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A Failure to Communicate

*Erwin Chemerinsky**

On Tuesday night, December 12, 2000, at about 10:00 p.m. eastern time, the Supreme Court released its decision in *Bush v. Gore*.¹ We all vividly remember the image of reporters standing outside the Supreme Court fumbling with copies of the opinion and trying to figure it out while speaking. Some got it badly wrong. In hindsight, it was a monumental failure to communicate by the Court. The public learned that night that the Court had ruled in favor of Bush, but there was not a clear explanation of why. This helped to fuel, though certainly was not entirely responsible for, the sense that the Court decided the outcome of the presidential election on a partisan basis.

Bush v. Gore, of course, is an extreme and obvious example of the Court failing to communicate effectively with the American people. Yet in a sense, history repeated itself in June 2012, when CNN and Fox News initially reported that the Supreme Court had declared unconstitutional the individual mandate in the Patient Protection and Affordable Care Act.² This was arguably the most anticipated, and perhaps the most important, Supreme Court decision since *Bush v. Gore*, and two major media outlets got it wrong and misinformed the American public.³

Although these errors in reporting are not typical and the press certainly deserves a great deal of the blame for hasty and inaccurate reporting, they reflect a larger problem. The United States Supreme Court has a serious failure in communicating with the American public.

In explaining this, I want to make three points. First, I want to describe why I believe that effective, clear communication by the Supreme Court is so important for the law and for society. Second, I

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1. 531 U.S. 98 (2000).

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

3. See Katherine Fung & Jack Mirkinson, *Supreme Court Health Care Ruling: Fox News Wrong on Individual Mandate*, HUFFINGTON POST (June 28, 2012), http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate_n_1633950.html; Tom Goldstein, *We're Getting Wildly Different Assessments*, SCOTUSBLOG, (July 7, 2012), <http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments>.

want to identify ways in which the Supreme Court fails to communicate effectively. Finally, I want to offer some suggestions to improve the Court's communications.

I. THE IMPORTANCE OF EFFECTIVE COMMUNICATION BY THE SUPREME COURT

A starting point in discussing communication by the Supreme Court is to ask, why does it write opinions at all? Neither legislatures nor executives are required to give reasons for their decisions, though reasons are often given. But the expectation is that when the Supreme Court decides a case, there will be a written opinion explaining the rationale. A written opinion serves many functions.⁴

A judicial opinion provides an explanation to the parties and their attorneys as to why a court came to its conclusion. Perhaps this is less important at the Supreme Court, but judicial opinions at all levels of courts are a way in which judges make it seem that their rulings are not arbitrary and they tell the parties why they won or lost. A large percentage of opinions issued by lower courts are not published and therefore exist solely to explain the rationale for the decisions to the litigants. Judicial opinions are also thought to improve decision making. The need to write out a rationale requires more careful thought than simply announcing a result; there may be instances in which judges change their minds when they try to write out an explanation for their decisions. Also, written opinions increase the legitimacy of a court's decisions for both the litigants and society; the result seems less arbitrary when reasons are given for it. For the Supreme Court, and for appellate courts more generally, written opinions provide guidance for lower courts and for government officials who must adhere to the decisions. In a common-law system, where precedent is given weight, written opinions facilitate this; it is hard to imagine *stare decisis* without written opinions.⁵

It is possible, then, to identify many audiences for Supreme Court decisions. The effectiveness of the Court's communication can be assessed relative to each of these audiences.

One audience, of course, is the parties. In a criminal case, an opinion for the government explains to a person why he or she will be

4. I examine this more fully in Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010–22 (2002).

5. For an argument that the Supreme Court follows a common-law approach to developing constitutional law, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

imprisoned or even executed. In a civil case, an opinion explains why people win or lose money or whether their interests are protected by the Constitution. Yet, in reading opinions, there is little explicit recognition that the parties are an audience for the opinions. Supreme Court opinions, like those of every court, are densely written, often using legal jargon and technical language. This may be necessary to meet the needs of other audiences, but it also means that the opinions will be difficult for many of the parties to understand.

A second audience for Supreme Court opinions is the press and, through them, the public. My sense is that relatively few in the public actually read the Supreme Court's opinions. The public thus learns of the Court's actions through the press. I would guess that a very small percentage of the American public, or even lawyers, read the Supreme Court's 193-page opinion concerning the constitutionality of the Affordable Care Act. People learned what the Court did and why from the media.

A third audience is the scholarly community. The Justices know that their opinions will be carefully read by academics who will write about them. Justices may be publicly disdainful of law review articles,⁶ but they also know that there will be scholarly attention to their judicial opinions. It is hard for me to believe that the Justices are totally indifferent as to how their opinions are analyzed, praised, and criticized. After all, four of the current Justices—Antonin Scalia, Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan—were primarily academics before going on to the bench.

A fourth audience, and one of the most important for Supreme Court opinions, is the lower courts that must follow them and apply them to future cases. This imposes a crucial duty on the Court to write its opinions to provide guidance to lower courts.

A fifth audience is the government officials who must apply and follow the Court's rulings. Because of the state action doctrine, constitutional decisions virtually always involve the government as one of the parties. Government officials at all levels must understand the Supreme Court's decisions and follow them in future actions. This imposes an important duty on the Court to write opinions in a way that guides these officials as to what is permissible and what is not allowed.

6. See, e.g., Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J.L. BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more> (Chief Justice Roberts saying that he rarely reads law review articles).

Sometimes, such as in criminal procedure cases, the audience is the police who need guidance as to what is permissible investigative behavior. Sometimes, the audience is the legislature that needs to be guided as to what future laws in the area are permissible and will not be struck down.

Finally, it is important to see the Court in subsequent cases and the Justices in the future as a crucial audience for Supreme Court opinions. As explained above, in a system based on precedent, judicial opinions are crucial. The Justices are aware that the language of their opinion shapes the law and future decisions. Concurring and dissenting opinions seem to be often written with the hope of influencing future cases.

Having identified the purposes of judicial opinions and the audiences for them, it is then possible to assess the effectiveness of the Court's communication in achieving these goals and in meeting the needs of these audiences.

II. "WHAT WE GOT HERE IS A FAILURE TO COMMUNICATE"⁷

At every stage of the process—taking and denying cases, hearing cases, releasing decisions, and writing opinions—the Supreme Court fails to effectively communicate.

A. Granting and Denying Review

In October Term 2011, the Supreme Court decided sixty-five cases after briefing and oral argument.⁸ The Court has over 10,000 petitions for review each year.⁹ Therefore, the Supreme Court's decision in the overwhelming majority of cases is a loss for the party seeking certiorari. I realize, of course, that the denial of certiorari is not a decision on the merits, but for the lawyer and the party it is often the end, the final loss.¹⁰

The Supreme Court never gives reasons why it is denying certiorari. Usually only an order is issued, though occasionally there will be a

7. This, of course, is a famous line from the movie, *COOL HAND LUKE* (Warner Bros. Pictures 1967).

8. Kedar Bhatia, *Final October Term 2011 Stat Pack and Summary Memo*, SCOTUSBLOG (June 30, 2012, 7:59 PM), <http://www.scotusblog.com/2012/06/final-octo-ber-term-2011-stat-pack-and-summary-memo>.

9. PUBLIC INFORMATION OFFICE, *A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES* 15 (2010).

10. In criminal cases from state courts, there is the possibility of a habeas corpus petition in federal district court.

dissent from the denial of certiorari or an opinion respecting the denial of certiorari. The lawyers and the parties are left to guess as to why they lost. Sometimes it is possible to speculate that the Court did not take a matter because there was not a split among the lower courts, or the Court wanted to wait for the issue to further “percolate,” or there was not a significant federal question. But there are so many instances from virtually every conference where the Court denies certiorari despite the presence of a split among the circuits and in cases presenting important, unresolved issues of federal law.

As a lawyer who so many times has been in this situation, including in capital cases, the denial of certiorari is intensely frustrating. It feels arbitrary because no reason is given or even hinted. All of the benefits of written opinions described above are missing. A decision has been made—the Court has decided not to take the case and thus the lower court ruling stands—but it seems arbitrary and there is nothing to say to a client, even one facing life in prison or death, except that the Court takes few cases and didn’t take his or hers.

B. Hearing Cases

Supreme Court proceedings, of course, are government events and there should be a strong presumption that people should be able to watch government proceedings.¹¹ Arguments in the Supreme Court always have been open to the public, but relatively few can attend in person. There are only 250 seats and people literally camp out all night, or for even longer, to be able to attend arguments in high-profile cases.

Broadcasting Supreme Court arguments would allow the entire nation to watch a crucial branch of government at work. Allowing broadcasts of Supreme Court arguments would help society understand the issues before the Court. For example, many thought that the central question before the Court with regard to the Affordable Care Act was whether people had a right to not purchase health insurance. That, of course, was not the issue at all; the Court’s focus was entirely on the scope of congressional power and the ability to force states to comply with federal requirements. Hearing the oral arguments would have made this much clearer for people.

Also, broadcasting Supreme Court arguments would help society understand the judicial process. The reality is that cases are heard in the

11. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (press and the public have a First Amendment right to attend criminal trials).

Supreme Court because there is no clear right or wrong answer; every case presents a choice and rarely, if ever, does the Court hear a case where there are not reasonable arguments on each side. Allowing people to listen and watch oral arguments would make this clear and apparent.

And broadcasting arguments would allow people to better understand the Court. They would see that cases are heard and decided by nine human beings, each with their own personalities. I believe that people of all political persuasions would be impressed and see that the Court is comprised of nine very intelligent individuals who work very hard to decide cases based on their best understanding of the law.

Unfortunately though, the Supreme Court's rules prohibit live broadcasting of oral arguments. I always have been struck that many of the arguments against allowing cameras in the courtroom are really arguments against allowing the public and reporters to be there at all, something that is thankfully unthinkable as well as unconstitutional.

At least since *Bush v. Gore*, the Supreme Court has on occasion, in high-profile cases, allowed broadcasting of the audiotapes of oral arguments immediately after they conclude. This occurred most recently after the oral arguments concerning the constitutionality of the Patient Protection and Affordable Care Act. C-SPAN has taken advantage of this opportunity, broadcasting the audiotapes as soon as they become available and showing still photographs of the Justices and advocates as their voices are heard. But if people can hear the tapes just minutes after the arguments conclude, it is impossible to see the harm in allowing them to see the proceedings live just an hour earlier.

What possible rationale is there for excluding cameras from Supreme Court proceedings?¹² One concern is that broadcasting oral arguments will change the behavior of lawyers and Justices. Perhaps that concern has some basis in trial courts where there is worry about the effect of cameras on witnesses. Even there, however, the experience of many jurisdictions with cameras in the courtrooms and many studies refute any basis for concern.

Especially in the Supreme Court, however, there seems little basis for worry. The lawyers, who are focused on answering intense

12. The primary advocate among academics against cameras in the Supreme Court has been Professor Nancy Marder. See, e.g., Nancy Marder, *Sunday Dialogue: Putting the Justices on TV*, N.Y. TIMES (Dec. 11, 2011), http://www.nytimes.com/2011/12/11/opinion/sunday/sunday-dialogue-putting-the-justices-on-tv.html?pagewanted=all&_r=0.

questioning from the Justices, are unlikely to alter their arguments to play to the cameras. Besides, anyone who has witnessed a Supreme Court argument knows that the Justices are firmly in control of the proceedings. Justices and lawyers know that the arguments, especially in high-profile cases, are going to be extensively covered in the media and that audiotapes will be publicly available. In this context, there is no reason why live broadcasting will change behavior.

I have heard Justices express concern that if television cameras were allowed, the media might broadcast excerpts that offer a misleading impression of oral arguments and the Court. But that is true when any government proceeding is taped or even when reporters cover any event. A newspaper or television reporter could quote a Justice's question or a lawyer's answer out of context. The Justices might be afraid that an excerpt of oral argument might appear on Jon Stewart or Jay Leno and be used for entertainment purposes; perhaps they will even be mocked. But that is a cost of being a democratic society and of holding a prominent position in government. In no other context would Supreme Court Justices say that government officials can protect themselves from possible criticism by cutting off public access.

Indeed, the Court's decision to preclude live broadcasts seems to be about protecting its own credibility. Over a decade ago, there was a panel discussion at the Ninth Circuit Judicial Conference about cameras in the courtroom. Fred Graham from Court TV challenged Justice Stephen Breyer as to why Supreme Court proceedings could not be broadcast. Justice Breyer responded by indicating that the public approval ratings of the Court were high compared to the other branches of government.¹³

But this mistakenly blames the messenger. There is no reason to believe that the Supreme Court's legitimacy is helped by prohibiting live broadcasts. Quite the contrary, I believe that the Court's credibility only will be enhanced if more people see the Justices at work. Anyone who watches a Supreme Court argument will see nine highly intelligent, superbly prepared individuals grappling with some of the nation's hardest questions. The public will see, too, that there are no easy answers to most constitutional questions and that there are usually compelling arguments on both sides. That can only increase

13. Professor Marder echoes this argument. *See id.*

the public's understanding of the law and its appreciation for the Court.

C. The Release of Decisions

From a communications perspective, there are many problems with how the Supreme Court releases its decisions. First, the Court gives no notice as to which cases will be announced on which day. Unless it is the last day of the term, in which case all the remaining decisions are expected, there is no way to know what cases will come down on any day. I never have understood why the Court can't announce, say the day before, which cases will be handed down. The California Supreme Court does this, and I never have seen any problem with it. Giving prior notice will allow reporters and commentators to be better prepared; they can review the cases that are about to be handed down and be in a better position to discuss them. Especially in a world where instant reporting and instant commenting occurs, better advance preparation can only help in more accurately informing the public.

Second, when the Court announces a decision, there is no clear, intelligent summary of the decision. I always have thought that a decision should be accompanied by a paragraph description of what the Court did. Like the syllabus that accompanies a decision, this would not be authoritative or part of the decision. Providing such a summary could avoid the mistaken reports that occurred when the Affordable Care Act decision was released. It would have been easy to have a paragraph that said: "The individual mandate was upheld, by a 5-4 margin, as a valid exercise of Congress's taxing power. Five Justices said that the individual mandate was not within the scope of Congress's commerce power or necessary and proper clause authority. The Court ruled 7-2 that forcing states to comply with the new Medicaid requirements by tying all Medicaid funds to compliance was unduly coercive." The description could have been more elaborate than this, but even a paragraph summary like this would help tremendously.

Third, there is no broadcast of the announcing of decisions. Justices announce their decisions from the bench, often briefly, sometimes in detail. Occasionally, dissents are read from the bench, often quite dramatically. Sometimes Justices say things in these oral pronouncements that are not in the written opinions. I do not understand why the announcing of decisions is not broadcast. As explained above, the primary argument against cameras in the Supreme Court is that it will

adversely affect behavior of lawyers and judges. This concern has no basis if all the Justices are doing is announcing their decisions.

Fourth, too many decisions are announced per day at the end of the term. Often during the last week of the term, multiple decisions are announced on a couple of days, such as in 2012 on Monday, June 25, and Thursday, June 28. In some years, several major, enormously important cases came down on the last day of the term. Having multiple major cases on the same day makes it harder for reporters to cover and harder for people to understand what the Court has done. Why not have the decisions spread out more that week, releasing one or two decisions each day of the week, rather than multiple decisions on a couple of days? This would allow for more in-depth reporting and greater understanding on the part of the public.

D. Supreme Court Opinions

Obviously, it would be easy to wish that more Justices wrote like Robert Jackson or Louis Brandeis. But beyond that, there are ways in which Court opinions fail to adequately communicate.

First, they have become much too long and thus far more difficult for lower courts and government officials to read and rely upon. Adam Liptak wrote of how the October 2009 Term set the all-time record for length of opinions.¹⁴ Liptak wrote:

Brown v. Board of Education, the towering 1954 decision that held segregated public schools unconstitutional, managed to do its work in fewer than 4,000 words. When the Roberts court returned to just an aspect of the issue in 2007 in *Parents Involved v. Seattle*, it published some 47,000 words, enough to rival a short novel. In more routine cases, too, the court has been setting records. The median length of majority opinions reached an all-time high in the last term.¹⁵

The opinions have not gotten shorter since then. The decision in the Affordable Care Act case was 193 pages long. Opinions over 100 pages long occur in far less prominent cases too.¹⁶ I long have believed that the

14. Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1.

15. *Id.*

16. See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (noting that the admission of expert testimony about the results of DNA testing performed by nontestifying analysts did not violate the Confrontation Clause, even when the defendant has no opportunity to confront the actual analysts, because the laboratory report here was deemed to be nontestimonial).

Court would benefit from word and page limits, like those imposed on litigants.

Second, too often the Court fails to give guidance for the lower courts that will need to follow its decisions. As explained above, this is one of the most important audiences for the Court. Yet, I often have had the sense that the Court does not focus nearly enough on the need for clarity to guide lower court judges. Examples are plentiful. In *Crawford v. Washington*, the Court significantly changed the rules of evidence in criminal trials, holding that prosecutors could not use “testimonial” statements of unavailable witnesses, even if they are reliable.¹⁷ The issue of what is “testimonial” was then something that would arise constantly in state and federal trial courts across the country. But the Court made no effort to give guidance to the lower courts and define it.

Another example comes from the area of civil litigation: *Philip Morris USA v. Williams*.¹⁸ For the third time in eleven years, the Court imposed constitutional limits on punitive damage awards.¹⁹ *Philip Morris*, though, seemed to go further than the earlier rulings in restricting punitive damages. The Supreme Court, in a 5–4 decision, held that juries cannot base punitive damage awards on harms to third parties other than the plaintiffs in the suit.²⁰ However, the Court qualified this holding by saying that juries may consider harm to third parties in assessing the reprehensibility of the defendant’s conduct,²¹ which the Court says is the most important factor in determining the size of a punitive damage award.²²

Trial judges are likely to struggle for years as to how to formulate jury instructions that simultaneously tell the jury to consider and not to consider harms to others besides the plaintiffs. Appellate courts are left with little guidance as to when punitive damage awards are allowed and when they are unconstitutional. Juries can consider harm to others in determining reprehensibility, but cannot base punitive damages on the

17. 541 U.S. 36 (2004).

18. 549 U.S. 346 (2007).

19. *Id.* at 353. The earlier cases were *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

20. *Philip Morris*, 549 U.S. at 356–57.

21. *Id.* at 357.

22. *Id.* at 363 (Ginsburg, J., dissenting); see also *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 419 (“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” (alteration in original) (citations omitted)).

harm to others. How can a court of appeals possibly determine whether the punitive damage award violates this command?

Finally, I believe that the increasing use of sarcasm and even ridicule in judicial opinions is undesirable. No Justice in Supreme Court history has consistently written with the sarcasm of Justice Scalia. No doubt, this makes his opinions among the most entertaining to read. He has a great flair for language and does not mince words when he disagrees with a position. But I think that this sends exactly the wrong message to law students and attorneys about what type of discourse is appropriate in a formal legal setting and how it is acceptable to speak to one another.

Examples of this abound; consider a few. In dissenting opinions, Justice Scalia describes the majority's approaches as "nothing short of ludicrous" and "beyond the absurd,"²³ "entirely irrational,"²⁴ and not "pass[ing] the most gullible scrutiny."²⁵ He has declared that a majority opinion is "nothing short of preposterous" and "has no foundation in American constitutional law, and barely pretends to."²⁶ He talks about how "one must grieve for the Constitution" because of a majority's approach.²⁷ He calls the approaches taken in majority opinions "preposterous,"²⁸ and "so unsupported in reason and so absurd in application [as] unlikely to survive."²⁹ He speaks of how a majority opinion "vandaliz[es] . . . our people's traditions."³⁰ In a recent dissent, Justice Scalia declared:

Today's tale . . . is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort.³¹

23. *Lee v. Weisman ex rel Weisman*, 505 U.S. 577, 637, 638 (1992) (Scalia, J., dissenting).

24. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting).

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

26. *Romer v. Evans*, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting).

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

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

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

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

31. *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting).

I do not deny that such language makes for entertaining reading. But I believe it is a terrible model for law students and lawyers as to how to write. Such sarcasm and ridicule adds nothing of substance and is not the way we should want our judges, our attorneys, and our law students to communicate.

III. PROPOSALS FOR REFORM

My suggestions for improving communication by the Supreme Court are implicit in the above criticisms. To be explicit,

1. The Court should offer brief reasons for denying certiorari. Any explanation would be better than nothing. Perhaps it could even be a sentence, "Certiorari denied because of the lack of an adequate split among the lower courts," or "Certiorari denied because of perceived procedural problems in the case." I am not optimistic that the Court will ever do this, because it is additional work and because it is assuming that there is a consensus among the Justices who denied certiorari. Yet, from the perspective of lawyers and parties who have lost what is often their final chance, some explanation would be tremendously helpful and appreciated.

2. All Supreme Court public proceedings should be broadcast. This includes oral arguments and the announcement of decisions and anything else done in open court.

3. The Court should announce a day in advance which cases will come down on the following day.

4. There should be a paragraph or two released along with decisions summarizing the Court's decisions. These would not be authoritative and would have no precedential value. In this way, it would be the same as the syllabus now released, with just the additional paragraph or two to help clarify.

5. The Court should spread out its release of decisions during the last weeks of the term. There is no reason why decisions cannot come out on four or five days of those weeks rather than on a couple of days.

6. There should be presumptive word and page limits for Supreme Court opinions. The Court, in fact all courts, believe that the discipline of word and page limits leads to better briefs. The same is true for the Court.

IV. CONCLUSION

For better or worse, the Supreme Court gets the last word on so many of the issues that are among the most important and controversial

in American society. In just these couple of years, the Court has been and will be deciding the fate of state immigration laws, such as Arizona's SB 1070, the constitutionality of the Affordable Care Act, whether colleges and universities can use race as a factor in admissions decisions, and likely whether there is a right to marriage equality for gays and lesbians. Yet most people have far less sense of the Court than other institutions of American government. In part, this is because of the Court's serious failure to communicate. There are many simple steps that can be taken to improve communication by the Court. But do the Justices care? Will they be willing to consider changing practices that have long been followed? Can they look at these issues not just from their perspective, but from that of the lawyers, judges, journalists, scholars, and public who read their opinions? I am not optimistic.

