

## Writing a Wrong: Improving the Relationship Between the Supreme Court and the Press

Jonah J. Horwitz

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## Writing a Wrong: Improving the Relationship Between the Supreme Court and the Press

JONAH J. HORWITZ\*

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### I. INTRODUCTION

In *Democracy in America*, Alexis de Tocqueville famously remarked, “[t]here is hardly a political question . . . which does not sooner or later turn into a judicial one.”<sup>1</sup> If anything, the observation is truer in our own time than it was in de Tocqueville’s.<sup>2</sup> Since *Democracy in America*, de

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1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence trans., HarperCollins Publishers, First Harper Perennial Modern Classics ed. 2006) (1840).

2. See, e.g., Mark A. Graber, *Resolving Political Questions Into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMMENT. 485, 530 (2004).

Tocqueville's famous work, was published, the United States has witnessed an exponential expansion in the breadth of statutory,<sup>3</sup> regulatory,<sup>4</sup> and constitutional law.<sup>5</sup> There may have been few types of disputes that did not ultimately end up in the courts in de Tocqueville's era, but there are hardly any now.<sup>6</sup>

A robust debate persists on whether the central role of the courts in our civic life is a good or a bad thing.<sup>7</sup> It is not the author's intention to wade into this thicket. Regardless of how one feels about it, the reality is that courts have assumed a crucial position in our country.<sup>8</sup> Given that reality, it is important that the public has some understanding of judicial decision-making, particularly as it relates to the most significant cases.<sup>9</sup> We cannot fully comprehend the criminal justice system, healthcare, or immigration, to name but a few particularly pervasive issues, if we do not appreciate, at least to some extent, the court cases that have profoundly shaped each area.<sup>10</sup> Most members of the public, unfortunately for the legal academy, are not in the habit of reading law review articles.<sup>11</sup> They get their news on the courts the same place they get their news on everything else: the media.<sup>12</sup> In light of the public's reliance on the media for legal news, it is essential that the media cover the judiciary accurately, thoroughly, and engagingly. To their credit, they often do. Understandably, considering the

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3. See, e.g., Randall T. Shepard, *The "L" in "CLE" Stands for "Legal,"* 40 VAL. U. L. REV. 311, 311 (2006).

4. See, e.g., James W. Jones, *Future Structure and Regulation of Law Practice: An Iconoclast's Perspective*, 44 ARIZ. L. REV. 537, 542 (2002) (commenting on "the extraordinary growth of administrative and regulatory law" in the modern era).

5. See, e.g., Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2094 (2008) (recalling how the Warren Court "constitutionalized . . . huge swaths of criminal procedure"); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 154 (2004) (complaining that the Supreme "Court, with substantial majorities in many cases, continues to constitutionalize more and more aspects of democratic politics").

6. See William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 3 (1993).

7. See, e.g., Richard Albert, *The Constitutional Imbalance*, 37 N.M. L. REV. 1, 1 (2007) (summarizing the scholarship criticizing the outsized role of "the modern American judiciary" as compared to the other political branches).

8. See Rehnquist, *supra* note 6, at 3.

9. See Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903, 903 (2007).

10. Cf. Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059, 1059 (1998) (arguing that "news media coverage of the United States Supreme Court, by creating an informed public that extends beyond the organized bar, is an essential element in the goal of guaranteeing respect for the United States Supreme Court and of fostering compliance with its decisions, which are the hallmarks of judicial independence").

11. See Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 318 (1989).

12. J. Thomas Greene, *Some Current Causes for Popular Dissatisfaction with the Administration of Justice*, 14 UTAH B.J. 35, 35 (2001).

difficulty of the task, they sometimes fall short.<sup>13</sup> It is the goal of this article to sketch out some guidelines for how the media should, and should not, cover the courts. In the interest of simplicity, it does so with reference to a relatively narrow set of media: the Supreme Court correspondents for *USA Today*, the *Wall Street Journal*, and the *New York Times*, reporting on a relatively narrow set of cases: Supreme Court decisions rendered in the 2012-13 term.<sup>14</sup> This article first catalogues some recurrent problems in the sample of newspaper pieces analyzed, providing examples of each, and classifying them into more general categories.<sup>15</sup> It then proposes remedies for the problems, drawing again upon models from within the sample itself.<sup>16</sup> Finally, this article concludes with some general thoughts on the significance of its findings, and on potential avenues for further scholarship.<sup>17</sup>

## II. THE PROJECT IN A NUTSHELL

At the outset, the parameters of the project should be defined. As noted, the sample is a tightly conscribed one: articles on Supreme Court decisions from the 2012-13 term that appeared in *USA Today*, the *Wall Street Journal*, and the *New York Times*. The three papers were chosen because they are currently the most widely circulated papers in the country.<sup>18</sup> Conveniently, they also collectively represent the entirety of the mainstream political spectrum. The *Wall Street Journal* is typically considered a conservative-leaning publication, the *New York Times* a liberal one, and *USA Today* a more apolitical outlet.<sup>19</sup> Such political diversity is valuable not because this is a study of bias in legal coverage, but because it demonstrates that the problems discussed here crop up in news outlets of all ideological stripes. Bias, to be sure, is one limited criticism explored below, but it is explored only insofar as it affects the overall quality of coverage, and not to compare the papers to rack up a final score.<sup>20</sup> Relatedly, the reader should remember that the approach here is qualitative, not quantitative. The goal is to point

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13. See *infra* notes 43-46 and accompanying text.

14. See *infra* Part II.

15. See *infra* Parts III.A-F.

16. See *infra* Parts IV.A-E.

17. See *infra* Part V.

18. *Top 10 Newspapers By Circulation: Wall Street Journal Leads Weekday Circulation*, HUFF. POST (Apr. 30, 2013), [http://www.huffingtonpost.com/2013/05/01/newspaper-circulation-top-10\\_n\\_3188612.html](http://www.huffingtonpost.com/2013/05/01/newspaper-circulation-top-10_n_3188612.html).

19. See, e.g., Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 807-08 (2009) (characterizing the *New York Times* as a paper “widely viewed as fairly liberal,” the *Wall Street Journal* as “commonly understood to be more conservative,” and *USA Today* as “ideologically centrist”).

20. See *infra* Part III.E.

out weaknesses in mainstream legal reporting and propose remedies for those weaknesses. Empiricism has no place in such a project.

To head off one potential reservation from the get-go, this article does not pretend that newspapers enjoy the same dominance in the media industry that they once did.<sup>21</sup> No one could deny that it is a struggling business, and that millions of Americans prefer to get their news from cable television, talk radio, and unaffiliated blogs, among other sources.<sup>22</sup> Nevertheless, newspapers continue to play a meaningful role in our political discourse.<sup>23</sup> The three papers considered below have a combined weekly circulation of 5,918,451;<sup>24</sup> no paltry number. Perhaps more importantly, the marquee newspapers punch above their weight in readership by shaping popular perception of an issue.<sup>25</sup> This is particularly true of prestigious brand names like the *Wall Street Journal* and the *New York Times*, with their illustrious histories, big-name editorial staffs, and deep connections to the political and intellectual elites.<sup>26</sup>

There is another, far simpler reason for the choice of samples. To put the point bluntly, it is an easy one. Unlike cable news or talk radio, the articles are all online and easily searchable.<sup>27</sup> Unlike the multitude of blogs, the sample represents a finite, small universe, as it comes from only three periodicals and concerns only one court's work in one year's time.<sup>28</sup> In other words, it is manageable. Other commentators can and should extend the same project to different news sources, different courts, and different types of legal proceedings.

### III. THE SIX DEADLY SINS OF SUPREME COURT COVERAGE

As this is a law review article, and not a newspaper article, we are regrettably compelled to begin our analysis with various clarifications. Let us begin by explaining what types of journalistic problems this article is *not* targeting. For starters, it is not singling out *anything* unrelated to legal

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21. See Brad A. Greenberg, Comment, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—And Why Congress Should Promote It*, 59 UCLA L. REV. 414, 416 (2011).

22. See, e.g., William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 316 (2008) (observing that 'the news media' is "increasingly partitioned through politicized talk radio programs, cable news channels, and Internet sites").

23. Greenberg, *supra* note 21, at 416.

24. *Top 10 Newspapers By Circulation: Wall Street Journal Leads Weekday Circulation*, *supra* note 19.

25. See Greenberg, *supra* note 21, at 416.

26. See, e.g., Joel M. Gora, *The Legacy of Buckley v. Valeo*, 2 ELECTION L.J. 55, 61 (2003) (insisting that newspapers like the *New York Times* and the *Wall Street Journal* "play[] a vital role in shaping [public] debate").

27. See Greenberg, *supra* note 21, at 417.

28. See *supra* Part I.

matters. Even though one could certainly raise any number of aesthetic grievances about many of these articles, it is not the place of the legal profession to police journalists on stylistic matters.<sup>29</sup> Likewise, though news outlets sometimes act hastily in pursuit of a scoop and incorrectly report a decision before taking the time to confirm the outcome,<sup>30</sup> a lawyer plainly cannot articulate that criticism any better for being a lawyer, nor can he add anything to it.

So what sort of shortcomings *is* this article hunting for? In a word, any shortcomings related to the *legal* nature of the coverage. That includes inaccurate descriptions of judicial proceedings, poor explanations of technical terminology, and incomplete accounts of the legal system, to name a few of the most common defects.<sup>31</sup> It also includes, more controversially, certain more subjective elements, such as sensationalism, bias, and over-politicization.<sup>32</sup> Certainly media professionals have their own views on all of those issues.<sup>33</sup> But the legal community might have some unique insights as well, maintaining as it does a very different type of relationship with the courts and a very different perception of cases.

Finally, I must offer four brief points of clarification. First, this study is limited to *decisions* the Court rendered. This means any formal action the Court has taken with respect to a case. Obviously, the release of written opinions is covered; so too, less obviously, are various rulings the Court made on petitions for certiorari and other more procedural matters, even where unaccompanied by explanation. Excluded are various Court events that cannot plausibly be called decisions, such as oral arguments, individual justices' talks and public remarks, and so forth. Media accounts of such things pose a number of interesting questions, but they are questions for another day.

Second, this study is also limited to articles styled as objective, factual reports on decisions. It does not encompass subsequent pieces providing commentary on the case. Not only does this approach keep the sample more conscribed, it also, hopefully, minimizes the risk of allowing too much subjective bias to seep into the criticisms. A color commentary piece is

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29. See, e.g., John M. Broder, *Vindication for Maligned Lawyer in Justices' Decision*, N.Y. TIMES (June 29, 2012), <http://www.nytimes.com/2012/06/30/us/in-health-ruling-vindication-for-donald-verrilli.html> (noting that at the Affordable Care Act arguments at the Supreme Court, Solicitor General Verrilli "stumbled early in the crucial second day of arguments, getting a frog in his throat that repeated sips of water could not clear").

30. See, e.g., Alicia Ouellette, *Health Reform and the Supreme Court: The ACA Survives the Battle of the Broccoli and Fortifies Itself Against Future Fatal Attack*, 76 ALB. L. REV. 87, 99 (2013) (documenting the fact that CNN and Fox News both announced the death of the individual mandate in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) before correcting themselves).

31. See *infra* Parts III.A, D, F.

32. See *infra* Parts III.B-C, E.

33. See Greene, *supra* note 12, at 37.

entitled to some artistic license in what information it presents and how it presents that information; a straightforward news story, in contrast, carries with it the expectation that it will be as accurate and impartial as possible.<sup>34</sup>

Third, the examples of errors are representative. Listing every instance of every category would be as exhausting as it would be exhaustive. The better course is to settle for an illustrative sampling. It may not have the rigor of an empirical study, but an empirical study cannot offer much in the way of meaningful advice on improving the *quality* of prose, which is the goal of this study.

Fourth, and finally, although this point will be discussed later as well, it bears reiterating that the purpose of the study is not to lambaste the work of the newspapers under review. It should not be thought that the following errors render all of the articles subpar, or that each discrete problem does that much damage to the overall quality of the piece in which it appears. In fact, in this author's opinion, all of the journalists in the sample do an excellent job with a very difficult task. That point will be underscored in the section presenting the solutions, as many of the examples are drawn from the work of other reporters within the sample.<sup>35</sup> On to the analysis.

#### A. *Oversimplification*

One of the largest categories of problems with legal coverage can be roughly characterized as "oversimplification."<sup>36</sup> Now, it would be grossly unfair to admonish reporters for merely simplifying Supreme Court decisions. The job of a reporter is to simplify.<sup>37</sup> A newspaper article announcing a recently released opinion cannot reasonably be expected to meticulously survey all of the nuances of the case, its history, its place in the Court's jurisprudence, the subtleties of all of the warring opinions in the case, and so on. Consequently, the focus here will be on oversimplifications that actively distort the coverage and can be easily fixed within the space and time limits of a newsroom. In the following part, the author will recommend alternatives for the oversimplified text criticized in this section.<sup>38</sup>

Lest the reader think that this article is a legalistic exercise in nit-picking, we begin with one of the more insidious kinds of oversimplifications, albeit one that is fortunately not as common as some of the others. Sometimes cases are easily broken down into winners and

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34. See BOB KOHN, JOURNALISTIC FRAUD: HOW THE NEW YORK TIMES DISTORTS THE NEWS AND WHY IT CAN NO LONGER BE TRUSTED 27 (2003).

35. See *infra* Parts IV.A-E.

36. See Catherine Crier, *Journalism and the Law*, 56 SYRACUSE L. REV. 387, 392 (2006).

37. See *id.* at 396.

38. See *infra* Parts IV.A-E.

losers.<sup>39</sup> One side may have been victorious on every issue, and the other thwarted on every issue. Sometimes, however, that is not the case.<sup>40</sup> There are many partial triumphs in the law.<sup>41</sup> Legal journalists are not blessed with the same material as sports journalists, who can tell you who won, who lost, or who tied—much as they sometimes wish that they were.<sup>42</sup>

Thus, we sometimes see a newspaper article glossing over a mixed result so as to present a clear-cut outcome. For example, the *New York Times* announced one decision with the headline, *Supreme Court Rules in Favor Of 1 Worker, but Not Another*.<sup>43</sup> The text continues in the same vein: “In a pair of 5-to-4 decisions issued on Tuesday, the Supreme Court ruled in favor of an injured airline mechanic and against a registered nurse who said her pay had been unfairly docked.”<sup>44</sup> It makes for a nice, clean headline and lede. The problem is, the headline is not quite true. In the former case, the Court delivered two holdings, one vindicating the mechanic’s arguments, the other his adversary’s.<sup>45</sup> It is precisely the tidiness of the erroneous wording that should raise eyebrows. To say that the Court, by the narrowest margin, sided with one middle-class professional in one case and against a middle-class professional in another is to deliberately provoke all sorts of questions. Who switched sides? Why did they do so? Is the Court being inconsistent? Are four justices consistently helping workers and four consistently helping corporations? Accounting for the mixed result draws a far more complicated picture. The fact that the dissenting justices in the mechanic’s case actually *joined* the latter half of the majority’s opinion further complicates the picture.<sup>46</sup> A journalist writing for a popular audience with tight word counts cannot be expected to capture all of this complexity and ambiguity. But he can be expected not to actively misrepresent the facts in order to present a more compelling narrative.

The same understandable urge—to tell a good story—can seduce reporters into glossing over other inconvenient, legalistic facts. Often this urge surfaces in the form of a legal doctrine that is collapsed into an

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39. Cf. Jessica J. Berch, *The Costs of Litigation: A Proposal to Amend Federal Rule of Appellate Procedure 39(A)(4)*, 83 TEMP. L. REV. 103, 109 (2010) (discussing how the proposition that “not all cases have clear winners and losers” illustrates how some cases *do* have clear winners and losers) (emphasis added).

40. *Id.*

41. *Id.*

42. *Id.*

43. Adam Liptak, *Supreme Court Rules in Favor Of 1 Worker, but Not Another*, N.Y. TIMES (Apr. 16, 2013), <http://www.nytimes.com/2013/04/17/business/supreme-court-rules-on-2-employee-employer-disputes.html>.

44. *Id.*

45. *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1551 (2013) (“Our holding today has two parts, one favoring U.S. Airways, the other McCutchen.”).

46. *Id.* (Scalia, J., dissenting) (agreeing with Parts I and II of the majority opinion, and disagreeing with Parts III and IV).



equitable framework. The *New York Times* committed this offense in its article on the airline mechanic, where it wrote that because of ambiguity in a contract “ordinary fairness required” one interpretation over the other.<sup>47</sup> It was not “ordinary fairness” that dictated the result; however, it was a well-established equitable rule known as the “common-fund doctrine.”<sup>48</sup> Granted, the “common-fund doctrine” could certainly be considered to be grounded in fairness concerns, given its equitable roots.<sup>49</sup> But to say that the Court read the contract to make it consistent with “ordinary fairness” is to plant in the reader’s mind the image of the Court saying something like: we agree with the plaintiff’s construction of the contract because it seems fairer to our sensibilities. That is a far cry from what the Court actually did; elucidate an old doctrine based on precedent and apply it to the facts of the case.<sup>50</sup> In some ways, the two approaches could be regarded as diametrically opposed. One asks what an instinctual moral code requires; the other seeks only to apply the law as it is written.<sup>51</sup> The *New York Times* should not be castigated for declining to explain a rather obscure common law doctrine in a column geared at a general readership.<sup>52</sup> That is not to say, though, that it may inaccurately tell its subscribers that the Court consulted only its intuitive sense of fairness, just because the word is more accessible to the layman.

A less pernicious type of oversimplification, but a more common one, can be found in many of the articles reporting on the Supreme Court’s decision not to take a case. Often the writer of such a piece will say something about how, as the *Wall Street Journal* once put it, the “[t]he [C]ourt denied the appeal without comment,”<sup>53</sup> or the like. Needless to say, these statements are true.<sup>54</sup> The problem with them is that the Court never explains its denial of petitions for certiorari.<sup>55</sup> It is therefore rather

47. See Liptak, *Supreme Court Rules in Favor of 1 Worker, but not Another*, *supra* note 43.

48. See *McCutchen*, 133 S. Ct. at 1550-51.

49. Cf. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2168 (2000) (“[A] century ago, the equitable common fund doctrine saw judges as specially responsible for insuring fair allocations of funds.”).

50. Cf. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1601-12 (1974) (tracing the history of the common fund rule); see generally *McCutchen*, 133 S. Ct. 1537.

51. Compare Liptak, *Supreme Court Rules in Favor of 1 Worker, but not Another*, *supra* note 43 with *McCutchen*, 133 S. Ct. at 1543 and Dawson, *supra* note 50, at 1601-12.

52. See Liptak, *Supreme Court Rules in Favor of 1 Worker, but not Another*, *supra* note 43.

53. Jacob Bunge & Brent Kendall, *Supreme Court Denies Appeal on Options Dispute*, WALL ST. J. (May 13, 2013), [http://online.wsj.com/news/article\\_email/SB10001424127887323716304578480963109693222-1MyQjAxMTA0MDIwMzEyNDMyWj#printMode](http://online.wsj.com/news/article_email/SB10001424127887323716304578480963109693222-1MyQjAxMTA0MDIwMzEyNDMyWj#printMode).

54. See *infra* note 55.

55. See, e.g., Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 952 (2008) (“[T]he Supreme Court never explains why certiorari is denied.”).

misleading to remark on the absence of a comment without adding that that very absence is standard practice.<sup>56</sup> Indeed, it would be better to simply not say anything about whether the Court justified its decision, rather than leaving the false impression that it could have explained but inexplicably failed to do so.

### B. Sensationalism

Journalists are routinely lambasted for sensationalizing the news.<sup>57</sup> Supreme Court coverage is not immune from this disease, though it does have slightly different symptoms. A typical demonstration can be seen in an excerpt from the *New York Times*' article on the Court's decision to grant review of *McQuiggin v. Perkins*.<sup>58</sup> It took the opportunity to quote from a previous opinion on the subject: "'This [C]ourt has *never* held,' Justice Antonin Scalia wrote in 2009, chillingly but accurately, 'that the Constitution forbids the execution of a convicted defendant who had a full and fair trial but is later able to convince a habeas court that he is 'actually innocent.'"<sup>59</sup> A quote from a judicial opinion is rarely a bad idea, as we will later show.<sup>60</sup> Editorializing in the middle of a quote, on the other hand, is a dangerous road to travel, and the *New York Times* followed that road off a cliff in this excerpt. It should come as no surprise that the pothole here is "chillingly." The quote is only chilling if one assumes that federal habeas relief is always and everywhere an appropriate remedy for voiding a death sentence. That is one massive assumption, composed of several smaller assumptions. An intelligent reader unfamiliar with the rather arcane concept of habeas corpus could be forgiven for assuming on the basis of the adverb chosen that federal habeas relief is the *only* avenue for getting off death row.<sup>61</sup> After all, if that were the case it certainly would be "chilling" if actual innocence made no difference to the Supreme Court. The temperature goes up rather dramatically when one clarifies the nature of habeas relief. What the quote neglects to inform the reader is that the typical convict sentenced to die has likely had no fewer than *ten* opportunities to clear his name by the time a habeas petition reaches the Supreme Court's doorstep: the trial; the direct appeal to the state intermediary court; the petition for discretionary review from the state high

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56. *See id.*

57. *See* Gary A. Hengstler, *Why Good Media Relations are Increasingly Important to Courts Today*, 46 *JUDGES' J.* 4, 7 (2007).

58. 133 S. Ct. 527 (2012); Adam Liptak, *Case Asks When New Evidence Means a New Trial*, *N.Y. TIMES* (Nov. 12, 2012), <http://www.nytimes.com/2012/11/13/us/post-trial-evidence-is-issue-in-supreme-court-case.html> (emphasis in original).

59. Liptak, *Case Asks When New Evidence Means a New Trial*, *supra* note 58.

60. *See infra* Part IV.B.

61. *See infra* note 62 and accompanying text.

court; the petition for certiorari from the U.S. Supreme Court; followed by a state habeas petition that climbs back through the ranks of the state judiciary; followed by a federal habeas petition that ascends the rungs of the federal judiciary.<sup>62</sup> The process is actually so duplicative that it has inspired a number of prominent commentators to call for a complete *withdrawal* of federal habeas relief for state convicts.<sup>63</sup> If it is chilling to suggest that a state death row inmate cannot avail himself or herself of an actual innocence claim on federal habeas review, it must induce frostbite to imagine a world in which a federal court could not free any state convict for any reason. None of which is to say that federal habeas relief is necessarily a ludicrous mechanism, or even that actual innocence claims *should* fail. 28 U.S.C. § 2254 has as many vigorous, sophisticated defenders as it does detractors.<sup>64</sup> It is only to say that the use of a word like “chillingly” is bound to provoke a sense of foreboding that does not accurately reflect the complexities of the actual issue. Again, the *New York Times* should not be faulted for not beginning the article with a lengthy description of the tortuous trek state inmates take through the judicial system.<sup>65</sup> Then again, nothing compelled the newspaper to use the quote in question *at all*, let alone to distort it so aggressively.<sup>66</sup>

The *New York Times* does not have a monopoly on the inappropriate use of scary words. It is a time-honored tradition in the press, and it is particularly prevalent when law enforcement snoops on people.<sup>67</sup> So it is far from shocking that *USA Today* claimed that the issue in *Clapper v. Amnesty International*,<sup>68</sup> the Supreme Court’s recent foray into national security surveillance procedures,<sup>69</sup> “was whether the people whose communications are intercepted can sue because of the fear – or reality – of having been heard.”<sup>70</sup> It is not Hearst fabricating a war; but, in terms of the

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62. See Christopher N. Lasch, *The Future of Teague Retroactivity, or “Redressability,” After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 4-5 (2009) (charting out this path).

63. See, e.g., Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1226 (2010) (noting that (later Chief Justice) John Roberts, while working at the Department of Justice early in his career, authored a memo proposing the abolition of “federal habeas review of state death penalty cases” on the grounds that they “make[] a mockery of the criminal justice system.”).

64. See generally Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 593 (1982).

65. See Liptak, *Case Asks When New Evidence Means a New Trial*, *supra* note 58.

66. See *id.*

67. See Richard Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, USA TODAY (Feb. 26, 2013), <http://www.usatoday.com/story/news/2013/02/26/supreme-court-wiretapping-surveillance-foreign-intelligence/1948569/>.

68. 133 S. Ct. 1138 (2013).

69. See *id.* at 1142.

70. Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67.

magnitude of the distortion, it is roughly comparable. Literally the *entire* majority opinion in *Clapper* turned on the fact that none of the plaintiffs had even purported to show that the government had intercepted their communications.<sup>71</sup> That very absence was the whole basis for the speculative nature of the injury, which in turn negated the plaintiffs' standing and persuaded the Court to toss the suit.<sup>72</sup> In short, it was the *entire* point of the case, and one on which all involved agreed.<sup>73</sup> It thus borders on the absurd to insinuate that the issue "was whether the people whose communications are intercepted can sue because of the . . . reality . . . of having been heard."<sup>74</sup>

It is tempting to chalk the problem up to sloppy drafting. Perhaps the author meant only to make reference to the admittedly true—and admittedly important—point that there had been no proof that the government *had not* surveilled the plaintiffs.<sup>75</sup> Ultimately, it matters not. The effect is to intimate darkly that the Court foreclosed lawsuits by people who could show the government was listening in on their conversation, when it did no such thing.<sup>76</sup> There are enough abuses of power in the world with which to legitimately terrify people and scare up sales without accusing the Court unfairly of such crimes.<sup>77</sup> It is one of the few institutions people expect to speak truth to power on a regular basis,<sup>78</sup> and it would be a shame if it lost that credibility through no fault of its own.

### C. Politicization

This is perhaps the most charged of the subjects addressed, and the most vulnerable to criticism. We must tread cautiously. The most sensible place to begin is with characterizations of the ideological blocs on the Court.<sup>79</sup> Imagine a case in which the Court splits five-to-four on an issue, with

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71. *Clapper*, 133 S. Ct. at 1143 ("Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications *will be acquired* under" the statute "*at some point in the future.*") (emphasis added).

72. *Id.*

73. *Id.* at 1143, 1155 (the majority and dissenting opinions discussing whether the injury was too speculative).

74. Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67.

75. See *Clapper*, 133 S. Ct. at 1148 ("[R]espondents have no actual knowledge of the Government's . . . targeting practices.").

76. See Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67.

77. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 783-84 (2008) (discussing the legal position of enemy detainees under the framework the government had established to try them).

78. See, e.g., Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1499 (2000) ("[A] recent survey indicates that the public has more 'respect' for the Supreme Court than for the political branches.").

79. See Jess Bravin, *Justices Limit Law's Reach for Acts Overseas*, WALL ST. J. (Apr. 17, 2013), <http://online.wsj.com/article/SB10001424127887323809304578428653861267098.html?KEYWORDS=bravin+nigeria>.

Justices Ginsburg, Breyer, Sotomayor, and Kagan on one side, and Chief Justice Roberts and Justices Scalia, Thomas, and Alito on the other.<sup>80</sup> It requires little imagination to guess how the media will depict the vote.<sup>81</sup> Just pick any of the tried and true formulae: “the justices divided along ideological lines,”<sup>82</sup> “the justices split 5-4 along their conservative-liberal divide,”<sup>83</sup> and so on.<sup>84</sup> We all know the Court is composed of two opposing camps, the skeptic might retort, so what is the problem with telling it like it is? As it happens, there are several problems with this approach.<sup>85</sup>

To begin, a lawyer might have a view of the Court’s ideological composition that is grounded in her reading of its opinions, or in scholarly articles on the subject.<sup>86</sup> If a non-lawyer has a position on the question, by comparison, it is likely because the media has told her so.<sup>87</sup> Thus, it is enormously problematic that an article would simply state, in absolute, unqualified terms, that there is an ideological divide, and that it perfectly explains the Court’s resolution of a given dispute.

It is equally troubling to see the pains journalists take to emphasize the politics of the Court, and the circular and defective logic they employ to that end.<sup>88</sup> Note that one justice is conspicuously absent from the list provided above in the imaginary vote breakdown: Justice Kennedy.<sup>89</sup> It is not by accident. When Justice Kennedy joins the four liberals in opposition to the four conservatives, the newspaper will tell its readers that the Court split along its ideological fault lines;<sup>90</sup> when he joins the four conservatives in opposition to the four liberals, it will say the same thing.<sup>91</sup> Something is not right here. Plainly, to assert that a five-to-four conservative vote represents the consistent ideological make-up of the Court is to assert that the Court has a consistently conservative makeup; to assert that a five-to-four liberal

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80. The reader will note that Justice Kennedy is not listed.

81. See, e.g., *infra* notes 82-84.

82. Adam Liptak, *Justices Bar Nigerian Human Rights Case from U.S. Courts*, N.Y. TIMES (Apr. 17, 2013), [http://www.nytimes.com/2013/04/18/us/justices-bar-us-suit-in-nigerian-human-rights-case.html?\\_r=0](http://www.nytimes.com/2013/04/18/us/justices-bar-us-suit-in-nigerian-human-rights-case.html?_r=0).

83. Bravin, *Justices Limit Law’s Reach for Acts Overseas*, *supra* note 79.

84. See, e.g., Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all> (“The court divided along ideological lines.”).

85. See *infra* notes 86-105 and accompanying text.

86. See, e.g., Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3 n. 155 (1996); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 812 (1995).

87. See, e.g., *supra* notes 82-84.

88. See *infra* notes 90-103 and accompanying text.

89. See *supra* note 80 and accompanying text.

90. See, e.g., Adam Liptak, *Harsher Sentencing Guidelines Can’t Be Used for Old Offenses, Justices Say*, N.Y. TIMES (June 10, 2013), <http://www.nytimes.com/2013/06/11/us/politics/supreme-court-divides-over-sentencing-guidelines.html>.

91. See, e.g., Bravin, *Justices Limit Law’s Reach for Acts Overseas*, *supra* note 79.

vote represents the consistent ideological makeup of the Court is to assert the opposite. At the risk of stating the obvious, both cannot be true.

More troubling still is the circular logic underpinning this journalistic approach.<sup>92</sup> When the two blocs fall neatly into place, the correspondent will invariably say so.<sup>93</sup> Many, many times every term they do not fall so neatly into place; to be precise, the Court split five-to-four in only twenty-nine percent of cases in the 2012-13 term.<sup>94</sup> What does the correspondent tell her readership the other seventy-one percent of the time? She says that the case “featured an unusual alignment of justices.”<sup>95</sup> Or, to use a culinary verb that has rather bizarrely become the go-to word for all three newspapers in such circumstances, that the vote “scrambled the [C]ourt’s ideological lines.”<sup>96</sup> If a circumstance that occurs seventy-one percent of the time is “unusual,” one wonders what exactly is normal?

It is worth inspecting the “unusual alignment of justices” line more closely.<sup>97</sup> To put it into context, an interesting couple of sentences follow that phrase: “Justice Antonin Scalia, a member of the [C]ourt’s conservative wing, wrote the majority decision. He was joined by Justice Clarence

92. See *infra* notes 93-96 and accompanying text.

93. See *supra* notes 90-91.

94. *Stat Pack for October Term 2012*, SCOTUSBLOG, [http://scotusblog.com/wp-content/uploads/2013/06/5-4-cases\\_OT12.pdf](http://scotusblog.com/wp-content/uploads/2013/06/5-4-cases_OT12.pdf) (last visited Feb. 10, 2013).

95. Adam Liptak, *Justices, Citing Ban on Unreasonable Searches, Limit Use of Drug-Sniffing Dogs*, N.Y. TIMES (Mar. 26, 2013), <http://www.nytimes.com/2013/03/27/us/justices-limit-use-of-drug-sniffing-dogs.html>; see also Adam Liptak, *Justices Take Case on Prayer at Town Board Meetings, and a Patent Dispute*, N.Y. TIMES (May 20, 2013), [http://www.nytimes.com/2013/05/21/us/politics/justices-take-case-on-prayer-at-town-board-meetings.html?\\_r=1&](http://www.nytimes.com/2013/05/21/us/politics/justices-take-case-on-prayer-at-town-board-meetings.html?_r=1&) (“An unusual coalition, made up of Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, joined Justice Scalia’s opinion without reservation.”); Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES (June 26, 2013), [http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all&_r=0) (“The vote in the California case was also 5 to 4, but with a different and very unusual alignment of justices.”).

96. Brent Kendall, *Court Curbs Drug-Sniffing Dogs*, WALL ST. J. (Mar. 26, 2013), <http://online.wsj.com/article/SB10001424127887324105204578384561455435192.html?KEYWORDS=kendall+scrambled>; David Jackson & Richard Wolf, *High Court Rules against Drug-Sniffing Dog Search*, USA TODAY (Mar. 26, 2013, 12:19 PM), <http://www.usatoday.com/story/news/2013/03/26/supreme-court-dog-sniffing-drug-case/2020743/> (“The ruling scrambled the court’s normal ideological divisions.”); Adam Liptak, *Justices Allow DNA Collection After an Arrest*, N.Y. TIMES (June 3, 2013), [http://www.nytimes.com/2013/06/04/us/supreme-court-says-police-can-take-dna-samples.html?\\_r=0](http://www.nytimes.com/2013/06/04/us/supreme-court-says-police-can-take-dna-samples.html?_r=0) (“The case featured an unusual alignment of justices that scrambled the usual ideological alliances.”); Jess Bravin, *Historic Win for Gay Marriage*, WALL ST. J. (June 26, 2013), <http://online.wsj.com/article/SB10001424127887324520904578553500028771488.html?KEYWORDS=%22brent+kendall%22> (“The court’s traditional ideological lineup was scrambled over the question of the court’s jurisdiction to hear the case.”); Brent Kendall, *Supreme Court Backs Couple in ‘Baby Veronica’ Adoption Case*, WALL ST. J. (June 25, 2013), <http://online.wsj.com/article/SB10001424127887323998604578567911903251562.html?KEYWORDS=%22brent+kendall%22> (“The ruling scrambled the court’s ideological lines.”).

97. Liptak, *Justices, Citing Ban on Unreasonable Searches, Limit Use of Drug-Sniffing Dogs*, *supra* note 95.

Thomas, a frequent ally, along with three of the [C]ourt's more liberal members, Justices Ruth Bader Ginsburg, Sonia Sotomayor[,] and Elena Kagan."<sup>98</sup> It is unclear what exactly makes this alignment unusual. Is it that Justice Scalia joined the liberals? Or is it that Justice Thomas did? One might think it was the former, as that seems to be the author's emphasis.<sup>99</sup> But the case in question involved constitutional criminal procedure, an area of jurisprudence in which Justice Scalia's originalism has routinely led him to take fairly libertarian, pro-defendant stances.<sup>100</sup> If it is instead Justice Thomas's vote that renders the case "unusual," the same sentence casts doubt on that theory, as it reminds us that he is "a frequent ally" of Justice Scalia, making it seem far from unusual that he would follow his colleague.<sup>101</sup> Perhaps it is just unusual that Justice Thomas favored the defense over the prosecution, though if so, the reporter is taking a rather oblique angle, to put the point charitably.<sup>102</sup> In any event, even that proposition is exceedingly debatable.<sup>103</sup> Nor is the fact that an individual Justice might tilt toward one political persuasion on some issues, and other persuasions on other issues, an obscure or insignificant aspect of the Court.<sup>104</sup> Quite to the contrary, it is a fact with demonstrably sweeping consequences for the entire country.<sup>105</sup>

As always, there are subtleties to account for on the other side as well. For one, the Court splits five-to-four along the "usual" lines far more often on the most publicized, hot-button issues than it does on more pedestrian

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98. *Id.*

99. *See id.*

100. *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013); *see also* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1867 (2012) (acknowledging that Justice Scalia led "the reinvigoration of the Sixth Amendment confrontation right" and struck "a resounding blow against prosecutorial power" in the process).

101. *See* Liptak, *Justices, Citing Ban on Unreasonable Searches, Limit Use of Drug-Sniffing Dogs*, *supra* note 95.

102. *See id.*

103. *See generally* Rachel E. Barkow, *Originalists, Politics, and Criminal Law in the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043 (2006) (attributing a growing pro-defendant jurisprudence to both Justice Thomas and Justice Scalia); *see also* Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409, 442 (2012) ("As often happens in the criminal context, the stereotypical liberal-conservative lines are blurred."); *but see* Madhavi M. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2008-2009 Term*, 29 MISS. C. L. REV. 1, 3, 6-7 (ranking Justices Thomas and Scalia as among the most pro-government in criminal cases).

104. *See* JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 29 (2007).

105. *See, e.g., id.* at 28 ("More often than not, on the big cases involving contentious social issues, O'Connor and Kennedy—or both of them together—would join the four liberals to rule against conservative positions."); Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. C. R. L.J. 455, 486 (2008) ("Justice Kennedy has shown his willingness to extend constitutional protections to gay Americans.").

matters;<sup>106</sup> and, it is true that, even setting aside the relative infrequency of one-vote margins, certain vote breakdowns are far less common than others.<sup>107</sup> None of that alters the fact that it is profoundly misleading for the press to cultivate the impression, without explanation, that the Court almost invariably votes lock-step in accordance with the political preferences of the justices. The term “without explanation” is the operative part of the sentence. If a reader comes to the conclusion, after meditating on the data and/or the opinions of the experts, that the Supreme Court is an entirely political entity made up of two warring parties, so be it. The media should not present the reader with this opinion as though it were gospel from on high.

#### D. Inaccuracy

Many of the plentiful inaccuracies regarding the Court stem from the desire to ascribe to the Court powers that it does not exercise, or positions that it has not taken.<sup>108</sup> A recurrent example of the latter is visible in the articles that interpret the denial of certiorari as a decision condemning the merits of the appeal.<sup>109</sup> “The Supreme Court has rejected a First Amendment challenge . . . .” an Associated Press story in the *Wall Street Journal* begins, in Exhibit A.<sup>110</sup> The most straightforward way to read such a declaration is: the Court took up the First Amendment question, and it decided there was no First Amendment violation.<sup>111</sup> To see why this is so, one need only think about how such a sentence would be perfectly appropriate in (and perfectly accurate in) a story about the Court’s *actually* resolving a First Amendment case against the plaintiff.<sup>112</sup> To the legally

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106. See Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 99 (2011) (observing that “a controversial case” is “one which might well divide the Court 5-4”); but see *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659, 2668 (2013) (splitting 5-4 with an “unusual” composition on a landmark gay rights case); *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2432 (2013) (splitting 8-1 on an eagerly awaited affirmative action case with Justice Ginsburg voicing the sole dissent).

107. See *Justice Agreement – Highs and Lows*, SCOTUSBLOG, [http://scotusblog.com/wp-content/uploads/2013/06/5-4-cases\\_OT12.pdf](http://scotusblog.com/wp-content/uploads/2013/06/5-4-cases_OT12.pdf) (last visited Feb. 10, 2014) (calculating that Justices Ginsburg and Kagan were in agreement in ninety-six percent of the cases from the 2012-13 term, whereas Justices Ginsburg and Alito were in agreement in only fifty-eight percent).

108. See *infra* notes 110-124.

109. *High Court Rejects Tobacco Marketing Appeal*, WALL ST. J. (Apr. 22, 2013), <http://online.wsj.com/article/AP384b0b837f5e4506a7bf52405db212b5.html?KEYWORDS=%22rejected+a+first+amendment+challenge%22>.

110. *Id.*

111. *Id.*

112. Cf. Erez Reuveni, *Copyright, Neuroscience, and Creativity*, 64 ALA. L. REV. 735, 789 (2013) (“In *Eldred v. Ashcroft* the Court rejected a First Amendment challenge.”).



sophisticated reader, the error is harmless.<sup>113</sup> She knows that the Supreme Court's denial of certiorari implies no opinion on the merits of the appeal.<sup>114</sup> To the lay reader, the error could be quite harmful.<sup>115</sup> He might not know anything about the certiorari process or about discretionary review generally. He might instead mistakenly assume that the Court did weigh in on the First Amendment issue. Not only would the journalist then have missed a chance to educate the public about a quintessential part of the Court's identity, she would also leave the reader with the disastrously mistaken belief that the Court sanctions each of the thousands of decisions it declines to review each year. That would not only be wrong, it would perpetuate a profoundly misguided understanding of our constitutional system of government.<sup>116</sup>

A similar motivation is at play when newspapers paint the rejection of any kind of challenge to a statute as a definitive and permanent vindication of the law, and any favorable ruling on such a challenge as the opposite.<sup>117</sup> So one might come across the following summation of the issue in *Shelby County v. Holder*:<sup>118</sup> "At the core of the disagreement [between the justices] was whether racial minorities continued to face barriers to voting in states with a history of discrimination."<sup>119</sup> The distortion here is subtle but important.<sup>120</sup> Justice Ginsburg and the three justices who joined her in dissent might well have no quarrel with this formulation.<sup>121</sup> To them, the disagreement did indeed turn on whether minorities do or do not confront impediments at the ballot boxes in southern states.<sup>122</sup> The majority saw things rather differently.<sup>123</sup> From Chief Justice Roberts's perspective, and those of the four members of the Court who agreed with him, the case at bottom concerned whether current needs continued to justify the *formula* for

113. See *Griffin v. United States*, 336 U.S. 704, 716-17 (1949).

114. See *id.* ("[D]enial of a petition for certiorari imports nothing as to the merits of a lower court decision. These denials do not remotely imply approval of the various rulings on evidence made in these cases by the Court of Appeals for the District.")

115. See *id.* (emphasizing that a denial of certiorari implies no judgment on a case's merits).

116. See *id.*

117. See *infra* notes 118-134.

118. 133 S. Ct. 2612 (2013).

119. See, e.g., Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, *supra* note 84.

120. See *Shelby County*, 133 S. Ct. at 2628-29, 2631 (emphasizing that the central issue is the preclearance formula, meaning any article suggesting that the issue was whether minorities faced hurdles to voting would miss the majority's central argument).

121. See *id.* at 2640 (Thomas, J., concurring).

122. See *id.* at 2634 (Ginsburg, J., dissenting) ("Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting law that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated."); see also *id.* at 2640 ("The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy.")

123. See *id.* at 2617 (majority opinion).

categorizing the states required to seek preclearance.<sup>124</sup> When the *New York Times* declared that the “core of the disagreement” was simply about whether minorities have trouble voting in the covered states, period, its obvious implication was this: the majority took the position that minorities have no problem casting their votes in the south; the dissent disagreed.<sup>125</sup> That is not at all what the opinions say.<sup>126</sup> The majority believed the criteria that the statute used to justify the burden imposed on the south were obsolete; the dissent thought otherwise.<sup>127</sup> To summarize the whole dispute with reference to what is really a *criticism* of the majority is to profoundly imbalance the coverage.<sup>128</sup> Let the reader decide for himself whether he agrees with the dissent’s criticism; do not spoon-feed it to him in an article that purports to contain only the facts.

Conversely, when the Court has anything positive to say about a statute, the newspapers prefer to pretend the justices championed it entirely, regardless of whether that happened or not.<sup>129</sup> Consider the sentence that appears at the end of a *USA Today* article regarding the Court’s denial of certiorari in an immigration case: “A similar provision in Arizona was upheld by the [C]ourt last year.”<sup>130</sup> The reference is to *Arizona v. United States*,<sup>131</sup> where the Supreme Court “upheld” the challenged statute only in the sense that it concluded that federal law preempted three challenged provisions, but not the fourth.<sup>132</sup> That is a very limited sense indeed and an extremely inaccurate simplification. The Court *struck down* more of the bill than it “upheld.”<sup>133</sup> It “upheld” the fourth provision only in the sense that it determined that federal law did not preempt it, making no comment on the serious and substantive constitutional challenges to the same provision that are currently wending their way through the courts.<sup>134</sup> Immigration is a

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124. See, e.g., *id.* (“Coverage today is based on decades-old data and eradicated practices.”); see also *id.* at 2628-29 (“[T]he coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”).

125. See Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, *supra* note 84 (emphasis added).

126. See, e.g., *Shelby County*, 133 S. Ct. at 2617 (majority opinion), 2640 (Ginsburg, J., dissenting).

127. *Id.* at 2617 (majority opinion), 2640 (Ginsburg, J., dissenting).

128. See *id.* at 2640-41 (Ginsburg, J., dissenting) (arguing against and criticizing the majority’s contention that current needs did not necessitate the preclearance formula).

129. See Richard Wolf, *Supreme Court Won’t Take Up Alabama Immigration Law*, USA TODAY (Apr. 29, 2013), <http://www.usatoday.com/story/news/2013/04/29/supreme-court-immigration-alabama/2120529/>.

130. *Id.*

131. 132 S. Ct. 2492 (2012).

132. *Id.* at 2510.

133. *Id.*

134. See *id.* (“This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.”); see also *Valle del Sol v. Whiting*, No. CV

subject of intense interest amongst huge swaths of the American public, and laws like those in Arizona and Alabama are objects of great interest to millions of people.<sup>135</sup> The media should not deceive readers into thinking that the highest court in the land has settled important questions of constitutional law that it has not yet even decided to take up.

It all comes back, as it so often does with the media, to the yearning for a satisfying narrative. The newspaper industry wants to tell the public that the immigration hawks are winning, or that they are losing. It does not want to tell readers that the one state's statute was partly struck down, at an initial stage, pending further review on other grounds, and that another state's statute is in an entirely different procedural posture.<sup>136</sup> But the legal pages cannot present a box score, as the sports pages can, because the law is a messier beast.

Moving to a different newspaper analogy, reporters on the Court's beat sometimes mistake themselves for their colleagues covering Capitol Hill, which explains the stories that characterize judicial actions as though they were free-floating policy decisions.<sup>137</sup> When the Court ruled recently that the Fourth Amendment contained no per se exception to the warrant requirement for taking blood samples from drunk drivers,<sup>138</sup> *USA Today* slapped the following headline on the story: "High [C]ourt wants warrants before testing drivers' blood."<sup>139</sup> If the legislature passed a bill requiring warrants in such circumstances, it would be because it "wanted" them, i.e., it thought it prudent as a policy to ensure that authorities obtain them. When the Court suppresses evidence for lack of a warrant, it is instead because it regards the Constitution as requiring one.<sup>140</sup> Some learned individuals do insist that all judges are simply legislators in robes, etching their policy preferences into the Constitution.<sup>141</sup> Nonetheless, with respect

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10-1061-PHX-SRB, 2012 WL 8021265, at \*2 (D. Ariz. Sept. 5, 2012) (discussing the Fourth Amendment and Equal Protection challenges to the provision).

135. See, e.g., Frederick Schauer, *Is It Important to be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77, 79 (2010) ("When asked in nonprompted fashion to name the most important issues facing the country, Americans overwhelmingly name . . . immigration" as one such issue).

136. *Arizona*, 132 S. Ct. at 2510.

137. See Richard Wolf, *High Court Wants Warrants before Testing Drivers' Blood*, USA TODAY (Apr. 17, 2013), <http://www.usatoday.com/story/news/nation/2013/04/17/supreme-court-drunk-driving-police-blood-test-alcohol-warrant/2091309/>.

138. *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

139. Wolf, *High Court Wants Warrants before Testing Drivers' Blood*, *supra* note 137.

140. See, e.g., *Segura v. United States*, 468 U.S. 796, 797 (1984) ("We granted certiorari to decide whether . . . the *Fourth Amendment requires suppression* of evidence.") (emphasis added).

141. See, e.g., Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 366 (1999) ("The predominant lens through which legal history is viewed today is legal realism, which, in varying degrees according to its more or less extreme forms, holds that judges are basically 'politicians in robes.'").

to the publication, it is not *USA Today*'s job to foist that presumption upon its readership.

### *E. Imbalance*

Imbalance can be tricky terrain, as its presence depends at least in part on the eye of the beholder, and on slippery, contextual matters.<sup>142</sup> So stick to the basic, indisputable principle: equality for both sides.<sup>143</sup> Equality in coverage requires several things. Most fundamentally, it requires equal attention.<sup>144</sup> For newspaper journalists, that often reduces to equal space devoted for quotations from the adversaries, a goal the Supreme Court's press pool often fails to accomplish.<sup>145</sup> The *New York Times*' article reporting the release of *Clapper v. Amnesty International* comprises nineteen paragraphs.<sup>146</sup> Four of them are devoted entirely to quoting or paraphrasing the remarks of Jameel Jaffer, an attorney for ACLU who worked on the case at every level of the judiciary,<sup>147</sup> including the final three paragraphs of the article.<sup>148</sup> The lone quote from the other side informs us, unhelpfully, that the administration was "obviously pleased with the ruling."<sup>149</sup> If that was all the government felt inclined to say, the journalist cannot be blamed for leaving it at that. He *can* be blamed for giving the other side so much ink despite the terseness of the Department of Justice spokesman. Especially when that ink is as colorful as Jaffer's ominous warning that the decision "leaves Americans' privacy rights to the mercy of the political branches" and when he gets the last word.<sup>150</sup> There is no need to pick on the *New York Times* alone here. *USA Today* mishandled

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142. See Kathy Roberts Forde, *The Enduring Problem of Journalism: Telling the Truth*, 13 J. OF MAGAZINE & NEW MEDIA RESEARCH 1, 2 (2012) (pointing to perspective as one reason for multiple kinds of "truth").

143. See Edd Applegate, *The Concepts of "News Balance" and "Objectivity,"* 52 PUB. REL. Q. 4,5 (2007).

144. See *id.*

145. See Everette E. Dennis, *Another Look at Press Coverage of the Supreme Court*, 20 VILL. L. REV. 765, 765 (1975), available at <http://digitalcommons.law.villanova.edu/vlr/vol20/iss3/2> ("[P]ress coverage of the Supreme Court has been notably inadequate in the view of critics both within and outside of the press.")

146. Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-law.html>.

147. See Brief for Respondents, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025), 2012 WL 4361439; Brief for the Plaintiffs-Appellants, *Amnesty Int'l USA v. Blair*, 638 F.3d 118 (2d Cir. 2011) (09-4112-cv), 2009 WL 8185998; Complaint for Declaratory and Injunctive Relief, *Amnesty Int'l USA v. McConnell*, 646 F. Supp.2d 633 (S.D.N.Y. 2009) (08 CIV 6259), 2008 WL 2773811.

148. See Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, *supra* note 146.

149. *Id.* (internal quotation marks omitted).

150. *Id.*

the coverage in an uncannily similar fashion.<sup>151</sup> It quotes the same line, and appends to it an even more striking coda for the article: ““This theory [i.e., the Court’s] is foreign to the Constitution and inconsistent with fundamental democratic values.””<sup>152</sup> *USA Today* gave the opposing side even shorter shrift, neglecting to quote the government at all, even with the throwaway line that the *New York Times* included.<sup>153</sup>

To be fair, both articles give ample room to Justice Alito to justify the decision.<sup>154</sup> In an ideal world, that might be sufficient. In the actual world, an advocate communicating with the press enjoys a freedom to speak in direct, forceful, informal language that the author of a majority opinion for the Supreme Court does not.<sup>155</sup> In the actual world, the final words in a short article often ring in the reader’s mind afterwards. And, in the actual world, journalists, much like courts, must be as sensitive to the perception of bias as they are to the offense itself.<sup>156</sup>

Balance means balance in all things, so far as possible. Not just between attorneys, as above, but between justices. Or, to be more precise, balance between battling opinions. Just as a quote from one attorney requires a corresponding quote from an attorney who disagrees, a quote from one opinion requires a quote from another taking a different view.<sup>157</sup> *USA Today* drives this lesson home with particular force in its coverage of *Missouri v. McNeely*.<sup>158</sup> In that article, there are exactly two paragraphs devoted exclusively to summarizing the majority opinion’s ruling and reasoning.<sup>159</sup> There are twice as many relating the reasoning of Chief Justice Robert’s forceful concurrence including, again, the final three paragraphs of the article.<sup>160</sup> And, again, one side gets by far the better lines. The Chief Justice is quoted as lamenting that “[a] police officer reading the [C]ourt’s opinion would have no idea—no idea—what the Fourth

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151. See Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67.

152. See *id.*

153. See *id.*

154. See *id.*; see also Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, *supra* note 146.

155. Compare Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, *supra* note 146 (Jameel Jaffer’s comments on the *Clapper* holding) with Linda Greenhouse, *Telling the Court’s Story: Justice and Journalism at the Supreme Court*, 105 YALE L. J. 1537, 1543-1444 (1996).

156. See *Liteky v. United States*, 510 U.S. 540, 558 (1994) (“One of the very objects of law is the impartiality of its judges in fact and appearance.”) (Kennedy, J., concurring) (emphasis added); *Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, <http://www.spj.org/pdf/ethicscode.pdf> (last visited Feb. 9, 2014); *Ethical Journalism: Handbook*, N.Y. TIMES (Sept. 2004), [http://www.nytc.com/wp-content/uploads/NYT\\_Ethical\\_Journalism\\_0904-1.pdf](http://www.nytc.com/wp-content/uploads/NYT_Ethical_Journalism_0904-1.pdf); *Editorial Policies*, USA TODAY, <http://www.usatoday.com/editorial-policy> (last visited Feb. 9, 2014).

157. See, e.g., Wolf, *High Court Wants Warrants before Testing Drivers’ Blood*, *supra* note 137.

158. 133 S. Ct. 1552; see also Wolf, *High Court Wants Warrants before Testing Drivers’ Blood*, *supra* note 137.

159. See Wolf, *High Court Wants Warrants before Testing Drivers’ Blood*, *supra* note 137.

160. See *id.*

Amendment requires of him . . . .”<sup>161</sup> He is then given credit for a powerful and accessible analogy to firefighting, and the article closes with him denouncing the majority for “offer[ing] no additional guidance” other than its bare bones conclusion.<sup>162</sup> *USA Today* leaves the majority with the lame, dry recitation of its holding: “Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case, based on the totality of the circumstances.”<sup>163</sup> As if to drive home just how dull the majority is, the soporifically legalistic “totality of the circumstances” phrase is repeated right before handing it off to the Chief Justice for the far more rousing finale.<sup>164</sup> To top it all off, the author tosses in a couple potshots in his own words against the majority, chastising it for being “elusive” and for failing to “present[ ] police with a clear rule to follow . . . .”<sup>165</sup> Because it is given far more and better attention, the overall impression is of the concurrence, not the majority. Drunk driving is a pervasive issue in the U.S.,<sup>166</sup> and the requirement *vel non* of a warrant for taking the blood of a person suspected of driving while under the influence is a matter that seriously affects no small number of regular Americans.<sup>167</sup> Someone who picks up the paper to get the news deserves to know the bottom line of the story. The bottom line with a Supreme Court decision is its majority opinion. It is the majority that is the law; separate writings are but icing on the cake. A reader should be told what the law is before being told what is wrong with it.

There is another form of imbalance so pernicious that it could just as aptly be categorized as inaccuracy. It surfaces when a newspaper collapses a criticism of a holding into its description of the holding itself.<sup>168</sup> A perfect demonstration is the following opening line from *USA Today*: “One of the most controversial anti-terrorism laws passed in the wake of the Sept. 11, 2011, attacks may be beyond normal judicial review, the U.S. Supreme Court ruled Tuesday.”<sup>169</sup> The Court ruled no such thing.<sup>170</sup> Actually, the majority opinion took pains to say the exact opposite: “[O]ur holding today

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161. *Id.*

162. *Id.*

163. *Id.*

164. See Wolf, *High Court Wants Warrants before Testing Drivers’ Blood*, *supra* note 137.

165. *Id.*

166. See *McNeely*, 133 S. Ct. at 1566 (citing a study estimating “that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes”).

167. See *Crime in the United States, 2011, Overview*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested> (last visited Feb. 9, 2014) (estimating that there were 1,215,077 arrests for driving under the influence in 2011).

168. See, e.g., Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67.

169. *Id.*

170. See *Clapper*, 133 S. Ct. at 1154.

by no means insulates [the challenged provision] from judicial review.”<sup>171</sup> It stressed that judges on the Foreign Intelligence Surveillance Court provide oversight, and that challenges to evidence seized under the law can also be lodged if prosecutors seek to use it in court.<sup>172</sup>

Of course, the plaintiffs in the case and their supporters disagree.<sup>173</sup> They do believe the decision will insulate the provision from ““meaningful judicial review.””<sup>174</sup> They said so in their briefs to the Court,<sup>175</sup> they said so in their responses to the decision,<sup>176</sup> and doubtlessly they will continue to say so. The point is that it is a *criticism*, not a component of the majority’s decision. In the first line of an article, of all places, a case should not be misrepresented as holding something it, of all things, specifically foreswore.<sup>177</sup> Democracy profits when citizens partake in a healthy debate about important decisions like *Clapper*. To be healthy, such debates must be well-informed. A reader of this article about *Clapper* would not be well-informed because his first exposure to the decision would be a rebuke to the majority masquerading as an objective summary of its holding.

The same journalist committed the same mistake three months later, introducing *McBurney v. Young*<sup>178</sup> with this line: “States may have little reason to restrict public records access to their own residents, but the practice is not unconstitutional, the Supreme Court ruled Monday.”<sup>179</sup> Again, not only did the Supreme Court *not* say that “States may have little reason to restrict public records access to their own residents . . . .,” it said the opposite. In his opinion for the majority, Justice Alito took care to show that Virginia’s public records law “has a distinctly nonprotectionist aim” because it allows for the state’s citizens to “obtain an accounting from” their elected officials, and because it “recognizes that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth” and are thus entitled to greater access to those records.<sup>180</sup> The mistake is more difficult to explain here than in *Clapper* because here the rationale behind

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171. *Id.*

172. *See id.* at 1143-45.

173. *See, e.g.,* Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67.

174. *Clapper*, 133 S. Ct. at 1154.

175. *Id.* (noting that the respondents in the case feared that a decision against them would “insulate the government’s surveillance activities from meaningful judicial review”).

176. *See* Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67 (quoting an ACLU attorney attacking the decision on the grounds that it “insulates the statute from meaningful judicial review”).

177. *See id.*; *Clapper*, 133 S. Ct. at 1954.

178. 133 S. Ct. 1709 (2013).

179. Richard Wolf, *Court Says States Can Restrict Access to Public Records*, USA TODAY (Apr. 29, 2013), <http://www.usatoday.com/story/news/politics/2013/04/29/supreme-court-virginia-public-records-access/2120761/>.

180. *McBurney*, 133 S. Ct. at 1715-16.

the statutory distinction is central to the legal analysis,<sup>181</sup> as opposed to *Clapper* where the degree of insulation from the judiciary was an ancillary point,<sup>182</sup> and because here the issue is far less contentious and the Court's opinion commanded a unanimous vote from the justices.<sup>183</sup> Unlike *Clapper*, then, the article on *McBurney* appears to be incorporating into its summary of the holding a criticism that does not even appear particularly relevant to the story.<sup>184</sup> Whatever the cause, the result is the same: in the same breath that the reader is told about the case, he is misinformed as to its reasoning.

#### F. Omissions

The desire to list the various pieces of information the author should have, in the expert opinion of the reviewer, included in her book seduces many book reviewers.<sup>185</sup> These are not useful reviews. The book is the author's, not the reviewer's, and decisions always must be made about what to include and what to exclude. That impulse must be resisted with particular vigilance here, because a newspaper article cannot hope to come even remotely close to covering all of the nuances of a Supreme Court case with its lengthy procedural history; its legal obscurities; its battling opinions; and the endless cast of characters interested in the result and clamoring to opine. That said, there are omissions that are problematic, because they distort the story or because they raise more questions than they answer.

One popular type of omission along these lines occurs when the reporter provides just enough information about a facet of a case to pique the reader's interest and then declines to explain or clarify that facet at all.<sup>186</sup> For example, take the *New York Times*' article on *Decker v. Northwest Environmental Defense Center*.<sup>187</sup> Halfway through that article we are informed that Justice Scalia issued "a long and slashing dissent" in the case.<sup>188</sup> "Slashing," you might have gathered, is the word meriting

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181. See *id.* at 1715 ("[T]he Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist *purpose* of burdening out-of-state citizens.") (emphasis added).

182. See *Clapper*, 133 S. Ct. at 1954.

183. See *McBurney*, 133 S. Ct. at 1713.

184. See Wolf, *Court Says States Can Restrict Access to Public Records*, *supra* note 179; *McBurney*, 133 S. Ct. at 1715-16.

185. See, e.g., Deborah Solomon, *Political Cartoons*, N.Y. TIMES (May 31, 2013), <http://www.nytimes.com/2013/06/02/books/review/the-art-of-controversy-by-victor-navasky.html?pagewanted=all> (complaining that "the omissions overshadow the inclusions").

186. See Adam Liptak, *Justices Back Loggers in Water Runoff Case*, N.Y. TIMES (Mar. 20, 2013), [http://www.nytimes.com/2013/03/21/us/justices-say-oregon-loggers-dont-need-permits-for-water-runoff.h](http://www.nytimes.com/2013/03/21/us/justices-say-oregon-loggers-dont-need-permits-for-water-runoff.html)

187. 133 S. Ct. 1326 (2013).

188. Liptak, *Justices Back Loggers in Water Runoff Case*, *supra* note 186.



attention. As an initial matter, the word is far too strong. With the possible exception of a few colorful phrases here and there,<sup>189</sup> the dissent is actually quite temperate,<sup>190</sup> particularly by Justice Scalia's standards.<sup>191</sup> Even making allowances for journalistic bombast, though, the real point is that the article does not make even the slightest attempt to justify the use of the word.<sup>192</sup> After describing the writing as "slashing," the *New York Times'* only other commentary on Justice Scalia's dissent is a paragraph that explains its reasoning in unusually dry, if not boring, language.<sup>193</sup> There is certainly nothing "slashing" about a technical discussion regarding how to interpret regulations governing "ditches, culverts and the like."<sup>194</sup>

It may seem petty at first blush to spend so much time griping about a single word selected by a journalist no doubt working on a strict deadline.<sup>195</sup> But words matter, and some words matter quite a lot. This particular word matters for two important reasons. First, judges typically enjoy the respect of the public most when they are thought to be treating each other civilly.<sup>196</sup> One need look no further than the increasing backlash in lay publications to the polemical tone of Justice Scalia's opinions.<sup>197</sup> If the Justices are behaving indecorously toward one another, the media can and should report it. The media should not, however, baselessly level an accusation that could have real, adverse consequences to the public's faith in the judiciary.

Second, a journalist should not describe a judicial opinion in any way that leads the reader to expect an example or two, reasonably, and then fails to provide one. This rule applies to any characterization of an opinion's tone as jocular, scholarly, grandiloquent, and so on. It applies with

189. See, e.g., *Decker*, 133 S. Ct. at 1339 ("Enough is enough. For decades, and for no good reason.")

190. See *id.* at 1339-44.

191. See, e.g., Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L. J. 167, 176 (2002) (observing that commentators often "[d]ecry[] [Justice Scalia's] aggressive tone and vocabulary as unnecessarily personal and sometimes cruel."); Richard K. Neumann, *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally*, 16 GEO. J. LEGAL ETHICS 375, 418 n.253 (2003) ("Some of Justice Scalia's dissents have included unusually personal comments that can be interpreted to reflect frustration with colleagues.").

192. See Liptak, *Justices Back Loggers in Water Runoff Case*, *supra* note 186.

193. See *id.*

194. *Id.*

195. Referring to "slashing." *Id.*

196. See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1194 (1992) ("It is 'not good for public respect for courts' . . . for an appellate judge to burden an opinion with 'intemperate denunciation of [the writer's] colleagues, violent invective, attribute[on]s of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice or obtuseness of [other judges].'").

197. See, e.g., Richard A. Posner, *Supreme Court Year in Review: Justice Scalia is Upset about Illegal Immigration. But Where is His Evidence?*, SLATE (June 27, 2013), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/\\_supreme\\_court\\_year\\_in\\_review/supreme\\_court\\_year\\_in\\_review\\_justice\\_scalia\\_offers\\_no\\_evidence\\_to\\_back\\_up\\_his\\_claims\\_about\\_illegal\\_immigration\\_.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html).

particular force when the characterization is, as discussed above, potentially deleterious to the Court's reputation. It applies with even greater force when, as here, the excerpt from the writing has exactly the opposite tone as the one described.

A milder form of the same error arises with respect to content, in addition to tone. In a brief piece on *Bailey v. United States*,<sup>198</sup> which concerned the Fourth Amendment,<sup>199</sup> the case is presented at the outset as a six-to-three opinion.<sup>200</sup> At the conclusion of the summary of the case, the justices who joined the majority are listed.<sup>201</sup> Though, the existence of the dissent is obviously implied, it is never mentioned explicitly.<sup>202</sup> The justices who joined the dissent (also implied) are not listed, the name of the author is omitted, and there is not even the vaguest reference to the dissent's reasoning.<sup>203</sup> This is supremely unsatisfying. If the article is going to mention the vote, the names, and the author of the majority, it owes the reader the same information regarding the dissent. And if the article is going to include such information, it also owes us at least a snapshot of the dissent's reasoning, especially given the fact that it enjoyed the support of a full third of the justices and, consequently, cannot be written off as a marginal view.<sup>204</sup> There is no other apparent reason *not* to offer a brief overview of the dissent. It involves search-and-seizure law, an eminently accessible and relevant subject,<sup>205</sup> and the opinion itself is grounded on common sense concerns like adherence to precedent, "privacy, safety, evidence destruction, and flight."<sup>206</sup> The cost of such an omission is to the reader's understanding of the case and of the issues it presented; issues worth bringing to the public's attention.

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198. 133 S. Ct. 1031 (2013).

199. *Id.* at 1035, 1037.

200. Adam Liptak, *Justices Take Case on Overall Limit to Political Donations*, N.Y. TIMES (Feb. 19, 2013), <http://www.nytimes.com/2013/02/20/us/politics/supreme-court-to-hear-campaign-finance-case.html?pagewanted=all>.

201. *Id.*

202. *See id.*

203. *See id.*

204. *See, e.g.*, John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213, 1230 (2012) ("[T]he core concerns of these three Justices also raise important questions.").

205. *But see* Christopher Slobogin, *What is the Essential Fourth Amendment?*, 91 TEX. L. REV. 403, 403-04 (2012) (reviewing STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* (2012)) (claiming that the Fourth Amendment is less comprehensible to the common citizen than other basic constitutional rights).

206. *Bailey*, 133 S. Ct. at 1049 (Breyer, J., dissenting).

## IV. THE FIVE MIRACLE CURES FOR SUPREME COURT COVERAGE

As those in the law are all too aware, it is far easier to criticize something than it is to offer viable alternatives.<sup>207</sup> With that in mind, this section is designed to suggest remedies for the problems surveyed above,<sup>208</sup> doing so, hopefully, while avoiding the temptation to propose solutions that are only workable in a fantasy world in which journalists have no deadlines or space constrictions, and instant access to every piece of information in the world. Journalists have none of these luxuries, and any guidelines that endeavor to be useful must work with reality as it is, not as we may want it to be. At any rate, it would not necessarily be the world's net gain if newspaper articles were all lengthy, exhaustive, and boringly but perfectly technically accurate. That is why we have law review articles! It is important for people, even lawyers, to have shorter, more accessible pieces to explain what they need to know about significant developments in the law, without explaining so much that the intended audience will not have the time or patience to read it.<sup>209</sup>

Wherever possible, examples of how to deal with the problems discussed above are drawn from other articles within the sample itself.<sup>210</sup> The fact that there are so many of these examples proves, it bears repeating, that the journalists critiqued here do a fine job, and could simply benefit from a more standardized approach. These examples also prove that the suggestions are not impracticable, as many are already being employed.<sup>211</sup>

A. *The Simple Stuff*

The articulation of the problems themselves makes their solutions so obvious that there is no need to dwell on the remedies or even to devote separate sections to enumerating them. In this category we have several of the issues with oversimplification, starting with the tendency to distort mixed rulings by announcing—misleadingly—a winner and a loser.<sup>212</sup> The cure is simply to stop doing it. Instead of touting *U.S. Airways v. McCutchen*<sup>213</sup> as a case in which the Court “ruled in favor of an injured airline mechanic,”<sup>214</sup> when half of the opinion did the opposite,<sup>215</sup> just say

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207. Cf. Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 532 n.371 (2013) (“[W]hile the Supreme Court deserves much of the criticism it receives, it is also far easier to criticize judicial opinions than to write them.”)

208. See *supra* Part III; see also *infra* Parts IV.A-E.

209. See Lawrence B. Solum, *Blogging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071, 1075-76 (2006).

210. See *supra* Part III.

211. See, e.g., *infra* notes 217-218, 227, 232 and accompanying text.

212. See *supra* notes 43-46 and accompanying text.

213. 133 S. Ct. 1537 (2013).

214. Liptak, *Supreme Court Rules in Favor of 1 Worker, but not Another*, *supra* note 43.

the Court “ruled in favor of an injured airline mechanic on one issue, and against him on another.” Or—if the editors are scrounging for space—say “the Court decided a case involving an injured airline mechanic.”

Likewise, rather than falsely claiming that the Court relied on “ordinary fairness” to reach a certain result;<sup>216</sup> a journalist can either refer to the “common-fund doctrine” or—if he understandably believes the reader to be uninterested in such matters—to “precedent.” Similarly, a story reporting on a decision regarding certiorari can easily avoid the danger of implying that there is some significance to the Court’s refusal to explain the decision.<sup>217</sup> The *Wall Street Journal* handled the matter capably when it wrote about one such decision: “As is customary, the Supreme Court didn’t cite a reason for declining to hear Alabama’s appeal.”<sup>218</sup> Any number of similar phrases is available for variation.<sup>219</sup> Alternatively, if space is so essential that even these few words are too much, a newspaper can simply omit any reference to the lack of explanation. The solution for the inclusion of inappropriately sensationalistic words is the same: leave them out. Do not insist to the reader that Justice Scalia’s commentary on the narrowness of federal habeas relief is “chilling.”<sup>220</sup> Do not assert incorrectly that the issue in *Clapper* “was whether the people whose communications are intercepted can sue because of the . . . reality . . . of having been heard.”<sup>221</sup> Strike the dubious, editorializing words. The sentences are just as descriptive and helpful without them, and far less questionable.

Continuing along the same lines, the most prudent way to minimize politicization of the Court is either to insert a caveat, or simply to say nothing on the subject whatsoever. Substitute something like “commonly perceived ideological lines” for the absolute, Voice of God “ideological lines”<sup>222</sup> and you are at least giving the reader the opportunity to question received wisdom. If the justices did not play into type, there is no cause to write that the vote was “unusual”<sup>223</sup> or that it “scrambled the court’s normal

215. U.S. Airways v. McCutchen, 133 S. Ct. at 1551.

216. Liptak, *Supreme Court Rules in Favor of 1 Worker, but not Another*, *supra* note 43.

217. See, e.g., Miriam Jordan, *Justices Rebuff Alabama over Immigration Law*, WALL ST. J. (Apr. 29, 2013), <http://online.wsj.com/article/SB10001424127887323982704578453123678098556.html?KEYWORDS=jordan+court+alabama+immigration> (emphasis added).

218. *Id.* (emphasis added).

219. See, e.g., Adam Liptak, *Justices Decline Case on Graphic Abortion Images*, N.Y. TIMES (June 10, 2013), [http://www.nytimes.com/2013/06/11/us/justices-decline-case-on-graphic-abortion-images.html?\\_r=0](http://www.nytimes.com/2013/06/11/us/justices-decline-case-on-graphic-abortion-images.html?_r=0) (“As is their custom, the justices gave no reasons for declining to hear the case.”).

220. Liptak, *Case Asks When New Evidence Means a New Trial*, *supra* note 58.

221. Wolf, *Supreme Court Blocks Challenge to Anti-terrorism Law*, *supra* note 67 (emphasis added).

222. See *supra* notes 82-83 and accompanying text.

223. Liptak, *Justices, Citing Ban on Unreasonable Searches, Limit Use of Drug-Sniffing Dogs*, *supra* note 95.

ideological divisions.”<sup>224</sup> Given that the so-called “normal” five-to-four split is far from pervasive,<sup>225</sup> it is enough to provide the breakdown.

Many inaccuracies can be resolved in the same fashion. When the Court declines to hear a case, the story should not characterize the decision as “reject[ing] a First Amendment challenge,”<sup>226</sup> wrongly implying that the Court weighed in on the merits.<sup>227</sup> Journalists should follow the path that *USA Today* wisely took in reporting on the denial of certiorari in a Second Amendment case, where the headline, subtitle, and lead, all used some form of, the Court “declined to consider . . .” the case.<sup>228</sup> Sometimes it is a mere matter of replacing one word with another. Recall *USA Today*’s article that claimed the Court’s denial of certiorari in an Alabama immigration case was at odds with “[a] similar provision in Arizona [that] was upheld by the court last year.”<sup>229</sup> This despite the fact that the Court actually struck down three out of four challenged provisions, and upheld the fourth only in the very limited sense of determining that federal law did not preempt it, leaving untouched the serious substantive constitutional attack on the statutory provision.<sup>230</sup> All of these concerns could have been alleviated if the article substituted “addressed” for “upheld.” This is less definitive, granted, but also far more accurate. *USA Today*’s declaration that the “[h]igh court wants warrants before testing drivers’ blood” presents an even easier call.<sup>231</sup> The Court did not “want” them, it “required” them,<sup>232</sup> and the story should have said so. “Required,” if anything, is *stronger* than “wanted;” in addition to being correct. The *New York Times* laudably recognized the distinction in its own headline on the story: “Court Says Police *Need* Warrant for Blood Test.”<sup>233</sup>

Other inaccuracies cannot be corrected by replacing discrete words; they require the author to revisit the formulation itself. That is the case with the article that claims, falsely, that the difference of opinion in the Voting Rights Act case was over “whether racial minorities continued to face barriers to voting in states with a history of discrimination,”<sup>234</sup> when no one

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224. Jackson & Wolf, *supra* note 96.

225. *See supra* note 94 and accompanying text.

226. *High Court Rejects Tobacco Marketing Appeal*, *supra* note 109.

227. *See supra* note 110 and accompanying text.

228. Richard Wolf, *Justices Decline N.Y. Case Restricting Guns in Public*, USA TODAY (Apr. 15, 2013), <http://www.usatoday.com/story/news/nation/2013/04/15/supreme-court-guns-new-york-law/2083907/>.

229. Wolf, *Supreme Court Won’t Take Up Alabama Immigration Law*, *supra* note 129.

230. *See supra* note 134 and accompanying text.

231. Wolf, *High Court Wants Warrants Before Testing Drivers’ Blood*, *supra* note 137.

232. *McNeely*, 133 S. Ct. at 1557, 1561, 1568.

233. Adam Liptak, *Court Says Police Need Warrant for Blood Test*, N.Y. TIMES (Apr. 17, 2013), <http://www.nytimes.com/2013/04/18/us/court-rules-warrants-are-needed-to-draw-blood-in-drunken-driving-cases.html> (emphasis added).

234. *See, e.g.*, Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, *supra* note 84.

suggested that they did not. The author has two options here. One choice is to reframe the dispute more broadly: “the core disagreement was whether the impositions on southern states’ voting procedures remain justified,” or the like. Another is just to summarize each position in turn: “The majority held that the preclearance requirements were no longer justified because the formula was out of date. Disagreeing, the dissent said minorities continued to face barriers to voting in states with a history of discrimination, thus making the requirements reasonable.” One may fairly characterize the heart of the disagreement in a sentence, or one may fairly characterize the competing views with respect to the current barriers in several sentences. The one thing an author may not do is fairly characterize the disagreement solely with reference to barriers because the two camps sharply differ on the very role those barriers play in the legal analysis.<sup>235</sup>

The key to fixing imbalance is, unsurprisingly, balance. In terms of space issues, this means allotting as many paragraphs to one side as the other. Naturally, one attorney may not have as much to say as another,<sup>236</sup> and a journalist cannot—or, at least, should not—fabricate quotes.<sup>237</sup> One of the perks to covering the Supreme Court, though, is that there are always many people from many walks of life following its work.<sup>238</sup> It would not require any Watergate-like investigative work to find someone, whether at a non-profit organization, a lobbying entity, or a law school or university, to say a few knowledgeable words, either for or against, about a recent decision. With respect to allocating space for the judicial opinions themselves, a journalist does not have to pick up the phone; the opinions are there on the page, and a quote from a neglected writing can be copied in a few short moments and added to the article to correct any imbalance.

Transitioning to the next type of imbalance; stories sometimes collapse a criticism of a holding into a description of the holding itself. For example, when *USA Today* wrote, incorrectly: “One of the most controversial anti-terrorism laws passed in the wake of Sept. 11, 2011, attacks may be beyond normal judicial review . . . .”<sup>239</sup> Instead: “A plaintiff without proof of actual surveillance cannot challenge one of the most controversial anti-terrorism laws passed in the wake of Sept. 11, 2011 . . . .” Slightly longer, but surely it is worth a couple more words so as to avoid making a deeply misleading statement. *USA Today*’s similar sin involving *McBurney v. Young* can be

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235. See *Shelby County*, 133 S. Ct. at 2617 (majority opinion), 2640 (Ginsburg, J., dissenting).

236. See, e.g., *supra* note 149 and accompanying text.

237. See, e.g., *Editorial Policies*, *supra* note 156.

238. See, e.g., Ann Southworth, *What is Public Interest Law? Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 508 (2013) (commenting on the “trend of dramatically increased amicus participation in Supreme Court litigation since the 1960s.”).

239. Wolf, *Supreme Court Blocks Challenge to Anti-Terrorism Law*, *supra* note 67.

extirpated with even less hassle. The newspaper summarized *McBurney* thusly: “States may have little reason to restrict public records access to their own residents, but the practice is not unconstitutional, the Supreme Court ruled Monday.”<sup>240</sup> The more accurate version would be: “States may restrict public records access to their own residents;” in addition to accuracy, the sentence offers the benefit of greater concision.

Turning to the final category of errors, the proper fix for omissions depends in part on the source of the problem. For instance, the real problem with the *New York Times*’ failure to provide any support for its claim that Justice Scalia’s dissent in *Decker* was “slashing”<sup>241</sup> is that the opinion was not “slashing” by any reasonable interpretation of the word.<sup>242</sup> The solution is not to add more about the dissent, but rather, to remove the word causing the trouble. Last, if an article notes that some justices dissented from an opinion, and particularly if the article mentions the author of the majority opinion and the justices who joined,<sup>243</sup> the article should also mention the justices who joined the dissent and briefly summarize that writing, as well. The reporter’s choices are simply: either include a bit on everything or provide a bare bones summary of the majority opinion with no extraneous details about individual justices.

### B. More and Better Quotes

Even the most diligent journalist will slip from time to time when using his own words. The journalist may choose an inaccurate<sup>244</sup> or inappropriate<sup>245</sup> word, may phrase something in an inadvertently charged way,<sup>246</sup> or may err in any number of ways. The range of potential errors is greatly reduced, if not eliminated, when the reporter uses the words of the justices themselves.<sup>247</sup> One advantage of the Court beat is that a judicial opinion invariably summarizes its position.<sup>248</sup> Such summaries are immensely useful, as characterizations of holdings are frequently trouble spots for newspapers.<sup>249</sup> The *New York Times* followed this strategy to good effect in its article on *Moncrieffe v. Holder*,<sup>250</sup> which began with two

240. Richard Wolf, *Court Says States Can Restrict Access to Public Records*, *supra* note 179.

241. Liptak, *Justices Back Loggers in Water Runoff Case*, *supra* note 186.

242. *See supra* note 194 and accompanying text.

243. *See supra* note 201 and accompanying text.

244. *See supra* Part III.D.

245. *See supra* notes 68-78 and accompanying text.

246. *See supra* notes 58-64 and accompanying text.

247. *See Quotes*, NEWS MANUAL, [http://thenewsmanual.net/Manuals%20Volume%201/volume1\\_08.htm](http://thenewsmanual.net/Manuals%20Volume%201/volume1_08.htm) (last visited Feb. 10, 2014).

248. *See, e.g., Shelby County*, 133 S. Ct. at 2619; *see also Clapper*, 113 S. Ct. at 1143; *Segura*, 468 U.S. at 797-98.

249. *See supra* notes 43-46 and accompanying text.

250. 133 S. Ct. 1678 (2013).

quotes from the majority opinion clarifying the subject matter and the holding, respectively.<sup>251</sup>

Quotes can be usefully plucked from sources other than the Supreme Court's opinions themselves. One refreshing source, utilized in the *New York Times* article on *McNeely*, is the lower courts<sup>252</sup> In that piece, the *New York Times* noted in its thumbnail account of the case's procedural history, that the state supreme court opined, "[w]arrantless intrusions of the body are not to be undertaken lightly."<sup>253</sup> Although the quote does not add any real substantive content to the discussion, it serves the valuable function of giving the reader some sense of the judicial hierarchy beyond the Supreme Court, which often seems to dwell in complete isolation in the media's portrayal. Not to mention the fact that it is a nicely turned phrase with impressive judicial gravitas.

Next, quotes can perform an important service in holding the reader's attention.<sup>254</sup> Important decisions with sweeping consequences to the public are often boring, even for lawyers. Colorful language from an opinion serves as an excellent mechanism for livening up what might otherwise be a dry, technical discussion.<sup>255</sup> In fairness, journalists already know this lesson well. A sampling of the stories here reveals several gems, including "'Pinocchio (when inside the whale) are not vessels,'"<sup>256</sup> "Kagan said that 'blame-the-bean defense' wasn't worthy,"<sup>257</sup> and "[a] sniff is up to snuff when it meets that test."<sup>258</sup> Journalists could do better because Supreme Court opinions are often chock-full of entertaining digressions,<sup>259</sup> and provide an excellent resource for them to draw upon.

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251. Adam Liptak, *Court Rules for Immigrant on Deportation in Drug Case*, N.Y. TIMES (Apr. 23, 2013), [http://www.nytimes.com/2013/04/24/us/supreme-court-ruling-on-marijuana-and-deportation.html?\\_r=0](http://www.nytimes.com/2013/04/24/us/supreme-court-ruling-on-marijuana-and-deportation.html?_r=0).

252. See Liptak, *Court Says Police Need Warrant for Blood Test*, *supra* note 233.

253. *Id.*; *State v. McNeely*, 358 S.W.3d 65, 74 (Mo. 2012).

254. See *Quotes*, *supra* note 246.

255. See, e.g., *infra* notes 255-257 and accompanying text.

256. Adam Liptak, *It May Float, but a Home Isn't a Boat, Justices Rule*, N.Y. TIMES (Jan. 15, 2013), <http://www.nytimes.com/2013/01/16/us/floating-home-like-pinocchio-in-the-whale-is-not-a-vessel-justices-rule.html> (quoting *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 740 (2013)).

257. Richard Wolf, *Supreme Court Sides with Monsanto in Major Patent Case*, USA TODAY (May 13, 2013), <http://www.usatoday.com/story/news/nation/2013/05/13/monsanto-patent-grain-biotechnology-soybeans-supreme-court/2116333/> (quoting *Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1769 (2013)).

258. Liptak, *Justices Take Case on Overall Limit to Political Donations*, *supra* note 200 (quoting *Florida v. Harris*, 133 S. Ct. 1050, 1058 (2013)).

259. See generally Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1062 (1994).



The Supreme Court's opinions affect many people outside the legal community.<sup>260</sup> Those people often have plenty to say as well. Their words deserve inclusion in newspaper stories, too, and can often help bring an otherwise airy legal discussion down to the realm of regular humanity, thus helping the reader understand how the Court's work reverberates throughout society.<sup>261</sup> Unlike colorful quotes from the Court, the thoughts of individuals with no legal titles, either as attorneys, amici, law professors, etc., are all too often absent.<sup>262</sup> The *New York Times*' article on *Lozman* provides a rare exception.<sup>263</sup> "I'm levitating," the article quotes the plaintiff in the case in the final paragraph, "adding that he hoped the decision would help thousands of owners of floating homes around the country."<sup>264</sup> Both in terms of the emotional insight offered into the mindset of the plaintiff, without whom the case would never have existed, and in terms of the light it sheds on how the plaintiff conceives of her role in helping others through the lawsuit, this quote adds a great deal to the article. More quotes such as this would be a blessing.

### C. More Links

The challenge of crafting high quality news articles on the Court is to convey complicated information accurately and succinctly.<sup>265</sup> Hyperlinks ("links") are one extremely effective way to make information available without sacrificing brevity. In the Internet age, nearly everything can be linked, and with stories about the Court, nearly everything *should* be.<sup>266</sup> Interestingly, the newspapers studied here are wildly inconsistent, not just between each other, but also within the same publication.<sup>267</sup> The *Wall*

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260. See, e.g., Tony Mauro, *Supreme Court Cases and Their Impact*, USA TODAY (Mar. 19, 2012), <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-03-20/supreme-court-health-care-juvenile-parole/53656034/1>.

261. See, e.g., Liptak, *It May Float, but a Home Isn't a Boat, Justices Rule*, *supra* note 254.

262. See, e.g., Liptak, *Court Rules for Immigrant on Deportation in Drug Case*, *supra* note 251 (quoting Justice Sotomayor, Justice Thomas, and Justice Alito, but no individuals without legal expertise).

263. See Liptak, *It May Float, but a Home Isn't a Boat, Justices Rule*, *supra* note 254.

264. *Id.*

265. See *A Journalist's Guide to the Federal Courts*, U.S. COURTS, <http://www.uscourts.gov/uscourts/News/docs/JournalistGuide2011.pdf> (stating that both judges and journalists have a mutual interest in the informed and accurate reporting of federal courts).

266. See Steve Buttry, *Plagiarism and Fabrication Summit: Journalists Need to Use Links to Show Our Work* BUTTRY DIARY (Apr. 5, 2013), <https://stevebuttry.wordpress.com/2013/04/05/plagiarism-and-fabrication-summit-journalists-need-to-use-links-to-show-our-work>; see also Steve Buttry, *You Can Quote Me on That: Advice On Attribution for Journalists*, BUTTRY DIARY (Oct. 31, 2011), <http://stevebuttry.wordpress.com/2011/10/31/you-can-quote-me-on-that-advice-on-attribution-for-journalists>.

267. See *infra* notes 267-274 and accompanying text.

*Street Journal* sometimes includes quite a few links,<sup>268</sup> and sometimes almost none.<sup>269</sup> Closer to the middle of the spectrum, the *New York Times* is slightly more consistent, almost always linking to the opinion itself,<sup>270</sup> while fluctuating back and forth on other documents, such as older Supreme Court opinions referenced in the article,<sup>271</sup> lower court decisions,<sup>272</sup> statutes,<sup>273</sup> briefs,<sup>274</sup> and so on. By contrast, *USA Today* appears never to include any links.<sup>275</sup>

While interesting, this range of approaches is not really relevant to the proposal: link everything, in every article. This includes the opinion itself; any lower court opinions that are referenced; any briefs that are mentioned; any other Supreme Court opinions that are discussed; any constitutional provisions or statutes that appear; and any other document that pops up in the article which may have some relevance to the case. Numerous benefits exist for doing so, and with no apparent downside.<sup>276</sup> Obviously, a link makes up for the inability to express everything exhaustively in such a confined space. What the reader cannot get from the article may be found from the linked sources. Along the same lines, the presence of links disincentivizes, to some extent, the journalist from straying too far from a

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268. See, e.g., Jacob Gershman, *For Next Big Religion Case, High Court Goes to Greece*, WALL ST. J. (May 20, 2013), <http://blogs.wsj.com/law/2013/05/20/for-next-big-religion-case-high-court-goes-to-greece/> (linking to the court's decision on certiorari, the petition for certiorari, the response to the petition, and a lower court opinion on the same subject).

269. See, e.g., Jess Bravin, *FCC Can Set Deadlines for Cell Tower Applications*, WALL ST. J. (May 20, 2013), <http://online.wsj.com/news/articles/SB10001424127887324102604578495153284551388> (linking only to biographies of Justices Sotomayor and Kagan and, amusingly, Chevron's stock price as a result of a reference to *Chevron* deference).

270. See generally *infra* Table I.

271. Compare Liptak, *It May Float, but a Home Isn't a Boat, Justices Rule*, *supra* note 255 (linking to older Supreme Court opinions) with Liptak, *Court Rules for Immigrant on Deportation in Drug Case*, *supra* note 250 (mentioning older Supreme Court opinions but not linking to them).

272. Compare Liptak, *Justices Back Loggers in Water Runoff Case*, *supra* note 186 (linking to the lower court opinion) with Liptak, *Justices, Citing Ban on Unreasonable Searches, Limit Use of Drug-Sniffing Dogs*, *supra* note 95 (mentioning the lower court opinion but not linking to it).

273. Compare Adam Liptak, *Supreme Court Limits Reach of 2010 Ruling on Deportation Warning*, N.Y. TIMES (Feb. 20, 2013), <http://www.nytimes.com/2013/02/21/us/supreme-court-limits-ruling-on-deportation-warning.html> (linking to a statute) with Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, *supra* note 146 (mentioning the Foreign Intelligence Surveillance Act but not linking to it).

274. Compare Liptak, *It May Float, but a Home Isn't a Boat, Justices Rule*, *supra* note 256; Liptak, *Case Asks When New Evidence Means a New Trial*, *supra* note 58; Adam Liptak, *Supreme Court Backs State Restrictions on Who Can Ask for Information*, N.Y. TIMES (Apr. 29, 2013), [http://www.nytimes.com/2013/04/30/us/justices-back-state-restrictions-on-information-requests.html?ref=adamliptak&\\_r=1&](http://www.nytimes.com/2013/04/30/us/justices-back-state-restrictions-on-information-requests.html?ref=adamliptak&_r=1&) (each linking to an amicus brief) with Table I *infra* (listing the other articles in the sample, none of which link to amici briefs).

275. See generally *infra* Table I.

276. See generally *infra* Part IV.C.

fair account of the case. Presumably, a reporter will hesitate before mischaracterizing a Court holding that is but a mouse click away.

Links can also play an invaluable educational role.<sup>277</sup> Even if most readers elect not to look at a linked opinion, those who do can learn a great deal about the actual work product of the Court in a way that no news article, no matter how well written, could ever capture. Supreme Court opinions affect all of our lives; anything that encourages people to read and understand them is a good thing. The inclusion of any other documents proves beneficial for the same general reasons. A brief or petition for certiorari teaches the reader about advocacy and the adversarial process.<sup>278</sup> A lower court opinion or previous Supreme Court decision teaches the reader about the judicial structure and the development of jurisprudence in a common law system. All of these things are well worth the citizen's time, as they illuminate important and ill-understood parts of how our country works. It would be especially instructive for newspapers to link to the statutes and, even more so, constitutional provisions interpreted in the opinion. Such sources would likely not only be more approachable than lengthy, dense opinions and briefs, they would also allow the reader to form his own educated opinion from the text itself. Living as we do in an era in which every talking head seems to think the Constitution is a free-floating codification of whatever policy she happens to think preferable,<sup>279</sup> a little more meditation on the text itself would be a tremendous contribution to the quality of public discourse.

#### D. Discrimination

This sections addresses discrimination in terms of which cases to cover, and which not to. The tips here are designed to require as little additional work and columns as possible.<sup>280</sup> Realistically, though, there will be a price to pay in labor and ink. Getting cases right takes more time, and sometimes more space, than newspapers are currently devoting to the cause. Something must give, and that something is stories about cases that require no coverage.

Legal journalists find the Supreme Court an easy focus for many reasons. The Court operates in a single place, procedures are tightly

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277. See Buttry, *You Can Quote Me on That: Advice on Attribution for Journalists*, *supra* note 266 (stating that links allow the reader to view cited information in its original context).

278. See BLACK'S LAW DICTIONARY 217, 258, 1261 (9th ed. 2009) (defining brief, certiorari, and petition respectively).

279. See, e.g., Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 835 (1972) ("Accustomed as we are to treat nearly all questions of policy as questions of constitutional law, we find it easy to conclude that whatever we dislike intensely must also, and therefore, be unconstitutional as well.").

280. See generally *infra* Part IV.D.

conscripted and universally known, actions are almost all transparent, and important work is explained exhaustively in polished, written form, posted on a single website.<sup>281</sup> That does not mean, however, that everything it does needs to be reported in a general newspaper. While all the Court's opinions are exceedingly important to the legal profession, they are not all important to the lay reader. There are two types of cases we don't need stories on: (1) cases that have vanishingly small relevance to the average reader; and (2) cases that are too difficult to explain in any meaningful way without a lengthy discussion. *Johnson v. Williams*,<sup>282</sup> which received four paragraphs at the end of an article centrally focused on another case in the *New York Times*, stands as a paradigmatic example of both above examples of cases that should not be reported.<sup>283</sup> *Johnson* dealt with the standard that federal courts apply to state court judgments in habeas proceedings.<sup>284</sup> It was a highly technical, fact-intensive case that worked no change in the law.<sup>285</sup> Through no fault of its own, the *New York Times* failed to report this story in a way that made it either comprehensible or meaningful to the lay reader, or really to any reader, attorney or not, who has no special interest in habeas law. No mortal newspaper writer could make such an obscure issue comprehensible in such a limited space, as none could make such an obscure case meaningful to a popular audience, no matter how much space he had. The author did the most he could do: offer a disjointed, unclear, largely opaque summary, raising more questions than answers.

Drawing a line between a case that merits coverage and a case that does not is not always easy. On slow news days a newspaper can be forgiven for reaching decisions that fall in the gray area. However, some general principles can be articulated.<sup>286</sup> The primary one is that the bar for inclusion varies depending on the area of law. Habeas law, to stick with *Johnson*, is certainly an important area in terms of its centrality to our legal system<sup>287</sup> and its rich history,<sup>288</sup> and an area of law that *can* produce cases of intense interest to the country at large.<sup>289</sup> But many habeas cases are of marginal

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281. See generally SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/> (last visited Feb. 9, 2014); see also SCOTUSBLOG, <http://www.scotusblog.com> (last visited Feb. 9, 2014).

282. 133 S. Ct. 1088 (2013).

283. Liptak, *Supreme Court Limits Reach of 2010 Ruling on Deportation Warning*, *supra* note 273.

284. See *Johnson*, 133 S. Ct. at 1091 (summarizing question presented and holding).

285. See generally *id.* at 1091-92.

286. See generally *infra* Part IV.D.

287. See, e.g., *In re Kaine*, 55 U.S. (14 How.) 103, 147 (1852) (Nelson, J., dissenting) ("This writ has always been justly regarded as the stable bulwark of civil liberty.").

288. See, e.g., Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1080 (1995) ("The writ is deeply based in the English common law, dating back at least to the thirteenth century.").

289. The most obvious examples from recent history are those involving military detainees. See, e.g., *Boumediene*, 553 U.S. 723; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Older habeas cases with

interest to the general public. This is almost always true of a habeas case dealing exclusively with the procedural interplay between the federal and state courts, as *Johnson* does. State prisoners almost never obtain any kind of relief on federal habeas claims,<sup>290</sup> so such a case will have very little concrete effect on anyone, even the numerous convicts filing petitions. Unlike, say, a habeas case that the Court has taken to clarify the quality of representation a defendant is entitled to,<sup>291</sup> an issue that is, in fact, relevant to a huge number of Americans,<sup>292</sup> a procedural habeas opinion like *Johnson* will primarily affect only *the way in which* federal courts reject petitions, not whether they actually reject them, so grants will remain a tiny percentage of dispositions.<sup>293</sup>

What, then, is a newspaper to do with a case like *Johnson*? One viable option is to simply ignore it and tell the public about some other legal issue that matters more to the average subscriber. As it stands, one typically reads about a legal issue only if the U.S. Supreme Court happens to have addressed it, regardless of its importance; or if some crisis or splashy story is erupting, as when a celebrity appears in court,<sup>294</sup> a horrific crime grabs the public's eye,<sup>295</sup> or a politically controversial issue is being litigated.<sup>296</sup> More newspaper reports on a phenomenon in the legal system with ramifications to many people, for that fact alone, would be refreshing. Such articles are not unheard of,<sup>297</sup> but there could be more if there were fewer *Johnson*-like pieces.

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sweeping consequences to the public include *Gideon v. Wainwright*, 372 U.S. 335 (1963) (giving defendants a right to counsel) and *Ex parte Milligan*, 71 U.S. 2 (1866) (forbidding military trials for civilians during the Civil War).

290. See, e.g., Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 778 n.183 (2010) (calculating that .29% of habeas petitions result in relief in a sample of noncapital cases).

291. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984).

292. See *Crime in the United States, 2011*, U.S. DEPT. OF JUSTICE (Sept. 2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested> (estimating that almost thirteen million people were arrested in the U.S. in 2011).

293. See *Johnson*, 133 S. Ct. at 1091.

294. See, e.g., Anthony McCartney, *Lindsay Lohan in Court: Actress May Face Jail Time*, HUFF. POST (Jan. 30, 2013), [http://www.huffingtonpost.com/2013/01/30/lindsay-lohan-court-los-angeles\\_n\\_2580581.html](http://www.huffingtonpost.com/2013/01/30/lindsay-lohan-court-los-angeles_n_2580581.html).

295. See, e.g., Daniel Trotta & Kim Palmer, *Prosecutor to Seek Murder Charges against Accused Ohio Kidnapper*, REUTERS (May 9, 2013), <http://www.reuters.com/article/2013/05/09/us-usa-missing-ohio-idUSBRE94600620130509>.

296. See, e.g., David McKinney, *Appeals Court Overturns Illinois Concealed Carry Law in Gun Rights Victory*, CHICAGO SUN-TIMES (Dec. 11, 2012), [http://blogs.suntimes.com/politics/2012/12/big\\_win\\_for\\_gun-rights\\_groups\\_federal\\_appeals\\_court\\_tosses\\_state\\_ban\\_on\\_carrying\\_concealed\\_weapons.html](http://blogs.suntimes.com/politics/2012/12/big_win_for_gun-rights_groups_federal_appeals_court_tosses_state_ban_on_carrying_concealed_weapons.html).

297. See, e.g., Catherine Rampell, *Trend Linked to Widespread Layoffs*, N.Y. TIMES (Jan. 11, 2011), <http://www.nytimes.com/2011/01/12/business/12bias.html> (discussing how employment discrimination claims rise with the onset of a recession).

Another perfectly acceptable option is to glean from a case like *Johnson*, if possible, a story that *is* interesting, accessible, and relevant, even if it is not a story about the issue the opinion decided. With *Johnson*, one intriguing angle to take would be exploring the fact that the Court unanimously reversed Judge Reinhardt of the U.S. Court of Appeals for the Ninth Circuit.<sup>298</sup> It is intriguing because Judge Reinhardt is widely considered one of the most liberal judges<sup>299</sup> on one of the most liberal courts<sup>300</sup> in the country, and because he has suffered a remarkably high reversal rate at the U.S. Supreme Court,<sup>301</sup> including in several recent habeas cases.<sup>302</sup> All of that information can be presented quickly and simply, as it just was, and the reader can make of it what he likes. It would also kill two birds with one stone by replacing a useless story with a useful one, while at the same time taking on, at least indirectly, the politics of the Court in a way that is far less dogmatic and misleading than the usual newspaper discussion of the subject.<sup>303</sup>

#### E. Personnel

In any venue, the writer is closely intertwined with her writing. Coverage of the Court is no different. A journalist's background and other experiences will inevitably exert some influence on her articles on the Court, for good or ill.<sup>304</sup> Given the similar backgrounds and positions of the writers whose work is under examination,<sup>305</sup> and given that this article is not

298. *Johnson*, 133 S. Ct. at 1099; *Williams v. Cavazos*, 646 F.3d 626, 630 (9th Cir. 2011).

299. See, e.g., Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 176 (2013) (remarking that Judge Reinhardt is "well known as one of the most liberal members of the federal bench"); Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 927 (2010) ("Judge Reinhardt has been called the most liberal judge on the liberal Ninth Circuit.").

300. See, e.g., Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1269 (2012) (observing that the Ninth Circuit "is generally considered to be the most liberal circuit in the country").

301. See, e.g., M. Todd Henderson, *Justifying Jones*, 77 U. CHI. L. REV. 1027, 1027, 1029 n.15 (2010) (calculating that Judge Reinhardt is affirmed in 16% of the opinions he authors that are reviewed by the Supreme Court, as compared with the 35% average for court of appeals judges).

302. See *Johnson*, 133 S. Ct. 1088; *Swarthout v. Cooke*, 131 S. Ct. 859, 860 (2011); *Premo v. Moore*, 131 S. Ct. 733, 736 (2011); *Harrington v. Richter*, 131 S. Ct. 770, 780-81 (2011). A few months after *Johnson*, Judge Reinhardt was reversed in another habeas case, this time in a per curiam opinion issued without the benefit of briefs, an especially telling sign of the Supreme Court's displeasure. *Nevada v. Jackson*, 133 S. Ct. 1990, 1992, 1994 (2013) (per curiam); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1200 (2012) ("Traditionally, the per curiam was used to signal that a case was uncontroversial, *obvious*, and did not require a substantial opinion.") (emphasis added).

303. See *supra* notes 82-106 and accompanying text.

304. William P. Cassidy, *Outside Influences: Extramedia Forces and the Newsworthiness Conceptions of Online Newspaper Journalists*, 13 FIRST MONDAY (Jan. 7, 2008), <http://firstmonday.org/article/view/2051/1922>.

305. See, e.g., *infra* note 306 and accompanying text.

an empirical comparison, it is mere speculation to wonder how different journalists might do things differently. But it is, hopefully, educated speculation.

Taking up first the question of background, newspapers ought to entrust coverage of the Court to journalists with law degrees. This may be a somewhat controversial proposal. Attorneys, after all, are notorious for producing the sort of convoluted, inscrutable prose that drive people to newspapers in the first place; lawyers included.<sup>306</sup> Lawyers are also far from perfect in terms of accuracy, as this article well attests. At least two of the reporters considered here, Adam Liptak of the *New York Times* and Jess Bravin of the *Wall Street Journal*, received law degrees from elite law schools,<sup>307</sup> and neither has been unerringly precise in his coverage of the Court. But no one is perfect.<sup>308</sup> At the end of the day, it is a tall order for anyone to read and digest a lengthy Supreme Court opinion on a complex, difficult issue and describe it briefly and accessibly for a popular audience.<sup>309</sup> It is a taller order for someone untrained in the law to do so, however. Three years of legal education at least puts an individual in a position to comprehend as many of the abstruse legalisms as possible and to translate them into English.<sup>310</sup> Though many lawyers are probably too steeped in the profession to do the translating part, they are at least cut out for the comprehension bit.<sup>311</sup> Stated differently, not every lawyer is qualified to cover the Court, but everyone who is qualified to cover the Court is a lawyer.

It does not seem an unreasonable administrative burden to ask newspapers to hire lawyers for the job. Enormous droves of people attend law school each year, many of whom will practice law for only brief stretches, or not at all.<sup>312</sup> There has long been a thriving interchange

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306. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) (noting the two things wrong with legal writing: style and content).

307. Adam Liptak, N.Y. TIMES (Feb. 16, 2014), [http://topics.nytimes.com/top/reference/timestopics/people/l/adam\\_liptak/index.html](http://topics.nytimes.com/top/reference/timestopics/people/l/adam_liptak/index.html) (noting that Liptak graduated from Yale Law School); *Law Blog, Jess Bravin*, WALL ST. J. (Feb. 16, 2014), <http://blogs.wsj.com/law/jess-bravin/> (noting that Bravin graduated from Berkeley Law School).

308. See Katherine Fung & Jack Mirkinson, *Supreme Court Health Care Ruling: CNN, Fox News Wrong on Individual Mandate (VIDEO)*, HUFF. POST (June 28, 2012), [http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate\\_n\\_1633950.html](http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate_n_1633950.html) (reporting that CNN and Fox News wrongly announced that the Supreme Court had struck down the individual mandate in the Affordable Care Act).

309. See *id.*

310. Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 62-63 (2003).

311. See *id.*

312. See Chris Fletcher, *A Message to Aspiring Lawyers: Caveat Emptor*, WALL ST. J. (Jan. 2, 2013), <http://online.wsj.com/news/articles/SB10001424127887323320404578213223967518096> (“Nationally there are twice as many [law school] graduates as there are jobs.”).

between the journalistic and legal communities, and that interchange has only grown in recent years.<sup>313</sup> Finally, law school courses do not, in and of themselves, permanently distort the perspective or prose of an individual. Rather, they show one how to view the world through a certain lens;<sup>314</sup> the very same lens through which the Court views itself, composed as it is of nine lawyers.<sup>315</sup> Accordingly, there should be a decent-sized pool of qualified people for the job.<sup>316</sup>

Once the journalist is hired, the question becomes how to define his position at the publication. The beats of the different reporters in the sample each have different boundaries.<sup>317</sup> Adam Liptak of the *New York Times* is almost entirely focused on the judiciary, with a very heavy emphasis on the Supreme Court.<sup>318</sup> Occasionally he has penned more general piece that implicates the Court in some way but is not focused on it.<sup>319</sup> Jess Bravin walks a similar beat, writing largely about the courts, the high court in particular, though he publishes some work that contains no real discussion of the judiciary.<sup>320</sup> *USA Today's* Richard Wolf has the most varied brief. In addition to his many articles on the Supreme Court, the lower courts, and other legal matters, he writes extensively on completely unrelated subjects.<sup>321</sup>

Coverage of the Court would improve if each newspaper dedicated at least a single correspondent solely to the Court, and accepted only relatively

313. See, e.g., Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 *FORDHAM L. REV.* 1985, 1986 (2000) (remarking that “many lawyers pursue careers in . . . journalism”).

314. See Henderson, *supra* note 310, at 62-63.

315. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 23, 2014).

316. See *supra* note 311 and accompanying text.

317. See *infra* footnotes 317-320 and accompanying text.

318. See Adam Liptak, *N.Y. TIMES*, [http://topics.nytimes.com/top/reference/timestopics/people/l/adam\\_liptak/index.html](http://topics.nytimes.com/top/reference/timestopics/people/l/adam_liptak/index.html) (last visited Feb. 9, 2014) (noting that Liptak graduated from Yale Law School).

319. See, e.g., Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, *N.Y. TIMES* (Mar. 11, 2013), <http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html#smallstate>.

320. See, e.g., Jess Bravin, *Renewed Gitmo Push Faces Test in Congress*, *WALL ST. J.* (May 2, 2013), <http://online.wsj.com/article/SB10001424127887324582004578459322512639786.html?KEYWORDS=bravin>.

321. See Richard Wolf, *USA TODAY*, <http://content.usatoday.com/topics/reporter/Richard+Wolf> (last visited Feb. 9, 2014) (listing Wolf's stories). See, e.g., Richard Wolf, *Improved Jobs Report Buys Obama*, *USA TODAY* (Oct. 6, 2012) [http://usatoday30.usatoday.com/USCP/PNI/Nation/World/2012-10-06-TDS-SEPTJOBSPOLITICAL\\_ANALYSIS\\_ST\\_U.htm](http://usatoday30.usatoday.com/USCP/PNI/Nation/World/2012-10-06-TDS-SEPTJOBSPOLITICAL_ANALYSIS_ST_U.htm) (discussing Labor Department's optimistic jobs report); Richard Wolf, *Presidential Campaign Keeps Candidates on the Road*, *USA TODAY* (Sept. 19, 2012), <http://usatoday30.usatoday.com/news/politics/story/2012-09-19/campaigning-obama-election/57809080/1> (discussing President Obama's and Governor Romney's cross-country campaign plans); Richard Wolf, *Whitehouse Warns of Massive Defense, Domestic Cuts*, *USA TODAY* (Sept. 14, 2012), <http://content.usatoday.com/communities/theoval/post/2012/09/14/obama-says-sequestration-would-be-disaster/70000363/1#UwY2hvdVuI> (discussing the effects of the 2012 automatic budget cuts).



straight, objective stories from him. The problem with a journalist who covers all three branches is that the same political concepts reasonably used in coverage of the legislature and executive creep unreasonably or, at least, without explanation, into coverage of the Court. Most strikingly, articles on the Court end up referring reflexively and without substantiation to ideological divisions on the Court.<sup>322</sup> In the Congress of the twenty-first century, it is not so implausible to characterize nearly everything that happens with reference to the relationship between the two major parties.<sup>323</sup> It makes far less sense to do so with the Court given many justices' eccentricities;<sup>324</sup> the ever-shifting alliances;<sup>325</sup> the regular occurrence of all kinds of different voting patterns;<sup>326</sup> and the fact that many legal issues, unlike most legislative issues, do not break down upon any kind of ideological lines.<sup>327</sup> To give the job to a reporter professionally insulated from the jostling of the political branches would not erase the problem, but it would at least help the reporter to focus on the politics of the courts, which are quite different from the politics of the Hill and the White House.

The problem with a journalist who writes articles that arguably reflect the subjective opinions of the author is the effect on the journalist's credibility more than his actual bias. A journalist has the same view when she writes a piece about an opinion that she has always had, regardless of whether she has previously expressed that view in writing. The difference is that the astute reader would not necessarily *know* about that view. When the judiciary is entitled to respect for its independence, it deserves that respect, and public faith in the government as a whole can benefit. A press corps perceived as independent serves the same ends, and is worth pursuing for the same reasons.

More so than some of the other suggestions, the proposal to dedicate a full-time employee to the Court may rankle those in the newspaper business, as it would hamper flexibility and efficiency by removing an able-bodied reporter from assignments he might otherwise take on. To respond,

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322. See *supra* notes 82-106 and accompanying text.

323. See, e.g., Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 412 (2012) ("Numerous studies show increased Democratic and Republican Party polarization among members of Congress between the late 1960s, early 1970s, and the late 1990s through 2000s.").

324. See, e.g., *Following Souter*, ECONOMIST (May 7, 2009), <http://www.economist.com/node/13611101> (noting that Justice Souter ate yogurt and apples to the core at his desk for lunch, and lived alone in "a dilapidated wooden farmhouse").

325. See, e.g., Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007) (noting that "virtually every Justice serving since the 1930s has moved to the left or right" while on the Court).

326. See *supra* notes 94-105 and accompanying text.

327. See, e.g., Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 752 (2009) ("Many legal issues arise that have no ideological overtones, or that turn on technical issues of law.").

though there may be some marginal cost to flexibility and efficiency, the Supreme Court could generate an infinite number of stories even while not in session, from the quirks of its current and past members<sup>328</sup> to its slightly uneasy place in the D.C. establishment,<sup>329</sup> to the fascinating nature of the building itself and its connection to the public.<sup>330</sup> Newspapers do not hesitate to publish such pieces now,<sup>331</sup> and they are almost definitely more captivating to lay readers than coverage of many cases. A special Supreme Court correspondent would only allow for more articles of that type, ultimately more of a financial boon than a grudging social responsibility for the newspapers who run them.

#### V. CONCLUSION

The suggestions outlined here could have salutary effects, it is hoped, far beyond the narrow world of Supreme Court newspaper stories. For one thing, all the news media that cover the Court could benefit from adopting them. For another, such changes would greatly improve news coverage of court cases and the legal system generally. It is breathtaking how many stories flow, in some respect, from the legal world.<sup>332</sup> Articles about scandals are often articles about the indictments and the prosecutions that follow them.<sup>333</sup> Articles about struggles over social issues are often articles about the court battles that tackle them.<sup>334</sup> Articles about government actions and programs are often articles about the quasi-judicial administrative processes that led to them,<sup>335</sup> and/or about the legal challenges that ensue.<sup>336</sup> Even articles about areas that seem to be removed

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328. See *supra* note 323.

329. See, e.g., Ariane de Vogue, *State of the Union 2011: Supreme Court Justices Divided on Attending*, ABC NEWS (Jan. 24, 2011), [http://abcnews.go.com/Politics/State\\_of\\_the\\_Union/state-union-2011-supreme-court-justices-divided-attending/story?id=12748996#Uaz4LtJJOAg](http://abcnews.go.com/Politics/State_of_the_Union/state-union-2011-supreme-court-justices-divided-attending/story?id=12748996#Uaz4LtJJOAg) (examining the fraught relationship between the justices and the state of the union address).

330. See, e.g., Sarah Kliff, *Supreme Court and the Business of Waiting in Line*, WASHINGTON POST (Mar. 25, 2012), [http://www.washingtonpost.com/blogs/wonkblog/post/the-business-of-waiting-in-line/2012/03/25/gIQAhFjkZS\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/the-business-of-waiting-in-line/2012/03/25/gIQAhFjkZS_blog.html) (discussing the intricacies and manipulations of the queue for attending oral argument).

331. See articles cited *supra* notes 327-329.

332. See *supra* notes 332-338 and accompanying text.

333. See, e.g., David Morgan, *Details from John Edwards Indictment*, CBS NEWS (June 3, 2011), <http://www.cbsnews.com/news/details-from-john-edwards-indictment/>.

334. See, e.g., Tom Howell, *Appeals Courts Mull 'Obamacare' Contraception Mandate*, WASHINGTON TIMES (May 26, 2013), <http://www.washingtontimes.com/news/2013/may/26/appeals-courts-mull-obamacare-contraception-mandat/?page=all>.

335. See, e.g., Claire Healey, *EPA Submits Its Regulation on Coal Power Plants*, SPECTATOR (July 2, 2013, 5:44 PM), <http://spectator.org/blog/2013/07/02/epa-submits-climate-rule-to-wh>.

336. See, e.g., Suzanne Goldenberg, *Campaigners Sue EPA over Carbon Emissions*, GUARDIAN (Nov. 28, 2012), <http://www.guardian.co.uk/environment/2012/nov/28/campaigners-sue-epa-carbon-emissions>.

from the judicial realm at first glance, like sports,<sup>337</sup> entertainment,<sup>338</sup> or international affairs,<sup>339</sup> routinely involve legal issues, and frequently center on them.

The legal world offers great promise to the news industry. It distills complex social conflicts into much more narrow, comprehensible form: the plaintiff on Side A, the defendant on Side B, the trial court deciding it first, and the appellate courts deciding it later. It provides a neat, confined forum to cover: read the filings, look at the documents, watch the court proceedings, and follow the judicial decision. But it is also a subject with many pitfalls. The very narrowness of the legal world, with its comforting transparency and consistency, makes it a difficult subject to capture accurately for a lay audience.<sup>340</sup> Legal proceedings are esoteric things: the terms are precise,<sup>341</sup> the procedures highly technical,<sup>342</sup> and, perhaps most importantly, the relationship between the Court and the outside world can be difficult to discern. It is a relationship that requires intense attention to detail accompanied by great care, caution, and expertise. As this article demonstrates, even the best correspondents can stumble in such terrain, even while covering the part of the legal world that is most predictable, transparent, and publicly understood.<sup>343</sup> The damage can be far worse in stories on more inaccessible legal proceedings.<sup>344</sup> But this article also demonstrates that there are a number of straightforward, manageable

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337. See, e.g., *NFL Players File Antitrust Suit against League as Owners Lock out Players*, FOXNEWS (Mar. 12, 2011), <http://www.foxnews.com/sports/2011/03/11/nfl-labor-talks-continue/>.

338. See, e.g., Bob Van Voris, *Citigroup Verdict over Guy Hands's Terra Firma Thrown Out*, BLOOMBERG (May 31, 2013), <http://www.bloomberg.com/news/2013-05-31/citigroup-verdict-over-guy-hands-s-terra-firma-thrown-out.html>.

339. See, e.g., Bruno Waterfield, *Serbian Security Chiefs Acquitted of War Crimes by UN Judges*, TELEGRAPH (May 30, 2013), <http://www.telegraph.co.uk/news/worldnews/europe/serbia/10089709/Serbian-security-chiefs-acquitted-of-war-crimes-by-UN-judges.html>.

340. Elliot E. Slotnick, *Media Coverage of Supreme Court Decision Making: Problems and Prospects*, 75 JUDICATURE 128, 130 (1991).

341. Alice Koskela, *Conversion, Consideration, and Demise: Why We Need the Media Guide to the Idaho Courts*, ADVOCATE, Dec. 2005, at 16.

342. See generally FED. R. CIV. P.

343. See *supra* Part III.

344. For a particularly egregious example, see Thomas Erdbrink, *A Founder of the Revolution is Barred From Office, Shocking Iranians*, N.Y. TIMES (May 21, 2013), <http://www.nytimes.com/2013/05/22/world/middleeast/iranians-await-list-of-approved-candidates.html> (reporting on the decision to exclude a candidate from an election without once mentioning who made the decision or for what announced reason). Indeed, it is troubling that stories on legal proceedings in the developing world so often omit the most basic details regarding the tribunal, the arguments, the controlling law, and so on, *see id.*, while stories on legal proceedings in the West typically include at least a rudimentary discussion of each of those things. See, e.g., Henry Chu, *Germany's Constitutional Court Upholds Eurozone Bailout*, L.A. TIMES (Sept. 7, 2011), <http://articles.latimes.com/2011/sep/07/world/la-fgw-german-ruling-20110907>. The gap could easily lead the reader to assume that the former proceedings are corrupt and political and the latter proper and lawful, though he would have no firm evidence upon which to base that conclusion.

policies that could do immense good.<sup>345</sup> All of us, lawyers included, will understand our world a little better if they are adopted.

#### TABLE I: THE SAMPLE

The following is a list of all the newspaper articles from the sample discussed above,<sup>346</sup> organized by periodical and date of publication.

##### USA TODAY

- Richard Wolf, *Supreme Court Blocks Challenge to Anti-Terrorism Law*, USA TODAY (Feb. 26, 2013), <http://www.usatoday.com/story/news/2013/02/26/supreme-court-wiretapping-surveillance-foreign-intelligence/1948569/>.
- David Jackson & Richard Wolf, *High Court Rules against Drug-Sniffing Dog Search*, USA TODAY (Mar. 26, 2013), <http://www.usatoday.com/story/news/2013/03/26/supreme-court-dog-sniffing-drug-case/2020743/>.
- Richard Wolf, *Justices Decline N.Y. Case Restricting Guns in Public*, USA TODAY (Apr. 15, 2013), <http://www.usatoday.com/story/news/nation/2013/04/15/supreme-court-guns-new-york-law/2083907/>.
- Richard Wolf, *High Court Wants Warrants before Testing Drivers' Blood*, USA TODAY (Apr. 17, 2013), <http://www.usatoday.com/story/news/nation/2013/04/17/supreme-court-drunk-driving-police-blood-test-alcohol-warrant/2091309/>.
- Richard Wolf, *Supreme Court Won't Take Up Alabama Immigration Law*, USA TODAY (Apr. 29, 2013), <http://www.usatoday.com/story/news/2013/04/29/supreme-court-immigration-alabama/2120529/>.
- Richard Wolf, *Court Says States Can Restrict Access to Public Records*, USA TODAY (Apr. 29, 2013),

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345. See *supra* Part IV.

346. See *supra* Part II (defining the sample). Newspaper articles from outside the sample that are mentioned above are excluded. See, e.g., *supra* notes 293-295 (citing articles in other publications to support ancillary points).

<http://www.usatoday.com/story/news/politics/2013/04/29/supreme-court-virginia-public-records-access/2120761/>.

- Richard Wolf, *Supreme Court Sides with Monsanto in Major Patent Case*, USA TODAY (May 13, 2013), <http://www.usatoday.com/story/news/nation/2013/05/13/monsanto-patent-grain-biotechnology-soybeans-supreme-court/2116333/>.

#### NEW YORK TIMES

- Adam Liptak, *Case Asks When New Evidence Means a New Trial*, N.Y. TIMES (Nov. 12, 2012), <http://www.nytimes.com/2012/11/13/us/post-trial-evidence-is-issue-in-supreme-court-case.html>.
- Adam Liptak, *It May Float, but a Home Isn't a Boat, Justices Rule*, N.Y. TIMES (Jan. 15, 2013), <http://www.nytimes.com/2013/01/16/us/floating-home-like-pinocchio-in-the-whale-is-not-a-vessel-justices-rule.html>.
- Adam Liptak, *Justices Take Case on Overall Limit to Political Donations*, N.Y. TIMES (Feb. 19, 2013), <http://www.nytimes.com/2013/02/20/us/politics/supreme-court-to-hear-campaign-finance-case.html?pagewanted=all>.
- Adam Liptak, *Supreme Court Limits Reach of 2010 Ruling on Deportation Warning*, N.Y. TIMES (Feb. 20, 2013), <http://www.nytimes.com/2013/02/21/us/supreme-court-limits-ruling-on-deportation-warning.html>.
- Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-law.html>.
- Adam Liptak, *Justices Back Loggers in Water Runoff Case*, N.Y. TIMES (Mar. 20, 2013), <http://www.nytimes.com/2013/03/21/us/justices-say-oregon-loggers-dont-need-permits-for-water-runoff.html>.
- Adam Liptak, *Justices, Citing Ban on Unreasonable Searches, Limit Use of Drug-Sniffing Dogs*, N.Y. TIMES (Mar. 26, 2013),

<http://www.nytimes.com/2013/03/27/us/justices-limit-use-of-drug-sniffing-dogs.html>.

- Adam Liptak, *Supreme Court Rules in Favor Of 1 Worker, but Not Another*, N.Y. TIMES (Apr. 16, 2013), <http://www.nytimes.com/2013/04/17/business/supreme-court-rules-on-2-employee-employer-disputes.html>.
- Adam Liptak, *Justices Bar Nigerian Human Rights Case from U.S. Courts*, N.Y. TIMES (Apr. 17, 2013), [http://www.nytimes.com/2013/04/18/us/justices-bar-us-suit-in-nigerian-human-rights-case.html?\\_r=0](http://www.nytimes.com/2013/04/18/us/justices-bar-us-suit-in-nigerian-human-rights-case.html?_r=0).
- Adam Liptak, *Court Says Police Need Warrant for Blood Test*, N.Y. TIMES (Apr. 17, 2013), <http://www.nytimes.com/2013/04/18/us/court-rules-warrants-are-needed-to-draw-blood-in-drunken-driving-cases.html>.
- Adam Liptak, *Court Rules for Immigrant on Deportation in Drug Case*, N.Y. TIMES (Apr. 23, 2013), [http://www.nytimes.com/2013/04/24/us/supreme-court-ruling-on-marijuana-and-deportation.html?\\_r=0](http://www.nytimes.com/2013/04/24/us/supreme-court-ruling-on-marijuana-and-deportation.html?_r=0).
- Adam Liptak, *Supreme Court Backs State Restrictions on Who Can Ask for Information*, N.Y. TIMES (Apr. 29, 2013), [http://www.nytimes.com/2013/04/30/us/justices-back-state-restrictions-on-information-requests.html?ref=adamliptak&\\_r=1&](http://www.nytimes.com/2013/04/30/us/justices-back-state-restrictions-on-information-requests.html?ref=adamliptak&_r=1&).
- Adam Liptak, *Justices Take Case on Prayer at Town Board Meetings, and a Patent Dispute*, N.Y. TIMES (May 20, 2013), [http://www.nytimes.com/2013/05/21/us/politics/justices-take-case-on-prayer-at-town-board-meetings.html?\\_r=1&](http://www.nytimes.com/2013/05/21/us/politics/justices-take-case-on-prayer-at-town-board-meetings.html?_r=1&).
- Adam Liptak, *Justices Allow DNA Collection After an Arrest*, N.Y. TIMES (June 3, 2013), [http://www.nytimes.com/2013/06/04/us/supreme-court-says-police-can-take-dna-samples.html?\\_r=0](http://www.nytimes.com/2013/06/04/us/supreme-court-says-police-can-take-dna-samples.html?_r=0).
- Adam Liptak, *Justices Decline Case on Graphic Abortion Images*, N.Y. TIMES (June 10, 2013), [http://www.nytimes.com/2013/06/11/us/justices-decline-case-on-graphic-abortion-images.html?\\_r=0](http://www.nytimes.com/2013/06/11/us/justices-decline-case-on-graphic-abortion-images.html?_r=0).

- Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html?pagewanted=all>.
- Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES (June 26, 2013), [http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all&_r=0).

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- Brent Kendall, *Court Curbs Drug-Sniffing Dogs*, WALL ST. J. (Mar. 26, 2013), <http://online.wsj.com/article/SB10001424127887324105204578384561455435192.html?KEYWORDS=kendall+scrambled>.
- Jess Bravin, *Justices Limit law's Reach for Acts Overseas*, WALL ST. J. (Apr. 17, 2013), <http://online.wsj.com/article/SB10001424127887323809304578428653861267098.html?KEYWORDS=bravin+nigeria>.
- *High Court Rejects Tobacco Marketing Appeal*, WALL ST. J. (Apr. 22, 2013), <http://online.wsj.com/article/AP384b0b837f5e4506a7bf52405db212b5.html?KEYWORDS=%22rejected+a+first+amendment+challenge%22>.
- Jess Bravin, *Virginia Records Rule Upheld by High Court*, WALL ST. J. (Apr. 29, 2013), <http://online.wsj.com/article/SB10001424127887323798104578453300289567938.html?KEYWORDS=bravin>.
- Miriam Jordan, *Justices Rebuff Alabama Over Immigration Law*, WALL ST. J. (Apr. 29, 2013), <http://online.wsj.com/article/SB10001424127887323982704578453123678098556.html?KEYWORDS=jordan+court+alabama+immigration>.
- Jacob Bunge & Brent Kendall, *Supreme Court Denies Appeal on Options Dispute*, WALL ST. J. (May 13, 2013), <http://online.wsj.com/article/SB1000142412788732371630457848>

0963109693222.html?KEYWORDS=%22denies+appeal+on+options+dispute%22.

- Jess Bravin, *FCC can Set Deadlines for Cell Tower Applications*, WALL ST. J. (May 20, 2013), <http://online.wsj.com/article/SB10001424127887324102604578495153284551388.html?KEYWORDS=supreme+court+fcc+chevron>.
- Brent Kendall, *Supreme Court Backs Couple in 'Baby Veronica' Adoption Case*, WALL ST. J. (June 25, 2013), <http://online.wsj.com/article/SB10001424127887323998604578567911903251562.html?KEYWORDS=%22brent+kendall%22>.
- Jess Bravin, *Historic Win for Gay Marriage*, WALL ST. J. (June 26, 2013), <http://online.wsj.com/article/SB10001424127887324520904578553500028771488.html?KEYWORDS=%22brent+kendall%22>.