supreme Court*, TWITTER (June 6, 2019, 10:13 AM), https://twitter.com/JudgeRhondaWood/status/1136652223059021825).

6. *Rules of the Supreme Court of the State of Arkansas*, 43 Ark. 1, 3–4 (1885) ("In all cases except felonies . . . the appellant . . . shall file with the Clerk . . . an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision.").

7. *Id.* at 4.

8. *See* ARK. CIV. CODE tit. XIX, § 862 ("It shall be the duty of the appellant to file . . . an authenticated copy of the record"); ARK. CRIM. CODE tit. IX, §§ 327, 340 (providing, respectively, that "appeal is taken by lodging . . . a certified transcript of the record" and that "appeal . . . shall be granted upon the condition that the record is lodged") *in* CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF ARKANSAS (1869).

9. MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 595 (Arthur Vanderbilt, ed., 1949). ("It is the practice in many states to require, in addition to the record itself, a

1938, the federal rules and many state rules required a narrative summary of the testimony.[10] However, the Committee on Improvement of Appellate Practice of the American Bar Association recommended doing away with the abstracting requirement, and this recommendation was adopted by the ABA in 1938.[11] The recommendation stated that "abstracts of the record should not be required, but that such matters in the record as the parties desire to bring to the attention of the court should be set forth in appendices to the brief, either by summarized statement or quotation."[12]

By the time of a 1949 report examining acceptance of the 1938 ABA recommendations, several states had already eliminated the abstracting requirement, and Arkansas was in a minority.[13] However, the authors of the report noted that only ten states that had done away with the abstracting requirement were requiring summaries or quotations from the record as part of the brief, which was also recommended.[14] The committee reasoned that in those jurisdictions with no abstracting requirement and no requirement for inclusion in the brief of summaries or quotations from the record, the reviewing court would be forced to closely examine the entire record, making submission of a "sufficient number of copies of the record . . . a matter of necessity."[15] The inefficiency and undesirability of justices having to examine the entire record has been one of the most-cited arguments in favor of the Arkansas abstracting requirement.[16]

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complete abstract thereof, which must be printed for the use of the members of the Court.").

10. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 8.1, 196 (2d ed. 1989).

11. VANDERBILT, *supra* note 9 at 385–86, 422–24.

12. *Id.* at 422.

13. *Id.* at 423 ("Only a few states reported that the criticized requirement of abstracts of the record still exists: *Arkansas, Colorado, Illinois, Kansas,* and *Wyoming.*" (citations omitted)); *see also id.* at 424 (including national map).

14. *Id.* at 425.

15. *Id.*

16. Smith, *supra* note 2 at 361, n. 3 (citing Griffin v. Mo. Pac. R.R., 227 Ark. 312, 298 S.W.2d 55 (1957) ("It has been pointed out repeatedly that this court will not search the record; that it is wholly impractical for the seven members of this court to read the one record.")); *see also* Zini v. Perciful, 289 Ark. 343, 344, 711 S.W.2d 477, 478 (1986) (stating that "[i]t is impossible for us to consider the appellants' contentions, because

In 1953 the Arkansas General Assembly passed Act 555, purporting to simplify civil appeals.[17] Section 10 of the Act made provision for a party to "prepare and file . . . a condensed statement in narrative form of all or part of the testimony."[18] The section also provided that any other party to the appeal could require submission of the testimony in question-and-answer format if not satisfied with the narrative.[19] Section 12 of the Act required omission of "all matters not essential to the decision of the questions presented by the appeal"[20] and warned parties not to unnecessarily demand the question-and-answer format if the narrative summary sufficed, providing for the imposition of costs for violating this requirement.[21] Section 12 also clearly set out the rule that "[w]here the record has been abbreviated by agreement or without objection from opposing parties, no presumption shall be indulged that the findings of the

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counsel have not provided us either with an exact quotation of the instrument in question or with an abstract of it. We have no idea how it reads. We are referred by the appellants to Exhibit 2 in the transcript, but *for a hundred years we have pointed out, repeatedly, that there being only one transcript it is impractical for all members of the court to examine it, and we will not do so*." (emphasis added)); Collins v. Duncan, 257 Ark. 722, 724–25, 520 S.W.2d 192, 193–94 (1975) (indicating that court affirmed when appellants failed to abstract a liquidated-damages clause in a contract, which was the exclusive remedy upon which they relied). After noting that

> [t]he appellants cite numerous cases on contract law and pertaining to measure of damages, the intention of parties, and ambiguity in contracts, but we are unable to determine whether the decisions cited by the appellants are applicable to the contract here involved because we do not know what the contract contained without each member of this court being required to read the single record in this case.

Id. at 724, 520 S.W.2d at 193, the *Collins* court then reiterated the longstanding rationale:

> As we have so often pointed out in prior cases, one transcript of the record is filed in a case on appeal to this court and time simply does not permit each of the seven members of this court to search the single record for the pertinent provisions pertaining to points involved on appeal. In many instances the record is voluminous and to require each member of this court to ferret out from a single record the matter necessary for a clear understanding of the question in controversy, would create an impossible situation.

Id. at 725, 520 S.W.2d at 193–94.

17. 1953 ARK. ACTS 1449 ("An Act to Simplify the Procedure of Appeals from the Circuit, Chancery and Probate Courts to the Supreme Court of Arkansas in Civil Cases; and for Other Purposes").

18. 1953 ARK. ACTS at 1453.

19. *Id.*

20. 1953 ARK. ACTS at 1454.

21. *Id.*

trial court are supported by any matter omitted from the record."[22]

The Arkansas Supreme Court, perhaps in response to Act 555,[23] revised Rule 9 in 1954, adding a requirement that a preliminary statement of the case and a list of the points on appeal precede the appellant's abstract and brief.[24] Rule 9 became Rule 4.2 when the rules of the Arkansas Supreme Court and the Arkansas Court of Appeals were revised and renumbered effective May 1, 1993.[25]

By the year 2000, only Arkansas, Oklahoma, and Oregon still required a narrative abstract.[26] Illinois rules permitted an appellate court to require an abstract, but in practice the court "never call[ed] for an abstract."[27] Oklahoma is the only other state that still requires a narrative summary of the record.[28] The Oregon rule now requires only an excerpt of the record, stating "[a]ll documents or parts of documents must be copies of documents included in the record, rather than summarized or paraphrased."[29] The Illinois rule was amended in 2017 to remove all references to an abstract.[30]

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22. *Id.*; *see* Beevers v. Miller, 242 Ark. 541, 543–44, 414 S.W.2d 603 (1967) (citing cases).

23. David Newbern, *Truth in the Abstract, Trouble in the Telling*, 51 ARK. L. REV. 679, 682–83 (1998).

24. George Rose Smith, *The Introductory Portion of the Appellant's Brief*, 15 Ark. L. Rev. 357 (1961).

25. 311 Ark. 672, 673 (1993). The abstracting requirement was not substantively changed in this revision. *Id.*

26. John J. Watkins & Price Marshall, *A Modest Proposal: Simplify Arkansas Appellate Practice by Abolishing the Abstracting Requirement*, 53 Ark. L. Rev. 38, 48–49 (2000).

27. *Id.* at 49 n.68.

28. OKLA. S. CT. R. 1.11(e) (providing that "[t]he brief of the moving party shall contain a Summary of the Record, setting forth the material parts of the pleadings, proceedings, facts and documents upon which the party relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this Court for decision"). A recent article in the *Oklahoma Bar Journal* includes advice on writing the summary of the record. Susan Beaty & Kellie Laughlin, *Practical Tips for Civil Appellate Brief Writing in Oklahoma State Court*, OKLA. BAR J. (Oct. 2019), *available at* https://www.okbar.org/barjournal/oct2019/obj9008beatylaughlin/.

29. The relevant Oregon rule provides that

> The excerpt of record and any supplemental excerpt of record must be in the following form:
>
> > (a) All documents or parts of documents must be copies of documents included in the record, rather than summarized or paraphrased. Omissions,

III. JUSTIFICATION OF THE ABSTRACTING RULE

An important justification for Arkansas's abstracting requirement has been the need for the reviewing court to have access to the relevant facts impacting the issues on appeal. As famed legal scholar Karl Llewellyn wrote about appellate advocacy, "[t]he court is interested not in listening to a lawyer rant, but in seeing, or discovering, from and in the facts, where sense and justice lie," emphasizing that "[t]he court does not know the facts, and it wants to."[31] Arkansas Supreme Court Associate Justice David Newbern similarly observed that "[n]othing is more important in the process of deciding an appeal than the procedural and adjudicative facts of the case."[32]

In a 1905 opinion, the Arkansas Supreme Court reasoned that the abstracting requirement saved the litigant money by not requiring the entire record to be reproduced, but instead requiring that it be fully abstracted "so that each judge of the court may have the case in a condensed form" leaving out "extraneous matters and abandoned questions" and presenting only the "real questions."[33] The judges believed that by complying with the rule, attorneys could present their appeals "concisely and strongly" and also aid the court.[34]

Arkansas Supreme Court Justice George Rose Smith asserted that the abstracting requirement was "purely practical," pointing out that the record as a whole contains "captions and signatures to pleadings, their verification, irrelevant testimony, interlocutory orders, and so forth" that are unnecessary for understanding the issues on appeal and that "some condensation of the record is absolutely essential."[35] In a 1978 case, the court advised, "If the lawyer in preparing the abstract will remember

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if not apparent, must be noted. No matter may be omitted if to do so would change the meaning of the matter included."

OR. R. APP. P. 5.50(5)(a).

30. ILL. S. CT. R. 342, *available at* http://www.illinoiscourts.gov/supremecourt/rules/Art_III/ArtIII.htm#342 (showing that reference to "abstract" has been removed).

31. Karl N. Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COLUM L. REV. 167, 183 (1946).

32. Newbern, *supra* note 23, at 679.

33. Neal v. Brandon & Baugh, 74 Ark. 320, 323–24, 85 S.W. 776, 777 (1905).

34. *Id.*

35. Smith, *supra* note 2, at 361.

that the Supreme Court Justices have never heard of his case until they pick up the brief to read it, the lawyer will have a better comprehension of what is required in abstracting."[36] Two decades later, Justice Newbern agreed that the record must be presented to the appellate court in a "condensed document that objectively depicts what happened to cause the appellant to allege that reversible error occurred in the trial court."[37]

IV. PROBLEMS WITH THE ABSTRACTING RULE

Many attorneys and judges would agree with Justice Smith's assertion that the abstracting requirement "creates more problems for the court and for the appellate bar than all the court's other rules put together."[38] Twenty years ago, two members of the Arkansas Supreme Court Committee on Civil Practice enumerated several problems with the Arkansas abstracting requirement:

- expense to litigants;[39]
- difficulty for attorneys;[40]
- appellate decisions not based on the merits of the cases;[41]
- a "Catch-22" between under- and over-inclusiveness in abstracts;[42]
- inconvenience for appellate judges and their law clerks;[43]

36. *Bank of Ozark v. Isaacs*, 263 Ark. 113, 114, 563 S.W.2d 707, 708 (1978).

37. Newbern, *supra* note 23, at 682.

38. Smith, *supra* note 2, at 359–60.

39. Watkins & Marshall, *supra* note 26, at 42–43 (quoting Newbern, *supra* note 18, at 683 (explaining that the appellant's attorney "must engage in hard and tedious work" that "translates into expense for any appellant, and potentially any appellee, who is represented by counsel")).

40. *Id.* at 43 (discussing the complexity and counterintuitive nature of the abstracting rules).

41. *Id.* at 43–44, nn. 44 & 45 (citing twenty-two cases in calendar year 1999 in which the Arkansas Supreme Court and the Arkansas Court of Appeals did not reach the merits due to finding the abstracts flagrantly deficient and another nineteen in which at least one issue on appeal was not addressed due to an insufficient abstract (citations omitted)).

42. *Id.* at 45–46 (citing Gerry Schultze, *What's Wrong with Appellate Law in Arkansas?* 31 ARK. LAW. 10, 12 (1996)).

- availability of the record;[44] and
- potential for the introduction of inaccuracies or distortions of the record.[45]

Matters not properly abstracted would not be considered. As the court declared in an 1892 case,

> [t]he appellant argues that the court erred . . . but his exception on that score has not impressed him as being serious enough to require him to point out the error by setting out the prayers in his abstract in accordance with the rules. We therefore take it as a waiver of the objection."[46]

In an 1893 case, referencing evidence alluded to in the appellant's brief as insufficient but not abstracted, the court stated that "[t]he rules of practice do not make it our duty to explore the transcript for . . . evidence . . . omitted; and, as it is not before us, we presume, in favor of the decrees, that the court's second, third, and fourth findings are correct."[47] In a 1948 case, the court defended the rule and reiterated that "reasonable enforcement of this rule of procedure is absolutely necessary to the orderly and efficient dispatch of the business of the court."[48] This "reasonable enforcement" has continued through the decades.[49] Because courts refuse to consider an

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43. *Id.* at 46–47 (pointing out that abstracts "regularly contain hundreds of pages" and "[w]ith no detailed statement of facts in the briefs to guide them, appellate judges and their law clerks must ferret out the essential facts themselves." The authors give an example of a case with one issue in which the appellant's brief had a twenty-five page argument section (the maximum allowed without a grant of permission to enlarge), but the opening brief and abstract contained 400 pages bound in two volumes. *Id.* at 47 (citing SEECO, Inc. v. Hales, 330 Ark. 402, 954 S.W.2d 234 (1997)).

44. *Id.* at 47 (questioning the validity of the oft-made claim that seven justices could not possibly share a single record).

45. *Id.* at 47–48. The authors give an example of an abstract that combined testimony from the top of one page of the transcript with testimony from the bottom of the following page, inaccurately representing the witness's testimony. *Id.* at 48.

46. Koch v. Kimberling, 55 Ark. 547, 548, 18 S.W. 1040, 1040 (1892).

47. Ruble v. Helm, 57 Ark. 304, 21 S.W. 470, 471 (1893) (citing Massey v. Gardenhire, 12 Ark. 639 (1852)).

48. Golden v. Wallace, 212 Ark. 732, 733, 207 S.W.2d 605, 605 (1948) (citations omitted).

49. The court consistently reiterated this standard through the beginning of the twenty-first century. *See, e.g.*, Baptist Health v. Murphy, 365 Ark. 115, 123, 226 S.W.3d 800, 807 (2006) ("Baptist claims that it raised the argument at the February 26, 2004, hearing before the circuit court; however, as previously noted, although directed to do so by this court, Baptist failed to abstract the legal arguments presented at the hearing. We have been

issue that isn't properly abstracted, attorneys feel forced to abstract even marginally relevant materials just in case, making abstracts "too damn long,"[50] which defeats the goal of condensing the record.[51]

Historically, one of the most serious problems with the abstracting rule was the harsh outcome for appellants if an abstract was found flagrantly deficient. Prior to 2001, a flagrantly deficient abstract would lead to an automatic affirmance of the result below.[52] This rule was enforced rigorously[53] and was decried by the appellate bar as one of the

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resolute and consistent in holding that all material information must be included in the abstract and that we will not be placed in the position of having seven justices scour the one record for absent information."); Cosgrove v. City of West Memphis, 327 Ark. 324, 328, 938 S.W.2d 827, 830 (1997) ("When we are unable to determine from the abstract what arguments were made to the trial court and the rulings of that court, we will not entertain those arguments on appeal."); Ark. Dep't of Human Servs. v. Harris, 322 Ark. 465, 466, 910 S.W.2d 221, 222 (1995) ("We will not reach an issue where the abstract does not show that it was raised in the trial court." (citing Johnson v. Lilly, 308 Ark. 201, 823 S.W.2d 883 (1992)); Dustin Grain Co. v. Gravette, 148 Ark. 655, 229 S.W. 717, 718 (1921) ("Of the two instructions now complained of, which the court did not give, it is sufficient to say that one of them is not abstracted and therefore cannot be considered.").

50. Gerry Schultze, *What's Wrong with Appellate Law in Arkansas?* 31 ARK. LAW. 10, 12 (1996).

51. An abstract can also be found flagrantly deficient for over-inclusiveness of non-essential material because "[e]xcessive abstracting is as violative of the rules as omissions of material pleadings, exhibits, and testimony." Forrest Const., Inc. v. Milam, 70 Ark. App. 466, 476, 20 SW3d 440, 446 (2000) (citing Schwarz v. Moody, 55 Ark. App. 6, 928 S.W.2d 800 (1996)).

52. Robert L. Brown, *The Arkansas Supreme Court: The Job and How It Has Changed*, ARK. LAW. 9, 11 (Winter 2005) (characterizing automatic affirmance as "draconian"); *see also Ruble*, 57 Ark. 304, 21 S.W. 470.

53. Moncrief v. State, 325 Ark. 173, 174, 925 S.W.2d 776, 777 (1996) ("We do not address the merits of the appeal because we find the appellant's abstract of the record to be flagrantly deficient under Ark. Sup. Ct. R. 4–2(b). For that reason, we affirm."); Bridger v. Mooney, 278 Ark. 225, 225, 644 S.W.2d 929, 929 (1983) (explaining, in a pro se case, that "[t]he appellant has failed to comply with Rule 9(d) of the Rules of the Supreme Court, so we affirm the trial court"); Ki v. Hartje, 294 Ark. 16, 18, 740 S.W.2d 143, 144 (1987) ("We cannot decide the points argued for the want of an abstract and, accordingly, we must affirm under Rule 9(d)."); Goodson v. Smith, 263 Ark. N-82, n–82 (1978) ("This appeal is affirmed because we find the abstract of the record to be flagrantly in violation of Rule 9(e)(2)."); Dyke Indus., Inc. v. E. W. Johnson Const. Co., 261 Ark. 790, 791, 551 S.W.2d 217, 218 (1977) ("We must affirm the trial court . . . because appellant's abstract of the record is in noncompliance with Supreme Court Rule 9(d)."); Fin. Sec. Life Assur. Co. v. Powell, 247 Ark. 609, 609, 447 S.W.2d 64, 64 (1969) ("The . . . appeal is affirmed for noncompliance with Supreme Court Rule 9(d), appellant having failed to abstract the complaint, answer, decree and doctor's report upon which it relies.").

three biggest problems in Arkansas appellate procedure.[54] A leading practitioner bemoaned the fact that "[i]nsufficient abstracting . . . will doom an appeal,"[55] and called on the court to "humanize" the rules so that more appellate cases could be decided on the merits rather than being summarily affirmed.[56] However, a judge of the Arkansas Court of Appeals noted in 1998 that the appellate courts continued to summarily affirm appeals if the abstract was flagrantly deficient, and that there had been ninety-four reported cases involving a flagrantly deficient abstract between 1970 and 1998.[57]

V. PRIOR REFORM EFFORTS

A. The Appendix Experiment

In 1988, the justices of the Arkansas Supreme Court proposed a revision to the rules because "[f]or some time [we] have been concerned about whether our system requiring abstracting of the record is worth the effort lawyers must devote to it, and thus the money litigants must invest in it, in each case."[58] The court proposed moving to an appendix system like

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However, the court did make some exceptions where an affirmance would have been unduly harsh, noting in one case that although the abstract was "flagrantly deficient" in failing to "contain an impartial condensation of material parts of the record necessary to an understanding of all questions presented to the court for decision," it would not dismiss. Instead, the court found that "*affirmance based upon a flagrantly deficient abstract would be unduly harsh in this case*," and permitted "appellant's attorney to revise and provide a brief in compliance with Ark. Sup.Ct. R. 4–2(a)(6)." McGehee v. State, 344 Ark. 602, 604, 43 S.W.3d 125, 127 (2001) (emphasis added). The court also ordered the appellant's attorney to bear the associated expense. *Id.*

54. Schultze, *supra* note 50, at 10. The other two problems he identified were the timing of filing the notice of appeal and the timing of filing the record. *Id.*

55. *Id.* at 12.

56. *Id.* at 13.

57. Terry Crabtree, *Abstracting the Record*, 21 U. ARK. LITTLE ROCK L. REV. 1 (1998). Judge Crabtree pointed out that cases affirmed due to a flagrantly deficient abstract would typically not be published, so the number of affirmances for this rule violation would be much higher than those ninety-four reported cases. *Id.* at 1 n.5.

58. *In the Matter of the Revision of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas*, 296 Ark. Appx. 581 (1988) [hereinafter *1988 Rules Proposal*]. Justice Hickman dissented, asserting that "[w]e have the best appellate procedure in America." *Id.* at 587.

those in the federal appellate courts and most other state appellate courts.[59]

Under the Federal Rules of Appellate Procedure, the appellant is responsible for preparing and submitting with the opening brief a single appendix containing

- relevant docket entries;
- relevant portions of the pleadings, charge, findings, or opinion;
- the judgment, order, or decision appealed from; and
- all portions of the record designated by either the appellant or appellee.[60]

What goes into the appendix and how it is prepared largely determines the cost of appellate review in any given case.[61] The appendix is "an addendum to the briefs for the convenience of the judges."[62] To keep the appendix from being over-inclusive, the rule allows both parties and the court to rely on parts of the record even if they are not included in the appendix.[63]

Under the proposed 1988 revision of the Arkansas rules, rather than requiring an abstract, the court would instead require submission of copies of those pages of the record "crucial to the decision of the case," in an appendix, with any necessary factual background included in the statement of the case.[64] The rules implementing the appendix system experiment became effective May 15, 1989, though appellants could still opt to use the abstract method through December 31, 1989.[65] The justices

59. *Id.* at 581.

60. FED. R. APP. P. 30 (a)(1).

61. CHARLES ALAN WRIGHT & MARY KAY KANE, 20 FEDERAL PRACTICE & PROCEDURE DESKBOOK § 111 (2d ed. 2019). Wright and Kane note that "[t]he question of the contents and preparation of the appendix was more controversial than any other question in the preparation of the Appellate Rules" *Id.* (footnote omitted).

62. *Id.* (citing Bernard J. Ward, *The Federal Rules of Appellate Procedure*, 28 FED. B.J. 100, 108 (1968)).

63. FED. R. APP. P. 30(a)(2).

64. *1988 Rules Proposal*, *supra* note 58, at 581.

65. *In Re: Amendments to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, the Arkansas Supreme Court Administrative Orders, the Rules of the Arkansas Supreme Court and Court of Appeals, and the Inferior Court Rules*, 298 Ark. Appx. 666, 667 (1989).

announced their hope that the rule changes would decrease the expense of appellate litigation while increasing the ease and accuracy of evaluating appeals.[66]

Most appellant counsel continued under the old rules, not giving the court enough experience with the appendix system to compare the merits of the two systems, so the court extended the trial period until July 15, 1990.[67] In June 1990, the court announced another extension of the trial period, until March 1, 1991.[68] In the June 1990 per curiam order, the court noted that while appellate litigation costs might have decreased in appeals using the appendix method, the ease and accuracy of evaluating appeals had not increased as the justices had hoped.[69] In fact, they declared that the cases submitted with appendices had been "generally more difficult and time consuming" than the cases submitted under the old system.[70] The justices identified three problems with the appendix system:

- Many counsel failed to provide the required appendix table of contents;
- Counsel did not seem to understand the heightened importance of the statement of facts; and
- Counsel were including too much of the record in the appendix.[71]

The justices acknowledged that some of the problems were likely inevitable during the transition and expressed their hope that addressing the problems and extending the trial period would lead to the appendix method proving successful at easing the appellate review process.[72] Unfortunately, the court ultimately decided that the appendix system took longer and

66. *Id.*

67. *In Re: Amendments to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, the Arkansas Supreme Court Administrative Orders, the Rules of the Arkansas Supreme Court and Court of Appeals, and the Inferior Court Rules*, 300 Ark. Appx. 633 (1989).

68. *In Re: Amendments to the Rules of the Arkansas Supreme Court and Court of Appeal*s, 302 Ark. Appx. 639, 640 (1990).

69. *Id.*

70. *Id.*

71. *Id.* at 641.

72. *Id.*

made the review process more difficult.[73] Effective August 1, 1991, the court once again required all briefs submitted in appeals to contain abstracts.[74]

The main problem the justices identified with the appendix method was attorneys' inability to adapt to the "expansion of the statement of the case, with appropriate appendix references, to an extent which would save members of the Court from having to scour the appendix for factual details."[75] They reiterated their desire for the appellate review system to be "as inexpensive and simple as possible" and indicated a possible future return to an appendix-type system with revisions.[76]

B. The Addition of an Addendum Requirement

In response to continuing problems with deficient abstracts leading to summary affirmances and thus preventing numerous appeals from being decided on the merits, the Arkansas Supreme Court proposed two rule changes in late 1997, adding an addendum requirement and formalizing the rules regarding the practice of allowing motions to supplement abstracts before cases are submitted for decision.[77] The changes were adopted in January 1998, to be effective for briefs filed after July 1, 1998.[78] The final rule added new subsection (a)(8) to Rule 4-2:

> ADDENDUM. Following the Argument (and after the signature and certificate of service if they are contained in the brief), the brief shall contain an Addendum which shall include photocopies of the order, judgment, decree, ruling, letter opinion, or administrative law judge's opinion, from which the appeal is taken. It should be clear where any item appearing in the Addendum can be found in the record. An item appearing in the Addendum should not be abstracted. Pursuant to subsection (c) below, the Clerk will refuse to accept an appellant's brief if it does not contain the required Addendum. The appellee's brief shall only contain

73. *In the Matter of Revision of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas*, 306 Ark. Appx. 655, 655 (1991).

74. *Id.*

75. *Id.* at 655–56.

76. *Id.* at 656.

77. *In Re Supreme Court Rule 4-2,* 330 Ark. 878 (1997) (setting out proposed changes).

78. *In Re Supreme Court Rule 4-2*, 331 Ark. 611 (1998).

> an Addendum to include an item which the appellant's Addendum fails to include.[79]

The final rule also emphasized that "[a] document included in the Addendum pursuant to Rule 4-2(a)(8) should not be abstracted."[80]

C. The 2000 Proposal for a Return to the Appendix System

In 2000, the Committee on Civil Practice submitted proposed rules that would have replaced the abstract with "a detailed statement of facts and a separately bound appendix."[81] In crafting the proposal, the committee considered the previous appendix experiment, relevant scholarship on appellate procedure, current appellate rules in other states, their own experience as appellate practitioners, and comments from other experienced appellate lawyers, including the appellate practice committee of the Arkansas Bar Association and appellate attorneys in the Arkansas Attorney General's Office.[82] The committee had two ideals in mind: every appellate case should be decided on the merits, and each case should be decided as efficiently as possible for all involved.[83] Its members believed that requiring a statement of facts and an appendix rather than an abstract would help attorneys "distill the essentials" of their cases, assisting the court in more efficient dispositions.[84]

Unfortunately, despite nearly unanimous support from the Arkansas bar,[85] the court rejected the committee's proposal, instead adopting an alternative proposal crafted by appellate

79. *Id.* at 613.

80. *Id.* at 612 (referring to subsection (a)(6)).

81. Watkins & Marshall, *supra* note 26, at 51. The statement of facts would also have replaced and expanded the required statement of the case. *Id.*

82. *Id.*

83. *Id.* at 51–52.

84. *Id.* at 52.

85. John J. Watkins, *Abstracting the Record on Appeal: The Dragon Lives*, 2001 ARK. L. NOTES 85, 85 (reporting that "the audience erupted into spontaneous applause" when a speaker at the 2000 Annual Meeting of the Arkansas Bar Association described the Committee's proposal to eliminate abstracting, and also noting that a survey taken there revealed that 94.3 percent of attorneys attending were in favor of the proposal). Eighty-seven percent of the attorneys who later submitted comments to the Arkansas Supreme Court during the comment period for the Committee's proposal were in favor of it. *Id.* at 85–86.

justices.[86] The court acknowledged when announcing the decision that it had received many comments with the recurring theme that appeals should not be summarily affirmed due to deficiencies in the abstract but should be decided on the merits.[87] Another theme in the comments was that the abstracting practice was "behind the times," and "wasteful of attorney's time and client's money."[88] The court embraced the first contention, but rejected the second, declaring abstracting as still beneficial to the judges and attorneys: "In our view, the abstracting of testimony serves the court well and is not an antiquated process. We know the judges benefit from it, and we believe that the time expended by attorneys is rewarded when writing the argument portion of the brief."[89]

Though the justices were unwilling to entirely do away with the abstracting requirement, they did attempt to reform the process. To ensure that appeals would be decided on the merits, the rule was modified to give appellants who file a deficient abstract the opportunity to cure the defects.[90] The court also acknowledged that "abstracting of pleadings, exhibits, and other written documents is not the best means to understand such materials"[91] and that it would be more useful to examine the pertinent documents.[92] Thus, the court revised the rule regarding the addendum to expand it,[93] allowing inclusion of relevant pleadings and other written documents that previously had to be abstracted.[94] The revised rule for the addendum is set out in full below, with the relevant additions underlined:

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86. *In Re: Modification of the Abstracting System—Amendments to Supreme Court Rules 2-3, 4-2, 4-3, and 4-4*, 345 Ark. 626 (2001) [hereinafter *2001 Modification*].

87. *Id.* at 627.

88. *Id.*

89. *Id.*

90. ARK. SUP. CT. R. 4-2(b)(3) (providing that "[w]hether or not the appellee has called attention to deficiencies in the appellant's abstract . . ., [i]f the court finds the abstract or addendum to be deficient . . . the court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, addendum, and brief."); *see also 2001 Modification*, *supra* note 86, at 632.

91. *2001 Modification*, *supra* note 86, at 627.

92. *Id.*

93. That rule had been added in 1998, *see supra* section V(B).

94. ARK. SUP. CT. R. 4-2(a)(8).

> *Addendum.* Following the signature and certificate of service, the appellant's brief shall contain an Addendum which shall include true and legible photocopies of the order, judgment, decree, ruling, letter opinion, or Workers' Compensation Commission opinion from which the appeal is taken, along with any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the Court's jurisdiction on appeal. In the case of lengthy pleadings or documents, only relevant excerpts in context need to be included in the Addendum. Depending upon the issues on appeal, the Addendum may include such materials as the following: a contract, will, lease, or any other document; proffers of evidence; jury instructions or proffered jury instructions; the court's findings and conclusions of law; orders; administrative law judge's opinion; discovery documents; requests for admissions; and relevant pleadings or documents essential to an understanding of the Court's jurisdiction on appeal such as the notice of appeal. The Addendum shall include an index of its contents and shall also be clear where any items appearing in the Addendum can be found in the record. The appellee may prepare a supplemental Addendum if material on which the appellee relies is not in the appellant's Addendum. Pursuant to subsection (c) below, the Clerk will refuse to accept an appellant's brief if its Addendum does not contain the required order, judgment, decree, ruling, letter opinion, or administrative law judge's opinion. The appellee's brief shall only contain an Addendum to include an item which the appellant's Addendum fails to include.[95]

One member of the committee that had proposed the new appendix rule sharply criticized the court's decision to retain the abstracting requirement for testimony.[96] He observed that the new system might actually be worse than the prior system because of the way the required contents were ordered, which he characterized as "disjointed," potentially making it harder for

95. ARK. SUP. CT. R. 4-2(a)(7) as set out in *2001 Modification*, *supra* note 86, at 630–31. Though the court retained the abstracting requirement, allowing more materials to be placed in the addendum was "a movement away from abstracting." Josephine Linker Hart & Guilford M. Dudley, *Briefing in an Electronic Age*, 46 ARK. LAW. 18, 19 (Summer 2011).

96. Watkins, *supra* note 85, at 91–94.

judges and their clerks to quickly ascertain the key facts.[97] He also noted that though the court had essentially eliminated the "affirmance rule," it left standing the related doctrine treating the abstract and addendum as the record for purposes of appellate review.[98]

In March 2007, the court issued a per curiam order regarding "the diminishing quality of appellate briefs."[99] The court expressed concern about the number of cases in which re-briefing had to be ordered, delaying justice for the parties and making more work for the court.[100] The justices identified omissions in the abstract and addendum as a recurring deficiency second only to practitioners lodging unripe appeals and threatened a return to the affirmance rule.[101] In 2011 a commentator noted continuing problems in this area, with re-briefing ordered in nine cases in the 2007–2008 term; nineteen cases in the 2008–2009 term; and seven cases in the 2009–2010 term.[102] A study of Arkansas Supreme Court cases from 2006 to 2010 found that most re-briefing orders were the result of "deficiencies in the abstract and addendum."[103]

Meanwhile, the court published proposed rule changes in June 2009, including a change that would require referral to the Office of Professional Conduct in certain instances of uncured

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97. *Id.* at 91 (pointing out that "[u]nder prior practice, the statement of the case preceded the abstract, which included a summary of the pleadings and other documents as well as testimony," but that under the new rule, "the statement of the case comes after the abstract, which contains only the abridged testimony, while documents appear in the addendum following the argument").

98. *Id.* at 93. Watkins referenced nineteen cases from calendar year 1999 in which the Supreme Court and Court of Appeals refused to reach particular issues not properly abstracted. He noted that although judges defend the rule by asserting that going to the record would slow decisionmaking, the result is that lawyers tend to include almost everything in the abstract and addendum, which surely must slow things down. *Id.* at 93–94; *see also* Schultze, *supra* note 50. For cases illustrative of the rule limiting the record on appeal to matters in the abstract, s*ee Wells v. State*, 2012 Ark. App. 151, 153 (2012) (noting that "[i]t is well-settled law that the record on appeal is confined to that which is abstracted, and failure to abstract a critical matter precludes this court from considering the issue on appeal" and collecting cases).

99. *In Re: Appellate Practice Concerning Defective Briefs*, 369 ARK 553 (2007).

100. *Id.*

101. *Id.* at 554.

102. Megan Hargraves, *Common Procedural and Jurisdictional Pitfalls to Avoid in Practicing Before the Arkansas Supreme Court*, 33 U. ARK. LITTLE ROCK L. REV. 119, 128 (2011).

103. *Id.*

non-compliance, and allowed the possibility of contempt, suspension of the privilege to practice in Arkansas appellate courts, or imposition of sanctions under Rule 11(c) of the Rules of Appellate Procedure—Civil.[104] In the final version of the amendments, which took effect January 1, 2010, the court declined to require referral to the Office of Professional Conduct, changing "shall be referred" in the proposed amendments[105] to "may be referred," but left open the possibility of the other sanctions for uncured non-compliance with the rules.[106]

In the January 1, 2010 amendments, the court sought to address some of the problems with the abstract and addendum requirements, and to clarify what should be abstracted.[107] The contents portion of the completely rewritten[108] abstract rule is set out below:

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104. *In Re: Arkansas Supreme Court and Court of Appeals Rules 4-1 and 4-2*, 2009 Ark. 350 (2009) at 14 [hereinafter *2009 Proposed Amendments*].

105. *Id.*

106. *In Re: Arkansas Supreme Court and Court of Appeals Rules 4-1, 4-2, 4-3, 4-4, 4-7 and 6-9*, 2009 Ark 534 [hereinafter *2009 Adoption*]. For an example of a case in which the court referred an attorney to the Office of Professional Conduct for repeatedly failing to comply with the abstracting rules, see *Deere v. State*, *59* Ark. App. 174, 954 S.W.2d 943 (1997), in which the Court of Appeals did not mince words:

> We note at the outset that the abstract prepared by appellant's counsel is flagrantly deficient with respect to most of the points raised on appeal. Neither the search warrant nor affidavit exhibits were abstracted, even though the arguments under the first four points of appeal challenge the validity of the February 17 search and the evidence that was procured pursuant to it. Moreover, appellant's counsel did not abstract the original plea statement, conditions of suspension, petition for revocation, judgment and commitment order, and conditions of suspension related thereto. . . . Appellant's counsel has previously been notified about abstracting deficiencies. *See Allen v. Routon,* 57 Ark. App. 137, 943 S.W.2d 605 (1997). We direct the clerk to forward a copy of this opinion to the Supreme Court Committee on Professional Conduct.

Id. at 174, 954 S.W.2d at 944. Judge Griffen wrote a concurring opinion in *Deere* "to elaborate on the harm posed by appellant's counsel . . . in her persistent refusal to comply with the abstracting rule." *Id.* at 174 (Griffen, J., concurring). He too did not mince words, asserting that "[a] lawyer who knowingly violates court rules so as to expose her clients to summary adverse consequences does a dis-service to her clients and is harmful to the administration of justice." *Id.*

107. Brian Brooks, Rebecca Kane & Dee Studebaker, *Significant Decisions*, ATLA DOCKET 4, 4 (Winter 2010). The authors note that the rules changes stemmed from the court's frustration with deficient briefing as well as attorneys' frustration with a lack of clarity in the rules. They assessed the changes positively, but cautioned attorneys to read the new rules carefully. *Id.*

108. *See 2009 Proposed Amendments*, *supra* note 104, at 5–7.

> (5) *Abstract.* The appellant shall create an abstract of the material parts of all the transcripts (stenographically reported material) in the record. **Information in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal.**
>
> > (A) *Contents.* All material information recorded in a transcript (stenographically reported material) must be abstracted. **Depending on the issues on appeal, material information may be found in, for example, counsel's statements and arguments, voir dire, testimony, objections, admissions of evidence, proffers, colloquies between the court and counsel, jury instructions (if transcribed), and rulings. All material parts of all hearing transcripts, trial transcripts, and deposition transcripts must be abstracted, even if they are an exhibit to a motion or other paper.** Exhibits (other than transcripts) shall not be abstracted. Instead, material exhibits shall be copied and placed in the addendum. **If an exhibit referred to in the abstract is in the addendum, then the abstract shall include a reference to the addendum page where the exhibit appears.**[109]

The rule regarding the addendum was also rewritten to lay out specific examples of the types of documents that should be in the addendum.[110] The contents portion is set out below:

> (8) *Addendum.* The appellant's brief shall contain an addendum after the signature and certificate of service. The addendum shall contain true and legible copies of the non-transcript documents in the record on appeal that are essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. The addendum shall not merely reproduce the entire record of trial court filings, nor shall it contain any document or material that is not in the record.
>
> > (A) Contents.
> >
> > > (i) The addendum must include the following documents:

109. *2009 Adoption*, *supra* note 106, 4–6. (emphasis added).

110. *See 2009 Proposed Amendments*, *supra* note 104, at 8–11.

• the pleadings (as defined by Rule of Civil Procedure 7(a)) on which the circuit court decided each issue: complaint, answer, counterclaim, reply to counterclaim, cross-claim, answer to cross-claim, third-party complaint, and answer to third-party complaint. If any pleading was amended, the final version and any earlier version incorporated therein shall be included;

• all motions (including posttrial and postjudgment motions), responses, replies, exhibits, and related briefs, concerning the order, judgment, or ruling challenged on appeal. But if a transcript (stenographically reported material) of a hearing, deposition, or testimony is an exhibit to a motion or related paper, then the material parts of the transcript shall be abstracted, not included in the addendum. The addendum shall also contain a reference to the abstract pages where the transcript exhibit appears as abstracted;

• any document essential to an understanding of the case and the issues on appeal, such as a will, contract, lease, note, insurance policy, trust, or other writing;

• in a case where there was a jury trial, the jury's verdict forms;

• defendant's written waiver of right to trial by a jury;

• in a case where there was a bench trial, the court's findings of fact and conclusions of law, if any;

• the order, judgment, decree, ruling, letter opinion, or administrative agency decision from which the appeal is taken. In workers' compensation appeals, the administrative law judge's opinion shall be included when it is adopted in the order of the full commission. If the order (however named) incorporates a bench ruling, then that ruling must be abstracted and the addendum must contain a reference to the abstract pages where the information appears as abstracted. The transcript (stenographically

> reported material) containing the ruling may also be copied in the addendum or omitted, at the appellant's choice;
>
> • all versions of the order (however named) being challenged on appeal if the court amended the order;
>
> • any order adjudicating any claim against any party with or without prejudice;
>
> • any Rule of Civil Procedure 54(b) certificate making an otherwise interlocutory order a final judgment;
>
> • all notices of appeal;
>
> • any postjudgment motion that may have tolled the time for appeal, and is therefore necessary to decide whether a notice of appeal was timely filed;
>
> • any motion to extend the time to file the record on appeal, and any related response, reply, or exhibit;
>
> • any order extending the time to file the record on appeal; and
>
> • any other pleading or document in the record that is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. For example, docket sheets, superseded pleadings, discovery related documents, proffers of documentary evidence, jury instructions given or proffered, and exhibits (such as maps, plats, photographs, computer disks, CDs, DVDs).
>
> (ii) *Waiver of addendum obligation*. If an exhibit or other item in the record cannot be reproduced in the addendum, then the party making the addendum must file a motion seeking a waiver of the addendum obligation.[111]

The general rule for deciding whether an exhibit should be in the abstract or in the addendum is "if the court reporter takes it down and it's material, it gets abstracted. Otherwise it goes in

111. *2009 Adoption*, *supra* note 106, at 7–9.

the addendum."[112] For other documents, from a practitioner point of view, "if a pleading or document has anything at all to do with preservation of an issue for appeal, jurisdiction on appeal including the timeliness of filing the appeal or the record, or the issues discussed on appeal, it needs to be included in the addendum or abstracted.[113]

Prior to 2011, deficiencies in the abstract or addendum could be addressed in one of three ways under Rule 4-2 (b):

- The appellee could call attention to the deficiency and had the option to submit a supplemental abstract or addendum and submit a motion requesting costs.[114]
- If the case had not yet been submitted to the court, the appellant could file a motion to supplement the abstract or addendum and file a substituted brief.[115]
- The court could address the question of deficiencies at any time. If deficiencies would keep the court from reaching the merits or cause unreasonable or unjust delay, the court would give the appellant an opportunity to cure the deficiencies and file a substituted abstract, addendum, and brief at his or her own expense.[116]

In 2011, upon recommendation by the Civil Practice Committee, the court added Rule 4-2(b)(4), which provides a fourth alternative for addressing a defective abstract or addendum. Under the new provision, if deficiencies or omissions in the abstract or addendum need to be corrected, but complete re-briefing is not needed, then the court will order the appellant to file a supplemental abstract or addendum.[117]

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112. Brooks et al., *supra* note 107, at 4.

113. *Id.*

114. ARK. SUP. CT. R. 4-2 (b)(1).

115. ARK. SUP. CT. R. 4-2 (b)(2).

116. ARK. SUP. CT. R. 4-2 (b)(3). This is the 2001 amendment that essentially did away with the affirmance rule: "Appeals will no longer be affirmed because of the insufficiency of the abstract without the appellant first having any opportunity to cure the deficiencies." *2001 Modification*, *supra* note 86, at 627.

117. *In Re 4-2(b) of the Rules of the Supreme Court and Court of Appeals*, 2011 Ark. 141 (providing that supplement is to be filed within seven calendar days).

VI. THE 2019 PILOT PROJECT AND PROPOSED NEW RULES

The court's June 2019 per curiam contained four important announcements:

- Immediate authorization for electronic filing of all case-initiating documents, including appellate records, in Arkansas appellate courts;
- Proposed amendments to appellate court rules incorporating electronic filing, eliminating the abstract and addendum requirements for briefs, and updating appellate briefing rules;
- Authorization for parties in cases with electronically filed records to immediately proceed under the proposed new rules as a pilot project; and
- An exploration of automating the filing of electronic records, relieving appellants' attorneys of the burden of filing the record.[118]

The court made clear that the proposed rule changes anticipate a future system of comprehensive electronic filing.[119] In the last decade, the court has made several steps in the direction of mandatory e-filing in appeals.[120] The court authorized voluntary e-filing of "select motions, petitions, and responses thereto" in 2015.[121] Electronic filing of motions, petitions, and responses that were not case-initiating and required no fee became mandatory on September 21, 2016.[122] The court authorized acceptance of electronic briefs via the court's electronic filing system, eFlex, in 2016.[123] Electronic

118. *2019 Announcement*, *supra* note 4, at 1.

119. *Id.*

120. *Id.* at 1–2. The court embraced the concept of electronic filing as early as 2010 in its Administrative Order Number 21, encouraging courts statewide to implement e-filing systems and authorizing adoption of e-filing in the Arkansas appellate courts. *In Re Administrative Order No. 21—Electronic Filing*, 2010 Ark. 304.

121. *In Re Appellate Motion Electronic-Filing Pilot Project*, 2015 Ark. 282 ("[W]e authorize the establishment of an electronic-filing pilot project limited to select motions filed in the appellate courts to begin this summer as a first step toward mandatory electronic filing in the appellate courts.").

122. *In Re Appellate-Motion Electronic-Filing Pilot Project and Appellate-Brief Electronic-Filing Pilot Project*, 2016 Ark. 314, at 1.

123. *Id.* Parties electing to file briefs electronically were still required to file three paper copies of each brief within five calendar days of the electronic filing. *Id.* at 2.

filing became mandatory for briefs filed by represented parties on January 1, 2018.[124] Effective the same date, for represented parties, the clerk's office began serving the orders and opinions of the Arkansas appellate courts electronically via eFlex rather than mailing hard copies.[125] Most recently, the court authorized acceptance of petitions for review and petitions for rehearing via eFlex in March 2019, noting software enhancements that allowed the system to process payment of filing fees.[126] The transition period was shorter for this change, with mandatory e-filing required effective July 1, 2019.[127] The rules continue to allow conventional paper filing for pro se litigants or persons with special needs that would prevent electronic filing.[128]

Twenty-one of the state's twenty-eight circuit courts required electronic filing as this article was being prepared for publication in the spring of 2020.[129] Two additional circuits have announced that electronic filing will be mandatory by the end of 2020.[130] But even in those circuits that do not currently mandate electronic filing, circuit court staff must provide the record in electronic format upon request, subject to payment of any required fees for such preparation.[131]

The proposed rules contain an important format change, requiring separation of the circuit clerk's portion of the record from the transcript prepared by the court reporter.[132] The clerk's portion and the transcript shall be separate documents, each in a

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124. *In Re Mandatory Electronic Filing of Appellate Briefs and Electronic Service of Court Orders and Opinions*, 2017 Ark. 353, at 1.

125. *Id.* at 2.

126. *In Re Electronic Filing of Petitions for Rehearing and Petitions for Review*, 2019 Ark. 79 at 1–2.

127. *Id.* at 2.

128. *Id.* at 3 (showing elimination of special treatment for filings requiring payment of fees and retention of other provisions of Rule 2-1(a)).

129. *Electronic Filing Support and Contact Information*, ARK. JUDICIARY (n.d.), https://efile.aoc.arkansas.gov/eflexResources/footer/support.html (providing information about individual courts under *Circuit Courts* heading). E-filing is mandatory in the circuit courts of Baxter, Benton, Boone, Craighead, Crawford, Faulkner, Garland, Grant, Hot Spring, Howard, Little River, Lonoke, Marion, Miller, Newton, Pike, Pulaski, Searcy, Sevier, Van Buren, and Washington counties. *Id.*

130. *Id.* (indicating that the circuit courts of Jefferson and Lincoln counties will both begin mandatory electronic filing on December 2, 2020).

131. *2019 Announcement*, *supra* note 4, at 2.

132. *Id.*

PDF file, and each separately paginated.[133] Exhibits are to be scanned whenever possible and included in the transcript portion of the record. Documentary exhibits that cannot be scanned must be provided to the appellant or appellant's counsel for conventional filing and clearly identified as such in the electronic record.[134] To assist circuit clerks and court reporters, the Arkansas Supreme Court Clerk's Office provided model records for each on its website.[135] An appellate review attorney from the Clerk's Office has also conducted trainings at meetings of the state associations of circuit clerks and court reporters.[136]

The proposed rules for appellate briefs eliminate the abstract and addendum requirements, replacing the abstract and addendum with an updated jurisdictional statement and an enlarged statement of the case and facts section.[137] "[A]ll of the factual and procedural information needed to understand the case and decide the issues on appeal" should be included in the statement of the case and the facts.[138] For all parts of the brief, parties are instructed to cite directly to the PDF page numbers of the circuit clerk's portion or the court reporter's portion of the electronic record containing the relevant information.[139]

In the order announcing the new rules and the pilot project, the court noted that with the adoption of electronic records on appeal, the abstract and addendum sections of the brief are no longer necessary,[140] declaring that "the problems that arose when there was only one paper record of the trial court's proceedings are no more."[141] The court also referenced the prior reform efforts, noting that those efforts were made during a time when there was still only one paper appellate record and the

133. *Id.* If either portion is thirty megabytes or larger, that portion must be divided into separate consecutively paginated PDF files that are under the thirty-megabyte limit. *Id.* at 2–3.

134. *Id.* at 3.

135. Arkansas Judiciary, Clerk of the Courts, *Pilot Project for Electronic Records on Appeal*, ARCOURTS.GOV (n.d.), https://www.arcourts.gov/courts/clerk-of-the-courts/pilot.

136. E-mail from Paul Charton, App. Rev. Att'y, Office of the Clerk—Ark. S. Ct. & Ct. of App., to Author (Feb. 3, 2020, 3:01 PM CST) (copy on file with author).

137. *2019 Announcement*, *supra* note 4, at 3.

138. *Id.* at 3–4.

139. *Id.* at 4.

140. *Id.*

141. *Id.* at 5.

appellate judges firmly believed abstracting testimony was still necessary if they were to understand the record and the context of the decision below.[142]

VII. PARTICIPATION IN THE PILOT PROJECT

From July 1, 2019, through March 23, 2020, 585 appeals that required full briefing were lodged with either the Arkansas Supreme Court or the Arkansas Court of Appeals.[143] Out of those 585, a total of seventy-five records were lodged electronically.[144] This represents slightly less than thirteen percent, suggesting that the majority of appellate attorneys have thus far chosen not to take the leap. Perhaps more should have tried the pilot program, because the Arkansas Court of Appeals has ordered re-briefing or supplementation in at least seven of the traditionally filed cases due to deficiencies in either the abstract or addendum or both,[145] and the Arkansas Supreme Court has declined to reach the merits in at least one.[146]

The Court of Appeals ordered re-briefing in three cases due to a deficient abstract related to verbatim copying of the transcript.[147] In seven of the cases in which re-briefing was

142. *Id.*

143. Email from Cassandra Butler, Exec. Assistant to Clerk of Ark. S. Ct., to Author (Mar. 23, 2020, 1:23 P.M. CDT) (copy on file with author).

144. *Id.*

145. *See infra* notes 148–49.

146. Pugh v. State, 2019 Ark. 319, 1, 587 S.W.3d 198, 200 (2019) ("In his brief, Pugh refers to his claim that there was a mistake in the sentencing order, but he does not include the motion in the addendum to his brief."). Justice Hart believed that refusing to allow Pugh an opportunity to correct the deficiency violated the rules:

> Mr. Pugh's addendum is deficient in that he has failed to include his motion to correct the sentencing order in his case. That motion, styled "Motion Seeking Order for Nunc Pro Tunc," appears in the record, but not in Mr. Pugh's brief. Our rule, Supreme Court Rule 4-2, requires that we give Mr. Pugh the opportunity to cure this deficiency. It is improper to simply point out the omission and refuse to take up the issue on appeal.

Id. at 8, 587 S.W.3d at 204 (Hart, J., dissenting). It bears noting that Pugh was a pro se appellant, *see id*. at 1, 587 S.W.3d 200 (referring to appellant's pro se status), and may not have had the resources or technical proficiency to file electronically.

147. Thomas v. State, 2019 Ark. App. 479, 2 (2019) ("Thomas's abstract is a verbatim reproduction of the transcript and is submitted entirely in question-and-answer format. This is expressly forbidden by Rule 4-2(a)(5)(B)." (citations omitted)); *Roberts v. Roberts*, 2019 Ark. App. 393, 2 (2019) ("Rather than abstracting the bench trial in the first person, appellant reproduced the transcript in question-and-answer format. This is expressly

ordered, essential information or documentation was missing from the abstract or addendum.[148] The court ordered supplementation of the addendum, but not full re-briefing, in at least three other cases, two because the addendum lacked a

prohibited, as the rule clearly mandates that '[t]he question-and-answer format shall not be used.' . . . Due to appellant's failure to comply with our rules concerning abstracting, we order appellant to file a substituted abstract, addendum, and brief curing the deficient abstract." (citations omitted)); Genz v. Carter-Cooksey, 2019 Ark. App. 339, 2 (2019) (explaining that "[r]ather than condensing and abstracting the transcript in the first person," appellants created "a 475-page abstract" of which "an overwhelming portion . . . is a verbatim replication of the trial transcript" and concluding "that appellants' abstract does not comply with Arkansas Supreme Court Rule 4-2," but declining to strike the brief and ordering appellants to "file a substituted brief, curing the deficiencies in the abstract").

148. Torres v. State, 2020 Ark. App. 158, 3 (2020) (ordering remand to settle and supplement the record, giving appellant additional time after settlement to file a new abstract, and noting that the original addendum did not "contain the August 30, 2012 plea agreement that sets forth the conditions of his probation," characterizing it as "essential" to review of the case); Morgan v. Ark. Dep't of Human Servs., 2020 Ark. App. 128, 2 (2020) (remanding to settle and supplement the record and ordering re-briefing because "[i]t appears that the addendum in this case is missing the petition for emergency custody and dependency neglect; the ex parte order for emergency custody; the order on probable cause; and the June 21, 2018 permanency-planning order," recognizing that "[t]hese documents are necessary because the process leading up to a termination of parental rights consists of a series of hearings—probable cause, adjudication, review, no reunification, disposition, and termination—and all of these hearings build on one another, and the findings of previous hearings are elements of subsequent hearings"); Hurst v. Riceland Foods, Inc., 2020 Ark. App. 85, 3 (2020) (remanding for supplementation of the record and ordering re-briefing because "[t]he addendum contained in the filed brief must contain all relevant documents that are essential to an understanding of the case and this court's jurisdiction on appeal"); Bugg v. Bassett, 2020 Ark. App. 41, 4 (2020) (noting that the addendum in a pro se case was deficient and ordering re-briefing because "[i]n his current brief, Bugg has entirely failed to correct his previous deficiencies and has created others," including his condensing the fifty-two-page transcript of a hearing into four pages and thirteen pages of witness testimony into "a single sentence"); Johnson v. State, 2019 Ark. App. 548, 2 (2019) (citing problems with the addendum, ordering re-briefing, and noting that although the appellant argued that " the trial court abused its discretion in denying his motion to sever," the relevant hearing transcript was not abstracted and the court did not have "the oral arguments presented to the court or the court's oral ruling from that hearing," both of which were "clearly essential" to the court's ability to decide the case); Childers v. State, 2019 Ark. App. 461, 2 (2019) ("Here, Childers's brief is deficient because his addendum lacks relevant pleadings essential to an understanding of the case and to confirm our jurisdiction. . . . [T]he addendum fails to include the final general court-martial order and the supporting written offer to plead guilty. Therefore, we direct Childers to file a supplemental addendum including the necessary documents."); Bens v. State, 2019 Ark. App. 355, 2–3 (2019) (declaring abstract deficient both for failing to abstract essential information and for including irrelevant information; noting that "counsel failed to include a motion for extension of time for filing the record and the order granting that extension" in the addendum, although they were "essential" to confirming the court's jurisdiction; and requiring their inclusion in the substituted addendum along with guilt-phase verdict forms omitted from the original addendum).

physical copy of a DVD containing information essential to the appeal.[149]

Filing electronically under the pilot project might not have solved all of the problems in the cases where re-briefing or supplemental briefing was ordered. In two of the cases, the court required a physical copy of a DVD.[150] The appellants in each likely would still have been required to supplement the record had they initially left out the DVDs. But problems such as those created by copying transcripts verbatim into the abstract[151] would not have arisen. Electronic filing would likely not have been an option for the pro se litigants,[152] but the ability to file an electronic record and to avoid having to submit an abstract and addendum might have helped them be heard.

The limited participation in the pilot project is reminiscent of the failed appendix experiment of 1989–1991.[153] However, though the comment period ended on February 28, 2020, the pilot project allowing appeals under the proposed new rules continues, and participation will likely increase as more trial courts move to electronic filing.

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149. Watts v. State, 2020 Ark. 102, 2 ("We cannot reach the merits of Watts's appeal because he omitted the following items from the addendum: (1) a physical copy of the DVD 'confession' that was played to the jury (State's exhibit No. 49) and (2) his proposed redacted version of the transcript of the DVD (defendant's proffered exhibit No. 1). These two items are essential for us to understand and decide this appeal as it has been presented to us."); *Shoulders v. State*, 2020 Ark. App. 125, 2 (2020) ("During the suppression hearing, the State introduced a DVD containing a recording of the trooper's dashcam video of the traffic stop, during which the trooper asked for Shoulders's consent. Shoulders argues on appeal that he did not consent to the search, and the State counters that he did. The exchange between the trooper and Shoulders is thus critical to our understanding of the case. Shoulders, however, did not include a physical copy of the DVD in his addendum. Rather, the addendum contains a photocopy of a photograph of the DVD." (footnote omitted)); *Bray v. Bray*, 2019 Ark. App. 422, 2 (2019) (remanding to settle and supplement the record and ordering filing of a supplemental addendum because "[a]lthough appellant states that such an order exists, it is not in the record" and "appellant's statement of the case mentions several motions for change of custody as well as court orders addressing those motions . . . [that] are also not contained in the record").

150. *Watts*, 2020 Ark. App. 2; *Shoulders*, 2020 Ark. App. 125.

151. *See supra* note 147 (collecting cases).

152. *Pugh*, 2019 Ark. 319; *Bugg*, 2020 Ark. App. 4**;** *see also* note 146, *supra* (discussing Justice Hart's dissent in *Pugh*).

153. *See supra* notes 58–76 and accompanying text.

VIII. FORMAL COMMENTS ON THE PROPOSED RULE CHANGE

Written comments on the proposed rule change were overwhelmingly positive. A total of fourteen written comments were submitted during the comment period: eleven from appellate attorneys, two from appellate law clerks at the Arkansas Court of Appeals, and one from a circuit court reporter.[154] None of the comments suggested keeping the abstract requirement.[155] The comment from the circuit-court reporter did not address the abstract or addendum.[156] One appellate law clerk wrote to point out that the Arkansas Court of Appeals had just that week (the end of the comment period) received the first appeal filed under the pilot program and that an extension of the comment period would allow her to give relevant feedback.[157] The other appellate law clerk heralded the rule change as a "step in the right direction" and stated that "[r]emoving the abstracting requirement alone is removing a huge barrier to appellate practice in Arkansas."[158]

Four of the attorney comments were submitted the day the per curiam order was published. The first comment, submitted "on behalf of all five attorneys and the 10+ support staff" at a Little Rock criminal-defense firm, described the abstracting requirement as "vestigial" and suggested it was "lunacy" to continue with it in this "era of electronic filing."[159] Another attorney wrote to express his support for "the total elimination of

154. Copies of comments submitted to the Clerk are on file with the author.

155. *Id.*; *but see* note 158, *infra*, for comments in support of paper briefs and requiring an addendum.

156. Email from Brenda Thompson, Official Ct. Rep., Cir. Ct. Div. 1, 21st Judicial Cir., Crawford Cnty., to EROA Comments (Jan. 14, 2020, 11:55 AM CDT) (copy on file with author). Ms. Thompson's comment concerned her recommendation that an index to the transcript would be more efficient than a table of contents. *Id.*

157. Email from Lindsay Harper, L. Clerk to Mike Murphy, J., Ark. Ct. App., to EROA Comments (Feb. 27, 2020, 2:35 PM CDT) (copy on file with author).

158. Ltr. from Josie Richardson, L. Clerk to Mike Murphy, J., Ark. Ct. App., to Stacy Pectol, Clerk of Cts. (Feb. 25, 2020) (copy on file with author). Ms. Richardson noted that she was working with her first full case submitted under the pilot program. She advocated for keeping the addendum requirement and still requiring some paper copies of the brief. *Id.*

159. Email from Michael Kaiser, App. Att'y, James L. Firm, to EROA Comments (June 6, 2019, 11:56 AM CDT) (copy on file with author).

the abstracting and addendum requirement"[160] and noted his belief that this elimination "would greatly reduce the costs to litigants seeking appellate services."[161] Yet another wrote in support of elimination that "[a]bstracts serve very little purpose in the highly digitized world and whatever benefit they may offer is substantially outweighed by the hassle and effort they require."[162] The same attorney shared that the requirements to submit an abstract and addendum "have frustrated every appellate attorney I know."[163] The fourth attorney comment, received on June 6, noted that while the author would have liked to send "a more detailed and thoughtful response," he wished to show his support "immediately" for the elimination of the abstract and addendum requirements.[164] The comment concluded by noting that the elimination of these requirements "will promote access to the justice system, reduce undue stress on attorneys and litigants, and hopefully free them up to spend more time on research and advocacy."[165]

An attorney comment submitted on June 10 commended the court and all who had worked on the proposed rule changes, making the important point that these changes will help level the playing field and provide more access to justice: "[T]he elimination of the abstracting and addendum requirements will significantly reduce costs on appeal and allow parties to pursue their appellate rights who otherwise have been prevented by these unnecessary costs."[166]

The last six attorney comments were submitted in the final week of the comment period. Two of those attorneys specifically stated that they had filed appeals under the pilot program and

160. Email from William Zac White, Att'y & Counselor at L., to EROA Comments (June 6, 2019, 12:11 PM CDT) (copy on file with author).

161. *Id.*

162. Email from Tyler Ginn, Att'y at L., to EROA Comments (June 6, 2019, 12:00 PM CDT) (copy on file with author).

163. *Id.*

164. Email from Jordan Tinsley, Att'y at L., to EROA Comments (June 6, 2019, 4:51 PM CDT) (copy on file with author).

165. *Id.*

166. Email from Chad Pekron, Att'y, Quattlebaum, Grooms & Tull, to EROA Comments (June 10, 2019 11:31 PM CDT) (copy on file with author). Mr. Pekron also noted that allowing electronic submission of documents whenever possible both reduces costs and facilitates public access to those documents. *Id.*

found it "superior."[167] Three of the attorneys pointed out that the proposed changes are "understandable and workable."[168] They also noted that "[t]he time and cost savings associated with the elimination of the abstract and addendum requirements are significant."[169] A longtime appellate practitioner stated that "like every other appellate lawyer in Arkansas, despite the recommendations of George Rose Smith, I have struggled with the abstracting and addendum requirements."[170] He went on to say that these requirements "date back to the days of scriveners wearing sleeve garters and eyeshades."[171] Another practitioner shared his view that the statement of the case and the facts, citing directly to the electronic record, presents the court a far better product than under the old rule.[172] He voiced his strong support for permanent adoption of the proposed rules or a significant extension of the pilot program.[173]

In support of the contention that the proposed rules will save significant time and costs, one attorney commenter shared that her last appeal "cost thousands in copying and binding alone."[174] In sharp contrast to the former rationale that "it is wholly impractical for the [multiple] members of this court to read the one record,"[175] she called it "axiomatic in this day and age that three, six, seven, nine, or even twelve judges can share an electronic copy of the record."[176]

An attorney from Northwest Arkansas wrote to "join the chorus for eliminating the abstract and addendum requirement."[177] He stressed that many of his clients exhaust

167. Brooks, *infra* note 172; Davis, *infra* note 170.

168. Brooks, *infra* note 172; Mallett, *infra* note 174; Sharum, *infra* note 180.

169. Brooks, *infra* note 172; Mallett, *infra* note 174; Sharum, *infra* note 180.

170. Ltr. from Steve Davis, Davis Law Firm, to Stacey Pectol, Clerk of Cts. (Feb. 26, 2020) (copy on file with author). Mr. Davis filed his first appeal in the Arkansas Supreme Court in 1983. *Id.*

171. *Id.*

172. Ltr. from Brian Brooks, Att'y at L., to Stacey Pectol, Clerk of Cts. (Feb. 26. 2020) (copy on file with author).

173. *Id.*

174. Letter from Jess Virden Mallett, Att'y, L. Offices of Peter Miller, P.A., to Stacey Pectol, Clerk of Cts. (Feb. 26, 2020) (copy on file with author).

175. Smith, *supra* note 2 at 361, n.3.

176. Mallett, *supra* note 174.

177. Email from Matthew Kezhaya, Kezhaya L. PLC, to EROA Comments (Feb. 26, 2020 5:40 PM CDT) (copy on file with author).

their finances during trial and that the proposed new rules would significantly improve access to justice in Arkansas.[178] A Little Rock attorney applauded the proposed rules and stated his belief that the abstracting rule "has caused acrimony between attorneys and the Arkansas Supreme Court, with many attorneys believing the outdated abstracting rule exists only to discourage appeals."[179] A Fort Smith practitioner described the "old method" as "redundant and unnecessary" and praised the change allowing citation directly to the entire record.[180]

IX. CONCLUSION

When announcing the failure of the appendix experiment, the court signaled the possibility of a return to a similar system in the future. When rejecting the 2001 proposal to abolish the abstract requirement but making other modifications, the court acknowledged that advances in technology would eventually lead to further revision of the rules upon the full implementation of electronic filing.[181] It appears that time is imminent.

One of the primary reasons cited for the failure of the appendix experiment was that attorneys did not fully understand how to properly prepare the statement of the facts, and did not comprehend its importance.[182] As Professor Llewellyn said so well, "[t]he court does not know the facts, and it wants to."[183] Justices should not have to read the entire record to discern the facts, but abstracting the record is clearly not the best way to communicate the facts to the court. Replacing the abstract with an enlarged statement of the case and statement of facts, with appropriate citations that link directly to the electronic record, is a giant step forward for appellate advocacy in Arkansas.

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178. *Id.*

179. Letter from Neil Chamberlin, Att'y, McMath Woods, P.A., to Stacey Pectol, Clerk of Cts. (Feb 26, 2020) (copy on file with author).

180. Letter from Stephen M. Sharum, Att'y at L. & Trial Att'y, to Stacey Pectol, Clerk of Cts. (Feb. 26, 2020) (copy on file with author).

181. *2001 Modification*, *supra* note 86, at 628.

182. See supra notes 68–71 and accompanying text. The other problems were over-inclusiveness in the appendix and failing to provide a table of contents for the appendix. Under the new rule, these will be non-issues.

183. Llewellyn, *supra* note 31, at 183.

Just because judges will have access to the entire record doesn't mean attorneys won't have work to do. Appellate advocates will have to carefully craft the statement of the case and statement of facts, citing in each to the relevant portions of the record. Attorneys (or their staff) may need training in linking from the statement of facts or statement of the case to the appropriate place in the record, creating bookmarks, managing large PDF files, and so on. But the new rules will save attorneys time, and they require no printing, copying, or binding costs, which in turn will save their clients money.

Arkansas was the first state to designate online opinions as official and stop producing print reports.[184] That leadership stands in stark contrast to the state's long struggle to modernize appellate briefing. It is time to join the vast majority of other states and follow through with abolishing the abstract and addendum requirements, leveraging the power of modern technology to maximize efficiency and improve access to justice.

184. *See* Arkansas Judiciary, *Reporter of Decisions*, ARCOURTS.GOV (n.d.), https://www.arcourts.gov/courts/supreme-court/reporter. Since February 14, 2009, all opinions of the Arkansas Supreme Court and the Arkansas Court of Appeals have been officially reported and distributed electronically on the Arkansas Judiciary website. *Id.*; *see also* Peter W. Martin, *Abandoning Law Reports for Official Digital Case Law*, 12 J. APP. PRAC. & PROCESS 25 (2011) (providing a view of the relevant history and assessing the Arkansas courts' early experience with digital publication).

"REMARKABLE INFLUENCE": THE UNEXPECTED IMPORTANCE OF JUSTICE SCALIA'S DECEPTIVELY UNANIMOUS AND CONTESTED MAJORITY OPINIONS

Linda L. Berger
Eric C. Nystrom*

I. INTRODUCTION

What constitutes judicial influence and how should it be measured? Justice Antonin Scalia was known for his memorable phrasing ("this wolf comes as a wolf,"[1] "[l]ike some ghoul in a late-night horror movie"[2]) and for being cited at a rate twice that of his colleagues.[3] Justice Elena Kagan gave him credit for transforming "all of us" into statutory textualists and constitutional originalists.[4] Since his death, critics have provided

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1. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

2. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia & Thomas, JJ., concurring in judgment).

3. Frank B. Cross, *Determinants of Citations to Supreme Court Opinions (and the Remarkable Influence of Justice Scalia)*, 18 SUP. CT. ECON. REV. 177, 191 (2010).

4. *In Scalia Lecture, Kagan Discusses Statutory Interpretation*, 8 HARV. L. TODAY 29 (Nov. 17, 2015) (advance toggle on scrubber bar in embedded video to 8:29) (declaring that, after Justice Scalia's lessons on statutory interpretation, "we're all textualists now"), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation; *Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62, 81 (2010) (testimony of Solicitor General Elena Kagan) (noting without mentioning Justice Scalia that the Framers "sometimes . . . laid down very specific rules" and "[s]ometimes . . . laid down broad principles," acknowledging that "[e]ither way we apply what they say, what they meant to do," and indicating that "in that sense, we are all originalists").

mixed reviews of the extent of his influence on the Supreme Court, other judges, law students, and the general public.[5]

Curious about the broader role rhetoric plays in judicial influence over time, we undertook a rhetorical-computational analysis of the 282 majority opinions that Justice Scalia wrote during his thirty years on the Supreme Court. The resulting study casts doubt on the ability of judicial authors, including Justice Scalia, to control their influence on later courts, at least as far as influence is reflected in citation counts.

Blending rhetorical and computational methods, we explored potential connections between the rhetorical construction of the opinions Justice Scalia wrote for the Court and the ways in which later courts treated them as precedent.[6] One important finding from our study is that relying on only the vote counts of the Justices obscures the actual failures of unanimity that may generate long-lasting uncertainty. When there are concurring opinions in decisions whose vote counts are unanimous—opinions we reclassified as "deceptively unanimous"—later courts may continue to debate one or more issues over a long period of time, and that may result in a "long tail" of more frequent citations, not because of the majority opinion's influence but because of the continuing conversation. If later courts diverge about the meaning or application of the rules established in the majority opinion, they may rely on a concurring opinion that gains or loses adherents over time. In these circumstances, both the original majority opinion and the concurring opinion will continue to be cited. And more frequent citations—to both the majority and the concurrence or concurrences—will extend long after the debate is settled as still-later cases recount the history of the dispute.[7]

A second finding emerging from our analysis is that Justice Scalia's rhetorical statements appeared to be more or less attractive to later courts depending on the particular rhetorical

5. *See infra* notes 33–36 and accompanying text.

6. Other researchers sought the same connections. *See, e.g.*, Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 892 ("The significance of opinion language in giving effect to opinions merits investigation. . . . Opinions are certainly meant as communication to judges deciding future cases, so language could be measured against precedential impact, including measures such as the likelihood of an opinion being distinguished in a future case." (footnote omitted)).

7. For discussion of this point, see text accompanying notes 131–38.

context of the later judicial author. Although this finding may seem obvious, our analysis provided specific details. The federal courts of appeals, for example, were more likely to "cite" than to "follow" Justice Scalia's precedential rules.[8] Perhaps reflecting both their institutional role and their greater resources, the federal courts of appeals tended to more extensively discuss both the arguments made and the rules established in Justice Scalia's majority opinions while the federal district courts and the state courts were somewhat more likely to simply follow the rules.[9] These tendencies toward more extensive discussion were somewhat more pronounced when the later courts were writing opinions they knew would be "reported" rather than "unreported."[10]

Finally, our analysis illuminates how difficult and complex it is to discern and describe the effects of rhetorical structures, argument frames, and word choices on judicial decisionmaking and opinion writing. For example, we suspect that Justice Scalia's stated preferences for constructing particular kinds of rhetorical rule statements—bright lines, broad categories, strict limits—may in fact have resulted in more frequent citations, which some observers might translate into an inference of greater influence. Our analysis, however, indicates that these more frequent citations over time often were the result of Scalia rule statements that either created or contributed to lingering disputes about interpretation or application or both.[11] That kind of sustained citation frequency likely is not the long-lasting influence Justice Scalia sought.

Our purpose in undertaking this rhetorical-computational analysis was to discern patterns and connections across a substantial data base and, because of the breadth of the project, to be able to support our inferential findings with some

8. In using the terms "cite" and "follow," we are adopting LexisNexis terms of art for mere citations of a precedential opinion without more ("cite") as distinguished from citations that positively "follow" or adhere to an earlier precedent. *See* text accompanying notes 128–29.

9. *See* text accompanying Tables 7, 12, and 13.

10. *See* text accompanying notes 161–64. As discussed in Part VI, "unreported" opinions are not literally unreported or unpublished, but instead they are available in both published and electronic form. More accurately, these opinions are said to lack precedential value outside the specific line of lawsuits in which they are decided.

11. For discussion of this point, see Part VII.

confidence.[12] This "medium data" approach[13] provides a larger and more data-driven perspective than traditionally practiced by historians or rhetorical analysts, but it remains an interpretive mode, its data collection narrower and its assessment goals more modest than those asserted by researchers conducting quantitative analysis of so-called "big data." In projects such as this one, analysis and interpretation of the collected data proceeds through recursive rounds of hypothesis, computation, depiction, and further hypothesis.[14]

We have made what we think are reasonable assumptions about the role of judicial discretion and ideology in judicial decisionmaking. First, we assume that ideology alone does not drive most of the decisions made by judges, especially judges in the lower federal and state courts who are bound by vertical precedent.[15] Second, we assume that these judges—though bound by precedent—often have choices among the precedents they refer to, and especially about the manner in which they do so, including whether to "cite" or to "follow" a particular precedent. Because we hope to better understand how a later judge has been influenced to select particular language to rely upon in an opinion's reasoning or decision, we necessarily assume that the later judge was not compelled in every case to follow an earlier decision. That is, we think circumstances not controlled by precedent (at least according to the arguments of the parties) happen frequently enough to make our project worthwhile. And even when the opinion writer is compelled to follow a particular precedent, we expect that the judge retains discretion to choose among the elements in the earlier opinion and to emphasize those she finds more crucial. When judges are engaged in this process, aided by the arguments of lawyers for the parties, they are engaged in "an organized and systematic

12. For discussion of this point, see text accompanying notes 43–45.

13. David S. Tanenhaus & Eric C. Nystrom, *Pursuing* Gault, 17 NEV. L.J. 351, 358 (2017) (crediting historians Kellen Funk and Lincoln Mullen for the term).

14. For discussion of this point, see text accompanying notes 46–48.

15. We recognize that higher rates of citation for Justice Scalia's opinions may be influenced over time by political appointment patterns, that is, by the presence of greater numbers of federal district court and courts of appeals judges sympathetic to his views. Our project did not account for ideological preferences of judges, but unlike many studies, it did extend to judges at all levels of federal and state courts.

process of conversation by which our words get and change their meaning."[16]

We know that language choices govern the content and affect the lasting influence of judicial opinions because lawyers and judges treat the words and phrases of earlier opinions as rules[17] with consequences for later cases. When an earlier opinion governs a later case, the earlier opinion's text is treated as the "repository" of information that determines what the law is and what its impact might be.[18] But the author's language choices alone do not determine the staying power of judicial opinions. It's not only the rhetoric selected by the judicial opinion's author that determines when, whether, and how a later judge will pick it up and use it, it's the complex rhetorical situation in which the later judge finds herself.

II. THE CHOICE TO STUDY JUSTICE SCALIA'S MAJORITY OPINIONS

> *Scalia's words were his most potent weapon in his struggle to get the Court to rethink first principles and apply his views of freedom. . . . But his words were also his greatest weakness*.[19]

In 2010, the Cross study of citations to Supreme Court opinions found an "extremely high rate" of citations to Justice Scalia's majority opinions.[20] Professor Cross determined that the

16. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 268 (1985).

17. An early note on one of our own language choices: we use the term "rules" broadly throughout most of this article, as here, to indicate the universe of legal principles that are relied upon by lawyers and judges to make choices about what happens in particular legal contexts. See the discussion in Part VI for more explanation of how we distinguished between "rules" and "arguments" in the coding process. In Part VII, we discuss the distinction between "rules" and "standards," but this is not a distinction that we attempted to apply elsewhere in the article.

18. Chad Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L. J. 1283, 1328 (2008).

19. RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 7 (2018).

20. Cross, *supra* note 3, at 191. Professor Cross studied citations to Supreme Court opinions over a ten-year period, tracing total citations, positive citations, and negative citations; he used Westlaw's KeyCite for treatment citations and confined his research to

number of lower court citations and the number of positive citations to Justice Scalia's opinions occurred at more than twice the rate of the average of other Justices during the period of his study.[21] Scholarship like the Cross analysis—supported by Justice Scalia's nearly thirty years on the Court and his widespread reputation as a skilled judicial author—bolstered our choice of Scalia texts as the object of study.[22]

Because majority opinions are a richer source for study of a Justice's long-term influence, we focused on those 282 cases rather than on Justice Scalia's more well-known dissents.[23] We began with a couple of hypotheses about why Justice Scalia's majority opinions might be especially influential, if in fact they were.

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published opinions. *Id.* at 177–78 (describing selected period and approach), 180 n.8 (describing use of KeyCite), 181 (noting that study's "data are limited to published opinions"). In comparison, as will be discussed in Part IV, our analysis relied on LexisNexis headnotes and Shepard's treatment citations, and we included both reported and so-called unreported opinions, distinguishing in some analyses between the two.

21. This was such an important finding that it found its way into the title of the resulting article. *See* Cross, *supra* note 3; *but see* David Cole, *Scalia: The Most Influential Justice Without Influence in Supreme Court History*, NATION (Feb. 18, 2016), https://www.the.nation.com/article/scalia-the-most-influential-justice-without-influence-in-supreme-court-history/ (arguing that to be an originalist is to look backward and that as constitutional law evolves, originalists are likely to be left behind).

22. An earlier project using similar techniques indicated that the later influence of one of Justice Scalia's more controversial majority opinions was limited. Linda L. Berger, *Rhetorical Constructions of Precedent: Justice Scalia's Free Exercise Opinion*, *in* JUSTICE SCALIA: RHETORIC AND THE RULE OF LAW 197, 212–13 (Brian G. Slocum & Francis J. Mootz III, eds. 2019) [hereinafter SCALIA: RHETORIC].

23. Justice Scalia's majority opinions are much more restrained in rhetorical style than his dissents. His style in dissent likely reflects Justice Scalia's perspective that the most important reason for dissenting is that it "renders the profession of a judge . . . more enjoyable." As he explained in a 1994 speech,

> To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues; to address precisely the points of law that one considers important and *no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.

Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HISTORY 33, 42 (Dec. 1994).

According to one recent study, and as the reputation of Justice Scalia's dissents suggests, the use of memorable language increases the long-term impact of dissenting opinions. Rachael K. Hinkle & Michael J. Nelson, *How to Lose Cases and Influence People*, 8 STATISTICS, POLITICS & POL'Y 195 (2018) (available behind paywall at https://doi.org/10.1515/spp-2017-0013). But dissenting opinions are, of course, rarely cited.

A. Rhetoric

Our first hypothesis was the obvious one: Justice Scalia's rhetoric, his often-remarkable use of language. But we considered rhetoric broadly, from the author's choice among his sources of support to his construction of argument frames to his selection of images and words. Professor Cross had suggested that Justice Scalia's approach to writing opinions "translate[d] into considerable precedential influence for lower courts" and speculated that his "relatively maximalist" approach might be the reason for his greater precedential influence.[24] Because whether an opinion is maximalist or minimalist is more a matter of the scope of the decision than of the doctrine involved, the distinction is discernible primarily in contrast with the opinions of other Justices.[25]

More generally, Professor Cross had suggested that fundamentalist opinions—those that, like some Scalia opinions, make large, sweeping, or broad changes in the law—might offer more opportunities for citations while, somewhat paradoxically, opinions that establish clear rules—like other Scalia opinions—might yield less litigation, and thus fewer citations, than opinions containing standards.[26] Again, although rules and standards are notably difficult to differentiate without context and comparison, we thought qualities such as maximalism, fundamentalism, and the setting of rules rather than standards might be detected in the phrasing of Justice Scalia's majority

24. Cross, *supra* note 3, at 191. Justice Scalia was first characterized as a "maximalist" opinion-writer by Professor Sunstein, who placed him at the far end of a continuum on which a minimalist decision is narrow and shallow and decides no more than is absolutely necessary to resolve the case. Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 123–24 (2005).

25. One study of the effects of the maximalist-minimalist distinction looked at differences between the judgments that the Justices reached in the cases and the reasoning they expressed in their opinions (assuming that narrowness and shallowness would be reflected in the opinions, not the judgments). The study developed an empirical measurement for minimalism and concluded that it had a statistically significant effect on opinions of the Justices on the Rehnquist Court. Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1045 (2009).

26. Cross, *supra* note 3, at 184.

opinions (for example, maximalism might be linked to judicial expressions of certainty).[27]

B. Originalism

Another possible source of influence might be Justice Scalia's philosophy of originalism.[28] A number of authors have challenged the premise that this philosophy had any particular effects, rhetorical or otherwise, on his opinions.[29] Shortly after Justice Scalia joined the Court, Professor Sullivan concluded that his reliance on originalism or traditionalism amounted to a means of decisionmaking, not an end, because for Justice Scalia, "the rule's the thing."[30] Her conclusion did not change, but gathered support over time. More practically, the combination of rhetorical and computational analysis we used for our project[31] simply did not lend itself to tracing the influence of originalism, which likely would have required experts to read hundreds of citing cases. Other hypotheses—such as Justice Scalia's ideological leadership or his relationships with others on the Court—were rejected for similar reasons: they had already been tested by others more expert or they could not adequately be studied within the parameters of our proposed analysis.

Despite the results of the leading citation studies, some experts have found that Justice Scalia's influence with specific target audiences failed to match the outsize nature of his

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27. Even though one hallmark of all judicial opinion writing is the author's assumption of the inevitability of the result, *see* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010–14 (2002), Justice Scalia expressed particularly high levels of certainty, Cross & Pennebaker, *supra* note 6, at 889, and consistently led the Court in his use of intensifiers in both majority and dissenting opinions, Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933, 952 (2013).

28. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

29. For example, scholars have challenged the claim that Justice Scalia's "originalist textualism" restrained his use of judicial discretion. In fact, "[e]xamination of his rhetoric evidences that he often is engaged not in the reduction but rather the enhancement of judicial discretion—his own." George H. Taylor, Matthew L. Jockers & Fernando Nascimento, *No Reasonable Person*, *in* SCALIA: RHETORIC, *supra* note 22, at 137.

30. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78 (1992).

31. *See* text accompanying notes 75–97.

reputation. For instance, it was often suggested that Justice Scalia's main goal was to reach law students and thus to influence future generations of lawyers and judges.[32] According to one study of legal textbooks, Justice Scalia made major contributions to the legal and interpretive theory these texts contained even though he often ended up on the losing side in high-profile cases.[33] Nonetheless, the authors concluded that the most important factor in whether a particular Justice's opinions were included in a casebook was seniority on the Court, that is, "chief justices and justices who led their ideological wings of the Court have a great deal of power to assign themselves opinions that are likely to end up in our casebooks."[34] Looking at "how often Scalia's opinions (for the Court, or his separate opinions) are excerpted in the principal cases and how often he is referred to by notes preceding and following the principal cases," the authors found that "Scalia is at or near the top of most of the metrics . . . but he does not tower over the competition."[35]

Similarly, Professor Hasen concluded after Justice Scalia's death that features of his institutional role on the court would diminish his long-term reputation as an influential Justice. For example, Justice Scalia was never the swing Justice; he wrote fewer majority opinions than other Justices; and he wrote few landmark majority opinions outside the field of criminal procedure.[36]

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32. And also, perhaps, to influence the general public. *See, e.g.*, Meghan J. Ryan, *Justice Scalia's Bottom-Up Approach to Shaping the Law*, 25 WM. & MARY BILL OF RTS. J. 297 (2016). *See also* J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 253 (2017).

33. Brian T. Fitzpatrick & Paulson K. Varghese, *Scalia in the Casebooks*, 84 U. CHI. L. REV. 2231, 2232 (2017).

34. *Id.*

35. *Id.*

36. Richard Collins, *Ask the Author: Antonin Scalia "*The Justice of Contradictions,*"* SCOTUSBLOG (Mar. 19, 2018), https://www.scotusblog.com/2018/03/ask-author-antonin-scalia-justice-contradictions (transcribing interview with Professor Richard Hasen about his then-new book—RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION (2018)—considering Justice Scalia's career). Still, Justice Scalia was influential because of the "sheer force of his writing and personality. . . . He had big ideas and wrote and spoke about them forcefully." *Id.* On the other hand, because "he was also a polarizer, . . . he helped usher in an era in which we have divided our justices into teams." *Id.*

III. USING CONTENT ANALYSIS TO STUDY HOW PRECEDENT WORKS

For years, the legal academics studying how doctrine developed and the political science researchers examining how judges made decisions remained in separate lanes. While legal scholars used interpretive methods to identify the core themes and concepts running through the subject matter of the law, political and other social scientists were conducting quantitative analyses that correlated judicial characteristics (political ideology in particular) with the outcomes of judicial decisions.[37] More recently, increasing numbers of researchers have turned to empirical analysis to examine the content of judicial opinions, many relying on new linguistic tools.[38]

In their comprehensive survey published in 2008, Professors Hall and Wright emphasized that systematic content analyses using empirical methods would be relying on the same raw materials as traditional legal interpretation, studying "judicial reasoning as expressed through the legal and factual content of written opinions."[39] To fall within the category of systematic analyses included in their survey, a study had to include three processes: "(1) selecting cases; (2) coding cases; and (3) analyzing the case coding, often through statistical

37. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). A common criticism of the leading statistical studies of voting patterns and decision outcomes was the overwhelming emphasis they placed on "ideological explanations of judicial behavior to the exclusion of legal explanations." David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1674 (2010) (citing, among others, Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1904–07 (2009) and Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 687–89 (2009)). These studies were said to ignore the opinions and miss the law: "Merely coding for the outcome misses most of the importance of the judicial decision." Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?* 100 NW. U. L. REV. 517, 524 (2006).

38. Until the last ten years, "[e]mpirical studies of the reasons for which judges employ certain analytical techniques or justify their decisions in particular ways" were rare. Law & Zaring, *supra* note 37, at 1673 (citing, among others, Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 885 (2008) (reviewing FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007))).

39. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 66 (2008).

methods."[40] Although not usually thought of in this way, West's Key Number System and Shepard's Citations are longstanding and widely used examples of content analyses.[41]

After an appropriate corpus or set of cases has been identified, content analysts define a set of elements for coding the content of the cases. In the Hall and Wright overview, for example, the authors included only those studies whose coding process "brought some legal judgment to bear on the judicial opinions analyzed, such as describing the content of the parties' arguments or the judge's reasoning, or studying the influence of legally relevant facts."[42] Analysts can then test and evaluate tentative hypotheses about which factors persuade courts and they can confirm speculative insights into cases. "Although it is no substitute for legal analysis, the disciplined reading and analysis of the cases required to code them for computer analysis eliminates casual meandering through factors on a case-by-case basis."[43] Coding provides a check on the analyst and thus "strengthens the objectivity and reproducibility of case law interpretation."[44]

Content analysis allows the researcher to find patterns and associations across opinions and to be more confident that those patterns and associations are meaningful. This increased confidence relies on breadth rather than depth. As Professors Hall and Wright point out, "content analysis reaches a thinner understanding of the law than that gained through more reflective and subjective interpretive methods."[45]

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40. *Id.* at 79. They found content analysis studies focusing on specific legal topics, ranging from administrative law to torts; questions of legal methods; judicial decision making; and statutory interpretation. *Id.* at 73. The difference between traditional methods and content analysis, the authors say, may be analogized as follows: "When Dean Prosser read cases for possible discussion in his Torts treatise, he was auditioning a crowd of singers to find the best soloists." *Id.* at 76. His goal was to find particular cases that exemplified specific points. *Id.* In contrast, content analysts are not looking for soloists. "Instead, they assemble a chorus, listening to the sound that the cases make together. This distinction between the collective and individual insights drawn from judicial opinions is the starting point for the functional differences between content analysis and traditional literary legal analysis." *Id.*

41. *Id.* at 121.

42. *Id.* at 81.

43. *Id.* at 80–81 (footnote omitted).

44. *Id.* at 81.

45. *Id.* at 87.

Most of the studies that emerge from this kind of content analysis are descriptive or explanatory—they map rather than test—and they fall into two general categories: studies that "examine the background of legal doctrines, case subject matter, or case outcomes" and studies that "focus on particular techniques of opinion-writing, such as syntax, semantics, citations, or reasoning style."[46] In most studies, "[t]he approach is loosely structured, calling on the researcher simply to observe and document what can be found, as a naturalist might explore a new continent or even a familiar patch of woods by turning over stones to see what crawls out."[47] Our Scalia-opinions project falls into this mapping category, an approach that "contrasts with more focused analytic projects that use formal, statistical hypothesis testing to generate definitive conclusions about cause-effect relationships that have theoretical significance."[48]

A. Rhetorical-Pattern and Word-Choice Analyses

1. Rhetorical Patterns

Studying how judges reason and present their reasoning in written opinions appears to be a potentially rich application of content analysis.[49] Given our goals, among the most helpful examples we studied was Professor Little's search for rhetorical patterns in a body of procedural decisions.[50] She identified possible language patterns in decisions focused on jurisdictional or related procedural grounds by asking whether there were recurrent tropes and linguistic devices that served to obscure the effects of the decisions being made.[51] After completing her rhetorical analysis of the text, she added content analysis

46. *Id.* at 90.

47. *Id.*

48. *Id.*

49. Existing research has overlooked "a crucial aspect of Supreme Court decisions: their rhetoric," or their "reasoned arguments intended to persuade." Chemerinsky, *supra* note 27, at 2008.

50. *See, e.g.*, Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 80 (1998).

51. *Id.* at 80.

methodology, allowing her to generate the data necessary to perform complex comparisons.[52]

2. Style

Among the most recent content analyses, Professor Varsava studied the impact of "stylistic features" on the citation of published opinions issued by the Tenth Circuit from 2003 to 2015. Acknowledging that her results do not prove causality, she nonetheless concluded that they supported the conclusion that "judges will cite serious, formal, and solemn opinions over light-hearted, colloquial, and jocular ones."[53]

3. Word-Choice Analyses

Rather than coding by expert readers, a growing number of studies rely on a linguistic-analysis program, Linguistic Inquiry and Word Count (LIWC),[54] that counts the words used in various categories. Some of the results that appeared relevant to our analysis follow.

Using this tool, one study examining opinions from the Roberts Court found "significant differences" in the language used depending on whether the opinion was written for the majority or was written as a separate opinion, and it found some differences related to individual authors.[55] Professors Cross and Pennebaker speculated that language differences detected in majority and separate opinions indicated the "significance of compromise at the Court."[56]

52. *Id.*at 80–81.

53. Nina Varsava, *The Citable Opinion: A Quantitative Analysis of the Style and Impact of Judicial Decisions* (Oct. 28, 2018) at 3, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3197209.

54. *See, e.g.*, Yla R. Tausczik & James W. Pennebaker, *The Psychological Meaning of Words: LIWC and Computerized Text Analysis Methods*, 29 J. LANGUAGE & SOC. PSYCH. 24 (2010) (explaining how LIWC was created and tested and indicating that empirical studies demonstrated its ability to detect social and psychological meaning in a variety of experimental settings); *see also How It Works*, LIWC (n.d.), https://liwc.wpengine.com/how-it-works/.

55. Cross & Pennebaker, *supra* note 6, at 872–92.

56. *Id.* at 853; *see also id.* at 874–75 (discussing repeated circulation of drafts and compromise involved in preparing majority opinion).

Another recent study found that lower courts were more likely to treat Supreme Court opinions positively when the opinions contained "more certain" language.[57] Earlier studies had hypothesized more mixed rhetorical effects. Some analysts argued that an opinion's use of words associated with breadth and certainty helped readers better understand the opinion's rules.[58] Other researchers theorized that higher levels of certainty resulted from the opinion's author expressing or portraying issues in a less complex way, and still others suggested that certainty is the result when an author is faced with an argument that is likely to lose: "winners and losers do write differently in appellate briefs and opinions depending on the perceived threat to the writer's legal argument."[59] In some researchers' opinion, Justice Scalia was not only the most certain but also the clearest opinion writer.[60]

Scholars also differed on whether the use of word choices thought to reflect cognitive complexity helped or hindered the influence of judicial opinions. Professors Tetlock, Bernzweig, and Gallant suggested that greater cognitive complexity is a strength in judicial reasoning,[61] while Professors Owens and Wedeking thought it might be a weakness, diminishing the clarity of the opinion.[62] As for the use of words associated with emotions, another linguistic study found no great difference in the levels of anger expressed in majority, concurring, and dissenting opinions.[63] The same study found little difference in

57. *See* Pamela C. Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 L. & SOC'Y REV. 35, 54 (2014).

58. Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & SOC'Y REV. 1027, 1029–31 (2011).

59. Cross & Pennebaker, *supra* note 6, at 873 (noting also that "words of certainty may be used as a defensive mechanism when a justice is in fact uncertain"); *see also* Long & Christensen, *supra* note 27, at 958–59.

60. The Owens and Wedeking study concluded that Justices Scalia and Breyer wrote the clearest opinions. Their study found that all the Justices wrote clearer dissents than majority opinions, and that the clearest majority opinions were the result of "minimum winning coalitions." The authors also concluded that "opinions that formally alter Court precedent render less clear law, potentially leading to a cycle of legal ambiguity." Owens & Wedeking, *supra* note 58, at 1027.

61. Philip E. Tetlock et al., *Supreme Court Decision Making: Cognitive Style as a Predictor of Ideological Consistency of Voting*, 48 J. PERSONALITY & SOC. PSY. 1227 (1985).

62. Owens & Wedeking, *supra* note 58, at 1038–42.

63. Cross & Pennebaker, *supra* note 6, at 883.

expressions of positivity by opinion type, "though concurrences are somewhat more positive. Per curiam opinions are remarkably negative in emotionality."[64]

B. Citation Analyses

In contrast with content analyses, citation analyses may examine only the non-rhetorical aspects of opinions, such as the legal issues involved or the size of the majority coalition. Acknowledging that the use of citations is an imperfect proxy for influence or importance, researchers emphasize that citations are nonetheless "a facially clear measure of the importance of opinions, at least within the law itself."[65] Professors Cross and Spriggs determined in their study of the "most important" and "best" opinions and Justices that citation rates for Justices Thomas and Scalia were "very high."[66] As Professor Cross had already suggested in his companion study of Justice Scalia's influence,[67] these authors hypothesized that having Justices Scalia and Thomas near the top and Justice Breyer near the bottom of their results was "some evidence" for the hypothesis that maximalist opinions have more influence over time.[68]

1. Majority Coalitions

As for the effects on citation patterns of the size of the majority coalition, results vary. One conventional view was that the more Justices joined an opinion, the more its precedential

64. *Id.* at 883–84.

65. Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 411 (2010); *see also id.* at 420–30 (describing theoretical basis for citation-based study of Supreme Court opinions. Each citation is a "latent judgment" that indicates the case being cited is "precedent." James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedents*, 30 SOC. NETWORKS 16, 17 (2008). Other researchers focus more narrowly on only positive citations. *See, e.g.*, Matthew P. Hitt, *Measuring Precedent in a Judicial Hierarchy*, 50 L. & SOC'Y REV. 57, 63–64 (2016) (emphasizing importance of later cases following a particular precedent).

66. Cross & Spriggs, *supra* note 65, at 495.

67. *See, e.g.*, Cross, *supra* note 3, at 201 (characterizing Justice Scalia as a maximalist).

68. Cross & Spriggs, *supra* note 65, at 495.

value.[69] Others argued that the more controversial and important decisions likely would not be decided by a unanimous court. Instead, they suggested that the cases that were decided unanimously were not very interesting to the Supreme Court, and so they would not be frequently cited by later courts. Others speculated that when the results were unanimous, the holdings would necessarily be narrower, and as a result, these opinions would be less frequently cited.[70] Professors Cross and Spriggs found that cases with unanimous coalitions were less often cited by the Supreme Court in the future but that those lesser citation rates did not hold true in the lower federal courts.[71]

2. Longer Opinions

Again, the results have been mixed, but some research suggests that longer opinions are more likely to be cited in the future.[72] Some analysts theorized that Justices who are committed to defining the law and increasing the influence of the Supreme Court write longer opinions; in comparison, Justices who write shorter opinions might be thought to be more open to greater flexibility by future courts.[73]

3. Internal Citations

As for the number of internal citations—or the number of times the studied opinion cited earlier cases—the Cross and Spriggs study found a "consistently positive and significant [effect]" between the number of later citations for an opinion

69. Cross, *supra* note 3, at 193 (citing Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J 419 (1992)).

70. *Id.* at 194 (citing Frank B. Cross, et al., *Determinants of Cohesion in the Supreme Court's Network of Precedents* (presented Nov. 2007) (Second Annual Conference on Empirical Legal Studies)).

71. Cross & Spriggs, *supra* note 65, at 479.

72. *Id.* at 480; *but see* Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEG. STUD. 325 (2013) (positing depreciation over time as the primary factor in citation rates for Supreme Court opinions and cautioning against reliance on other potentially relevant variables without first accounting for the influence of depreciation).

73. Cross & Spriggs, *supra* note 65, at 480 (hypothesizing that Justices writing longer opinions might want "to project greater influence over future development of the law").

and its number of internal citations. The authors speculated that the opinions with more internal citations were either actually "better grounded in the existing law" or more persuasive because they appeared to have more precedential support.[74]

IV. OUR RHETORICAL-COMPUTATIONAL RESEARCH APPROACH

Our project relied on a blended rhetorical-computational analysis of the 282 majority opinions written by Justice Scalia while on the Supreme Court. By weaving together rhetorical and computational methods, we hoped to strengthen our ability to gauge the influence of precedent on one of the most important audiences for judicial opinions, the later judges and Justices who read, interpret, and use them when making decisions in later cases.

Applying both computational and rhetorical methods to the construction and reception of judicial opinions has several potential benefits. First, the study is an effort to chart the movement and the evolution of legal principles through legal networks. Because judicial opinions constitute the law, "[t]heir power is enhanced by the common law doctrine that links them in a chain of influence and causation—the doctrine of precedent."[75] Second, the study attempts to discern and begin to measure the influence of different rhetorical approaches on different audience members: "Judges intend their published opinions not only as a communication to the parties in the particular case that gave rise to the opinion, but also as a communication to other judges, other lawyers, other litigants, and other actual and potential participants in the legal system."[76]

The project applied rhetorical methods to a sample that appears to lend itself to data analysis, that is, we were reading and coding the "rules" reflected in the LexisNexis headnotes in

74. *Id.*

75. Hall & Wright, *supra* note 39, at 92–93 n.119 (quoting Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 773 (1981)).

76. *Id.* at 93 n.120 (quoting Bernard Trujillo, *Patterns in a Complex System: An Empirical Study of Variation in Business Bankruptcy Cases*, 55 UCLA L. REV. 357, 364–65 (2005)).

all 282 of the Scalia majority opinions.[77] Because they isolate headnote rules, the LexisNexis editors try to identify each legal issue discussed in an opinion, label each issue with a headnote number, and then extract much of the exact language of the opinion on that point.[78] But they omit all citations to authorities, including constitutional provisions, regulations, statutes, and case law, from the headnotes. This means that when we read the Lexis headnotes, we were reading the text Justice Scalia wrote with one major omission: the citations to authorities.

As any lawyer will tell you, a statement made in a brief without a citation to an authoritative source loses much of its ethos, credibility, and persuasiveness. Headnotes, however, are not part of the judicial opinion, but instead they are editorial additions used by attorneys early in the research and writing process as a way to quickly identify specific portions of an opinion that might be most useful for their focused attention. For the attorney reader of a headnote, the ethos function is served by the implicit citation of the entire statement in the headnote to the author of the opinion being excerpted.

Our initial goal was to examine the text of each headnote through a network of lenses suggested by the rhetorical canons

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77. Metadata about opinions is derived from the Supreme Court Database. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2018 Supreme Court Database*, WASH. U. L. (n.d.), http://Supremecourtdatabase.org (click "Data," then "Previous Versions" and then click "Version 2018 Release 01") [hereinafter SCDB]. Each opinion's text was downloaded manually from LexisNexis. Note that the count of Scalia-authored opinions includes nine "Judgments of the Court" (decisionType=7), which are opinions on which a majority of the Justices could not agree. Following SCDB recommendations, these have been included in our data. *See SCDB*, *Online Code Book—Decision Type*, WASH. U. L. (n.d.), http://scdb.wustl.edu/documentation.php?var=decisionType (defining "decisionType=7" as a case in which "less than a majority of the participating justices agree with the opinion produced by the justice assigned to write the Court's opinion" and indicating that cases classified as "decisionType =7 should be included in analyses of the Court's formally decided cases").

78. *See* Susan Nevelow Mart, *The Case for Curation: The Relevance of Digest and Citator Results in Westlaw and Lexis*, 32 LEGAL REFERENCE SERVS. Q. 13, 18–19 (2013) (explaining that, to prepare headnotes, Westlaw editors may summarize the legal points in their own words, but Lexis editors extract the precise language of the case) [hereinafter Mart, *Curation*]. The use of LexisNexis and Westlaw headnotes by researchers, both students and lawyers, raises interesting questions about how the presence of headnotes affects our unknowing assumptions about what is "important" in an opinion. *See, e.g.,* Susan Nevelow Mart, *Every Algorithm has a Point of View*, 22 AALL SPECTRUM 40 (Sept./Oct. 2017) (surveying differences and similarities in results generated by searching various legal databases).

of *invention* (the creation of arguments), *arrangement* (the structure and sequencing of arguments), and *style* (the words, phrases, and images chosen to present arguments). Because of the nature of headnote text, only some kinds of rhetorical analysis worked effectively as a first level of categorization. We were able to identify with some confidence the headnotes that constituted the steps in Justice Scalia's argument in any given opinion (labeled "argument" in what follows) and also the headnotes that constituted statements of what Justice Scalia likely considered to be the rules established by or necessary to the decision in any given case (labeled "Scalia rules").[79]

Applying quantitative methods, we moved next to the immediate audience for his majority opinions, the judicial authors of later opinions at all levels of the state and federal court systems. There, we found some tentative linkages between the rhetorical construction and rhetorical framing of the Scalia majority opinions and the ways in which subsequent courts relied upon them. For example, in cases where the later court might have—or might appear to have—greater discretion, there is a small but noteworthy difference in citation patterns.[80]

A. The Research Question and the Research "Corpus"

Our broad research question was to better understand whether Justice Scalia's majority opinions exerted a "remarkable influence" on particular categories of later judicial authors—as gauged by citations—and if so, what factors were important in influencing them. The majority opinions provided a reasonably convenient and coherent body of his work for study.

To address the question, we gathered all the majority opinions written by Justice Scalia, from his arrival on the Supreme Court in the fall of 1986 to his death in early 2016.[81]

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79. The classified data is available as Linda L. Berger & Eric C. Nystrom, *Classification of Majority Opinions and Headnotes Written by U.S. Supreme Court Justice Antonin Scalia* (July 12, 2019), DOI: 10.5281/zenodo.3333948. We also were able to identify the headnotes containing the rules that Justice Scalia likely intended to establish as rules answering the question posed in a particular case as stated by Justice Scalia (labeled "Scalia-intended rules"). A later research project may examine this connection further.

80. *See, e.g.*, text accompanying notes 192–201.

81. As in the Cross and Pennebaker study, we studied only majority opinions. They "excluded all opinions of fewer than one hundred words, for which the program's

Most lawyers and judges would agree that "what matters is not merely what the court said [and did], but how it said it."[82] The words and phrases used by the court are "regarded as consequential in (if not dispositive of) a subsequent case even if the language at issue was not directly implicated in the decision of the prior case."[83] Because the text of the opinion is the only definitive source to which litigants, lawyers, and judges can refer,[84] compiling the full texts as the dataset was essential. The number of opinions was large enough to make observations at scale possible, but not so large as to make assembly of the dataset impossible.

The procedure involved collecting data from several sources. The SCDB compiles a range of helpful data about every Supreme Court case.[85] Using SCDB's "majOpinWriter" variable, a spreadsheet was compiled of the 282 cases with majority opinions written by Justice Scalia from 1986 to 2015.[86] Recognizing that "majority opinions" often include contributions from a number of authors,[87] we concluded after review that the opinions on the whole reflect Justice Scalia's rhetorical work, both in a narrow wordsmithing sense and in the broader sense of rhetorical structure. Working from the list of Justice Scalia's majority opinions, we downloaded each case's data from LexisNexis. Both the case opinion and the Shepard's

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reliability was uncertain; these were generally separate opinions." Cross & Pennebaker, *supra* note 6, at 872.

82. Oldfather, *supra* note 18, at 1327.

83. *Id.* (footnote omitted).

84. *Id.* (indicating that judicial opinions are "the embodiment of precedent").

85. *See generally* SCDB, *supra* note 77.

86. *Online Code Book*, *Majority Opinion Writer*, SCDB, supra note 77 (identifying "AScalia" authorship as value 105).

87. A majority opinion must be joined by at least half the other Justices on the Court. Joining the majority opinion does not preclude Justices from expressing significant disagreement in the kinds of concurring opinions whose importance is underlined by our study. Court opinions at all levels are influenced by the clerks (if any) who work for the authoring Justice as well as the Justices in the majority. In this vein, Judge Wald has said that "the drafting of majority opinions is a delicate political and human relations undertaking, [which] precludes the exercise of pure stylistic preference by a judge in choosing relevant rationales, rhetoric, issues, legal doctrines, precedents, authorities, and even linguistic flourishes." Cross & Pennebaker, *supra* note 6, at 875 (quoting Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CINN. L. REV. 651, 658 (2000)).

report were downloaded in HTML format, in several pieces if necessary, and saved with filenames reflecting the SCDB ID and a standard notation about their contents.[88] After downloading, checks were made to ensure the completeness and correctness of the dataset, which ultimately comprised 653 downloaded files.

The Shepard's reports contained data used to address the second goal of understanding the reception of Justice Scalia's ideas over time. The primary element of a Shepard's report is a list of the subsequent cases that cited the opinion being Shepardized. With such a report for each opinion Justice Scalia wrote, we had the raw material to see how a crucial audience—judges, especially in lower courts—interpreted Justice Scalia's judicial opinions. Since each citing case was itself a product of a particular time and place, we could follow the use of his ideas over time.

The opinion text and the Shepard's reports provided another element to explore the reception of Justice Scalia's rhetoric. Each opinion, like all opinions on the LexisNexis database, was preceded by numbered LexisNexis headnotes that are "key legal points of a case drawn directly from the language of a court by LexisNexis attorney-editors."[89] Inclusion of the headnotes in the online version of a case allows researchers to easily locate key points in what amounts to a table of contents at the beginning of the opinion. Having located the relevant headnote, "you can jump directly to the text point where each LexisNexis Headnote appears by selecting the down arrow associated with it."[90]

In a Shepard's report showing subsequent citations to the case, LexisNexis also identifies, when possible, the headnote from the original case that seems to best represent the specific

88. Downloading was done manually through the standard interface and took several weeks to complete. Professor Nystrom's "sheptools" programs were specifically created to work with the saved HTML exported report. The tools were developed against the HTML versions because they were slightly easier to work with programmatically than other electronic case reports. *See* Eric C. Nystrom, *Sheptools: Legal History Tools to Manipulate Downloaded Shepard's Citation Data*, https://github.com/ericnystrom/sheptools (providing software); *see also* DOI:10.5281/zenodo.3271794 (same). A caveat: Since these data were collected, the output format from LexisNexis has changed.

89. *Caselaw Summaries and Headnotes*, LEXISNEXIS (2008), http://www.lexisnexis.com/tutorial/global/US/Academic/en_US/summaries_text.htm.

90. *Id.*

point that the citing case is invoking. Headnotes are therefore units of content, smaller than the opinion as a whole, but composed (with very few exceptions)[91] of the original text from the opinion and connected to subsequent uses of that case. Incorporating both treatment citations and citations to specific headnote numbers allows for finer-grained interpretation and analysis than analyses based only on citation counts. We anticipated that (1) the headnotes could give us a more precise and narrower understanding of how a citing case was reading and using the original opinion and (2) the headnotes could be read for rhetorical content and context because they were excerpts of unaltered opinion text.

With these multiple purposes in mind, we extracted several types of information from the downloaded files. From the opinion texts, we gathered the LexisNexis headnotes for each case as well as the narrative summary information contained in the so-called syllabus at the beginning of each opinion about the facts of the case and the judgment. From the Shepard's report, we extracted information about subsequent cases that cited each Scalia case. We also added information from the SCDB about the case being cited. After processing each opinion and Shepard's report, and removing duplicate entries,[92] we had a total of 2,903 distinct headnotes, and a total of 510,705 citations to the 282 Scalia-authored opinions. Of these, only 15.5% (79,254) of the citations lacked any headnote information.[93]

B. Our Toolkit

Rather than LIWC,[94] the linguistic analysis software that has often been used for content analysis, we used custom open-source software to analyze a combination of LexisNexis headnotes and Shepard's Citations. The data compilation and

91. LexisNexis editors will change a word or two to make the headnotes readable; for example, "we hold" will become "the court holds."

92. Most duplicates were the result of errors in the process of downloading too-large Shepard's reports in several smaller pieces, but smaller numbers of duplicates are contained within the Shepard's reports themselves.

93. Descriptive statistics derived from tabular data, revision 0519, copy in possession of authors. This includes a number of corrections by the present authors to the Lexis-Nexis-owned data.

94. *See* Tausczik & Pennebaker, *supra* note 54.

analysis techniques used here were developed by Professor Nystrom in collaboration with Professor David Tanenhaus.[95] Professors Nystrom and Tanenhaus characterized their work as applying what historians have dubbed a "medium data" perspective.[96] As discussed earlier, this perspective is more data-driven than the approaches traditionally practiced by historians and rhetoricians, but unlike much quantitative analysis, it is still primarily interpretive. Our analysis and interpretation proceeded through recursive rounds of hypothesis, computation, depiction, and further hypothesis.

The toolkit was first applied to better understand how one important case was interpreted over time, but the potential to derive insights from analyzing a corpus of cases seemed clear, leading to the present project. Several elements influenced the start of our project. First, as noted above, scholars have suggested that Justice Scalia's use of language is linked to the successful spread of his ideas. A legal rhetorician might closely read Justice Scalia's opinions to discern the source of such a relationship, but would the links hold for the bulk of them?

A second element was the possibility that headnotes, because they contained the words of the opinion, might be read for their rhetorical content. True, a handful of text snippets—especially recognizing that LexisNexis tries to capture only the "rules" or legal principles stated in an opinion in the headnotes—represented the opinion as a whole only thinly, but these particular snippets had been selected to stand in for the most important points in the opinion.

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95. Tanenhaus & Nystrom, *supra* note 13. Using custom tools to convert a LexisNexis Shepard's report into tabular data, Professors Tanenhaus and Nystrom examined how *In re Gault*, 387 U.S. 1 (1967), which established certain key due process protections for juveniles, had been cited over time. Tanenhaus & Nystrom, *supra* note 13, at 358–69; *see also* DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *IN RE GAULT* AND JUVENILE JUSTICE (2011). Professors Tanenhaus and Nystrom used Lexis-generated headnotes as proxies for the several strands of legal thought in Justice Fortas's *Gault* opinion. Since nearly eighty-five percent of the cases identified in the Shepard's report as having cited *Gault* included a Lexis-provided note about the legal issues (summarized as one or more headnotes) from *Gault* that had been invoked in the citing case, they traced the headnotes singly and in groups to uncover how the meaning of the classic case had shifted over time. Tanenhaus & Nystrom, *supra* note 13, at 358–69.

96. Tanenhaus & Nystrom, *supra* note 13, at 358 (referring to the work of Professors Funk and Mullen).

Third, we had already developed some tools and concepts to make an investigation at scale somewhat more feasible. In the course of earlier work, major components of the Shepard's data toolkit had been built and tested. Further, in thinking about how to analyze the headnotes, Professor Nystrom took inspiration from an earlier collaboration with Professor Tanenhaus, in which it proved relatively straightforward to use a custom database to present terms to be evaluated in batches by an expert.[97] Once the evaluations were gathered, they could be applied to the rest of the data by the computers without further difficulty. Finally, we began with an explicit commitment to an open-ended inquiry and an affirmation of our intent to situate that inquiry in the humanistic traditions of rhetoric and history.

V. WHAT WE FOUND: THE BIG PICTURE

This section establishes overall patterns as a first sketch of the subsequent history of Justice Scalia's majority opinions. First, we explore Justice Scalia's most-cited majority opinions as a way to begin to think about explanations for his later influence. Next, we look at how citation patterns change when the later court is deciding to "follow" rather than merely "cite to" a Scalia majority opinion. Third, we explore the effects on citation patterns of the size and shape of the majority coalition. Finally, we look at how citation patterns differ by jurisdiction and level of the citing court.

To begin, our dataset included 282 majority opinions and a total of 510,705 citations to these opinions.[98] The mean number of citations for each Scalia-authored opinion is 1811.01, but the median is only 613, which suggests a distribution heavily

97. Professor Tanenhaus, a juvenile justice expert, *see, e.g.*, *David Tanenhaus, James E. Rogers Professor of History and Law*, UNLV WILLIAM S. BOYD SCHOOL OF LAW, https://law.unlv.edu/faculty/david-tanenhaus (2020) (summarizing professional expertise and linking to C.V.), had ranked terms from juvenile justice legislation for their relative association with "punitive" or "rehabilitative" approaches to youth crime. These weighted terms were then used to calculate an approximation of any particular bill's degree of punitiveness. Eric Nystrom & David S. Tanenhaus, *The Future of Digital Legal History: No Magic, No Silver Bullets*, 56 AM. J. LEG. HISTORY 150 (2016).

98. We froze our Shepard's data as of November 2017, due in part to the time-consuming nature of manually re-downloading Shepard's reports for all 282 cases if an update was desired.

skewed by a smaller number of very influential opinions. About 90% of opinions received fewer than 4648 citations; about 75% of opinions received 1626 citations or fewer; and the bottom quartile had 228 citations or fewer. In our data, one opinion got just two citations, though the opinion with the next-fewest cites had twenty-four. Eleven opinions received more than 10,000 citations (and the twelfth missed that mark by fewer than 300); these are listed in Table 1 below.

A. Justice Scalia's Most-Cited Opinions

Justice Scalia's most-cited opinions do not constitute a top-ten list of landmark constitutional rulings. Instead, they include rulings on issues important to litigants frequently seen in the federal courts and legal questions likely to recur as federal judges manage the process of prisoner lawsuits, criminal prosecutions, and civil litigation.

Table 1
Scalia-Authored Majority Opinions with 10,000 Citations or More[99]

Citations	SCDB ID	Case Name	Reference	Decision
25,982	1993-084	Heck v. Humphrey	512 U.S. 477	9-0
24,078	2003-080	Blakely v. Wash.	542 U.S. 296	5-4
21,456	1992-112	St. Mary's Honor Ctr. v. Hicks	509 U.S. 502	5-4
18,840	1991-085	Lujan v. Defenders of Wildlife	504 U.S. 555	6-3
16,257	1990-108	Wilson v. Seiter	501 U.S. 294	5-4
15,924	2003-040	Crawford v. Wash.	541 U.S. 36	9-0
15,382	1986-158	Anderson v. Creighton	483 U.S. 635	6-3

99. The SCDB ID is assigned according to the Supreme Court Term in which the opinion falls. Supreme Court terms begin on the first Monday in October and continue until late June or early July. The date of the decision, and thus of the published opinion, may reflect a different year. For example, Heck v. Humphrey, 1993-084, was published as 512 U.S. 477 (1994).

Note that the vote counts in the column labeled "Decision" are based on SCDB data reflecting the votes for the majority and the minority opinions rather than on our own analysis of the size and shape of the majority coalitions as explained further below in Table 4. We also looked at the top eleven Scalia-authored majority opinions counting only "reported" cases; the numbers of citations of course decreased, but there was little change in the order of cases cited.

Table 1 (cont'd)
Scalia-Authored Majority Opinions with 10,000 Citations or More

Citations	SCDB ID	Case Name	Reference	Decision
13,908	1995-081	Lewis v. Casey	518 U.S. 343	8-1
12,865	1993-047	Kokkonen v. Guardian Life Ins. Co.	511 U.S. 375	9-0
12,287	1990-124	Ylst v. Nunnemaker	501 U.S. 797	6-3
11,792	2006-037	Scott v. Harris	550 U.S. 372	8-1

The subject matter of these opinions may seem to suggest a simple explanation for Justice Scalia's apparent influence as measured by their later citations: these legal questions make up much of the federal courts' dockets. For example, his most-often-cited opinion, *Heck v. Humphrey*,[100] is a prisoners' rights lawsuit, a category that is among the most often filed and heard in the federal courts. In fact, the category of "inmate litigation" is so common that the authors of the Cross study excluded prisoner "tort actions for liability" and prisoner actions involving "cruel and unusual punishment" because of their possible distorting effects on the comparison of citation rates among Justices.[101] Although excluding these cases makes sense in a quantitative comparison among the various Justices, we determined that including their citation rates would inform rather than distort our more inferential analysis of a single Justice's influence.

Based on the Court's statements of the subject matter of the controversy, the SCDB first assigns cases to very specific issues and then groups those together into the broader groups of issue areas noted in Table 2.[102] As the data in Table 2 suggest, looking

100. 512 U.S. 477 (1994).

101. Cross, *supra* note 3, at 191.

102. When the SCDB identifies the issues, the focus is on the subject matter of the controversy stated by the Court. Quoting from the SCDB, the scope of these categories is as follows:

- Criminal procedure encompasses the rights of persons accused of crime, except for the due process rights of prisoners . . . .
- Civil rights includes non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage. . . .

at all of Justice Scalia's majority opinions together, almost twice as many fell into the area of criminal procedure as any other issue area, and the top three categories of criminal procedure, judicial power, and civil rights overwhelmed all other categories.

Table 2
Issue Areas of Scalia-Authored Majority Opinions, Number of Citations

Case Issue Area	Citations	% Total Citations
Criminal Procedure	186,946	36.61
Judicial Power	97,149	19.02
Civil Rights	91,462	17.91
Economic Activity	50,726	9.93
Due Process	39,553	7.74
Attorneys	19,785	3.87
Federalism	9826	1.92
First Amendment	7342	1.44
Unions	5145	1.01
Privacy	1229	0.24
Miscellaneous	866	0.17
Federal Taxation	676	0.13

- First Amendment encompasses the scope of this constitutional provision, but do note that not every case in the First Amendment group directly involves the interpretation and application of a provision of the First Amendment . . . .
- Due process is limited to non-criminal guarantees . . . .
- The four issues comprising privacy may be treated as a subset of civil rights.
- Because of their peculiar role in the judicial process, a separate attorney category has been created, which also includes their compensation and licenses, along with those of governmental officials and employees. . . .
- Unions encompass those issues involving labor union activity. . . .
- Economic activity is largely commercial and business related; it includes tort actions and employee actions vis-a-vis employers. . . .
- Judicial power concerns the exercise of the judiciary's own power. . . .
- Federalism pertains to conflicts and other relationships between the federal government and the states, except for those between the federal and state courts. . . .
- Federal taxation concerns the Internal Revenue Code and related statutes.
- Miscellaneous contains three groups of cases that do not fit into any other category.

SCDB, *supra* note 77 (describing categories in *Online Code Book* at http://scdb.wustl.edu/documentation.php?var=issue).

In addition to interpreting procedural and constitutional requirements in prisoner lawsuits, Justice Scalia's most-cited cases involved constitutional protections in criminal prosecutions, questions of standing for plaintiffs wishing to challenge a government agency's rule, and burdens of proof in employment discrimination lawsuits. Because these issues are so likely to recur, we might expect the Scalia opinions for that reason alone to be among those to which the lower courts are most likely to turn. But this explanation does not distinguish Justice Scalia's opinions from those of the other Supreme Court Justices who decide the same kinds of legal questions.

In Part VII, we will examine the subsequent citation histories of some of these most-cited opinions further. To provide context for the initial presentation of data, following is a brief summary of the decisions themselves.

1. Case Summaries

a. Prisoner Cases

First, grouping together the prisoner lawsuits, Justice Scalia's most-cited opinion is his majority opinion in *Heck v. Humphrey*, where the Court held that a plaintiff cannot bring a § 1983 claim (a civil action for a civil-rights violation) unless there has been a previous favorable termination of a criminal conviction or reversal.[103] Without such a previous termination, the Court said, allowing the § 1983 case to proceed would be inconsistent with the outcome of the criminal case.[104]

Another major category of prisoner lawsuit is represented by *Wilson v. Seiter*,[105] in which the Court interpreted the Eighth Amendment prohibition on cruel and unusual punishment as applied to prisoners' conditions of confinement. There, Justice Scalia established a new standard that required plaintiffs to show both that the conditions were objectively cruel and unusual and

103. 512 U.S. at 487 (holding that a claim for damages in relation to "a conviction or sentence that has not been . . . invalidated is not cognizable under § 1983").

104. *Id.* at 486–87.

105. 501 U.S. 294 (1991).

that they were the result of "deliberate indifference" by prison officials.[106]

In *Lewis v. Casey*,[107] the Supreme Court imposed standing requirements that protected state prison officials from federal court interference. The Court held that finding a "demonstrated harm from one particular inadequacy in government administration" would not permit the courts "to remedy *all* inadequacies in that administration."[108]

And in *Ylst v. Nunnemaker*,[109] the Court ruled on one of the questions involved when a prisoner files a habeas petition in federal court collaterally attacking his state conviction. The "procedural default" rule says that if the prisoner failed to make his claim in the manner and within the time required by established state rules, and the state courts rejected his claim for that reason, the federal court cannot consider the claim unless one of the exceptions to the rule applies. *Ylst* established a "look through" rule for federal courts when the last state decision is a simple denial but an earlier decision has a full explanation, allowing courts to look through intervening decisions and assume that the later decisions relied on the earlier explanation.[110]

b. Constitutional Issues in Criminal Cases

The second group of most-cited opinions addressed constitutional issues in criminal prosecutions. In *Blakely v. Washington*,[111] the Court held that within the context of mandatory sentencing guidelines under state law, the Sixth Amendment right to a jury trial prohibited judges from enhancing criminal sentences based on facts not decided by a jury or admitted by the defendant.[112] Because it extended the holding for the first time to all the states, the opinion was characterized as "a legal haymaker that has sent the criminal

106. *Id.* at 303–04.
107. 518 U.S. 343 (1996).
108. *Id.* at 357.
109. 501 U.S. 797 (1991).
110. *Id.* at 805–06.
111. 542 U.S. 296 (2004).
112. *Id.* at 303–05.

sentencing world reeling"[113] and a "sea change in the body of sentencing law."[114]

A similarly sweeping change occurred as a result of Justice Scalia's opinion in *Crawford v. Washington*,[115] holding that testimonial hearsay is inadmissible at trial unless the declarant is available for cross-examination. Justice Scalia reconfigured the standard for determining when the admission of hearsay statements in criminal cases is permitted under the Sixth Amendment's Confrontation Clause.[116] Courts subsequently struggled to define "testimonial hearsay," again leading to a long line of subsequent citations.

In *Anderson v. Creighton*,[117] the Scalia majority opinion expanded the doctrine of qualified immunity as a defense available to government officials in actions based on constitutional torts. A court now asks not only whether the right allegedly violated was clearly established but also whether a reasonable official in the defendant's position would have known that his or her conduct violated the right.[118]

Finally, in the widely discussed *Scott v. Harris,*[119] the Court ruled on a fact question on the basis of the Justices' own viewing of a videotaped police chase that left the fleeing driver a quadriplegic.[120] After viewing it, the Court found that the police officer's actions were reasonable under the Fourth Amendment because his use of deadly force was justifiable.[121]

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113. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 377 (2005).

114. United States v. Ameline, 376 F.3d 967, 973 (9th Cir. 2004).

115. 541 U.S. 36 (2004).

116. *Id.* at 68 "(Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" (footnote omitted)).

117. 483 U.S. 635 (1987).

118. *Id.* at 640–41.

119. 550 U.S. 372 (2007).

120. *Id.* at 378–80.

121. *Id.*; *but see id.* at 389–94 (Stevens, J., dissenting).

c. Civil Cases in Federal Court

The third group of most-cited opinions addressed the process of civil lawsuits in federal courts. Justice Scalia's majority opinion in *St. Mary's Honor Center v. Hicks*[122] re-emphasized the allocation of the burden of persuasion to the plaintiff in Title VII employment discrimination cases.[123]

In *Lujan v. Defenders of Wildlife,*[124] Justice Scalia's majority opinion established a new principle of federal standing. Post-*Lujan* plaintiffs must show that they suffered a concrete, discernible injury—not a "conjectural or hypothetical one."[125]

The power of federal district courts to exercise jurisdiction over settlement agreements was the topic of *Kokkonen v. Guardian Life Insurance Co. of America*.[126] The Court indicated in dicta that the trial court retains jurisdiction to enforce a settlement agreement if it either incorporates the settlement agreement into the dismissal order or specifically includes a clause in the dismissal order retaining jurisdiction.[127]

B. Justice Scalia's Most-Followed Opinions

When we looked at Justice Scalia's most-followed—rather than his most-cited—opinions, there were few changes other than the expected decline in the number of citations. LexisNexis assigns subsequent cases to very specific treatment categories that can be grouped into more general categories. For example, "positive" citations include those that "follow" the precedent case, while "negative" citations include those that "question" the original decision or "caution" the researcher about its use. The most common category, "Cited," is sometimes characterized as essentially neutral, but the mere citation of the case has also been interpreted to indicate that the author accepted its general

122. 509 U.S. 502 (1993).
123. *Id.* at 507.
124. 504 U.S. 555 (1992).
125. *Id.* at 560 (citation omitted).
126. 511 U.S. 375 (1994).
127. *Id.* at 380–82 (declining to extend ancillary jurisdiction).

validity.[128] Of the 510,705 distinct citations in our dataset, 75% are labeled as "Cited" and nothing more (384,410 or 75.27%), and nearly 80% of the citations in the data at least include the "Cited" label (408,401 or 79.97%).

A smaller number of citations were labeled by LexisNexis as having used the case in a more active way. If we include variations[129] and those cases that have multiple labels identified, we see 94,490 citations that include the "Followed" label in some form, which is 18.5% of the total number of citations. Small shifts in order occurred when we examined the "most-followed" opinions rather than the most-cited opinions. The top eight opinions remained the same and were joined by three more not far behind on the list of most-cited opinions.

Table 3
Top 11 Scalia-Authored Majority Opinions with Greatest Number of "Follow*" Citations

Follow* Citations	SCDB ID	Title	Reference	Decision
12,310	1993-084	Heck v. Humphrey	512 U.S. 477	9-0
7161	1991-085	Lujan v. Defenders of Wildlife	504 U.S. 555	6-3
4852	1992-112	St. Mary's Honor Ctr. v. Hicks	509 U.S. 502	5-4
4370	1990-108	Wilson v. Seiter	501 U.S. 294	5-4
3873	1995-081	Lewis v. Casey	518 U.S. 343	8-1
3350	2003-040	Crawford v. Wash.	541 U.S. 36	9-0
2173	1986-158	Anderson v. Creighton	483 U.S. 635	6-3
2104	2003-080	Blakely v. Washington	542 U.S. 296	5-4
1561	1996-056	Edwards v. Balisok	520 U.S. 641	9-0
1415	1993-028	Liteky v. United States	510 U.S. 540	9-0
1297	1987-147	Pierce v. Underwood	487 U.S. 552	6-2

Most notable is the sharp drop in the number of citing cases that "followed" rather than merely "cited" the majority opinion.

128. Cross, *supra* note 3, at 182 (suggesting that "[a]ny citation to a Supreme Court opinion might be regarded as a positive one, in that it recognizes the importance of the opinion, rather than simply ignoring it").

129. The category included "Followed" as well as "Followed in Concurring" and "Followed by Questionable Precedent."

The last three opinions were not in the most-cited list, but the subject matter of each has much in common with at least one case on the first list.[130]

C. Citation Rates by Shape and Size of Majority Coalition

One way to assess the court's voting coalition is to look at the number of Justices recorded by SCDB as voting for the majority opinion or for a minority opinion. Using the SCDB data,[131] and assuming that a unanimous decision is one in which no Justice dissents even if there are one or more concurring opinions, 42.6% of Scalia-authored opinions were unanimous. By contrast, 39.4% were decided with slim majorities of five or six Justices, and 23.0% were decided by five-four majorities.

As other authors have pointed out, concurring opinions are very common in unanimous decisions.[132] Therefore, we decided that it would be more accurate to take concurring opinions into account because they so often indicate disagreement with, rather than "merely supplementation or extension of, the majority opinion."[133] In a separate analysis, we counted opinions with concurrences as "deceptively unanimous" rather than "truly unanimous." We extended our counting of concurrences and partial dissents to our categorization of "strong majority" and "contested majority" opinions. As a result, our analysis showed that only 23% of Scalia-authored majority opinions were truly unanimous, 20% were deceptively unanimous (that is, there was at least one concurrence), 21% were strong majority opinions (with one or two Justices filing full or partial dissents), and 36% were contested majority opinions (with three or more Justices filing full or partial dissents).

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130. *Edwards* was another § 1983 opinion; *Liteky* involved recusal by federal judges when their impartiality might be questioned; and *Pierce* was a dispute about attorneys' fees.

131. Data about majority/minority votes were taken from the SCDB for each of our Scalia opinions.

132. Lee Epstein, William M Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?* 106 NW. U.L. REV. 699, 700 (2012) (noting that "41% of the unanimous decisions in The Supreme Court Database include concurring opinions, compared to 38% for non-unanimous decisions").

133. *Id.*

Table 4
Degree of Unanimity, Number and Percentage of Opinions, and Citations to Opinions

Majority Coalition	Scalia Opinions	% Opinions	Citations	% Citations
Truly Unanimous	65	23.13	72,373	14.19
Deceptively Unanimous	57	20.28	136,840	26.83
Strong Majority	59	21.00	95,518	18.73
Contested Majority	100	35.59	205,308	40.25

Using as a baseline the number of truly unanimous opinions within the database, Table 4 indicates that "truly unanimous" opinions (constituting 23% of the Scalia majority opinions) were under-represented in later citations (only 14% of the citations) while both "deceptively unanimous" (20% of the opinions and 27% of the citations) and "contested majority" opinions (36% of the opinions and 40% of the citations) were over-represented. One possible explanation for this result is suggested by the history of *Heck.*[134] The recorded majority-to-minority vote for *Heck* is nine to zero, but the majority opinion has been described as "a 5-4 decision on the rationale"[135] because of two concurrences, one joined by four Justices. The Scalia majority (based on a rationale from the common law of torts) was joined only by Justices Rehnquist, Kennedy, Thomas, and Ginsburg. Justice Thomas concurred, expressing a completely different view about the rationale,[136] and Justice Souter, joined by Justices Blackmun, Stevens, and O'Connor, concurred on the basis that the proper way to resolve the case was to construe § 1983 in light of the habeas corpus statute.[137] Justice Souter's concurrence eventually led to a long-running split of authority in the federal courts of appeals that at least

134. 512 U.S. 477.

135. Lyndon Bradshaw, Comment, *The Heck Conundrum: Why Federal Courts Should Not Overextend the* Heck v. Humphrey *Preclusion Doctrine*, 2014 BYU L. REV. 185, 193.

136. *Heck*, 512 U.S. at 490–91 (Thomas, J., concurring).

137. *Id.* at 503 (Souter, J., concurring) (concluding that "the proper resolution of this case . . . is to construe § 1983 in light of the habeas statute and its explicit policy of exhaustion").

partially explains the frequency of citations to *Heck* over time (as discussed in Part VII).[138]

Several other often-cited opinions initially categorized as unanimous joined *Heck* as "deceptively unanimous" in our later analysis.[139] For example, in a related case, *Edwards v. Balisok*,[140] Justice Scalia held that the prisoner's claim for damages and declaratory relief was not cognizable under § 1983, because the principal procedural defect complained of—exclusion of exculpatory evidence as a result of deceit and bias of the hearing officer—would, if established, necessarily have implied the invalidity of the deprivation of the good-time credits.[141] As in *Heck*, there was a concurrence, this time joined by three Justices, that expressed the view that some of the procedural defects were immediately cognizable under § 1983.[142] Similarly, in *Crawford v. Washington*,[143] Justice Scalia's opinion overruling *Ohio v. Roberts*[144] was joined by six Justices while Justices Rehnquist and O'Connor concurred on the basis that the judgment followed from *Roberts* without the need for overruling.[145] Again, in *Liteky v. United States*,[146] Justice Scalia's opinion on federal judges' recusal where their impartiality might be questioned was joined by four Justices, but Justice Kennedy's concurrence was joined by three.[147] Even though the concurrence agreed with the holding, Justice Kennedy said that "the Supreme Court's opinion announced a mistaken, unfortunate precedent."[148]

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138. *See infra* text accompanying notes 189–94.

139. These were coded by Berger after reviewing each opinion's syllabus. All unanimous opinions with concurrences were coded as deceptively unanimous.

140. 520 U.S. 641 (1997).

141. *Id.* at 648.

142. 520 U.S. at 649–50 (Ginsburg, Souter & Breyer, JJ., concurring).

143. 541 U.S. 36 (2003).

144. 448 U.S. 56 (1980).

145. *Id.* at 76 (Rehnquist, C.J., & O'Connor, J., concurring) (concluding that "[t]he result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases").

146. 510 U.S. 540 (1994).

147. *Id.* at 557 (Kennedy, Blackmun, Stevens & Souter, JJ., concurring in the judgment).

148. *Id.* Our subsequent analysis also changed the shape of the majority coalition in several most-cited cases that were not first categorized as unanimous. For example, *Lewis*, 518 U.S. 343, was initially categorized as an eight-to-one opinion, but our later analysis

D. Citation Rates by Jurisdiction and Level of Court

A Supreme Court opinion may be cited by a federal or state court at various levels of each jurisdiction. The opinion might be cited as horizontal precedent on a federal issue (binding as the earlier decision under *stare decisis*) by the Supreme Court itself; more commonly, the opinion would be cited as vertical precedent on a federal issue (binding as the higher decision under hierarchical principles) by a federal court of appeals, federal district court, or special federal court; or by a state supreme court or state lower court.

Table 5
Citations of Scalia-Authored Majority Opinions, by Jurisdiction Group

Jurisdiction	Citations	% of Citations
Federal Appeals (including SCOTUS)	85,420	16.73
Federal (all other)	352,971	69.11
State Supreme Courts	16,788	3.29
State Courts (all other)	55,486	10.86
Jurisdiction not recognized	40	0.01
Total	510,705	

More than 85% of the citations of Justice Scalia's opinions came from the federal courts. Citations by other Supreme Court cases were few (2759 or 0.54% of all citations), an expected result given *stare decisis* and the relatively few Supreme Court grants of certiorari each year. State courts at all levels were responsible for only about 14% of the citations to Justice Scalia's opinions.

VI. WHAT WE FOUND: THE DETAILS

Having broadly sketched the history of Justice Scalia's majority opinions in Part V, we describe in this Part our use of LexisNexis headnotes to explore when, whether, and how later judges or panels of judges might decide to select specific

indicated that the majority opinion was contested by three or more Justices voting against some part of it.

language to rely upon for their reasoning or decision in a particular rhetorical situation.

A. Coding: What Rhetorical Functions Might Be Identified by Analyzing the Language Captured in Headnotes?

We began by testing whether each headnote, derived as it was from the opinion's text, might be effectively analyzed on its own for evidence of rhetorical framing or structure. Given the emphasis placed on Justice Scalia's memorable writing style, our first approach to rhetorically analyzing the language used in the headnotes focused on the Justice's use of surface rhetorical devices such as vivid images or characterizations. Our more successful second approach relied on the common syllogistic structure of most legal arguments. Using a combination of the language selected by Justice Scalia (primarily, did it state a proposition that could be applied beyond the present case?) and the headnote's place in the argument structure (primarily, did it seem to lead to the holding and did it appear in the appropriate part of a conventional syllogistic form?), we classified each headnote as

- a preexisting rule,
- an argument or a step along the route to a rule, or
- a Scalia-crafted statement of a rule.

To further explain this classification within the framework of a syllogism, the same statement might be classified as an argument if it appeared as a "premise" or as a Scalia rule if it appeared as a "conclusion."[149]

To place the headnotes in the initial schema we outlined—preexisting rule, argument, and Scalia rule—we created a website where Professor Berger[150] could read through

149. See Appendix A for examples of our coding of representative headnotes. For illustrations of how the same statement might be classified as an argument or as a rule, see Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 819 (2002) (pointing out that opinions are not made up of individual syllogisms but instead are "chains of syllogisms . . ., in which the conclusions of syllogisms earlier in the chain supply the premises of syllogisms that are later in the chain").

150. When acting individually, the co-authors are referred to by last name.

preliminary information on each case[151] so that she understood the overall context of the opinion. She then read through the headnotes in sequence. The website stored Professor Berger's responses in a database, where they were collated with other data once complete. The website was created out of open-source tools[152] and was built in such a way that it could be used again with little or no modification by loading different data and/or a different set of questions. For a larger project, the website software could support multiple distinct user/evaluators, which would be helpful in determining inter-rater reliability. Because Professor Berger evaluated each headnote for this project, we could consider the entire set as an expression of her judgment and expertise. After several months, Professor Berger re-evaluated and made corrections to the initial coding. In all, Professor Berger coded 2,903 distinct headnotes, representing every headnote identified by LexisNexis in Justice Scalia's 282 majority opinions. Despite the challenges, these headnotes seemed likely to be our best opportunity to trace at least a skeletal rhetorical structure from 282 cases in fragmentary form across half a million citations and nearly three decades.

B. Hypothesizing and Testing: How Do Later Courts Choose Among "Arguments" and "Rules," and Between "Citing" or "Following" Precedent?

Having coded the headnotes as containing either an argument or a step along the route to a rule or a Scalia-crafted statement of a rule (and leaving aside the very small number of preexisting rules), we hypothesized about the rhetorical situations in which a later court might choose to rely on portions of a case represented by an argument headnote, a rule headnote, or (more likely) a combination of the two. Imagining the context within which a later court might be making these choices was necessary in order for us to begin to select from among the seemingly infinite number of potential computational analyses.

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151. The preliminary information was the syllabus containing a summary of the case, the holdings, and the votes. See Appendix A for examples.

152. The pages were written in PHP and utilized some JavaScript elements from Twitter Bootstrap. The database back-end was SQLite.

Generating these hypotheses helped shape our initial computations. An important note about the data to follow: each record of the citation of one case by another in the Shepard's data may contain a reference to one or more headnotes. These are the elements of the cited case (in this case, Justice Scalia's majority opinion) that LexisNexis determined were at issue in the citing case.[153] The headnote numbers themselves are those from the original case being cited (that is, Justice Scalia's opinion). If LexisNexis determined that a citing case invoked principles covered by more than one headnote in the original case, multiple headnotes may be listed. Therefore, a "headnote-citation" in our data is properly understood as a citation, with a headnote attached by Lexis to help specify the areas of the opinion that were invoked when the citing case cited it. The citing case does not specify the original case's headnote explicitly. Since our analysis of "rules" will eventually analyze the language used in individual headnotes, they must be disaggregated first. In disaggregated data, each entry (which we are calling here a "headnote-citation") represents one headnote invoked by one citing case. If a citing case was deemed to have invoked three headnotes when it cited Justice Scalia's opinion, then it appears in the disaggregated data three times (once for each headnote); similarly, if no headnotes were associated with a case's citation of Justice Scalia's opinion, then that case does not appear in the disaggregated data at all. The 510,705 citations in our dataset yield 794,060 headnote-citations when disaggregated.

Of the 2903 headnotes extracted from Scalia-authored majority opinions that Professor Berger evaluated, 1890 (65.1%)

153. As already noted, Westlaw and LexisNexis prepare their headnote texts differently. They also use different systems for assigning their headnotes to particular classifications, as well as different algorithms for linking the headnotes in the original opinion to the citing references. According to one researcher, "the text of the headnote of the Shepardized case is compared algorithmically with language from the citing cases to identify references (within the citing case) that match the language of the LexisNexis headnote within the Shepard's report." Mart, *Curation*, *supra* note 78, at 21 (endnote omitted). According to this author, Westlaw relies on human editing to assign headnotes to a point in its classification system, while "LexisNexis relies primarily (although not exclusively) on algorithms to assign a headnote to a topic in the classification scheme." *Id.* at 18, 21. But "both systems use algorithms to link headnotes to matching headnotes in citing references, although the algorithms are different." *Id.* at 21. All this matters because researchers using different search engines will get different results.

were deemed to represent "arguments," 241 (8.3%) represented "preexisting rules," and 772 (26.6%) represented "Scalia rules." Note that not all headnotes were actually found in headnote-citations. Only 757 distinct "Scalia rule" headnotes, 1828 distinct "argument" headnotes, and 140 "preexisting rule" headnotes appeared in headnote-citations. When we looked at citation patterns broadly, the headnotes referring to opinion language that we categorized as "Scalia rules" were cited more frequently: they represented 42.91% of headnote-citations despite being just 26.9% of all headnotes.

TABLE 6
Headnotes and Headnote-Citations, by Berger Rule Categorization

Type	# of HNs	% of HNs	# of HN-Cites	% HN-Cites
Argument	1890	65.11	448,748	56.51
Scalia Rule	772	26.59	340,718	42.91
Preexisting	241	8.3	4589	0.58

The single most frequently invoked headnote-citation, with 18,280 appearances, was Headnote 10 from *Heck*,[154] categorized in our rhetorical analysis as a "Scalia rule."[155] This headnote-citation was invoked 5,000 more times than the next most-cited

154. 512 U.S. 477.

155. Headnote 10 is an unusually long headnote that sums up the general rule of *Heck*:

> In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a 42 U.S.C.S. § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C.S. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under 42 U.S.C.S. § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

See text accompanying notes 192–97, *infra*, for discussion of the rhetorical effect of this headnote.

one. The top ten headnote-citations by usage were split evenly between arguments and Scalia rules.[156]

As noted earlier, when examined as a whole, opinion language characterized as falling into Scalia-rule headnotes was cited much more frequently than opinion language characterized as falling into argument headnotes.[157] The mean number of headnote-citations for Scalia-rule headnotes was 450.09, while the mean for argument headnotes was 245.49, and the medians, respectively, were ninety-two and fifty-four.[158] In other words, later courts relied on Scalia rules much more often than they cited the language we coded as arguments.

Substantial variation was found from case to case. When a later judge (or panel of judges) relied on a majority opinion written by Justice Scalia, it was very likely that the later author would cite both arguments and rules from the prior opinion. Which arguments and rules, how many, and the way in which the reliance was expressed were questions we wished to explore further.

The headnote citations for a truly "average" Scalia majority opinion, should one exist, would be about 56% of the argument type, about 43% of the Scalia-rule type, and perhaps a smattering of preexisting ones. A few of our most-cited cases (mentioned in Table 1 above) can serve as examples.

For instance, *Wilson v. Seiter*[159] had 33,933 individual headnote-citations: that means among all the citations, from

156. Our rhetorical analysis of some of the most-cited headnotes can be found in Part VII. *See infra* text accompanying notes 170–227.

157. Remember that the later judges are not citing the headnotes themselves, but instead are citing the language of the opinion (which often includes citations to earlier authorities). LexisNexis has excerpted the language and designated it as a headnote, and we have characterized that language as an "argument" or as a "Scalia rule."

158. Scalia-rule headnotes, number of headnote-citations:

- Mean: 450.0898
- 1st quartile: 27
- Median: 92
- 3rd quartile: 302.

Argument headnotes, number of headnote-citations:

- Mean: 245.4858
- 1st quartile: 15
- Median: 54
- 3rd quartile: 167.

159. 501 U.S. 294).

courts at all levels, LexisNexis determined that the citing court was discussing a part of the *Wilson* opinion represented by a specific headnote this many times. Of those later citations, 17,891 were citations to the "argument" headnotes in *Wilson* (52.7%), and 16,042 were citations to the Scalia-rule headnotes in *Wilson* (47.3%). This is reasonably close to the proportions a statistically "average" case might have.

By contrast, other highly cited cases revealed different patterns. *Heck* had 36,242 headnote-citations, but only 26.7% of them (9673) were of the argument type, while 72.9% (26,410) were Scalia rules. In *Heck*, therefore, the Scalia rules were cited by later courts much more often than the other headnotes, and more than would be the case in an average Scalia opinion. Two factors may have influenced this citation pattern. First, as noted earlier, the decision in *Heck* was deceptively unanimous, and its concurrences foreshadowed a continuing dispute. Second, as will be discussed in Part VII, the general rule stated in the *Heck* majority opinion appeared to hold rhetorical appeal for later judges no matter what their reasoning and judgment in a later dispute.

Some cases among Scalia's most cited opinions illustrated the opposite pattern. In *Blakely v. Washington*,[160] the argument headnotes made up 88.9% of the case's headnote-citations (30,903 headnote-citations) while the case's Scalia-rule headnotes accounted for just 11.1% of the headnote-citations (3851). *Blakely* extended a Sixth Amendment right to mandatory sentencing guidelines under state law, but it specifically addressed Washington's sentencing scheme. In this rhetorical situation—where the state courts in many other individual jurisdictions were left to grapple with and reason their way through the meaning or application of *Blakely* to the context of their particular state laws—it makes sense that subsequent decision makers would be citing more argument headnotes than rule headnotes from *Blakely*. The explanations of these later judges would necessarily be more extended than those of judicial authors who simply follow the governing rule from an earlier opinion because the precedent case is so similar to the situation before them. These differentiations suggest that the

160. 542 U.S. 296.

influence of Justice Scalia's majority opinions depended not only on the rhetorical construction of his opinions and his rhetorical framing of the rules but also on the rhetorical situation in which the later judge found herself.

C. Rule-to-Argument Citation Patterns

Given variations from one case to another in patterns of citation, the next question we addressed was whether these variations could be linked to the jurisdiction and level of court or to the reported or unreported status of the court's opinion.

1. Court Characteristics

a. Type of Court: Federal or State

If the headnote-citations are grouped by jurisdiction, do we see any differences? The table below compares the rule types of headnote-citations from citing cases originating in federal and state courts, respectively.

Table 7
Headnote-Citations with Rule Types, by Type of Jurisdiction

Jurisdiction	Rule Type	HN-Cites	% of Jurisdiction	Difference: Average of All
Federal	Argument	381,531	56.97	+0.46
Federal	Scalia Rule	283,757	42.37	-0.54
Federal	Preexisting	4402	0.66	+0.08
State	Argument	67,217	54.05	-2.46
State	Scalia Rule	56,961	45.8	+2.89
State	Preexisting	187	0.15	-0.43

Recall that Table 6 showed the average headnote-citations for all jurisdictions: 56.51% for argument headnotes and 42.91% for Scalia-rule headnotes. And recall that Scalia-rule headnotes were cited more often than their frequency (26.59%) and argument headnotes substantially less often (65.11%). Table 7 indicates that the relative distributions for all federal and all state courts were fairly close to the norm and fairly close to one another. Because, as Table 5 shows, by far the majority of citations to Scalia majority opinions came from federal courts (85%), it is not surprising that the percentages for the federal

courts closely matched the baseline. The largest difference appeared to be the increased proclivity of federal courts over state courts to use argument headnotes (57% to 54%). In contrast, state courts cited the opinion language excerpted as what we have categorized as Scalia-rules headnotes somewhat more often than did federal courts (46% to 42%). These differences might be explained by state courts' tending more frequently to encounter situations in which they can simply apply rules rather than engage in the kind of more detailed reasoning that requires the citation of arguments and rules.

More interesting, however, is the difference in the argument-to-rule selection rates for the federal and state courts. In most situations, later courts decided to cite both argument and rule headnotes. Table 7 indicates that federal courts chose to rely on argument headnotes 57% of the time and Scalia-rule headnotes 42% of the time (that is, they selected opinion language representing arguments 15% more often than they selected rule headnotes), while state courts chose to rely on argument headnotes 54% of the time and Scalia rule headnotes 46% of the time (about 8% more often). A greater reliance on argument headnotes—recognizing that the judicial author is likely relying on both—may indicate that the author is engaging in more explanation and exposition.

b. Type of Court: Levels of Federal and State Courts

The next table shows differences with somewhat more finely divided jurisdiction information. Recall that Table 6 showed that across the whole dataset, 56.51% of headnote-citations are argument type, and 42.91% are Scalia-rule type.

As Table 8 demonstrates, the Supreme Court was the least likely to cite opinion language we categorized as "Scalia rules." When an earlier Scalia majority opinion is cited in the Supreme Court, the reason most likely is that the issue has been raised again and so the opinion authors would be more likely look to the arguments from the prior opinion rather than to the rules. At the other end of the spectrum, state supreme courts cited Scalia-rule headnotes in greater proportion than any other jurisdictional group. Although not reflected in this table, we found little

difference in citation rates between the federal courts of appeals and the federal district courts.

Table 8
Headnote-Citations with Rule Types, by Jurisdiction Groups

Jurisdiction	Rule Type	HN-Cites	% of Jurisdiction	Difference from Average
SCOTUS	Argument	2501	62.68	+6.17
SCOTUS	Scalia Rule	1438	36.04	-6.87
SCOTUS	Preexisting	51	1.28	+0.7
Other Federal	Argument	379,030	56.94	+0.43
Other Federal	Scalia rule	282,319	42.41	-0.5
Other Federal	Preexisting	4351	0.65	+0.07
State Supreme	Argument	15,871	52.69	-3.82
State Supreme	Scalia Rule	14,192	47.12	+4.21
State Supreme	Preexisting	54	0.18	-0.4
State	Argument	51,346	54.48	-2.03
State	Scalia Rule	42,769	45.38	+2.47
State	Preexisting	133	0.14	-0.44

Again, the most striking difference in the argument-to-rule selection gap is between the jurisdictions. The Supreme Court cited argument headnotes 62.68% of the time and Scalia-rule headnotes only 36.04% of the time, favoring argument headnotes by a difference of 27% (in contrast to the difference of 13.6% for all jurisdictions). The argument-over-rule difference for all other federal courts was 15%, and the difference for the two levels of state courts was under 10%.

c. Type of Court: Geography and Controlling Circuit

The preceding tables indicate that although substantial variation in the citation use of argument headnotes and Scalia-rule headnotes might exist from one case to another, the average proportions generally remained within a few percentage points of each other when aggregated on a national level. Table 9, which appears on the following page, shows notable geographic variation in citation practice.

In Table 9, which shows only the Scalia-rule figures for clarity, all courts were grouped by the federal court of appeals that is controlling in their states and territories. (The Ninth

Circuit group, for example, contains both the federal district courts in the Ninth Circuit and the state or territorial courts of each state and territory within the geographic boundaries of the Ninth Circuit.) Those courts with nationwide jurisdiction, such as the Supreme Court and special-purpose courts for patents, military justice, and so on, are in the "National Courts" group. The highest and lowest percentages have been bolded, and because it may be helpful to recall that the average percentage of headnote-citations to Scalia rules for all courts combined is 42.90%, Table 9 shows that figure as well.

Table 9
Headnote-Citations for Scalia Rules Only, by Controlling Circuit

Controlling Circuit	HN-Cites	% of Circuit
Ninth	69,907	**38.56**
Third	27,885	42.01
First	9504	42.64
Eighth	17,540	42.81
Overall Average		*42.90*
Eleventh	25,918	43.42
Tenth	19,211	43.70
Fifth	32,088	44.07
National Courts	5546	44.27
DC	8642	44.86
Seventh	24,548	45.04
Fourth	26,492	45.06
Sixth	42,361	45.08
Second	31,076	**45.97**

The highest proportion of headnote-citations came from cases in the geographic region of the Second Circuit, which includes New York. This figure was certainly above the overall federal court average of 42.37%, but was under the 47.12% for state supreme courts nationally. At the other end, it is striking how much lower the figure for use of Scalia rules was for state and federal courts in the Ninth Circuit. The only comparably low jurisdiction was the Supreme Court itself, at 36.04%, which is shown in Table 8.

2. Reported or Unreported Status

Judges might be expected to follow different writing practices when they are working on opinions that they know will be unreported. Unreported opinions exist as records of the decisions in the cases that they decide—and they are readily accessible on electronic databases—but their precedential value is limited, at least in federal courts.[161] For any opinion issued on or after January 1, 2007, under Federal Rule of Appellate Procedure 32.1(a), attorneys practicing in any federal court may freely cite to a federal judicial opinion or other written disposition that has been designated by the issuing court as "unpublished," "not for publication," "non-precedential," "not precedent" or anything similar. Before this rule was enacted, the local rules of the federal courts of appeals typically restricted or even prohibited the citation of unpublished opinions in court filings.

In the early days of the practice, "unreported" opinions not only had no precedential value, they were difficult to find. LexisNexis and Westlaw began to offer them for view, and since 2001, unreported opinions from the federal courts of appeals have also been published in the *Federal Appendix*.[162] Given their existence in Lexis without a traditional reporter citation or in the *Federal Appendix*, we were able to distinguish "unreported" opinions in our dataset in two ways: (1) if they appeared in the *Federal Appendix* or (2) if the first citation in the Shepard's report, which is supposed to be the primary one, is a "LEXIS" citation, indicating that there are no more-traditional reporter citations to be had. In Table 10 below, we consider a

161. For discussion of the history and continuing controversy, see, for example, Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001); Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683 (2018); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Scott Rempell, *Unpublished Decisions and Precedent Shaping: A Case Study of Asylum Claims*, 31 GEO. IMMIGR. L.J. 1 (2016).

162. According to Thomson Reuters, the *Federal Appendix* "is a federal case law reporter series in West's® National Reporter System® . . . [that] covers opinions and decisions from 2001 to date issued by the U.S. courts of appeals that are not selected for publication in the *Federal Reporter*." *See Federal Appendix (National Reporter System)*, THOMSON REUTERS (n.d.), https://store.legal.thomsonreuters.com/law-products/Reporters/Federal-Appendix-National-Reporter-System/p/100000796.

case to be unreported if it meets either of those criteria, and treat any case that fails to satisfy either as "reported" in a recognized reporter.

Table 10
Headnote-Citations with Rules, by Reporting Status

Rule Type	HN-Cites Reported	% Reported	HN-Cites Unreported	% Unreported
Argument	145,141	56.27	303,607	56.63
Scalia Rule	110,500	42.84	230,218	42.94
Preexisting	2295	0.89	2294	0.43

A first glance at Table 10 suggests that, examined broadly, reported and unreported cases use the different types of headnotes in much the same way. The sheer number of headnote-citations in unreported opinions is also quite striking, reflecting the large number of unreported cases generally. When reported and unreported cases are distinguished according to jurisdictional groups, however—as in Table 11 below—the data suggest important differences in practice at different court levels. (The percentage of each reported and unreported court-type grouping that used Scalia rules is bolded, to aid in visual comparison.)

Table 11
Headnote-Citations with Rules and Reporting Status, by Jurisdiction Group

Jurisdiction	Rule Type	HN-Cites, Reported Cases	% Reported, Court Type	HN-Cites, Unreported Cases	% Unreported, Court Type
Fed. Appeals	Argument	46,283	58.85	27,149	54.03
Fed. Appeals	Scalia Rule	31,467	**40.01**	22,848	**45.47**
Fed. Appeals	Preexisting	902	1.15	254	0.51
Fed. Other	Argument	60,481	57.37	247,618	56.88
Fed. Other	Scalia Rule	43,690	**41.44**	185,752	**42.67**
Fed. Other	Preexisting	1256	1.19	1990	0.46
St. Supreme	Argument	147,54	52.38	1117	57.11
St. Supreme	Scalia Rule	13,355	**47.42**	837	**42.79**
St. Supreme	Preexisting	52	0.18	2	0.10
St. Other	Argument	23,623	51.70	27,723	57.10
St. Other	Scalia Rule	21,988	**48.12**	20,781	**42.80**
St. Other	Preexisting	85	0.19	48	0.10

In the federal courts of appeals, the judges writing opinions that would be unreported cited significantly more Scalia rules and significantly fewer argument headnotes than when they were writing opinions in reported cases.[163] When federal appellate judges were writing opinions that would be reported, they cited the argument headnotes at a rate 18% higher than their citations of Scalia-rule headnotes, while the gap between argument headnotes and rule headnotes in unreported opinions was about half as much. This difference might be explained because judges writing opinions that they know will be reported—and that therefore will have precedential value—will take more time to justify their decisions. As part of the decisionmaking and opinion-writing process, they may include more of the reasoning from the majority opinion that they are relying on, resulting in more citations of argument headnotes as well as citation to the rules.[164]

D. Cite-to-Follow Citation Patterns

If Justice Scalia's influence were directly linked to the rhetorical construction of his opinions, we might expect to find the clearest links in cases where his opinion was followed by the later court. In those cases, the rule or the argument has a discernible effect on the outcome, that is, the later judge "follows" it rather than simply re-stating the rule or the argument with implicit approval. Most citations in a Shepard's report are notes that the case was cited by the later opinion. Indeed, of the 510,705 distinct citations in our dataset, 75% are labeled as "Cited" and nothing more (384,410, or 75.27%), and nearly 80% of the citations in the data at least include the "Cited" label (408401, or 79.97%). If we include variations[165]

163. In the federal courts of appeals, decisions generally are made by panels, but the opinions are presented as if they have been written by individual judges. We use "significantly" here not in the statistical sense but in its ordinary meaning.

164. In contrast to the relatively uniform, although controversial, federal practices regarding nonprecedential cases, the rules and practices for unreported or unpublished cases at the state level are inconsistent and confusing. Lauren S. Wood, Comment, *Out of Cite, Out of Mind: Navigating the Labyrinth that Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561 (2016).

165. Again, the category included "Followed" as well as "Followed in Concurring" and "Followed by Questionable Precedent."

and those cases that have multiple labels identified, 94,490 citations included the "Followed" label in some form, which is 18.5% of the total number of citations.

1. Court Characteristics

When we grouped the citations by jurisdiction group first, then examined patterns of Following or Citing, we found some differences. (Note that other types of treatment are ignored in Table 12 below.)

Table 12
Citation Treatment of Scalia Opinions Among Different Jurisdiction Groups

Jurisdiction	All Citations	Follow* Citations	% Follow	Cited-Only Citations	% Cited-Only
Fed. Appeals	85,420	13,668	16	61,971	72.55
Fed. Other	352,971	69,967	19.82	269,685	76.4
St. Supreme	16,788	3069	18.28	10,537	62.77
St. Other	55,486	7786	14.03	42,217	76.09

According to these data, the federal courts of appeals followed Justice Scalia's Supreme Court majority opinions 16% of the time, compared with 20% for federal district courts. This may suggest that the judges who make up the panels in the federal courts of appeals—given that they generally are the recipients of more briefs and have greater resources and more time to devote to the individual case—exercised their discretion somewhat differently than did federal district judges. A decision to cite rather than to follow an earlier opinion may indicate that the earlier opinion will be one of several to be discussed before a more independent decision is reached rather than the one whose decision is to be followed.

2. Reported or Unreported Status

Table 13 below examines the same data with additional attention to the reported status of the case. Here, we found that the federal courts of appeals were slightly more likely to "follow" a Scalia opinion if the citing case was reported. This difference is much more pronounced, however, in state lower courts and state supreme courts.

Table 13 Following Citations, by Jurisdiction, Including Reported and Unreported					
Jurisdiction	**Citations, Reported/Unreported**	**Follow*, Reported**	**% Follow, Reported**	**Follow, Unreported**	**% Follow, Unreported**
Fed. Appeals	48,189/37,231	8175	16.96	5493	14.75
Fed. Other	64,216/288,755	12,455	19.4	57,512	19.92
St. Supreme	15,245/1543	2917	19.13	152	9.85
St. Other	25,424/30,062	4741	18.65	3045	10.13

E. Effects of Majority Coalitions

As explored above in Part V, the size and shape of the majority coalition may have an effect on the rate at which a case is cited. In the corpus of Justice Scalia's majority opinions, for example, what Professor Berger labeled as "deceptively unanimous" cases were 20.28% of cases, but 26.83% of citations. Similarly, "contested-majority" opinions were 35.59% of cases, but 40.25% of citations.[166] Table 14 breaks out these voting-coalition categories by the four jurisdiction groups and compares how cases from courts in each group differ from the percentage of citations attributable to each voting coalition when citations are considered without reference to court level.

1. Court Characteristics

Table 4 showed that the frequency of citations for deceptively unanimous opinions (26.83%) outstripped their distribution among Scalia majority opinions (20.28%).[167] The same was true of the frequency of citations for Scalia contested-majority opinions (40.25%) compared with their distribution among his majority opinions (35.59%). But the opposite was true—fewer citations than percentage of total opinions—for truly unanimous and strong majority opinions. Thus, Table 14 below suggests that while the over-representation of deceptively unanimous and contested majority opinions affects all levels of courts, the relatively higher than expected citation rates for deceptively unanimous opinions were linked to the federal

166. *See* Table 4, *supra* page 266.

167. *See* text accompanying notes 134–48, *supra*.

district courts while the relatively higher than expected citation rates for contested majority opinions were linked to the federal courts of appeals (as well as to the state courts). One possibility for the very high rates of citation in the state courts is that the issues that resulted in those cases being decided by contested majorities were so controversial that they remained hotly contested for at least several years after the decisions were made.

Table 14
Citations by Jurisdictional Group to Cases with Varying Voting Coalitions, Scalia-Authored Majority Opinions[168]

Jurisdiction	Majority Coalition	Citations	% of Jurisdiction	Difference From Average for Majority Type in All
Fed. Appeals	Truly unanimous	10,886	12.74	-1.45
Fed. Appeals	Deceptively unanimous	20,234	23.69	-3.14
Fed. Appeals	Strong majority	17,630	20.64	+1.91
Fed. Appeals	Contested majority	36,558	**42.8**	**+2.55**
Fed. Other	Truly unanimous	55,063	15.6	+1.41
Fed. Other	Deceptively unanimous	99,621	28.22	+1.39
Fed. Other	Strong majority	68,389	19.38	+0.65
Fed. Other	Contested majority	129,374	**36.65**	**-3.6**
State Supreme	Truly unanimous	1715	10.22	-3.97
State Supreme	Deceptively unanimous	3967	23.63	-3.2
State Supreme	Strong majority	2834	16.88	-1.85
State Supreme	Contested majority	8252	**49.15**	**+8.9**
State Other	Truly unanimous	4702	8.47	-5.72
State Other	Deceptively unanimous	13,018	23.46	-3.37
State Other	Strong majority	6636	11.96	-6.77
State Other	Contested majority	31,120	**56.09**	**+15.84**

168. As discussed earlier,

- Deceptively unanimous opinions are unanimous opinions with concurrences,
- Strong majority opinions are opinions with one or two Justices dissenting or failing to join the full majority opinion, and
- Contested majority opinions are opinions with three or more Justices dissenting or failing to join the full majority opinion.

Another study found higher than expected citation rates at the Supreme Court for so-called "doctrinal paradoxes" (where every rationale is rejected by a majority) but those higher citation rates were not repeated in the federal courts of appeals or the federal district courts. Hitt, *supra* note 65, at 67–68.

2. Reported or Unreported Status

The voting coalition on Scalia-authored opinions might also be expected to have an impact on whether an opinion is cited in cases that are reported or unreported.

Table 15
Majority Coalition on Scalia Opinion,
Citations by Reported/Unreported Status

Majority Coalition	Reported Citations	% Reported Citations	Unreported Citations	% Unreported Citations
Truly unanimous	23,784	15.53	48,589	13.59
Deceptively unanimous	32,560	21.27	104,280	29.16
Strong majority	30,646	20.02	64,872	18.14
Contested majority	65,812	42.98	139,496	39.01
Uncategorized	307	0.2	359	0.1
Total	153,109		357,596	13.59

Next, we might add to our analysis a finer breakdown by jurisdictional groupings of the citing courts. Comparison of Table 15, above, with Table 16, below, suggests the degree to which courts in different jurisdictions might make differential use of precedent depending on both the voting coalition in the precedential case and the reporting status of the case citing that precedent. For example, contested-majority opinions represent about 39% of all citations by unreported cases. However, in the case of the federal courts of appeals, those contested-majority cases represent almost 45% of citations by unreported cases, suggesting a willingness for judges who are deciding an unreported case to use precedent that was decided on a contested vote.

In Table 16, we compare three factors that may impact citations of any particular opinion: the jurisdiction level, the makeup of the original case's voting coalition, and the reported or unreported status.[169] Again, what stands out is the state courts' high rates of citation to contested-majority cases.

169. A handful of citing cases are missing information for analysis in one of these three categories, so any citing case without all elements is left out. The percentages are calculated from the total of citing cases for which all information is known, hence the totals in the table.

Table 16
Citations by Voting Coalition, Jurisdiction Group, and Reported/Unreported Status

Jurisdiction	Majority Coalition	Reported Citations	% Jurisdiction (Reported)	Unreported Citations	% Jurisdiction (Unreported)
Fed. Appeals	Truly unanimous	7788	16.2	3098	8.32
Fed. Appeals	Deceptively unanimous	10,372	21.57	9862	26.49
Fed. Appeals	Strong majority	10,078	20.96	7552	20.29
Fed. Appeals	Contested majority	19,844	41.27	16,714	44.9
Total		**48,082**		**37,226**	
Fed. Other	Truly unanimous	11,936	18.64	43,127	14.95
Fed. Other	Deceptively unanimous	12,663	19.77	86,958	30.15
Fed. Other	Strong majority	14,491	22.63	53,898	18.69
Fed. Other	Contested majority	24,951	38.96	104,423	36.21
Total		**64041**		**288,406**	
St. Supreme	Truly unanimous	1629	10.7	86	5.57
St. Supreme	Deceptively unanimous	3650	23.97	317	20.54
St. Supreme	Strong majority	2602	17.09	232	15.04
St. Supreme	Contested majority	7344	48.24	908	58.85
Total		**15,225**		**1543**	
St. Other	Truly unanimous	2426	9.54	2276	7.57
St. Other	Deceptively unanimous	5875	23.11	7143	23.76
St. Other	Strong majority	3449	13.57	3187	10.6
St. Other	Contested majority	13,669	53.77	17451	58.06
Total		**25,419**		**30,057**	

3. Rule-to-Argument Ratio by Voting Coalition

Our interest in the impact of voting coalitions on subsequent citations might also extend to look at whether particular parts of the cases are cited more or less frequently depending on the vote in the original case. A look at the headnote-citations classified by the type of rule they presented suggests that the shape of the voting coalition of the original case may play a role in what parts of it are used by subsequent courts.

Table 17
Rule Types by Type of Voting Majority on Scalia Opinion

Majority Coalition	Rule Type	HN-Cites	Rule % of Coalition	Difference From Average for all HN-Cites
Truly unanimous	Argument	58,414	63.3	+6.69
Truly unanimous	Scalia Rule	33,146	35.92	-6.99
Truly unanimous	Preexisting	727	0.79	+0.21
Deceptively unanimous	Argument	100,892	46.35	-10.26
Deceptively unanimous	Scalia Rule	116,208	53.38	+10.47
Deceptively unanimous	Preexisting	583	0.27	-0.31
Strong majority	Argument	78,441	52.23	-4.38
Strong majority	Scalia Rule	71,107	47.34	+4.43
Strong majority	Preexisting	647	0.43	-0.15
Contested majority	Argument	210,680	63.16	+6.55
Contested majority	Scalia Rule	120,257	36.05	-6.86
Contested majority	Preexisting	2632	0.79	+0.21

As can be seen in Table 17 above, Scalia rules were cited more often when they were found in deceptively unanimous opinions. The same phenomenon was visible with Scalia rules emerging from opinions that had a strong but not unanimous voting coalition. By contrast, "arguments" were cited more frequently both when they emerged from opinions that were truly unanimous as well as from opinions that were decided by a contested majority. Possible explanations for these findings await further analysis.

VII. THE INTERPLAY OF RHETORICAL FRAMES, MAJORITY COALITIONS, AND CITATIONS OVER TIME

So far, we have been focusing on one rhetorical function played by the language excerpted in a headnote: What role did the language play within the rhetorical framework of the syllogism put together by Justice Scalia? From the beginning, we assumed that the language of Justice Scalia's opinions influenced the choices made by later judges in ways not captured by this question. By engaging in rhetorical analysis of

the most-cited headnotes (a bit of reverse engineering), we identified some additional potential sources of influence.[170]

A. The Rhetoric of the Rule Statement

Much has been written about whether Supreme Court Justices prefer to state the conclusive principles that summarize their decisions in the form of rules or standards.[171] Opinions establishing newly discovered bright-line *rules* are sometimes linked to so-called maximalist Justices, and opinions revolving around more flexible and incremental *standards* are thought to be produced by more minimalist decision makers.[172] Whatever purpose rules and standards serve for the authoring Justice, our focus was on how the difference might affect the choices made by later judges as they write their own opinions.

Justice Scalia was known as a proponent of rules rather than standards, and our rhetorical analysis of his most-cited opinion language (represented by the top fifty most-cited headnotes) supported this characterization. Recognizing the

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170. The top fifty most-cited headnotes included multiple headnotes from almost all the top eleven most-cited or most-followed cases (among them *Heck*, *Lujan*, *Crawford*, *Blakely*, *Lewis*, *St. Mary's*, *Wilson*, *Ylst, Anderson*, and *Liteky*), plus one or more headnotes each from well-known opinions including *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2014) (finding the definition of violent felony in the Armed Career Criminal Act to be unconstitutionally vague); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, (1997) (holding that Title IV's prohibition against discrimination because of sex applies when the harasser and the harassed employee are of the same sex); and *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (holding that a guerrilla organization's attempt to coerce a person into performing military service is not necessarily persecution on account of political opinion).

171. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 104 (1991); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Sullivan, *supra* note 30.

172. *See* Sunstein, *supra* note 24. The simplest distinction between rules and standards is the extent to which the content of the "law" is determined in advance, rules being the most predetermined. Kaplow, *supra* note 171, at 559. Professor Sullivan places rules and standards on a continuum depending on the "relative discretion they afford the decision maker. . . . A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." In comparison, a "legal directive is 'standard'-like when it tends to collapse decision making back into the direct application of the background principle or policy to a fact situation." For example, the constitutional law debate between categorical rules and balancing tests is the debate between rules and standards. Sullivan, *supra* note 30, at 58–62.

impossibility of precisely applying the definitions of rules and standards, we undertook a broad-brush analysis. That analysis indicated nearly thirty of his fifty most-cited headnotes were stated in the form of rules,[173] while only twelve qualified as standards, with the remainder falling outside either category. From the perspective of the later judge, a precedent stating a bright-line rule might seem the better choice because the rule appears to more readily resolve the issue and to be more easily applied. On the other hand, even though a more flexible standard might not so clearly resolve the issue, the later judge might prefer it because it affords her more discretion.

The difficulty of distinguishing rules from standards, and the complex ramifications for subsequent citations by later courts, are illustrated by Justice Scalia's discussion in *Anderson v. Creighton*.[174] The Court held there that a plaintiff could defeat a qualified-immunity defense to an action based on a constitutional tort only if the constitutional right was "clearly established" at the time of the government official's violation of the right.[175] The "clearly established" language likely was chosen in an effort to limit unnecessary litigation. But what does "clearly established" mean? The opinion went on to say that it "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" and that "in the light of pre-existing law the unlawfulness must be apparent."[176] But explanations like these are difficult to apply to later facts without concrete examples. As a result, even rules intended to limit debate may generate more, rather than less, litigation as well as more frequent references simply citing the original opinion rather than following its rules.[177]

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173. This includes so-called decision rules. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (categorizing as decision rules the Court's judicial directions about how courts should decide whether operative rules have been satisfied).

174. 483 U.S. 635.

175. *Id.* at 638–39.

176. *Id.* at 640.

177. As in the *Anderson* example, it is not surprising that a rule requiring petitioning prisoners to show that prison officials had engaged in the "unnecessary and wanton" infliction of pain or had exhibited "deliberate indifference" to "serious" medical needs did not put an end to litigation over cruel and unusual punishment of those convicted of crimes. Wilson v. Seiter, 501 U.S. 294, 303–04 (1991). After *Wilson*, beyond the need for further litigation to clarify the application of the standard, debate also continued over whether an

Perhaps more important to the lower-court opinion writer is the rhetorical usefulness of Justice Scalia's rule statements within the conventional format of judicial opinion writing. Judging by his most-cited headnotes, Justice Scalia's majority opinions provided a ready source of general-rule frameworks, which are essential to that format. Judicial opinion writers invariably begin their analyses by stating and citing to the most general rule that governs the issue before the court. For complex issues, what's often most helpful to the current opinion writer is to find that an earlier author has created an entire rule framework, one that provides a visual collection and restatement in convenient and capsule form of the entire structure of the analysis, together with a corresponding series of statutory and case citations that add visual and rhetorical weight. The mere statement of such a rule framework boosts the credibility of the original and subsequent opinion authors. When he was able to provide organized and memorable rule frameworks on legal issues that would recur, Justice Scalia ensured that his opinions would be looked to as sources of authority in the future.

From the opinion-writing point of view, lower-court judges likely welcomed this familiar aspect of Justice Scalia's approach to precedential construction.[178] For example, the most-cited headnote in *Lujan*[179] is a broad general rule that significantly narrows many plaintiffs' pathways to litigation. The rule's phrasing underlines its potential usefulness to the federal judge who must decide whether a range of plaintiffs have established standing, the essential first step to remain in court:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains

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objective or subjective standard was appropriate in the first place. *See, e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018).

178. As Professor Sullivan succinctly summarized Justice Scalia's approach to precedential construction:

> [F]irst, state the general rule; second, rationalize the existing messy pattern of cases by grandfathering in a few exceptions and doing the best you can to cabin their reach; and third, anticipate future cases in which the rule might be thought problematic and dispose of them in advance by writing sub-paragraphs and sub-sub-paragraphs qualifying the rule with clauses beginning with "unless" or "except."

Sullivan, *supra* note 30, at 87.

179. 504 U.S. 555.

> three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized, see *id.*, at 756; Warth v. Seldin, 422 U.S. 490, 508, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-741, n. 16, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Whitmore, *supra*, at 155 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.[180]

This three-step analytical framework is neatly packaged and numbered, and Justice Scalia's word choices seemingly apply to a broad range of plaintiffs. They limit every potential plaintiff's opportunity to stay in federal court because the minimum for standing is not only a high bar, it is an "irreducible" one: the injury must be "concrete and particularized" as well as "actual or imminent"; it must be linked to the defendant; and it must be "likely" that the injury will be redressed by a favorable decision.

As *Lujan* illustrates, general-rule statements may be most valuable to the later opinion writer when they are phrased broadly, but framed to lead to a particular result. Phrased in that manner, general-rule statements are set free from the facts of the immediate case and can be applied to very dissimilar circumstances. Moreover, the categories constructed and the definitions provided lead to predetermined outcomes rather than remaining open to interpretation.

Scott v. Harris,[181] the controversial ruling based on the Justices' viewing of a videotape of a police chase, is another example. In the majority opinion Justice Scalia described the

180. *Id.* at 560–61 (footnote omitted).

181. 550 U.S. 372 (2007).

pursuit that left a criminal defendant permanently disabled very differently from the version of the facts that the court below had accepted as true.[182] Despite the unusual circumstances, the language captured in *Scott*'s most-cited headnote is phrased as a broad general rule. It could apply to any summary judgment motion in which the judge is able to decide that one version of the facts is "blatantly contradicted by the record":[183]

> At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.[184]

Judging by the most-cited headnotes, later opinion writers also found Justice Scalia's statements of policy to be attractive, perhaps on the same basis as the general propositional rules exemplified by *Lujan* and *Scott*. These policy pronouncements similarly were framed in a manner that led to a favored

182. *Id.* at 379–80. Despite the majority's conclusion, the interpretation of the facts in Scott might have been found to be very much in contention. *See id*. at 389–97 (Stevens, J., dissenting).

183. *Id.* at 380.

184. *Id.* at 380.

conclusion, as shown by the most-cited headnote in *Kokkonen v. Guardian Life Insurance*:[185]

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. 131, 136-137, 117 L. Ed. 2d 280, 112 S. Ct. 1076 (1992); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986), which is not to be expanded by judicial decree. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. Bank of North-America, 4 U.S. 8, 4 Dall. 8, 11, 1 L. Ed. 718 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183, 80 L. Ed. 1135, 56 S. Ct. 780 (1936).[186]

B. Citations over Time

Finally, we used Shepard's Citations data to uncover nuanced information about how an opinion was treated by later courts over time. Based on a comprehensive study of Supreme Court precedent and in line with other similar studies, Professors Black and Spriggs reported a typically curved citation history, with most citations in the early years after the decision was issued, and then trailing off as the case fell into obscurity.[187] Shepard's data in tabular form can be used in a similar way to plot the number of citations per year, generating a curve. Spikes in the curve might indicate a rediscovery of the case, perhaps because an issue it addressed became newly relevant in society, or perhaps for more idiosyncratic reasons such as a particular judge's affinity for a favorite case.[188]

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185. 511 U.S. 375.

186. *Id.* at 377.

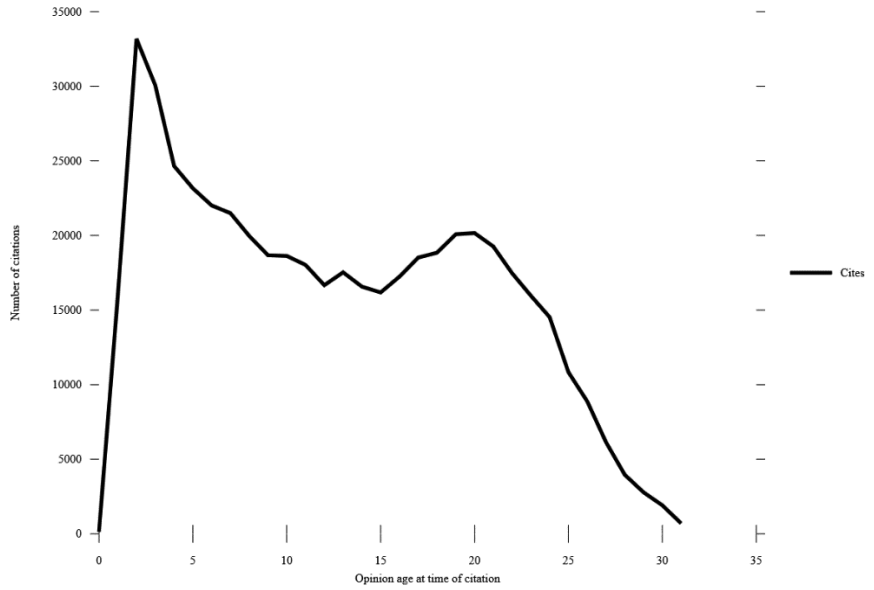
187. Black & Spriggs, supra note 72, at 341–43 (including tabular and graphical information).

188. *See, e.g.*, Tanenhaus & Nystrom, *supra* note 13, at 365–66.

1. Effects of Opinion Age over Time

Simply plotting citations by year is less meaningful when considering 282 cases over a thirty-year period, as in this analysis. Instead, we adjusted each citation to determine the "opinion age" when the later opinion cited the earlier case.[189] (That is, a case from 1996 citing a case decided in 1988 would have an opinion age of eight years.) Grouping and plotting citations by their opinion age—rather than by the year they were decided—omits spikes or lulls in response to societal events or cultural trends, placing emphasis instead on the case and its use over time.

Figure 1
Number of Citations by Opinion Age,
All Scalia-Authored Majority Opinions



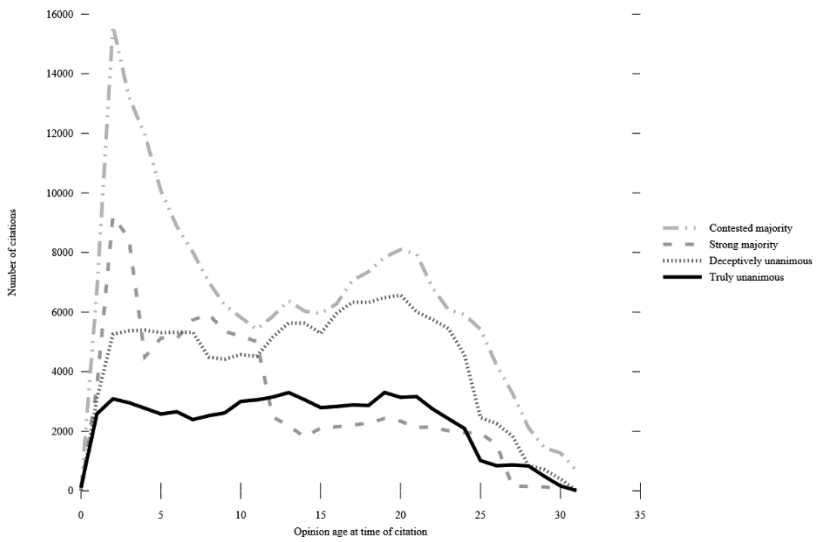
189. This was done by subtracting the year of the SCOTUS term from the year of the decision in a citing case, provided by Shepard's. For a more fine-grained measure, it should be possible to utilize the decision date (MM/DD/YYYY) reported for each case in the SCDB, but given occasional inconsistencies between the full date information in LexisNexis and the SCDB, the yearly measure seemed useful enough for our purposes.

A graph of all the citations of all Scalia-authored majority opinions, grouped by opinion age, appears above in Figure 1. As might be expected, citations quickly spiked in the first year or two after a case was decided and researchers readily found it. Within a few years, citations began to drop off, but the curve did not slide quickly toward zero. Between five and fifteen years, cases saw a steady decline in citation but were clearly still in circulation. Even more interesting is the bump between opinion ages fifteen and twenty-three, where the total number of citations increased, then slowly returned to their previous level. Beyond an opinion age of about twenty-five, citations declined rapidly. Because the oldest Scalia opinions are only slightly more than thirty years old, this trend might need qualification.

2. Effects of the Shape of the Majority Coalition over Time

We found higher than expected citation rates for opinions decided by contested majorities and for deceptively unanimous opinions. This result was discussed earlier and illustrated in Table 4,[190] but is illustrated here in Figure 2 over time.

Figure 2
Citations by Opinion Age, Categorized by Degree of Unanimity



190. *See* text accompanying notes 134–48.

As Figure 2 confirms, citation rates started out higher for truly unanimous and strong majority opinions. Over time, the opinions that contained alternative reasoning in the form of concurrences and dissents gained ground.

3. Comparative Histories of Scalia Majority Opinions over Time

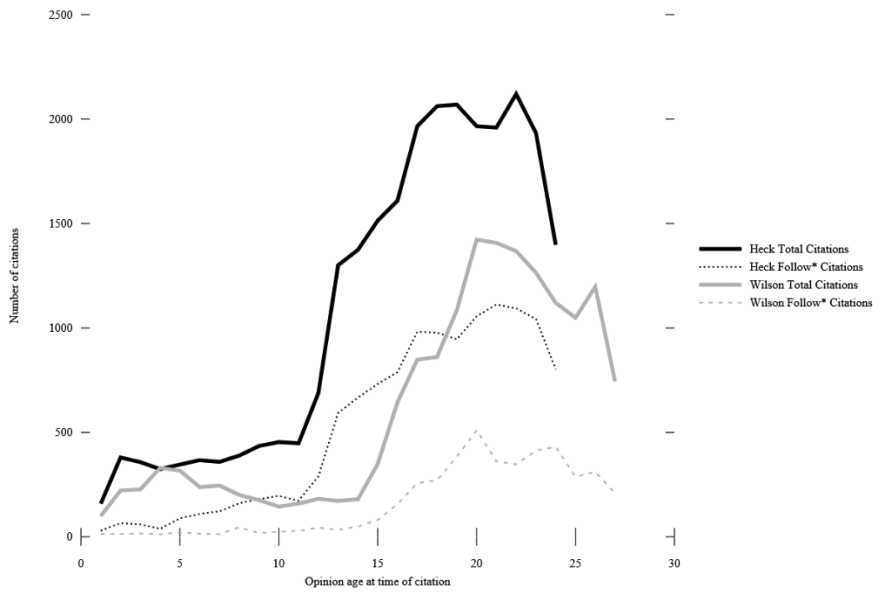
To illustrate their different trajectories, Figures 3 through 5 compare the citation histories of six Scalia majority opinions. Using pairs of cases, the "Follow" citations of a Scalia majority opinion are compared with the number of later cases that "Cited" the same precedent case. As discussed earlier, "follow" citations are clearly positive, indicating that the judge or judges in the later case are following, or adhering to, the decision of the precedent case while a "cited" citation reflects a recognition that the earlier case is relevant as precedent.[191] In Figures 3 through 5, the gap between the two lines—depicted in each figure for each case in the pair—suggests the gap between the "governing" influence of the majority opinion, as shown by "follow" citations, and its usefulness in a continuing conversation, as shown by "cited" citations.

a. "Live" Issues in Prisoners' Rights Lawsuits

We classified *Heck v. Humphrey*,[192] which limited prisoners' § 1983 lawsuits, as a deceptively unanimous opinion. *Wilson v. Seiter*,[193] which restricted lawsuits based on prison conditions, was decided by a five-to-four majority. As discussed earlier,[194] the presence of both concurring and dissenting opinions may foreshadow continuing controversy, indicating that one or more issues in the case will remain alive for decades after the majority opinion. That "live-ness" rather than the influence of the majority opinion may explain the subsequent high citation rate. Both in rough outline and in the gap between the follow and cited citation lines, these opinions affecting prisoners' rights lawsuits had similar histories.

191. *See* text accompanying notes 128–29.
192. 512 U.S. 477.
193. 501 U.S. 294.
194. *See* text accompanying notes 134–38.

Figure 3
Opinion Age and Citations, *Heck v. Humphrey* and *Wilson v. Seiter*



One of the best examples of the deceptively unanimous phenomenon is *Heck*, Justice Scalia's most-cited majority opinion, and the Scalia rule reflected in its most-cited headnote, headnote 10. The language excerpted in that headnote pulled together everything a later judge would need to state a general rule about § 1983 lawsuits brought by prisoners:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or

> sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.[195]

The opinion-age curve for *Heck* shown above in Figure 3 illustrates the historical outcome for this deceptively unanimous opinion: the issues apparently resolved by the opinion were controversial for decades. Twenty-five years later, several circuit splits—the result of the original concurring opinions in *Heck*, a follow-up Supreme Court decision, and later "dicta-parsing"[196]—remained. Among other questions, according to a petition for certiorari that was denied in January of 2018, the federal courts of appeals were almost evenly split on whether an exception to *Heck* applies when the plaintiff was never in custody or was so briefly in custody that habeas corpus would be futile.[197]

A different kind of unresolved issue followed *Wilson*,[198] a contested majority opinion in which Justice Scalia provided a state-of-mind definition in the most-cited headnote:

> The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, *Robinson* v. *California*, 370 U.S. 660, 666, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962), prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes. In *Estelle* v. *Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), we first acknowledged that the provision could be applied to some deprivations

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195. 512 U.S. at 486–87.

196. John P. Collins, *Has All Heck Broken Loose? Examining* Heck*'s Favorable Termination Requirement in the Second Circuit After* Poventud v. City of New York, 42 FORDHAM URBAN L.J. 451, 453 (2014).

197. Pet. for Cert., *Henry v. City of Mt. Dora* (No. 17-652) (U.S. Oct. 26, 2017), *cert. denied*, Jan. 8, 2018, *available at* https://www.scotusblog.com/wp-content/uploads/2017/11/17-652-petition.pdf. In addition, other disputes remained about whether *Heck* applied in particular circumstances. *See* Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals who Lack Access to Habeas Corpus?* 121 HARV. L. REV. 868 (2008).

198. 501 U.S. 294.

> that were not specifically part of the sentence but were suffered during imprisonment. We rejected, however, the inmate's claim in that case that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs—because he had failed to establish that they possessed a sufficiently culpable state of mind. Since, we said, only the "'unnecessary *and wanton* infliction of pain'" implicates the Eighth Amendment, *id.*, at 104 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (joint opinion) (emphasis added)), a prisoner advancing such a claim must, at a minimum, allege "deliberate indifference" to his "serious" medical needs. 429 U.S. at 106. "It is *only* such indifference" that can violate the Eighth Amendment, *ibid.* (emphasis added); allegations of "inadvertent failure to provide adequate medical care," *id.*, at 105, or of a "negligent . . . diagnosis," *id.*, at 106, simply fail to establish the requisite culpable state of mind.[199]

Four Justices agreed with the result in *Wilson*, but they did not agree that the subjective intent of government officials should measure Eighth Amendment challenges to conditions of confinement.[200] As Figure 3 illustrates and as predicted by the concurrence, basic issues remained open after *Wilson*, starting with the intent requirement, which "will likely prove impossible to apply."[201]

b. Bright-Line Rules Intended to Enforce the Sixth Amendment

The opinion-age graphs in two of Justice Scalia's Sixth Amendment opinions, *Blakely v. Washington*[202] and *Crawford v. Washington*,[203] illustrate radically different trajectories.

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199. *Id.* at 297.

200. The concurrence argued that "inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time." *Id.* at 310 (White, Marshall, Blackmun & Stevens, JJ., concurring). In those situations, "it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system." *Id.* (footnote omitted). *See also* Schlanger, *supra* note 177.

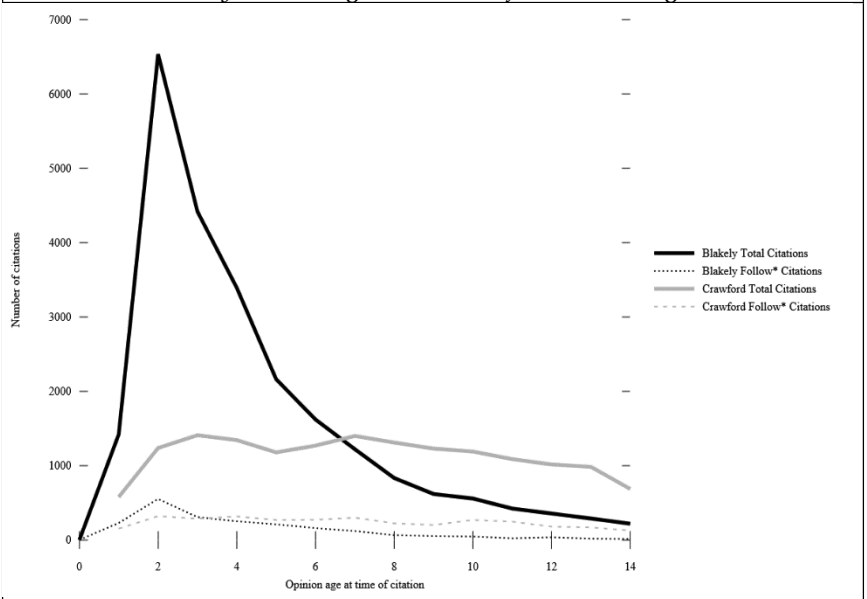
201. 501 U.S. at 310 (White, Marshall, Blackmun & Stevens, JJ., concurring).

202. 542 U.S. 296 (2003).

203. 541 U.S. 36 (2004).

The Scalia majority opinion in *Blakely v. Washington* effectively invalidated key aspects of state sentencing guidelines for failure to comply with the Sixth Amendment's jury-trial requirement.[204] The ruling questioned those parts of the guidelines that permitted judges to impose sentences higher than the presumptive guideline range based on facts found by the judge using the preponderance-of-the-evidence standard, rather than by the jury using the beyond-a-reasonable-doubt standard.[205] After *Blakely*, state courts faced challenges to their many distinctive sentencing systems.[206]

Figure 4
Opinion Age and Citations,
Blakely v. Washington* and *Crawford v. Washington



According to our analysis, among the most-cited headnotes from *Blakely* is one discussing Washington's Sentencing Reform Act, what it specifies as a "standard range" for a particular offense, and how a judge may impose a sentence

204. 542 U.S. at 303-04.

205. *Id.* at 313-14.

206. Frank O. Bowman, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended,* 77 U. CHI. L. REV. 367, 369–70 (2010).

above the standard range.[207] A state judge deciding the constitutional question about her own state's sentencing system likely would cite the language excerpted in that headnote because the judge would apply the ruling in *Blakely* by comparing the sentencing guidelines before her court with those at issue in *Blakely*. Another frequently cited *Blakely* headnote is one we characterized as "argument" because it took the next step in the argument framework, stating the prior rule before it was applied to a new situation:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see 530 U.S., at 476-483, 489-490, n 15, 147 L. Ed. 2d 435, 120 S. Ct. 2348; *id.*, at 501-518,

207. 542 U.S. at 299–300. As discussed earlier, see note 153, *supra*, Lexis applies unique algorithms to attribute the language of cited cases to headnotes, to match the language of citing cases to the headnotes in cited cases, and to calculate the numbers of headnote citations. Because our data was generated by Lexis itself, our results include any judgment calls Lexis may have needed to make in these first two areas. But counting relevant headnotes may be another matter. Since our data reports were collected in late 2017, Lexis has rolled out new web interface software, which among other features offers "highly relevant results" for searches, *see, e.g.*, *NexisUni FAQs*, NEXISUNI (2017), https://www.lexisnexis.com/pdf/academic/nexis-uni/nexis-uni-faq.pdf, meaning that potential matches are filtered more aggressively and less transparently for potential relevance than before. Other than new citations added since our data was collected, this is the likely source of any substantial differences between our computations and Lexis's displays of headnote citations counts.

> 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Thomas, J., concurring), and need not repeat them here.[208]

Figure 4 illustrates the initially very high citation rates for *Blakely*—presumably reflecting many early challenges at the state level—and the steep drop-off thereafter. Soon after *Blakely*, the Court decided whether an application of the Federal Sentencing Guidelines also violated the Sixth Amendment. In *United States v. Booker*, the Court held in an opinion by Justice Stevens that the Sixth Amendment applied to the Sentencing Guidelines.[209] In a separate opinion by Justice Breyer, the *Booker* Court further concluded that two provisions of the federal statute that had effectively made the Guidelines mandatory must be invalidated.[210] In federal courts, *Booker* appeared to supersede *Blakely* as the precedent of choice, thus accounting for at least some of the rapid decline in citations.

The history of the opinion in *Crawford v. Washington*[211] contrasts with *Blakely*'s history. A long-running dispute over interpretation followed Justice Scalia's majority opinion holding that the Sixth Amendment's Confrontation Clause makes testimonial hearsay inadmissible unless the declarant is available for cross-examination.[212] The opinion reconfigured the standard for determining when the Confrontation Clause permits admission of hearsay statements in criminal cases, and both state and federal courts subsequently struggled to define "testimonial hearsay," again leading to a long line of subsequent citations.

Here are the *Crawford* rule and most-cited headnote as formulated by Justice Scalia:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such

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208. *Id.* at 302 (referring to the rule in *Apprendi v. N.J.*, 530 U.S. 466 (2000), which provides that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt") (footnote omitted).

209. 543 U.S. 220, 226–27 (2005) (concluding that *Apprendi* and *Blakely* require "juries, not judges, to find facts relevant to sentencing").

210. *Id.* at 245 (acknowledging that decision makes Guidelines "effectively advisory") (Breyer, J., Rehnquist, C.J., O'Connor & Kennedy, JJ., dissenting).

211. 541 U.S. 36 (2004).

212. *Id.* at 68–69.

> statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial."[10] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.
>
> ---
>
> 10. We acknowledge the Chief Justice's objection . . . that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. . . . The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.[213]

That *Crawford* did not resolve the issue is vividly illustrated by Justice Scalia's joining Justice Kagan in dissent nine years later in *Williams v. Illinois*.[214] Referring to *Crawford* as one of the opinions of which he was most proud,[215] Justice Scalia foresaw that later decisions might overturn it.[216]

c. Citation Standbys Narrowing Plaintiffs' Options in Federal Court

Two Scalia majority opinions restricting plaintiffs' access to federal courts are often cited, but less frequently followed.

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213. *Id.* at 68.

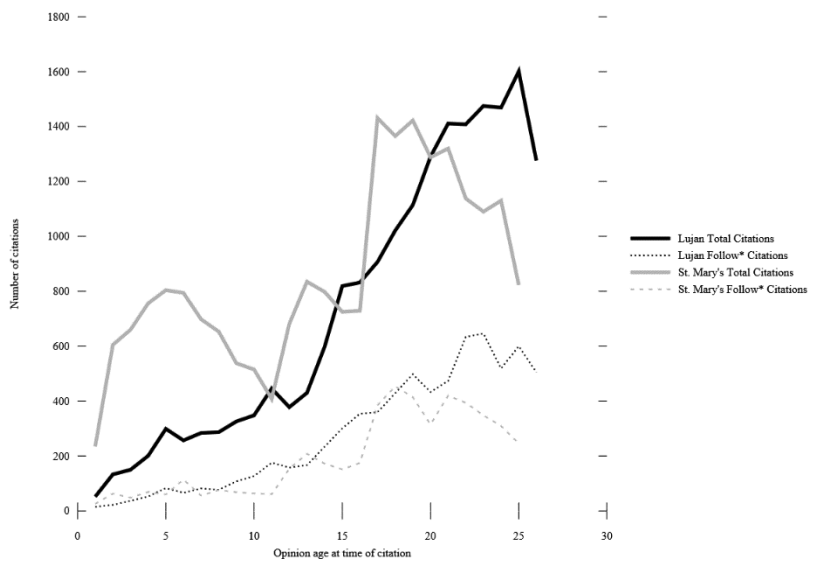
214. 567 U.S. 50, 118 (2012) (Kagan, Scalia, Ginsburg & Sotomayor, JJ, dissenting); *see also* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 Wash. U. L. Rev. 847, 875–76 (2012) (arguing that Justice Scalia in *Crawford* adopted a seemingly bright-line rule that turned on the meaning of "testimonial," not recognizing that the rule would prove to be unworkable in practice).

215. Joan Biskupic, *Scalia Replacement Could Move Court Rightward on Criminal Justice*, CNN (Dec. 7, 2016), http://www.cnn.com/2016/12/07/politics/scalia-criminal-justice-trump/index.html (referring to Justice Scalia's mention of "groundbreaking opinions that enhanced the ability of criminal defendants to challenge witnesses face-to-face in court") (quoted in HASEN, *supra* note 19, at 153).

216. Justice Scalia wrote separately in *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 2184 (2015) (Scalia & Ginsburg, JJ, concurring), "to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford*."

Lujan[217] imposed stringent standing requirements on plaintiffs in environmental lawsuits, while *St. Mary's*[218] made it more difficult for plaintiffs to pursue their employment discrimination claims.

Figure 5
Opinion Age and Citations,
Lujan v. Defenders of Wildlife* and *St. Mary's Honor Center v. Hicks



Writing for a six-to-three majority, with one section garnering only a plurality, Justice Scalia found in *Lujan* that a group of environmental organizations lacked standing to challenge federal regulations.[219] The opinion established a new principle: standing requires plaintiffs to show a concrete, discernible injury, not a "conjectural or hypothetical one."[220] *Lujan* additionally marked a more fundamental shift because Constitutional standing requirements had never before been used "to prevent a litigant from pursuing a cause of action statutorily

217. 504 U.S. 555 (1992).
218. 509 U.S. 502 (1993).
219. 504 U.S. 555 (1992).
220. *Id.* at 560–61.

authorized by Congress."[221] Since *Lujan*, the Supreme Court has interpreted the injury requirement to preclude speculative or hypothetical injuries but has never precisely defined what constitutes an "imminent injury." Instead, the imminent-injury test has been interpreted in different ways by different courts.[222] Although *Lujan* was controversial, and a dispute about its correctness might be expected to endure, one empirical study of D.C. Circuit decisions found that *Lujan* had influenced judges of all political stripes similarly by prompting them to discuss standing more often, and it had measurably pushed conservative judges to dismiss more cases for lack of justiciability.[223]

Narrowing plaintiffs' opportunities to pursue employment discrimination claims under Title VII, the Scalia majority opinion in *St. Mary's* adjusted the reach of the *McDonnell-Douglas* framework.[224] Unlike *Lujan*, where a more compact rule statement (discussed in part VII(A) above) was the one most-cited headnote, several headnotes from *St. Mary's* were frequently cited, but together they constituted a similar rule framework. The first step recounted and manipulated the *McDonnell-Douglas* framework:

> Under the McDonnell-Douglas scheme, "establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. Burdine, *supra*, at 254." To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, *Federal Evidence* § 67, p. 536 (1977). Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate nondiscriminatory reason."

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221. Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 933 (2008).

222. Bradford C. Mank, Clapper v. Amnesty International*: Two or Three Competing Philosophies of Standing Law?* 81 TENN. L. REV. 211, 220–22 (2014).

223. Fleisher, *supra* note 221, at 923–24.

224. *St. Mary's*, 509 U.S. at 510 (pointing out that if the defendant "has succeeded in carrying its burden of production, the *McDonnell Douglas* framework . . . is no longer relevant").

> Burdine, 450 U.S. at 254. "The defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *Id.*, at 254–255, and n. 8. It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253.
>
> . . . . .
>
> "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," *Burdine*, 450 U.S. at 255," and "drops from the case," *id.*, at 255, n. 10." The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," *id.*, at 256," and that race was. He retains that "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." *Ibid.*[225]

The language captured in the second-most-frequently cited headnote reiterated that the burden of production becomes irrelevant after the defendant introduces evidence of legitimate reasons for its action and that the plaintiff has the burden of persuasion. And the third-most-frequently cited headnote recaps:

> If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U.S. at 254. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply

225. *Id.* at 506–08.

> drops out of the picture," *at* 255. . . . The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race, at 253. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*."[226]

Within the decade, a conflict had arisen among the federal courts of appeals about how to interpret *St. Mary's* and its precedential network.[227] Like *Lujan*, *St. Mary's* remains a frequently cited standby, but the gap between its "follow" and "cited" citations is large.

VIII. CONCLUSION

> *The most prominent feature of the judicial opinion is that it is not an isolated exercise of power but part of a continuing and collective process of conversation and judgment.*[228]

Although outcomes and subsequent citations contribute significantly to the development of the law, the language of the majority opinion is the precedent that lower courts are expected

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226. *Id.* at 510–11.

227. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 146 (2000) (noting that court of appeals had "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence"); *see also* Kenneth R. Davis, *The Equality Principle: How Title VII Can Save Insider Trading Law*, 39 CARDOZO L. REV. 199, 227 n. 178 (2017) (noting that the *St. Mary's* Court eviscerated *McDonnell Douglas*'s burden-shifting approach); Ann C. McGinley *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1458–59 (1996) ("[T]he *St. Mary's* decision, in effect, requires the plaintiff to produce direct evidence of discrimination or to rebut all of the potential reasons for firing her, even those never articulated by the defendant").

228. WHITE, *supra* note 16, at 264.

to turn to for direct guidance that speaks to their current decision. Most of us assume that an opinion's influence is largely determined by its language because the language decides not only this case but all future interpretations: the language creates flexible standards or black-and-white rules, the language contracts or expands preexisting rules, the language may be determined to cover many or few cases. We suspect that some opinions are more powerfully written than others and will thus be more influential. As in other kinds of persuasion, we expect that rhetorical persuasiveness (however that can be obtained) will ease the way for later judges to accept and more readily follow an opinion's rules.

Following the suggestion that Justice Scalia's opinions might be written in a fashion that projects greater precedential significance,[229] we based our study on the rhetoric, defined broadly, of the Scalia majority opinions. Our analysis revealed small but important connections between the rhetoric of Justice Scalia's majority opinions and the ways in which later courts relied upon their language.

We focused first on the rhetorical construction of Justice Scalia's opinions, and in particular on the rhetorical framing of his rules and the rhetorical structure of his argument frames. Justice Scalia was universally known for averring that "the rule of law is a law of rules"[230] and that the only appropriate argument frame is the syllogism.[231] Although critics have pointed out that Justice Scalia's arguments, like the purported syllogisms in most legal briefs and opinions, rely on missing, unstated, or only arguably true premises, his opinions are framed in take-no-prisoners syllogistic form.[232] Because one appropriate measure of rhetorical effectiveness is audience response, we used citations by federal and state courts at all levels over time to explore that aspect of the Scalia majority opinion.

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229. Cross, *supra* note 3, at 191.

230. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

231. In their book about persuading judges, legal writing guru Bryan Garner and Justice Scalia recommended that legal writers "think syllogistically" and write the same way. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 41 (2008).

232. *See, e.g.*, Taylor et al., *supra* note 29, at 137 (introducing an analysis of Justice Scalia's penchant for calling others' views "absurd").

A. What Factors Appeared Most Important in How Precedent Was Used over Time?

We found that the shape of the majority coalition appeared to contribute more than any other factor to citation rates, especially over time.[233] Compared with what might have been expected given their distribution among Justice Scalia's majority opinions, we found relatively higher citation rates for deceptively unanimous opinions and contested majority opinions. Looking at these opinions together, citations continued or sometimes re-emerged after an initial period of quiet. This citation curve might be explained because the concurring or dissenting opinions gained adherents as the years passed and later courts continued to debate the meaning or application of a rule established in a majority opinion.

Next, we found that the characteristics of the audience mattered both in how a particular opinion would be selected and in how specific elements of that opinion would be used by later courts. When the citing court was a federal court of appeals—that is, when the typical audience for the majority opinion constituted a panel of three judges along with their career and recent law-graduate clerks—there was a greater tendency to rely more extensively on the entire argument framework established by a Scalia majority opinion. These courts tended to discuss both the arguments advanced in support of, and the rules established in, Justice Scalia's majority opinions; federal district courts and state courts were somewhat more likely to simply follow the rules. The institutional role of the lower courts, including the federal courts of appeals, is to look to precedent for guidance and either to follow it or to explain its effects on the lower court's reasoning. In our project, it appeared that the federal courts of appeals were spending substantial time on their reasoning and explanatory functions.

Finally, we found that the rhetorical framing of the rules might have influenced citation rates in contradictory ways. For example, if a lower court judge had a hypothetical choice between a bright-line and easy-to-apply rule and one that required her to look into many facts or to examine legislative

233. *See* Parts IV and VII, *supra*.

history or other sources for interpretation, she might choose the time- and cost-effective route. But lower court judges do not usually have such choices, and instead most have to determine what to do with the precedent that appears to govern their issue. In those situations, bright-line rules that are easy to apply may lead to more "follow" citations by the lower courts, but more complex and time-consuming applications may lead to a greater number of total citations over time as the interpretations and applications are worked out. On the other hand, we suspect that one possible result of Justice Scalia's tendency to formulate maximalist or fundamentalist rules was that more Justices chose to write concurring or dissenting opinions, and those sources of alternative reasoning may have resulted in more citations (for all the opinions) as the lingering disputes resolved themselves over time.

Many of the recent citation studies rely on sophisticated analyses that combine various influence measures, but some researchers have assumed that more citations mean greater influence. Our results cast doubt on that assumption because of the finding that Justice Scalia's contested majority and deceptively unanimous opinions were more frequently cited by all levels of lower courts than their distribution among his opinions would suggest. This leads us to infer that the reason is not the governing influence of his opinions but the continuing disputes about the questions presented.[234]

Together, these results leave us optimistic about the process of judicial decisionmaking by lower court judges.[235] Our findings indicate that later opinion authors are making thoughtful selections as they engage in the shifting "process of conversation and judgment" that is carried on among many different levels of legal communicators.[236]

234. Final resolutions of legal disputes are of course rare. Still, we expect that "influence" means something other than being cited for one side of an argument.

235. *See, e.g.*, Fleisher, *supra* note 221, at 925 ("[A]re precedential opinions a gross bludgeon constraining lower court judges only at the broadest level of rhetoric, or a subtle tool swaying those decision makers in a more nuanced manner? . . . [T]he latter is a more accurate description.").

236. WHITE, *supra* note 16, at 264.

B. Does the Rhetorical-Computational Method Hold Promise for Future Research and Analysis?

Coding the content of the large numbers of cases necessary for content analysis is difficult and time consuming. Incorporating the headnotes compiled by LexisNexis and Westlaw into the analysis takes advantage of content analysis techniques that are widely accepted and have been subject to some reliability testing. The use of the headnotes should allow careful researchers to trace and begin to account for networks of influence of legal doctrine. We found the use of headnotes as substitutes for rhetorical analysis of full or partial opinions to be more complicated.

The most important shortcoming of headnotes as tools for rhetorical analysis is that they are taken out of context, a shortcoming we tried to accommodate in part by reading the syllabus of the opinion first and then reading the headnotes in sequence. In addition, headnotes do not include citations (which themselves are important for many rhetorical reasons), and because headnotes are taken out of context, when they are read separately, even in sequence, the reader may make inferences about language and structure that do not necessarily reflect the intent of the author. Again, reflecting the important absence of context, no headnotes are extracted from the facts section of an opinion or from the concurring and dissenting opinions, so analysis of the headnotes alone is incomplete. In future work, we might adjust our use of headnotes in several ways, including identifying the portions of the opinion in which the author intended to establish a new rule. We could trace the influence of the author's intended doctrine against the propositions that actually ended up being influential (that is, other portions of the opinion that were more often cited by subsequent courts). On the whole, while the techniques we explore here will never replace "close reading" for the purposes of rhetorical analysis, this project has illuminated some of the potential challenges and analytical promise of attempting to understand judicial authors and judicial audiences by harnessing a combination of rhetorical and computational techniques.

APPENDIX

Following are four randomly selected examples of the headnote-coding framework we followed. The syllabus, holding, and Justices' votes are taken from the electronic versions of the opinions available on LexisNexis.*

1. *INS v. Pangilinan*, 486 U.S. 875 (1988).

SYLLABUS

Respondents, 16 Filipino nationals who served with the United States Armed Forces during World War II, seek United States citizenship pursuant to §§ 701 through 705 of the Nationality Act of 1940, as amended in 1942. Under § 702 of the Act, the Commissioner of Immigration and Naturalization was authorized to designate representatives to receive petitions, conduct hearings, and grant naturalization outside the United States. In August 1945, the American Vice Consul in Manila was designated pursuant to § 702 to naturalize aliens. The Philippine Government, however, expressed its concern that a mass migration of newly naturalized veterans would drain the soon-to-be independent country's manpower, and so the naturalization officer's authority was revoked for a 9-month period between October 1945 and August 1946. Respondents would have been eligible for citizenship under the provisions of the 1940 Act if they had filed naturalization applications before the Act expired on December 31, 1946, but did not do so. More than 30 years later, they petitioned for naturalization, claiming that the 9-month absence of a § 702 naturalization officer violated the 1940 Act and deprived them of rights secured by the Fifth Amendment. The naturalization examiner, in all of the cases consolidated here, recommended against naturalization, and the District Courts rejected the naturalization petitions. On respondents' appeals (some of which were consolidated), heard in two cases by different Ninth Circuit panels, the Court of Appeals ultimately held that the revocation of the Vice Consul's naturalization authority violated what it characterized as the 1940 Act's

mandatory language, and that the naturalization of respondents was an appropriate equitable remedy.

Held:

1. Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of the limitations imposed by Congress in the exercise of its exclusive constitutional authority over naturalization. Since respondents have no current statutory right to citizenship under the expired provisions of the 1940 Act, the Ninth Circuit lacked authority to grant the petitions for naturalization. The reasoning of *INS* v. *Hibi*, 414 U.S. 5—which held that the same official acts as those alleged here did not give rise to an estoppel that prevented the Government from invoking the December 31, 1946, cutoff date in the 1940 Act—suggests the same result as to the "equitable remedy" theory in this case. Even assuming that, in reviewing naturalization petitions, federal courts sit as courts of equity, such courts can no more disregard statutory provisions than can courts of law. Congress has given the power to the federal courts to make someone a citizen as a specific function to be performed in strict compliance with the terms of 8 U.S.C. § 1421(d), which states that a person may be naturalized "in the manner and under the conditions prescribed in this subchapter, and not otherwise." Pp. 882–885.

2. Assuming that respondents can properly invoke the Constitution's protections, and granting that they had statutory entitlements to naturalization, there is no merit to their contention that the revocation of the Vice Consul's naturalization authority deprived them of their rights under the Due Process Clause of the Fifth Amendment and under its equal protection component. Respondents were not entitled to individualized notice of any statutory rights and to the continuous presence of a naturalization officer in the Philippines from October 1945 until July 1946. Moreover, the historical record does not support the contention that the actions at issue here were motivated by any racial animus. Pp. 885–886.

3. There is no merit to the separate arguments of respondents Litonjua and Manzano, including the argument that the Government did not introduce any evidence in their

cases concerning the historical events at issue. It is well settled that the burden is on the alien applicant to establish his eligibility for citizenship. Pp. 886–887.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. KENNEDY, J., took no part in the consideration or decision of the cases.

LexisNexis® Headnotes

Preexisting Rule [HN1] See § 701 of the Nationality Act of 1940, 54 Stat. 1137.

Preexisting Rule [HN2] See § 702 of the Nationality Act of 1940, 54 Stat. 1137.

Preexisting Rule [HN3] See § 705 of the Nationality Act of 1940, 54 Stat. 1137.

Preexisting Rule [HN4] See U.S. Const. art. I, § 8, cl. 4.

Argument [HN5] Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law.

Scalia Rule [HN6] An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

Scalia Rule [HN7] Once it has been determined that a person does not qualify for citizenship, the district court has no discretion to ignore the defect and grant citizenship.

Argument [HN8] The burden is on the alien applicant to show his eligibility for citizenship in every respect.

2. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

SYLLABUS

During a routine traffic stop, a Wyoming Highway Patrol officer noticed a hypodermic syringe in the driver's shirt pocket, which the driver admitted using to take drugs. The officer then searched the passenger compartment for contraband, removing and searching what respondent, a passenger in the car, claimed was her purse. He found drug paraphernalia there and arrested respondent on drug charges. The trial court denied her motion to suppress all evidence from the purse as the fruit of an unlawful search, holding that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband. Respondent was convicted. In reversing, the Wyoming Supreme Court ruled that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search; but, if the officer knows or should know that a container belongs to a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection. Applying that rule here, the court concluded that the search violated the Fourth and Fourteenth Amendments.

Held:

Police officers with probable cause to search a car, as in this case, may inspect passengers' belongings found in the car that are capable of concealing the object of the search. In determining whether a particular governmental action violates the Fourth Amendment, this Court inquires first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed, see, *e.g., Wilson* v. *Arkansas,* 514 U.S. 927, 931, 131 L. Ed. 2d 976, 115 S. Ct. 1914. Where that inquiry yields no answer, the Court must evaluate the search or seizure under traditional reasonableness standards by balancing an individual's privacy interests against legitimate governmental interests, see, *e.g., Vernonia School Dist. 47J* v. *Acton,* 515 U.S. 646, 652-653, 132 L. Ed. 2d 564, 115 S. Ct. 2386. This Court has concluded that the Framers would have regarded as reasonable the warrantless search of a car that police had probable cause to

believe contained contraband, *Carroll* v. *United States,* 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, as well as the warrantless search of containers *within* the automobile, *United States* v. *Ross,* 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157. Neither *Ross* nor the historical evidence it relied upon admits of a distinction based on ownership. The analytical principle underlying *Ross*'s rule is also fully consistent with the balance of this Court's Fourth Amendment jurisprudence. Even if the historical evidence were equivocal, the balancing of the relative interests weighs decidedly in favor of searching a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars. See, *e.g., Cardwell* v. *Lewis,* 417 U.S. 583, 590, 41 L. Ed. 2d 325, 94 S. Ct. 2464. The degree of intrusiveness of a package search upon personal privacy and personal dignity is substantially less than the degree of intrusiveness of the body searches at issue in *United States* v. *Di Re,* 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 and *Ybarra* v. *Illinois,* 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338. In contrast to the passenger's reduced privacy expectations, the governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings, since an automobile's ready mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained, *California* v. *Carney,* 471 U.S. 386, 85 L. Ed. 2d 406, 105 S. Ct. 2066; since a passenger may have an interest in concealing evidence of wrongdoing in a common enterprise with the driver, cf. *Maryland* v. *Wilson,* 519 U.S. 408, 413-414, 137 L. Ed. 2d 41, 117 S. Ct. 882; and since a criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car, see, *e.g., Rawlings* v. *Kentucky,* 448 U.S. 98, 102, 65 L. Ed. 2d 633, 100 S. Ct. 2556. The Wyoming Supreme Court's "passenger property" rule would be unworkable in practice. Finally, an exception from the historical practice described in *Ross* protecting only a passenger's property, rather than property belonging to *anyone* other than the driver, would be less sensible than the rule that a package may be searched, whether or not its owner is present as a passenger or otherwise, because it might contain the object of the search. Pp. 3–11.

956 P.2d 363, reversed.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, THOMAS, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

LexisNexis® Headnotes

Argument [HN1] U.S. Const. amend. IV protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. In determining whether a particular governmental action violates this provision, the court inquires first whether the action was regarded as an unlawful search or seizure under the common law when amend. IV was framed. Where that inquiry yields no answer, the court must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Argument [HN2] Contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant where probable cause exists.

Scalia Rule [HN3] If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. This applies broadly to all containers within a car, without qualification as to ownership.

Argument [HN4] The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought.

Scalia Rule [HN5] When there is probable cause to search for contraband in a car, it is reasonable for police officers to examine packages and containers without a showing of individualized probable cause for each one. A passenger's

personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are in the car, and the officer has probable cause to search for contraband in the car.

3. *Kansas v. Ventris*, 556 U.S. 586 (2009).

SYLLABUS

Respondent Donnie Ray Ventris and Rhonda Theel were charged with murder and other crimes. Prior to trial, an informant planted in Ventris's cell heard him admit to shooting and robbing the victim, but Ventris testified at trial that Theel committed the crimes. When the State sought to call the informant to testify to his contradictory statement, Ventris objected. The State conceded that Ventris's Sixth Amendment right to counsel had likely been violated, but argued that the statement was admissible for impeachment purposes. The trial court allowed the testimony. The jury convicted Ventris of aggravated burglary and aggravated robbery. Reversing, the Kansas Supreme Court held that the informant's statements were not admissible for any reason, including impeachment.

Held:

Ventris's statement to the informant, concededly elicited in violation of the Sixth Amendment, was admissible to impeach his inconsistent testimony at trial. Pp. 590-594.

(a) Whether a confession that was not admissible in the prosecution's case in chief nonetheless can be admitted for impeachment purposes depends on the nature of the constitutional guarantee violated. The Fifth Amendment guarantee against compelled self-incrimination is violated by introducing a coerced confession at trial, whether by way of impeachment or otherwise. *New Jersey* v. *Portash*, 440 U.S. 450, 458-459, 99 S. Ct. 1292, 59 L. Ed. 2d 501. But for the Fourth Amendment guarantee against unreasonable searches or seizures, where exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee, admissibility is determined by an exclusionary-rule balancing test. See *Walder* v. *United States*, 347 U.S. 62, 65, 74 S. Ct. 354, 98 L. Ed. 503. The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct. See, *e.g., Harris* v. *New York*, 401 U.S. 222, 225-226, 91 S. Ct. 643, 28 L. Ed. 2d 1. The core of the Sixth Amendment right to counsel is a trial right, but the right covers pretrial interrogations to ensure that police manipulation does not deprive the defendant of "'effective representation by counsel at the only stage when legal aid

and advice would help him.'" *Massiah* v. *United States*, 377 U.S. 201, 204, 84 S. Ct. 1199, 12 L. Ed. 2d 246. This right to be free of uncounseled interrogation is infringed at the time of the interrogation, not when it is admitted into evidence. It is that deprivation that demands the remedy of exclusion from the prosecution's case in chief. Pp. 590-593.

(b) The interests safeguarded by excluding tainted evidence for impeachment purposes are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Stone* v. *Powell*, 428 U.S. 465, 488, 96 S. Ct. 3037, 49 L. Ed. 2d 1067. Once the defendant testifies inconsistently, denying the prosecution "the traditional truth-testing devices of the adversary process," *Harris, supra*, at 225, 91 S. Ct. 643, 28 L. Ed. 2d 1, is a high price to pay for vindicating the right to counsel at the prior stage. On the other hand, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence for officers, who have an incentive to comply with the Constitution, since statements lawfully obtained can be used for all purposes, not simply impeachment. In every other context, this Court has held that tainted evidence is admissible for impeachment. See, *e.g., Oregon* v. *Hass*, 420 U.S. 714, 723, 95 S. Ct. 1215, 43 L. Ed. 2d 570. No distinction here alters that balance. Pp. 593-594.

285 Kan. 595, 176 P. 3d 920, reversed and remanded.

JUDGES: Scalia, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Souter, Thomas, Breyer, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined, *post*, p. 594.

LexisNexis® Headnotes

Argument [HN1] The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that in all criminal prosecutions, the accused shall have the assistance of counsel for his defense. The core of this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial. However, the right extends to having counsel present at various pretrial

"critical" interactions between the defendant and the State, including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge.

Argument.[HN2] Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes that explicitly mandates exclusion from trial, and sometimes it does not. The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise. The Fourth Amendment, on the other hand, guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence; exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee. Inadmissibility has not been automatic, therefore, but the U.S. Supreme Court has instead applied an exclusionary-rule balancing test. The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct.

Argument [HN3] The core of the right to counsel is indeed a trial right, ensuring that the prosecution's case is subjected to the crucible of meaningful adversarial testing. But U.S. Supreme Court opinions under the Sixth Amendment, as under the Fifth, have held that the right covers pretrial interrogations to ensure that police manipulation does not render counsel entirely impotent—depriving the defendant of effective representation by counsel at the only stage when legal aid and advice would help him.

Argument [HN4] The Massiah right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That is when the assistance of counsel is denied.

Argument [HN5] Post-charge deliberate elicitation of statements without the defendant's counsel or a valid waiver of counsel is not intrinsically unlawful when the questioning is unrelated to charged crimes—the Sixth Amendment right is offense specific. However, officers may not badger counseled defendants about charged crimes so long as they do not use information they gain.

Scalia Rule [HN6] The game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are outweighed by the need to prevent perjury and to assure the integrity of the trial process. It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can provide himself with a shield against contradiction of his untruths. Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of the traditional truth-testing devices of the adversary process is a high price to pay for vindication of the right to counsel at the prior stage.

4. *Whitfield v. United States*, 135 S. Ct. 785 (2015).

SYLLABUS

Petitioner Whitfield, fleeing a botched bank robbery, entered 79-year-old Mary Parnell's home and guided a terrified Parnell from a hallway to a room a few feet away, where she suffered a fatal heart attack. He was convicted of, among other things, violating 18 U.S.C. §2113(e), which establishes enhanced penalties for anyone who "forces any person to accompany him without the consent of such person" in the course of committing or fleeing from a bank robbery. On appeal, the Fourth Circuit held that the movement Whitfield required Parnell to make satisfied the forced-accompaniment requirement, rejecting his argument that §2113(e) requires "substantial" movement.

Held:

A bank robber "forces [a] person to accompany him," for purposes of §2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance, as was the case here. At the time the forced-accompaniment provision was enacted, just as today, to "accompany" someone meant to "go with" him. The word does not, as Whitfield contends, connote movement over a substantial distance. Accompaniment requires movement that would normally be described as from one place to another. Here, Whitfield forced Parnell to accompany him for at least several feet, from one room to another, and that surely sufficed. The severity of the penalties for a forced-accompaniment conviction—a mandatory minimum of 10 years, and a maximum of life imprisonment—does not militate against this interpretation, for the danger of a forced accompaniment does not vary depending on the distance traversed. This reading also does not make any other part of §2113's graduated penalty scheme superfluous. Pp. ___ - ___, 190 L. Ed. 2d, at 659-661.

548 Fed. Appx. 70, affirmed.

JUDGES: Scalia, J., delivered the opinion for a unanimous Court.

LexisNexis® Headnotes

Argument [HN1] Federal law establishes enhanced penalties for anyone who forces any person to accompany him in the course of committing or fleeing from a bank robbery. 18 U.S.C.S. § 2113(e).

Preexisting Rule [HN2] See 18 U.S.C.S. § 2113(e).

Scalia Rule Congress enacted the forced-accompaniment provision that appears in 18 U.S.C.S. § 2113 in 1934 after an outbreak of bank robberies committed by John Dillinger and others. Section 2113 has been amended frequently, but the relevant phrase—"forces any person to accompany him without the consent of such person"—has remained unchanged, and so presumptively retains its original meaning. In 1934, just as today, to accompany someone meant to go with him. The word does not connote movement over a substantial distance. It was, and still is, perfectly natural to speak of accompanying someone over a relatively short distance, for example: from one area within a bank to the vault; to the altar at a wedding; up the stairway; or into, out of, or across a room.

Scalia Rule [HN4] It is true enough that accompaniment does not embrace minimal movement—for example, the movement of a bank teller's feet when a robber grabs her arm. It must constitute movement that would normally be described as from one place to another, even if only from one spot within a room or outdoors to a different one.

Scalia Rule [HN5] It does not seem that the danger of a forced accompaniment varies with the distance traversed. Consider, for example, a hostage-taker's movement of one of his victims a short distance to a window, where she would be exposed to police fire; or his use of a victim as a human shield as he approaches the door. And even if the United States Supreme Court thought otherwise, it would have no authority to add a limitation the statute plainly does not contain. The Congress that wrote 18 U.S.C.S. § 2113(e) may well have had most prominently in mind John Dillinger's driving off with hostages, but it enacted a provision which goes well beyond that. It is simply not in accord with English usage to give "accompany" a meaning that covers only large distances.

Argument [HN6] 18 U.S.C.S. § 2113's graduated penalty scheme prescribes: (1) a 20-year maximum sentence for bank robbers who use force and violence or intimidation, 18 U.S.C.S. § 2113(a); (2) a 25-year maximum sentence for those who assault or put in jeopardy the life of another by the use of a dangerous weapon or device, 18 U.S.C.S. § 2113(d); and (3) a minimum sentence of 10 years, and a maximum sentence of life, for forced accompaniment, 18 U.S.C.S. § 2113(e).

Argument [HN7] Even if bank robbers always exert some control over others, it does not follow that they always force others to accompany them somewhere—that is, to go somewhere with them. And because 18 U.S.C.S. § 2113(a), (d), and (e) all cover distinct conduct, an interpretation of "accompany" to mean that a bank robber forces a person to go somewhere with him does not make any part of § 2113 superfluous.

Scalia Rule [HN8] A bank robber forces a person to accompany him, for purposes of 18 U.S.C.S. § 2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

BOOK REVIEW

ONE OF THE GOOD GUYS: *THE MAKING OF A JUSTICE – REFLECTIONS ON MY FIRST 94 YEARS*

Jamal Greene*

John Paul Stevens's first published judicial opinion was a dissent.[1] He joined the Seventh Circuit a few days after the court issued its opinion in *Groppi v. Leslie*,[2] and dissented soon afterward when the court upheld that decision on rehearing. Wilbur Pell, who until Stevens joined was the only Republican among the Seventh Circuit's seven active judges, wrote both *Groppi* opinions.[3] Yet Stevens, brand new to the court, dissented from Pell's opinion on rehearing.[4]

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1. JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 111 (2019).

2. 436 F.2d 326 (7th Cir. 1970), *aff'd on reh'g*, 436 F.2d 331 (7th Cir. 1971). Groppi, a Milwaukee priest and civil rights activist, had led 1,000 people in a raucous sit-in at the Wisconsin Assembly to protest planned welfare cuts. *See* State ex rel. Groppi v. Leslie, 171 N.W.2d 192 (Wis. 1969). Groppi was cited without prior notice for legislative contempt and given a six-month prison sentence, receiving no opportunity to contest the charge. He won his subsequent federal habeas case in the district court but lost on appeal at the Seventh Circuit.

3. STEVENS, *supra* note 1, at 109–10.

4. STEVENS, *supra* note 1, at 109.

There was no reason to think Father Groppi, who was arrested for leading a demonstration that interrupted the Wisconsin Assembly's work, was innocent of legislative contempt, but Stevens believed the Fourteenth Amendment insisted on certain procedural protections before a person's liberty could be denied, whether by a court or a legislature. "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen," Stevens wrote, quoting Justice Brandeis.[5] "And in the development of our liberty," he continued, "insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."[6] Stevens couldn't persuade his colleagues, but the Supreme Court eventually granted cert in Father Groppi's case and unanimously adopted Stevens's position.[7]

Biography is an imperfect predictor of a judge's character and priorities. On reading Justice Stevens's 2019 memoir, published a month after his ninety-ninth birthday and two months before his death, one is overwhelmed at once with the privilege that attended Stevens's childhood. He was born in 1920 into a family of hoteliers. His grandfather, J.W. Stevens, founded the Illinois Life Insurance Company and owned the tony La Salle Hotel in the Chicago Loop. His father, Ernest, ran the Stevens Hotel, the largest in the world when it opened in 1926, and was for a time one of Chicago's wealthiest men.[8]

But a memoir that opens to audiences with Amelia Earhart and Charles Lindbergh, summers at the vacation estate in Lakeside, Michigan, and trips to World Series games at Wrigley

5. Groppi v. Leslie, 436 F.2d 331, 336 (7th Cir. 1971) (Stevens, J., Swygert, C.J. & Kiley, J., dissenting from denial of rehearing en banc (quoting Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting))). Stevens would be appointed to the Brandeis seat five years later.

6. *Id.*

7. Groppi v. Leslie, 404 U.S. 496 (1971).

8. STEVENS, *supra* note 1, at 7. It is sometimes said of the scions of the wealthy that they have their own money. John Paul Stevens had his own swag: Guests at the opening banquet of the Stevens Hotel received gifts of bronze bookends that featured little John Paul and one of his brothers, both naked, next to a large fish. *Id.* at 10.

Field—including, famously, the one at which Babe Ruth is said (including by Stevens) to have called his home run[9]—ends with a lengthy, heartfelt dissent from the Supreme Court's refusal to permit Congress to regulate the influence of big money on elections. Stevens was no populist but he cared deeply about the little guy. He was no iconoclast but he wrote more dissents than any Justice in history. He was the only WASP on the Court he retired from, and the only Justice who wore a bowtie to work, but he was among the least wed to establishment thinking.

Why?

He doesn't say, not directly anyway. Deep introspection isn't the aim here; Stevens mostly sticks to the facts, but there are hints. The book is effectively laid out in two acts. The first quarter or so is more conventionally autobiographical, telling of Stevens's childhood and first home on Blackstone (!) Avenue, his college years at the University of Chicago, his Navy service as a codebreaker at Pearl Harbor, his law school days at Northwestern, his clerkship with Justice Rutledge, his time in practice as a successful antitrust lawyer, and his five-year stint as an appellate judge.

The most bracing passages, and perhaps the most telling, relate to the scandal that engulfed Stevens's father, and the events that followed. In 1933, the Cook County state's attorney charged Ernest Stevens, his brother, and his father with embezzling more than $1 million in connection with a loan the Stevens Hotel obtained from J.W.'s company.[10] Ernest's conviction was eventually overturned for insufficiency of evidence.[11] In the meantime, though, two terrifying incidents shattered whatever sense of security John Paul's wealth and social stature might have supplied him. First, the family chauffeur, Orson Washburne, was kidnapped at gunpoint and interrogated about the location of cash believed to be stashed in the Stevens's home.[12] Shortly thereafter, four armed men claiming to be Chicago police officers burst into the Stevens family home one evening. They ransacked the place, threatened to "mow down" the family and, before leaving, promised

9. *Id.* at 10–11, 12, 18.
10. *Id*. at 19.
11. *Id*. at 24.
12. *Id*. at 19–20.

reprisals against John Paul and his brother if anyone ratted them out.[13]

Whether or not Ernest Stevens was guilty of any crimes, John Paul clearly believed his father had been wrongfully convicted. And whatever the identities of the men who invaded the Stevens home just after that Saturday dinner, Stevens reveals lingering suspicion that they might well have had day jobs as Chicago police officers. Much later in life, just before his appointment to the Seventh Circuit, Stevens led a corruption investigation into members of the Illinois Supreme Court. All of which is to say that Stevens's personal engagements with the criminal justice system could not have inspired unqualified confidence in individual police officers, prosecutors, and judges. Yet, his father was acquitted, and Stevens's investigation led to the resignation of two state Supreme Court Justices. There are bad guys who wield power within the system, but sometimes the good guys win.

The book's much longer second act offers a term-by-term recounting of Stevens's thirty-five-year tenure as a Supreme Court Justice. In this sense this book serves as a valuable trial version of Justice Stevens's papers. No personal records have been released from any Justice for the period after Justice Blackmun's retirement in 1994, and so Justice Stevens gives the desperate researcher a trailer for what they will find when his actual papers become available.[14] Like any good trailer, it contains few spoilers, but there are at least three reveals I view as significant.

The first and perhaps most significant revelation has nothing to do with the cases but rather with the circumstances surrounding Justice Stevens's nomination and confirmation. Stevens was nominated in November 1975 and was confirmed in just nineteen days by a Senate that had a filibuster-proof Democratic majority. In that sense, his confirmation process seems to harken to an earlier time in which Supreme Court nominations were far less a subject of partisan politics.

13. *Id*. at 21.

14. *See* Susan David deMaine, *Access to the Justices' Papers: A Better Balance*, 110 L. LIBRARY J. 185 (2018). Per the terms of Justice Stevens's gift to the Library of Congress, his papers relating to the period prior to October 2005 are scheduled to become public in October 2020. The remainder will be released in 2030. *See id*. at 219.

(Stevens's aside that he shared a glass of bourbon with Mississippi Senator James Eastland[15] in the middle of his confirmation hearing feels straight out of *Mad Men*.) And yet, Stevens reveals that Illinois Senator Chuck Percy—a friend since their college days at the University of Chicago[16]—told him that Senate Democrats made clear that "if [Stevens] were not confirmed before the end of the year, they would delay the process . . . until after the next presidential election."[17]

This tactic might sound familiar. After Justice Antonin Scalia's death in February 2016, Senate Republicans refused to hold a hearing on President Obama's nomination of Merrick Garland, the D.C. Circuit's well-respected chief judge, to fill the seat. Senate Majority Leader Mitch McConnell invoked what he said was a norm of the Senate not filling a Supreme Court seat in an election year.[18] Democrats cried foul, arguing that there was no such norm—to cite two examples, Louis Brandeis was nominated and seated in 1916, and Anthony Kennedy wasn't confirmed until February 1988.[19] Republicans countered that the norm was limited to occasions in which the Senate was controlled by the opposition (as it wasn't for the Brandeis nomination) and in which the vacancy arose during the election year (as it didn't for the Kennedy nomination).[20]

I am unaware of anyone in the course of this debate having referred to the Stevens nomination as a relevant precedent. But surely Republicans would have made great hay of a prior Democratic Senate's promise to hold up a Republican president's uncontroversial nominee solely because the election calendar was about to turn—Stevens was confirmed unanimously just before Christmas, after all of five minutes of

15. STEVENS, *supra* note 1, at 131–32.

16. *Id.* at 107. Percy had recommended Stevens for the Seventh Circuit opening five years before. *Id.* at 107–08.

17. *Id*. at 129.

18. *See, e.g.*, Dave Boyer, *Senate Republicans Tell Obama: No Hearings for Supreme Court Nominee*, WASH. TIMES, Mar. 2, 2016.

19. *See id*.; Timothy S. Heubner, *In Court Fight, History Backs Obama*, N.Y. TIMES, Feb. 16, 2016, at A19.

20. *See, e.g.*, Siobhan Hughes & Kristina Peterson, *Hearings for a Court Pick Are Ruled Out by GOP*, WALL ST. J., Feb. 24, 2016, at A2.

debate.[21] It seems distinctly possible that, by 2016, the machinations around the Stevens nomination were unknown to, or not remembered by, anyone but Justice Stevens himself.

Three other noteworthy revelations concern two of the most controversial cases of Justice Stevens's tenure, both decided shortly before he retired. In *District of Columbia v. Heller*,[22] the Court held that the Second Amendment protects an individual right to keep a handgun in the District. In the book, Justice Stevens calls *Heller* the most "clearly incorrect" decision of his time on the Court.[23] The fact that he had once been held at gunpoint in his own home surely adds some heft to that charge, but he's made similar charges before.[24] Of greater note is a behind-the-scenes tease that might well bear upon the current state of Second Amendment litigation. Stevens writes that he circulated his *Heller* dissent before Justice Scalia circulated what would become the majority opinion. He performed this unusual order of operations in order to persuade Justice Kennedy or Justice Thomas to change his vote. He didn't succeed, of course, but he thought he might have pushed Justice Kennedy to "insist[] on some important changes" to the majority opinion before signing on.[25]

Justice Stevens doesn't identify those changes, but it has long been suspected that portions of Justice Scalia's majority opinion were inserted reluctantly. Specifically, Justice Scalia wrote that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[26] This curious disclaimer lingers in

21. *See* Lesley Oelsner, *Senate Confirms Stevens, 98-0*, N.Y. TIMES, Dec. 17, 1975, at A1.

22. 554 U.S. 570 (2008).

23. STEVENS, *supra* note 1, at 482.

24. JOHN PAUL STEVENS, SIX AMENDMENTS 126 (2014); John Paul Stevens, Op-Ed, *Repeal the Second Amendment*, N.Y. TIMES, Mar. 27, 2018, *available at* https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html.

25. STEVENS, *supra* note 1, at 485–87 (describing the review of historical sources that preceded Stevens's writing of his opinion and also quoting the cover memorandum circulated with his draft opinion).

26. *Heller*, 554 U.S. at 626–27.

the opinion unsupported by any explanation or analysis. Which mental illnesses disqualify Americans from gun ownership? Why isn't the District of Columbia, the seat of the federal government, a "sensitive place"? If commercial speech is protected by the First Amendment, why aren't gun sales protected by the Second? Justice Stevens's confirmation that Justice Kennedy requested significant changes to the opinion offers a likely explanation for this language.

Moreover, the fact that securing Justice Kennedy's join required some qualifications to the right recognized in *Heller* isn't just a matter of legal historical trivia but might be relevant to modern Second Amendment litigation. It is notable that, with one prominent exception,[27] the Court did not take any Second Amendment cases during the remainder of Justice Kennedy's tenure. Then, barely three months after Kennedy's replacement, Brett Kavanaugh, was seated, the Court granted cert in *New York State Rifle & Pistol Association v. City of New York*,[28] a challenge to a unique city regulation involving the transport conditions imposed upon gun owners who held "premises" licenses, but not "carry" licenses.[29] Justice Kennedy seems to have been holding back the tide.

An additional bit of red meat for Court watchers emerges from Justice Stevens's discussion of *Citizens United v. FEC*.[30] The case was decided in Stevens's last Term on the Court—indeed, the Justice's trouble reading his dissent in the case from the bench alerted him to a minor stroke he had suffered and led to his decision to retire.[31] The *Citizens United* Court struck down a federal ban on certain election-related expenditures funded out of the general treasury funds of a corporation or union, overturning two earlier decisions in the process.[32] Jeffrey Toobin reported in 2012 that Chief Justice Roberts had originally wanted to issue a narrow decision refusing to apply

27. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010).

28. ___ U.S. ___, 140 S. Ct. 1525 (2020).

29. *See* N.Y. State Rifle & Pistol Ass'n v. City of N.Y., 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (No. 18-280) (Jan. 22, 2019).

30. 558 U.S. 310 (2010).

31. *See* STEVENS, *supra* note 1, at 503.

32. *Citizens United* overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and portions of *McConnell v. FEC*, 540 U.S. 93 (2003).

the expenditure ban to Citizens United, an ideological nonprofit seeking to release a movie through video on demand, as distinct from a television advertisement.[33] On Toobin's telling, Justice Kennedy circulated a broader concurring opinion that would reach the constitutional question and eventually attracted significant support among the Court's conservatives.[34] Roberts's decision to allow Kennedy's opinion to be the majority opinion prompted a virulent dissent by Justice David Souter, who objected to striking down Congress's work on its face without proper briefing and argument.[35] Justice Souter's dissent, Toobin says, cowed Roberts into setting the case for reargument the following term.[36] Justice Stevens says nothing of this reporting but he does confirm that Justice Souter circulated a dissent after the first argument. Indeed, he says his own dissent from the eventual decision drew heavily on Justice Souter's.

I clerked for Justice Stevens during the Supreme Court Term that began in October 2006, three years before he retired. I am aware of the risk of hagiography in assessing the work of a revered mentor, especially one who passed so recently. Still, I am confident in reporting that, in three important respects, Justice Stevens was the same principled man who had admirably dissented in Father Groppi's case nearly four decades earlier.

First, Justice Stevens firmly believed that each case stood on its own feet. "General propositions do not decide concrete cases," Justice Oliver Wendell Holmes wrote in his famous *Lochner* dissent. "The decision will depend on a judgment or intuition more subtle than any articulate major premise."[37] The law insists on every case being placed in its own context; this is indeed what principled decisionmaking requires. We often think of principles as unbending but, as the constitutional theorist Robert Alexy has written, principles are "optimization requirements" that, through the exercise of reasoned judgment,

33. JEFFREY TOOBIN, THE OATH 167 (2012).
34. *Id*. at 167–68.
35. *Id*. at 168.
36. *Id*.
37. Lochner v. N.Y., 198 U.S. 45, 76 (Holmes, J., dissenting).

must accommodate competing principles and facts about the world.[38]

Justice Stevens's longstanding suspicion of the Court's multi-tiered approach to the Equal Protection Clause reflects this orientation toward legal standards over hard-and-fast rules. Less than a year into his tenure, the Court heard *Craig v. Boren*,[39] a challenge to an Oklahoma drinking-age law that discriminated against men. Justice Brennan's majority opinion in *Craig* announced the use of "intermediate" scrutiny for laws that discriminate on the basis of sex. Justice Stevens's concurring opinion began:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. . . . I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms.[40]

This approach to equal protection cases perhaps allowed Justice Stevens to see factual distinctions that others miss, such as his often underappreciated embrace of forward-looking but not remedial race-based affirmative action.[41] Stevens credits his Northwestern legal education under Dean Leon Green for his strong orientation toward "facts and procedure instead of generally applicable substantive rules."[42] Still, one gets the sense from the book that Stevens's appreciation for common

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38. *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47–48 (Julius Rivers trans., 2002).

39. 429 U.S. 190 (1976).

40. *Id.* at 211–12 (Stevens, J., concurring).

41. *Compare* Fullilove v. Klutznick, 448 U.S. 448, 538–39 (1980) (Stevens, J., dissenting), *with* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting).

42. STEVENS, *supra* note 1, at 54.

sense over formalisms is more innate than acculturated. One got the same sense in person.

A second respect in which Father Groppi's case seemed to personify Justice Stevens more broadly is in its display of his independence. Not only was it a dissent in his first published judicial opinion but it was a dissent in a case that, Stevens notes, he was warned by a fellow judge would have political implications affecting who was considered for the Supreme Court.[43] It's unlikely that Stevens's dissent earned him plaudits from Richard Nixon, but he dissented all the same.

Much as Justice Stevens insisted that each case must stand on its own feet, he also wanted judges to make their own decisions. If judges disagreed with the dispositions in particular cases, their duty was not to go along to get along but rather to write separately and explain what the majority got wrong. Indeed, perhaps the single most consequential decision Justice Stevens authored, his opinion for the Court in *Sony Corporation of America v. Universal City Studios*, began as a dissent.[44] In *Sony*, the so-called "Betamax" case, the Court held that using a home recording device to make a copy of a television show for private, noncommercial use did not violate the copyright law. Justice Stevens's dissent helped prompt the Court to set the case for reargument, leading Justice O'Connor to switch her vote and make the dissent a majority opinion.[45]

Justice Stevens's practices in chambers were calculated to preserve his independence. Early on, for example, he declined Chief Justice Burger's invitation to join the "cert pool," a system in which the clerks of participating Justices divide the petitions and write a shared memo summarizing the case and offering a recommendation on whether it should be granted or denied.[46] Justice Stevens borrowed his preference for reading the papers in his own chambers from Justice Rutledge, who did not trust Chief Justice Fred Vinson's clerks fairly to handle *in forma pauperis* petitions, those from (typically *pro se*) petitioners who

43. *Id*. at 111.

44. *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984); STEVENS, *supra* note 1, at 200–01.

45. STEVENS, *supra* note 1, at 200–01.

46. *Id*. at 137–38.

had obtained waivers of the filing fee.[47] In one such petition that Vinson's clerks had recommended be denied, the Rutledge chambers insisted on a response from the government and the case resulted in a confession of error and a summary reversal.[48] Justice Stevens reveals that something similar happened during his own tenure, in *BMW of North America v. Gore*,[49] a case limiting the scope of punitive damages under the Due Process Clause. Chief Justice Rehnquist did not put the case on the list for discussion at the Justices' conference, but the Stevens chambers added it to the list.[50] It became a grant and then a reversal. Justice Stevens wrote the majority opinion.[51]

In addition to exempting himself from the cert pool, Justice Stevens also eschewed "bench memos" from his law clerks—he preferred to read the papers on his own and discuss the cases orally with his clerks before argument—and he typically wrote the first drafts of his opinions. As with his refusal to rely on shared cert memos from other chambers, both practices mirrored those of Justice Rutledge.[52] Writing the first draft helped to ensure that he was comfortable with his reasoning before falling under the influence of a skilled writer. It also trained his attention on the facts of the case. The book includes the candid, indeed chilling, admission that his outsourcing of the statement of facts in *Jurek v. Texas*,[53] one of five cases through which the Court lifted its moratorium on the death penalty, led him erroneously to vote to affirm the capital sentence.[54]

A third defining characteristic of Justice Stevens, in addition to his attention to facts and his independence, is somewhat more difficult to articulate with precision but leaps off the pages of his book and would be easily recognized by all who knew him. Let's call it "professionalism." A casual

47. *Id*. at 62–63.

48. *Id*. at 63; *see* Marino v. Ragen, 332 U.S. 561 (1947) (per curiam).

49. 517 U.S. 559 (1996).

50. STEVENS, *supra* note 1, at 138.

51. *BMW*, 517 U.S. at 574 (explaining that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose" (footnote omitted)).

52. STEVENS, *supra* note 1, at 62–63.

53. 428 U.S. 262 (1976).

54. STEVENS, *supra* note 1, at 143.

observer could easily accuse Stevens of being a kind of naïf. Notably, in a memoir that runs more than 500 pages and is overwhelmingly devoted to his time on an increasingly polarized Supreme Court, Justice Stevens never—not once—accuses his colleagues of partisanship. He also notes that, consistent with his commitment to the independence of each Justice, he almost never visited his colleagues to try to persuade them to join his opinions.[55] And so it is easy to get the impression of the courtly man in a bowtie and spectacles studying the facts and plugging away one case at a time while clever partisan plots swirl about him, over his head.

Although his optimism in chambers was striking, I think it would be quite wrong to view Justice Stevens's generosity toward his colleagues as guilelessness. This was, after all, a man whose father once, successfully, asked Al Capone to stop crime in Chicago as a personal favor.[56] The memoir gives a hint that Justice Stevens knew exactly what was happening to the Court. The book includes a lengthy discussion of *Bush v. Gore*,[57] in which the Court halted a manual recount of presidential ballots cast in Florida in 2000, effectively handing the election to George W. Bush. Among the several problems Justice Stevens found with the majority's approach, the one that clearly stuck with him was the unspoken assumption that the judges on the Florida Supreme Court who had ordered the recount were partisan operatives. He thus ended his unusually pointed dissent with these words:

> The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election,

55. STEVENS, *supra* note 1, at 205. One notable exception is *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), his most cited opinion, which he lobbied Justice Brennan to join and therefore make the opinion unanimous. *See id.*

56. STEVENS, *supra* note 1, at 7.

57. 531 U.S. 98 (2000).

> the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[58]

As if to actively perform that shaken confidence, for two of the cases discussed in the remainder of the chapter on the October 2000 Term and for one case from the following term, Justice Stevens refers to the Court as "the five-justice majority" from *Bush v. Gore*.[59] The three cases had nothing to do with election law. One involved the Clean Water Act,[60] another the Federal Arbitration Act,[61] and a third the availability of an implied constitutional damages remedy.[62] Observers of the Court will recognize these areas of law as having been in the crosshairs of legal conservatives over the last several decades. Affiliating the conservative decisions in these cases with *Bush v. Gore* is as close to a wink at the camera as Justice Stevens gives in his memoir.

The professionalism one observes in Justice Stevens doesn't, then, speak to naiveté so much as to the kind of role awareness he urged his colleagues to maintain in *Bush v. Gore*. One observes something similar in Stevens's caginess about his own abilities. The book reads at times almost as a *Forrest Gump* for the elite lawyer class. Here he is being invited fresh out of college, as if at random, to help break the Japanese naval code.[63] And there he is winning a clerkship with Justice Rutledge on a coin flip.[64] He's casually asked to be general counsel to Sears after conducting a routine deposition of one of the company's senior officers.[65] (He declined.) Byron White wants him to run the Justice Department's antitrust division, Stevens suggests, because they had met in Hawaii during the war.[66] He acts surprised, just off his bombshell investigation into the Illinois Supreme Court and his election as vice president of the Chicago

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58. *Id*. at 128–29 (Stevens, Ginsburg & Breyer JJ., dissenting).

59. STEVENS, *supra* note 1, at 374, 377, 381.

60. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

61. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

62. Correctional Serv. Corp. v. Malesko, 534 U.S. 61 (2001).

63. *See* STEVENS, *supra* note 1, at 35.

64. *See id*. at 58–59.

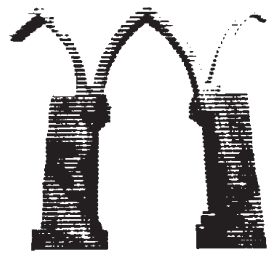
65. *See id*. at 85.

66. *See id*. at 99.

Bar Association, when Senator Percy floats him for the Seventh Circuit.[67]

Don't be fooled. Justice Stevens was as aware of his brilliance as he was of his privilege. But he let it speak for itself. Don't toot your own horn, don't disparage others, trust your judgment, do your job, and you can be one of the good guys.

67. *See id*. at 106–08.



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