

Supreme Verbosity: The Roberts Court's Expanding Legacy

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SUPREME VERBOSITY: THE ROBERTS COURT’S EXPANDING LEGACY

MEG PENROSE*

The link between courts and the public is the written word. With rare exceptions, it is through judicial opinions that courts communicate with litigants, lawyers, other courts, and the community. Whatever the court’s statutory and constitutional status, the written word, in the end, is the source and the measure of the court’s authority.

It is therefore not enough that a decision be correct—it must also be fair and reasonable and readily understood. The burden of the judicial opinion is to explain and to persuade and to satisfy the world that the decision is principled and sound. What the court says, and how it says it, is as important as what the court decides. It is important to the reader. But it is also important to the author because in the writing lies the test of the thinking that underlies it. “Good writing,” Ambrose Bierce said, “essentially is clear thinking made visible.”¹

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* Professor of Law, Texas A&M University School of Law. Professor Penrose would like to thank Texas A&M law students Lindsay Willeford and Jordan Curry for their significant contributions to this article. Professor Penrose would also like to thank her Spring 2018 Judicial Bootcamp students for proving that accurate, effective legal writing can be concise.

1. WILLIAM W. SCHWARZER, *Foreword to the First Edition* of FED. JUDICIAL CTR., JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES, at vii (2d ed. 2013).

I. INTRODUCTION—THE WRITTEN WORD

Words matter. Just ask Bryan Garner, the country’s legal lexicographer.² Or, former Circuit Judge, Ruggero J. Aldisert, an authority on judicial opinions.³ Or, the Federal Judicial Center (FJC), the organization that publishes the *Judicial Writing Manual: A Pocket Guide for Judges*.⁴ Or, better yet, ask the current justices. With the exception of newly appointed Justice Neil Gorsuch, the remaining justices are on record as opposing unnecessarily long writing.⁵ Despite an oft-fractured Court, the justices are unanimous in their desire for concise legal writing. Yet, these same justices are responsible for some of the lengthiest opinions in Supreme Court history.⁶ While past opinions were regularly communicated in short order—often by a single justice—the Roberts Court regularly issues lengthy, *seriatim* opinions. Further, the current

2. BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* (2d ed. 2001). Professor Garner believes that “it’s impossible to separate good writing from clear thinking.” Bryan A. Garner, *Preface to LEGAL WRITING IN PLAIN ENGLISH*, at xiii (2d ed. 2001).

3. RUGGERO J. ALDISERT, *OPINION WRITING* (Carolina Acad. Word Press, 3d ed. 2012).

4. See SCHWARZER, *supra* note 1, at vii. In the First Edition’s Foreword, William W Schwarzer, then Director Emeritus of the Federal Judicial Center, explained:

To serve the cause of good opinion writing, the Federal Judicial Center has prepared this manual. It is not held out as an authoritative pronouncement on good writing, a subject on which the literature abounds. Rather, it distills the experience and reflects the views of a group of experienced judges, vetted by a distinguished board of editors. No one of them would approach the task of writing an opinion, or describe the process, precisely as any of the others would. Yet, though this is a highly personal endeavor, some generally accepted principles of good opinion writing emerge and they are the subject of this manual. We hope that judges and their law clerks will find this manual helpful and that it will advance the cause for which it has been prepared.

Id. The Federal Judicial Center (FJC) has this, and many other excellent writing resources, available online for free. FED. JUD. CTR., <https://www.fjc.gov/subject/opinion-writing-legal-writing> [<https://perma.cc/JGN9-C87R>] (last visited Mar. 5, 2018).

5. See Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEG. WRITING (2010) (including interviews with Justices Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, and Alito). Professor Garner interviewed Justices Sotomayor and Kagan after their appointments; see also Mary Margaret Penrose, *To Say What the Law Is Succinctly*, 51 LOY. L.A. L. REV. (forthcoming 2018).

6. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (50,870 words); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (67,053 words). Ironically, *McDonald* was a simple incorporation case. *McDonald* held that the Second Amendment was incorporated via the Fourteenth Amendment to apply to the states and their subdivisions. *Id.* at 778. It is curious to imagine this limited holding would necessitate 17,000 more words than the more difficult substantive decision of whether the Second Amendment provided an individual right to possess an operable handgun in the home for self-protection, the topic of *Heller*.

*The word count includes footnotes, internal case citations and all opinions—majority, concurrences, and dissents. The author opted for this fuller word count as it represents the justices’ true output. Further, readers are expected to consume the entire opinion.

justices frequently render individualized positions in cases without adding precedential value. They deride lawyers' verbose writing while paying inadequate attention to their own writing.⁷ If words matter, Shouldn't words matter in all legal writing?

Just as words matter, writing matters. As Judge Re, writing for the FJC noted, there is a difference between good legal writing and poor legal writing.⁸ The question becomes whether the end product represents one's "best effort."⁹ The Roberts Court needs to return to good legal writing by improving their efforts—both at writing and editing. Opinions are too long, too confusing, and are becoming increasingly inaccessible. The solution lies in returning to the basics—the ABCs.

II. BACK TO BASICS—SETTING THE EXAMPLE

[T]he purpose of all legal writing is persuasion. . . . Similarly, the purpose of a judicial opinion is to convince any reader that sound logic supports the court's decision. . . . Excessive citation, excessive footnoting and excessive pedantry . . . run[] against your sole purpose: to sell your argument to your readers.¹⁰

The three pillars of good legal writing are accuracy, brevity, and clarity.¹¹ Accuracy is the foundation. Without accuracy, the entire brief, memorandum, or judicial opinion becomes suspect. If a legal writer cannot get the facts (or law) straight, chances are the rest of the document is equally flawed. Brevity and clarity, meanwhile, go hand in hand. Brevity helps accomplish clarity by avoiding unnecessary topics, eliminating adjectives and adverbs, and minimizing verbal clutter. Brevity does not automatically ensure clarity. But, clarity is more apparent in concise writing than in lengthy documents filled with endless footnotes or judicial opinions filled with unnecessary dicta. Good legal writing is easy to spot. But in modern Supreme Court opinions, the ABCs of good legal writing are becoming harder to find.

7. Gerald Lebovits, *Short Judicial Opinions: The Weight of Authority*, 76 N.Y. ST. B.J. 64 (2004) ("Some judges who lament that lawyers' papers are too lengthy are more guilty of overwriting than lawyers.").

8. Edward D. Re, Chief Judge, U.S. Custom Court, Appellate Opinion Writing, Federal Judicial Center 1 (Mar. 11, 1975).

9. *Id.*

10. ALDISERT, *supra* note 3, at 118.

11. Re, *supra* note 8, at 2–7.

They are not only professional writers. They are the legal voice for our country. They set the example. Their cases become the training tools for all future lawyers. Their writing serves as the example to law students of how to “think like a lawyer.” Personal invectives, obiter dictum, hidden standards of review, and unclear analysis appearing in Supreme Court opinions serve as training tools. If this is how the Supreme Court operates, it must be how the legal profession operates. If this is how the justices write, this must be how lawyers write.

But, alas. The justices tell us we, the lawyers, are failing.¹² They unanimously agree that our briefs are too long. They explain that just the sight of a lengthy brief yields a heavy sigh.¹³ Did the brief really need to be *this long*? Ironically, lawyers have the same reaction to the justices’ writing. Lengthy opinions are met with a heavy sigh. And, an unclear opinion is met with increased expenses for our clients—something the justices never face. Do the justices, whose reading tastes reject lengthy and unclear writing, forget what it’s like to be a reader when it’s their turn to write? Why are the justices not doing better in their own legal writing? We may be failing. But so are they.

This article challenges the justices, and those working in judges’ chambers, to work as hard on their legal writing as they do in rendering their decisions.¹⁴ Judges are responsible for “saying what the law is.” They must do so in a manner that is clear and understandable. After all, ignorance of the law is no excuse. When complex writing and unnecessary secondary opinions work to confuse even skilled legal readers, there is a problem. The justices must do something to correct their growing problem—lengthy, confusing opinions. The Roberts Court is quickly becoming the most verbose Supreme Court in history, and it’s time for change.

This article offers a solution. Supreme Court opinions should abide by the Supreme Court Rules—in length and format. Those rules govern the conduct of litigants *before* the Court. Shouldn’t the justices be able to conform their writing to the same standards? Opinion length can be governed by the same rules as petitions for certiorari and briefs. After all, the Court’s opinion is written after briefing concludes and, in many cases, following oral argument. Unlike practicing lawyers, the Court need not survey the universe of case law or write on a blank slate. The issues have already been focused, case law presented, and relevant authority cited. Opinion content can be governed by

12. Lebovits, *supra* note 7, at 64.

13. *See id.*

14. *See* FED. JUDICIAL CTR., JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 2 (2d ed. 2013) (“[T]he purpose of the manual is to stimulate judges to think as systematically about writing their opinions as they do about deciding their cases.”).

the same rules as petitions for certiorari, with clarity demanded for questions presented, constitutional provisions and statutes relied upon, a statement of the case, and a “direct and concise argument amplifying the reasons” for the decision.¹⁵ And, opinions exceeding 1,500 words should contain a table of contents and authorities.¹⁶

Were the justices required to adhere to the Supreme Court Rules, their opinions would improve. The rules governing litigants’ briefing demand accuracy, brevity, and clarity. Few realize that the “failure of a petitioner 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].”¹⁷ In other words, the Court can deny a petition for certiorari literally for poor legal writing.¹⁸ Maybe it is time for the justices to live by these same standards. Tasked with “saying what the law is” carries a responsibility to say what the law is clearly. The time has come for the justices to set the example.

III. FROM JOHN MARSHALL TO JOHN ROBERTS—A FLOOD OF WORDS

*During Marshall’s thirty years as chief, “there weren’t a lot of concurring opinions. There weren’t a lot of dissents. And nowadays, you take a look at some of our opinions and you wonder if we’re reverting back to the English model, where everybody has to have their say. It’s more being concerned with the jurisprudence of the individual rather than working toward a jurisprudence of the Court.”*¹⁹
*John Roberts, Chief Justice of the United States*²⁰

15. SUP. CT. R. 14.1(h).

16. SUP. CT. R. 14.1(c). (“If the petition prepared under Rule 33.1 exceeds 1,500 words or exceeds five pages if prepared under Rule 33.2, a table of contents and a table of cited authorities. The table of contents shall include the items contained in the appendix.”); *see also* SUP. CT. R. 24(c) (imposing same rule for Briefs).

17. SUP. CT. R. 14.4.

18. *See id.*

19. Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 106–07.

20. 28 U.S.C. § 1 (2012) (presenting the official title of the Chief Justice). The statute states: “The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.” *Id.* The Chief Justice has not been called the “Chief Justice of the Supreme Court of the United States” since 1866. Chief Justice Salmon Chase urged a bill to change the justices’ Circuit riding duties that, incidentally, also changed the Chief Justice’s official title. Act of July 23, 1866, 14 Stat. 205 (now codified at 28 U.S.C. § 1); *see also* William Hornbeck, <http://www.americancriminalallawreview.com/aclr-online/whats-name-chief-justices-official-title> (last visited Mar. 12, 2018).

There have been seventeen Chief Justices of the United State of America.²¹ Courts, both in their successes and failures, are often referred to under the Chief's name. Thus, the "Marshall Court" covers the period between 1801 and 1835.²² Chief Justice John Marshall, our fourth Chief, drafted several of the Court's most important decisions. Speaking for the Court, he did so clearly and succinctly.²³ Marshall eliminated the Court's early tradition of *seriatim* (or, individually authored) opinions.²⁴ This presented a unified Court at a time when the Court needed to enhance its institutional standing.²⁵ The current Chief, Justice Roberts, believes "the most successful chief justices help their colleagues speak with one voice."²⁶ Marshall certainly accomplished this. And, he did so without unnecessary elaboration.

Marshall Court opinions were often brief but powerful.²⁷ There were outliers, of course. *Marbury v. Madison*, for example, established judicial review in 9,500 words.²⁸ *McCulloch v. Maryland* upheld the federal government's authority to create a national bank using the "necessary and proper" clause in roughly 10,000 words.²⁹ But, those were atypical cases. And, despite their length, they were clearly written.

"Today, most Supreme Court opinions are incomprehensible to the general public. This is due, in large measure, to the language that is used."³⁰ Length is an equal concern. "While lack of simplicity in the choice of words is a major fault of present Supreme Court opinions, length is of comparable importance. Many opinions are composed of a flood of words. The sheer volume constitutes a verbal curtain to communication even to the professional readers," including Constitutional Law professors.³¹

21. *Justices 1789 to Present*, SUP. CT. OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/BE7L-86SF] (last visited Mar. 12, 2018).

22. *Id.*

23. See William H. Rehnquist, *The Supreme Court: "The First Hundred Years Were the Hardest"*, 42 U. MIAMI L. REV. 475, 481 (1988).

24. *Id.* at 480–81.

25. *Id.*

26. Rosen, *supra* note 19, at 105.

27. See, e.g., *United States v. Schooner Peggy*, 5 U.S. 103 (1801) (806 words); *Strawbridge v. Curtiss*, 7 U.S. 267 (1806) (158 words); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829) (1,013 words).

28. 5 U.S. 137 (1803).

29. 17 U.S. 316 (1819). And, unlike modern cases, *McCulloch* was argued over the course of nine separate days.

30. Ray Forrester, *Supreme Court Opinions – Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 173 (1995).

31. *Id.* at 175.

As Chief Justice William Rehnquist, Roberts's immediate predecessor, noted:

Surely one of Marshall's great abilities that contributed to his preeminence was his ability to explain clearly and forcefully why the Court reached the conclusions it did. Marshall had the power of clear, logical exposition . . . and his opinions reflect it. They are a breath of fresh air, given that they were written at the time when English and American legal writing was often shrouded in fog.³²

Marshall's economic use of language contrasts easily with the Roberts Court. By 2010, just five years into his tenure, Roberts presided over the most prolix Supreme Court in history.³³ In fact, the New York Times reported in 2010 that the Roberts Court had issued four of the ten lengthiest opinions ever.³⁴ This report, however, fails to account for the Supreme Court's most infamous decision, *Dred Scott v. Sandford*, which spans over 110,000 words.³⁵ While Marshall's thirty-four year tenure as Chief resulted in numerous seminal cases, many of which are still taught and relied upon today, Roberts is accomplishing something Marshall never did—supreme verbosity. And, despite his preference for a more unified Court, Roberts presides over one of the most divided, and divisive, Supreme Courts.

If the present Court adopted the Marshall method of working out a compromise, as the legislature does, before announcing its new law with one voice, the law would become more clear, more succinct, more verbally and logically consistent, and more predictable. This would increase public understanding and acceptance of the Court's vast power and it would fortify the all-important Rule of Law.³⁶

IV. BY THE NUMBERS: A GROWING PROBLEM

*[T]he weaknesses of legal writing have become increasingly obvious and, more importantly, have spread to the most influential example of American—the opinions of the United States Supreme Court.*³⁷

32. Rehnquist, *supra* note 23, at 481.

33. Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 17, 2010, at A24.

34. *Id.*

35. 60 U.S. 393 (1856).

36. Forrester, *supra* note 30, at 179.

37. *Id.* at 167.

Judicial opinions are becoming more voluminous and less luminous.³⁸ This grievance is not new.³⁹ Lawyers have complained about judicial opinion lengths for years.⁴⁰ Literally. Every generation seems to lament the “good old days” when cases were three pages, or four pages or—gasp—six pages.⁴¹ Every generation complains. Judges keep writing long opinions.⁴²

In fairness, there was a physical cost to opinion length in the twentieth century. Longer opinions meant more pages. More pages meant bigger books.⁴³ Bigger books cost more money. And, while this may seem foreign in our digital age, lawyers from the 1800s through 1980 relied almost exclusively on books.⁴⁴ Before Westlaw, Lexis, and Google, longer cases impacted a law firm’s bottom line as lawyers had to keep purchasing more and more legal books to ensure they were current with the law.

Modernly, the issue is time and accessibility.

While law offices can now survive without subscriptions to the regional reporters and the U.S. Reports, there is a time investment when judges write lengthy opinions. And, for modern Americans who communicate using terser language, lengthy opinions run counter to the cultural revolution of concision. From Twitter, to Facebook, to Snapchat, individuals want their information faster, clearer, and without much effort. While I am not suggesting the Court use a mere 240 characters to resolve our nation’s most pressing matters, I do think the justices can improve their current approach. Refusal to appreciate brevity’s virtue costs the legal profession time. And, lawyers still bill by the hour.

38. Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1357 (1988).

39. Lebovits, *supra* note 7, at 60.

40. *Id.*

41. *See id.* at 64 (comparing New York state opinions from the 1880s–1970s, which averaged between 3.6 and 4.4 pages to the 1980 averages of 5.7 pages to the 1990s average of six pages). Federal cases saw an even larger increase climbing from 2,863 average words in 1960 to 4,020 average words in 1980. *Id.*

42. Mikva, *supra* note 38, at 1358.

43. *Id.* (comparing literal page lengths taken up in the printed reporters).

44. In a telling comment written in 1921, Chief Justice Winslow of the Wisconsin Supreme Court noted:

The law library of the future staggers the imagination as one thinks of the countless multitude of shelves that will stretch away in the dim distance, all loaded with their many volumes of precious precedents; and as one thinks of the intellectual giant that will be competent to retain a knowledge of them, as well as the judge that must pass upon the principles involved, one must believe they need be supermen, indeed.

James E. Markham, *The Argument in the Decision*, 6 A.B.A. J. 270, 271 (1921) (quoting Justice Winslow).

Supreme Court opinions are increasingly accessible to the public through a variety of platforms. Their mushrooming length, however, makes their true accessibility a distant prospect. In 2005, the Roberts Court majority opinions averaged just over 4,300 words.⁴⁵ Five years later, the average length expanded to around 5,000 words.⁴⁶ Since then, the Court's opinions have continued to grow, with recent majority opinions *averaging* over 8,000 words.⁴⁷ This does not include the growing number of—and length attributable to—concurring and dissenting opinions. So, while Americans can freely obtain Court opinions on numerous modern devices, it is unlikely this increased accessibility adds understanding. In a perverse twist, as society moves towards more efficient communication, the Court is issuing encyclopedic opinions rivaling great literary works.

This disconnect becomes clear in the following chart. This chart provides a page and average word count for all Roberts Court majority opinions from 2013 through 2017.⁴⁸ In a telling move, the *Harvard Law Review*, which has been keeping Supreme Court statistics since 2006, first began reporting opinion length in 2013.⁴⁹ Using the Harvard metrics, it is easy to see the Court's growing problem, by the numbers.

45. Rosen, *supra* note 19, at 111.

46. Liptak, *supra* note 33, at A24.

47. See Table created by author using *The Statistics*, HARV. L. REV., <https://harvardlawreview.org/category/statistics> (last visited Mar. 24, 2018). *The Statistics*, which keeps annual data regarding Supreme Court activity, is currently available for Supreme Court terms 2006–2017.

48. See *Statistics*, HARV. L. REV., <https://harvardlawreview.org/category/statistics> [<https://perma.cc/HM6M-FR7G>] (last visited Mar. 24, 2018). This author-created chart does not include word counts for concurring and dissenting opinions. Information provided by *The Statistics* does.

49. See Harvard Law Review Ass'n, *The Statistics*, 127 HARV. L. REV. 408, 415 (2013). *The Statistics* noted in 2013, “[t]his is the first year that *The Statistics* has included data on opinion length. Monitoring opinion length by Justice will likely be useful for tracking the writing habits of individual Justices over time, as well as for comparing the writing habits of Justices in a given term.” *Id.*

Table: P = Pages W = Words

*The word counts provided use both of Harvard's metrics—the first number estimates 560 words per page, the second number estimates 590 words per page.⁵⁰

<u>Court Term</u>	<u>Opinions</u>	<u>Avg. Signed Maj. Opinion</u>		<u>Avg. Including PC Opinions</u>	
2013	78	P: 15.2	W: 8,512–8,968	P: 14.3	W: 8,008–8,437
2014	72	P: 17.5	W: 9,800–10,325	P: 16.6	W: 9,296–9,794
2015	74	P: 15.2	W: 8,512–8,968	P: 14.3	W: 8,008–8,437
2016	75	P: 14.4	W: 8,064–8,496	P: 13.3	W: 7,448–7,847
2017	69	P: 13.7	W: 7,672–8,083	P: 12.7	W: 7,112–7,793

Looking at this chart, a few things become clear. First, the justices are averaging seventy-four opinions per year. That number is far lower than earlier courts that issued (a) shorter opinions, and (b) fewer individual concurring and dissenting opinions. Second, the average *majority* opinion—meaning the average length without considering individual concurring and dissenting opinions—is 15.2 pages. *Marbury v. Madison*, in contrast, was nine pages.⁵¹ Third, the average word count has jumped considerably since 2010.⁵²

There are four potential measurements to assess word count. But, under any of the four, the increase is salient. If the lower estimate of 560 words per page is used, then the Court's average signed majority opinion (where a Justice signs their name to the opinion) is 8,512 words. If the higher estimate of 590 words per page is used, the Court's average signed majority opinion is 8,968 words. If the lower estimate of 560 words per page is used against all the Court's opinions, including per curiam opinions (where no Justice signs their name to the opinion), the average majority opinion length is 7,974 words. If the higher estimate of 590 words per page is used for all the Court's opinions, including per curiam opinions, the average majority opinion length increases to 8,462 words.⁵³

50. *See id.* ("A typical slip-opinion page contains approximately 560 to 590 words."). To give readers of this article a clear picture of the potential word counts, I have opted to use both numbers.

51. Forrester, *supra* note 30, at 182.

52. Liptak, *supra* note 33, at A24.

53. It's also worth pointing out that Justice Scalia's death in 2016 likely impacted both the Court's 2016 word count and the Court's 2017 output while awaiting a ninth Justice. Unfortunately, once Justice Gorsuch joined the Court, the 2018 numbers returned to the modern norm. At least nine

The increases since 2010 are remarkable. Using the lower average for signed opinions and higher average for all opinions, the current five-year average appears to be majority opinions of 8,500 words. That number becomes staggering when you add the average length of concurring and dissenting opinions. As Gerald Lebovits writes, “Concision is a virtue. Wordiness, not complexity, creates long opinions.”⁵⁴

Something must change. Roberts himself noted that “[i]f the Court in Marshall’s era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have, . . . what the Court’s been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up. I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn’t it’s going to lose its credibility and legitimacy as an institution.”⁵⁵

V. LAW AS LITERATURE? FROM SHORT STORIES TO BIBLICAL PROPORTIONS

*[O]f the many mansions in the house of literature, law is not one.*⁵⁶

To put the Roberts Court’s verbosity in context, it helps to compare the justices’ writing to other written works. In 2010, the average majority opinion was roughly 5,000 words.⁵⁷ Today, those opinions have swollen to 8,500 words.⁵⁸ In literary circles, this means the Roberts Court has shifted from opinions rivaling short stories to opinions rivaling novellas. And, again, these averages only count majority opinions—not the verbal multiplicity of concurring and dissenting opinions.

Joe Hilland, of the *Indiana Review*, explained why most publishers limit the length of a short story to 8,000 words or less:

I’ve always been fond of Edgar Allen Poe’s description of the short story as a work of fiction that can be read in a single sitting. I like that Poe defines the short story form largely by focusing on the reader’s interaction with the text, and I like that he places a time limit on this interaction—a single sitting.

cases surpass 20,000 words, including critical cases dealing with search and seizure, presidential powers, and immigration.

54. Lebovits, *supra* note 7, at 64.

55. Rosen, *supra* note 19, at 105.

56. Felix Frankfurter, *When Judge Cardozo Writes*, THE NEW REPUBLIC, Apr. 8, 1931, at 211.

57. Liptak, *supra* note 33, at A24.

58. See Table created by author using *The Statistics*, *supra* note 48. *The Statistics*, which keeps annual data regarding Supreme Court activity, are currently available for Supreme Court terms 2006–2017.

I think most readers would agree that they begin a short story with the understanding that, barring any outside interruptions, they won't need a bookmark to get to the end. For editors, however, the idea that a short story should be read in a single sitting raises an important question: How long are readers willing to sit with a story? Half an hour? An hour? Three hours?

Like most literary journals, *IR* places a word limit on fiction as part of our submissions guidelines. We accept stories of up to 8,000 words, which is probably an average word limit, relative to other American journals of our size. You'll find journals that cap their stories at 5,000 or 6,000 words, and you'll find some journals that will accept stories as long as 10,000 words. Journals without word limits in their submission guidelines for fiction are, in my experience, extremely rare.

Editors place word limits on fiction submissions partly as a matter of practicality. Longer stories obviously take more time to read, and few journals have staffs large enough to handle slush piles filled with stories that ask readers to sit with them for an hour or more. More importantly, longer stories take up more space in the journal, space that could otherwise be devoted to work from several other authors.⁵⁹

Word count averages, as set forth above, tell some of the story. But, it helps to put those numbers—and word counts—into other measurable contexts. I have evaluated Supreme Court opinions in relation to books of the Bible and other literary works. In this way, individuals visualizing the length of modern judicial opinions have a reference beyond mere numbers.

Marshall's legal masterpiece establishing judicial review, *Marbury v. Madison*, was equivalent in length to the Biblical books of Revelation or Proverbs⁶⁰—or Herman Melville's short story, *Bartleby the Scrivener*.⁶¹ Remarkably, *Marbury*'s word count sits just above the Roberts Court's current five-year *average* for majority opinions. The main difference between

59. Joe Hiland, *When Is A Short Story Too Long?*, IND. REV. (Feb. 11, 2013), <https://indianareview.org/2013/02/when-is-a-short-story-too-long/> [<https://perma.cc/SHB2-K69P>].

60. Jeffrey Kranz, *Word Counts for Every Book of the Bible*, OVERVIEWBIBLE (May 29, 2014), <https://overviewbible.com/word-counts-books-of-bible/> [<https://perma.cc/5C4S-9UH9>]; see also Felix Just, *New Testament Statistics*, <http://catholic-resources.org/Bible/NT-Statistics-Greek.htm> [<https://perma.cc/XL73-GBBW>] (last visited Mar. 12, 2018).

61. Word count available at <https://www.readinglength.com/book/isbn-1466268778/> [<https://perma.cc/87TH-QDSN>] (last visited Mar. 24, 2018).

Marshall's writing and the Roberts Court's writing is that the vast majority of Marshall Court decisions involved a single Court opinion.⁶²

In contrast, the Roberts Court is increasingly displaying a return to the *seriatim* approach of individually authored opinions. An illustration is *National Federation of Independent Business v. Sebelius*, the Obamacare decision.⁶³ When the various, individually authored opinions are added together, this one opinion is 52,395 words. This gargantuan writing equates to reading the three longest of the four Gospels (John, 15,635 words; Luke, 19,482 words; and, Matthew, 18,346 words).⁶⁴ That is quite a task when one considers that most judicial opinions should be consumable in a single sitting.

The *average* Roberts Court majority opinion far *exceeds* forty of the sixty-six books in the Bible.⁶⁵ In fact, in averaging 8,500 words per majority, Con Law students are asked to invest—*per average case*—the equivalent of reading Galatians, Ephesians, Philippians, and first and second Thessalonians.⁶⁶ The Roberts Court's 2014 average majority opinion—*average*—was the length of the Book of Revelation.⁶⁷ In fact, the 2014 *average* majority opinion was as long as *Marbury v. Madison*.⁶⁸ This growing problem compromises education and comprehension.

These lengthy opinions rival great literary works. At 8,500 words, one can read both Nathaniel Hawthorne's *The Ambitious Guest* (3,343 words) and *Young Goodman Brown* (5,387 words) in the same time it takes to read the average Roberts Court majority opinion.⁶⁹ The average majority opinion is a full 1,300 words—or a little more than the length of Kate Chopin's *The Hour* (1,009)—longer than Edgar Allan Poe's *The Fall of the House of Usher* (7,226).⁷⁰

62. See Mikva, *supra* note 38, at 1359 (explaining the growing length of Supreme Court opinions may be due, in part, to the increase in concurring and dissenting opinions).

63. 567 U.S. 519 (2012).

64. Kranz, *supra* note 60; see also Just, *supra* note 60.

65. Kranz, *supra* note 60; see also Just, *supra* note 60 (providing word counts for books in the Bible).

66. Kranz, *supra* note 60; see also Just, *supra* note 60.

67. Kranz, *supra* note 60; see also Just, *supra* note 60.

68. *Marbury v. Madison*, 5 U.S. 137 (1803). See also author's table from page 10.

69. Word counts were either obtained via Hawthorn Mineart's *Word Counts of Famous Short Stories*, COMMONPLACEBOOK (Jan. 22, 2012), <http://commonplacebook.com/writing/word-counts-of-famous-short-stories/> [<https://perma.cc/B2EX-LDA8>] or by this author's downloading the original short story and performing a computer-assisted word count.

70. *Id.*

Consuming a controversial case, however, such as *Obergefell v. Hodges*⁷¹ would demand the literary attention of Shirley Jackson's *The Lottery* (3,773 words); Jack London's *To Build a Fire* (7,176); O'Henry's *The Gift of the Magi* (2,163); Mark Twain's *The Celebrated Jumping Frog of Calaveras County* (2,631 words); Edgar Allan Poe's *The Tell-Tale Heart* (2,093); Frank Stockton's *The Lady or the Tiger* (2,747); and, Anton Chekhov's *The Bet* (2,871).⁷²

Obergefell, at just over 24,000 words, is only half the length of the Roberts Court's Second Amendment cases, *District of Columbia v. Heller*⁷³ (50,870 words) and *McDonald v. Chicago*⁷⁴ (58,597 words). To cover cases of this length requires the reading equivalent of Washington Irving's *The Legend of Sleepy Hollow* (29,280 words); F. Scott Fitzgerald's *Babylon Revisited* (7,433 words); Ernest Hemingway's *The Snows of Kilimanjaro* (42,630 words); and D.H. Lawrence's *The Rocking-Horse Winner* (9,150 words).⁷⁵

Thus, when teaching the two modern Second Amendment cases and the same-sex marriage case, a Constitutional Law professor must acknowledge that she is teaching the equivalent of an upper-level English literature course. What college students study over a semester, law students must learn over days. This is a heavy pedagogical lift.

Excessive opinion length "has the practical effect, even if not intended, of removing the opinions from the scrutiny of the governed. The excessive length has the effect of anesthetizing the reader. The needless verbosity not only serves to confuse the reader, it also make the task too time consuming."⁷⁶

Judge Abner Mikva observed that excessively long Supreme Court opinions hinder legal education. "If we think of education in terms of the law school classroom, the disruptive effect of the epic opinion is quite clear. Close analysis of judicial opinions is the centerpiece of law school study."⁷⁷ The time now required to consume and analyze these opinions is unnecessarily increased. Further, because law school casebook editors publish heavily edited versions of each case, chances increase that something important will be lost in studying a case where lengthy portions have been removed during editing. It is becoming increasingly difficult for professors, and casebook editors, to discern the important messages from each case.

71. 135 S. Ct. 2584 (2015).

72. Mineart, *supra* note 69.

73. 554 U.S. 570 (2008).

74. 561 U.S. 742 (2010).

75. Mineart, *supra* note 69.

76. Forrester, *supra* note 30, at 177.

77. Mikva, *supra* note 38, at 1359.

Constitutional law is not intended to emulate English literature courses. As Justice Holmes remarked, “Of course the law is not the place for the artist or the poet. The law is the calling of thinkers.”⁷⁸

Yet, the justices appear not to have received this message. Instead, judges, in writing for too many people, write too much.⁷⁹ “[T]hese twin defects feed on each other. An important consequence of this problem is the disruption of the educational process as it unfolds not only in the law school classroom, but in the larger world of legal practitioners, and in the still larger realm of informed citizens.”⁸⁰ Judicial opinions are not intended to be great literary works. While some enjoy the clever, albeit professorial, writing of modern justices, many wish the Supreme Court would revert back to simply saying what the law is. Consuming a case involving important constitutional rights should not require the study and attention of a freshman English literature course. “[T]he practical result of such long and involved opinions is that few people are likely to read them.”⁸¹

VI. THE SEARCH FOR CLARITY AND CONCISION

*Unfortunately, bad decisions seem to coincide all too often with opinions of excessive length.*⁸²

From guns to gay marriage, the Roberts Court has taken opinion writing to a new level. This new level is increasing costs and sowing confusion. Lawyers must read longer opinions and sift through multiple, individually drafted writings in search of the Court’s holding. Does this concurrence add anything? Is this lengthy dissent evidence of what is to come—or, merely evidence of what the dissenters wish had happened? Lawyers, and law students, are reading Supreme Court opinions that often lack clarity and concision.

Constitutional standards of review are no longer obvious. Take *Obergefell v. Hodges* for example. The justices wrote five separate opinions totaling approximately 24,000 words.⁸³ Critics were unsure whether the Court decided the case on Equal Protection grounds or substantive due process.⁸⁴ At a recent Constitutional Law Scholars Forum, a panel discussing *Obergefell* lamented its

78. Frankfurter, *supra* note 56, at 211.

79. Mikva, *supra* note 38, at 1369.

80. *Id.*

81. Forrester, *supra* note 30, at 177.

82. *Id.*

83. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also* Penrose, *supra* note 5.

84. Penrose, *supra* note 5.

lack of clarity.⁸⁵ One presenter indicated he had to read the opinion multiple times to discern its meaning.⁸⁶ The dissenting opinions offered little respite. The dissenters—and all four dissenting justices authored individual opinions—used their writing to chastise the majority, cast pejoratives, and lament the end of our democracy.⁸⁷ The tone was overtly personal and hyperbolic, an approach prohibited when filing briefs with the Supreme Court.⁸⁸ The five opinions require a serious time investment yet provide scant legal guidance.

District of Columbia v. Heller fares no better.⁸⁹ This Second Amendment case intentionally fails to set forth a governing constitutional standard of review.⁹⁰ Is the majority relying upon strict scrutiny, since we are dealing with an enumerated right, or something else? While Justice Scalia liberally, and appropriately, criticized the *Obergefell* majority for creating what appears to be a fundamental right but failing to use the traditional constitutional standard of strict scrutiny review, his *Heller* majority commits the identical error.⁹¹ *Heller* finds self-defense in the home to be the Second Amendment's core protection but fails to explain why many disfavored individuals, including convicted non-violent felons, fall outside this protection.⁹² Justice Scalia explains that there are longstanding legal prohibitions precluding ownership by such individuals, but fails to cite a single source.⁹³ *Heller*'s failure to clarify the depth and breadth of our Second Amendment rights is why tangential issues keep coming

85. *Id.*

86. *Id.*

87. *Obergefell*, 135 S. Ct. at 2626–43. Chief Justice Roberts, Justice Thomas, Justice Alito, and Justice Scalia all filed individual dissenting opinions.

88. *See* SUP. CT. R. 24.

89. 554 U.S. 570 (2008).

90. *Id.* at 628–29.

91. *Id.* Rather than provide an applicable constitutional level of scrutiny, Justice Scalia's majority opinion states: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster." *Id.* (internal citation and footnote omitted). Footnote 27 within this quote challenges Justice Breyer's dissenting approach using rational basis review. But, such argument—placed in a footnote no less—is hardly adequate to advise litigants and legislators of the governing constitutional standard of review.

92. *Id.* at 626–27.

93. *Id.* Justice Scalia's exact quote reads: "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* And, while Justice Scalia provides a footnote at the end of this statement, the footnote's content provides commentary rather than sourcing—"We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

before the Supreme Court.⁹⁴ Unfortunately, since *McDonald*, the Court has provided little guidance.

Heller and *Obergefell*, and the numerous dissents attached to both opinions, fail the test of Supreme Court Rule 14.4. Neither case was concise. Neither was clear. Both add great length to the U.S. Reports without adding equal value. Both offer a “quick-fix” for a complicated problem. And, in doing so, both offer more confusion than guidance. The only thing certain about either opinion is that decided matters are far from resolved.

Professor Bryan Garner’s useful text, *Plain English for Lawyers*, gives simple advice for better writing. Most of his recommended tools were absent in both *Heller* and *Obergefell*. In fact, most of his tips seem ignored altogether at the highest Court. Why would the justices eschew the very writing approach they crave as readers? The Supreme Court Rules demanding brevity and clarity seem to capture many sage writing tips:

1. Use simple, commonly understood words;⁹⁵
2. Eliminate adjectives and adverbs;
3. Omit needless words;⁹⁶
4. Eliminate unnecessary footnotes;⁹⁷ and,
5. Limit sentence and paragraph length;⁹⁸

Good writing techniques yield clearer and more concise writing. It is the writing approach I teach—and, strive to emulate. I don’t always succeed. But, I always keep these thoughts in mind. Consider the reader. Make *their* job easier. Eliminate verbal clutter. Keep it simple.

94. *E.g.*, *Silvester v. Becerra*, 843 F.3d 816 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945 (2018) (involving California’s ten day waiting period to purchase firearms); *Peruta v. California*, 824 F.3d 919 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1995 (2017) (concerning whether an individual has a lawful right to carry firearms in public for self-defense); *Norman v. Florida*, 215 So.3d 18 (Fla. 2017), *cert. denied*, 138 S. Ct. 469 (2017) (involving the right to openly carry firearms); *Kolbe v. Hogan*, (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017) (involving the right to own semiautomatic rifles and magazines).

95. GARNER, *supra* note 2, at 44–65; *see also* Rachel Clark Hughey, *Age-Old ABCs of Writing Applied to the Law: Accuracy, Brevity, and Clarity*, 59 THE FED. LAW., June 2012, at 4, 5 (attributing the following to Hippocrates: “The chief virtue that language can have is clearness, and nothing detracts from it so much as the use of unfamiliar words.”).

96. GARNER, *supra* note 2, at 24–27. Apparently, Professor Garner was channeling his inner-Thomas Jefferson in doing so, as Rachel Clark Hughey attributes Jefferson as saying, “The most valuable of all talents is that of never using two words when one will do.” Clark Hughey, *supra* note 95, at 4; *see also* ALDISERT, *supra* note 3, at 274.

97. *See* Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 647 (1985); Jack Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 276 (1989) (reminding that an argument that “places too much of its substantive argument in the footnote was probably not well organized or well written in the first place”).

98. GARNER, *supra* note 2, at 27–31, 88–92.

After studying Professor Garner's text, I challenged my students to redraft any of the individual opinions in *Heller* or *Obergefell* in the spirit of Rule 14.4. The assignment required that each opinion retain the voice and holding of the Court, or individual Justice, but be cut in length by two-thirds. The results were amazing. The students excelled. And, the opinions became clearer and more concise. To demonstrate the ease of redrafting these opinions presenting only the relevant points raised in each case, I have attached one of my student's work (with her permission) in Appendix A.⁹⁹ As her work shows, even controversial opinions become less objectionable once they become understandable.

The Roberts Court needs to reassess its writing. Lengthy opinions are not a new phenomenon.¹⁰⁰ Lawyers have been complaining for years about opinion length.¹⁰¹ Yet, opinions keep growing and growing.¹⁰² Empirically, the Roberts Court has achieved a new benchmark. Its opinion averages are the lengthiest in Court history—by a wide and growing margin. I have attached as Appendix B a chart listing all the Roberts Court's opinions with word counts over 20,000 words.¹⁰³ This appendix allows readers to appreciate the expanding verbal legacy of the Roberts Court.

Without diminishing the Court's role, or disparaging any of the justices, my research suggests the justices spend inadequate time editing their work. How is it possible that dissenting and concurring opinions are frequently lengthier than the majority opinion? Why are there no governing limitations, or self-imposed restraints on opinion length? When will the Court set the example as writers they demand as readers?

I propose the time is now. Let's face it, "[e]asy reading is damn hard writing."¹⁰⁴

VII. THE PROPOSAL

The short opinion would seem to be the better vehicle for conveying jurisprudence to farther distances. Short opinions are more easily and generally read than are the longer ones. The affection of the American people for short movie newsreels, crisp radio broadcasts, pictorial essays, novelettes

99. Jordan Curry, J.D. Candidate Class of 2019, Texas A&M School of Law.

100. Lebovits, *supra* note 7, at 60.

101. *Id.*

102. *Id.* at 64.

103. Research Chart prepared by Lindsay Willeford, J.D. 2017, Texas A&M School of Law.

104. Hughey, *supra* note 95, at 5 (attributing this quote to Nathaniel Hawthorne).

*and tabloid newspapers, weekly-condensed news magazines and readers' digests, certifies a universal demand for brevity in a swift-moving age.*¹⁰⁵

The swift-moving age described above was the mid-twentieth century. The twenty-first century edition would agree that short opinions reach wider audiences. YouTube, Facebook, Twitter, and Snapchat have taken the place of “short movie newsreels” and “readers’ digests.” Brevity, combined with instant access, is a thoroughly modern value. Our President communicates via Twitter. We receive legal and political news from social media. Despite the vintage reference to “tabloid newspapers,” Justice Martin’s message is as timely today as when it was first written. The short opinion still appears to be “the better vehicle” for the Court to communicate its work. Readers, whatever draws their interest to the Court’s work, do not want their information littered with lengthy citations, difficult language, and public conversations between the justices played out in *seriatim* opinions. Readers simply want to know what the law is.

Americans, in particular, want to understand their legal rights. Do gays have a constitutional right to marry? Does the Constitution protect the right to possess a handgun or an assault rifle? Can the government force me to buy health insurance? Can the government track my movements by using my cell phone’s incidental contacts with cell towers as I drive? These are critical matters for many Americans. The Court owes us clarity in announcing our rights. What, exactly does the Constitution say about these things—and other matters that haven’t yet come to our attention? The justices have an obligation to tell us—briefly.

I propose the justices live by the rules they have established for litigants. The justices should be held to the same maximum length requirements in *their* opinions required in *our* briefs. We all share a disdain for long, confusing legal prose. We all need clarity in the law. And, brevity often brings clarity along as its companion.

With *seriatim* opinions spanning 20,000 to 40,000 words, and majority opinions averaging 8,500 words for the past five terms, the Court has to set a limit upon itself. Majority opinions should be capped at the same length as petitions for certiorari. This would require the justices to work as hard on their writing as they do on reaching their decision. This would eliminate the “law reviewitis”—the urge to cite every matter that touches an issue, usually resulting in vast overwriting—that young law clerks bring to chambers. This would require the justices to live up to their own standards of accuracy, brevity, and clarity.

105. John D. Martin, *The Problem of Reducing the Volume of Published Opinions*, J. AM. JUDICATURE SOC’Y, Feb. 1943, at 138, 141.

The Supreme Court Rules already address opinions. Rule 41 requires the Clerk of Court release opinions, initially in slip form.¹⁰⁶ Why not add a Rule that limits the length of these opinions? Why not add a Rule that limits the number of concurrences and dissents to a particular case? Why not formalize the elimination of *seriatim* opinions by limiting the total length of an opinion—absent extenuating circumstances—to 9,000 total words? The Court already has a system in place to grant litigants extensions in arguments.¹⁰⁷ A rule can be crafted giving the same, exceptional relief to the Court. There are few cases that cannot be communicated more concisely than they are now. Simple cases should yield simple opinions. Complicated cases might yield longer opinions but not every case is complicated. The Roberts Court invests far too much energy in obiter dictum. The point is to say what the law is—not what it ought to be. Worse still, an opinion is no occasion to undermine the integrity of the Court or its members.

Placing word limits on the Court presents a workable solution. The justices control their docket, their chambers, and their law clerks. They also control the rules they are willing to abide by. If I am limited in the words I can use to communicate my case—a case sufficiently important that I sought an audience before the Country’s highest tribunal—the Court should be similarly limited. Our words should be of equal value. After all, the Court has the benefit of a parsed down record, case law presented through briefing, and on occasion, oral argument. In fact, the justices decide whether to schedule oral argument, which provides them even greater opportunity to marshal the facts and law, if unclear.¹⁰⁸

The justices should welcome this limitation in the same way that lawyers welcome word limits. At some point, every lawyer must be able to succinctly discuss her case. This task, requiring the sharp editorial tool of summarizing, would be a welcome addition to judicial opinions. In an era where it is all too easy to literally “cut and paste” passages in briefs, or past cases, the intellectual task of editing—left unchecked—goes unpracticed. Computers and the comforts of modern legal research enable the Court to write and write and write and write, without exerting much physical effort. This contrasts with the days of past justices who either wrote in longhand or used actual typewriters. The cases they referenced were in a literal library, not on their cell phones. The important passage in a case could not be found through computerized assistance but required one to pour over the pages. No wonder opinions were short. The job of legal research was exhausting. And, writing was no easier.

106. SUP. CT. R. 41.

107. SUP. CT. R. 28.3.

108. SUP. CT. R. 28.

Today, writing is easier—physically, intellectually, and technologically. But, the justices’ words carry important weight. They must take more care in putting those words on paper. Their words matter. The justices should approach writing with the understanding that what they seek as readers, we seek as readers. In law, time literally is money. Time spent reading unnecessarily long cases is misspent time. Instead, the justices should invest their time in editing and crafting a product that is accessible. With the technological advancements of the 21st century, accessibility means more than merely the ability to find the law. One must be able to understand the law.

VIII. IN CONCLUSION, LET ME BE BRIEF¹⁰⁹

*Supreme Court opinions in recent years increasingly have become exercises in individual argumentation and advocacy on the part of the several justices. The [Roberts] Court has given new meaning to the word “opinion.”*¹¹⁰

Intractable problems are hard to solve. The issue of long, complicated legal opinions goes back a full century. What began as a call for reform from “lengthy” five to six-page opinions has morphed into a prayer against short novels. The return to *seriatim* opinions occurred even as Chief Justice Roberts heralded a return to consensus. It turns out, the Supreme Court mirrors the division in our country. But, must it also mirror the divisive discourse and constant argument? Must everyone have their individual say—the ubiquitous, Can I finish?

Now is a time for leadership at the Court, not individuality. The justices must lead our legal community. In doing so, they will help lead our nation. Future discussions should focus on the proliferation of separate opinions. For now, if the justices would curb their prose, all would benefit. Supreme Court opinions are legal pronouncements. They are the written response to legal “cases and controversies.”¹¹¹ They should not rival novellas or transform into personal speeches about the Court’s role in society. They should not sound political or ideological. The justices should focus on the law. Their writing would benefit. Society would benefit.

109. #irony. It is hard to defend the use of footnotes for substantive discussion—such as why an essay on verbosity needs 8,500 words. But I will try. This essay is intended as both a research tool and a proposal for clearer, concise judicial opinions. It provides references for those working toward reform and charts a course for further study. This is also the average length of a Roberts Court majority opinion.

110. Forrester, *supra* note 30, at 182.

111. U.S. CONST. art. III, § 2.

To achieve concision, the justices should voluntarily agree to adopt the same word length limitations the Court imposes on litigants. They should set the example. They should show us what good legal writing looks like by sticking to the issues, writing clearly, and saying only what needs to be said. They should consider their own observations about legal writing: no one ever looked at a lengthy opinion and said, I wish that had been longer.

As accessibility to Supreme Court opinions improves, the justices should expect their writing to become more universally consumed. Their audience is worldwide—available on every iPhone, every tablet, and every computer. Their writing should reflect this advancement. More importantly, their writing should reflect their institutional position. Our Founders gave us “one Supreme Court.”¹¹² That Court has a solemn duty to “say what the law is.” It, not they, should do so in a manner we can all understand.

Now is the time. Just ask the justices.

112. U.S. CONST. art. III, § 1.

APPENDIX A

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

Justice Kennedy delivered the opinion of the court.

These cases come to us from the States of Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. *See* Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev. Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. Petitioners are fourteen same-sex couples and two men whose same-sex partners are deceased, and respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Substantive Due Process Clause of the Fourteenth Amendment by denying the right to marry or have their marriages, lawfully performed in another state, given full recognition.

Petitioners filed these suits in United States District Courts in their home states, and each District Court ruled in their favor. Respondents appealed the decisions against them to the Sixth Circuit Court of Appeals. It consolidated the cases and reversed the judgments of the district courts holding that a state has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of state. We reverse.

The issues before the Court are (1) whether the Due Process Clause of the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and (2) whether the Due Process Clause of the Fourteenth Amendment requires a state to recognize a same-sex marriage licensed and performed in a State which does grant that right. We answer each inquiry in the affirmative.

I

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this clause include most of the rights in the Bill of Rights, and extend also to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1968) (holding the right to obtain contraceptives, married or single, is fundamental). Further, identification of fundamental rights requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the state must accord them its respect. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). History and tradition guide this

inquiry, but do not set its outer boundaries. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). In other words, historical and traditional factors are to be considered in defining whether a right is fundamental, but are not always dispositive.

The right to marry is protected by the Constitution. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *Loving* invalidated bans on interracial unions holding marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Id.* This fundamental right to marriage was reaffirmed through the Court’s decisions that followed. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (holding the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding the right to marry was abridged by regulations limiting the privilege of prison inmates to marry).

Today the Court finds the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples as opposite-sex couples. The Court bases its conclusion on four principles.

First, the right to marry is fundamental because the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This is why *Loving* invalidated interracial marriage bans under the Due Process Clause—choices concerning marriage, namely *who* to marry, are among the most intimate a person can make. Indeed, it would be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” *Zablocki*, 434 U.S. at 386. The nature of marriage is that, through its enduring bond, two persons can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, no matter their sexual orientation.

Second, the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This Court’s jurisprudence has recognized the intimate association protected by this right. *See Griswold*, 381 U.S. at 485; *see also Turner*, 482 U.S. at 95–96. As the court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. It does not follow that the freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

Third, the right to marry is fundamental because marriage safeguards children and families and thus draws a meaning from related rights of childrearing, procreation, and education. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court has recognized these connections by describing this group of rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due

Process Clause.” *Zablocki*, 434 U.S. at 384. Marriage also confers benefits to children by allowing them to “understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Windsor v. United States*, 133 S. Ct. 2675, 2694–95 (2013). Marriage also affords the permanency and stability important to children’s best interests. Without this permanency and stability, the children of same-sex couples would suffer the stigma of knowing their families are somehow lesser. These intangible injuries do not exist alone, however. There are significant material costs of being raised by unmarried parents. For example, drawing on the factual scenario of one of the couples involved in this very case, in a state that only allows for opposite sex couples or single persons to adopt a child, a child’s “parent” may find him or herself with no legal rights over a child he or she has raised if tragedy were to befall the true adoptive parent. Further, in such a state, schools and hospitals may treat children of same-sex couples, having been only legally adopted by one of the parents, as only having that one parent ignoring the nonadoptive parent who has also raised the child. Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry—the safeguarding of children and family.

Fourth, this Court’s cases and the nation’s traditions make it clear that marriage is a keystone of our social order. Marriage has long been “a great public institution, giving character to our whole civil polity.” *Maynard v. Hill*, 125 U.S. 190, 211 (1888). This is evidenced by the varying, but great list of governmental rights, benefits, and responsibilities conferred upon married couples by their State. Thus, the States have contributed to the fundamental character of the marriage right by placing it at the center of so many facets of the legal and social order. There is no difference between same and opposite-sex couples with respect to this principle, yet by exclusion from that institution, same-sex couples are denied the constellation of benefits that states have linked to marriage. Exclusion from the status that States attach more and more significance to teaches that same-sex couples are unequal in important respects.

The Court therefore finds the fundamental right to marry applies to same-sex couples in the same way it does to opposite-sex couples.

II

Respondents raise several arguments urging the opposite conclusion as is reached here, and the Court addresses some of those arguments in turn, finding after consideration that the remainder have no merit.

First, respondents note the history of marriage as between a man and a woman, and that fact should be dispositive in this case. But this argument ignores the rule set out above, that history and tradition is *not* always dispositive in determining whether a right is fundamental. Further, the idea of marriage has changed over time—history is ever-evolving. For example, marriage used

to be arranged by an individual's parents, but now is a consensual union. Additionally, marriage has evolved as the status of woman has changed. Marriage is no longer defined as a male-dominated legal entity as it was in the recent past. These changes deeply transformed the structure of marriage, and affected aspects of marriage long viewed by many as essential. Therefore, as has happened in the past, the structure of marriage can change again, and continue to transform as our society does.

Not only has marriage, as an institution, transformed over time, but the rights of gays and lesbians have as well. For example, in the past, gays and lesbians were prohibited from most government employment and barred from military service, but that is no longer the case. They used to be excluded from immigration law and targeted by the police. Being gay or lesbian used to be deemed a mental disorder, but now is known to be immutable. Further, same-sex intimacy used to be outlawed, but is now protected. States all over the country have begun to allow same-sex marriage as protected under their own constitutions. The Defense of Marriage Act, defining marriage as between a man and a woman, was invalidated, and the Federal Government now recognizes lawful same-sex marriages.

Further, the petitioners acknowledge the history of marriage, but contend that the history contributes to their desire to marry. It is the enduring importance of marriage that underlies the petitioners' desire to have their marriage licensed or recognized—their respect and need for its privilege and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to profound commitment.

Second, respondents argue that petitioners are not asserting an existing fundamental right—the right to marry. Rather, they are asserting a new and nonexistent right to same-sex marriage. In support of this argument, respondents cite *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) which called for a “careful description” of fundamental rights.

However, *Glucksberg* is not among and is not consistent with the vast jurisprudence this Court has used in discussing other fundamental rights. All relevant precedent refers to the right to *marry* in its comprehensive sense rather than the “right to interracial marriage” (*Loving*), “right of fathers with unpaid child support to marry” (*Zablocki*), or “the right of an inmate to marry” (*Turner*). Nothing in our jurisprudence, therefore, should cause us to define the right at issue in this case as “the right of same-sex couples to marry.” Further, *Glucksberg* is distinguishable from the instant case, as it dealt with physician-assisted suicide rather than marriage.

Third, respondents argue there has been a lack of diplomatic discourse required to decide an issue so basic as the definition of marriage. In other words, respondents argue that such a decision should be left for the legislature

to decide. But this Court does not have to wait for legislative action to correct a constitutional transgression. Indeed, when the rights of persons are violated, as is the case here, “the Constitution *requires* redress by the courts.” *Schuette v. BAMN*, 134 S. Ct. 1623, 1626 (2014) (emphasis added). The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.

III

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on religious or philosophical premises, which are not disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The Court now holds that same sex couples may exercise the fundamental right to marry. Today this Court overrules decisions inconsistent with this opinion. The state laws challenged by petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. And if states are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. Therefore, this Court holds there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.

Reversed.

APPENDIX B

#	Term	Case	# of Authors	Total
1	2009-2010	McDonald v. City of Chicago, 561 U.S. 742 (2010).	5	58,597
2	2011-2012	Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).	4	52,395
3	2009-2010	Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).	5	46,513
4	2006-2007	Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).	5	44,503
5	2005-2006	Hamdan v. Rumsfeld, 548 U.S. 557 (2006).	6	43,661
6	2007-2008	District of Columbia v. Heller, 554 U.S. 570 (2008).	3	41,033
7	2007-2008	Boumediene v. Bush, 553 U.S. 723 (2008).	4	37,642
8	2017-2018	Carpenter v. United States, 138 S. Ct. 2206 (2018).	5	35,189
9	2014-2015	Glossip v. Gross, 135 S. Ct. 2726 (2015).	5	33,281
10	2005-2006	League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006).	6	32,796
11	2017-2018	Sessions v. Dimaya, 138 S. Ct. 1204 (2018).	4	30,459
12	2017-2018	Abbott v. Perez, 138 S. Ct. 2305 (2018).	3	28,174
13	2013-2014	Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014).	5	26,916
14	2015-2016	Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).	4	26,722
15	2017-2018	Trump v. Hawaii, 138 S. Ct. 2392 (2018).	5	26,395
16	2017-2018	Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).	5	25,773

17	2013-2014	NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).	2	25,534
18	2014-2015	Obergefell v. Hodges, 135 S. Ct. 2584 (2015).	5	25,497
19	2005-2006	Rapanos v. United States, 547 U.S. 715 (2006).	5	25,295
20	2014-2015	Zivotofsky <i>ex. rel.</i> Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).	5	25,115
21	2017-2018	Jennings v. Rodriguez, 138 S. Ct. 830 (2018).	3	24,904
22	2008-2009	Ricci v. DeStefano, 557 U.S. 557 (2009).	4	24,797
23	2009-2010	Skilling v. United States, 561 U.S. 358 (2010).	4	24,339
24	2011-2012	Williams v. Illinois, 567 U.S. 50 (2012).	4	24,031
25	2017-2018	Janus v. American Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).	3	23,353
26	2017-2018	Florida v. Georgia, 138 S. Ct. 2502 (2018).	2	22,644
27	2007-2008	Baze v. Rees, 553 U.S. 35 (2008).	7	22,583
28	2008-2009	Horne v. Flores, 557 U.S. 433 (2009).	2	22,560
29	2010-2011	Brown v. Plata, 563 U.S. 493 (2011).	3	21,987
30	2013-2014	McCutcheon v. Fed. Election Com'n, 572 U.S. 185 (2014).	3	21,412
31	2006-2007	Fed. Election Com'n v. Wisc. Right to Life, Inc., 551 U.S. 449 (2007).	4	21,132
32	2011-2012	Arizona v. United States, 567 U.S. 387 (2012).	4	21,100
33	2017-2018	Ortiz v. United States, 138 S. Ct. 2165 (2018).	3	20,984
34	2013-2014	Town of Greece v. Galloway, 572 U.S. 565 (2014).	5	20,956

35	2007-2008	Medellin v. Texas, 552 U.S. 491 (2008).	3	20,622
36	2012-2013	United States v. Windsor, 570 U.S. 744 (2013).	4	20,592
37	2013-2014	Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).	4	20,372
38	2009-2010	Graham v. Florida, 560 U.S. 48 (2010).	5	20,298
39	2009-2010	Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).	2	20,107