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## Enough Said: A Proposal for Shortening Supreme Court Opinions

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# Enough Said: A Proposal for Shortening Supreme Court Opinions

Meg Penrose

“Brevity is the soul of wit.” — William Shakespeare<sup>1</sup>

Are the United States Supreme Court Justices effective legal writers? Economical with language? Clear? Mindful of reader needs? Few have addressed this subject directly.<sup>2</sup> Most scholarship focuses on case results, ideology, and perceived analytical lapses without considering whether the Court’s opinions are well written. Yet the question merits attention — serious attention — with an emphasis on efficacy rather than on ideology or outcome.

The Justices have written about effective writing.<sup>3</sup> They have made *their* case about the need for accuracy, brevity, and clarity from litigants.<sup>4</sup> The Court’s own rules demand nothing less.<sup>5</sup> But do the Justices heed their own advice? Nearly all the current Justices have complained about the length and verbosity of Supreme

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<sup>1</sup> Hamlet, Act 2, scene 2, 86–92.

<sup>2</sup> *But see* Norman E. Plate, *Do As I Say, Not As I Do: A Report Card on Plain Language in the United States Supreme Court*, 13 T.M. Cooley J. Prac. & Clinical L. 80 (2010) (providing one of the few qualitative assessments grading the Justices’ writing); *see also* Richard A. Posner, *Reflections on Judging* 40–41 (2013) (who, based on his student-teaching experience at Harvard, would give the current Justices “higher grades in a freshman composition course” than the Justices of the 1960s).

<sup>3</sup> *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008).

<sup>4</sup> *Id.* at 23–24; *see also* Interviews with United States Supreme Court Justices, 13 Scribes J. Legal Writing 1, 22, 50, 51–54, 82–83, 96, 102, 119–21, 127, 133–34, 137, 165, 166–67, 170–71, 173–74 (2010).

<sup>5</sup> U.S. Sup. Ct. R. 14.

Court briefs.<sup>6</sup> And yet the *average* Supreme Court opinion, including concurrences and dissents, is longer than the Constitution.

This should change. The Justices should lead by example. Run-on opinions tax readers, can leave the law unclear or unsettled, and strain the Court's credibility given its strict word limits for litigants. Lengthy opinions also send a bad message to new generations of lawyers. After all, law students' primary method of learning constitutional law begins with reading Supreme Court opinions, often prolix,<sup>7</sup> to discern "what the law is."<sup>8</sup> By writing lengthy opinions, Justices perpetuate the same legal-writing habits that they bemoan. And this persists despite the numerous calls, spanning over a century, for shorter, clearer opinions.

By this article's end, I hope to have convinced you — and the Court — that Justices should adhere to existing Supreme Court rules that limit the length of litigants' filings. Whether by internal rule or informal agreement, the Justices should avoid drafting opinions that rival novels in length. Change is needed. Now.

### Supreme Length: Opinions Rivaling Novels

For decades, Americans — including Supreme Court Justices — have decried the verbose complexity of judicial opinions.<sup>9</sup> The

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<sup>6</sup> See Justice Interviews, 13 *Scribes J. Legal Writing* at 35, 50, 53, 102, 119–20, 137, 167, 174.

<sup>7</sup> Bryan A. Garner, *The Elements of Legal Style* 2 (2d ed. 2002) (We lawyers "have a history of wretched writing, a history that reinforces itself every time we open the lawbooks.").

<sup>8</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and the duty of the Judicial Department to say what the law is."); see Interview with Chief Justice John G. Roberts Jr., 13 *Scribes J. Legal Writing* 5, 10–11 (2010).

<sup>9</sup> See Robert Kingsley, *The Length of Judicial Opinions*, 17 *Mass. L.Q.* 28 (1931).

substance of the criticism has not changed.<sup>10</sup> It has remained consistent and untempered. It continues today.

As early as 1939, the President of the American Bar Association lamented:

The increased complexity of modern society does not call for increased cumbersomeness in judicial opinions . . . . [S]ince the invention of stenography and of dictating machines, and since employment of high-speed typists and industrious legal secretaries, these opinions are steadily and rapidly getting longer and longer . . . . If the judges would use fewer words, they would not only reduce our law book bill: they would also make it easier for us to find out what their opinions mean.<sup>11</sup>

This was nearly 80 years ago, before the computer, the Internet, the cert pool, and the increasing numbers of judicial law clerks. One can only imagine President Beardsley's reaction to opinions that are now longer than many of Shakespeare's plays and numerous classic American novels.

Much more recently, legal-writing expert Bryan Garner made a similar appeal for concise, clear judicial opinions: "The field of law would benefit if we had shorter judicial opinions — as opposed to opinions bloated with hand-wringing dicta that only obscure the law."<sup>12</sup>

Despite its own calls for shorter briefs, including mandating change through the Federal Rules of Appellate Procedure, the

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<sup>10</sup> See, e.g., Abner J. Mikva, *Goodbye to Footnotes*, 56 *Colo. L. Rev.* 647, 647 (1985) ("Judicial opinions (at which Professor Rodell took a very heft sideswipe) have not changed except to become even longer and more numerous.").

<sup>11</sup> Charles A. Beardsley, *Judicial Draftsmanship*, 26 *A.B.A. J.* 3, 3 (1940) (and adding, "[T]he judges don't stop when they run out of their own words. They cause their typists to copy paragraph after paragraph, and sometimes page after page, of other judges' words — all of which copies words the lawyers have already bought and paid for stored on their book shelves.").

<sup>12</sup> Bryan A. Garner, *How Lockhart Really Should Have Been Decided: Canons of Construction Are Key*, 102 *Judicature* 56, 57 (2018).

Roberts Court has issued 5 of the 11 lengthiest opinions in Supreme Court history.<sup>13</sup> This is remarkable in light of the Justices' stated preferences for brevity and clarity.<sup>14</sup> Chief Justice Roberts once observed: "I have yet to put down a brief and say, 'I wish that had been longer.' . . . Almost every brief I've read could be shorter."<sup>15</sup> Former Justice John Paul Stevens agreed, noting that briefs "seem somewhat longer than necessary on occasion."<sup>16</sup> Justice Scalia called "prolixity" the main shortcoming of most briefs.<sup>17</sup> Justice Thomas urged litigants to make their briefs "as short as necessary" — to "pare them down to what you need, not expand them to the page limit."<sup>18</sup> Justice Breyer likewise lamented

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<sup>13</sup> *Ten of the Longest Supreme Court Decisions*, N.Y. Times, Nov. 18, 2010, <http://www.nytimes.com/imagepages/2010/11/18/us/18rulingsGrfxB.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=EndOfArticle&pgtype=article>. The N.Y. Times chart provides the following list:

<i>Buckley v. Valeo</i>	76,639 words
<i>McConnell v. Federal Election Commission</i>	70,228 words
<i>Furman v. Georgia</i>	66,233 words
<i>McDonald v. Chicago</i> (Roberts Court)	58,597 words
<i>Communist Party v. Subversive Activities Board</i>	58,404 words
<i>Oregon v. Mitchell</i>	51,628 words
<i>Hamdan v. Rumsfeld</i> (Roberts Court)	50,096 words
<i>Planned Parenthood v. Casey</i>	48,878 words
<i>Citizens United v. Federal Election Commission</i> (Roberts Court)	48,686 words
<i>Parents Involved v. Seattle</i> (Roberts Court)	47,235 words

This 2010 chart omits the 2012 decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the so-called Obamacare case, which is 52,395 words.

<sup>14</sup> See Justice Interviews, 13 *Scribes J. Legal Writing* at 35, 50, 53, 102, 119–20, 137, 167, 174.

<sup>15</sup> Chief Justice Roberts Interview, 13 *Scribes J. Legal Writing* at 35.

<sup>16</sup> Interview with Justice John Paul Stevens, 13 *Scribes J. Legal Writing* 41, 50 (2010).

<sup>17</sup> Interview with Justice Antonin Scalia, 13 *Scribes J. Legal Writing* 51, 53 (2010).

<sup>18</sup> Interview with Justice Clarence Thomas, 13 *Scribes J. Legal Writing* 99, 120 (2010).

that briefs are too long.<sup>19</sup> He admitted that when he “see[s] something 50 pages, . . . I’m already going to groan. And I’m going to wonder, Did he really have to write that 50 pages? I would have preferred 30.”<sup>20</sup> With this uniform preference for brevity, it is troubling that many Supreme Court opinions fail to lead by example.

*Brown v. Board of Education*,<sup>21</sup> the seminal constitutional case striking down “separate but equal” education, was fewer than 4,000 words.<sup>22</sup> Yet when the Roberts Court addressed modern integration efforts, a far less momentous undertaking, the decision reached 47,235 words — or 12 times *Brown*’s length.<sup>23</sup>

For years, the Supreme Court — and the Roberts Court in particular — has been issuing increasingly verbose opinions. In 2010, the average opinion length, including concurrences and dissents, reached a new record: nearly 5,000 words per opinion.<sup>24</sup> To help put this number in perspective, the Gettysburg Address was roughly 270 words.<sup>25</sup> The Declaration of Independence is 1,458 words, including signatures.<sup>26</sup> The average length of Franklin Delano Roosevelt’s dozen State of the Union addresses was only 3,563 words.<sup>27</sup> The U.S. Constitution itself is just over 4,500

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<sup>19</sup> See Interview with Justice Stephen G. Breyer, 13 *Scribes J. Legal Writing* 145, 167 (2010).

<sup>20</sup> *Id.*

<sup>21</sup> 347 U.S. 483 (1954).

<sup>22</sup> *Id.*; Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. Times, Nov. 7, 2010, <http://www.nytimes.com/2010/11/18/us/18rulings.html>.

<sup>23</sup> Liptak, *supra* note 22.

<sup>24</sup> *Id.*

<sup>25</sup> *The Brevity of Abraham Lincoln’s Gettysburg Address Continues to Inspire on 150th Anniversary*, N.Y. Daily News, Nov. 19, 2013.

<sup>26</sup> Sol Bloom, *Constitution of the United States: Questions and Answers*, Charters Freedom, <https://www.archives.gov/founding-docs/constitution-q-and-a> (last visited Nov. 11, 2016).

<sup>27</sup> The American Presidency Project, *Length of State of the Union Messages and Addresses in Words*, [www.presidency.ucsb.edu/sou\\_words.php](http://www.presidency.ucsb.edu/sou_words.php) (last visited January 29, 2017).

words, including signatures.<sup>28</sup> Thus, the *average* Supreme Court opinion, which often answers a single discrete constitutional question, is now *longer* than the very document it is interpreting. Something is askew.

Several recent Roberts Court opinions underscore the incongruity between the Justices' advice for concision and their actual practice. *Trump v. Hawaii* (the "travel ban" case),<sup>29</sup> one of 2018's most anticipated decisions, was over 25,000 words. Five Justices wrote individual opinions, ranging from Justice Kennedy's 358-word concurrence to Justice Roberts's 11,206-word majority opinion. Similarly, *Sessions v. Dimaya*,<sup>30</sup> another 2018 immigration case, nearly eclipsed 30,000 words because four Justices wrote lengthy individual opinions. Justice Thomas's 10,000-word dissenting opinion was 2,000 words longer than Justice Kagan's majority opinion.

The 2017 term was no aberration.

*Obergefell v. Hodges*,<sup>31</sup> the controversial 2015 same-sex-marriage case, generated five separate opinions totaling nearly 24,000 words. Chief Justice Roberts's dissenting opinion was actually one page longer than the majority opinion.<sup>32</sup> To help give perspective, after combining the various Justices' separate opinions, *Obergefell* and *Trump* are each longer than 19 of Shakespeare's plays<sup>33</sup> and nearly as long as Ernest Hemingway's *The*

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<sup>28</sup> *Id.*

<sup>29</sup> 138 S. Ct. 2392 (2018).

<sup>30</sup> 138 S. Ct. 1204 (2018).

<sup>31</sup> 135 S. Ct. 2584 (2015).

<sup>32</sup> *See id.* at 2611–26 (Roberts, C.J., dissenting).

<sup>33</sup> *Shakespeare's Plays, Listed by Number of Words*, Open Source Shakespeare, [http://www.opensourceshakespeare.org/views/plays/plays\\_numwords.php](http://www.opensourceshakespeare.org/views/plays/plays_numwords.php) (last visited Oct. 10, 2016). The *Obergefell* opinion is nearly as long as *Romeo and Juliet* (24,545 words) and longer than the following works: *Richard II* (22,423); *Merry Wives of Windsor* (21,845 words); *Measure for Measure* (21,780 words); *As You Like It* (21,690 words); *Henry VI, Part I* (21,607 words); *Love's Labour's Lost* (21,459 words); *Merchant of Venice* (21,291 words); *Much Ado*

*Old Man and the Sea* (roughly 26,000 words).<sup>34</sup> And they're longer than every single U.S. president's average State of the Union address — by wide and consistent margins.

In 2010, *Citizens United v. Federal Election Commission*,<sup>35</sup> the First Amendment case permitting extensive campaign spending by noncandidates, totaled 48,686 words — 2,000 words longer than Ray Bradbury's *Fahrenheit 451* (46,118 words) and nearly 20,000 words longer than George Orwell's *Animal Farm* (29,966 words), Charles Dickens's *A Christmas Carol* (28,944 words), John Steinbeck's *Of Mice and Men* (29,160 words), and Shakespeare's longest play, *Hamlet* (approximately 30,500 words).<sup>36</sup>

The Court's 2008 decision in *McDonald v. City of Chicago*,<sup>37</sup> holding that the Second Amendment is incorporated against the states through the Fourteenth Amendment, amassed 58,597 words. This is remarkable because *McDonald* was merely an incorporation case. The more notable Second Amendment case, *District of Columbia v. Heller*,<sup>38</sup> broke more new ground than *McDonald* and yet is shorter. *McDonald* rivals the length of *Lord of the Flies* (62,481 words) and *Brave New World* (64,531 words).<sup>39</sup>

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*About Nothing* (21,157 words); *Taming of the Shrew* (21,055 words); *King John* (20,772 words); *Titus Andronicus* (20,743 words); *Twelfth Night* (19,837 words); *Julius Caesar* (19,703 words); *Pericles* (18,529 words); *Timon of Athens* (18,216 words); *Two Gentlemen of Verona* (17,129 words); *Macbeth* (17,121 words); *Midsummer Night's Dream* (16,511 words); and *Comedy of Errors* (14,701 words).

<sup>34</sup> *Average Book Lengths: Guess How Many Words Are In A Novel*, [www.huffingtonpost.com/2012/03/09](http://www.huffingtonpost.com/2012/03/09). See also [commonplacebook.com/art/books/word-count-for-famous-novels](http://commonplacebook.com/art/books/word-count-for-famous-novels) (last visited Jan. 29, 2017).

<sup>35</sup> 558 U.S. 310 (2010).

<sup>36</sup> Open Source Shakespeare, *supra* note 33; see also *Average Book Lengths*, *supra* note 34.

<sup>37</sup> 561 U.S. 742 (2010).

<sup>38</sup> 554 U.S. 570 (2008) (confirming Second Amendment right to defend oneself in the home with a handgun).

<sup>39</sup> *Average Book Lengths*, *supra* note 34.

Finally, the Court’s 2012 decision in *National Federation of Independent Business v. Sebelius*,<sup>40</sup> which decided the Affordable Health Care Act’s fate (in part), came in at a robust 52,395 words. This decision surpasses F. Scott Fitzgerald’s classic *The Great Gatsby*, which is just over 47,000 words.<sup>41</sup> The excessive length was split evenly between the majority, concurring, and main dissenting opinions.<sup>42</sup> All three rival the length of Shakespearean plays. Chief Justice Roberts’s majority opinion, at 17,020 words, excluding footnotes, is essentially as long as *Macbeth*.<sup>43</sup> Justice Ginsburg’s concurring opinion, at 16,436 words, came close to achieving the length of *A Midsummer Night’s Dream*.<sup>44</sup> Justice Scalia’s dissenting opinion, the longest of any of the opinions, came in at 18,726 words,<sup>45</sup> or just under the length of *Julius Caesar* and *Twelfth Night*.<sup>46</sup> In short, this one Supreme Court case, in its unedited format, demands the same reading attention required for three Shakespearean plays.

With this trend, the Court is exacerbating a long-standing problem. As its opinions expand in length and complexity, public access suffers despite society’s increased interest in, and ready physical access to, the Court’s opinions. True accessibility — including actual understanding — is hampered by unnecessarily long opinions.

The Court’s trend toward lengthy opinions is also at odds with its long-standing calls for brevity from litigants. As early as 1923, Justice Clark encouraged litigants who sought favor with the Court to “condense, condense, condense and then con-

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<sup>40</sup> 567 U.S. 519 (2012).

<sup>41</sup> [www.readinglength.com/book/isbn0743273567](http://www.readinglength.com/book/isbn0743273567) (last visited Jan. 29, 2017).

<sup>42</sup> See *Nat’l Fed’n*, 567 U.S. 519.

<sup>43</sup> Open Source Shakespeare, *supra* note 33 (listing *The Tempest* at 16,633 words).

<sup>44</sup> *Id.* (listing *A Midsummer Night’s Dream* at 16,511 words).

<sup>45</sup> *Id.* If Justice Scalia’s dissent were a Shakespearean play, it would be the sixth shortest.

<sup>46</sup> *Id.* (listing *Julius Caesar* at 19,703 words and *Twelfth Night* at 19,837 words).

dense.”<sup>47</sup> The Justices have been consistent in advising litigants to keep their words lean and their ideas clear. They have urged lawyers to omit unnecessary details,<sup>48</sup> avoid repeating themselves,<sup>49</sup> and be careful about the language they use.<sup>50</sup> Justice Scalia gave a convincing summary of the problem: “I don’t want to hear the same thing again. You’re wasting my time. When you waste my time, I begin turning the pages faster and I may miss something that you would have wanted me to see. If there are fewer pages, I will pay attention.”<sup>51</sup>

Given the Justices’ impatience with runaway briefs, one wonders why the Court isn’t making the necessary effort to shorten its opinions and make them more manageable for the average person. The current Justices are deciding far fewer cases than in past decades.<sup>52</sup> Yet even with fewer decisions and more time to edit, the Court’s opinions are longer and more fragmented.<sup>53</sup> Increasingly, each Justice wants to have his or her own say, often writing lengthy concurring or dissenting opinions.

The Justices are well aware of the problems associated with prolix writing — and with lengthy opinions. And they acknowledge that opinions can, and should, be both shorter and more accessible. Justice Alito, for example, confirms that “in general [judicial opinions] could be shortened . . . . [I]t’s mostly a

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<sup>47</sup> Clarke, 9 A.B.A. J. at 80.

<sup>48</sup> Justice Ginsburg Interview, 13 Scribes J. Legal Writing at 133–34 (reminding law students that “good, concise writing counts”).

<sup>49</sup> Justice Scalia Interview, 13 Scribes J. Legal Writing at 72.

<sup>50</sup> Interview with Justice Anthony M. Kennedy, 13 Scribes J. Legal Writing 79, 97 (2010) (“[T]he law lives through language, and we must be very careful about the language we use.”).

<sup>51</sup> Justice Scalia Interview, 13 Scribes J. Legal Writing at 54.

<sup>52</sup> Posner, *Reflections on Judging* at 43–44 (noting a drop from over 180 opinions per term in the 1930s to about 150 per term in the 1960s — to the Roberts Court’s output of 50–65% fewer opinions than past courts).

<sup>53</sup> *Id.* at 44 (observing that “no one thinks that the length of Supreme Court opinions is positively correlated with their quality”).

matter of time and energy. It is the process of shortening — it’s work, it’s time-consuming, and it requires mental energy to do it.”<sup>54</sup> Justice Ginsburg hopes her writing is “clear enough for a lay audience.”<sup>55</sup> She tries to keep her opinions to fewer than 20 pages.<sup>56</sup> When she fails, she “regret[s] that [she] couldn’t make it shorter.”<sup>57</sup> Justice Scalia reminded us that there are real costs to lengthy opinions.<sup>58</sup> As he explained, judicial opinions must “be short — as short as the nature of the case allows — because the time [to read and get through them] gets billed to somebody.”<sup>59</sup> Indeed, when a lawyer must read — carefully — the equivalent of a novella, the client’s fees mount quickly.

As for accessibility, Justice Thomas has long stressed the need for ordinary people to understand his opinions, whether “a parent” or “the person at the gas station.”<sup>60</sup> He’s observed that “[t]here are some average readers and barely above average [readers] out here. There are people who are busy — busy sole practitioners out here, busy judges who are doing all sorts of things, part-time judges. We’ve got to write for them. Shouldn’t they have access to the Constitution?”<sup>61</sup>

So why not strive for more brevity? If, as Justice Scalia noted, “[t]o write well is to communicate well. To write poorly is to communicate poorly,”<sup>62</sup> why don’t the Justices do more to improve their writing through concision? Many, even some of the Justices, blame judicial law clerks — who often play a role in

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<sup>54</sup> Interview with Justice Samuel A. Alito Jr., 13 *Scribes J. Legal Writing* 169, 175 (2010).

<sup>55</sup> Interview with Justice Ruth Bader Ginsburg, 13 *Scribes J. Legal Writing* 133, 141 (2010).

<sup>56</sup> *Id.* at 134.

<sup>57</sup> *Id.*

<sup>58</sup> Justice Scalia Interview, 13 *Scribes J. Legal Writing* at 54.

<sup>59</sup> *Id.*

<sup>60</sup> Justice Thomas Interview, 13 *Scribes J. Legal Writing* at 100, 129.

<sup>61</sup> *Id.*

<sup>62</sup> Justice Scalia Interview, 13 *Scribes J. Legal Writing* at 51.

drafting opinions — for the increasing length and complexity of court opinions.<sup>63</sup> But it is the Justices who sign their names to opinions. It is the Justices who have been vetted and confirmed by the Senate. It is the Justices, not their clerks, who are charged with the duty to “say what the law is” with sufficient clarity. To place the writing responsibility on anyone besides the Justices is to give the Justices a pass that they do not give litigants.

The Justices know what it means to write crisp, clear sentences and present well-structured legal arguments. Few would dispute that they are among the best legal minds in our country and are gifted writers in many respects. Some modern Justices excel at direct, conversational writing.<sup>64</sup> The true genius, Justice Thomas contends, “is having a ten-dollar idea in a five-cent sentence, not having a five-cent idea in a ten-dollar sentence.”<sup>65</sup> So if the Justices know what constitutes concise, effective legal writing, why would they sign off on something longer and more confusing than necessary? If the Justices detest 50-page briefs, why would they draft opinions that exceed 50 pages and continue to grow?

A Supreme Court opinion should not require more time and attention than a Shakespearean play. With many of the Court’s opinions weighing in between Shakespeare’s shortest play, *The Comedy of Errors* (14,701 words), and his longest play, *Hamlet* (30,066 words), legal audiences are being asked to give increasing attention to the Court’s prose.<sup>66</sup> The Justices are not writing

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<sup>63</sup> Justice Alito Interview, 13 Scribes J. Legal Writing at 175–76; Justice Stevens Interview, 13 Scribes J. Legal Writing at 42; see also Posner, *Reflections on Judging* at 45–46; William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 299 (1987).

<sup>64</sup> See Jill Barton, *Supreme Court Splits . . . on Grammar and Writing Style*, 17 Scribes J. Legal Writing 33 *passim* (2016–2017).

<sup>65</sup> Justice Thomas Interview, 13 Scribes J. Legal Writing at 100.

<sup>66</sup> Open Source Shakespeare, *supra* note 33; cf. Garner, *The Elements of Legal Style* at 12 (reminding that “[l]egal writing shouldn’t be lethal reading”).

opinions “to show [that they are] well-read. [They’re] writing an opinion as a useful document to lawyers and judges.”<sup>67</sup> As a Fifth Circuit judge put it more than 50 years ago, “Here is the place for the perfectionist. He is the polisher who goes the last mile to [e]nsure the accomplishment of his goal: brevity, clarity and precedential preciseness.”<sup>68</sup>

It is time to turn the mirror back on the Justices.

### Supremely Simple: The ABCs

As noted above, good legal writing generally requires three elements: accuracy, brevity, and clarity.<sup>69</sup> It is serious writing<sup>70</sup> and should avoid attempts at wittiness and personal invectives.<sup>71</sup> It “is not the place for the artist or poet.”<sup>72</sup> The law must be stated

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<sup>67</sup> Justice Breyer Interview, 13 *Scribes J. Legal Writing* at 155.

<sup>68</sup> Griffin B. Bell, *Style in Judicial Writing*, 15 *J. Pub. L.* 214, 217 (1966).

<sup>69</sup> Garner, *The Elements of Legal Style* at 4–5 (“The chief aim of style is clarity. But achieving clarity is only the first step; much remains — brevity, for example, and accuracy.”); see also Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 *Scribes J. Legal Writing* 1, 22 (2003–2004) (“Above all, revere clarity and simplicity . . .”).

<sup>70</sup> Griffin B. Bell, *Style in Judicial Writing*, 1 *J. Nat’l Ass’n Admin. L. Judges* 26, 29 (Fall 1981) (reminding that “[t]he adversary process is serious: life, liberty or property is at stake”).

<sup>71</sup> See Marshall F. McComb, *A Mandate from the Bar: Shorter and More Lucid Opinions*, 35 *A.B.A. J.* 382, 384 (1949) (“Do not scold the trial judge, counsel, parties or your colleagues. It is your duty to decide the controverted questions presented, not to present your views on the numerous problems confronting humanity. Such unnecessary comments are discourteous and a waste of time. Usually they indicate an unfortunate feeling of self-righteousness on the part of the author. Remember there is never a good reason for being discourteous, even in a written opinion.”); see also Frances A. Leach, *The Length of Judicial Opinions*, 21 *Yale L.J.* 141, 145 (1911) (“[I]t is a serious question whether . . . humor or possibly facetiousness is properly the part of the expression by a court of final resort of its conclusions of law.”).

<sup>72</sup> Douglas E. Abrams, *What Great Writers Can Teach Lawyers and Judges: Precise, Concise, Simple and Clear*, *N.H. B.J.* 6, 6 (Summer 2011) (citing Oliver

accurately without hyperbole. The law must be stated in as few words as necessary to accurately convey the message. “Ideally, legal writing is taut.”<sup>73</sup> It’s that simple.

Needless length impairs clarity. Chief Justice Rehnquist noted that “[i]f a sentence takes up more than six lines of type on an ordinary page, it is probably too long.”<sup>74</sup> But length alone is not the problem. Increasingly, there are complaints that the Court’s decisions lack clarity. When a person reaches the end of a lengthy opinion and cannot discern what the Court held — as in *Obergefell* — the lack of clarity becomes as maddening as the unnecessary length.<sup>75</sup> First and foremost, an opinion must be clear. If the law is not clear, if it is not understood, the entire point of legal writing has failed.<sup>76</sup>

When I presented this research at law schools, some scholars challenged that the metrics used to assess the Justices’ writing must consider — and vary with — their audience. I find this argument unconvincing. First, the Supreme Court has multiple audiences at any given time, ranging from the litigants to the lower courts to every judge in the nation — not to mention our police, legislators, family members, and neighbors.<sup>77</sup> Like Judge Aldisert, I believe that if the Court focuses on its primary audience, then

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Wendell Holmes, “The Profession of the Law,” in *Collected Legal Papers* 29, 29 (1920)).

<sup>73</sup> Garner, *The Elements of Legal Style* at 53.

<sup>74</sup> Rehnquist, *The Supreme Court: How It Was, How It Is* at 299.

<sup>75</sup> See Vicki Waye, *Who Are Judges Writing for?*, 34 U.W. Austl. L. Rev. 274, 286 (2009) (describing Australian courts in a manner that seems apt of many courts: “It seems the more important and controversial a case, the longer the exegesis required to justify its outcome.”).

<sup>76</sup> See Albert Chandler, *Appellate Opinions: A Lawyer and a Reporter Offer Suggestions*, 35 A.B.A. J. 277, 279 (1949) (observing that “[t]he man in the street, being presumed to know the law, has a right to see it clearly, and ought to be made to see it”).

<sup>77</sup> Erwin Chemerinsky, *The Case Against the Supreme Court* 314–15 (2014) (listing six general audiences: (1) the parties; (2) the press and public; (3) scholars and teachers; (4) the lower courts; (5) government officials; and (6) the Court itself).

any secondary audience members automatically benefit from the opinion.<sup>78</sup> Second, all Supreme Court opinions — all “cases and controversies” before the Court — involve real people with real disputes. Writing an opinion that affects real people in a real dispute should prioritize answering that dispute in a manner that satisfies the participants. Even if the Court views its ultimate role as something more than pure error-correction, this should remain the priority. It should remain the first rule of judging. Audiences beyond the courtroom, while important, should not take precedence over those standing before the Court.

A colleague of mine remarked that while the President has the power of the sword and Congress the power of the purse, the Supreme Court is limited to the power of the pen and verse. The Court’s ability to “say what the law is” becomes both its purpose and its strength.<sup>79</sup> When the Justices fail to effectively convey the law, their opinions become increasingly difficult to understand and enforce. The law becomes difficult to predict and follow. When the Court does not clearly say what the law is, it has not effectively performed its role in the democratic process.

The Justices should never lose sight of the ordinary person.<sup>80</sup> Simply put, “[a]n opinion which has to be read two or three times, and slowly at that, before a lawyer of average intelligence can get any definite meaning out of it, is a bad opinion.”<sup>81</sup> Under this definition, the Supreme Court writes too many “bad” opinions.

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<sup>78</sup> Ruggero J. Aldisert, *Opinion Writing* 22–24 (3d ed. 2012) (dividing the two audiences between the “primary consumers” and “secondary markets”).

<sup>79</sup> Bell, *Style in Judicial Writing*, 1 J. Nat’l Ass’n Admin. L. Judges at 26 (“In the common-law countries the courts play a fundamental role in applying and developing the law. This function is served largely by communication through written opinions.”).

<sup>80</sup> Cf. Waye, *Who Are Judges Writing for?*, 34 U.W. Austl. L. Rev. at 281 (making a similar accessibility argument regarding the Australian court system).

<sup>81</sup> William M. Blatt, *An Opinion on Opinions*, 12 Law Soc’y J. 292, 292 (1946).

For all the convenience it offers, modern technology may contribute to the prolixity problem by minimizing the physical challenge of getting words on the page. No longer are opinions drafted by hand or dictated to an assistant.<sup>82</sup> Most judicial law clerks have never used a typewriter, relied on carbon copies, or required corrective tape. Instead, most judges (and law clerks) draft their opinions on a computer with word-processing software that permits, perhaps even encourages, wordiness. If they struggle for a word, they can simply pull down the thesaurus and find a suitable term. But physical ease in composition is no substitute for the intellectual rigor of clear, concise writing.

Many have speculated that the tightness of Justice Oliver Wendell Holmes's opinions was due to his drafting in longhand while standing up.<sup>83</sup> Few, if any, judges still approach opinion drafting this way. But it is hard to accept that Holmes's clear writing — universally lauded as excellent — was due merely to drafting while upright. More was necessary. More was certainly done. Clear thinking leads to clear writing. Clear writing aids in clear understanding. Holmes wrote clearly.

Recent resistance to *Obergefell* and its constitutionalizing a right to same-sex marriage may be attributable, at least in part, to the unwieldy opinions, including scathing dissents intended to undermine the majority opinion. The dense opinions lack clarity and direction. The legal reasoning seems opaque, if not indecisive. Despite five separate opinions, few among us can easily articulate

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<sup>82</sup> Clarence M. Hanson, *Judicial Administration: The Avalanche of Appellate Court Opinions*, 33 A.B.A. J. 426, 427 (1947) (noting in 1947 that the growth in bulky opinions devoid of adequate analysis was “[n]o doubt . . . due to the present-day method of dictating opinions instead of writing them out in long hand”).

<sup>83</sup> Bell, *Style in Judicial Writing*, 1 J. Nat'l Ass'n Admin. L. Judges at 29 (explaining that Holmes himself attributed his short opinions to the fact that he “wrote his opinions in longhand while standing at a desk. [Holmes] felt that standing contributed to brevity. Perhaps there should be a return to his practice.”).

why marriage, a matter historically reserved to the states, is now a federal matter. After reading *Obergefell*, one finds it difficult to say with confidence what the law is.

My complaints about *Obergefell* are not substantive. Instead, I challenge the writing that fueled resistance to the opinion. Uncertainty follows even today. Does the decision embrace common-law marriage? Is the decision retroactive? With such a lengthy opinion, one would expect the legal basis for the decision to be clear, or at least reasonably ascertainable. It is not. In contrast to so many of the well-written opinions that lead us to accept the Court's proclamations, *Obergefell* falls flat.

### Supreme Challenge: Do as We Say

The Supreme Court's rules put a premium on clear, concise writing. Rule 14 requires litigants to state their claims "briefly and in plain terms."<sup>84</sup> It also demands a "direct and concise argument."<sup>85</sup> A petitioner's "failure . . . to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition [for certiorari]."<sup>86</sup> Thus, if the Court finds a litigant's writing intolerably verbose, convoluted, or imprecise, that finding alone is grounds for denying certiorari.

Litigants must also meet mandated word limits, which vary by document. For example, Supreme Court Rule 33 limits petitions for certiorari to 9,000 words.<sup>87</sup> Estimating 250 words per page, 9,000 words equates to 36 pages. This is nearly twice the length of the Constitution itself, nearly twice the average State of the Union address, and roughly half of *Hamlet*. If the Justices

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<sup>84</sup> Sup. Ct. R. 14.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Sup. Ct. R. 33.

believe that they can discern the most important constitutional controversies from no more than 9,000 words, we can reasonably expect the Justices to resolve those controversies in the same amount of space.

In short, the Court should demand of itself what it demands of litigants, adhering to any style requirement or word count found in its rules.<sup>88</sup> If there are valid reasons to constrain litigants' petitions and briefs despite a case's historical importance, what could justify exempting the Court from those constraints? Surely a case does not become more complicated when it arrives for decision than when it was petitioned or briefed. And unlike the litigants, the Justices have the benefit of already-synthesized arguments and citations.

The Justices would do a great service by adopting the following guidelines for all but the most extraordinary cases:

1. No majority opinion should exceed 9,000 words, the limit for petitions for certiorari. An opinion should be only as long as necessary to achieve accuracy.
2. No secondary opinion, either concurring or dissenting, should exceed 3,000 words, the limit for rehearing motions. A secondary opinion should be only as long as necessary to achieve accuracy and point out the legal distinctions with the majority opinion.
3. Opinions should be in plain English. Legalese and uncommon words should be avoided if possible.

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<sup>88</sup> Cf. Chemerinsky, *The Case Against the Supreme Court* at 325. While Dean Chemerinsky has “long believed that the Court would benefit from word and page limits, like those imposed on litigants,” I have not been able to find his precise formula. The essence of his proposal, however, is one I share. *Id.* at 322. In his recommendation section, Dean Chemerinsky simply notes that “[t]here should be presumptive word and page limits for Supreme Court opinions.” *Id.* at 325. I would, and do, go further in giving the precise word-count recommendations set forth in this section.

4. Obiter dicta, digressions, and commentary unnecessary to the Court's holding should be avoided.

This proposal's focus is on length and clarity. With any word-length requirement — whether on an exam, in an appellate brief, or in a judicial opinion — people can and do adapt. The average Supreme Court opinion is now roughly 5,000 words,<sup>89</sup> so a 9,000-word limit would seem generous if not extravagant. Supreme Court opinions should never be longer than the documents pending before the Court. Of course, if a case is so complicated that the Court grants the litigants leave to file longer documents, then the Court should likewise have license to lengthen its opinion. But when the litigants are constrained to 9,000 words<sup>90</sup> in a petition for certiorari (a rather generous opportunity to communicate any message), the Court should be likewise restrained.

Justice Jackson, arguably the Court's finest writer, regularly drafted clear, succinct opinions. His majority opinion in the famous flag-salute case, *West Virginia State Board of Education v. Barnette*, took fewer than 3,900 words.<sup>91</sup> That decision, issued during World War II, was quite controversial at the time. Yet Justice Jackson wrote in terse, ordinary language. He explained that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”<sup>92</sup> The decision was — and is — accessible to varied audiences.

My proposal recommends limiting secondary opinions to 3,000 words. Again, I chose this number because it is the same limit that the Court imposes on motions for rehearing.<sup>93</sup> In

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<sup>89</sup> Liptak, *supra* note 22.

<sup>90</sup> Sup. Ct. R. 33.

<sup>91</sup> 319 U.S. 624 (1943).

<sup>92</sup> *Id.* at 642.

<sup>93</sup> Sup. Ct. R. 33.

essence, a concurring opinion is a “yes, but” opinion. Concurring opinions agree on the result and are written to express some disapproval with the Court’s method for achieving its result. By definition, a concurring opinion did not garner a majority of votes. It is secondary, though often useful. A 3,000-word cap is fitting.

It’s true that some historically important decisions were concurring opinions. For example, *Katz v. United States*<sup>94</sup> provides much of our current Fourth Amendment search jurisprudence. Justice Harlan’s 639-word concurrence in *Katz* is exemplary. In disagreeing with the majority’s reasoning but not its conclusion, Justice Harlan briefly stated his preferred approach and gave us an enduring test to assess the constitutional reasonableness of searches.<sup>95</sup> He did not belabor the point. My proposed limit would still allow for a concurrence almost five times longer.

I likewise recommend limiting dissenting opinions to 3,000 words because the dissenting opinion is the losing viewpoint. And while today’s dissent may become tomorrow’s majority, at present the dissent failed to garner sufficient votes. A dissenting opinion is most like a motion for rehearing because its reasoning pleads for reconsideration. There is no reason that the losing position should take up more space than the majority opinion. A dissent is a call for change. But the ordinary American needs to know what the law *is* — not what some of us wish it were or hope it becomes. A dissent should state its disagreement with the majority succinctly, clearly, and cogently. The dissent should not receive the same platform, much less be the same length, as the governing decision.

Some of the greatest dissents have exposed the majority’s errant logic in far fewer than 3,000 words. A notable example was Justice Jackson’s famed dissent in *Korematsu v. United States*,

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<sup>94</sup> 389 U.S. 347 (1967).

<sup>95</sup> *Id.* at 361 (Harlan, J., concurring).

which was fewer than 1,900 words.<sup>96</sup> In it, Justice Jackson penned this memorable warning in response to the majority's validation of a World War II executive order interning Japanese Americans:

But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>97</sup>

Dissents, often more than majority opinions, lend themselves to memorable sound bites. Justice Holmes, known as the Great Dissenter, authored the famous dissent in *Lochner v. New York*.<sup>98</sup> It remains one of Holmes's masterpieces.<sup>99</sup> Using only 622 words, Holmes convinces us of the importance of judicial restraint and respect for legislative judgments.<sup>100</sup> He reminds us that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,”<sup>101</sup> while declaring that “[g]eneral propositions do not decide concrete cases.”<sup>102</sup> His words, while few, are forceful. They are clear. They are memorable. And unlike so many modern dissents that alternate between discussing differences in judicial philosophy and casting invectives toward the majority, a Holmes dissent meant something. He used words sparingly to ensure that

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<sup>96</sup> 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

<sup>97</sup> *Id.* at 246.

<sup>98</sup> 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

<sup>99</sup> *Id.*; see also Rehnquist, *The Supreme Court: How It Was, How It Is* at 206 (comparing Justice Holmes's dissent in *Lochner* to the majority opinion and opining that Holmes's dissent was “the more lucid and succinct of the two”).

<sup>100</sup> *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting).

<sup>101</sup> *Id.* at 75.

<sup>102</sup> *Id.* at 76.

his message was not diluted or confused. Holmes proves that a concise dissent can be achieved even in a contentious case.

*Katz* likewise proves that even contentious, fractured Supreme Court opinions can be brief. With its three concurring opinions<sup>103</sup> and a lengthy dissent,<sup>104</sup> *Katz* comes in at 6,280 words, excluding footnotes. Importantly, the majority opinion is a mere 2,038 words. Thus, ordinary Americans can read and digest *Katz*. Contrast *Katz* with *Obergefell*, a case generating five separate, lengthy opinions with extensive obiter dicta. Much of *Obergefell* is vague and redundant. The opinion is the antithesis of accuracy, brevity, and clarity. Many readers remain unsure whether the decision created a substantive due-process right or uncovered an equal-protection violation. The constitutional standard of review applied is equally uncertain. *Obergefell* exemplifies the need to fix the Court's verbosity problem.

### Courting Supreme Justice: Closing Argument

My proposal for shorter, clearer Supreme Court opinions will likely go unheeded despite the Justices' own stated preferences for shorter, tighter legal writing. All past efforts have failed. But the fact that change may not occur does not minimize the need to continue this conversation and urge change. As William Blatt proclaimed in 1946:

The written decision of an appellate court of law, misnamed an opinion, is a human product with human weaknesses. It is the interest and duty of the bar and the public to notice these weaknesses, to point them out and to guard against

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<sup>103</sup> 389 U.S. at 347–64 (concurring opinions consisting of Justice Douglas's 327-word concurrence, Justice Harlan's 639-word concurrence, and Justice White's 185-page concurrence, which, when combined, added up to roughly half the length of the majority opinion).

<sup>104</sup> *Id.* at 364–74 (Black, J., dissenting) (an inexplicably lengthy dissent of 3,091 words — or 50% longer than the majority opinion).

them. Now and then an individual contributes to this end, but the effort should be general and constant. Hence this essay.<sup>105</sup>

In 1984, Justice Arthur Goldberg took up the cause, urging the Court to show “self-discipline” and “curtail significantly the length and proliferation of writing by members of the Court.”<sup>106</sup> Change never came. Opinions only got longer. He lamented that “[i]n addition to majority opinions that are overly lengthy, there is far too much unnecessary writing in concurring and dissenting opinions. Many concurrences do not actually present a different point of view.”<sup>107</sup> Many dissenting opinions, Justice Goldberg explained, are unnecessary because they “more or less repeat the same thesis. By agreement among the dissenters, in most cases, a single dissenting opinion could be filed.”<sup>108</sup>

I concur with Justice Goldberg.

Professor David Mellinkoff — who waged a long, public battle against legalese and verbosity — perhaps said it best in a deceptively simple quip that exemplifies the power of direct language: “The most effective way of shortening law language is for judges and lawyers to stop writing.”<sup>109</sup>

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<sup>105</sup> Blatt, *An Opinion on Opinions*, 12 Law Soc’y J. at 292.

<sup>106</sup> Arthur J. Goldberg, *Managing the Supreme Court’s Workload*, 11 Hastings Const. L.Q. 353, 355 (1984).

<sup>107</sup> *Id.* at 356.

<sup>108</sup> *Id.*

<sup>109</sup> David Mellinkoff, *The Language of the Law* 404 (1963).