

Intelligible Justice

MICHAEL SEROTA*

I. PHILOSOPHY OF JUDICIAL OPINION WRITING	651	R
II. SUPREME COURT OPINION WRITING AND PUBLIC COMPREHENSION	657	R
III. PUBLIC OPINIONS	662	R
IV. CONCLUSION	669	R

*“Justice is not there unless there is also understanding.”*¹

The judicial opinions issued by the U.S. Supreme Court are binding law in America, impacting nearly every aspect of life in the polity. And yet, both their sheer complexity and astonishing length render them unintelligible to most Americans. But regardless of whether they are understood or not, the Court’s opinions establish a range of compulsory legal obligations that apply to all who fall within its sweeping jurisdiction. And compliance with these obligations is essential, for the individual who fails to comport her behavior accordingly risks confrontation with the coercive power of the State. This situation thus presents a troubling paradox: while the Court’s opinions constitute the rule of law, governing a wide array of both public and private affairs, the average American is likely to find them utterly incomprehensible.

The problematic nature of the unintelligibility paradox is similarly highlighted by the essential democratic values that the practice of judicial opinion writing otherwise redounds to society. At the heart of American political theory is the foundational principle that legitimate political authority is rooted in public consent—as the Declaration of Independence phrases it, only through the “consent of the governed” are the “just powers” of government derived.² But while the elected branches of government are able to secure legitimacy *qua* consent at the ballot box, an unelected and life-tenured federal judicial branch cannot. These judges must instead rely upon the power of persuasion; that is, by providing reasoned justifications for their rulings, judges are able to secure the “tacit approval and obedience of the governed.”³ And yet, persuasion

* J.D., University of California, Berkeley, School of Law. The author would like to thank Michelle Singer, Joseph Serota, Robert Dolehide, and Ethan Leib for their helpful advice and comments. Special thanks to Emily Horowitz, Theresa Breslin, and the rest of the *University of Miami Law Review* for their hard work and careful editing.

1. *People v. Dixon*, 231 N.Y. 111, 130 (1921) (Cardozo, J., dissenting).
 2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
 3. Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 173 (1995).

demands comprehension at the very least. As such, when judicial opinions are unintelligible to the governed, judges lack the democratic legitimacy that the exercise of reason-giving would otherwise afford them.

The detrimental impact of the unintelligibility of the Court's work, however, is not lost on many of our nation's commentators, who have urged the justices to increase both the clarity and brevity of their opinions with the hopes that such changes would make them more accessible.⁴ But while such reforms are necessary, they are not alone sufficient to address the true breadth of the public comprehension gap. The variance between the complexity of the issues the Court confronts and the astonishingly low levels of civic literacy in America requires a more robust, bottom-up approach to reform. This Essay proposes one potential solution in the form of a two-tier system of opinion publication. Specifically, it argues that the Court should begin publishing what I call "Public Opinions"—in essence, a translation of the Court's regular opinions into a more publicly accessible, civic education-based format—and that it should also establish an "Office of Public Opinion," consisting of an interdisciplinary staff of lawyers, civic educators, and civic literacy experts, to implement a comprehensive Public Opinions program.

I make the case for this type of reform in three parts. Part I begins with a discussion of the practice of judicial opinion writing, assessing both the primary functions judicial opinions serve and the normative benefits that flow from fulfilling those functions. I then explain why each of these functions requires that judicial opinions be comprehensible as a general matter, and then assess the more specific question of audience—that is, "to whom must they be comprehensible?" After briefly discussing the two approaches commentators take, what I label the "professional view" and the "populist view," I set forth an argument in favor of the latter, suggesting a judicial obligation to write widely accessible judicial opinions.

Part II then gauges whether and to what extent the Supreme Court's contemporary opinions meet this obligation, an exploration without

4. See, e.g., *id.* at 187 (proposing clarity and brevity-based reforms); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 55 (2002) (same); see also JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 113 (1992) (noting the importance of writing clear and comprehensible judicial opinions in the context of constitutional law); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 335 (1987) (espousing the virtues of clarity and brevity in legal writing); Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008) (describing the ethical implications of clarity and brevity in judicial opinion writing); Adam Liptak, *Justices are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 17, 2010 (criticizing the Court's recent opinions for their lack of clarity and brevity), <http://www.nytimes.com/2010/11/18/us/18rulings.html>.

encouraging results. The substantial disparity between the complexity and length of the Court's work and the high levels of civic illiteracy in America suggests a severe public comprehension gap. Moreover, such high levels of civic illiteracy also help illuminate why clarity and brevity-based reforms are not alone sufficient to address the comprehension problem, given that the average American simply does not possess enough substantive legal knowledge to be capable of confronting many of the complex issues at the heart of the Court's work, no matter how clearly or succinctly they are addressed. Having identified the civic illiteracy-based architecture of the intelligibility problem, then, I argue that any attempt to make the Court's work accessible to the public must be grounded in civic education.

Part III proposes a solution to this quandary by suggesting the adoption of a two-tiered system of opinion writing that publishes the complementary civic education-based Public Opinion format alongside the Court's regular opinions. I first outline the basic components of a Public Opinion and then explain how a comprehensive Public Opinion program might best be implemented. I next discuss some of the benefits that this bifurcated approach could produce, while exploring the Court's educative mandate that legitimizes them. I then briefly conclude.

I. PHILOSOPHY OF JUDICIAL OPINION WRITING

Judicial writing is a peculiar phenomenon. Article III of the Constitution tasks judges with deciding "Cases" and "Controversies," but says nothing about how judges ought to communicate their decisions to the public.⁵ Judges are therefore left with significant discretion to craft their opinions however they please, and this discretion is clearly reflected in the wide array of authorial approaches contained in the pages of the federal reporters. And yet, while the rules of engagement governing the practice of judicial opinion writing are few and far between, the choices judges make in this area have important societal consequences. An analysis of the three primary functions that judicial opinions serve—broadly conceived as rule of law, legitimacy, and constraint—reveals why.

At its most basic level, a written judicial opinion is simply a means of resolving a dispute before a court; in the words of the Federal Judicial Center's Judicial Writing Manual, a published opinion "communicate[s] a court's conclusions and the reasons for them to the parties and their lawyers."⁶ But in the American legal system, judicial opinions also serve a broader function; that is, they establish binding rules of law, or prece-

5. U.S. CONST. art. III, § 2, cl. 1.

6. FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL 1 (1991).

dents, that apply to all those falling within a court's jurisdiction.⁷ In this way, published judicial opinions both enable individual actors to determine "what the law requires of them" and allow "other courts and judges to decide like cases alike."⁸ These two precedential functions are part and parcel with the rule of law; by informing the public of its rights and obligations and facilitating their uniform judicial enforcement, judicial opinions help create the predictability, certainty, and stability necessary to establish a "sphere of autonomy within which individuals can act without fear of government interference."⁹

Judicial opinions not only facilitate the rule of law, however; they also serve a vital legitimizing function. It is a foundational principle of American political theory that the democratic legitimacy of each branch of government rests upon public consent.¹⁰ And yet, while the legislative and executive branches secure that public consent through the electoral process, an unelected and life-tenured federal judiciary cannot. Surviving Article II's presidential nomination and Senate confirmation process is a start¹¹—although the contemporary trend toward "vacuity and

7. RAYMOND WACKS, *LAW: A VERY SHORT INTRODUCTION* 13 (2008) (explaining that the building blocks of the American common law system are cases, and that the common law therefore "elevates the doctrine of precedent to a supreme position"); Judith S. Kaye, *Judges As Wordsmiths*, 69 N.Y. ST. B.J. 1, 1 (1997) (noting that judges do not "just write decisions, [they] write precedents").

8. Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 1003 (1992); see Forrester, *supra* note 3, at 173 ("Judicial opinions also serve the function of setting up 'helpful guide posts' for proper future compliance by lawyers, other judges, present and future, and, most importantly, the people in general."); Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 747 (2006) ("By disclosing the ostensible justifications for a court's decision, an opinion enables the various audiences to which it is directed to . . . act in response to it.")

9. Lawrence B. Solum, *Legal Theory Lexicon 017: Rule of Law*, *Legal Theory Lexicon*, http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_3.html; see Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 165 (2006) (noting "the rule-of-law values of predictability, certainty, and stability"); Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL'Y REV. 415, 428 (2011) (discussing rule-of-law values).

10. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."); Wanderer, *supra* note 4, at 50 (noting the relationship between judicial opinions and public consent); see also Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 995 (2010) (explaining that "the Declaration of Independence grounds American political thought in the consent of the governed" and that although "[t]he Constitution does not use the same language . . . there can be little doubt the Framers and the Ratifiers understood that the Constitution, by the very act of breaking down the Articles of Confederation and reconstituting the government under the new document, fit within the Declaration's consent theory"); THE FEDERALIST NO. 85 (Alexander Hamilton) (referencing "[t]he establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people . . .") (emphasis added).

11. U.S. CONST. art. II, § 2 (providing that the President "shall nominate, and by and with the Advice of the Senate, shall appoint . . . Judges of the [S]upreme Court").

farce”¹² likely detracts from the democratic legitimacy afforded by this process—but it is not alone sufficient to account for the judiciary’s power to strike down laws enacted by a democratically elected Congress and signed by a democratically elected President.¹³ Rather, as the Supreme Court has itself noted, the judiciary’s legitimacy hinges upon the practice of producing “legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation,”¹⁴ or simpler yet, engaging in reason-giving. As Ray Forrester phrases it, judicial opinions are a democratic concession to the “exercise of elitist power over a mass of consenting subjects”—that is, “by explaining and attempting to justify decrees imposed on the majority,” judges thereby “gain the tacit approval and obedience of the governed.”¹⁵

Finally, judicial opinions serve an essential constraining function, which they achieve in a cluster of ways. At their most basic level, published judicial opinions limit the range of potential outcomes for a case to those that can be reasonably justified. And while the demands of reasonable justification may not be exacting—due to both the contested nature of what qualifies as “reasonable” in a given case and the concomitant wide-ranging discretion this uncertainty creates—when applied to the virtuous decisionmaker they can indeed serve as a meaningful constraint. As Patricia Wald observes, “[f]or a conscientious judge, the simple obligation to write an opinion persuasively explaining the outcome of a case is a profound constraint on judicial discretion.”¹⁶

12. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920 (1995) (“When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public.”); see Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J. L. & POL. 123, 131–32 (2011) (noting that “senators on both sides of the aisle spend more time accusing their political opponents or the nominee of favoring unconstitutional judicial activism than asking questions calculated to illuminate what kind of justice the nominee will be”).

13. See Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L. L. 81, 90 (1994) (noting the “key role” the “reasoned opinion plays . . . in justifying judicial creativity,” given that “political choices in a democracy are normally reserved for the legislature and executive”).

14. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992); see Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) (noting that judges write reasoned opinions to reinforce their “oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do”) [hereinafter Wald, *Rhetoric*].

15. Forrester, *supra* note 3, at 173.

16. Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987) [hereinafter Wald, *Thoughts*]; see DANIEL FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* 44 (2009) (noting that “[t]he best judges, confronting a

A second, but no less important, constraining function that judicial opinions serve inheres in their ability to facilitate both public and judicial oversight of judges. As to the former, the requirement that judges justify their decisions in a publicly available document enables the public to monitor the exercise of judicial power, and to respond accordingly.¹⁷ Those judges who issue poorly reasoned decisions may over time invite “limits on jurisdiction, constitutional amendments, or changes in the way that litigants, the public, or the popular branches respond” to their rulings.¹⁸

The judicial opinion writing requirement similarly constrains the discretion of judges by facilitating judicial oversight. Consider first the vertical channel of appellate review, whereby the issuance of a judicial opinion provides a means for hierarchically superior courts to scrutinize the decisionmaking of lower courts. By exposing a judge’s reasoning to scrutiny and enabling the reversal of arbitrary, incorrect, or poorly reasoned decisions—however infrequently that scrutiny may actually occur¹⁹—judicial review helps limit the occurrence of “misguided or destructive exercise of judicial power.”²⁰ There is also a more consistently available, if somewhat less robust, constraint on the judicial discretion of all appellate judges, which is the practice of separate opinion writing. By issuing a stinging dissent or pointed concurrence, judges are able to illuminate the flaws in a majority opinion’s reasoning and to offer a public rebuke with the potential to deter an abuse of judicial power.²¹

decision that ‘won’t write,’ [because it cannot stand up to the requirement of reasoned elaboration] will change that decision”).

17. See George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 200–01 (1967) (“Above all else [the purpose of a judicial opinion is] to expose the court’s decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether . . . the court is doing its job, whether a particular judge is competent.”); Eisgruber, *supra* note 8, at 1003 (noting the impact that “hav[ing] to justify the result in a document subject to public criticism” will have on the judicial decisionmaking process); Oldfather, *supra* note 8, at 747 (noting that judicial opinions enable the public to “monitor the court’s performance”).

18. FARBER & SHERRY, *supra* note 16, at 44.

19. The extent to which appellate review serves as a meaningful constraint on judicial discretion is likely to vary both by court and legal issue, given the growing case load at the U.S. Courts of Appeal, the low statistical probability of Supreme Court review, and the Court’s own placement at the top of the judicial hierarchy. See Toby J. Stern, Comment, *Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377, 386–91 (2003) (discussing the rise in case loads at the U.S. Courts of Appeal and its impact on the quality of review); The Supreme Court of the United States, *Frequently Asked Questions*, <http://www.supremecourt.gov/faq.aspx#faq9> (noting that the Supreme Court receives approximately 10,000 petitions for writ of certiorari each year and grants only seventy-five to eighty).

20. Wells, *supra* note 13, at 89.

21. See *id.* (noting the constraining function that separate opinions play).

To sum up, then, judicial opinions serve three primary functions: to enable litigants to respond to a court's decree and to inform the public of its legal rights and responsibilities (rule of law); to effect public persuasion through the practice of reasoned justification (legitimacy); and to facilitate oversight by both judges and the public (constraint).²² After assessing these functions, it is not difficult to see why judicial opinions ought to be comprehensible. A general principle of comprehension is implied in each:²³ judicial opinions cannot notify, inform, persuade, or otherwise make oversight possible if they cannot be understood.

The more interesting question, then, is not whether judicial opinions ought to be comprehensible—clearly they must—but rather, to whom must they be comprehensible? This is the question of audience, which requires that we identify the limits of the judicial obligation to write comprehensible opinions.

Those commentators who have addressed the audience question generally subscribe to one of two approaches, the narrower of which I refer to as the “professional approach,” and the broader of which I call the “populist approach.” The professional approach envisions that the relevant audience of judicial opinions is comprised of legal professionals and government elites, thereby placing little to no emphasis on the importance of public comprehension. The following statement from Henry Hart typifies this approach:

[T]he test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.²⁴

22. For substantively similar views on the primary functions judicial opinions serve, see Lebovits, *supra* note 4, at 244–45 (explaining that communication with litigants, the constraint of arbitrariness, ensuring correctness, and precedent are the primary functions that judicial opinions serve); Wells, *supra* note 13, at 86–89 (explaining that guidance, persuasion, judicial accountability, and legitimacy are the primary functions that judicial opinions serve).

23. Cf. Wanderer, *supra* note 4, at 48 (noting the relationship between the “judiciary’s responsibility to communicate clearly” and the ability of judicial opinions to “achiev[e] the goals of our judicial system”).

24. Henry M. Hart, Jr., *The Supreme Court, 1958 Term – Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959); see, e.g., Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–14 (1961) (noting a range of comments offered by various state and federal appellate judges indicating their endorsement of the professional approach); Burke Marshall, *Foreword* in GOLDSTEIN, *supra* note 4, at 7 (“Familiarity with the Court’s work overwhelmingly demonstrates at a minimum that the members of the Court view their work as directed at the elite, and not to the people.”); see also Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 948–49 (noting that “the Court writes for a very limited audience” including “the parties[.]

Conversely, the populist approach, as the label itself suggests, emphasizes wide-reaching accessibility and envisions the relevant audience for judicial opinions as encompassing the general public. In this regard, consider Justice Hugo Black's declaration that "litigants, people in barber shops, [and] 'your momma'" ought to be able to understand his opinions,²⁵ or Justice Sandra Day O'Connor's focus on the "wide audience" to which judicial opinions ought to be accessible.²⁶

But while prominent voices exist on both ends of the opinion-writing spectrum, a closer look at the functions judicial opinions serve suggests that the narrower professional approach must ultimately be rejected and supplanted by the populist approach.²⁷ First, the rule of law function necessitates a broad level of public comprehension, given that each citizen is bound by the precedents judicial opinions create. Indeed, public comprehension is vital, since the broad sweep of judicial opinions shapes the lives of American citizens and is backed by the coercive power of the state. Second, the democratic legitimacy that reason-giving and justification confer on judges similarly requires a broad standard of public accessibility due to the public consent principle that undergirds persuasion on a societal scale. In other words, the "consent of the governed" demands persuasion of the entirety of the governed, rather than of some elite subsection of it. And finally, a judicial opinion's function as a facilitator of public oversight also establishes a concomitant principle of public comprehension, since the only way members of the public can scrutinize a judge's decisionmaking process is if they are able to understand the opinions that record it.

In sum, the general principle of comprehension inherent in judicial opinions entails, in its practical application, a standard of *public* comprehension. Thus, the audience for which judicial opinions ought to be intelligible is wide indeed. With that normative benchmark in mind, I devote the rest of this Essay to exploring the relationship between the theory and practice of intelligible opinion writing by focusing on that

. . . lower courts[,] . . . future litigants[,] . . . legislative staffs[,] . . . academics[,] . . . and the media").

25. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 325 (2d ed. 1997).

26. Forrester, *supra* note 3, at 167 (quoting Letter from J. Sandra Day O'Connor, U.S. Supreme Court, to Ray Forrester, Professor, Univ. of Cal. Hastings Coll. of Law (May 11, 1988)). On the academic side, Ray Forrester has noted the importance of writing judicial opinions "for people in general of varying levels of education and intelligence," *id.* at 173, while Joseph Goldstein has argued that it is important that Supreme Court opinions be comprehensible to the entire public, GOLDSTEIN, *supra* note 4, at 112.

27. *Cf.* Thomas Jefferson, Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 10 THE WRITINGS OF THOMAS JEFFERSON, at 161 (1899) (explaining that if the people themselves are "not enlightened enough" to exercise the "ultimate powers of society . . . with a wholesome discretion," then the only remedy is to "inform their discretion").

singular judicial institution whose opinions bind the entire nation: the United States Supreme Court.

II. SUPREME COURT OPINION WRITING AND PUBLIC COMPREHENSION

The standard metric for determining the accessibility of judicial opinions encompasses two dimensions.²⁸ The first, clarity, evaluates whether an opinion effectively communicates its holding and supporting rationale using language the reader can understand. The clarity dimension is composed of two different subparts, what I refer to as “clarity of thought” and “clarity of expression.” The former focuses on the quality of an opinion’s reasoning—that is, does the opinion intelligibly articulate “the steps and connections in a logical argument”?²⁹ Conversely, the latter is concerned with presentation, determining whether an opinion contains prose, grammar, punctuation, structure, and an overall format that are comprehensible to the reader.³⁰

And yet, while clarity is a necessary condition of intelligibility, it is not alone sufficient. Even if an opinion is written clearly, it can still be so lengthy, and therefore so time consuming, that it is simply inaccessible to the general reader. Thus, the second dimension that commentators evaluate when gauging accessibility is brevity: Does an opinion communicate its essential reasoning in as few words as possible?³¹ The importance of this quantitative dimension cannot be understated, given that time is a limited resource, and lengthy opinions can require a greater expenditure of resources than readers have to offer.³²

According to a variety of experts—including lower court judges, law professors, and legal journalists—the Supreme Court’s recent decisions are neither clear nor brief. First, critics point out that many of the Court’s opinions are so obfuscated that they create turmoil within the legal system itself. According to *New York Times* reporter Adam Liptak, “[i]n decisions on questions great and small, the court often provides

28. See, e.g., Wanderer, *supra* note 4, at 55 (noting the importance of writing “clear” and “concise” opinions); Forrester, *supra* note 3, at 175 (noting that “lack of simplicity” and “length” are both “major fault[s] of present Supreme Court opinions”); Liptak, *supra* note 4 (criticizing the Court for its lack of clarity and brevity).

29. Gopen, *supra* note 4, at 335.

30. See *id.* at 348.

31. In the oft-referenced words of William Strunk and E. B. White, “Omit needless words! Omit needless words! Omit needless words!” WILLIAM STRUNK, JR. & E. B. WHITE, *THE ELEMENTS OF STYLE* (3d ed. 1979).

32. See Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 628 (2008) (explaining that “lengthy opinions make even more difficult the public’s task of decoding the Court’s decisions”); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 917 (2005) (“Time and attention are limited resources. As a result, citizens must make deliberate choices about what to focus on and gather information about.”).

only limited or ambiguous guidance to lower courts.”³³ As Professor Arthur Miller similarly notes, one of the Court’s most impactful recent decisions—*Ashcroft v. Iqbal*³⁴—has caused substantial “confusion and disarray among judges and lawyers,” leading him to describe the opinion as “shadowy at best.”³⁵ Eleventh Circuit Judge Frank Hull likewise imparts that the Court’s recent Fourth Amendment jurisprudence evidences “a marked lack of clarity,” causing lower court judges to struggle with applying it correctly.³⁶ These sorts of examples raise the obvious point that if legal experts are struggling to decipher the meaning of the Court’s writing, then one might reasonably assume that the average American is faring far worse.

Inherent in that assumption, of course, lies another assumption: That the average American actually has the time required to read through the Court’s increasingly lengthy opinions. For even if we set clarity aside, the sheer number of pages the Court currently produces is sufficient to deter all but the most devoted Court followers. For example, during the 2009 term, the median length of the Court’s majority opinions (4,751 words) and the overall length of its opinions including dissents and concurrences (8,265 words) were at an all-time high.³⁷ These numbers included, for example, the blockbuster *Citizens United v. Federal Election Commission*,³⁸ weighing in at an awe-inspiring 183 pages and over 48,000 words.³⁹ And since the Court issues approximately eighty judicial opinions per year, the time burden on a citizen interested in reading them is, quite simply, overwhelming. As Ray Forrester puts it, “[t]he practical result of the verbosity and sheer bulk of the opinions is to erect a heavy curtain of words between an unfortunate decision and the public awareness and understanding of what is going on.”⁴⁰

With the foregoing problems of obfuscation and verbosity in mind, commentators have urged the justices to reverse course by increasing both the clarity and brevity of their writing.⁴¹ These are the traditional reforms that are suggested to combat the comprehension problem. But

33. See Liptak, *supra* note 4 (discussing the lack of clarity in recent Supreme Court opinions such as *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007)).

34. 556 U.S. 662 (2009).

35. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 24, 31 (2010).

36. *Rehberg v. Paulk*, 611 F.3d 828, 844 (11th Cir. 2010).

37. Liptak, *supra* note 4.

38. 130 S. Ct. 876 (2010).

39. Liptak, *supra* note 4.

40. Forrester, *supra* note 3, at 177.

41. See, for example, sources cited *supra* note 4.

while there is little doubt that such reforms are vital, as both clarity and brevity in judicial opinion writing are necessary components of a well-functioning legal system, they are not alone sufficient to address the true scope of the problem—that is, to enable the Court’s work to meet the broad standard of public accessibility discussed *supra* in Part I. An overview of the stunningly low rates of civic literacy, and legal literacy in particular, illuminate why this is so.

As Ilya Somin puts it, “the low level of political knowledge among American citizens is one of the best-established findings in all social science.”⁴² Studies reveal, for example, that a majority of Americans lacks basic information about the responsibilities of individual agencies and public officials,⁴³ while one-third of Americans cannot even *name* a single branch of government.⁴⁴ Studies similarly demonstrate that the public knows very little about the Constitution; consider that 80% of Americans cannot identify two First Amendment rights, 98% cannot identify two Fifth Amendment rights,⁴⁵ 55% believe that the right to education is part of the First Amendment,⁴⁶ and a majority of Americans cannot even identify how many senators the Constitution mandates.⁴⁷ In the words of Charles Quigley, the Executive Director of the Center for Civic Education, Americans have “an appalling lack of knowledge of a document that impacts their daily lives.”⁴⁸

Most relevant to the public comprehension problem at the heart of this Essay, though, is the fact that high rates of *legal* illiteracy pervade American life.⁴⁹ In fact, there is significant public confusion as to the

42. Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1371 (2004).

43. *Id.* at 1305.

44. See Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 2007 GEO. L.J. 899, 899 (2007).

45. See MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 71 (1996).

46. Rachel Gillespie, *Do You Think Teens Know the Difference Between Madison and Marx?*, A More Perfect Blog: the Official Blog of the Bill of Rights Institute (Dec. 15, 2010), <http://blog.billofrightsinstitute.org/2010/12/do-you-think-teens-know-the-difference-between-madison-and-marx/>.

47. Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1434–35 (1999).

48. *Id.*; see Neal Devins, *The D’oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1340 (2007) (reviewing JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006)) (“How Much Does the Public Know about the Constitution? Next-to-nothing.”).

49. See Janet Stidman Eveleth, *Advancing the Public’s Understanding of the Law: The Value of Law-Related Education*, 36 MD. B.J. 44, 44 (2003) (discussing high levels of legal illiteracy and that “[t]oday’s average citizen knows little about our justice system, and understands even less”); Jamieson & Hennessy, *supra* note 44, at 899 (noting that “public knowledge about both the Constitution and the courts is low”).

very nature of the judicial role: Approximately half of all Americans believe that judges are responsible for enforcing, rather than interpreting, the law.⁵⁰ And more than a third of all Americans are misinformed as to one of the most basic tenets of our criminal justice system—that a criminal defendant is innocent until proven guilty—instead believing just the opposite: “that the defendant must prove innocence rather than the prosecutor must prove guilt.”⁵¹

Americans are also uninformed as to the role and responsibilities of the U.S. Supreme Court. As Kathleen Jamieson and Michael Hennessy highlight: (1) close to a majority of Americans (45%) either affirmatively believes that the Supreme Court cannot strike down a statute as unconstitutional (22%) or do not know (23%); (2) a near majority (47%) believes that the justices do not regularly give written reasons for their rulings (18%) or do not know (29%); and (3) a majority (53%) believes that a 5-4 decision by the Supreme Court carries a different amount of legal weight than does a unanimous decision, while 39% believe that this split decision must either be referred to Congress for resolution (23%) or reheard by lower courts (16%).⁵² Americans even lack basic knowledge of the Court’s decisions;⁵³ in this regard, one study revealed that a majority of Americans could not describe the content of landmark decisions such as *Roe v. Wade*⁵⁴ or *Miranda v. Arizona*.⁵⁵ As Doni Gewirtzman aptly sums it up, “large segments of the public are essentially ignorant about the Court and its work.”⁵⁶

Such high levels of civic illiteracy, and of legal illiteracy in particular, strongly support the otherwise well-established conclusion that the Court’s opinions are inaccessible to most Americans.⁵⁷ Specifically,

50. AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 10 (1999).

51. *Id.* at 9.

52. Jamieson & Hennessy, *supra* note 44, at 900 (discussing data from Annenberg Judicial Independence Survey, September 2006 (2006 Survey); Annenberg Supreme Court Survey: Lawyers and the Public, June 2005 (2005 Survey)). Jamieson and Hennessy similarly note that “35% think that it was the intention of the Founding Fathers to have each branch hold a lot of power but the President have the final say.” *Id.*

53. See Devins, *supra* note 48, at 1340 (“The Court’s decisions go unnoticed by nearly all Americans.”); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2620–23 (2003) (discussing the data on public awareness of Supreme Court opinions and reaching the conclusion that “only a small fraction of the Supreme Court’s work is likely to be salient with the public”).

54. 410 U.S. 113 (1973).

55. 384 U.S. 436 (1966); CARPINI & KEETER, *supra* note 45, at 70–71 (noting that 55% of survey participants were not able to state the holding of *Miranda v. Arizona* and 70% were not able to state the holding of *Roe v. Wade*).

56. Gewirtzman, *supra* note 32, at 920; see Chemerinsky, *supra* note 24, at 950 (“The public is remarkably ignorant about the Supreme Court.”).

57. See Forrester, *supra* note 3, at 187 (noting that “[t]oday, most Supreme Court opinions are incomprehensible to the general public”); Tony Mauro, *The Chief and Us: Chief Justice William*

they demonstrate that the average American simply does not possess enough substantive legal knowledge to be able to comprehend judicial opinions covering the range of complex issues the Court confronts. To understand why this is so, consider the following discussion by political scientists Richard Niemi and Jane Junn on the impact that knowledge of political facts has on the comprehension of political analysis:

[I]n truth, there exists no list of essential political facts. At the same time, it is important for citizens to know some facts and, in general, the more the better. Almost any single piece of information by itself seems unessential. One can live one's daily life without knowing that the president is commander-in-chief of the armed forces or, for that matter, without knowing the name of the president. But how many political discussions and how many news reports would be incomprehensible without this information? And the more political information citizens have, the more sense they can make of those discussions and news reports⁵⁸

The general principle underlying Niemi and Junn's argument is both straightforward and intuitive: to make sense of a subject-specific analysis, a reader must possess some minimum level of knowledge relevant to the subject under discussion. Its application to the context of judicial opinion writing is similarly clear: the dearth of law-related facts possessed by the average American strongly suggests that discussions premised upon the application of those facts to complex questions of law are going to be incomprehensible.

There are two important takeaways here. The first is for the proponents of clarity- and brevity-based reforms. Conceptualizing the incomprehensibility of judicial opinions as a top-down problem—that is, as a malady rooted in the justices' obfuscation and long-windedness—misses the more systemic cause of unintelligibility for many Americans: legal illiteracy. While increased clarity and brevity are important goals, to be sure, they do not capture the entire picture of unintelligible opinion writing. Rather, a bottom-up approach to reform—that is, one grounded in civic education—is also necessary to confront the public comprehension problem.

Second, and more generally, given the substantial levels of legal illiteracy that pervade American life, attempting to address the public

Rehnquist, The News Media, and the Need for Dialogue Between Judges and Journalists, 56 SYR. L. REV. 407, 411 (2006) (noting that “a large number of [Supreme Court opinions]—including some of the most important ones—will be nearly incomprehensible to many members of the public” and that “the law has reached a level of complexity that puts many decisions beyond the reach of lay people (and many lawyers too)”).

58. RICHARD G. NIEMI & JANE JUNN, CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN 11 (1998); see CARPINI & KEETER, *supra* note 45, at 294 (noting that “factual political knowledge is the most important component of a broader notion of political sophistication”).

comprehension problem within the confines of a one-size-fits-all approach is not only impractical, but is imprudent as well. The variance between low legal literacy rates and the complex legal issues that the Court confronts suggests that requiring the Court's regular opinions to be broadly accessible to the public would constrain its ability to adequately address the issues before it. There is surely a limit on the extent to which the resolution of challenging legal issues can be simplified without sacrificing essential analytical depth or nuance. Thus, notwithstanding the Court's mandate to issue opinions that are as clear and succinct as possible, its overriding adjudicatory obligation requires that the quality of justice dispensed not be bounded by the limits of public comprehension.

The quandary with which we are left demands a program of reform that would enable the Court to better meet its goal of broad accessibility while still allowing it to engage in the level of analysis that the labyrinthine issues before it demand. In the third and final Part of this Essay, I propose a potential solution that could achieve this: the implementation of a Public Opinion program.

III. PUBLIC OPINIONS

The general mandate underlying a Public Opinion program is to translate each of the Court's published opinions into a publicly accessible medium of judicial communication, which accounts for both the low rates of civic literacy and the limited time the average American has to devote to reading the Court's work. What follows in this part is an attempt at transforming this mandate into a workable program of reform.

It is important to note at the outset, however, that this part paints with broad strokes, with the intended goal of identifying the overall structure of a Public Opinion program rather than specifying its particulars. The details of a Public Opinion program ought to be built upon the best research of the day by experts in the relevant education-specific fields (indeed, the interdisciplinary composition of the "Office of Public Opinion," discussed *infra*, specifically reflects this important point), and this explication not only leaves such experts with the space to accomplish this, but expressly invites them to do so.

If Public Opinions are to effectively translate the Court's regular opinions into a publicly accessible, civic-education-based format—thereby enabling the justices to meet the benchmark of public accessibility discussed in Part II—the primary hurdle they must overcome is the high rates of legal illiteracy. In order to surmount that obstacle, the first component of a Public Opinion—the "Essentials" section—must accomplish two goals. First, the section must explain as many of an opinion's

essential legal facts and concepts as possible in an effort to bridge the divide between the uninformed citizen and the complex legal issues regularly before the Court. Second, the section must provide the reader with this information in an easily navigable way so as to enable the reader to economize on time—that is, the section should allow the reader to absorb those legal facts and concepts with which she is unfamiliar, while ignoring those she already understands.

The next component of a Public Opinion is the “Background” section, which is devoted to providing a case’s factual and procedural context alongside a succinct overview of the legal issues presented. Each of the three segments of the Background section—facts, procedure, and law—ought to be communicated in an engaging narrative style that highlights the relevant human drama or high stakes involved in the case. Whether the case presents an exciting set of facts, a vigorous inter-circuit dispute, or an otherwise interesting legal issue, the key here is to pique the reader’s interest by underscoring the aspects of the case that lend themselves to a sense of provocativity, while retaining the integrity of the case itself.⁵⁹ After finishing this section, the reader should possess a general understanding of both the factual and legal issues in a given case, as well as a basic grasp on how those lower court judges who previously grappled with the issues resolved them.

The third and final component of a Public Opinion is the opinion summary itself, the “Decision” section. This section is the heart of a Public Opinion; it is a translation of the essential parts of the Court’s rationale, including concurrences and dissents, into an accessible capsule summary expressed as simply as possible and lacking formalistic hurdles, such as footnotes, citations, or legalese, that have the effect of “separat[ing] the opinion from the general public.”⁶⁰ This requires Public Opinion drafters to condense the regular opinion’s rationale to its bare essentials, thereby emphasizing accessibility, clarity, and brevity rather than breadth of coverage. In so doing, the drafters must be careful to safeguard the integrity of the Court’s reasoning; indeed, Public Opinions must always retain a reflective, rather than revisionary, character. Indeed, given the substantial level of discretion involved, the drafting of a Public Opinion is more of a craft than a science. Deciding what ought to be retained and what ought to be excised should not only turn upon legal considerations—that is, what is essential to retain an opinion’s core reasoning—but also upon pedagogical concerns and an understand-

59. Indeed, the Supreme Court generally does not grant certiorari to cases that do not encompass at least one of these angles; the challenge is to communicate them to the average reader in an interesting, relatable manner so as to create a desire to learn more.

60. GOLDSTEIN, *supra* note 4, at 121; *see, e.g.*, Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 648 (1985) (noting the difficulty of reading with footnotes).

ing of the average American's cognitive capacities.⁶¹

With that in mind, it is worth discussing how, exactly, the Court might implement a comprehensive Public Opinion program. As a general matter, the substantial investment of resources and varying expertise that a Public Opinion program requires justifies the creation of an Office of Public Opinion housed within the Court devoted to administering the program. Specifically, that office ought to consist of individual experts culled from the relevant fields of law, education, and psychology so as to ensure the multidisciplinary objectives of accuracy in translation, accessibility in presentation, and efficacy in communication are met.

And yet, while the Office of Public Opinion would be charged with composing the first draft of a Public Opinion, the Public Opinion's role in bridging the gap between the Court and the people demands authorial ownership by the justices themselves.⁶² This means that the Court must retain a supervisory role over the Office staff and the translation process so as to ensure that the Public Opinions correspond with their regular opinions. To best facilitate this, the authoring justice would be responsible for approving as a fair and accurate portrayal the portion of Public Opinion translation representing his or her majority, concurrence, or dissent. Further, regular opinions and public opinions ought to be released simultaneously. While this would require collaboration between chambers and Public Opinion staff, and therefore an expenditure of the Court's time, the value of such collaboration cannot be understated. Public Opinions would not only benefit from the justices' authorial ownership—ensuring that they constitute legitimate representations of the Court's work—but the justices themselves might also benefit, given that the process would require each justice to regularly confront the non-legalistic, plain English import of his or her decisions *prior* to

61. For anecdotal evidence that even children can engage with difficult legal issues once provided the foundational facts and concepts underlying those issues, see Michael Serota, *Civic Education and Popular Constitutional Interpretation*, JURIST—FORUM, Nov. 18, 2010, <http://jurist.org/forum/2010/11/civic-education-and-popular-constitutional-interpretation.php> (discussing one instructor's experience teaching high school students to grapple with complex issues of constitutional interpretation). For a fascinating look at how an ombudsman might be used in the legislative context to facilitate the effective communication of complex legal issues by lawmakers to the children they represent, see generally Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. (forthcoming 2012).

62. While Public Opinions are clearly juridical in nature, they are not intended to have any legal effect or precedential value; therefore, each Public Opinion should state that up front. Like the case summaries the justices read from the bench when opinions are released, Public Opinions would function solely as a communicative and educative device, and not as a source of legal authority. See generally Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75 (2010) (discussing the practice of "oral announcements").

publication.⁶³

This concludes my preliminary outline of a Public Opinion program.⁶⁴ While many details must still be filled in, hopefully its basic components have been clearly elucidated. At this point, it is worth addressing one possible objection to the implementation of a Public Opinion program: that it would be superfluous due to the wide-ranging media coverage of the Court. As I explain below, however, a closer examination of the overly politicized, excessively narrow, and unduly simplistic character of this coverage in fact highlights, rather than obviates, the novelty and importance of a Public Opinion program.

The literature on Supreme Court reporting reveals a panoply of defects.⁶⁵ First, scholars routinely note that media coverage does not reflect the entirety of the Court docket, and that this misrepresentation pervades newsmagazine, newspaper, and television news stories.⁶⁶ More disconcerting than the selective coverage, however, is that many commentators characterize the quality of reporting on the Court as both shallow and divisive. As Justice William O. Douglas once put it, “the author of the court opinion would hardly recognize [the media’s reporting] as descriptive of what he had written.”⁶⁷ More recently, Justice Antonin Scalia harangued the media’s overly simplistic results-oriented focus by stating that “[u]sually, the criticism in the press . . . has nothing to do with the law They’ll just tell you who the plaintiff was, what the

63. For a general argument on the importance of a pre-release viewing by the justices, see GOLDSTEIN, *supra* note 4, at 111 (noting that a pre-release viewing would “ensure that the opinions are clear about the nature and extent of concord and discord among the justices concerning the constitutional issues that they address”).

64. Although the Public Opinion program I propose here is focused on the U.S. Supreme Court, comparable programs could be instituted by state courts and other federal courts. The civic illiteracy-based underpinnings of the comprehension problem suggest that all courts likely face similar problems in terms of the intelligibility of their work.

65. See, e.g., DAVID L. GREY, *THE SUPREME COURT AND THE NEWS MEDIA* 4 (1968) (quoting journalist Max Freedman as stating that “the Supreme Court is the worst reported and worst judged institution in the American system of government”); Elliot E. Slotnick, *Media Coverage of Supreme Court Decision Making: Problems and Prospects*, 75 *JUDICATURE* 128, 131 (1991) (“Commentary has been frequent in criticism of the press for its coverage of the judiciary.”).

66. Rorie L. Spill & Zoe M. Oxley, *Philosopher Kings or Political Actors?: How the Media Portray the Supreme Court*, 87 *JUDICATURE* 22, 23 (2003) (citing Michael E. Solimine, *Newsmagazine Coverage of the Supreme Court*, 57 *JOURNALISM Q.* 661 (1980)); see Dorothy A. Bowles & Rebekah V. Bromley, *Newsmagazine Coverage of the Supreme Court During the Reagan Administration*, 69 *JOURNALISM Q.* 948, 949 (1992); Richard Davis, *Lifting the Shroud: News Media Portrayal of the U.S. Supreme Court*, 9 *COMM. & L.* 43, 43 (1987); Ethan Katsh, *The Supreme Court Beat: How Television Covers the U.S. Supreme Court*, 67 *JUDICATURE* 6, 8 (1983); Jerome O’Callaghan & James O. Dukes, *Media Coverage of the Supreme Court’s Caseload*, 69 *JOURNALISM Q.* 195, 195 (1992); J. Douglas Tarpley, *American Newsmagazine Coverage of the Supreme Court, 1978–81*, 61 *JOURNALISM Q.* 801, 801 (1984).

67. CHARLES PRESS & KENNETH VERBURG, *AMERICAN POLITICIANS AND JOURNALISTS* 10 (1988) (quoting Justice William O. Douglas).

issue was and who won. If you like the result then it's a great opinion, and if you don't like it, it's terrible."⁶⁸ Another commentator describes how the media regularly preoccupies itself with "the drama of human situations and the thrill of clashes between important interests" rather than the "essential" task of "relating what has been decided to the lives of the readers."⁶⁹ Therefore, the popular media coverage we are left with is, as Amnon Reichman puts it, "the jurisprudence of sound bites rather than the jurisprudence of concept, interest, or value."⁷⁰ Substantial shortcomings such as these illuminate the need for a more balanced, comprehensive, substantive, and therefore, educative, source of judicial information. Public Opinions are one potential solution.⁷¹

Having established the necessity of a Public Opinion program, it is also worth considering some of its potential benefits beyond enabling judicial opinions to realize their essential purposes. The educative value of the Public Opinion suggests many. First, as Niemi and Junn point out, "political knowledge helps citizens operate effectively in a democracy, heightens their awareness of the limits of both governmental and citizen behavior, [and] increases attainment of democratic goals by promoting more equal access among citizens."⁷² William Galston similarly notes a direct correlation between civic literacy and normatively desirable civic modes of behavior, such as "political participation [and the] expression of democratic values including toleration, stable political attitudes, and adoption of enlightened self-interest."⁷³ Findings such as these suggest that, by providing the public with a unique source of law-related civic education, a Public Opinion program could contribute to the democratic vitality of the polity while cultivating the civic virtue of its citizens.

68. MJ Lee, *Antonin Scalia Dissents on Press Criticism*, POLITICO (Oct. 5, 2011) (quoting Justice Antonin Scalia).

69. Irving R. Kaufman, *Helping the Public Understand and Accept Judicial Decisions*, 63 A.B.A. J. 1567, 1568 (1977); see Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1639 (2007) (explaining that "the media is likely to highlight elements it perceives as controversial or as likely to arouse a controversial reaction"); Spill & Oxley, *supra* note 66, at 29 (noting the media's emphasis "on the political implications and speculation for future activities rather than on the legal facts or on the rationale of the justices"). The quality of coverage coming from the legal blogosphere, however, is generally of much higher quality, and some sites, such as *SCOTUSblog*, provide that coverage in a more publicly accessible fashion.

70. Reichman, *supra* note 69, at 1641.

71. It is worth noting that Public Opinions might also provide the media with an important source of information on the Court, thereby enhancing the quality of its own reporting as well.

72. NIEMI & JUNN, *supra* note 58, at 11; see Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 967 (2009) (noting the general consensus that civic education can "lead to greater student involvement in the community and politics").

73. William A. Galston, *Civic Education and Political Participation*, 85 PHI DELTA KAPPAN 29, 29 (2003).

Second, these same educative benefits might also help to obviate negative public perceptions of the judiciary. As Justice Sandra Day O'Connor—civic education advocate *par excellence*—has noted, “[c]itizens who are less knowledgeable about the judiciary are more likely to believe that judges are biased and less likely to believe that courts act in the public interest.”⁷⁴ In O'Connor’s view, the survival of an independent judiciary is dependent upon public understanding, requiring a proactive effort to preserve the judiciary “as a meaningful part of our constitutional framework.”⁷⁵ Given the Public Opinion program’s potential as a vehicle for civic education on the judiciary, such a program would be directly responsive to O'Connor’s call.

Finally, a Public Opinion program would also be responsive to the Court’s institutional educative calling. As Eugene Rostow famously noted, “[t]he Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.”⁷⁶ Over the years since Rostow first set forth his vision of the Court *qua* national civics instructor, many commentators have endorsed it.⁷⁷ Consider, for example, Joseph Goldstein, who argues that “an intelligent democracy” depends upon Supreme Court opinions that clearly teach the public about rights, values, and the limits of government.⁷⁸ Or consider Christopher Eisgruber, who, in an article devoted to exploring Rostow’s view, argues that the Court’s educative mandate is actually an inbuilt feature of the constitutional architecture, providing the justices with a robust incentive and opportunity to teach.⁷⁹ But if these commentators are correct, and the Court is in fact an educative institution, then the justices’ opinions—their primary means of instruction—ought to be tai-

74. Sandra Day O'Connor, *The Democratic Purpose of Education: From the Founders to Horace Mann to Today*, in *TEACHING AMERICA: THE CASE FOR CIVIC EDUCATION* 3 (2011) (citing Jamieson & Hennessy, *supra* note 44, at 902); cf. Wanderer, *supra* note 4, at 50 (noting that “[w]hen people do not feel committed to judicial pronouncements because they do not understand them. . . . cynicism about legal institutions flourishes”).

75. O'Connor, *supra* note 74, at 8.

76. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 *HARV. L. REV.* 193, 208 (1952).

77. See, e.g., GOLDSTEIN, *supra* note 4, at 112 (endorsing Rostow’s view); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 26 (2d ed. 1986) (1962) (same); ROBERT BORK, *THE TEMPTING OF AMERICA* 249 (1990) (same); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 112 (1982) (quoting Rostow); Eisgruber, *supra* note 8, at 1028–32 (supporting the view of the justices as educators); see also Allen D. Black, *Judge Wisdom, the Great Teacher and Careful Writer*, 109 *YALE L.J.* 1267, 1269 (2000) (arguing that judicial opinions must “teach basic principles of democracy, equal protection of the laws, and constitutional federalism to lawyers, government officials, and the general public”); Robin West, *Foreword: Taking Freedom Seriously*, 104 *HARV. L. REV.* 43, 103 (1990) (noting “the educative role of Supreme Court opinions”).

78. See GOLDSTEIN, *supra* note 4, at 6.

79. See Eisgruber, *supra* note 8, at 1005–13.

lored to the abilities of their students: the general public.⁸⁰

And yet, the comprehension gap discussed *supra* Part II confirms that they are not. Public Opinions could thus begin to ameliorate this problem in an intuitive and straightforward way: in their ability to serve as a pedagogical tool to be incorporated into the civic curriculum. The self-contained nature of Public Opinions would provide civics instructors with an effortless means of incorporating contemporary legal issues into the classroom environment.⁸¹ And given their analytical content, they would also provide a pedagogically valuable way of doing so, since critical approaches to civics instruction are more effective than those involving rote learning.⁸² In this way, the legal reasoning at the heart of judicial opinions—and the Public Opinions that translate them—could be a particularly powerful way of attuning our nation’s youth to the demands of justice at a critically important time in their civic development.⁸³

Thus, when the foregoing panoply of educative benefits are viewed in light of the normative benchmark of accessibility that judicial opinions’ primary functions suggest, there is a strong case to be made for the Court’s implementation of a civic education-based program such as the Public Opinion program presented here.

Before concluding, one final word is in order. Although the costs of implementing a Public Opinion program are significant, requiring the hiring of staff, the creation of an office, and the use of the justices’ time, these costs are easily justified by the profound malady they seek to cure. The public comprehension gap revealed in this Essay suggests that for many Americans, the Court is little more than a political abstraction, steering the path of American society by what likely appears from their perspective to be sheer edict. For if the average American cannot understand the Court’s reasoning, then all that remains are the Court’s rulings; but rules issued by unelected judges lacking an accessible justification can be experienced as subjugation.⁸⁴ Indeed, this phenomenon may

80. *Id.* at 1030 (noting that if the people’s level of comprehension is below that of the Court’s, then “the Court must bring its message down to the level of the people”).

81. See NIEMI & JUNN, *supra* note 58, at 156 (explaining the importance of incorporating contemporary issues into the civics classroom and the scarcity of textbooks that do this).

82. *Id.* at 157 (noting that civic pedagogy “should be structured to put less emphasis on rote learning and more on analytical and critical understandings of democracy” but that “textbooks and established practices” are focused more on “memorization and drilling”); see generally Charles Quigley & Charles Bahmueller, *Teaching Political Sophistication: On Self-Interest and the Common Good*, in TEACHING AMERICA: THE CASE FOR CIVIC EDUCATION (2011) (noting the importance that civic education curricula train students to think critically).

83. See NIEMI & JUNN, *supra* note 58, at 156 (noting that “teaching civics later in high school, specifically during the twelfth grade, has the most [positive] impact” on young people’s political socialization).

84. See JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL

explain the pervasive disaffection that we see today: a nation that knows more about Snow White's Seven Dwarves⁸⁵ or the judges on American Idol than it does about Supreme Court justices.⁸⁶ Of course, even if a Public Opinion program were implemented, dramatic change would not occur overnight. But by creating a pathway for citizens to begin developing a more meaningful conception of the Court's work, a Public Opinion program would not only enable judicial opinions to better realize their essential functions, but over time, would have the potential to lead to a better-informed, more engaged citizenry and a healthier democracy.

IV. CONCLUSION

This Essay began by exploring the rule of law, legitimacy, and constraint functions that the practice of judicial opinion writing serves. A closer look at each of these functions revealed that judicial opinions should be intelligible not only to the legal community, but to the general public. That the average American be able to comprehend the work of our judiciary is an essential component of our legal order. But the analysis offered in Part II revealed that the Supreme Court's opinions fall far short of meeting the populist standard of accessibility, given the variance between the highly technical legal issues that come before the Court and the low rates of civic literacy in America. I then explained why this comprehension gap suggests that the regularly proffered reforms of increased clarity and brevity in the opinion writing process are not alone sufficient to solve the problem, and argued that a more robust, civic education-oriented approach is necessary.

With the civic illiteracy-based architecture of the comprehension problem in mind, Part III proposed one possible solution in the form of a Public Opinion program that incorporated a two-tiered approach to opinion writing. After introducing the primary components of a Public Opinion, and discussing how a comprehensive Public Opinion program might best be implemented, I considered the virtues of such an approach. Public Opinions would not only enable the Court to increase the overall intelligibility of its work without detracting from the quality of justice, but they also could provide the public with an important new pathway for law-related civic education, with the potential to redound a range of normative benefits to the polity in the process.

CRITICISM 101 (1990) (noting the ability of an opinion to serve as an "authoritarian text" that "demands simple and total obedience from its reader").

85. See Zogby International Poll, *More Americans Know Snow White's Dwarfs than U.S. Supreme Court Justices*, August 15, 2006, <http://www.zogby.com/news/ReadNews.cfm?ID=1208>.

86. See Seth Schiesel, *Former Justice Promotes Web-Based Civics Lessons*, N.Y. TIMES, June 9, 2008, <http://www.nytimes.com/2008/06/09/arts/09sand.html>.

