

Michigan Law Review

Volume 100 | Issue 8


2002

The Rhetoric of Constitutional Law

Erwin Chemerinsky

University of Southern California Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

 Part of the [Constitutional Law Commons](#), [Legal Education Commons](#), [Legal Writing and Research Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008 (2002).

Available at: <https://repository.law.umich.edu/mlr/vol100/iss8/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE RHETORIC OF CONSTITUTIONAL LAW

*Erwin Chemerinsky**

I spend much of my time dealing with Supreme Court opinions. Usually, I download and read them the day that they are announced by the Court. I edit them for my casebook and teach them to my students. I write about them, lecture about them, and litigate about them. My focus, like I am sure most everyone's, is functional: I try to discern the holding, appraise the reasoning, ascertain the implications, and evaluate the decision's desirability.

Increasingly, though, I have begun to think that this functional approach is overlooking a crucial aspect of Supreme Court decisions: their rhetoric. I use rhetoric here, not in the popular pejorative sense, but in the classical meaning of the word. The Supreme Court's opinions are rhetoric in that they are reasoned arguments intended to persuade. I believe that we can gain new insights about the Court and constitutional law by looking at the opinions from a rhetorical perspective.

Imagine that the Supreme Court decided cases without published opinions. This is not inconceivable.¹ Other branches of government generally make their choices without written opinions. Congress generally provides legislative history for its bills, but it usually is about explaining the meaning of the provisions more than presenting a persuasive argument in favor of a law. Most state and local governments don't even provide a formal legislative history for their enactments. Presidents tend to act without formal statements justifying their conduct. Even in lower courts, cases are most frequently decided without published opinion. One study found that there is no written opinion in almost seventy-five percent of federal court of appeals decisions.² But every Supreme Court decision has a written opinion.³

* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California Law School. B.S. 1975, Northwestern; J.D. 1978, Harvard — Ed. I am very grateful to Catherine Fisk for many very helpful conversations discussing this topic and to Amy Kreutner for her excellent research assistance. I also am grateful to the participants at faculty workshops at Syracuse Law School and Whittier Law School for their ideas and suggestions.

1. Written opinions by courts can be traced back to Roman law and were a key part of the English legal tradition that was followed in the United States. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 n.1 (1995).

2. *Id.* at 1713 n.3.

3. This is not to say that every Supreme Court action has a written opinion. The Supreme Court's denials of certiorari, which dispose of over ninety-eight percent of cases

If there were no written opinions, the practice and teaching of law would be vastly different. There would be no rules of constitutional law announced by the Court; there would only be those principles that could be inferred from the Court deciding a case in a particular way. Lawyers would argue over what a result means and lower courts would try to determine the implications of rulings to avoid being reversed. Professors would try to weave the results into a coherent body of law and they, not the Court, would then be in control of the rhetoric of constitutional law. But obviously, the whole nature and enterprise of constitutional law would be vastly different. Just imagine what it would be like to teach or study constitutional law if there were no written opinions from the Supreme Court.

In this paper, I want to begin to examine the rhetorical aspects of constitutional law and what can be learned by focusing on them.⁴ In any rhetorical enterprise there are three key components: the speaker, the message, and the audience.⁵ Part I of this paper focuses on the message — the opinions themselves. Part II looks at the many audiences for Supreme Court opinions and what can be understood about the Court and constitutional law from each. Finally, Part III looks at the Court as a speaker.

A few disclaimers at the outset. The focus is only on the Supreme Court and not on lower federal courts or state courts. Undoubtedly, many of the same characteristics are present in the rhetoric of all courts. But there also are differences: a key aspect of the rhetoric of lower courts is demonstrating consistency with the rulings of a higher court and perhaps trying to predict what the higher court will do.⁶ More importantly, focusing on the Supreme Court offers a finite body of opinions to examine; the opinions of all of the lower federal and state courts seem almost infinite by comparison.

Also, the focus is exclusively on constitutional, as opposed to statutory, decisions. Again, unquestionably, there are similarities in the Supreme Court's decisions, whether constitutional or statutory. There are, however, also key differences in how results are explained in constitutional as opposed to statutory cases. There is a voluminous litera-

brought to it, are not justified in a written opinion, though sometimes there are published dissents from the denial of certiorari. The law, however, is clear that a denial of certiorari is not precedent; it is in no way a decision of the issues in the case.

4. In working on this, I have come to realize that this Article is only the beginning of a much longer, book-length examination of the topic. I thus regard this Article as a rather tentative initial exploration of something I hope to work on for some time to come.

5. Actually, there is a fourth: a feedback loop where the speaker responds to the reaction of the audience. This, too, is worthy of consideration as to constitutional law, though in this Article, I just examine speaker, message, and audience.

6. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1 (1994) (discussing whether it is the role of lower courts to attempt to predict what the higher court will do).

ture on statutory interpretation⁷ that shows approaches often quite different from the methods of constitutional interpretation. Also, the rhetorical enterprise is different because the Court knows that Congress can effectively overrule decisions interpreting statutes by revising the laws, but constitutional decisions can be overruled only through the cumbersome amendment process.⁸

My central thesis is that the opinions written by the Justices and issued by the Court are a central, not an incidental, aspect of American constitutional law and that focusing on the opinions as rhetoric can help us to understand and appraise the Supreme Court's work. There is both a descriptive and a normative aspect to this enterprise: both identifying and describing aspects of the rhetoric of constitutional law and also normatively assessing the desirability of the Court's actions.

I. THE MESSAGE

In this section, I want to focus on characteristics of the opinions themselves. Although there are many, here I will focus on four: (A) Opinions are written to make results seem determinate and value-free, rather than indeterminate and value-based; (B) Opinions are written to appear consistent with precedent, even when they are not; (C) Opinions are written to make decisions seem restrained, rather than activist; dissents criticize decisions as activist and not restrained; and (D) The language used by the Court has changed over time; my impression — and I present it as just that, a subjective sense — is that the language is less eloquent and more sarcastic than before.

A. *Opinions Are Written to Make Results Seem Determinate and Value-Free, Rather Than Indeterminate and Value-Based*

The outcome of the vast majority of Supreme Court cases is indeterminate in the sense that reasonable Justices and people can differ as to the proper interpretation of the Constitution as it applies to a specific case. Phrased differently, rarely in constitutional cases can any result be justified as the one and only correct choice.⁹ Inescapably, value choices need to be made when the Supreme Court interprets constitutional provisions.

7. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Cass R. Sunstein, *Statutory Interpretation in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

8. Also, statutory rulings touch on every area of federal law, most of which are far beyond my field. Focusing on constitutional law is, in large part, a function of the desire to stay within my field.

9. Of course, even to speak of "correct" rulings is to beg the question of whether such a thing exists and this, too, inherently involves a value choice.

The reasons for this are familiar and fairly obvious. Often the Court deals with issues where there are no textual provisions to interpret. Is the president entitled to claim executive privilege and what is its scope?¹⁰ Is there constitutional protection for basic aspects of liberty such as the right to marry,¹¹ the right to procreate,¹² the right to custody of one's children,¹³ the right to keep the family together,¹⁴ the right to raise one's children,¹⁵ the right to purchase and use contraceptives,¹⁶ the right to abortion,¹⁷ and the right to refuse medical care?¹⁸ Some might say that the silence of the Constitution should be the basis for deciding the cases; but that, of course, is itself a value choice about how to interpret the Constitution, and one that the majority of the Court has clearly rejected in these decisions.

Even when there are textual provisions, interpreting them inevitably requires value choices as to their meaning. Is the death penalty as applied to the mentally retarded "cruel and unusual punishment" in violation of the Eighth Amendment?¹⁹ Is government aid to parochial schools, in the form of vouchers, a law impermissibly "respecting the establishment of religion"?²⁰

Perhaps most commonly, constitutional cases involve balancing, and this inherently requires a value choice. Sometimes there is a conflict between two constitutional rights, such as in the recent case where the Court had to weigh freedom of the press and the right to privacy in deciding whether the First Amendment protects the right of the media to broadcast the tape of a conversation that was illegally intercepted

10. *See, e.g.,* *United States v. Nixon*, 418 U.S. 683 (1974) (holding that executive privilege exists, but is not absolute and must yield to overriding needs for information).

11. *See, e.g.,* *Zablocki v. Redhail*, 434 U.S. 374 (1978) (recognizing a fundamental right to marry); *Loving v. Virginia*, 388 U.S. 1 (1967).

12. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (recognizing a fundamental right to procreate).

13. *See, e.g.,* *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing a fundamental right to custody, including for unmarried fathers).

14. *See, e.g.,* *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning ordinance that prevented a grandmother from living with her grandchildren).

15. *See, e.g.,* *Troxel v. Granville*, 530 U.S. 57 (2000) (declaring unconstitutional an order of grandparents' rights over the mother's objection).

16. *See, e.g.,* *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965), *discussed infra* at text accompanying notes 39-45.

17. *See, e.g.,* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 179 (1973).

18. *See, e.g.,* *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990) (recognizing a right of competent adults to refuse medical treatment).

19. *Atkins v. Virginia*, 122 S.Ct. 2242 (2002) (holding that the death penalty for the mentally retarded is unconstitutional).

20. *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002) (holding that the Establishment Clause is not violated by vouchers used in parochial schools).

and recorded.²¹ Sometimes the very definition of the right requires balancing, such as under the Fourth Amendment in deciding what is a “reasonable” search or seizure.²² The levels of scrutiny, used throughout equal protection and individual rights analysis, are a form of balancing, with the weights arranged on the scale in a particular fashion, in favor of the law under rational basis review and against it under strict scrutiny. Deciding whether a law serves a compelling or even a legitimate interest requires a value choice.

This seems so obvious as to not even warrant explication. Yet, the Supreme Court’s opinions rarely acknowledge the indeterminacy of the issues or the value choices involved. Quite the contrary, the opinions are written to make it seem that there is only one correct result and that it was derived in a formalistic fashion that excludes individual value choices.²³ Consider how infrequently opinions even acknowledge that issues are difficult and present close questions. To the extent the indeterminacy is acknowledged or the value choices recognized, it is in the dissenting opinions lamenting the majority’s approach.

The legal realists buried formalism in the early decades of the twentieth century,²⁴ but in reading Supreme Court opinions, one gets the sense that formalism is alive and thriving. This explains the continuing vitality of originalism in Supreme Court opinions even though critics have made a compelling case against it in the scholarly literature.²⁵ Originalism has the appeal of making it seem that the Court isn’t making value choices at all, but rather just following the intent of the drafters.²⁶ Of course, according such weight to the Framers is itself

21. *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that the First Amendment precludes the imposition of civil liability for using or disclosing the contents of illegally intercepted communications on a person who was not involved in the interception, but who knew or had reason to know that the interception was unlawful).

22. *See, e.g., United States v. Arvizu*, 534 U.S. 266 (2002) (holding that reasonableness is to be determined based on the totality of the circumstances).

23. My point here is descriptive — that the Court hides its value choices. Although I believe that normatively this is undesirable and that greater candor would be preferable, I recognize that this is a separate argument and would require elaboration beyond the scope or length of this Article. For excellent discussions of this topic, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

24. By formalism, I mean the approach to judicial decisionmaking that sees judges as reasoning from determinate premises to determinate results. For an excellent summary of the legal realists’ critique of formalism, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 182-230 (1992).

25. *See, e.g.,* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Jeffrey Shaman, *The Constitution, the Supreme Court and Creativity*, 9 HASTINGS CONST. L.Q. 257 (1982); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985).

26. Justice Scalia offers a variant saying that interpretation should focus on “original meaning” as evidenced by practices at the time rather than on the Framers’ intent. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*

a value choice and besides, usually there are choices to make about who counts as a Framers, what they thought, and at what level of abstraction to state their views.

An important example of this is the Supreme Court's recent decisions expanding state sovereign immunity. In recent years, the Supreme Court has substantially expanded the scope of state sovereign immunity, such as by holding that Congress can authorize suits against states only if it acts pursuant to section five of the Fourteenth Amendment;²⁷ that states cannot be sued under particular federal laws, such as for patent infringement²⁸ or for violating the Age Discrimination in Employment Act²⁹ or for employment discrimination in violation of Title I of the Americans with Disabilities Act;³⁰ and that state governments cannot be sued in state court without their consent.³¹ All of these rulings have been by 5-4 margins, with the majorities comprised of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. In every case, Justices Stevens, Souter, Ginsburg, and Breyer have dissented.

Each of these cases ultimately is about a value choice concerning the appropriate balance between state government immunity and state government accountability. The text of the Constitution provides no guidance because the Eleventh Amendment does not apply in state court and even in federal court, it only bars suits against a state by citizens of other states and citizens of foreign countries. Nor is the Framers' intent helpful because scholarship has shown that the goal of

(1997). Yet, discerning the "original meaning," deciding the level of abstraction at which to state it, and applying it all involve value choices. See Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 391-401 (2000).

27. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress may override the Eleventh Amendment when acting pursuant to section five of the Fourteenth Amendment but Congress may not override the Eleventh Amendment pursuant to any other constitutional authority).

28. *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that the Eleventh Amendment bars a claim against a state for violating patents and that the Patent and Plant Protection Remedy Clarification Act is an unconstitutional exercise of Congress's authority under section five of the Fourteenth Amendment in authorizing federal court jurisdiction for such claims against state governments).

29. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that state governments may not be sued in federal court for violating the Age Discrimination in Employment Act and that the law is not a valid exercise of Congress's section five power that authorizes suits against state governments).

30. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that state governments may not be sued for employment discrimination in violation of section one of the Americans with Disabilities Act).

31. *Alden v. Maine*, 527 U.S. 706 (1999) (holding that because of state sovereign immunity, a state government may not be sued in state court without its consent and that Maine could not be sued in Maine court for violating the Fair Labor Standards Act without its consent).

the Eleventh Amendment was simply to preclude suits against states based on diversity jurisdiction.³²

Inescapably, the sovereign immunity cases are all about a choice between protecting government immunity or ensuring government accountability. Yet, the decisions never acknowledge this. The opinions are written without recognizing the underlying value choice being made. The closest the Court ever has come is in *Alden v. Maine*.³³ Justice Kennedy expressly spoke of the need for sovereign immunity to protect state treasuries:

Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.³⁴

But this argument rests on an unsupported, and unacknowledged, assumption: that protecting the government treasury is more important than the benefits of liability in terms of ensuring compensation and deterrence. Sovereign immunity assumes that providing the government immunity, so as to safeguard government treasuries, is more important than ensuring government accountability. Yet, in none of the sovereign immunity cases has the Supreme Court ever justified this value choice.

Moreover, this is not a value that can be simply assumed to be paramount under the Constitution. Basic constitutional principles such as ensuring the supremacy of federal law, holding the government accountable, and providing due process all make sovereign immunity unacceptable. Although abolishing sovereign immunity would impose financial burdens on the government, the question is whether it is better to spread the costs of injuries from illegal government actions among the entire citizenry than to make the wronged individual bear the entire loss.³⁵

My point is that the Court's sovereign immunity decisions are written in highly formalistic language to make it seem that the results are dictated by the text and history when such is not the case at all. The value choices by the Court are very much hidden and not discussed in the majority opinions.

32. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

33. 527 U.S. 706 (1999).

34. *Id.* at 749.

35. I develop the argument against sovereign immunity in Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

This is not to say that the indeterminacy of constitutional law and the value choices of the Justices are never acknowledged. Most commonly, it is dissenting opinions that do so. For instance, in *Garcia v. San Antonio Metropolitan Transit Authority*, then-Justice Rehnquist declared that his dissenting view of the Tenth Amendment would someday triumph and that there was no need to say more than that.³⁶ Even more powerfully, Justice Blackmun, in a concurring opinion in *Planned Parenthood v. Casey*, said that he was eighty-three years old and would not remain on the Court much longer and the next president — to be chosen in November of that year — would make the Supreme Court appointment that would decide the future of abortion rights.³⁷ In each of these instances, the Justices made it clear how much decisions are a product of who is on the Court and their values. But such acknowledgments are rare and even jarring when they occur.

B. *Opinions Are Written to Appear Consistent with Precedent, Even When They Are Not*

Precedent matters largely, and probably only, because there are written opinions. Without them, there would not be any need for courts to reconcile their decisions with earlier holdings. Perhaps precedent would play some limited role without written opinions in that courts would still try to decide like cases in a like manner. But stare decisis as we know it would not be the same without pronouncements that count as the law to be followed in future cases.

An important aspect of the rhetoric of constitutional law is how the Supreme Court deals with its precedents.³⁸ The Court writes its opinions to make them seem consistent with prior decisions, even when they are not. For instance, in *Griswold v. Connecticut*, Justice Douglas's majority opinion began by rejecting substantive due process as a basis for finding a right to privacy in the Constitution.³⁹ Instead, Justice Douglas said that privacy was found in the penumbras of the provisions of the Bill of Rights.⁴⁰ In doing so, he cited to many cases under specific provisions as supporting this view. Among those men-

36. 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).

37. *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

38. Judge Wald writes: "My hunch is that the bulk of the rhetoric of appellate opinions is spent in explaining why past cases do or do not apply." Wald, *supra* note 1, at 1403.

39. 381 U.S. 479, 481-82 (1965).

40. One commentator described Justice Douglas's approach by writing: "[In *Griswold*, Douglas] skipped through the Bill of Rights like a cheerleader — 'Give me a P . . . give me an R . . . an I . . .' and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right." Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 84.

tioned, Douglas listed *Meyer v. Nebraska*⁴¹ and *Pierce v. Society of Sisters*⁴² as First Amendment cases.⁴³ But neither was based on the First Amendment; the First Amendment had not yet been incorporated and applied to the states.⁴⁴ *Meyer* and *Pierce* were unabashedly substantive due process decisions finding a right of parents to control the upbringing of their children within the liberty of the due process clause. But Douglas, in an effort to reject substantive due process and to make his approach seem consistent with precedent, mischaracterizes the cases.⁴⁵

Brandenburg v. Ohio, an important case concerning the First Amendment, is another illustration of the Court making it seem that its decision is consistent with precedent even when it is not.⁴⁶ The issue in *Brandenburg* was when speech is “incitement” that falls outside the protection of the First Amendment. This, of course, is an issue the Court struggled with throughout the twentieth century in some of the most important free speech cases.⁴⁷ In *Brandenburg*, the test for incitement was presented as if the Court were simply reciting well-established law announced in prior cases. The Court said that its prior decisions:

have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁴⁸

The Court cited to *Dennis v. United States*⁴⁹ as establishing this test.

41. 262 U.S. 390 (1923) (holding that a state law prohibiting teaching of the German language violates right of parents to control the upbringing of their children).

42. 268 U.S. 510 (1925) (holding a state law prohibiting parochial school education unconstitutional as violating the right of parents to control the upbringing of their children).

43. *Griswold*, 381 U.S. at 481-82.

44. The first case to incorporate the First Amendment was *Gitlow v. New York*, 268 U.S. 652 (1925), decided shortly after *Pierce*.

45. In fact, an even more profound way in which *Griswold* shows the importance of the rhetoric of decisions is Douglas’s vehement rejection of substantive due process, even though his opinion ultimately relies on it. Douglas finds privacy in the penumbra of the Bill of Rights. The Bill of Rights, however, is applied to the states through the Due Process Clause of the Fourteenth Amendment. Therefore, what keeps states from infringing privacy — as Douglas himself found it — is the Due Process Clause’s prohibition against interference with liberty without a sufficient justification: substantive due process.

46. 395 U.S. 444 (1969) (per curiam).

47. See, e.g., *Whitney v. California*, 274 U.S. 357 (1927) (using a reasonableness test); *Schenck v. United States*, 249 U.S. 47 (1919) (articulating the “clear and present danger” test).

48. *Brandenburg*, 395 U.S. at 447.

49. *Id.* (citing *Dennis v. United States*, 341 U.S. 494, 507 (1951)).

But the *Brandenburg* test is nothing like the one used in *Dennis*. In that case, the Court said that the protection of speech was to be determined by “ask[ing] whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger.”⁵⁰ *Brandenburg* says nothing of the sort. *Brandenburg* emphasizes the need for “imminent harm,” while *Dennis* expressly rejects such a requirement.⁵¹ *Brandenburg* contains an intent requirement: the speech must be directed to causing the harm. Nothing like it is found in *Dennis*. *Brandenburg*’s approach is very different from any prior test for incitement announced by the Supreme Court.⁵² But the Court did not acknowledge this; to the contrary, the Court made it seem that it was just following precedent.

The power of precedent also can be seen in the Court’s hesitancy to overrule earlier cases, even when there seems to be a majority available to do so and even when there is a very good reason for doing so. I always have been puzzled as to why the Supreme Court in upholding Title II of the 1964 Civil Rights Act, which prohibits racial discrimination by places of public accommodation, relied on the Commerce Clause rather than section five of the Fourteenth Amendment.⁵³ The obvious answer is that the *Civil Rights Cases*, in 1883, held that Congress under section five of the Fourteenth Amendment only could regulate state and local governments and not private behavior.⁵⁴

But there clearly seem to have been at least five votes on the Court to overrule this aspect of the *Civil Rights Cases*. Just four years later, in *Jones v. Alfred H. Mayer Co.*,⁵⁵ the Court overruled the *Civil Rights Cases*’ holding that Congress could not regulate private behavior when acting pursuant to Section Two of the Thirteenth Amendment. In fact, just two years later, in *United States v. Guest*,⁵⁶ six Justices expressly stated that they believed that Congress could regulate private conduct pursuant to section five of the Fourteenth Amendment.

50. *Dennis*, 341 U.S. at 510 (plurality opinion) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)) (internal quotation marks omitted).

51. *Dennis*, 341 U.S. at 509 (plurality opinion).

52. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) (describing the *Brandenburg* test as “the most speech-protective standard yet evolved by the Supreme Court”).

53. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

54. 109 U.S. 3 (1883).

55. 392 U.S. 409 (1968) (upholding the application of 42 U.S.C. § 1982 to private discrimination in housing).

56. 383 U.S. 745 (1966) (upholding a federal law protecting the right to travel from private interference). The six Justices, though, did not join in one opinion so as to make this a holding of the Court.

In upholding Title II of the 1964 Civil Rights Act, only two Justices — Douglas and Goldberg — said that they preferred to rely on section five as authority.⁵⁷ Why didn't the majority do so? The only explanation seems to be that they did not want to write an opinion that overruled precedent, especially in upholding an important and controversial law. Yet, this rhetorical choice had long-term consequences as the Court in *United States v. Morrison*,⁵⁸ in 2000, said that the law was clear that the *Civil Rights Cases* never had been overruled and that Congress could not regulate private behavior pursuant to section five. Perhaps the Court would have come to the same conclusion in *Morrison* even if it meant overruling decisions from the mid-1960s, but this result seems less likely precisely because of the rhetorical power of precedent.

The rhetorical force of precedent also is seen in how the Court writes its opinions when it does overrule earlier decisions. The Court describes the earlier rulings as aberrations and its current interpretation as the long-standing approach, even when that is not at all the case. As described above, the Court writes the opinions to avoid acknowledging that there is a value choice being made, almost always changing the law as a result of shifts in the composition of the Court.

In *Seminole Tribe v. Florida*,⁵⁹ the Court overruled *Pennsylvania v. Union Gas Co.*,⁶⁰ which had been decided just seven years earlier. *Pennsylvania v. Union Gas* held that Congress could override the Eleventh Amendment and authorize suits against states pursuant to any of its powers, so long as the law was clear in the text in permitting such litigation. But in *Seminole Tribe*, the Court expressly overruled this and held that Congress only could abrogate the Eleventh Amendment when acting pursuant to section five of the Fourteenth Amendment.

What happened during those seven years between *Pennsylvania v. Union Gas* and *Seminole Tribe v. Florida*? Did the Court find a musty, long-buried history of the Eleventh Amendment that showed that it had made a mistake? Had *Pennsylvania v. Union Gas* proven impossible to apply in practice? Of course not; the only difference was a change in the composition of the Court. *Pennsylvania v. Union Gas* had been a 5-4 decision with the majority comprised of Justices Brennan, White, Marshall, Blackmun, and Stevens; the dissent was

57. *Heart of Atlanta*, 379 U.S. at 280 (Douglas, J., concurring) (“I would prefer to rest the assertion of legislative power [on] § 5 of the Fourteenth Amendment . . .”); *id.* at 293 (Goldberg, J., concurring).

58. 529 U.S. 598 (2000) (invalidating the civil damages provision of the Violence Against Women Act as exceeding the scope of Congress’s powers under the Commerce Clause and under section five of the Fourteenth Amendment).

59. 517 U.S. 44 (1996).

60. 491 U.S. 1 (1989).

Rehnquist, O'Connor, Scalia, and Kennedy. In the intervening years, four of the five in the majority — Brennan, White, Marshall, and Blackmun — had retired from the Court, but all of the dissenters remained. The four dissenters were joined by Justice Thomas to create a majority to overrule *Pennsylvania v. Union Gas*. Did the Court explain it this way? Certainly not; Chief Justice Rehnquist's majority opinion described *Pennsylvania v. Union Gas* as having "deviated sharply from our established federalism jurisprudence."⁶¹

Similarly, in *Payne v. Tennessee*,⁶² the Court overruled two recent decisions — one from two years earlier⁶³ and the other from four years prior⁶⁴ — and held that victim-impact statements are admissible in sentencing at capital trials. *Payne*'s overruling of recent precedent was entirely a product of changes in the membership of the Court. But Chief Justice Rehnquist's majority opinion does not even acknowledge this reality. Instead, the opinion in *Payne* focuses on why the earlier decisions were aberrational departures from prior rulings and should be overruled.

All of this illustrates the key point concerning the powerful role of precedent in constitutional opinions. Even when they are overruled, the Court works hard to justify why its new approach is actually consistent with long-standing decisions. A significant portion of almost every Supreme Court opinion is about how the decisions fit within, and flow from, the earlier cases.

C. *Opinions Are Written to Make Decisions Seem Restrained, Rather Than Activist; Dissents Criticize Decisions as Activist and Not Restrained*

Over the last few decades, political rhetoric frequently focuses on whether decisions are "judicial activism." In presidential debates and in the judicial confirmation process, avoiding judicial activism is seen as an important virtue. Of course, the concepts of "judicial activism" and "judicial restraint" are never defined with any precision. I often have the sense that judicial activism is simply the label used for decisions one does not like.

The rhetoric of activism and restraint also appears in Supreme Court decisions, particularly in dissenting opinions. Dissenters frequently characterize majority opinions as activist in nature. This is seen as a serious criticism, even though the normative basis for the conclusion is rarely explained. Obviously, judicial activism can be

61. *Seminole Tribe*, 517 U.S. at 45.

62. 501 U.S. 808 (1991).

63. *South Carolina v. Gathers*, 490 U.S. 805 (1989).

64. *Booth v. Maryland*, 482 U.S. 496 (1987).

good or bad. *Brown v. Board of Education* was activist in the sense that it overturned laws in many states and overruled precedent, but few today would deny that it was a good decision.⁶⁵ *Plessy v. Ferguson* was an exercise in judicial restraint in that it upheld a law mandating segregation, but it was tragic and impossible to reconcile with a commitment to equal protection.⁶⁶ But judicial activism can be bad, such as in the *Lochner* era,⁶⁷ and judicial restraint good, such as in upholding the 1964 Civil Rights Act.⁶⁸ Although obviously each characterization is a value judgment, most commentators and Justices likely would agree with these views. However, rhetoric, both popular and in judicial opinions, treats judicial activism as inherently bad and judicial restraint as always good.

Both liberals and conservatives are fond of characterizing the decisions that they don't like as judicial activism. For example, the more liberal Justices have attacked the Supreme Court's federalism decisions, such as in using the Tenth Amendment as a limit on Congress and in expanding sovereign immunity, as undue judicial activism.⁶⁹ On the other hand, conservatives frequently object to decisions protecting individual rights on the same basis.⁷⁰

Simply put, the rhetoric of activism and restraint is quite important in both political discourse and judicial opinions. For the last few decades, it has been conservatives using this rhetoric to attack decisions expanding rights and protections under equal protection. Now, though, with the activism coming from the right — particularly in decisions narrowing the scope of Congress's powers,⁷¹ expanding sovereign immunity,⁷² and increasing the protections of the takings clause⁷³ — it

65. 347 U.S. 483 (1954) (“Brown I”).

66. 163 U.S. 537 (1896).

67. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a state's maximum-hour law).

68. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964).

69. See, e.g., *Alden v. Maine*, 527 U.S. 706, 761 (1999) (Stevens, J., dissenting) (objecting to the Court's holding that state governments cannot be sued in state court without their consent); *id.* at 760 (Souter, J., dissenting) (same); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 868 (1976) (Brennan, J., dissenting) (objecting to the majority's use of the Tenth Amendment as undue judicial activism).

70. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Cruzan v. Dir., Mo. Dep't of Health Services*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

71. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

72. See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

73. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (allowing takings challenges to regulations that were in place at the time property was acquired).

will be interesting to see how, if at all, this rhetoric changes. Will conservatives largely abandon attacking judicial activism since the activism of today and the foreseeable future is likely to be in a conservative direction? Will liberals increasingly adopt this rhetoric in criticizing conservative decisions striking down laws based on federalism and property rights?

D. *The Language Used by the Court Has Changed over Time*

My impression — and this is no more than a subjective sense — is that the language of opinions today is less eloquent and more sarcastic than before. I feel less confident about the former statement and much more so about the latter.

I cannot think of recent opinions that had the eloquence of Justice Louis Brandeis's explanation for the protection of freedom of speech in *Whitney v. California*,⁷⁴ or of Justice Robert Jackson's in *West Virginia State Board of Education v. Barnette*.⁷⁵ But perhaps this is unfair because these examples are exceptional opinions from the past that surely were atypical even then. My sense of opinions today is that they are much longer than they used to be, far more extensively footnoted, and generally less well-written than those from earlier times.⁷⁶

But it seems much more certain that there has been a great change in that Justices are far more willing to use a "poison pen" and be very sarcastic. Justice Scalia is the prime example of this phenomenon.⁷⁷ In dissenting opinions he describes the majority's approaches as "nothing short of ludicrous" and "beyond the absurd,"⁷⁸ "entirely irrational"⁷⁹ and not "pass[ing] the most gullible scrutiny."⁸⁰ He has declared that a majority opinion is "nothing short of preposterous" and that it "has no foundation in American constitutional law, and barely pretends to."⁸¹ He talks about how "one must grieve for the Constitution" because of a majority's approach.⁸² He calls the approaches taken in majority

74. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

75. 319 U.S. 624 (1943).

76. Some suggest that this might be attributed to the greater role of law clerks in drafting opinions. See BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 257-62 (1996) (lamenting the increased role of clerks in the Supreme Court's work).

77. This discussion is drawn from my earlier article: Chemerinsky, *supra* note 26.

78. *Lee v. Weisman*, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

79. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting).

80. *Morgan v. Illinois*, 504 U.S. 719, 748 (1992) (Scalia, J., dissenting).

81. *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

82. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

opinions “preposterous”⁸³ and “ridiculous” and “so unsupported in reason and so absurd in application [as] unlikely to survive.”⁸⁴ He speaks of how a majority opinion “vandaliz[es] . . . our people’s traditions.”⁸⁵

Perhaps most famously, in *Webster v. Reproductive Health Services*, he pointedly attacked Justice O’Connor for not joining him in overruling *Roe v. Wade* and said that her position “cannot be taken seriously.”⁸⁶ He talks about how her opinion “preserves a chaos that is evident to anyone who can read and count.”⁸⁷ He describes how “irrational is the new concept that Justice O’Connor introduces into the law” and complains that her approach is “the least responsible.”⁸⁸

In other cases, he says that he must “respond to a few of the more outrageous arguments in today’s majority opinion, which it is beyond human nature to leave unanswered.”⁸⁹ He describes majority opinions as “nothing less than Orwellian” and talks about how he is “appalled” by majority approaches.⁹⁰

When appraising this rhetoric, my question is whether this is how we want to teach law students to speak in their briefs and in courts. One of the primary audiences for Supreme Court opinions is law students. The message that they take from reading Justice Scalia’s opinions is that this is an acceptable way to characterize positions with which they disagree and to talk about their adversaries. No doubt, Justice Scalia’s pointed rhetoric makes his opinions among the most entertaining to read. He has a great flair for language and does not mince words when he disagrees with a position. But I think that this approach sends exactly the wrong message to law students and attorneys about what type of discourse is appropriate in a formal legal setting and how it is acceptable to speak to one another.

II. THE AUDIENCE

A crucial part of any rhetorical enterprise is the audience. Rhetoric exists to persuade an audience. It is possible to identify many different audiences for Supreme Court decisions: a) lower courts; b) govern-

83. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 735 (1994) (Scalia, J., dissenting).

84. *Grady v. Corbin*, 495 U.S. 508, 542, 543 (1990) (Scalia, J., dissenting).

85. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 163 (1994) (Scalia, J., dissenting).

86. 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

87. *Id.* at 535.

88. *Id.* at 536 n.*, 537.

89. *Planned Parenthood v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

90. *Id.* at 995, 998.

ment officials who must follow and implement the rulings; c) lawyers who will litigate future cases; d) the parties to that case; e) the public; f) professional critics (such as journalists who cover the Court and especially law professors); and g) future Justices on the Supreme Court.⁹¹

I believe that each of these audiences is important and influences, and normatively should influence, how opinions are written.⁹² In fact, the needs of these audiences provide criteria for evaluating Supreme Court opinions. Opinions are written precisely because there are importance audiences for them. Thus, opinions can be evaluated based on how they meet the needs of these audiences.

Also, the desire to appeal to these audiences might point in conflicting directions; what is best for one audience may be undesirable for another. Recognizing this fact can provide insights in understanding particular opinions.

A. Lower Courts

One of the most important audiences for Supreme Court opinions is the lower courts that must follow them and apply them to future cases. This imposes a crucial duty on the Court to write its opinions so as to provide guidance to lower courts. In other words, the Supreme Court's rhetoric must serve a key functional goal: state the law in a manner that can be used by lower courts.

The Court, however, often fails in this responsibility. An example of such failure is the Court's decision in *Brown II*, in which it did not give guidance to lower courts as to how to achieve school desegregation.⁹³ The Court remanded the cases to the lower courts to use traditional equity principles to fashion remedies "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."⁹⁴ This enigmatic statement — "deliberate speed"— seems an oxymoron, imposed no mandate and provided no

91. I do not mean to imply that this is an exhaustive list of possible audiences. For example, there may be an international audience for Supreme Court decisions. See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (arguing that the Cold War influenced the Court in the school desegregation decisions).

92. The extent to which Justices are consciously considering these audiences in writing opinions is unknown. It seems likely that some of these audiences, such as lower courts, are more consciously considered than others, such as professional critics. Certainly it is possible that the issue of audience is not thought of at all in writing a particular opinion. The discussion below, however, does not depend on conscious recognition by the Justices in every case of the identity of the audience. Rather, the point is that descriptively these are the audiences for Supreme Court opinions and normatively there are implications for how opinions should be written because of the importance of these audiences.

93. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) ("*Brown II*").

94. *Id.* at 301.

assistance to lower courts in carrying out the promise of *Brown v. Board of Education*.

The very slow pace of desegregation of schools, in part, is a result of the Supreme Court's failure to specify the responsibilities of lower courts.⁹⁵ In 1964, a decade after *Brown*, in the South, just 1.2% of black school children were attending school with whites.⁹⁶ In South Carolina, Alabama, and Mississippi, not one black child attended a public school with a white child in the 1962-1963 school year.⁹⁷ In North Carolina, only 1/5 of 1% — or 0.026% — of the black students attended desegregated schools in 1961, and the figure did not rise above 1% until 1965.⁹⁸ Similarly, in Virginia, in 1964, only 1.63% of blacks were attending desegregated schools.⁹⁹ Perhaps massive resistance was inevitable and nothing could have changed these events; but maybe Supreme Court opinions detailing the duties of lower courts could have hastened desegregation.

Another example of the Supreme Court's failure to give guidance to lower courts is its recent decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.¹⁰⁰ In *Brentwood*, the Court found that a private entity regulating high school athletics was a state actor based on the government's "entwinement" with its activities. In finding "entwinement," Justice Souter emphasized that eighty-four percent of the members of the private entity were public schools, that the state traditionally had delegated regulating interscholastic athletics to the entity, that most of its funds came from public schools, and that most of its meetings were held on government property. The Court said that together these factors justified applying the Constitution to the private entity's activities.

The key question concerning the *Brentwood Academy* case is whether it creates a new, broader exception to the state action doctrine and, if so, when it applies. Notably, Justice Souter does not use the traditional term in state action cases, "entanglement," in his majority opinion, but uses instead the word "entwinement." Justice Clarence Thomas, in a dissenting opinion, objected that "[w]e have never found state action based upon mere 'entwinement.'"¹⁰¹ "Entan-

95. For a lengthy discussion of the failure to achieve desegregation and possible explanations, see GERALD N. ROSENBERG, *THE HOLLOW HOPE* 39-166 (1991).

96. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994).

97. *Id.* at 9.

98. *Id.*

99. *Id.*

100. 531 U.S. 288 (2001).

101. *Id.* at 935 (Thomas, J., dissenting).

gment,” in prior cases like *Rendell-Baker v. Kohn*,¹⁰² had been found to require government encouragement of constitutional violations by private actors. But no encouragement was found in *Brentwood Academy*. Instead, the Court found that significant government involvement with the private entity was sufficient for a finding of state action.

This seems to be a much more expansive exception to the state action doctrine than that found in prior cases. But the exception is not defined. Although the Court identifies the factors that cause it to find the Tennessee Secondary Schools Athletic Association to be a state actor, it offers no criteria for determining more generally when there is enough entwinement for state action. It almost always is possible to find some degree of government involvement in private conduct. How much is enough to meet the test for “entwinement”? The Court doesn’t even offer clues to lower courts that will have to apply its opinion.

Some, such as Professor Cass Sunstein, praise very narrow rulings as desirable “constitutional minimalism.”¹⁰³ But the problem is that such minimalist opinions fail the needs of a key audience for the decisions: the lower courts that must follow them.

B. Government Officials

Because of the state action doctrine, constitutional decisions virtually always involve the government as one of the parties. Government officials at all levels must understand the Supreme Court’s decisions and follow them in future actions. This imposes an important duty on the Court to write opinions in a way that guides these officials as to what is permissible and what is not allowed. Sometimes, such as in criminal procedure cases, the audience is the police who need guidance as to what is permissible investigative behavior. Sometimes, the audience is the legislature that needs to be guided as to what future laws in the area are permissible and will not be struck down.

This realization helps to explain and justify Supreme Court opinions that are very prescriptive in terms of what the government can, or even must, do. For instance, in *Roe v. Wade*,¹⁰⁴ the Court divided pregnancy into three trimesters and specified the types of regulations that are permissible during each.¹⁰⁵ Some criticize the Court for this

102. 457 U.S. 830 (1982) (finding no state action when a private school that was almost totally subsidized by the government fired teachers because of their speech).

103. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM IN THE SUPREME COURT (1999); Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

104. 410 U.S. 113, 163-64 (1973).

105. *Id.*

decision, which seems almost legislative in its dictates.¹⁰⁶ But this criticism ignores the value of the clear guidance given to legislatures by the Court's opinion in *Roe v. Wade*. By describing in detail what was allowed and what was not permitted, the Court served the needs of legislatures seeking to regulate abortion after *Roe*.

Similarly, in *Miranda v. Arizona*,¹⁰⁷ the Court prescribed warnings that police must administer before questioning a suspect in custody. *Miranda* has been criticized as seeming unduly legislative. But this criticism ignores the benefit of the opinion in giving clear guidance to police officers as to what they need to do in order for confessions to be admissible. After *Miranda*, every officer knew exactly what to say in order for a confession to be presumed voluntary and likely admissible as evidence in court.

Other opinions might be criticized precisely for their failure to offer sufficient guidance to government officials as to how to act in the future. Among other criticisms, *Bush v. Gore* can be faulted on this basis.¹⁰⁸ In *Bush*, the Court made it clear that it was just deciding the case before it and declared: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."¹⁰⁹ It was predictable, however, that there would be lawsuits all over the country challenging variations within states in conducting elections and counting votes. *Bush* gives state and local election officials no guidance as to which variations are permissible and which are unconstitutional.

C. Lawyers

Another crucial audience for Supreme Court opinions are attorneys who must base arguments and advice to clients on them. This audience, like lower courts and government officials, needs guidance as to what constitutes an acceptable and persuasive argument. This imposes a burden on the Court to articulate its standards in a consistent manner and to follow consistent approaches to interpreting particular constitutional provisions.

Yet here too, the Court often fails in its opinion writing. Consider the Court's recent opinions interpreting the Fourth Amendment. There is no consistent approach and thus little guidance to lawyers concerning how to argue a Fourth Amendment case or to lower courts regarding how to analyze one. Often the Court's approach focuses en-

106. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

107. 384 U.S. 436 (1966).

108. 531 U.S. 98 (2000) (per curiam).

109. *Id.* at 109.

tirely on “reasonableness” and balances the government’s interests in effective law enforcement against the individual’s expectations of privacy. For instance, in the recent decision *Arvizu v. United States*, the Court held that it was permissible to stop a vehicle, based solely on legal and innocuous behavior because it was “reasonable” based on the totality of the circumstances.¹¹⁰

But sometimes the Court disavows a reasonableness inquiry and focuses entirely on historical practices. In *Atwater v. City of Lago Vista*,¹¹¹ the Court held that it is permissible for the police to arrest an individual for a misdemeanor that carries no possibility of a prison sentence. Justice Souter’s majority opinion focused solely on history and upheld such arrests because they were allowed when the Fourth Amendment was ratified in 1791. Justice O’Connor’s dissent stressed the need for a reasonableness inquiry, but the majority rejected this argument and focused solely on history.

In other Fourth Amendment cases, the Court creates a bright-line rule that eschews a reasonableness balancing approach. In *Kyllo v. United States*, for example, the Court held that thermal imaging of a home is a search within the meaning of the Fourth Amendment.¹¹² Justice Scalia’s majority opinion does not focus on reasonableness or historical practices (since thermal imaging obviously did not exist in 1791), but instead on the need for special protection of the home in light of the language and history of the Fourth Amendment.

How is a lawyer supposed to litigate Fourth Amendment issues, something that comes up every day in criminal courts across the country? To return to a prior point, how is a lower court to write the opinion? Should the focus be on balancing, history, or a bright-line rule? The Court’s varying and inconsistent approaches fail to give the essential guidance to those who must rely on its opinions.

D. *The Parties*

One reason for having written opinions is to provide the parties with an explanation for why they have won, or more importantly, lost. Written opinions make decisions seem not an arbitrary exercise of power, but a result of careful reasoning. Yet, in reading opinions, there is little explicit recognition that the parties are an audience for the opinions. Supreme Court opinions, like those of every court, are densely written, often using jargon and technical language. This may be necessary to meet the needs of other audiences, but it also means

110. 534 U.S. 266 (2002). Among the factors the Court pointed to were the car being near a border where smuggling often occurs, the driver not waving at the police officer, the children looking uncomfortable, and the car being a minivan.

111. 532 U.S. 318 (2001).

112. 533 U.S. 27 (2001).

that the opinions will be difficult for many of the parties to understand.

More importantly, the way in which the Supreme Court refers to the parties, sometimes using deprecating language, shows, at the very least, inattention to this audience. An extreme example of this inattention is Justice Holmes's infamous language in *Buck v. Bell*, in which he upheld the ability of the government to impose involuntary sterilization on the mentally retarded and declared, "Three generations of imbeciles are enough."¹¹³ Is it possible to imagine a Justice writing such a thing if he thought that there was a chance that the person he was writing about might read the opinion? In 1980, Carrie Buck was found to be alive and to be a woman of normal intelligence who very well might have read Holmes's words.¹¹⁴

The Court's indifference to the parties is also reflected in other ways in its rulings. For example, in *Tyler v. Cain*, the Court ruled that a prisoner cannot bring a successive habeas corpus petition, even if there is a Supreme Court case on point making it clear that the individual was unconstitutionally convicted, unless the Court expressly states that the new decision applies retroactively.¹¹⁵ In *Tyler*, the Court said that there was no relief available to an individual even though the jury instructions were unquestionably unconstitutional under a prior Supreme Court decision. These cases illustrate that the Court is willing to accept individuals, parties to the cases before it, being held unconstitutionally and indefinitely.

All of this creates the sense that the parties are almost incidental in Supreme Court opinions. The Court sees its decisions as less about resolving particular disputes and more about setting law for the future. Yet, it can be questioned whether these are as mutually exclusive as the Court's opinions make them seem.

E. *The Public*

The public seems an unlikely audience for Supreme Court opinions. After all, relatively few members of the public actually read the opinions, though many learn about them through media stories. Yet, this is an audience that has played an important part in constitutional theory. Some, such as Justice Felix Frankfurter and Professors Alexander Bickel and Jesse Choper, have based their approaches to constitutional interpretation on the need to preserve and enhance the Court's legitimacy with the general public.¹¹⁶ Daniel Conkle, for ex-

113. 274 U.S. 200, 207 (1927).

114. Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMM. 331, 336 (1985).

115. 533 U.S. 656 (2001).

116. See, e.g., *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (criticizing the Court's reapportionment decisions on the grounds that they will jeopardize the

ample, speaks of the “fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law.”¹¹⁷

Yet, such concerns about this audience seem quite unfounded. At a time when other government institutions are often held in disrepute, the Court’s credibility is high. Professors John M. Scheb and Williams Lyons set out to measure and determine this.¹¹⁸ They conducted a survey to answer the question: “How do the American people regard the U.S. Supreme Court?” Their conclusion is important:

According to the survey data, Americans render a relatively positive assessment of the U.S. Supreme Court. Not surprisingly, the Court fares considerably better in public opinion than does Congress. The respondents are almost twice as likely to rate the Court’s performance as “good” or “excellent” as they are to give these ratings to Congress. By the same token, they are more than twice as likely to rate Congress’ performance as “poor.”¹¹⁹

Strikingly, Scheb and Lyons found that the “Court is fairly well-regarded across the lines that usually divide Americans.”¹²⁰ For example, there are no significant differences between how Democrats and Republicans rate the Court’s performance.

In fact, *Bush v. Gore*¹²¹ lends support for the view that judicial credibility is not fragile and that preserving legitimacy need not be a primary focus in decisionmaking and opinion writing. After *Bush*, many suggested that it would undermine the Court’s credibility with the general public. Justice Stevens expressed this concern when he wrote:

[that the] position by the majority of the Court can only lend credence to the most cynical appraisal of the work of judges throughout the land Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is particularly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.¹²²

Yet, this loss of confidence is not manifest in any apparent way. Opinion polls show no substantial loss of approval in the Court among

Court’s legitimacy); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 12 (2d ed. 1986); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

117. Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry’s Constitutional Theory and Beyond*, 69 *MINN. L. REV.* 587, 588 (1985).

118. John M. Scheb II & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 *JUDICATURE* 273 (1994).

119. *Id.*

120. *Id.* at 273-74.

121. 531 U.S. 98 (2000).

122. *Id.* at 128-29 (Stevens, J., dissenting).

the public.¹²³ Why not? Perhaps it is that any loss of confidence among Democrats is offset by an increase in confidence among Republicans. Perhaps it is that people, more than commentators acknowledge, realize that the Court inherently makes “political” decisions and thus were not “shocked” by *Bush v. Gore*. Perhaps it is that the public thought that the election was so close that any victor would be arbitrary and thus was willing to accept any result. Perhaps it is that any effects were short-lived and public concern shifted elsewhere. Whatever the reason, *Bush v. Gore* certainly casts doubt on those who worry about the Court having fragile legitimacy with the public.

This realization should matter greatly in decisionmaking and opinion writing. The Court need not worry in deciding cases as to their impact on public attitudes about the Court. Nor need it write opinions to hide its reasoning so as to make the decisions seem formalistic. The public is an audience, at least indirectly, for Supreme Court opinions, but it is not an audience whose support is fickle or likely to be lost because of a single decision or even series of rulings.

But that does not mean that the public is an unimportant audience for Court decisions. Significant rulings on controversial issues will affect the public. It is particularly important in such cases for opinions to be written in a clear and accessible manner so that the public, largely through media reports, can understand the Court’s reasoning and the basis for its conclusions. Also, and this is admittedly speculation, the Internet will increase the number of people who actually read Supreme Court opinions as people can do so on their own computers without a need to find a law library.

F. *Professional Critics*

The most consistent readers of Supreme Court opinions are the journalists who are permanently at the Court and report on the rulings for the general public and, of course, law professors. These are the individuals who avidly read the opinions, argue over their meaning, and critique their writing and reasoning.

It is hard to identify specific ways in which this audience affects the rhetoric of constitutional law and yet it seems inevitable that Justices care about what this audience has to say. Three of the nine Justices — Scalia, Ginsburg, and Breyer — spent most of their careers before going on the bench as law professors. Nor does it seem likely that anyone can be completely immune to words of praise or criticism that are publicly expressed.

But the impact of the existence of this audience is difficult to describe; it generally seems an incentive for carefully reasoned and writ-

123. See Jeffrey Jones, *Hispanics, Whites, Rate Bush Positively, While Blacks are Much More Negative*, GALLUP POLL MONTHLY, June 2001, at 36.

ten opinions and, perhaps in specific cases, is a conscious influence. One thought is that Justices likely respond to the reactions from particular audiences, rather than general reactions from journalists or academics. For instance, it seems highly unlikely that liberal criticism of his rulings has the slightest effect on Justice Scalia, but praise from conservatives might matter a great deal. In other words, the impact of the speaker depends on his or her identity, hardly a surprising or novel conclusion.

G. Future Decisions

A final important audience for the Court's opinions is the Justices who will decide future cases in the area. This seems most obvious in concurring and dissenting opinions, which often seem to be written to influence future cases. For example, Justice Harlan's dissenting opinion concerning the scope of Congress's powers under section five of the Fourteenth Amendment in *Katzenbach v. Morgan*¹²⁴ became the majority approach in *City of Boerne v. Flores*.¹²⁵ The dissents concerning the admissibility of victim-impact statements in *Booth v. Maryland*¹²⁶ and *South Carolina v. Gathers*¹²⁷ became the majority a short time later in *Payne v. Tennessee*.¹²⁸

More subtly, and harder to prove, is when majority opinions include language that seems placed there to be used in future decisions. For example, in *Rizzo v. Goode*, then-Justice Rehnquist's majority opinion dismissed a suit against the Philadelphia police on standing grounds but then went on to say that principles of federalism limited judicial review of actions by local police departments.¹²⁹ This statement seems to have been placed there to provide a basis for dismissing future cases, even where there was standing. If followed, it would have a profound effect in limiting review of police conduct, and perhaps other local tasks, by the federal courts.

Justices surely hope that their opinions will be followed. Majority opinions are written to stand the test of time and to control future decisions. Concurring and dissenting opinions often seem written to appeal to a future Court.

124. 384 U.S. 641, 666 (1966) (Harlan, J., dissenting).

125. 521 U.S. 507 (1997) (declaring the Religious Freedom Restoration Act unconstitutional and holding that Congress under section five of the Fourteenth Amendment cannot expand the scope of rights or create new rights).

126. 482 U.S. 496 (1987).

127. 490 U.S. 805 (1989).

128. 501 U.S. 808 (1991).

129. 423 U.S. 362, 380 (1976).

H. Conclusion

My central point is that it is important to identify the audiences for Supreme Court opinions and that doing so generates important insights about what the Court does and should do. The above discussion is preliminary; it is exhaustive about neither the audiences that exist nor their significance in opinion writing.

III. THE SPEAKER

Of course, any rhetorical enterprise involves a speaker. A few important characteristics of the speaker in judicial opinions can be identified.

First, there is a tradition of signed opinions. Majority opinions always are written to speak for “the Court” as a whole; yet, except for per curiam opinions, they are signed by individuals. Early in American history, each Justice wrote an opinion in each case, so-called “seriatim” opinions. Chief Justice John Marshall changed this practice, so that since the early nineteenth century the tradition has been a majority opinion identified as having been written by a single Justice and joined by at least half of the other Justices on the Court.¹³⁰ The tradition certainly could have developed differently, with all majority opinions being per curiam and the identity of the authors remaining undisclosed. Such an approach would have increased the sense that all opinions are truly from the Court as a whole.

Yet, the practice of the last two centuries of signed majority opinions emphasizes the role and voice of the individual Justice at the same time as the edicts of the Court’s majority is being expressed. Obviously, Justices take very seriously their role as author and speaker for the Court. Recently, I noticed that in *Brady v. Maryland* the opinion says, “Opinion of the Court by Mr. Justice Douglas, announced by Mr. Justice Brennan.”¹³¹ Individual attribution is so valued that it is even identified when another Justice reads the opinion from the bench.

The importance of authorship also is reflected in instances in which the Court deviates from its usual practices. For instance, in *Cooper v. Aaron*, each Justice individually signed the majority opinion to convey, clearly and unequivocally, the Court’s insistence that state courts and governments comply with federal desegregation orders.¹³² A federal district court had ordered the desegregation of the Little Rock,

130. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 186 (abr. ed. 1991).

131. 373 U.S. 83, 84 (1963) (holding that prosecutors must disclose to defendants potentially exculpatory evidence).

132. 358 U.S. 1 (1958).

Arkansas, public schools. The State disobeyed this order, in part, based on professed concern that compliance would lead to violence, and, in part, based on a claim that it was not bound to comply with judicial desegregation decrees.

In an unusual opinion, signed individually by each Justice, the Court rejected this position and emphatically declared:

[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.¹³³

The Court strongly reaffirmed *Brown* and said that it could not be nullified either “openly and directly by state legislators or state executive or judicial officers” or “indirectly by them through evasive schemes for segregation whether attempted ‘ingeniously or ingenuously.’ ”¹³⁴

The choice to have every Justice individually sign this opinion obviously was done for rhetorical purposes. The Justices wanted to communicate a message to Little Rock and to the country about their views with regard to desegregation orders and the duty of state and local governments to obey them.

Another example was the joint opinion by Justices O’Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*.¹³⁵ Rather than the usual practice of one Justice authoring an opinion, joined by the other two, each of these three Justices signed as author of the opinion. Again, this choice seems clearly to have been motivated by rhetorical considerations: the Justices saw themselves as announcing an important resolution of a controversial and crucial issue. Indeed, the first sentence of their opinion indicates their sense of authoring a very significant opinion: “Liberty finds no refuge in a jurisprudence of doubt.”¹³⁶

A second rhetorical aspect of the Supreme Court as speaker is its desire for unanimity in handing down decisions where there is a serious risk of disobedience by government officials. *Brown v. Board of Education* is an obvious example of this.¹³⁷ Many have written how

133. *Id.* at 18.

134. *Id.* at 17 (quoting *Smith v. Texas*, 311 U.S. 128, 132 (1940)).

135. 505 U.S. 833 (1992). For a fascinating account of how this opinion came to be written, see EDWARD LAZARUS, *CLOSED CHAMBERS* 459-86 (1999).

136. *Id.* at 844.

137. 347 U.S. 483 (1954).

newly appointed Chief Justice Earl Warren perceived a need for unanimity to convey a clear message to the country, and particularly to southern states, about the Court's resolve and commitment.¹³⁸ In fact, every desegregation case for twenty years was unanimous undoubtedly for this reason.¹³⁹

Similarly, unanimity undoubtedly was perceived as important in *United States v. Nixon*,¹⁴⁰ where the Court ordered President Nixon to produce the Watergate tapes that quickly led to his resignation.¹⁴¹ There was a real chance that President Nixon would disobey the Court's order, especially if the Court was closely divided or there was any ambiguity in its opinion.¹⁴²

In cases like these, unanimity serves a key rhetorical function. A unanimous decision conveys a message of the Court's agreement and its resolve. It undermines the ability of an official considering disobeying the Court to argue that the decision was partisan or uncertain.

One more aspect of the Court as speaker that merits mention: the need to produce an opinion that gains support of a majority undoubtedly has a powerful effect on how many opinions are written. This often exercises a powerful effect on how Justices' opinions are written. Especially when the Court is closely divided, Justices write opinions in a way to keep their majority. For instance, in *Metro Broadcasting, Inc. v. FCC*,¹⁴³ Justice Brennan's majority opinion upholding preferences for minority-owned businesses in broadcast licensing invoked Justice White's earlier opinion in *Red Lion Broadcasting Co. v. FCC* which had upheld the Fairness Doctrine.¹⁴⁴ Although the issues in the case were quite different, Brennan seemed to be writing the opinion to appeal to White and his commitment to ensuring a diversity of views over the broadcast media.

Brown v. Board of Education and the desegregation cases that followed it again provide an important illustration. Neither in *Brown* nor in any of the subsequent desegregation decisions did the Court condemn laws requiring segregation as inherently violative of equal

138. See RICHARD KLUGER, *SIMPLE JUSTICE* 679-99 (1975); G. EDWARD WHITE, *EARL WARREN* 165-69 (1982).

139. The unanimity in desegregation cases ended in *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding 5-4, that inter-district desegregation remedies are permissible only if there is proof of an inter-district violation).

140. 418 U.S. 683 (1974).

141. For an account of how *Nixon* was written within the Court, see BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 301-47 (1979).

142. Nixon apparently raised the possibility of disobedience with his top advisers and they pointed to the unanimity of the decision and its clear order in persuading him to comply. See BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 264 (1976).

143. 497 U.S. 547 (1990).

144. 395 U.S. 367 (1969).

protection. *Brown*, of course, focused on the consequences of segregation in education. The subsequent cases striking down Jim Crow laws were handed down without any opinions.¹⁴⁵ It is unclear why, but the answer surely is about the rhetorical message. Perhaps it is because the Court could not agree on an opinion so it simply announced a result.¹⁴⁶ Also, the Court's approach conveyed a sense that the conclusions were clear and obvious, so much so that no opinions were needed.

CONCLUSION

My central thesis is that Supreme Court opinions are a rhetorical enterprise and that this fact profoundly influences much of what the Court does and also how the Court's decisions should be evaluated. To paraphrase an old song, it's only words, but words are often all we have.

145. See, e.g., *Gayle v. Browder*, 352 U.S. 903, *aff'g mem.* 142 F.Supp. 707 (D. Ala. 1956) (municipal bus system); *Holmes v. City of Atlanta*, 350 U.S. 879, *vacating mem.* 223 F.2d 93 (5th Cir. 1955) (municipal golf course); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877, *aff'g mem.* 220 F.2d 386 (4th Cir. 1955) (public beaches).

146. The cases did not obviously flow from *Brown* precisely because *Brown* focused on education and thus could not be used by itself to explain why segregation of beaches, buses, or golf courses is unconstitutional.