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## The Supreme Court's Transparency: Myth or Reality?

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## THE SUPREME COURT'S TRANSPARENCY: MYTH OR REALITY?

Nancy S. Marder\*

### INTRODUCTION

The United States Supreme Court has long been criticized for being the least democratic branch of our three branches of government.<sup>1</sup> The Court has had to contend with what Professor Alexander Bickel labeled “the countermajoritarian difficulty.”<sup>2</sup> The nine Justices, unlike their counterparts in the legislative and executive branches, are appointed, rather than elected, and their appointment is for life.<sup>3</sup> To make matters even more challenging, the Court does not have a vehicle for explaining its practices and traditions. The Justices write opinions in order to explain their reasoning in a case, but they cannot use their opinions to explain how the Court works. Occasionally, a Justice or his or her law clerk writes a book about the Court,<sup>4</sup> but such writing is ad hoc and usually guarded, especially when the Justice is still sitting on the Court. As a result, Court practices and traditions can be difficult to piece together. A number of academics have criticized the Court for this seeming lack of transparency. Professor Eric Segall, in his book *Supreme Myths: Why the Supreme Court Is Not a Court and Its Justices Are Not Judges*<sup>5</sup> and in his article *Invisible Justices: How*

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\* Professor of Law and Director of the Justice John Paul Stevens Jury Center, IIT Chicago-Kent College of Law. I thank Christine Lee and Luke Donohue, the Symposium Editors at *Georgia State University Law Review*, for organizing the on-site symposium at Georgia State University College of Law as well as the publication of this symposium. I also am grateful for the library assistance of Clare Gaynor Willis.

1. Even if the Court is the least democratic branch, it performs essential functions that protect individuals in a democracy and it operates under constraints that make it “the least dangerous branch.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

2. *Id.* at 16.

3. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

4. See *infra* notes 111–19 and accompanying text.

5. ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS*

*Our Highest Court Hides from the American People* in this Symposium,<sup>6</sup> joins other writers in this critique.<sup>7</sup>

This is not a view of the Court that I share. In part, this might be because I spent two years clerking for Justice Stevens, albeit a long time ago, and in part, this might be because I spent several years clerking at every level of the federal court system. These experiences, and especially two years at the Supreme Court, gave me the opportunity to observe the Court from a unique vantage point, and shaped my underlying view that, in general, the Justices try to perform their role responsibly and take seriously their obligations to ensure that the institution functions properly. I take this “court-centric” view, even when I disagree with particular decisions the Court reaches (and I disagree often). My clerkship experiences have inevitably shaped my view of judges and courts, though of course not everyone who serves as a law clerk emerges with this view. For some, the experience leads to cynicism.

In this Article, I begin by examining the critique that the Court is not transparent. Professor Segall makes this claim in general and offers the following as support: the Justices do not explain why they recuse themselves in certain cases; they do not reveal their votes on certiorari petitions, and they do not make their papers available to the public in a uniform manner after they retire from the Court.<sup>8</sup> In addition, the Court prohibits cameras in the courtroom.<sup>9</sup> What underlies Professor Segall’s view is a general distrust of the Justices. He argues that they cloak the Court’s doings in secrecy, and this tendency is contrary to a democratic institution. Moreover, it interferes with the public’s need to observe the Court to ensure that everything it does is aboveboard. Professor Segall assesses the

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JUSTICES ARE NOT JUDGES (2012).

6. Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787 (2016).

7. See, e.g., ERWIN CHEREMINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* 123 (2002) (“Every judge and every justice is appointed to the bench for life, immunized from public pressures. They don’t need television exposure to keep their jobs. They can enjoy power with near-anonymity.”).

8. See, e.g., Segall, *supra* note 6, at 797–818, 824–32, 832–45.

9. See *id.* at 788–97.

Court's transparency by comparing it to the other two branches of government and finds it lacking.

There are many good reasons for the Court's current practices with respect to certiorari votes, recusals, and making papers public after Justices' retirement or death. There are also good reasons for the Court's decision, at least for now, to refrain from having cameras in the courtroom. I focus on the reasons that the Court has for doing what it does. I take the Court as my starting point, and assess its practices based on whether they help or hinder the Court in performing its work. Underlying my view is a general trust in the Justices and their commitment to performing their role as ably as possible even if I disagree with particular results they reach in particular cases.

In my view, the starting point for assessing the Court's transparency is that its proceedings are public and its opinions are written and published. The Court conducts its oral arguments in open court; it publishes opinions in every case, and it gives reasons for every decision. These two defining features—public proceedings and written opinions—undermine critics' claim that the Court does its work in secret. In addition, the Justices and the Court take a number of steps to reach out to the public and explain the work of the Court. Against this backdrop of public proceedings, public opinions, and public outreach, I argue that the Court's transparency is reality, rather than myth.

Although I disagree with Professor Segall's claim that the Court works in secret, as well as with his particular policy recommendations for making the Court more transparent, I do think the Court, like any democratic institution, should always strive toward greater transparency. The Court can become more transparent by engaging in "incremental updating." Although I have applied this concept to lower courts,<sup>10</sup> I think it applies to the Supreme Court as well. By incremental updating, I mean that the Court needs to respond to changes in communication and technology; it needs to

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10. See Nancy S. Marder, *Judicial Transparency in the Twenty-First Century*, in POUND CIVIL JUSTICE INST., JUDICIAL TRANSPARENCY AND THE RULE OF LAW 101, 109–15 (2016).

“update” by adopting new ways of communicating that will allow it to reach more of the public. Yet, the Court needs to be circumspect, and therefore, it needs to update by taking small steps. The Supreme Court, unlike a start-up company, cannot race to create the next big thing. Rather, it needs to move forward, but to do so in “incremental” ways.

There are many small steps that the Court can take to enhance its transparency. The Court can make its public proceedings more accessible by making audio of oral argument available on the same day as the oral argument (as it does with transcripts of oral argument), rather than at the end of the week. It can also make the audio of oral dissents from the bench available much sooner than it currently does. The Court can make its written and published opinions more accessible by making small adjustments so that the press can better report on these opinions in a digital age, in which they have to write same-day articles for online newspapers as well as next-day articles for hard-copy newspapers. The Court also needs to make sure that its online opinions continue to look like its opinions published in hardbound volumes and include images that are integral to the opinions. The Justices have taken a number of steps to reach out to the public and explain their work, such as by participating in interviews broadcast by C-SPAN. Another way to reach the public is to make some of the Justices’ papers available online, after their retirement or death. Justices could make some of their papers available on the Supreme Court’s website, in addition to keeping the actual papers at a library or university, so that ordinary citizens have access to them and can gain a better understanding of the work of the Supreme Court. Through small steps that make use of new technology or new forms of communication, the Court can ensure that its work will become more accessible than it is now.

This Article is structured in three Parts. In Part I, I describe Professor Segall’s view that Supreme Court transparency is a myth. I explain his argument with respect to cameras in the courtroom, recusals, certiorari votes, and the Justices’ papers, and critique each of his policy suggestions. Underlying his view is a deep distrust of

the Justices. In Part II, I challenge the myth and describe the fundamental ways in which the Supreme Court is a transparent institution. It holds public proceedings, publishes written opinions, and undertakes public outreach to explain its work. Underlying my view is a general trust in the Justices that they take seriously both their role and the reputation of the Court. In Part III, I identify steps that the Court could take so that its public proceedings, published opinions, and public outreach are more accessible to people in this digital age. This approach, which I describe as “incremental updating,” would allow the Court to work toward greater transparency without taking risks that might impede its main functions.

#### I. THE SUPREME COURT’S TRANSPARENCY: IS IT A MYTH?

In Professor Segall’s view, the Supreme Court’s transparency is a myth. In general, he finds the Supreme Court to be “one of the least transparent governmental institutions in the United States.”<sup>11</sup> His Article is replete with descriptions of the Court and the Justices as “secret,” “hidden away,” “secretive,” “mysterious,” “shrouded in secrecy,” “non-transparent,” and “opaque.”<sup>12</sup> Against this backdrop of the Justices as secretive and the Court as intentionally (and perhaps even nefariously) hiding all that it does, he singles out several practices for particular opprobrium. These include cameras in the courtroom, recusal, certiorari votes, and the Justices’ papers.

With respect to each of these issues, Professor Segall’s view is that the Court needs to be transparent, and thus far, it is failing. Professor Segall describes himself as “an advocate,”<sup>13</sup> and indeed, he is. He holds strongly to his views and does not find any merit in opposing views. In the end, he thinks that if the Court is unwilling to take action, then Congress should step in and legislate to ensure that the Court achieves transparency.

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11. Segall, *supra* note 6, at 787.

12. *E.g.*, *id.* at 788, 794, 797, 798, 800, 807, 825, 828, 829, 830, 832, 833, 836, 839, 841, 846, 847.

13. Eric J. Segall, Panelist at the Georgia State University Law Review Symposium: Invisible Justices: Supreme Court Transparency in the Age of Social Media (Feb. 11, 2016).

Professor Segall is an advocate for transparency, but he does not really explain what problems he seeks to fix by having the Supreme Court be more transparent in the ways that he describes. For example, what problem is he trying to address by having the Justices make public how they voted on certiorari petitions? How would publication of the votes at this very early stage be useful, particularly because he is asking only for the votes, and not the reasons for the votes? He assumes that all transparency is good and that it does not involve any trade-offs. Admittedly, he believes that all of the information he is seeking belongs to the American people and we would be better off with it than without it. But he does not acknowledge that the information comes at a cost—usually to the decision-making process of the institution.

In my view transparency can be helpful, but it would depend on the information sought, the trade-offs involved, and whether the information would address some deficiency in the way the institution currently functions. Thus, I offer a critique with respect to several of the issues Professor Segall addresses: cameras, recusal, certiorari votes, and the Justices' papers. I do not think his proposed changes will make the Supreme Court more transparent in useful ways, but rather, his changes entail costs that, in the end, will do more harm than good.

What animates our different and competing policy approaches is an underlying difference about whether the Justices can be trusted or not. Professor Segall distrusts them to do their job responsibly and wants regulations, rules, and legislation to ensure they act aboveboard. In contrast, I trust that they take their roles seriously and that their traditions and norms will guide them to act in ways that enhance the Court's work. Although Professor Segall and I have fundamentally different views about whether the Justices can be trusted, we do share a view that the Court, like any other democratic institution, should strive toward making its work more transparent. I would have the Justices do so by engaging in incremental updating, rather than by mandate (which Professor Segall prefers), because I believe the Justices can be trusted to perform their role responsibly.

## A. *Cameras in the Courtroom*

### 1. *One View*

Professor Segall joins the media,<sup>14</sup> several members of Congress,<sup>15</sup> and a number of other academics,<sup>16</sup> all of whom have criticized the Supreme Court's practice of not allowing cameras in the courtroom. Professor Segall argues that having cameras in the courtroom for oral argument and the announcement of decisions would provide a video record of historic cases. Moreover, he points out that these are public events that should be available to the public, including those members of the public who cannot attend the oral argument or the announcement of a decision but who would watch it on television. The broadcast would help citizens learn more about the Court and would familiarize them with Court procedures and decisions. The video recording would have both historical and pedagogical value.

Professor Segall labels all of the reasons proffered by the Justices for excluding cameras in the courtroom as “unpersuasive.”<sup>17</sup> He rejects the view Justice Souter expressed when he was still on the Court that cameras would bring the Court more into the realm of politics, which is appropriate for the legislative and executive

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14. See, e.g., Editorial, *Cameras in the Courtroom*, N.Y. TIMES, May 15, 2007, at A28; Editorial, *Exceptional Court Coverage*, N.Y. TIMES, Nov. 18, 2011, at A32; Editorial, *For Courtroom Cameras*, CHI. TRIB., Nov. 27, 2005, at C10; Editorial, *Judges, Cameras and Guns*, CHI. TRIB., June 19, 2000, at 12; Editorial, *Judges' Wise Decision*, L.A. TIMES, reprinted in L.A. DAILY J., Feb. 22, 1996, at 6; Editorial, *Let the People See the Court*, CHI. TRIB., May 3, 2006, at 26; Editorial, *The Supreme Court Club*, N.Y. TIMES, Jan. 16, 2008, at 22.

15. See, e.g., DANIEL STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS 141 (2008) (describing Representative Steve Chabot's bill in 1997 to allow television coverage of federal courts, including the Supreme Court). Stepniak describes several other bills, such as the Sunshine in the Courtroom Act, which would have given federal judges authority to decide whether to have cameras in their courtroom, and a similar bill introduced by Senators Grassley and Schumer in 2000 and then in 2001. None of these bills passed both Houses of Congress. *Id.* at 142.

16. See, e.g., COHN & DOW, *supra* note 7, at 148 (“There is no cogent reason for keeping cameras out of the United States Supreme Court.”); STEPNIAK, *supra* note 15, at 142–47; Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 BYU L. REV. 1837; Sonja R. West, *The Monster in the Courtroom*, 2012 BYU L. REV. 1953 (addressing the various arguments that have been raised by the Justices as to why they do not permit cameras in the courtroom); Erwin Chemerinsky & Eric J. Segall, Opinion, *Supreme Court Should Lift its Blackout*, L.A. TIMES, Mar. 22, 2012, at A15 (arguing for cameras in the U.S. Supreme Court).

17. Segall, *supra* note 6, at 791.



branches, but not the judiciary.<sup>18</sup> Justice Souter also worried that broadcasts would undermine the dignity of the Court and would lead it to be viewed as just another form of entertainment.<sup>19</sup> Professor Segall is not persuaded by the concern Justice Scalia had voiced when he was on the Court that the media would highlight snippets from oral argument<sup>20</sup> nor the view expressed by Justice Breyer that cameras would make several of the Justices more self-conscious about what they say during oral argument.<sup>21</sup> He rejects Justice Kennedy's reasons that it would lead to sound bites by Justices and lawyers alike<sup>22</sup> and would shift the focus of attention from the Court's written opinions, with all of its reasoning, to oral argument, which is just a preliminary stage for the testing of arguments.<sup>23</sup>

Professor Segall regrets that one of the more recently confirmed Justices, Justice Sonia Sotomayor, expressed support for cameras in the courtroom during her confirmation hearings, but then abandoned that position once she joined the Court.<sup>24</sup> Justice Sotomayor now worries that the broadcasting of oral argument would lead to more second-guessing and reading of tea leaves, which would, in the end, do more harm than good.<sup>25</sup>

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18. *Id.* at 792.

19. *Id.*

20. *Id.* at 794.

21. *Id.* at 792. When Justice Souter was still on the Court, he also voiced this concern. He worried that he would feel more self-conscious in front of cameras, and it would affect his performance on the bench. He had a similar concern when he was a state court judge. Tony Mauro, *Roll the Cameras (or Soutersaurus Rex)*, LEGAL TIMES, Apr. 8, 1996, at 9.

22. Segall, *supra* note 6, at 793.

23. Justice Kennedy has explained to one congressional subcommittee that the focus of the Court's work is the written opinion and televised oral arguments would shift the public's attention to a preliminary stage in the Court's decision-making process. *See, e.g.*, Linda Greenhouse, *2 Justices Indicate Supreme Court is Unlikely to Televise Sessions*, N.Y. TIMES, Apr. 5, 2006, at A16 (Justice Kennedy explained "the absence of cameras as a positive." He stated to the House Appropriations subcommittee, "We teach that our branch has a different dynamic . . . . We teach that we are judged by what we write."). Justice Ginsburg also voiced the concern that cameras in the courtroom of the Supreme Court would lead the public to think that the oral argument was determinative, when so much of the work went on beforehand with the reading of briefs, and afterward, with the writing of opinions. *See Kalb Report: First Amendment and Freedom* (C-SPAN television broadcast Apr. 17, 2014) (interviewing Justices Ginsburg and Scalia).

24. Segall, *supra* note 6, at 794.

25. *Id.*

Professor Segall is not persuaded by any of the explanations offered by the Justices on the ground that “it is not up to government officials to decide what already public information should be shared with the public.”<sup>26</sup> But if that is his view, then no counterargument would persuade him. He points to the use of cameras in the courtroom in state courts and in several foreign countries, such as Canada, Brazil, and the United Kingdom, as support for his argument that cameras provide the public with information and education and do not have any deleterious effects on the courts.<sup>27</sup> He urges the Court to permit C-SPAN to broadcast oral arguments and announcements of decisions. Anything less would suggest, in Professor Segall’s words, that “the Justices are hiding from the very people they are supposed to work for and who pay their salaries.”<sup>28</sup>

## 2. *A Critique*

Professor Segall argues that transparency requires cameras in the courtroom, even though audio and transcripts of the oral argument make oral argument available to the public without any distractions. Every oral argument is recorded by the Court and is made available online by the end of the week of argument, along with a transcript of the argument on the day of argument. Both are available on the Court’s website, as well as on Oyez’s website and apps. In cases of particular interest to the public, the Court has made the audio available on the same day as the argument. Thus, members of the public who are interested in hearing the argument or reading a transcript of it, have access to it. Both of these forms ensure that the argument remains center stage, without any distractions. Professor Segall argues for cameras in the courtroom because he worries that most people will not listen to an hour-long argument or read a transcript of it, unless they have the images, which might be more captivating. However, images run the risk of distracting the viewer

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26. *Id.*

27. *Id.* at 795.

28. *Id.* at 797.

from the argument as they instead focus on how the participants look rather than on what the participants say.

Cameras in the courtroom pose several other challenges for the Court. For anyone who has been in the courtroom during oral argument, it is striking how intimate a setting it is. Supreme Court advocates have often commented on the fact that it feels like they are having a conversation with the Justices. They had not realized beforehand how close they would be standing to the Justices.<sup>29</sup> This conversational aspect could be lost when the exchange no longer takes place just before those in the courtroom, but is broadcast nationally.<sup>30</sup>

The Justices are right to be concerned about how cameras might change the dynamics in the courtroom. Professor Segall and others take the view that cameras have no effect on people's behavior, but he does not point to any empirical studies to support this claim. In fact, studies in other decision-making settings suggest that cameras do change behavior.<sup>31</sup> The studies from state courts have not been very rigorous, so it is hard to draw any conclusions from cameras in that context.<sup>32</sup> In addition, state judges, who are often elected, have a

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29. See, e.g., Kathleen McCleary, *One Page University: Supreme Court*, PARADE, Feb. 7, 2016, at 6 (“You’re very close to the justices physically,” says . . . SCOTUS blog reporter Amy Howe, who argued two cases in front of the Court. The distance between the attorney podium and the justices’ bench is so short that if a justice and lawyer leaned very far forward, they could almost shake hands.”).

30. One way to think about the effect is to consider the classroom. In a classroom, the teacher and students interact and students are encouraged to put forth ideas even if they are uncertain of them. The teacher might even try to put questions in a more provocative manner in order to engage students and to encourage them to participate. However, if the class discussion were being televised, students and teacher alike would be more careful about what they said and the way in which they said it. Indeed, some students would decide not to participate at all. The camera, whether noticeable or not, would chill the discussion.

31. See, e.g., Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 516 (2015) (“A rich body of evidence on perceived social-surveillance . . . proposes that people adhere to social norms and change their conduct *because* of that cognizance that someone else is watching . . .”) (citations omitted).

32. See MOLLY TREADWAY JOHNSON & CAROL KRAFFKA, FED. JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 38 n.33 (1994), [http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$file/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf) (“A handful of state studies other than those mentioned here address juror and witness issues; we did not include all of them, however, because some reports do not provide enough detail about methods to determine what questions were asked and how, and others used methods we did not consider sufficiently rigorous to rely on for

different incentive for wanting cameras in their courtroom. They want publicity that will help them to be reelected.<sup>33</sup> Federal judges, including Supreme Court Justices, are appointed for life and do not have that concern. Currently, the federal district courts do not permit cameras in the courtroom,<sup>34</sup> but the Second and Ninth Circuits do.

The Federal Judicial Center, the research arm of the federal courts, is conducting a multi-year study to try to determine what effects cameras will have in federal courts (trial and appellate).<sup>35</sup> The last time it undertook such a study was in 1994 (based on research begun in 1991) and the findings were mixed.<sup>36</sup> This time period predated the Internet, cell-phone cameras, and social media. Now, we live in a time when many people have a camera at their fingertips. Any images can end up on YouTube or Facebook forever, so there is little control over images if the Court were to allow cameras in the courtroom. The Court is wise to wait at least until the findings from the current Federal Judicial Center pilot program are known, and even those findings would at most be suggestive because they are based on federal district courts and courts of appeals, not the Supreme Court.

The Justices are also wise to proceed cautiously, especially when so many of the Justices have reservations about how cameras might affect the oral argument. The Court is a collegial institution. After all, the Justices need to work with each other for decades. It is important that they respect each other's views and proceed cautiously whenever

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this evaluation (e.g., a judge polling one jury after a trial about whether cameras affected them).”).

33. See, e.g., Justice Don Willett, Supreme Court of Texas, Panelist at the Georgia State University Law Review Symposium: Invisible Justices: Supreme Court Transparency in the Age of Social Media (Feb. 11, 2016) (noting that elected judges need to have name recognition and pointing out that their use of social media can help them in that task).

34. The only exception is for the fourteen federal district courts participating in the ongoing pilot program by the Federal Judicial Center. See *infra* note 35 and accompanying text.

35. See, e.g., *Courts Selected for Federal Cameras in Court Pilot Study*, FED. EVIDENCE (June 8, 2011), [http://federalevidence.com/pdf/2011/05\\_May/JCUS.Camera.Pilot.pdf](http://federalevidence.com/pdf/2011/05_May/JCUS.Camera.Pilot.pdf) (“Fourteen federal trial courts have been selected to take part in the federal Judiciary’s digital video pilot, which will begin July 18, 2011, and will evaluate the effect of cameras in courtrooms.”).

36. Compare JOHNSON & KRAFKA, *supra* note 32, at 18 (finding that some federal district court judges did not have favorable attitudes toward electronic media coverage, and some had strong objections), with *id.* at 43–46 (recommending that federal courts permit cameras in federal courtrooms; however, the Judicial Conference rejected this position with respect to district courts and left appellate courts to decide on a circuit by circuit basis).

they contemplate a change in their practice. This is a change that could affect how comfortable the Justices feel during oral argument in pressing a particular point or hypothetical no matter how extreme it might seem.<sup>37</sup> The Justices should not have to hold back on their point simply because they now have to worry about how it might play on television. Oral argument provides them with a vehicle for getting their questions answered, no matter how far-fetched their questions might be. Although the briefs provide some information, they do not always address the crux of the matter or the weakness of a particular position. This is where oral argument is useful to the Justices. The question of cameras in the courtroom should be addressed foremost from the perspective of does it help or hinder the Justices in the performance of their task. In other words, the Court should take a “court-centric” view and this seems appropriate because oral argument is supposed to be an aid to their decision-making.

There is also the problem of unintended consequences. A change in one practice or procedure can affect an institution in unanticipated ways. Institutions are not static. If Supreme Court Justices find themselves having to work in the courtroom under the watchful gaze of a camera, they might shift more of their work from the courtroom to their Chambers. For example, the amount of time allotted for oral argument has not remained fixed in stone. At one point, each side had an hour,<sup>38</sup> now it is down to thirty minutes.<sup>39</sup> If the Justices found

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37. Justice Souter told the House Appropriations subcommittee that he found that cameras “‘affected my behavior’” when he was a justice on the New Hampshire Supreme Court. COHN & DOW, *supra* note 7, at 111.

38. Justice Stevens explained this change:

When [Warren] Burger joined the Court, the rules authorized two hours for oral arguments, with each side having a full hour. . . . [O]n July 1, 1970, the Court implemented its present rule limiting the time for each advocate to thirty minutes in all cases. The primary concern motivating that change was the overcrowded condition of the docket . . . .

JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 119 (2011).

39. *See, e.g.*, ROBERT SHNAYERSON, *THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 45 (1986) (“Only by limiting each side to thirty minutes can the Court squeeze in twelve one-hour arguments per week and still have time for writing opinions. These oral argument sessions occur three days a week (Monday, Tuesday, and Wednesday) during fourteen weeks interspersed from October through April . . . .”); STEVENS, *supra* note 38, at 119 (describing the Court’s current rule of thirty minutes per side for oral argument).

oral argument before a camera to be less useful than it had been without a camera, they could further limit the amount of time for each side. Thus, the introduction of cameras in the courtroom, which was intended to make oral argument more transparent to the broader public could end up making oral argument less transparent to everyone because there would be less of it. The federal courts of appeals have already reduced not only the amount of time that each side has for oral argument,<sup>40</sup> but also the cases that qualify for oral argument.<sup>41</sup> Although the courts of appeals have done this to save time and enable the courts of appeals judges to handle a growing workload,<sup>42</sup> the end result has been what I have described elsewhere as “the vanishing oral argument.”<sup>43</sup> If oral argument at the Supreme Court became less effective because of the introduction of cameras, then we might see the vanishing oral argument at the Supreme Court as well. Already there has been “a dramatic reduction of the number of oral arguments” heard by the Court,<sup>44</sup> though it is hard to know whether the decline is attributable to the repeal of the Court’s mandatory jurisdiction, the reduction in conflicts among courts of appeals, or the increasing number of Justices who belong to the cert pool.<sup>45</sup>

Another possibility is that if cameras were introduced in the courtroom, oral argument could simply become more scripted and less interactive than it currently is. Today, the Supreme Court has a

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40. See, e.g., WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* 85 (2012) (“Today, extended oral argument is a rarity in the federal circuit courts; the norm is no argument at all, and most arguments last fifteen minutes or less.”).

41. See FED. R. APP. P. 34(a)(2)(A), (B), & (C) (providing for oral argument except when all three judges on a panel agree that the appeal is frivolous, the dispositive issues have been authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and little would be gained by oral argument).

42. See, e.g., David R. Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, 61 CLEV. ST. L. REV. 47, 48 (2013) (“Caseload volume has been a thorn in the side of the federal appellate system for over a half-century. A rise in the number of appeals has not been accompanied by a commensurate increase in judges to handle those appeals nor has the system been restructured to handle the additional caseload.”) (footnotes omitted).

43. Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1546 (2012) (describing the courts of appeals’ trend in which fewer cases receive oral argument as part of the “vanishing oral argument”).

44. STEVENS, *supra* note 38, at 209.

45. *Id.*

very active bench.<sup>46</sup> The Justices, with the exception of Justice Thomas,<sup>47</sup> are actively engaged in questioning the lawyers; they might even be too active sometimes, barely letting the lawyers respond to a question before the Justices ask another question. The introduction of cameras could lead more of the Justices to follow Justice Thomas' lead and simply allow the attorneys to make their argument. Thus, the public would miss out on the Justices' identification of the key issues, and the Justices would miss out on the opportunity to have their questions answered and to hear the questions that their colleagues have about the case.

Cameras in the courtroom might lead the Justices to forgo or to curtail other courtroom traditions. For example, there is the tradition of the Justice who wrote the majority opinion announcing it from the bench. These announcements are typically brief summaries of the opinion and they are distinct from the written opinion or even the syllabus of the opinion prepared by the Reporter's Office. Some Justices, such as Justice Byron White, simply announced the case name and judgment in the case. Cameras could inspire more Justices to follow Justice White's bare-bones approach rather than the more detailed description that most Justices currently provide. There is also the tradition of a Justice announcing an oral dissent from the bench. According to one article recounting the history of this tradition, this had once been a more common occurrence in the courtroom,<sup>48</sup> but Chief Justice Burger did not agree with the tradition and urged the Justices to exercise it more sparingly.<sup>49</sup> The tradition continues,<sup>50</sup> but

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46. See, e.g., Adam Liptak, *Nice Argument, Counselor, but I'd Rather Hear Mine*, N.Y. TIMES, Apr. 5, 2011, at A12 (reporting that the Justices have become so active in their questioning during oral argument that the attorneys can barely get a word in edgewise).

47. See Adam Liptak, *Thomas Ends 10-Year Silence on the Bench*, N.Y. TIMES, Mar. 1, 2016, at A1 (reporting that Justice Thomas had broken his ten years of silence during oral argument by asking a series of questions in a case recently heard by the Court).

48. See Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75, 88–106 (2010).

49. See *id.* at 108–10.

50. Justice Potter Stewart told Justice Stevens when he joined the Court that Justice John Harlan had “expressed the view that in every term, at least one dissenter should announce his opinion from the bench” because these “announcements revealed qualities of some of [the Justices’] disagreements that could not be adequately expressed in writing.” STEVENS, *supra* note 38, at 158. Justice Stevens passed on that tradition to each of his newer colleagues, so that it survives. *Id.*

is reserved for those times when the dissenting Justice feels so strongly that he or she wants to make the extent of the disagreement known. This oral dissent is usually brief and distinctive from the Justice's written dissent. With cameras in the courtroom, the reading of an oral dissent from the bench would be immediately conveyed to a broadcast audience or it could die out altogether if the Justices felt that this tradition did not translate well to the television screen. Yet, it provides an interesting window into the strength of the dissenting Justice's view, and it would be a shame to lose the tradition. Thus, Professor Segall's call for cameras in the courtroom, in an effort to make the courtroom proceedings more available to a broader swath of the public, could in fact reduce the types of proceedings that the Court conducts in the courtroom, making the Court's work less visible than it currently is.

When other branches of government have let cameras in, the effect has been to have more staged proceedings that reveal limited information. For example, the President delivers his State of the Union address by appearing before Congress, Cabinet Secretaries, the Supreme Court, select members of the public, and the television cameras. However, this is a speech that the President simply reads. Similarly, certain congressional speeches take place in front of cameras, and the proceedings are broadcast on C-SPAN. However, the speeches are read by members of Congress, and only the speaker is shown. The speeches can be given to an empty Chamber, and television viewers cannot tell. For both the executive and legislative branches, these are formal, scripted readings. They do not involve the give-and-take that oral argument entails. Moreover, these are mainly reports by the other branches, and are a way to convey information to the public. In contrast, oral argument is a way primarily to educate the Justices so that they have a more complete understanding of the case and can get answers to their questions before they have to decide the case.

In addition, when other branches of government have let cameras in, the real decision-making has moved elsewhere; it does not take place before the cameras. For example, the confirmation hearings



that the Senate holds when considering a Supreme Court nominee had once been held behind closed doors and the Senators could ask any question, including those pertaining to the law. The confirmation hearings were first televised when Judge Robert Bork was being considered for the Supreme Court. Those hearings were very revealing—both because Judge Bork tried to answer the questions extensively and held unpopular views and because the Senators were willing to ask probing and even technical questions about the law. However, Judge Bork was not confirmed. The lesson for all future nominees was to say as little as possible during the hearings. The lesson for all future Senators was to use the television time to impress their constituents. They realized that a technical discussion of any aspect of the law was not the best way to appeal to a broad television audience.

As a result, today's confirmation hearings, which are televised, reveal almost nothing. The Senators and the public learn little about the nominees. The decision-making takes place elsewhere, and the Senators have less information on which to base their decision than they had when confirmation hearings were held behind closed doors. This is an instance where cameras were introduced to satisfy the appearance of transparency, when in fact the public learns little of substance.

Cameras present yet another problem for the Court because they transform everything into entertainment. This transformation would not benefit the Court, the Justices, or the public. The courtroom provides a setting that is dignified and solemn. Each participant has his or her place in the courtroom and follows set procedures. The parties bring their dispute to the Court with the belief that the Court will act fairly and impartially. The setting of the courtroom, the demeanor of the Justices, the formality of the proceedings, the structure of oral argument, and the adherence to traditions all contribute to the respect that the parties have for what takes place in the courtroom and their willingness to accept the Court's decision.

Cameras threaten to disrupt the solemnity that the courtroom setting creates, not because they introduce noise and distraction as

they once did,<sup>51</sup> but because they can highlight certain moments, which can look humorous or silly, when taken out of context. A particular facial tic or gesture, which the person is unaware of, can be shown up close and repeatedly. Given the Internet and social media, that image can go viral and be shared with millions of people. The image becomes entertainment and will be what viewers remember about the oral argument. One journalist's suggestion is that the Justices can just act like "normal people" and control themselves and can control the lawyers who appear before them; however, normal people use gestures, expressions, and body language that feel normal to them but can appear funny or odd on camera, especially when they become the focus of the camera.<sup>52</sup> The courtroom needs to provide a solemn setting where disputes are heard and resolved in a civil manner. Transforming the courtroom into a television set and the Justices and lawyers into fodder for entertainment, no matter how inadvertent, will do more harm than good.

Once images are introduced, the public's focus is likely to shift from the argument that the lawyers and Justices are engaged in to the images of the lawyers and Justices. Women lawyers and Justices might be judged more severely, with an emphasis on how they look and what they wear, than men in the same position.<sup>53</sup> The Court

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51. The large cameras, wires, microphones, and lights that turned earlier trials into circuses when cameras were permitted in the courtroom are no longer the problem. *See* *Estes v. Texas*, 381 U.S. 532, 536 (1965). Today's cameras are unobtrusive, unlike their predecessors. However, today's cameras, as unobtrusive as they physically are, can nonetheless be used in a highly obtrusive manner by taking particular moments from oral argument and highlighting them in a way that makes them appear funny, silly, or ridiculous.

52. Consider Richard Nixon's five o'clock shadow and beads of perspiration during his debate with John F. Kennedy when both were running for the presidency in 1960 and the debates were televised for the first time. We remember the images—Nixon's shiftiness and Kennedy's good looks—not the policy positions they debated. *See, e.g.*, PAUL F. BOLLER, JR., *PRESIDENTIAL CAMPAIGNS* 298–99 (1984) (“[T]he cameras were kinder to Kennedy than to Nixon. During the debate Kennedy looked pleasant, relaxed, and self-assured, while Nixon (who had barely recovered from his illness) looked pale, tired, and emaciated, with his customary five o'clock shadow making him look a bit sinister.”).

53. *See, e.g.*, Julia Baird, Opinion, *Sarah Palin's Mustache*, N.Y. TIMES, Feb. 26, 2016, at A29 (“Why, then, does the lens through which we view and judge prominent people still remain more magnified, harsh and unforgiving for women than for men?”); Pamela Paul, *She Sounds Smart, but That Hair!*, N.Y. TIMES, Mar. 29, 2015, (Styles), at 2 (“The outcome is that by focusing on women's appearance [on television], you take away from their accomplishments and professionalism . . .”) (quoting Elisa Lees Munoz, executive director of the International Women's Media Foundation); Michael Schulman, *Now, Playing Herself*, N.Y. TIMES, Mar. 3, 2016, at D1 (In a television series about

needs to keep the focus on the argument, and ultimately, on the written opinion because it is the written opinion on which the Court will be judged. Cameras, which focus on human foibles and quirks, are likely to introduce a distraction.

Not only do cameras in the courtroom raise the possibility of images that go viral, but also they raise the possibility of Justices that become celebrities.<sup>54</sup> Although Professor Segall has argued,<sup>55</sup> as have members of the press,<sup>56</sup> that the Justices have already started down this path by publishing books, appearing on talk shows, and giving interviews, if they become regulars on television their visibility will only increase. The role of the judge is at odds with the role of the celebrity. Judges don robes to step into their professional roles, to join their colleagues on the bench, and to obscure individual differences. In England, the judges go one step further toward obscuring individual differences by wearing a wig as well as a robe.<sup>57</sup> While a Justice has an integral role to play during oral argument, he or she is just one member of a nine-member panel. In contrast, a celebrity stands out from the crowd and attracts individual attention. To the extent that cameras in the courtroom contribute to the transformation of Justices into celebrities, they will undermine the judicial role.

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the O.J. Simpson trial, Sarah Paulson plays prosecutor Marcia Clark, who was “hounded by news media unfairly fixated on her perceived shrewishness and (questionable) perm. ‘That’s the first thing people say when they hear “Marcia Clark” . . . They don’t even think “lawyer.” They just think “hair.”’”) (quoting actress Sarah Paulson).

54. See, e.g., Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2d. 157, 161-67 (2016) (noting that Supreme Court Justices have become celebrities, and quantifying this by reviewing reported public appearances or interviews of sitting Supreme Court Justices between 1960–2014). Professor Hasen found that the number of extrajudicial appearances has increased dramatically but it is not distributed evenly among all of the sitting Justices. *Id.* at 163.

55. See also Segall, *supra* note 6, at 797 (noting that the Justices are no longer “out of the public eye”).

56. See, e.g., James Oliphant, *Justices Come Off the Bench To Chat*, CHI. TRIB. (Apr. 30, 2008), at 4 (“Breyer, Thomas and Scalia have since written books, and their sudden availability to the press has been timed with the release of those books.”).

57. See, e.g., Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 CHI.-KENT L. REV. 537, 549 (2011) (describing the “donning of gowns and wigs” of judges and barristers at the Old Bailey in London as contributing to an “atmosphere of formality and civility” and also “mark[ing] membership in a learned, professional community”).

Of course, the disruptive role that a camera in the courtroom is likely to play now does not mean that it will always play that role. A new generation of Justices might be more comfortable conducting oral argument before a camera. In addition, cameras have become ubiquitous and it might grow increasingly hard for the Court to resist having its oral argument conducted before a camera. However, it may be that the reform Professor Segall suggests—having C-SPAN simply broadcast the Court's courtroom proceedings—might no longer be feasible in this age when everyone has a camera on their cell phone and uses it all the time. It will be hard to draw the line between C-SPAN cameras and citizen-journalists' cameras. It might be easier for the Court to continue to ban all cameras in the courtroom than to permit some cameras (C-SPAN) but not other cameras (individuals).

*B. The Justices' Recusal Decisions*

*1. One View*

Another area of Court practice in which Professor Segall urges greater transparency is the Justices' decisions about when they should recuse themselves from a case. He believes that they should explain their recusals; otherwise, the public is left to guess the reasons. He describes a case in which Justice Alito initially recused himself at the certiorari petition stage, but then participated in the case when it came before the Court.<sup>58</sup> He suggests that the most likely explanation is that Justice Alito had initially owned stock in the company, but had sold it by the time the case was heard.<sup>59</sup> However, he also thought that Justice Alito could have acted from improper motives, such as divesting in order to ensure that one party would win.<sup>60</sup> Professor Segall argues that without Justice Alito providing his reasons the public will never know and might suspect the worst.

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58. Segall, *supra* note 6, at 797–98.

59. *Id.* at 798.

60. *Id.*

Professor Segall suggests that the Justices should follow all the federal statutes that govern when lower court judges have to recuse themselves from a case,<sup>61</sup> and they should explain in writing “a decision to recuse or not recuse in a particular case.”<sup>62</sup> He faults Justice Kagan for not explaining her decision to participate in the Affordable Care Act case. He agrees that “[t]here is no evidence that Kagan had any direct involvement in the case” when she was Solicitor General,<sup>63</sup> but he questions whether her connections to the case might have had a “cumulative effect” that should have led her to address the issue in a public manner.<sup>64</sup>

Professor Segall wants to make sure that the Justices are being as careful as the lower court judges about when they should recuse themselves from a case. Although the Justices have an added consideration—which is that if one Justice recuses himself or herself then the Court might not be able to decide the case if the remaining eight Justices are evenly divided—Professor Segall’s solution would be to use another Article III judge instead.<sup>65</sup> Professor Segall would like the Court’s recusal process to have all the protections of an adversarial proceeding, including a written decision that contains the reasons for or against the recusal decision.<sup>66</sup>

## 2. *A Critique*

The Justices take seriously their decision about when to recuse themselves from a case. Although Professor Segall points to one or two cases in which he thinks an explanation should have been forthcoming, in general the Justices recuse themselves for the same reasons that lower court judges recuse themselves, and indeed, they

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61. All federal judges, including the Justices of the U.S. Supreme Court, have to adhere to 28 U.S.C. § 455 (2012) (Disqualification of justice, judge, or magistrate). Professor Segall would also like the Justices to adhere to 28 U.S.C. § 144 (2012) (Bias or prejudice of judge), which applies only to federal district court judges.

62. Segall, *supra* note 6, at 800.

63. *Id.* at 802.

64. *Id.* at 803.

65. *Id.* at 817 (drawing on the work of Professors Michael Dorf and Lisa McElroy).

66. *Id.* at 818.

are subject to the same disqualification statute.<sup>67</sup> The statute provides several situations in which they must recuse themselves including whenever their impartiality might reasonably be questioned. Typically, they recuse themselves when they or family members have a financial stake in the outcome of the case, when they have a familial or close connection to one of the parties, or when they think their participation might not satisfy the appearance of impartiality, such as if they worked on the case when in private practice or government employment.

It is up to the individual Justice to recognize when he or she has a conflict, just like it is up to lower court judges to recognize when they have a conflict, though of course, the parties or the press might bring to light a connection of which a Justice might be unaware.<sup>68</sup> An individual Justice also can turn to his or her colleagues for their opinions on whether they think a recusal is appropriate.<sup>69</sup> In a Justice's case, there is an additional consideration that lower court judges do not face. If a Justice recuses himself or herself, there is the chance that the remaining eight Justices will be evenly divided, in which case their decision provides no precedent and the lower court decision is simply affirmed. In contrast, when a lower court judge recuses himself or herself from a case, another judge can serve instead. At the Supreme Court, however, there are only nine Justices, and the absence of one Justice can have a profound effect.

Thus, the Justices have to think carefully about their decision to recuse and to strike the right balance. They have to recuse themselves when they think it is necessary in the interest of fairness, but they

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67. See 28 U.S.C. § 455 (2012) (“Disqualification of justice, judge, or magistrate judge”).

68. For example, Justice Stevens explained that he had participated in the Conference at which the certiorari petition in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), was considered because, in his words: “At that time I did not see how the outcome of the case could possibly impact the value of the condominium that my wife Maryan owns in Fort Lauderdale, Florida, or my own enjoyment of one of the most beautiful beaches in the world. The thought of disqualifying myself did not occur to me then.” Justice John Paul Stevens (Ret.), *The Stevens Lecture: The Ninth Vote in the “Stop the Beach” Case*, 88 CHL-KENT L. REV. 553, 556 (2013). However, once news stories suggested that he “might have an interest in the outcome” he decided to recuse himself and did not participate in the decision of the case. *Id.* He noted that in that case, his “recusal did not affect the Court’s disposition of the case.” *Id.*

69. Charles Lane, *Justice Gives Rare Peek into Top Court’s Workings*, CHI. TRIB. (Oct. 19, 2003), [http://articles.chicagotribune.com/2003-10-19/news/0310190364\\_1\\_justices-recusal-supreme-court](http://articles.chicagotribune.com/2003-10-19/news/0310190364_1_justices-recusal-supreme-court).

have to ask in each instance if it is really necessary. If they recuse themselves too readily then there is a chance that the parties' case cannot be decided definitively and that their decision will not be binding in future cases. A tie vote that merely affirms the lower court's judgment and does not result in a precedent yet still requires preparing for oral argument and discussing the case is not an efficient use of the Justices' limited resource of time.

This is an instance in which the Justices have a statute to follow,<sup>70</sup> as do all federal judges, as well as their own practices. They take the decision seriously and turn to their colleagues for further advice. There is no problem that Professor Segall points to that is in need of fixing here. Even the question he raises about Justice Kagan's recusal decision does not justify a change in practice, since he did not think that there was sufficient evidence that she should have recused herself.<sup>71</sup> If the result in an unusual case would not have changed, it seems likely that the current practice, used in case after case, is not in need of changing. Moreover, Professor Segall's proposed fix—adversarial proceedings, a written opinion, and possibly a substitute Article III judge—seems likely to do more harm than good, making the process far more political than it is. This is an instance in which the underlying distrust that Professor Segall has for the Justices comes to the foreground, but it should not be allowed to shape practice, especially when he has not demonstrated the need for a change.

### C. *Certiorari Votes*

#### 1. *One View*

Professor Segall also finds the certiorari (cert) process “mysterious” and in need of greater transparency.<sup>72</sup> The Court receives between 7,000 to 8,000 cert petitions a year and grants

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70. See 28 U.S.C. § 455 (2012).

71. Segall, *supra* note 6, at 802 (“There is no evidence that Kagan had any direct involvement in the [ACA] case . . . .”); *id.* at 806 (“The point is not that Elena Kagan should have recused herself from the ACA case.”).

72. *Id.* at 825.

certiorari in only about 75 to 80 cases a Term.<sup>73</sup> What standards do the Justices use to decide whether to grant certiorari and how did they vote in particular cases? Professor Segall believes the American people are entitled to know and likens the certiorari process to the “‘Star Chamber’ model of judging [rather] than an open and transparent process befitting a representative democracy.”<sup>74</sup>

The solution, according to Professor Segall, is that the Justices should have to publish how they voted on each cert petition, or at least how they voted on the cert petitions that were granted each Term. He cannot come up with any reasons why their votes should be “secret.”<sup>75</sup> He argues that with respect to the executive and legislative branches, there is a presumption of “strict disclosure requirements, including open-records laws and televised proceedings,” and there should be a similar presumption with respect to the Supreme Court Justices’ votes on certiorari.<sup>76</sup> He also mentions the cert pool, to which eight of the current Justices belong, as giving too much influence to law clerks in the certiorari decision-making process. In sum, he derides the cert process as being “opaque, non-transparent, and largely secret” and recommends that the Justices make public their votes and the roles that their law clerks play in the process.<sup>77</sup> Again, Professor Segall has not identified what problem the publication of cert votes would fix, other than that he distrusts the Justices and believes that this information should be available to the public.

## 2. *A Critique*

One reason for not requiring publication of votes with respect to cert votes is the old adage, “if it ain’t broke, don’t fix it.” Professor Segall has not identified any unseemly activities that these unpublished cert votes have masked, so he has not provided any reason that the Court should deviate from a practice that has worked

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73. *See, e.g.*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/> (last visited June 17, 2016).

74. Segall, *supra* note 6, at 826.

75. *Id.* at 828.

76. *Id.* at 830.

77. *Id.* at 832.



well. Moreover, when individual Justices feel strongly enough in a particular case that cert should have been granted, they write a dissent from the denial of cert, or more precisely in Justice Stevens' words, "a statement with respect to the denial of certiorari." Thus, the Justices do have an outlet for expressing, in unusual cases, why they thought cert should have been granted even though their colleagues disagreed.

In fact, there are good reasons to have cert votes remain unpublished. Professor Segall recommends that the votes be published, but he has not asked that reasons should also be provided for the votes. Of course, there is a practical reason to avoid asking for reasons: the Justices have to cast votes on 8,000 petitions; if they had to provide reasons for all 8,000 petitions or even just for the cases they agreed to hear they would not have time to decide cases. However, without reasons, the publication of cert votes would be almost meaningless.

There are many reasons why a Justice might vote to grant or deny certiorari in a particular case, and the reason would not be apparent from the vote. It takes four votes in favor of granting a cert petition for the Court to hear a case. The Court has a tradition that if there are three Justices voting to grant a cert petition, a fourth Justice might "cast a vote known as a 'join three,' meaning that he would cast the fourth vote to grant review if three others voted that way."<sup>78</sup> It is a way of saying to colleagues, if you think the case is important enough for us to review, then I will provide a fourth vote. However, from the outside, just the publication of votes would not reveal this reason. So, whatever conclusions Professor Segall would draw from seeing the votes published, the votes alone would be misleading.

There are other reasons that Justices might vote to deny certiorari in a particular case even if they think the issue is an important one. These can include: a problem with the case that prevents it from being a good vehicle to address the certworthy issue, a narrow split among the Circuits so that the issue would benefit from further "percolation" because the split might resolve itself without the

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78. STEVENS, *supra* note 38, at 145.

Court's intervention, or several state courts are divided but the federal courts have yet to consider the issue. Thus, whatever conclusions Professor Segall would like to draw about the types of cases that particular Justices vote to grant or deny cert in, without the reasons he would draw conclusions that are likely to be wrong.

Yet another reason to eschew Professor Segall's suggestion of publishing cert votes is that the Justices are supposed to be impartial. If cert votes are published the Justices might feel that they are beginning to be associated with a position, even at this early stage when all they have before them is the cert petition. They have yet to read the briefs, to participate in oral argument, to discuss the case at conference, or to exchange any drafts of opinions. It is important that they keep themselves open to persuasion throughout the process, but a vote that is made public begins to associate them with a position.

Borrowing from another context, one reason a judge tells jurors to keep an open mind throughout the trial and not to speak to any of his or her fellow jurors about the trial until the jury begins its deliberations is because there is a sense that when people announce their views—no matter how tentative the views are—they begin to lean toward a position. Indeed, jurors who begin deliberations by taking an initial vote usually form coalitions based on that initial vote and feel locked into that coalition's position. This is known as a “verdict-driven deliberation” and is likely to lead to more entrenched views than an “evidence-driven deliberation,” in which the jurors begin by discussing the evidence rather than by casting a vote.<sup>79</sup> Justices are not jurors, but they should not be pushed to declare an initial view about a case publicly. They should always remind themselves to keep an open mind. A published vote makes such an effort that much more difficult. Even if the publication of the cert

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79. REID HASTIE ET AL., *INSIDE THE JURY* 163–65 (1983) (describing “verdict-driven” and “evidence-driven” styles of jury deliberations); see Am. Judicature Soc’y, *Behind Closed Doors: A Guide for Jury Deliberations*, WIS. CT. SYS (1999), <https://www.wicourts.gov/services/juror/docs/deliberate.pdf> (suggesting to jurors that they engage in evidence-driven deliberations by sharing views initially before taking any votes); Judge John L. Kane, *Giving Trials a Second Look*, JUDGES’ J., Fall 2004, at 28, 30 (2004) (advising juries that “no vote be taken before a full discussion is had on the issue to be voted on; otherwise you might lock yourself into a certain view before considering alternative and possibly more reasonable interpretations of the evidence”).

vote is delayed until after the published opinion, as one commentator has suggested,<sup>80</sup> it is likely to lead the public to think that the Justices had a position from early on. Thus, Professor Segall's proposed practice is more likely to impugn rather than to improve the Justices' impartiality, at least according to public perceptions.

#### *D. The Justices' Papers*

##### *1. One View*

Professor Segall concludes by arguing that because most of what the Supreme Court does is cloaked in secrecy the Justices' personal papers should be made public in a consistent manner so that the public can assess the performance of the Justices and the Court. Currently, the decision about the release of papers is left to the discretion of the individual Justice. Some Justices release their papers soon after they retire, such as Justice Thurgood Marshall did; other Justices, such as Justice Souter, wait years to release their papers, until the Justices they served with are no longer on the Court.

Professor Segall urges Congress to pass a statute that would require the Justices to make public their personal papers in a way that is similar to the requirements the President must meet under the Presidential Records Act. Professor Segall acknowledges that there might be differences between the President's records and the Supreme Court Justices' personal papers, but in the end, all of these papers "belong to the public."<sup>81</sup> He draws on the work of Professor Kathryn Watts to suggest that Congress should pass legislation that provides that the Justices' papers are public property, and then work with the Judicial Office of the United States Courts to work out the details of how the papers should be kept and made available to the public.<sup>82</sup> Professor Segall considers some of the counterarguments that Professor Watts raises, such as the potential chilling effect, the

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80. Segall, *supra* note 6, at 830 & n.244 (thanking Akhil Amar for this suggestion, though it is not Professor Segall's preferred solution).

81. *Id.* at 838.

82. *Id.* at 839 (citing Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1719 (2013)).

cost, the potential separation of powers violation, and Congress' own failure to legislate with respect to the papers of members of Congress; however, he concludes that the need for public access to the Justices' papers, and the transparency they will provide, outweighs any of the counterarguments.

## 2. *A Critique*

Many of the papers that Justices are likely to have in their files and eventually make available to the public (or to researchers, as some Justices have done) are papers that more than one Justice has. For example, all of the Justices will have the memos circulated amongst themselves in response to drafts of opinions; there are also drafts of opinions (on which individual Justices might or might not have written comments); there are memos on emergency stay applications, including stays of execution; and for members of the cert pool there would be a bench memo written by a law clerk and shared among the Justices who are members of the cert pool.<sup>83</sup> Thus, many of the papers that are included in a Justice's files are likely to be included in other Justices' files as well. So, even if an individual Justice did not make public his or her papers, these papers would be available through other Justices. Of course, there are the papers that are unique to a Justice, such as memos that are written from a law clerk to a Justice, notes that a Justice might have taken about the votes or reasons expressed tentatively at Conference, and drafts of opinions that a Justice never circulated to his colleagues.<sup>84</sup>

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83. Justice Alito is the only Justice on the Court now who is not a member of the cert pool. *See, e.g.*, Adam Liptak, *Supreme Court's End-of-Summer Conference: Where Appeals 'Go to Die'*, N.Y. TIMES, Sept. 1, 2015, at A15 ("Eight of the nine justices—the exception is Justice Samuel A. Alito Jr.—have assigned their law clerks to a shared 'cert. pool.'"); *accord* Adam Liptak, *From Age of Independence to Age of Ideology*, N.Y. TIMES, Apr. 10, 2010, at A1 ("For years, Justice Stevens has been the only justice to go it alone; Justice Samuel A. Alito Jr. left the cert. pool in 2008."). When Justice Stevens was still on the Court, he was not a member of the cert pool, nor were Justices Marshall or Brennan. For the origins of the cert pool, see STEVENS, *supra* note 38, at 139 ("Before [1975], Justice Lewis Powell had suggested that a great deal of valuable time could be saved by having a clerk prepare a memorandum for each application, summarizing it and recommending an appropriate disposition. The chief [Warren Burger] and Justices Byron White, Harry Blackmun, and William Rehnquist agreed with Lewis's suggestion, and their clerks formed a pool whose work products those justices shared.").

84. *See, e.g.*, JAMES F. SIMON, *THE CENTER HOLDS* 17 (1995) (quoting from a dissent that Justice William Brennan never circulated).

Most Justices make their papers available to the public, though the number of years before this takes place does vary. In the course of the entire Supreme Court history, only fifteen Justices have not made their papers available.<sup>85</sup> In more recent history, beginning in 1900, all but six Justices have made their papers available.<sup>86</sup> Admittedly, Justices will make their papers public after a certain amount of time has passed. For example, some Justices wait until after the Justices they sat with are no longer on the Court. In the long run, though, Justices' papers will be available to those interested in studying the history of the Court. One has to take a long-term view, which Professor Segall is unwilling to do. He wants the papers to be made public right away and he does not want to leave it to the Justices to decide on when the papers should be made available or even which papers should be made available.

One problem with having Congress mandate the release of the Justices' papers is that it would change some Justices' behavior and leave a less complete record than is currently available. For some Justices, it might make little or no difference. For example, Justice Stevens liked to discuss the cases with his law clerks; he did not want them to spend time putting their views down in a memo. He was of the view that the time should be spent working on opinions, not memos. So, there is little written record of the exchanges between Justice and law clerk, and therefore, little that would have been affected by a change in rule. Other Justices, however, who want everything in writing from their law clerks might well change that practice if they knew that every memo would be made public as soon as they retired or died.

In other contexts, communications are protected in order to encourage the expression of candid views. One reason for protecting communications between an attorney and a client is so that the client

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85. See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 452–60 tbl.5-11 (2007). Recent Supreme Court Justices are not included in this Table. The Table lists Chief Justice Burger as not making his papers available, but they will be available at a future date. Of the 98 Justices listed (excluding Burger), 15 have not made their papers available. *Id.*

86. *Id.* Since 1900, there have been six Justices who have not made their papers available. They include: Joseph McKenna, Mahlon Pitney, Owen J. Roberts, George Shiras, Jr., Edward D. White, and Charles E. Whittaker.

feels that he or she can speak candidly to the attorney.<sup>87</sup> One reason to protect the thought processes of an attorney is so that the attorney is willing to commit his or her thoughts to writing rather than relying on memory alone which is less reliable.<sup>88</sup> In other branches of government, such as the executive, communications that are part of the deliberative process are protected by executive privilege.<sup>89</sup> Again, there is the need on the part of the decision-maker to collect candid opinions and to test tentative views. If these exchanges were subject to public release, employees would be much more reticent about giving their candid views, and as a result, policy makers would have less reliable information on which to base their decisions.

Legislation requiring the Justices to make public their papers is likely to change their behavior in ways that will leave much less information to the public and to history than the current practice. For example, one state court justice at the Symposium suggested that if his comments on drafts of opinions or his written exchanges with law clerks were automatically available to the public when he was no longer a justice, then he would alter what he put down on paper.<sup>90</sup> Although Professor Segall wants Congress to require every Justice to leave all of his or her papers to the public, a statute requiring this action is likely to curtail what Justices put down in writing. One unintended consequence is that the public will know a lot less about the Justices from their papers than they currently know.

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87. See MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2015) ("A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent . . .").

88. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("[A lawyer's] work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

89. See *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966) (identifying "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" as a basis for invoking executive privilege); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-14 (1978) (discussing three grounds upon which executive privilege has been invoked).

90. Justice David Nahmias, Georgia Supreme Court, Panelist at the Georgia State University Law Review Symposium: Invisible Justices: Supreme Court Transparency in the Age of Social Media (Feb. 11, 2016).

*E. Two Underlying Visions of the Justices**1. Distrust*

Professor Segall sees the Court as lacking in transparency, and underlying his view is a fundamental distrust of the Justices and the way they perform their role. Transparency is critical for him because otherwise the Justices will act according to their own individual whims. He does not see them as trying to perform their job responsibly unless their actions are monitored closely by the public or mandated by Congress.

One reason Professor Segall wants cameras in the courtroom is so that the American people can see beyond the myth of Justices as “neutral arbiters” and recognize that their decisions are shaped by politics.<sup>91</sup> Similarly, Professor Segall does not trust the Justices, individually or as a group, to decide when recusal is appropriate. He imagines the worst about the Justices: that their decisions to recuse or not to recuse are results-oriented. He also assumes the worst as to the Justices’ votes on certiorari. He is suspicious any time they have discretion, and they exercise discretion when they make decisions about cert petitions. Finally, Professor Segall does not trust the Justices to leave their papers to the public, even though they have done so with only six exceptions in the past century. He believes that Congress should step in and make this a requirement; otherwise, the Justices will decide in their own “idiosyncratic”<sup>92</sup> ways, and “many of [the Justices] will adopt secretive rules for these vital historical materials.”<sup>93</sup> Again, his underlying assumption is that the Justices are not to be trusted.

In each of these areas, Professor Segall is skeptical about the Justices and how they will conduct themselves; thus, he wants them to explain their actions or to be regulated by Congress. Undoubtedly, Professor Segall takes to heart Justice Brandeis’ observation that

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91. Segall, *supra* note 6, at 797.

92. *Id.* at 833.

93. *Id.* at 836.

“[s]unlight is said to be the best of disinfectants,”<sup>94</sup> but that is because his underlying view of the Justices is one of distrust.

## 2. *Trust*

In contrast, I have an underlying trust that the Justices will act appropriately. They, unlike the other branches of government, have to give reasons for their decisions and the reasons are provided in writing and will be subject to extensive commentary by other Justices, lower court judges, lawyers, and legal academics. Although I do not agree with some of their decisions, I trust that they perform their job as responsibly as possible and that they think very carefully about the institution they serve. They want to protect the Court and its reputation for acting fairly and impartially.

My underlying trust in the Justices leads me to take a “court-centric” view. With the issues Professor Segall raises, my starting point is to ask how any change will help the Court to perform its roles. Thus, cameras in the courtroom could potentially inhibit the back-and-forth that is the mainstay of oral argument. Cameras have the potential to distract viewers from the argument and do not add much more than audio and transcripts now provide. With respect to the Justices’ decision to recuse, they balance the requirements of impartiality with the need to reach precedents in cases that they have agreed to hear, so they cannot simply follow what lower court judges do. They weigh carefully the decision whether to recuse, both individually and collectively, and do not reach these decisions in a cavalier or results-driven manner. Similarly, publishing their cert votes would have them declare preliminary views in a case before they have gone through all the stages of decision-making. It is likely to undermine the very impartiality they strive to maintain. Finally, the Justices are in the best position to decide which of their papers should be made public and when they should be made public, taking into account that they serve on a body of nine Justices and do not

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94. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1932).



want to release papers that might make it harder for sitting Justices to do their work.

My underlying assumption is that the Justices have a hard job and try to perform it well. They take seriously their responsibilities and the reputation of the Court. I might not agree with their results any more than Professor Segall does, but that is not the test of whether they perform their job responsibly. After all, the decisions that the Court makes are ones about which the lower courts disagree. Constraining the Justices and having them explain their actions every step of the way—from recusals to cert votes to when to release their papers—will not lead to a better work product. It will simply lead to a more rigid, bureaucratized Court, and not necessarily one that will produce results with which Professor Segall agrees.

## II. THE SUPREME COURT’S TRANSPARENCY: IS IT A REALITY?

Professor Segall offers one view of the Supreme Court in which its transparency is a myth; I offer another view in which its transparency is a reality. I take a different starting point than Professor Segall. I begin with the Court as an institution whose defining features are public. The Supreme Court conducts all of its courtroom proceedings in front of the public, the press, and the legal community. Perhaps most important, the Supreme Court decides all of its cases by written opinions that are published and available for all to read. People can disagree on the reasoning and the results, but the opinions are written and publicly available. The Court also engages in some public outreach to teach the public about what it does. The Court’s public proceedings, public opinions, and public outreach help to make its work transparent.

Set against this backdrop of transparency through public proceedings, public opinions, and even public outreach, I consider ways in which the Court can become even more transparent. Like every democratic institution, it should strive for greater transparency, but in ways that will not hinder its main functions. In this Part, I explore the ways in which the Court is a public institution. In the next

Part, I consider ways in which the Court could become more transparent through “incremental updating.” Such an approach will help the Court to reach the public more effectively in an age of rapidly changing communication and technology without jeopardizing its main task which is to decide cases fairly and impartially.

#### A. *Public Proceedings*

All of the proceedings in the courtroom are open to members of the public, the press, and the legal community. The courtroom is used to admit new members to the Supreme Court bar, to announce decisions that are being handed down that day, and to read the occasional oral dissent from the bench. However, the main activity that takes place in the courtroom is oral argument. When the Court agrees to hear a case, it typically grants plenary review,<sup>95</sup> which means that the parties will submit briefs containing their arguments and that the Court will hear oral argument in the case. During oral argument, each side will usually have thirty minutes to make its case. The lawyer will begin with his or her argument and the Justices will interject with questions, which the lawyer will attempt to answer. Oral argument is open to, and well attended by, the public. The Court also makes an audio recording and a transcript of the oral argument and both are available online.<sup>96</sup> Hard copies of the transcripts are also

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95. The occasional case that is not granted plenary review is one in which the Court is engaging in error correction and for which it does not need briefs or oral argument. For those cases, the Court will decide based on the cert petition and opposition and will issue a per curiam opinion, meaning that it is unsigned. In the 2014 Term, for example, the Court decided sixty-eight cases after plenary review and only eight cases as per curiam opinions. *See 2014 Term Opinions of the Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/opinions/slipopinion/14> (last visited Mar. 23, 2016).

96. The Supreme Court is not alone in making transcripts and audio of the oral arguments available to the public. The Oyez Project at IIT Chicago-Kent College of Law is a multimedia archive devoted to the Supreme Court of the United States and its work. The Oyez Project provides a website that includes the audio and transcripts of oral arguments, visual representations of the Justices with their voting records, and a sorting function so it is easy to see how any Justice voted in a case and what the alignments among Justices were. *Cases – 2015*, OYEZ, <https://www.oyez.org/cases/2015> (last visited May 18, 2016). The Oyez Project has also expanded to include two apps for smart-phones and tablets. One app is Pocket Justice, which contains case abstracts, opinions, and audio of the oral arguments. A second app is Oyez Today, which contains abstracts of current cases and new developments at the Court. These apps allow the public to follow the proceedings of the U.S. Supreme Court easily and from any location.

available at the Supreme Court Library and the audio recordings are ultimately deposited at the National Archives. Thus, the Court's courtroom activity is transparent to the general public, lawyers, and members of the press in the courtroom and to those who follow its work by reading transcripts or listening to the audio recordings.

The documents that are filed in each case are also available to the public. These include the petition for writ of certiorari and opposition to it, the briefs of the parties and amicus curiae, the joint appendix, any motions and orders in the case, the calendar for oral argument, and eventually, the written opinion by the Court. These documents are publicly available at the Clerk's Office and online.<sup>97</sup>

### B. *Published Opinions*

The Court's main task is to decide cases<sup>98</sup> and to explain its reasoning in a written opinion; thus, its work product is transparent and available for all to read. The opinion, which contains the Justices' reasoning and voting, is published as a slip opinion, then in an interim volume, and finally in a bound volume of a reporter. The written opinion is also available online. The individual Justices can either join an opinion that another Justice has written if they agree with the reasoning or write their own if they have a different point of view. Every Justice must vote in the case (except if they are recused from it or joined the Court after it was argued and discussed). Supreme Court opinions, unlike some of those written by federal circuit courts,<sup>99</sup> are always published.

There is a rhythm to the Court's work and its schedule is well publicized. The Term begins on the first Monday in October and

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97. These documents are available online at the Court's website, *see* SUP. CT. OF THE U.S., <http://www.supremecourt.gov> (last visited Mar. 10, 2016), though the merits briefs are actually found on the American Bar Association's website. *See Preview of United States Supreme Court Cases*, AM. BAR ASS'N, [http://www.americanbar.org/publications/preview\\_home.html](http://www.americanbar.org/publications/preview_home.html) (last visited Mar. 10, 2016).

98. *See* Justice John Paul Stevens (Ret.), *Foreword* to *OF COURTIER & KINGS: MORE STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES*, at ix (Todd C. Peppers & Clare Cushman eds., 2015) ("The fact that clerks now provide important assistance to their justices really has little impact on the most important work that justices do—deciding cases.").

99. *See* Cleveland, *supra* note 42, at 92 (describing the use of unpublished opinions as a way for the federal courts of appeals to handle their growing workload). *But see* FED. R. APP. P. 32.1 (permitting the citation of appellate court opinions even if they were unpublished).

usually ends on the last day in June, after which the Court is in recess. The Court will decide all of the cases argued during a Term,<sup>100</sup> which means that all opinions must be written by the end of June. Parties know that if the Court agrees to hear their case, it will be decided by the end of that Term. The Court makes public its calendar, with certain days allocated for oral argument. As the Justices grant certiorari in cases, the cases are assigned a date for oral argument.

The work that goes on before and after oral argument does take place behind closed doors, but it is all directed toward the written opinion, which will be made public when it has been completed. Before oral argument, the Justices will have read the briefs of the parties and the amicus briefs, and will have discussed the cases, at least preliminarily, with their law clerks, but not with each other.<sup>101</sup> The oral argument is the first point at which the Justices become aware of the questions or concerns their colleagues have about the case. At the conference that follows oral argument, which is attended only by the Justices, they will take a preliminary vote. Majority opinions will be assigned by the Chief Justice if he is in the majority, and by the most senior Associate Justice if he is in the majority and the Chief Justice is not.<sup>102</sup>

Once the Justices start circulating their draft opinions, other Justices will indicate by written memorandum, circulated among all nine Justices, whether they agree to join the draft as written, whether there are additional changes that they require before they will join, or whether they will write separately. As Justice Stevens observed in his memoir, *Five Chiefs*, it is not always clear until one starts writing an

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100. In some cases, the Court has delayed deciding a case in order to hear additional argument—see, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)—but these are rare occurrences. See STEVENS, *supra* note 38, at 44 (“On rare occasions, the Court is unable to resolve all the issues in a case before the term ends (usually in late June or the first week in July) and orders the parties to file additional briefs and present a second oral argument in the next term . . .”).

101. DVD: Supreme Court Week (C-SPAN, Oct. 9, 2009) (interview with Justice Anthony Kennedy) (on file with author); see also STEVENS, *supra* note 38, at 118 (“Oral arguments matter because they are often the first time that the justices speak with one another concerning the merits of the case.”).

102. See STEVENS, *supra* note 38, at 44, 231.

opinion whether one has reached the right decision.<sup>103</sup> The writing process is an aid to deciding a case. Even though the Justices vote at conference, each Justice has to vote on the written draft opinion that has been circulated. Only when there are five votes for the majority opinion that has been circulated is there finally a majority opinion. At that point, those in dissent will circulate their drafts, and the author of the majority opinion will make changes in response to any separate opinions. The final version of the majority opinion and the separate opinions will indicate who wrote the opinion and who joined it.

The written opinion is the main work of the Court and this work is made public as soon as it has been completed. Although the Court generally takes only hard cases<sup>104</sup>—usually cases about which the circuit courts disagree—the “easier” ones among these hard cases are typically announced a few months after oral argument, while the more difficult ones are not announced until the end of June. Justice Kennedy has appeared before congressional committees and reminded committee members that the Court’s main focus is to decide cases and to issue written opinions in which the Justices explain their reasoning. As Justice Kennedy explained to the House Appropriations subcommittee in 2006: “We teach that our branch has a different dynamic . . . . We teach that we are judged by what we write.”<sup>105</sup>

Although there has been criticism of the Court’s written opinions over the years—from their length, to their legalese, to their extensive reliance on footnotes—the point remains that the central work of the Court is the written opinion and this work is published and readily available to the public. For those who are not trained in law, and even for those who are, the journalists who cover the Supreme Court help everyone to understand the Supreme Court opinions and the grounds on which they were decided.<sup>106</sup> For those who are trained in the law,

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103. *Id.* at 123.

104. DVD: Supreme Court Week, *supra* note 101 (interview with Justice Anthony Kennedy).

105. Greenhouse, *supra* note 23, at A16.

106. Three of the journalists who cover the Supreme Court, Robert Barnes of *The Washington Post*, Adam Liptak of *The New York Times*, and Dahlia Lithwick of *Slate*, attended the Symposium and participated in a conversation about the press and the Court, moderated by Eric Segall and Luke Donohue, at the Symposium. Georgia State University College of Law Miller Lecture: Supreme Court

there are also law reviews in which law professors and law students analyze and critique the opinions of the Court. The Court's written opinions are subject to comment and criticism by generalists and experts alike. Thus, the Justices try to make clear their reasoning in their written opinions, and members of the public and the legal community can and do respond.

### C. *Public Outreach*

The Justices and the Court reach out to the public in other ways, large and small, to try to explain what the Court does and how it works. When groups of school children, lower court judges, foreign judges, and other dignitaries visit the Supreme Court, individual Justices will meet with them and talk to them about the Court. Similarly, Justices are asked to do interviews to teach the general public about the Justices and the Court,<sup>107</sup> and to aid academics in their understanding of the Court and its jurisprudence.<sup>108</sup> The Justices are also asked to address the legal community. Frequently, they are invited to give lectures, speeches, or talks at law schools and to write articles for law reviews. The bench and the bar invite Justices to offer remarks at their meetings, conferences, and award ceremonies. Justice Stevens, when he sat on the Court, served as the Justice for the Sixth and Seventh Circuits for most of his tenure. He regularly attended their annual meetings and gave talks at their annual dinners during which he reported on several of the cases that the Court had decided that Term. The frequency with which Justices are asked to address the public and to explain what they do once led Justice David Souter to write to Justice Harry Blackmun: "In a perfect world, I

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Transparency (Feb. 11, 2016). Their insights about why the Court is so challenging for the press to cover, especially in this age of 24/7 news coverage, were invaluable.

107. *See, e.g.*, DVD: Supreme Court Week, *supra* note 101 (interviews with Justices Kennedy, Ginsburg, Scalia, O'Connor, Sotomayor, Breyer, Thomas, Alito, Roberts, and Stevens) (on file with author).

108. For example, Justice Stevens did two interviews with Christopher Smith, a professor at Michigan State University. E-mail from Christopher Smith, Professor at Michigan State University to author (Nov. 5, 2015 at 11:19 CST) (on file with author). Professor Smith wrote a book about Justice Stevens' criminal justice jurisprudence. *See* CHRISTOPHER E. SMITH, JOHN PAUL STEVENS: DEFENDER OF RIGHTS IN CRIMINAL JUSTICE (2015).

would never give another speech, address, talk, lecture or whatever as long as I live.”<sup>109</sup> Justice Souter, though a wonderful public speaker, did not relish being in the public eye; rather, he was known for “eschewing the limelight and avoiding public appearances whenever possible.”<sup>110</sup>

More recently, sitting Justices and retired Justices have written books and have gone on book tours and talk shows in order to explain various facets of the judiciary’s role or their own experiences leading up to their role as a judge or Justice. Retired Justices Sandra Day O’Connor and John Paul Stevens each wrote books once they left the Court. One of Justice O’Connor’s books is a memoir about her childhood<sup>111</sup> and one of Justice Stevens’ books is about the five Chief Justices he served with or appeared before, when he was a Justice, a law clerk, and a practicing lawyer.<sup>112</sup> Justice Stephen Breyer wrote two books on the role of the Court in a democracy and in the world.<sup>113</sup> Justice Clarence Thomas wrote an autobiography<sup>114</sup> and Justice Antonin Scalia wrote books with Bryan Garner on statutory interpretation.<sup>115</sup> Justice Sotomayor, the first Latina on the Court, wrote a memoir recounting her early years and her various struggles growing up in a poor family.<sup>116</sup> She wrote it in part to serve as a role model so that “[p]eople who live in difficult circumstances [will] know that happy endings are possible.”<sup>117</sup> In an interview, she

109. 2 ALMANAC OF THE FEDERAL JUDICIARY 21 (2009).

110. *Id.*

111. SANDRA DAY O’CONNOR, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2003). Justice O’Connor also wrote two books pertaining to the Supreme Court. *See* SANDRA DAY O’CONNOR, *OUT OF ORDER: STORIES FROM THE HISTORY OF THE SUPREME COURT* (2013); SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (2003).

112. STEVENS, *supra* note 38. Justice Stevens also wrote a second book in which he identifies six constitutional amendments that he believes are in need of further amendment. JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014). He is currently at work on a third book.

113. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

114. CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* (2007).

115. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

116. SONIA SOTOMAYOR, *MY BELOVED WORLD* (2013).

117. *Id.* at viii.

explained that “encouraging others through her personal story—the diabetic child of a poor, non-English-speaking alcoholic, the first Hispanic member of the Court—was an even more important contribution than her jurisprudence.”<sup>118</sup> She even appeared on *Sesame Street* to reach young children with her message.<sup>119</sup>

Although all of the Justices engage in public outreach, the Chief Justice is also the “spokesman for the Court in nonjudicial functions.”<sup>120</sup> In this sense, the Chief Justice essentially serves as the public face of the Court. Justice Stevens described some of the many public functions performed by a Chief Justice at the beginning of *Five Chiefs*.<sup>121</sup> These functions include administering the oath of office to the President on Inauguration Day, presiding over the Judicial Conference, which is the policy-making body for the federal judiciary, chairing the board of the Federal Judicial Center, which provides education for federal judges and conducts empirical research on court-related issues, hosting many foreign dignitaries who visit the Court, serving as a member of the board of regents of the Smithsonian Institution, and managing the staff and the Supreme Court building.<sup>122</sup> Justice Stevens viewed Chief Justice Roberts, “with the possible exception of Earl Warren,” as “the best spokesman for the Court” in this nonjudicial role.<sup>123</sup>

The Court, in addition to the efforts of the Chief Justice and the Associate Justices, also undertakes public outreach. One significant way it does this is by maintaining a website for the Supreme Court, which makes the work of the Court easily accessible to the public. The website includes information about the Court and serves as a repository for its written opinions, transcripts, audio recordings of oral argument, and filed documents. The website also contains the Court’s calendar, a listing of the Term’s cases and when oral

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118. Jodi Kantor, *Sotomayor, a Star on the Book-Tour Circuit, Sees a New Niche for a Justice*, N.Y. TIMES, Feb. 4, 2013, at A12.

119. See, e.g., N.Y. Times, *The Sonia Show: Justice Sotomayor Tours U.S. with New Memoir*, YOUTUBE (Feb. 4, 2013), <http://www.youtube.com/watch?v=LzjCFeUQ8h4>.

120. STEVENS, *supra* note 38, at 210.

121. *Id.* at 44–47, 49–50.

122. *Id.*

123. *Id.* at 210.



argument will be heard in each one, and an archive of several Terms of Supreme Court opinions and oral arguments.

The Court also makes the opinions more accessible to lawyers and laypersons alike by providing a syllabus at the beginning of every opinion. It is a brief summary of the case, and includes the holding and the vote. It is a way of providing the public with a snapshot view of a case. The syllabus is written by the Reporter of Decisions Office, not the Justice who authored the opinion. It is an unofficial summary of a case; it is not a substitute for the opinion. Nevertheless, it benefits the public by providing readers with a synopsis of what are often very lengthy opinions.

The Court also provides a room in the building for the press so that they have a place to take the opinions and quickly digest them and write their analysis of them. Members of the press have urged the Court to do a lot more to make their coverage of the Court easier, especially in the digital age when journalists must file a story online as soon as an opinion is announced and then follow up with a print story soon afterward. Gone are the days when members of the press could take twenty-four to forty-eight hours before they wrote their story.<sup>124</sup> The Court has not always been quick to respond to journalists' requests for adjustments that would aid them in their coverage of the Court,<sup>125</sup> but it is starting to move in that direction.<sup>126</sup> In any event, the Court provides space in the building and the courtroom for members of the press so that they can do their job and describe the Court's opinions so that the public will understand them and their significance.

The Court also tries to educate the public about its role by maintaining exhibits on the ground floor of the Supreme Court that are open to the public and that teach about the work of the Court. In a

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124. DVD: Supreme Court Week, *supra* note 101 (interview of Justice Kennedy).

125. See, e.g., Panel Discussion on The Press, the Supreme Court, and the Constitution at Chicago-Kent College of Law Constitution Day Commemoration (Sept. 15, 2014) (describing ways in which the Court made press coverage difficult for journalists) (author's notes on file).

126. For example, the Court now releases opinions earlier in the morning (9:30 a.m. rather than 10:00 a.m.) to give journalists a little more time to read the opinions before they must write their stories. Conversation with Adam Liptak, Supreme Court Reporter, New York Times, in Atlanta, Ga. (Feb. 11, 2016).

similar vein, the Court organizes tours for visitors so that they can see different parts of the building and understand their significance.

In many ways, the Court tries to make its work more accessible and understandable to the public. Some of its efforts, such as the Supreme Court website, reach a vast number of people. Other efforts, such as an exhibit on its ground floor, reach only the people who manage to visit the building. Nevertheless, these are all efforts, large and small, to make the workings of the Court more transparent to the American public.

### III. TOWARD GREATER TRANSPARENCY THROUGH INCREMENTAL UPDATING

The Supreme Court needs to engage in what I call “incremental updating.” In this age of rapid growth in new forms of technology and communication, the Supreme Court needs to respond. Yet, the Court has to be measured in its response. It cannot respond too quickly or else it will make mistakes in its effort to update. The Court, unlike a start-up company, cannot race to find the next big thing. Yet, it cannot ignore all change and pretend it has not happened. Rather, it needs to adjust to changes in technology and communication, but to do so in incremental ways. The Court needs to strike the proper balance and to take small steps toward greater transparency. It can do this in each of its public functions: public proceedings, published opinions, and public outreach.

#### *A. Incremental Updating of Public Proceedings*

##### *1. Same-Day Access to Audio and Transcripts of Oral Arguments*

One way to update the courtroom proceedings so that they are more accessible to the public is to provide audio recordings of the oral argument on the same day as the argument rather than at the end of each week. Presumably if the audio can be made available on the

same day as argument in particularly newsworthy cases,<sup>127</sup> then the Court can make the audio available on the same day even in the more quotidian cases. The Court already makes transcripts of the oral argument available on the same day as the case is argued. It is hard to know if the current delayed release of the audio is due to technological or staff limitations, to the need to review the audio to correct errors before it is released, or to provide some cooling-down period between oral argument and the release of the audio.

The same-day release of the audio is a small step that the Court can take that would make oral argument more accessible to the public, and therefore, make the public proceedings more transparent, without the problems that cameras in the courtroom pose for the Court. In my view, there is a significant difference between audio and transcripts on the one hand and cameras on the other hand. Audio and transcripts keep the focus on the argument; the listener or reader has no choice but to pay attention to the words. In contrast, cameras introduce images that distract from the argument. Thus, the Court should work hard to make audio available as quickly as possible because audio, along with the transcript, preserves the oral argument's main focus. The Court should also take this matter into its own hands, rather than waiting for groups to lobby Congress to enact this change.<sup>128</sup>

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127. For example, the Court made the audio of oral argument in *Bush v. Gore*, 531 U.S. 98 (2000), available as soon as the argument was over. See STEPNIAK, *supra* note 15, at 145 (“[T]he US Supreme Court took the unprecedented step of releasing the audio recording of the hearings immediately on its conclusion.”). The Court also made the audio available the same day as the oral argument in several other cases. See, e.g., *Press Release on 3-04-08*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov> (last visited June 10, 2016) (describing the expedited release of the audio recording of oral argument in *District of Columbia v. Heller*); *Press Release on 12-20-07*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov> (last visited June 10, 2016) (describing the expedited release of the audio recording of oral argument in *Baze v. Rees*).

128. For example, during the question and answer period at the panel on Separation of Powers at the GSU Symposium, a member of the organization Fix the Court asked the panelists for their views on the best strategy for lobbying Congress. He asked whether his organization should use the issue of cameras in the courtroom as its gateway issue, and then turn to ethics, or whether it should use same-day audio as its gateway issue and then turn to cameras in the courtroom. Question & Answer at the Georgia State University Law Review Symposium: Invisible Justices: Supreme Court Transparency in the Age of Social Media (Feb. 11, 2016).

## 2. *Same-Day Access to Audio of Oral Dissents from the Bench*

Another small step the Court could take that would make courtroom proceedings more accessible to the public is to make the audio of oral dissents from the bench available sooner than the four months that it now takes the Court to make them available online.<sup>129</sup> Again, it is unclear why there is this lengthy delay. The delay for oral dissents from the bench is much longer than the delay for oral arguments and yet the former is much briefer than an oral argument and occurs much less frequently. Presumably if the Court can release audio of oral arguments by the end of the week, or in some cases on the same day as oral argument, then it can release oral dissents from the bench within the same time frame. There is the danger that oral dissents from the bench might lead the public to think that the Court is more divided on an opinion than it really is. However, oral dissents from the bench do not occur very often,<sup>130</sup> and it is important for the public to have access to them because they are unavailable in any other official way.

A Justice writes an oral dissent to be read from the bench and it is usually much shorter than the actual written dissent. A Justice might take some sentences from the written dissent, or might write the oral dissent without borrowing from the written version at all. Oral dissents can be written in a more informal or personal style than a written dissent, and for that reason, they might be more understandable to the general public. They are meant to be spoken and delivered only once.<sup>131</sup> A Justice might decide to read an oral dissent from the bench because he or she feels sufficiently strongly

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129. Conversation with Professor Christopher W. Schmidt, Director, Institute on the Supreme Court of the United States (ISCOTUS), IIT Chicago-Kent College of Law in Chicago, IL (Mar. 2, 2016).

130. See Schmidt & Shapiro, *supra* note 48, at 107 (providing a chart containing the number of oral dissents per Court Term).

131. Justice Ginsburg is the only current Justice who provides a written copy of her oral dissents to members of the press. See *id.* at 122 & n.296 (noting that Justice Ginsburg also makes her bench statements announcing majority opinions available to the press). Currently, the Court does not provide official transcripts of bench statements or oral dissents, but Oyez creates unofficial transcripts of both after they receive the audio. See E-mail from Matthew Gruhn, Applications Development Specialist, Oyez Project, IIT Chicago-Kent College of Law, to author (June 9, 2016, 14:47 CST) (on file with author).

about the case and this is one way to express that disagreement,<sup>132</sup> or a Justice might use an oral dissent to invite Congress to respond to a Court's statutory interpretation.<sup>133</sup> The oral dissent from the bench is heard by members of the public, the press, the Supreme Court bar, the other Justices, the law clerks, and the Justices' guests who are in the courtroom that particular day. The press might describe the oral dissent in their coverage of the Court for that day, or they might just note that an oral dissent was given, or they might not mention it at all.<sup>134</sup> Thus, an oral dissent, which can be particularly moving, might be lost altogether but for the audio recording of it. It is all the more important that the Court not let months go by before making the audio of the oral dissent available online. It can be a riveting moment in the courtroom and one that should be available to the broader public as soon as possible.

## *B. Incremental Updating of Published Opinions*

### *1. Aiding Press Coverage of Opinions*

There are several incremental steps that the Court could take that would help members of the press who cover the Supreme Court to report on the Supreme Court's opinions more effectively in the digital age. Not long ago, the Court would announce an opinion in the courtroom at ten o'clock in the morning, and the slip opinion would then be available for the press and the public at the Supreme Court. Journalists who covered the Supreme Court could hear the announcement in the courtroom, obtain a copy of the opinion, read it, and write an article about it that would appear in the newspaper the next day. Indeed, Justice Kennedy once described members of the press as having twenty-four or forty-eight hours in which to read a

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132. See, e.g., STEVENS, *supra* note 38, at 158.

133. See Schmidt & Shapiro, *supra* note 48, at 125 (describing Justice Ginsburg's oral dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), as an invitation to Congress to pass a law in response to the Court's decision).

134. See *id.* at 118 ("The most striking aspect of our findings is the pervasive underreporting of oral dissents in a significant percentage of cases.").

Supreme Court opinion, digest it, and write about it.<sup>135</sup> However, newspapers no longer appear just in print. They also have online versions, which run on a much tighter time schedule. Thus, the same journalist has to write not only an article for the next day's newspaper, but also an article that same day for the online version. Today's journalists have more writing to do and less time in which to do it. To further exacerbate the problem, there are fewer members of the press who cover the Supreme Court on a regular basis. Newspapers, in order to remain viable as businesses, have cut back on the number of reporters they assign to particular beats. One accommodation the Court has made is to release the opinions at 9:30 a.m. rather than 10:00 a.m.<sup>136</sup> The extra time helps journalists to get a start on reading the opinion so that they can write an article for the online newspaper early in the day on which the opinion was announced.

Another incremental step that the Court could take is to announce only one opinion per day. This has been a longstanding request of the press,<sup>137</sup> but the need has become more pressing in the digital age. The practice of the Court has been to announce opinions as soon as they are ready.<sup>138</sup> Toward the end of the Term, there can be several major, lengthy opinions being announced on the same day. If the Court announced only one opinion per day, especially at the end of the Term, this would ease the burden on members of the press who cover the Supreme Court. If they only have to read one major opinion per day and write their online article that same day and then their newspaper article to appear in print the next day, they would be able to do a better job explaining to the public what the opinion said. Justice Kennedy once lamented that he did not think the journalists always read the opinions; if they did, they would not make the mistakes he had spotted in some newspaper coverage of Supreme

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135. DVD: Supreme Court Week, *supra* note 101 (interview with Justice Kennedy).

136. See Conversation with Adam Liptak, *supra* note 126.

137. See, e.g., Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1558 (1996).

138. See, e.g., SHNAYERSON, *supra* note 39, at 30–31 (“Decisions are issued each week as they are completed . . .”).

Court opinions.<sup>139</sup> It is in the Court's and the public's interest to have the press read the opinions and report on them as accurately as possible. After all, many people will rely on the press's account of an opinion as their only source of information. Although members of the legal community might eventually read the opinion itself, they, too, rely on the press for immediate coverage.

Although the Court might not always be able to limit itself to one opinion per day, this is one step it could take that would lead to more effective coverage of its published opinions. On days when the Court has multiple opinions that it could announce, it could just announce whichever opinion was completed first. The first opinion that is completed would be announced on the first available argument day; the next opinion would be announced on the next available argument day. With such a practice, the Court would not have to worry about charges that it released opinions strategically nor would it have to worry about journalists who did not have time to read the opinions before having to write about them.

Another benefit to announcing just one opinion per day, particularly for the big cases at the end of the Term, is that members of the Supreme Court press would actually be able to be present in the courtroom for the announcement of the opinion. In that way, they could report not just on the opinion, but also on what took place in the courtroom, including the announcement of the opinion and any oral dissents from the bench. With the current practice, journalists face a quandary: Do they forgo the announcement of the opinion in the courtroom (and any separate opinions) so that they can start reading the opinion and writing their online and hard-copy articles, or do they go to the courtroom for the announcements and then get a late start on reading multiple opinions that were handed down that day? An announcement of one big opinion per day might be less efficient for the Court because the Justices would have to go back on the bench several days per week especially toward the end of the Term, but since their time on the bench would be quite brief, it should not pose much of an interruption to their workday.

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139. See DVD: Supreme Court Week, *supra* note 101 (interview with Justice Kennedy).

## 2. *Improving Online Opinions and Sources*

Supreme Court opinions reach readers through different avenues, including opinions that are available online. The Supreme Court puts slip opinions online on the Supreme Court website. Later, there is a hard-copy version in an interim paperback reporter, and then a final version in the hardbound, multi-volume, official Supreme Court reporter, *U.S. Reports*. There are other hardbound, multi-volume reporters as well, such as *Lawyers' Edition* or *Supreme Court Reporter*. There are also other online places where a Supreme Court opinion will appear, such as online databases (LexisNexis, Westlaw, and Bloomberg). As libraries at law schools and law firms give up their space and their books because most students, faculty and lawyers read opinions online, the online versions of the opinions assume greater importance.

For those Supreme Court opinions that contain images, such as a photograph, chart, map, artifact, diagram, or table, that are often integral to the opinion, the online version, at least in the online database, does not usually include the image, or if it does, the image is of poor quality.<sup>140</sup> The image can only be found in the hardbound, multi-volume, official *U.S. Reports*. As more readers depend on the online version of the opinion, they will be without access to a key element of the opinion. There is a certain irony in this situation: The image is included in the hardbound, official *U.S. Reports*, where it is expensive,<sup>141</sup> but the image is not necessarily included in the online database version, where there would be no cost and the image could be of great quality. The Court should include these images in the slip opinions that it makes available on its website and it should request

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140. See Nancy S. Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 CHI.-KENT L. REV. 331, 363 (2013) (identifying this deficiency with online opinions).

141. For example, Justice Stevens included a map to show “an obvious gerrymander” in *Karcher v. Daggett*, 462 U.S. 725 (1983). STEVENS, *supra* note 38, at 103. However, Chief Justice Burger was concerned about the cost of adding a map to the opinion, but Justice Stevens justified it by pointing out that he only had two law clerks rather than the three allotted to each Justice so he saved the Court money. See Carol Lee, *Reminiscences of Justice Stevens by His Law Clerks: Three Memorable Opinions*, 94 JUDICATURE 9 (2010) (“The chief justice objected that [the map] would be too expensive. Justice Stevens responded that the extra printing cost was less than the amount that he saved the Court by having only two law clerks.”).



that the online databases, such as LexisNexis and WestLaw, do the same. Although online services might have been unable to reproduce the images when they first started making Supreme Court opinions available online, this is no longer the case. In fact, given the integration of text and image on the Web, readers of online opinions should be able to see images that have great resolution and are available no matter which device they use (smart-phone, tablet, or personal computer) to access the opinion. The Court has started to include *U.S. Reports* volumes on its website, but it has only recent volumes.

A related issue, which the Court has taken the first step to address, is that Supreme Court opinions sometimes include citations to printed materials and videos found on the Web. The problem is that these materials might be “here today and gone tomorrow.” In the past, Supreme Court opinions cited earlier opinions and the opinions could be found in bound volumes, such as the *U.S. Reports*. As Supreme Court opinions include citations to materials found on the Web, the challenge is to make sure that these materials will be available in the future even if they are removed from a particular website or the website itself is taken down.

The Supreme Court has taken a first step by creating on its website a repository of all the materials found on the Web that are cited in any Supreme Court opinions.<sup>142</sup> In this way, lawyers, judges, academics, and law students will be able to go to the Supreme Court website and find any of the online materials on which a Supreme Court opinion relies. There are other repositories that do this,<sup>143</sup> but it is important that the Supreme Court does it for its opinions.

The Supreme Court should expand its repository to include not just written material found on a website, but also images and videos that it refers to or uses in its opinions. The Court is likely to include more videos and images in the future because they have become increasingly prevalent in our everyday lives—from surveillance

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142. See *Internet Sources Cited in Opinions*, SUP. CT. OF THE U.S., [http://www.supremecourt.gov/opinions/Cited\\_URL\\_List.aspx](http://www.supremecourt.gov/opinions/Cited_URL_List.aspx) (last visited June 17, 2016).

143. See, e.g., PERMA.CC, <https://perma.cc/> (last visited Mar. 11, 2016) (helping “scholars, journals, courts, and others create permanent records of the web sources they cite”).

cameras to citizens' videos—and in the courtroom.<sup>144</sup> Given that the Web often includes multiple versions of images and videos, it is important that the Court include in its own repository the particular image or video on which the Court relied. One particularly well-known example of this challenge is the video of a car chase that was central to the Court's decision in *Scott v. Harris*.<sup>145</sup> There were several versions of it, and it is important that the Supreme Court website repository contains the version that the Justices viewed since they had different and conflicting interpretations as to what the video showed. Justice Scalia, writing for seven other Justices, saw a chase that “resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.”<sup>146</sup> Justice Breyer, writing a concurrence, suggested that anyone who watched the video, including a reasonable jury, could not find that the officer involved in the car chase had used excessive force in violation of the U.S. Constitution.<sup>147</sup> In contrast, Justice Stevens, writing in dissent, suggested that if his colleagues had “learned to drive when most high-speed driving took place on two-lane roads rather than superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.”<sup>148</sup> Given that the opinion depends on how one interprets the video of the car chase, it is important that readers can watch the same video for themselves, and indeed, the Justices invite readers to do so.<sup>149</sup>

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144. See, e.g., NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT*, at xi (N.Y. Univ. Press rev. ed. 2011).

145. *Scott v. Harris*, 550 U.S. 372 (2007).

146. *Id.* at 380.

147. *Id.* at 387 (Breyer, J., concurring).

148. *Id.* at 390 n.1 (Stevens, J., dissenting).

149. See, e.g., *id.* at 378 n.5 (“See Record 36, Exh. A, available at [http://www.supremecourt.gov/opinions/video/scott\\_v\\_harris.html](http://www.supremecourt.gov/opinions/video/scott_v_harris.html) and in Clerk of Court’s case file.”); *id.* at 387 (Breyer, J., concurring). As an illustration of the challenge the Court faces, the link provided in the Court opinion now goes to an error page, though the Supreme Court website does contain a working version of the video. See *Media Files Related to Opinions*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/media/media.aspx> (last visited June 13, 2016).

### *C. Incremental Updating of Public Outreach*

There has been a noticeable increase in the public presence of the Justices once the Rehnquist Court ended and the Roberts Court began. Some have explained this change by pointing out that Chief Justice Rehnquist preferred the Justices to keep a low profile, whereas Chief Justice Roberts has not expressed the same concern. Others have attributed this trend to the retired justices, and in particular Justice O'Connor who has been very active off the bench as an author, an advocate for educating children about the courts, and an opponent of having state court judges chosen through elections. Whether it was the change in Chief Justices or the high visibility of retired Justices, many of the Justices have written books, appeared on talk shows, and given interviews. These efforts to educate the public about the role of the Supreme Court are important and could be expanded if the Justices were willing to take a few small steps.

#### *1. Maintaining a Public Face*

One way the Justices could continue to engage in public outreach that would reach many people is by appearing on special programs by C-SPAN such as the one that aired in October 2009. Every night for a week, there were interviews with different Justices. Some of the interviews were conducted by former law clerks; others were conducted by reporters who cover the Court. The setting was usually a Justice's Chambers, though it varied. The program showed other areas of the Court, in addition to Justices' Chambers that are not open to the public, such as the Justices' Conference Room and the lockers where they keep their robes. The C-SPAN series showed the Justices in Chambers or in other places in the building, explaining particular items or features, such as Justice Ginsburg's commentary on her collection of collars, or Justice O'Connor's description of some of the sculpture in the interior courtyards, which provide the public with insights into the Court and its workings that they could not get elsewhere. This is the kind of project that could take place under Chief Justice Roberts, but was unlikely to have taken place under

Chief Justice Rehnquist who thought that Justices and law clerks had to keep their distance from the media.<sup>150</sup> This is also the kind of project that allows Justices to “teach” the public about the law, which is how Justice Kennedy described the job of a Supreme Court Justice when he was interviewed for this program.<sup>151</sup> For those who did not watch this week-long special program, C-SPAN produced an abridged version on a DVD that is commercially available and is appropriate for law schools, colleges, and high schools.<sup>152</sup>

## 2. *Making a Justice's Papers Available Online*

Another way that Justices can engage in public outreach is by making some of their papers available online after they retire or after their death, in addition to having the actual papers located at a particular library. Some Justices' papers are already available online.<sup>153</sup> Typically, Justices choose where they want their papers to be kept. Justice Marshall's papers are available at the Library of Congress. Justice O'Connor's papers will also be kept at the Library of Congress.<sup>154</sup> Justice Blackmun's papers are also available at the Library of Congress,<sup>155</sup> whereas Chief Justice Burger's papers will be kept at the College of William and Mary.<sup>156</sup> One other step Justices could take to reach a broader audience than those who can go to the Library of Congress or to the College of William and Mary is to

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150. See Oliphant, *supra* note 56, at 4 (quoting Edward Lazarus, a former Supreme Court law clerk, who speculated that former Chief Justice Rehnquist “frowned on this a bit more than [Chief Justice] Roberts does”).

151. DVD: Supreme Court Week, *supra* note 101 (interviewing Justice Kennedy). I have used these interviews with the Justices in law school classes, such as in a course on “The Role of the Judge.”

152. DVD: The Supreme Court: Home to America's Highest Court (C-SPAN 2009) (on file with author).

153. See Ronald Collins, *Accessing the Papers of Supreme Court Justices: Online & Other Resources*, SCOTUSBLOG (Mar. 23, 2016, 7:33 PM), <http://www.scotusblog.com/2013/08/accessing-the-papers-of-supreme-court-justices-online-other-resources> (“Depending upon the institution, some material may be available online.”) (identifying nine Justices whose papers are available online).

154. As Professor Segall pointed out, Justice Marshall made his papers available two years after he retired, whereas Justice O'Connor's papers will not be available until her death and individual case files will not be available until after any Justice who participated in that case is no longer on the Court. Segall, *supra* note 6, at 834-35.

155. See EPSTEIN ET AL., *supra* note 85, at 452 tbl. 5-11.

156. Segall, *supra* note 6, at 836.

make some or all of their papers available online. In fact, selected papers could be part of the Supreme Court website's repository.

If some of the Justices' papers were available online at the Supreme Court website, after whatever time period the individual Justice thought was appropriate, then members of the public who could not go to the particular locations where the actual papers are kept would still be able to get a sense of what a Justice's papers look like, what kind of work they did, and the cases that arose while they served and some of their responses to them. It would be a great resource for students, teachers, and researchers. They would not have to travel to the actual site where the papers are housed unless they needed the complete set of the Justice's papers in order to conduct their research.

Undoubtedly, making some of the Justices' papers available online would entail some work. Each Justice would have to go through his or her own papers and decide which ones to make available online (or designate someone to perform this function). In addition, the repository would have to make clear that these were select papers and not the entire collection. I would also leave it to individual Justices to decide not only the timing of when their papers would become available online but also whether they wished to participate in this project at all. Unlike Professor Segall, I am willing to leave these decisions to the Justices. For those Justices who are willing to make their papers available online, the papers would provide tremendous public outreach.

An online repository of Justices' papers would make this resource available to a vast number of people who are unable or unwilling to travel to view the actual papers, but who are quite willing to read or study the papers if they are easily accessible.<sup>157</sup> I can envision a young generation of Justices, raised on computers and the Web, who might think that this is the best use of their papers and the best way to reach the next generation of researchers and ordinary citizens.

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157. Other collections of important public figures have gone online and are available for free. *See, e.g.,* Jennifer Schuessler, *Rosa Parks Archive Available Online*, N.Y. TIMES, Feb. 25, 2016, at C3 ("The Library of Congress has digitized the papers of Rosa Parks, enabling free online access . . .").

## CONCLUSION

My view of the Supreme Court is that it is a public institution whose work is transparent in significant ways. Its courtroom proceedings are open to the press and public; its opinions are written and published; and the Justices and the Court engage in public outreach. Like any institution in a democracy, however, it should strive for greater transparency. The challenge is that the Court has to strike a delicate balance. It is part of a rapidly changing world, in which there are new technologies and new forms of communication. The Court needs to update the ways that it reaches the public—through its courtroom proceedings, its opinions, and its public outreach—yet, it has to be cautious so that it does not make any serious mistakes along the way. In my view, if it engages in incremental updating, it should be able to strike the right balance.

I have an underlying trust in the Justices and the way they perform their role and I think it is appropriate that they, rather than another branch of government, decide which steps to take to achieve greater transparency. Any changes that the Justices make should be taken from a “court-centric” perspective and should include small, incremental steps that allow them to try new practices without undermining their main task, which is to decide cases and write opinions.

Professor Segall and I disagree on approaches because we have different underlying visions of the Justices and the Court. He has an underlying distrust of the Justices and finds the Supreme Court to be a secretive institution in need of outside intervention. Because he distrusts the Justices and thinks they hide what they do, he would require cameras in the courtroom, written explanations for recusals, publication of certiorari votes, and the Justices’ papers being made public right away. He sees the need for Congress to act, especially with respect to the Justices’ papers, because he does not think the Justices will act on their own. He views the Justices as opposed to transparency and believes it must be imposed from the outside.

Professor Segall sees the transparency of the Supreme Court as a myth, whereas I view the transparency of the Supreme Court as a reality. Although we do not share the same underlying vision of the Justices, we do agree that the Supreme Court is an institution that can take steps toward greater transparency, even though we propose different ways by which it can strive toward that goal.