Opinions as Rules

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It is a routine charge against contemporary judicial opinions that they read more like statutes than like opinions of a court. According to the typical formulation of the charge, the modern judicial opinion, especially the modern Supreme Court constitutional opinion, is excessively divided into sections and subsections, relies too heavily on three-part tests, is overly footnoted, cannot be understood by nonspecialists, is uninteresting to read even for specialists, and is devoid of anything even remotely resembling literary style.

Implicit in the charge, of course, is that there is something wrong with this state of affairs, and that judicial opinions resembling the Securities Act of 1933, the Internal Revenue Code, or the regulations of the Occupational Safety and Health Administration are for that reason deserving of all the scorn they receive at the hands of contemporary commentators. Yet those same commentators typically fail to castigate OSHA regulations as uninteresting, do not worry about the lack of literary style in the Internal Revenue Code, and are reluctant to complain about the intricate scheme of exceptions, definitions, parts, and subparts in the Securities Act of 1933. So it appears that the complaint is not that there is something intrinsically wrong with nonliterary complexity in legal items. Rather, the complaint presupposes that the judicial opinion is a legal item—a legal performance—of a special sort, one in which the features expected in statutes should largely be absent, and in which the features often detrimental to the effective operation of a statute or administrative regulation—literary flair, for example—are generally to be encouraged.

I want to challenge this presupposition, one that marks a profound difference between statutes and judicial opinions. The

† Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University. For what I believe to be good reasons, this Essay plagiarizes the title of a book review published as Frederick Schauer, Opinions as Rules, 53 U Chi L Rev 682 (1986). I am grateful to Virginia Wise for numerous conversations about the ways in which judicial opinions are used in actual legal practice and legal research.
charge I describe appears well founded if we see judicial opinions as consumption items for law professors, as evidence of the creative intelligence of their authors, or as objects of aesthetic pleasure. Yet perhaps judicial opinions should be none of these things. Perhaps instead the judicial opinion does or should serve a function within law quite different from that supposed by people who expect judicial opinions to either be accurate reflections of the reasoning processes of their authors, or literary performances to be appreciated like we appreciate a novel, a poem, or even an elegantly written work of nonfiction. And perhaps this function lies much closer to that served by the less literary legal performances we find in the \textit{Statutes at Large} and the \textit{Code of Federal Regulations}. If so, then the formal and unliterary style of many contemporary judicial opinions may be less an object of scorn and more of an indication—hardly yet an exemplar—of the functions that judicial opinions might serve in the actual operation of the law.

\textbf{I. THE CHARGE}

The charge of stylistic incompetence leveled against the modern judicial opinion is not only widespread, but also has multiple components. The most common component, especially when the accusation is directed at Supreme Court opinions, is an objection to doctrinal complexity, a complexity frequently manifested in the form of three-part (and occasionally four-part) tests. Robert Nagel, for example, in his tellingly entitled \textit{The Formulaic Constitution}, excoriates the modern Court for its excess reliance on “tests,” “prongs,” “requirements,” “standards,” and “hurdles.”\textsuperscript{1} He finds the Court’s style “obtrusively elaborate rather than economical or elegant,”\textsuperscript{2} and thus ill designed to serve the public informational and teaching function that Nagel believes to be a large part of the Court’s role.

Nagel is hardly alone in making this complaint. Writing eight years later, Morton Horwitz follows Nagel in mocking the Supreme Court for surrounding its opinions with “a thick undergrowth of technicality.”\textsuperscript{3} Like Nagel, Horwitz objects to “three or four ‘prong’ tests everywhere and for everything,”\textsuperscript{4} to “an almost

\begin{footnotesize}
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\item Id at 169.
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medieval earnestness about classification and categorization," to "a theological attachment to the determinate power of various 'levels of scrutiny,'" and to "amazingly fine distinctions that produce multiple opinions designated in Parts, sub-parts, and sub-sub-parts," all obviously the product of a Court "caught in the throes of various methodological obsessions."

Even more recently, Daniel Farber launched a similar attack. Focusing again on recent Supreme Court opinions, he concludes that they are "increasingly arid, formalistic, and lacking in intellectual value." Not only does he find that the opinions resemble the "inscrutable instructions accompanying an IRS tax form," containing "analysis [that] seems reminiscent of the Rule Against Perpetuities," but Farber also goes on to level an even more telling critique: the opinions lack "vigor" and "intellectual excitement," because they are "stodgy" and, worst of all, "dull."

Although the character of the Court's offense is apparent from the comments of Nagel, Horwitz, and Farber, it is less apparent why the style that they and so many others scorn should be considered deficient. On closer inspection, it appears that the wrongs committed are multiple. One of these wrongs, for Nagel and some others, is that multipart and multistate opinions resemble statutes. To Nagel and others, courts that write in quasistatutory language are no longer behaving like courts, thus exposing the questionable legitimacy of the enterprise. When the Court prescribes the exact words to be uttered by police officers while in the line of duty, as with the Court's opinion in Miranda v Arizona, or when the Court sets forth an elaborate scheme detailing which state regulations are appropriate at which times, as with the trimester framework of Roe v Wade, then the Court is simply legislating, thus not only usurping the power of a

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5 Id.
6 Id.
7 Id.
8 Id at 99.
9 Daniel A. Farber, Missing the "Play of Intelligence", 36 Wm & Mary L Rev 147 (1994).
10 Id at 147.
11 Id at 152.
12 Id at 156.
13 Id at 152-53.
majoritarian body, but also taking on a task better performed by different institutions with different structures.

Yet even for those who do not share Nagel's skepticism about the legitimacy of expansive conceptions of judicial power, the question of legitimacy continues to influence the stylistic critique of judicial opinions. The use of elaborate multipart tests and related instruments of formality, Horwitz and others appear to argue, is designed to suggest (erroneously) that judicial decision making is a largely mechanical task more determinate and less soaked with policy and political discretion than is actually the case. By writing in heavily formal prose, the argument continues, courts mask the human element and the consequent variability in the conclusions they reach.

A closely related charge questions the determinacy of the doctrinal structure created by such intricacy. When courts say that the law is to be interpreted pursuant to a "rule of reason," or (perhaps) when they set out a balancing standard with few clues about what is to be balanced and in what proportion, then at least courts are honestly recognizing the case-by-case subjectivity in the approach they announce. But when courts set forth intricately crafted multipart tests that switch subjectively between different levels of scrutiny, as with the four-part commercial speech test in Central Hudson Gas and Elec. Corp v Public Serv Comm'n of New York and the three- (or four-) part symbolic expression test in United States v O'Brien, they project a false precision and a false determinacy, misleadingly suggesting that intricate multipart standards are substantially more constraining than the typical balancing standard or rule of reason.

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16 Horwitz, 107 Harv L Rev at 99, 107-09 (cited in note 3).
19 391 US 367, 377 (1968). The test as announced by the Court has four parts, but the first, that a government regulation of speech must be "within the constitutional power of the Government," is of no significance. Id.
20 Horwitz is a good example of a commentator whose accusations in this respect are closely associated with skepticism about the value of various "levels of scrutiny." Such skepticism appears to be based on the plausible legal realist view that levels of scrutiny are sufficiently malleable verbal formulae that they can be attached as ex post rationalizations to any result a court wants to reach, such that a court can relatively easily find to be "substantial" or even "compelling" those interests with which it has sympathy, and not "substantial" or "compelling" those interests it rejects. Empirically, however, the skepticism about levels of scrutiny seems hard to justify. With some frequency, a low level of scrutiny appears to produce the validation of some quite tenuous governmental interests.
None of these charges addresses the literary quality of the opinion. Still, most of those who charge the courts with employing excess doctrinal and discursive complexity, including Nagel, Horwitz, and Farber, cannot resist pointing out the failure as literature of a piece of writing structured so woodenly. This, it is said, makes opinions less memorable, less quotable, less followable, and less teachable than the best work of a Holmes, a Hand, or a Cardozo, all of whom had the ability to write with great style—to produce the kind of opinion that is a pleasure to read, that is evocative and suggestive at numerous layers of subtlety, and that employs phrases that are at once insightful, persuasive, and memorable.

II. THE DEFENSE

In large part these charges are accurate. The phenomenon described by the commentators does appear to be growing in the Supreme Court, where there is much evidence of an increasing number of footnotes, expanding reliance on multipart tests, and a marked decrease in elegant phrasing. With some frequency the opinions are divided not only into parts identified with roman numerals, but also into lettered subparts, and numbered subdivisions within the subparts. And as the Court has dramatically decreased the number of cases it treats with full argument and opinion from over 150 a year through the mid-1980s to less than

See, for example, *City of New Orleans v Dukes*, 427 US 297, 303-06 (1976) (New Orleans’s interest in preserving the “charm” of the streets justified ordinance banning pushcart vendors except those that had operated for eight years or more); *Williamson v Lee Optical Co.*, 348 US 483, 488-89 (1955) (state interest in regulating eye exams justified statute prohibiting opticians, but not optometrists, from replacing lenses without a prescription). And a high level of scrutiny sometimes produces the invalidation of some quite strong or at least quite plausible governmental interests. See, for example, *Board of Airport Comm’rs of the City of Los Angeles v Jews for Jesus, Inc.*, 482 US 569, 572-77 (1987) (city interest in avoiding congestion in airport terminals does not justify airport speech restrictions); *Palmore v Sidoti*, 466 US 429, 431-34 (1984) (asserted government interest in removing child from mixed race household in order to avoid effects on child of racial prejudice did not justify using race as factor in determining custody); *Collin v Smith*, 578 F2d 1197, 1203-07 (7th Cir 1978) (village interest in preventing psychic harm to citizens, including deliberately targeted Holocaust survivors, did not justify restriction on the dissemination of race-hate materials).

This should come as no surprise, for a level of scrutiny is but a variant on a burden of proof. It may be that burdens of proof also make no difference—that finders of fact reach the same conclusions whether they apply the standards of a preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But this seems sufficiently inconsistent with most lawyers’ impressions that the burden of persuasion should rest on those who would question the validity of burdens of proof or levels of scrutiny to show that they do make little difference in actual litigation.
120 in the early 1990s to 87 in the 1993 Term, it has not decreased the number of pages it uses for those opinions in the United States Reports—conclusively demonstrating the substantial increase in the average length of a Supreme Court decision.

Perhaps it is hasty to draw sweeping conclusions about a change in judicial style, conclusions that many commentators reach by looking solely at Supreme Court constitutional decisions, and thus ignoring the nonconstitutional decisions of that body and all the decisions of every other court in the country. If one wanted, even informally, to assess the changing scene of American appellate adjudication, one would be well advised to survey a larger sample than just the small number of Supreme Court opinions likely to find their way into casebooks on constitutional law.

For my purposes, however, there is no harm in accepting the empirical assumptions that drive the charge of stylistic bankruptcy. For one thing, I want, in a qualified way, to argue that what many commentators see as pernicious is less so than they believe, so for this purpose I can accept that the phenomenon I wish to defend exists. In addition, I will focus my defense on Supreme Court constitutional decisions. As will become apparent, if this defense succeeds, then it will apply, a fortiori, to nonconstitutional decisions and to the opinions of lower courts. For purposes of attack, focusing only on Supreme Court constitutional decisions is potentially misleading. For purposes of defense, however, focusing on those same decisions is but an instance of a goal I take to be admirable, that of making things as hard as possible for my own views.

So let us take up the claim that a judicial opinion becomes less satisfactory as an opinion insofar as it is characterized by, or adorned with, a particular form of complexity, one with parts, subparts, sub-subparts, footnotes, and intricately interconnected tests. And in considering this claim, we can compare a reasonably well-known statute, the Securities Act of 1933. I use this as an example not only because this statute has been around for some time, but also because it is a statute of at times remarkable and at times infuriating complexity. Although the primary operative portion of the Act is in Section 5—which itself contains three subsections, two of which contain two sub-subsections—it is

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21 The figures come from the section entitled "The Statistics" in the annual Supreme Court issue of the Harvard Law Review.
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notorious that looking only at Section 5 tells the reader even less of what the Act is about and how it operates than is the case with most other statutory schemes.\textsuperscript{23} The definitions in Section 2 are crucial to the structure of the Act, and some, like the definition of "prospectus" in Section 2(10), define terms in certain ways for some purposes and differently for others.\textsuperscript{24} Large numbers of what seem to be securities are in fact exempted from the Act's operation in Section 3, but these exempted securities are not to be confused with the exempted transactions in Section 4. Here the exemptions turn out to be even more important, for Section 4(1) exempts all transactions not involving an issuer, underwriter, or dealer in securities; Section 4(2) exempts all transactions not involving a public offering; Section 4(4) exempts unsolicited brokers' transactions; and, despite the language of Section 4(1), Section 4(3) also exempts all transactions involving dealers, except that pursuant to Section 4(3)(A) the exemption for dealers does not apply during the first forty days of an offering.\textsuperscript{25} Indeed, not only is the complexity I have just described only the tip of the iceberg with respect to the Securities Act of 1933, I cannot resist adding that few would characterize it as having very much—for that matter, any—literary or artistic value. The following single sentence from Section 7 is illustrative:

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A of section 77aa of this title, . . . except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement.\textsuperscript{26}

\textsuperscript{23} 15 USC § 77e.
\textsuperscript{24} 15 USC § 77b(10).
\textsuperscript{25} 15 USC § 77d.
\textsuperscript{26} 15 USC § 77g.
Yet for all this facial impenetrability, the Securities Act of 1933 is generally regarded as a moderately workable statute. Some people may disagree with the substance of all or part of what the Act does, and amendments have occasionally been necessary over the years to deal with problems unforeseen by the 1933 drafters, but few have argued that the Act represents a decline in drafting skills, and fewer still that the Act is evidence of a failure in the craft of lawmaking. Rather, for all its complexity and inaccessibility to the nonspecialist, and for all the people who find it "dull," the Securities Act of 1933 is commonly perceived to be a moderately to highly successful exercise of the lawmaking function.

It now appears that most of the properties that draw scorn when found in judicial opinions—complexity, inaccessibility to nonspecialists, and dullness, to name just three—exist with far less disapproval when those same properties are present in statutes and regulations. The obvious reason for this, of course, is that statutes and judicial opinions are not the same. They are different beasts, designed to serve different purposes. Just as other characteristics are desirable in some domains and out of place in others—few of us want the characteristics in brain surgeons and airline pilots that we desire in stand-up comics or Grand Prix drivers, for example—so too should it not be surprising that properties seen as signs of decay when they appear in judicial opinions would be far less negative, or even positive, when they appear in other settings.

Yet this is too quick. The complexity, inaccessibility, and dullness that are at least tolerated and sometimes prized in the legal performances we call statutes and regulations are to be castigated in other legal performances only if there are relevant differences between the two. If it turns out that the differences are less than many people suppose, then the features that typically inspire scorn in judicial opinions may well be features that

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27 It is true that in 1980 the Council of the American Law Institute proposed reformulation of all of the federal securities laws, including the Securities Act of 1933, in the Proposed Federal Securities Code. See Thomas Lee Hazen, The Law of Securities Regulation 8-9 (West, 1985). Moreover, many important details of the Act are filled in by federal administrative regulation—agency regulations, rulings of the Securities and Exchange Commission, and records of its less formal actions (or, in this case, its less formal inactions, generally known as "no action" letters). Still, the Proposed Federal Securities Code was not enacted, and the Securities Act of 1933 continues to function moderately well. So although I make no claims that the Securities Act of 1933 is perfect as drafted, I do claim that as an exemplar of the craft of lawmaking, it has achieved some degree of success.

28 I am not one of them.
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Opinions deserve to be promoted rather than stifled. It will be useful, therefore, to look at the various purposes that judicial opinions might be thought to serve, with particular reference to those purposes that seem inconsistent with complexity, inaccessibility, and dullness. Perhaps, as we shall see, the functions that seem to require simplicity, accessibility, and style are themselves not all that they are traditionally said to be.

One of these functions is some degree of public accessibility. Nagel wants judicial opinions to “teach” the public, and he thinks it important that the Supreme Court “explain[ ] to the public” its conclusions. Even more explicitly, Farber asks courts to think about their “audience,” because “we as a society have the right [ ] to a persuasive explanation for this result.” Farber goes on to lament, therefore, that judicial opinions “do little to contribute to our national dialogues over public policy.” Similarly, various theorists in the modern republican tradition, such as Bruce Ackerman and Frank Michelman, see judicial opinions, and especially Supreme Court opinions, as central to the creation and coordination of engaged public deliberation, which to them is at the heart of democracy.

Yet in thinking about this function it can hardly be irrelevant that ordinary people simply do not read judicial opinions. Indeed, in some respects the primary sources of the law, including but not limited to judicial opinions, are considerably more

29 Nagel, 84 Mich L Rev at 171, 177 (cited in note 1). Nagel also believes we should worry about “excluding the general public from the Court’s audience.” Id at 182.
30 Farber, 36 Wm & Mary L Rev at 157-58 (cited in note 9).
31 Id at 158. Farber gives as an example the relative noninvolvement of the Supreme Court in national debates about environmental policy. I have no reason to doubt this conclusion, but one might ask why greater judicial involvement in such debates is to be desired. Strong arguments can be made that such increased judicial involvement would be a good thing, but strong arguments might also be made that this is an area in which economists, natural scientists, interest groups, and political officials ought to have much more influence than the courts. For my part, I just do not know, but the importance of Farber’s observation is to point out (although seemingly unintentionally in this case) the close relationship between an account of how courts ought to write their opinions and a usually implicit view about the role that courts ought to play in society.
32 See Bruce Ackerman, 1 We the People: Foundations 263-94 (Harvard, 1991).
34 Judge Posner recognizes the problem of audience, especially the “implied audience,” but then goes on to praise Holmes for trying to reach that part of the audience—perhaps one in a thousand—that does not consist of legal insiders. Richard A. Posner, Judges’ Writing Styles (And Do They Matter?), 62 U Chi L Rev 1421, 1431-32 (1995). Yet here a cost-benefit analysis seems particularly appropriate, since an opinion that might be better for the 1 in 1,000 could for just that reason be worse for the remaining 999.
The opinions of the courts are not the stuff of public discussion or even elite policy debate need not itself be cause for surprise or alarm. All of the other branches of government produce a great deal of documentation, similarly useful and usable within the government itself, but rarely seen by the public at large. The papers that appear in the Weekly Compilation of Presidential Documents, the notices that are found in the Federal Register, and the legislative materials that occupy the United States Code, Congressional and Administrative News are no less important because of their public inaccessibility. It is just that the bodies that produce these materials are known by the public for

35 Relatedly, there has been little attention to the process by which judicial opinions are mediated and translated to the public at large. Just as most law students have only read those portions of Roe v Wade, 410 US 113 (1973), and Buckley v Valeo, 424 US 1 (1976), that some casebook editor thinks they ought to read (I intentionally pick two quite lengthy opinions), so too is the public dependent for its view about what the courts do on Linda Greenhouse of the New York Times, Nina Totenberg of National Public Radio, Tony Mauro of USA Today, and others performing similar functions. This is not a bad thing by any means, but it does suggest an interesting research project into the relationship between the form of an opinion and what gets “picked up” by those with the ability and power to describe what courts do to a larger public.
the specific outcomes they produce, for their deeds and not for their words. Maybe it would be better were it otherwise. But unless there is to be a dramatic transformation of American public and political culture, it seems strange to criticize the authors of judicial opinions for not writing in a style designed to be comprehensible to what is in fact a virtually nonexistent audience.\(^3\)

So if the inaccessibility of judicial opinions to a wider audience is under current conditions a largely irrelevant charge, and if we cannot expect the American public to spend much more time reading courts' opinions than they do reading the Securities Act of 1933, we are reduced to the much smaller, but no less important, audiences of those who can be expected actually to read judicial opinions. For the most part these audiences will be composed of other judges, practicing lawyers, law students, and law professors. And with these audiences, the question of the functions performed by judicial opinions looks quite different.

One of these functions is that of explanation and justification. Unlike statutes, which in general prescribe but do not explain or justify, it is part of our understanding of judicial practice that judges' opinions should be reached by a process of "reasoned elaboration,"\(^3\) and that judges should explain, justify, and give reasons for their decisions. More accurately, albeit perhaps circularly, it is part of our tradition that when courts issue judicial opinions—a smaller proportion of delivered legal outcomes than many people think\(^3\)—those opinions will provide professional

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3 There is a causation problem here. Some might argue that the public does not read Supreme Court opinions because they are unreadable, not that Supreme Court opinions need not be readable because the public does not read them. Were this true, however, we might expect to have found more reading of court opinions by the general public back when they were (arguably) more readable, but there is no evidence that this was the case. Relatedly, we might investigate the identity of the "live" audience back when judges delivered all of their opinions orally from the bench, but I know of no research directed to this question.


35 Jury verdicts, denials of certiorari, and court of appeals decisions without opinion are but a few of the contexts in which American courts regularly refrain from giving (as opposed to having) reasons for the results they reach. For an analysis (and partial justification) of this practice, see Frederick Schauer, *Giving Reasons*, 47 Stan L Rev 633 (1995). In her contribution to this Special Issue, Judge Wald admirably notes the increase in the phenomenon of issuing rulings without opinion. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U Chi L Rev 1371, 1373-74 (1995). And her account of what judges are aiming to accomplish when they do write opinions is heavily influenced by the fact that judges do not write opinions in all cases. As she implicitly recognizes, not writing opinions in all cases dramatically undercuts the stan-
readers with explanations for the results reached. That a judicial opinion fails in this regard is a serious charge. Yet it is far from self-evident that a poorly written, inaccessible, unstylistic, and highly complex opinion is any more likely to fail as a piece of legal reasoning than one that is well written, understandable by a wide audience, elegant, and simple. It is true that formal structures and the language of deduction can at times suggest more precision and legal determinacy than in fact exists. But it is also true that the misleading use of the language of deduction to mask a far more creative process is hardly the province of the complex or inaccessible opinion. *Lochner v New York*, with its pseudo-definitional assertion that “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution,”\(^{39}\) is the classic example of the genre, yet it appears in a short, noncomplex, and easily readable opinion. Moreover, for every case in which a highly formal or complex structure masks deficiencies in reasoning, there seems to be at least one in which the same deficiencies are masked by an elegant or memorable phrase.\(^{40}\) Insofar as there is a standard of good judicial reasoning, and insofar as it is undesirable to hide bad judicial reasoning, it is far from clear that the characteristics of judicial opinions nowadays castigated are any more likely to facilitate such deception than are the characteristics celebrated by the contemporary critics.

III. Opinions as Rules

That it is the primary task of an appellate opinion to justify its outcome is itself a contestable proposition. In some respects the judicial opinion is quite an exceptional event. Most governmental decisions—and the judicial decision is a member of the class of governmental decisions—remain unaccompanied by public explanation, and certainly unaccompanied by public explanations that have the peculiar canonical form and status of the judicial opinion. Once we recognize this, we might ask just why we think it so important for judges to spend so much time explaining, obviously time that could be spent on other


\(^{40}\) I take this to be one of the primary themes of Richard A. Posner, *Cardozo: A Study in Reputation* 33-57 (Chicago, 1990).
things—such as judging. Indeed, it is just such a question that appears to have led to the increase within federal appellate courts of the practice of delivering judgments unaccompanied by formal opinions.41 But apart from the task of deciding, and apart from the task of explaining that decision, there is the task of guiding—the setting forth of standards to help those who are expected to follow the law.42 One common charge against the typical multilpronged standard and multipart opinion is that many of the so-called standards or tests are far less useful than their superficial complexity and appearance of precision might indicate. The three-part test for the determination of obscenity in Miller v California,43 for example, remains heavily dependent on concepts such as “appeal to the prurient interest” and “patently offensive” that are at best elusive. The four-part commercial speech test in Central Hudson44 requires difficult and arguably quite open-ended determinations of the degree of substantiality of a governmental interest (the second part), the directness of a relation between the regulation and the governmental interest (the third part), and the availability of less restrictive alternatives (the fourth part), all notoriously slippery tasks.45 And of course there is the continuing controversy about whether the three-part establishment clause test of Lemon v Kurtzman46 is at all useful in separating constitutional outcomes from unconstitutional ones.47 Yet once again the identification of causation is more problematic. I do not quarrel with the conclusion that many of the Supreme Court’s multipart tests are, at best, difficult to apply,48 but it does not follow that multipartness, or complexity in any form, is the culprit. Indeed, the Securities Act of 1933 is a

41 See generally William L. Reynolds and William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U Chi L Rev 573 (1981). There is obviously a difference between not writing an opinion and writing an opinion that is not published (although it is provided to the parties), but these complexities are not my concern here.

42 For an earlier and more tentative stab at this issue, see Frederick Schauer, Refining the Lawmaking Function of the Supreme Court, 17 U Mich J L Ref 1 (1983).


45 See United States v Edge Broadcasting Co., 113 S Ct 2696, 2702-06 (1993).

46 403 US 602, 615 (1971).

47 See, for example, Board of Educ. of Kiryas Joel Village Sch. Dist. v Grumet, 114 S Ct 2481, 2491-94 (1994); Lee v Weisman, 112 S Ct 2649, 2655-56 (1992).

48 Even here the charge may be somewhat overstated. Although there are multipart tests that provide little guidance to decision makers, that is certainly not the charge laid at the doorstep of cases such as Miranda and Roe. In both of these cases, and in others, the problem is not (for some critics) that the test does not work, but precisely that it does.
moderately good example of the fact that the legal rules that are easiest to follow are frequently the most complex. Often the legal rules that are less successful in performing the guidance function are the ones that are simple and vague. A good example, again from securities law, is the difference between the crisp complexity of Section 16(b) of the Securities Exchange Act of 1934 and the open-endedness of the similarly inspired SEC Rule 10b-5.

If we turn to judicial opinions, a few examples selected almost at random appear to confirm the view that complexity may be less causally connected to nonusability than is commonly supposed. In Shaw v Reno, the Supreme Court set out not three or four, but five "factors" that were to be used by future courts in deciding whether the shape of a legislative district violated the Equal Protection Clause, but this standard did not appear to trouble at least one lower court that took the list of five factors as a convenient way to organize its factual inquiry. In Firestone Tire & Rubber Co. v Bruch, the Court dealt with a technical question under the Employee Retirement Income Security Act of 1974 (ERISA). In writing for the Court, Justice O'Connor, whose opinion has three parts, one of which has two subparts, included the following centrally important language:

Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, we need not distinguish between types of plans or focus on the motivations of plan administrators and

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50 17 CFR 240.10b-5 (1994). I say "similarly inspired" because both deal, loosely, with the problem of insider trading.
54 489 US 101 (1989). I looked intentionally for an ERISA case. Although I am sure there are people who find the intricacies of ERISA law fascinating, I am not one of them. If a poll were to be taken of American law professors (or even of American lawyers) as to which are the least interesting areas of the law, I am moderately confident that ERISA would get a few votes. And Professor Langbein believes some of those votes would come from Supreme Court Justices. John H. Langbein, The Supreme Court Flunks Trusts, 1990 S Ct Rev 207, 228-29.
fiduciaries. Thus, for purposes of actions under § 1132(a)(1)(B), the de novo standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a “facto[r] in determining whether there is an abuse of discretion.”

Now although this passage is certainly complex, not particularly well-written, hardly memorable, and not especially accessible to the one who is not an ERISA specialist, it seems to have served its function quite well. In one lower court decision, for example, the judge noted that Firestone had “changed the legal landscape for ERISA decisions,” and proceeded seemingly without angst or uncertainty to employ the structure quoted above to the case before him. Finally, consider Farmer v Brennan,” in which Justice Souter’s opinion for the Court contained four parts, two of which contained two subparts each, with one of those subparts containing two numbered sub-subparts. Furthermore, the opinion contained the inelegant and cumbersome statement that “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”

This phrase, which is hardly a candidate for some future collection of great legal quotations, and which appears in an opinion marked by the very kind of complexity commonly castigated these days, seems (although it is too early to tell) to provide just the kind of guidance to lower courts that we might well think desirable in a Supreme Court opinion.

So if one of the functions of a judicial opinion is guiding lower courts and legally advised actors, then it is by no means clear that this goal is achieved by simplicity, elegance, accessibility, or literary style. Perhaps it is best achieved, as it is with the

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55 Firestone, 489 US at 115, citing Restatement (Second) of Trusts § 187 comment d (1959) (citation omitted).
58 Id at 1984.
Securities Act of 1933, by the kind of precision that may at times require complex structures, that may at times require the use of terms of art or technical "jargon," and that is likely almost always to be accompanied by a considerable dose of dullness and a consequent paucity of style, elegance, and creative subtlety.9

Once we recognize that the Supreme Court is now deciding fewer than one hundred cases a year with full opinions, that most other appellate courts issue opinions in far fewer of their cases with opinions than they actually decide, and that all courts make determinations likely to have a substantial influence on nonlitigated legal events,60 the guidance or lawmaking or rule-making function of the courts becomes much more important. Decisions attentive to this function may begin to resemble the Securities Act of 1933. But if the Securities Act of 1933, for all its stylistic complexity and verbal infelicity, is a successful exercise in the craft of rule making, then so too may judicial opinions possibly, and even desirably, bring the same blend of costs and benefits.

What this suggests is that it may be appropriate to think of opinion writing as (at least in part) a conscious process of rule making. To say this is not of course to suggest just how those rules should be made. At times it may be appropriate for a court, as with the exact specification in *Miranda v Arizona*,61 to delineate exactly what primary actors should do. At other times it may be appropriate to set out only broad standards, either as a way of delegating further specification to other bodies, or as a means of delaying further specification until additional cases arise. And at still other times it may be appropriate to set out neither crisp rules nor open-ended standards, delaying, in classic common law fashion, the entire rule-making process until a richer stock of experience is developed. But my point here is not one about just what kinds of rules the courts should make. It is about the importance of recognizing that judicial rule making is no less important than rule making by other bodies, and no less likely to

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9 See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 807-11 (1982). Judge Easterbrook writes: "The more the Court says, the more help it offers in planning. Longer and more detailed opinions are a rational and desirable response by a Court that cannot significantly increase the number of cases it hears but wants to offer guidance on the increasing number of problems it must address." Id at 808.


be constrained and informed by the kinds of considerations we would employ with respect to any other rule-making enterprise.\textsuperscript{62}

IV. A DIAGNOSIS

If commentators are typically unappreciative of the rule-like qualities that opinions serve, why is this so? A number of possibilities arise, most of which have to do with the fact that the culture within which the commentators exist is quite different from the culture in which judicial opinions are used by other legal actors.

For one thing, it is mainly within the world of law schools and legal scholarship that people actually read judicial opinions from beginning to end. If one takes the full opinion as the relevant item of comprehension, then certain expectations about the form, style, size, and readability of that item may follow. But if it turns out that opinions are typically read in chunks tracking the divisions created by the authors of the headnotes and the assigners of the key numbers for the West Publishing Company, with only a brief scan of the rest of the opinion to make sure that there are no undermining chunks anywhere else, then a quite different set of stylistic criteria seems appropriate.\textsuperscript{63} Indeed, the number of people who actually read judicial opinions is likely


\textsuperscript{63} The plausibility of Judge Posner's conclusions about the causal connection between a judge's reputation and that judge's skill at creating quotable and memorable aphorisms is heightened if I am correct about the way in which judicial opinions are actually consumed. My hypothesis is that the ability to produce a good line is more important if readers are scanning opinions looking for good lines than if readers are carefully reading an entire opinion as an internally coherent narrative.
decreasing. In the era of the growing dominance of LEXIS and Westlaw (and various other “online” sources as well), various search techniques will focus the user quickly and directly on the most relevant part of an opinion, requiring an extra step even to scan the entire opinion. Changing technology seems likely, therefore, to make the act of reading an opinion from beginning to end even rarer than it has been in the past. If it turns out (and all of this can and should be subject to serious empirical investigation, which is not what I purport to offer here) that opinions are “consulted” rather than read, scoured for quotable language rather than analyzed in depth, then the exercise of evaluating them as writings to be read in their entirety, when in fact few readers actually do so, appears both counterintuitive and counterproductive.

Perhaps, therefore, the charge I describe is the charge that opinions are becoming increasingly unsuited not for the general public (for whom they were never suited anyway), and not for the mine run of practicing lawyers (who access and use opinions in much the way that they access and use statutes and regulations), but only for one of their audiences—the audience of law students and law professors. Now this is a large and important audience. And its importance is wider than just the preoccupation of that particular culture. As long as the appellate opinion remains the primary teaching vehicle in American law schools, a phenomenon that is frequently lamented but rarely changed, those opinions will play a large part in determining the skills, aspirations, and self-understanding of American lawyers.

Yet of course appellate opinions are not the primary teaching vehicles in American law schools—that role is served by severely edited appellate opinions as they appear in casebooks. These edited opinions are themselves a distinct genre with distinct constraints. The standard length of an assignment in a typical law school course remains about fifteen pages, so one constraint of the genre is that opinions that cannot conveniently be edited to fifteen pages or less are problematic. Similar constraints may vary from course to course or from casebook to casebook. Is it important that there be a sharply opposed majority opinion and dissent, so that students can see and discuss “both sides?” Is it important that the facts be set out briefly (or that the facts are intrinsically simple rather than complex), so that most of the space can be devoted to the arguments and analysis of the court? Is it important that the most vital features of the opinion are in text rather than footnotes, since footnotes are especially difficult
to deal with in edited cases? I could list other constraints, and some might quarrel with the ones I have listed, but my point is not dependent on the exact features I name. Rather, it is that “the appellate opinion as it exists in edited form in a casebook designed for classroom teaching” is a quite different item from “the appellate opinion as it is written by the judge or her clerks,” and it may be worthwhile to examine the extent to which the standards appropriate to the former are the typical mode of evaluation of the latter.

The problem of legal culture, however, is even larger than the preoccupation with appellate opinions as the primary vehicle for teaching and data for scholarship. Within much of the legal culture, and certainly within much of the legal academy, judicial opinions are less important in themselves than they are as the evidence for deciding who are the best judges. With respect to statutes and regulations, we hardly ever know the identity of the scrivener—would anyone even consider identifying America’s third greatest statutory drafter?64—yet the culture of judge and court watching in the United States has a large focus on the individual judge and an even larger focus on normative judicial evaluation. The typical American law professor is more of a shadow judge than the typical American historian is a shadow policymaker, and this self-understanding produces a style in its own. Judicial evaluation, an activity not totally unlike fan voting for the participants in the National Basketball Association All-Star Game, or the selection of performers to receive “Oscars” by the Academy of Motion Picture Arts and Sciences, is a persistent feature of law school classrooms and legal scholarship. If judges are the most important actors in the legal system, and if it is important for legal scholars to evaluate their comparative performance, both debatable propositions, then the centrality of the judicial opinion in legal scholarship becomes somewhat more understandable.

Moreover, the criteria for evaluation likely reflect traits the evaluator herself finds important in her own activities, and likely reflect as well the relative ease of evaluating various characteristics. As generations of legal scholars have learned, textual analysis of judicial opinions is a relatively low-cost form of scholarship. Compared to other forms of scholarship, it rarely requires re-

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search grants, large data sets, careful hypothesis formulation, or a host of other problems that plague natural and social scientists. This does not mean that textual analysis and judicial evaluation are unimportant activities. It does mean that we should at least be aware of the possibility that the criteria used by an investigator—here the investigator of the role played by judicial opinions—may at times reflect more than anything else the needs and constraints of the investigator. Not only is the evaluative focus on the judicial opinion itself a function of the attention placed on judicial opinions by the legal academy, therefore, but the criteria applied in that evaluation also reflect the resources and norms of that academy. Analyzing an opinion for how it reads requires (perhaps) more raw intelligence and more creativity, in addition to requiring fewer resources, than attempting to determine whether an opinion has had the effect on transactions (or even on inferior courts) that its author intended. Yet perhaps the latter is every bit as important as the former, and when we apply that criterion it may turn out that opinions that look deficient according to the former criteria look much better when measured against the latter.

**CONCLUSION**

Seventy years ago Cardozo observed that the form of a judicial opinion “make[s] it what it is.” Yet perhaps the direction of influence is just the opposite, with what a judicial opinion is determining its form. This, of course, suggests the importance of an inquiry by judges and by those of us who comment on the behavior of judges into the function of the judicial opinion. Like many other performances, the performance that is the judicial opinion may have multiple functions, but that does not detract from the way in which the evaluation of the performance turns on the point of the performance. If, as I suspect, we understand that the primary purposes of a judicial opinion are to serve as a teaching vehicle for law students, a terrain on which legal scholarship is practiced, and a device for reinforcing the idea of the

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66 I cannot resist being pedantic here. The statement in the text obviously suggests the slogan, “form follows function,” but that statement, as originally used by the architect Louis Sullivan, does not mean that the form of a building is determined by the purpose it is to serve. Rather, at least to Sullivan, “form follows function” meant that the building’s external architectural features would both track and reveal its structural elements, so that the external architectural features would give the observer some idea of what held the building together (and up).
importance of the judge in the American legal culture, then we are likely to employ a method of evaluation that stresses the literary and the aesthetic and that rewards the imaginative and the stylish. But if, in addition to and not necessarily in replacement of, the foregoing purposes, we add the more mundane functions commonly associated with statutes such as the Securities Act of 1933, we will discover that a different mode of evaluation is also appropriate. This mode of evaluation may often find the literary and the aesthetic distracting, and the imaginative and stylish counterproductive. Indeed, such a mode of evaluation may turn out at times to reward the dull. But in law, as in life, dull may sometimes have its uses.