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Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech

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TOPIC 4

BEYOND THE WRITTEN OPINION: WHEN JUSTICES SPEAK TO THE PUBLIC

BEYOND THE OPINION: SUPREME COURT JUSTICES AND EXTRAJUDICIAL SPEECH

CHRISTOPHER W. SCHMIDT*

INTRODUCTION

Supreme Court Justice Hugo L. Black's relationship with the American people did not get off to a good start. It was late summer 1937, and his colleagues in the Senate had just confirmed his appointment to the Court.¹ The press picked up the story that early in his political life in Alabama Black had been a member of the Ku Klux Klan.² The resulting public outcry appeared to imperil the newly appointed Justice's place on the Court. Black was in Europe at the time, and he cut short his vacation to return home and confront the accusations.³ He decided to take his case directly to the public through a nationally broadcast radio address—"in a way that cannot be misquoted and so the nation can hear it," as he put it.⁴ Black explained that he had been, but was no longer, a member of the Klan and that his record in the Senate and his personal relationships with blacks, Catholics, and Jews showed that he was not a bigot.⁵ (*Newsweek's* headline following the speech: "I Did Join, I Resigned; The Case Is Closed."⁶) As it turned out, the eleven-

* Assistant Professor, Chicago-Kent College of Law; Faculty Fellow, American Bar Foundation. I would like to thank Todd Haugh, Sarah Harding, Steve Heyman, Mark Rosen, Carolyn Shapiro, and my fellow Symposium participants for all their helpful comments and suggestions, Laura Caringella for her editorial assistance, and Catie Cottle, Kylin Fisher and the rest of the Law Review editors for diligently and skillfully guiding this Article to publication.

1. The most detailed account of Justice Black's appointment to the Supreme Court is found in ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 233-46 (1994).

2. Ray Sprigle, *Black Life Member of Klan, Writer Says After Inquiry*, ATLANTA CONST., Sept. 13, 1937, at 1. Sprigle, a reporter for the *Pittsburg Post-Gazette*, broke the story, which was picked up by newspapers around the country. See, e.g., *Justice Black Is Recorded As Still a Member of Klan*, N.Y. TIMES, Sept. 13, 1937, at 1.

3. NEWMAN, *supra* note 1, at 249-55.

4. Willard Edwards, *Nation to Hear Black Defense on Klan Tonight*, CHI. TRIBUNE, Oct. 1, 1937, at 5.

5. *Justice Black's Speech*, N.Y. TIMES, Oct. 2, 1937, at 1 (text of radio address).

6. *I Did Join, I Resigned; The Case Is Closed*, NEWSWEEK, October 11, 1937, at 12.

minute address proved remarkably successful in deflating the controversy.⁷

For at least two decades following this embarrassing episode, Black retreated from the public spotlight.⁸ He would, as the saying goes, let his written opinions speak for themselves.⁹ Through the 1940s and 1950s, his judicial writings demonstrated a distinctive approach to constitutional interpretation, expressed in notably accessible language. His friends and admirers regularly urged him to present his views in a more public setting.¹⁰ He refused. "Should I conclude to deliver lectures anywhere," he wrote to a friend in 1959, "it will be over the protests of certain inner voices that keep telling me that the best thing I can do is tend to my knittin' here at home."¹¹

Eventually, however, Justice Black did accept one of these invitations, and in February 1960 he delivered an address on the Bill of Rights at New York University.¹² According to his biographer, one of the reasons Black overcame his reluctance was his interest in finding a new platform from which to present his constitutional views, one that would not be in the form of a rebuttal, as his judicial opinions typically were.¹³ Black's NYU lecture was provocative, particularly his uncompromising insistence that "there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"¹⁴ His remarks were reported on the front page of the *New York Times*,¹⁵ and

7. For accounts of Black's speech, see Martin Carcasson & James Arnt Aune, *Klansman on the Court: Justice Hugo Black's 1937 Radio Address to the Nation*, 89 Q. J. SPEECH 154 (2003); NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 141-42 (2010); NEWMAN, *supra* note 1, at 258-63.

8. See Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 659 (1962) (categorizing Black as one of the most reticent Justices); Samuel Krislov, *Mr. Justice Black Reopens the Free Speech Debate*, 11 UCLA L. REV. 189, 189-90 (1964) (same).

9. See, e.g., Westin, *supra* note 8, at 633 (quoting Justice Brennan, in 1959, stating that judicial independence "require[s] that the opinions by which judges support decisions must stand on their own merits without embellishment or comment from judges who write or join them").

10. NEWMAN, *supra* note 1, at 488.

11. NEWMAN, *supra* note 1, at 488 (quoting letter from Hugo L. Black to Edmund Cahn, July 8, 1959).

12. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

13. NEWMAN, *supra* note 1, at 488; see, e.g., *Barenblatt v. United States*, 360 U.S. 109, 143-46 (1959) (Black, J., dissenting) (discussing the themes that would eventually receive fuller treatment in NYU address).

14. Black, *The Bill of Rights*, *supra* note 12, at 867.

15. Anthony Lewis, *Black Condemns Limit on Liberty*, N.Y. TIMES, Feb. 18, 1960, at 1.

they sparked a flurry of controversy within the legal community.¹⁶ Soon enough, Black again was expounding on his jurisprudential views in a public setting, this time in a public interview at a meeting of the American Jewish Congress, an invitation he accepted in order to respond to the criticism his previous lecture had ignited.¹⁷

Toward the end of the 1960s, his long tenure on the Court nearing its end, Black again took to the lectern. When he agreed to deliver the Carpentier lectures at Columbia Law School in 1968, his main motivation was personal: a growing chorus of commentators was declaring that Black's recent decisions marked a conservative turn in his thinking, an accusation the Justice sought to rebut.¹⁸ "A number of people have been writing about my views in a way that causes me now to want to express those views for myself," Black told Columbia's dean.¹⁹ The series of three lectures, delivered in the spring of 1968 to an audience of some 1500, was well received.²⁰ He had the room laughing when he broke from the text of his speech to directly address his critics: "I know they're saying, 'Well, he used to be all right. He was young then. But he's getting old and mellow and forgetting the ideas he had when he was a young man.'"²¹ To which he responded defiantly: "Well, I don't think I'm old yet. And I think I can state categorically that I have not changed my basic constitutional philosophy in at least 40 years."²² The lectures were soon published in a volume titled *A Constitutional Faith*.²³

By this point in his career, Justice Black seemed to have taken a liking to his new life as a public figure. He agreed to be the first Justice

16. See, e.g., Alexander Bickel, *Mr. Justice Black: The Unobvious Meaning of Plain Words*, NEW REPUBLIC, Mar. 14, 1960, at 13.

17. In characteristically uncompromising fashion, Justice Black used this second major public appearance to reiterate and amplify the arguments of his initial lecture. *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).

18. Sydney E. Zion, *Justice Black Denies Change in Basic Constitutional Philosophy*, N.Y. TIMES, Mar. 21, 1968, at 43 ("Justice Black, whose opinions have been hailed by libertarians during most of his 30 years on the Court, has come under increasing attack from many libertarians in the last two years").

19. Newman, *supra* note 1, at 582 (quoting letter from Hugo L. Black to William Warren, Jan. 17, 1967); see also HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* 10 (1968) (discussing and rejecting accusation that he had changed his constitutional views); John P. MacKenzie, *Hugo Black Can't See He's Changed*, WASH. POST, Apr. 14, 1968, at B3. On Black's conservative turn, see generally Christopher Schmidt, *Hugo Black's Civil Rights Movement*, in *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ* 246-66 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

20. Zion, *supra* note 18.

21. *Id.*

22. *Id.*

23. BLACK, *A CONSTITUTIONAL FAITH*, *supra* note 19.

to sit for a feature-length television interview, which was filmed in Black's home study and aired on CBS in 1968.²⁴ Black was initially reluctant when approached with the idea of a television interview. Worried whether such a forum was appropriate for a sitting justice, he only agreed to the interview after consulting with Chief Justice Warren and Justice Douglas.²⁵ This time around, Black had an additional motivation in speaking out to the public, namely his concern with the increasing attacks on the Court that were taking place in the presidential campaign—Richard Nixon and George Wallace were basically running against the Warren Court.²⁶ Black was never fully comfortable about going on television. He insisted that a discussion about his pre-Court membership in the Klan be cut, and at one point after filming he tried to have the whole interview trashed.²⁷

In the end, the interview aired, and the wide-ranging discussion made for powerful television.²⁸ Early in the interview, Black pulled a well-worn copy of the Constitution from his suit pocket.²⁹ "I don't know it by heart," he confessed. "[M]y memory is not that good. When I say something about it, I want to quote it precisely."³⁰ When questioned about the attacks on the Court for its decision to protect the rights of criminal defendants, Black went on the offensive. "Well, the Court didn't do it . . . The Constitution-makers did it . . . They were the ones that put in every one of these amendments. They are complaining about the Constitution . . . And so, when they say the Court did it, that's just a little wrong. The Constitution did it."³¹ He suggested that the Court's implementation ruling in *Brown v. Board of Education*,³² with its "all deliberate speed" formula,³³ was ill-advised.³⁴ (This was the

24. NEWMAN, *supra* note 1, at 584-87.

25. *Id.* at 583-84.

26. *Id.* at 584; GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 34-35, 408-11 (1977) (summarizing politicization of Court in late 1960s).

27. NEWMAN, *supra* note 1, at 585.

28. Gerald Dunne uses the interview as the opening scene of his admiring biography of Justice Black. DUNNE, *supra* note 26, at 19-37. Dunne goes so far as to offer the improbable suggestion that if the interview had aired prior to the 1968 presidential election (it aired a month afterward), it might have changed the outcome. *Id.* at 37.

29. DUNNE, *supra* note 26, at 30.

30. *Justice Black and the Bill of Rights*, 9 SW. U. L. REV. 937, 939 (1977).

31. *Id.* at 947. "This passion for constitutional literalism has inspired an apocryphal story that Justice Black keeps locked in his drawer the only true copy of the Constitution, which he reveals to the world only through his judicial opinions." Fred P. Graham, *Justice Black: Center of Controversy*, N.Y. TIMES, May 11, 1968, at 21.

32. 349 U.S. 294 (1955).

33. *Id.* at 301.

34. *Justice Black and the Bill of Rights*, *supra* note 30, at 941.

page-one headline story in newspapers the following day.³⁵) At one point, the 82-year-old Justice picked up a volume of the *U.S. Reports* to read the concluding lines of *Chambers v. Florida*,³⁶ which left him wiping tears from his eyes.³⁷ The interview was awarded an Emmy for the year's best cultural documentary.³⁸ "It should be shown again and again," wrote the *Boston Globe*.³⁹

Justice Black demonstrated remarkable skills in these off-the-bench appearances. In terms of communicating with a general audience, serving as a spokesperson for the Court, explaining his distinctive approach to constitutional interpretation, expressing his heartfelt commitments regarding the law, the Constitution, and the Court, he might very well be unequaled among the justices who have served on the Court. In this Article, I draw on Black's story not just to show his singular ability to hold forth in these off-the-bench forums, but also to highlight the concerns and opportunities that exist when justices venture beyond their written opinions. For there is much in Black's story that is quite representative of the strange, often contradictory phenomenon of justices taking their message directly to the American people.

My examination of extrajudicial speech as practiced by members of the Supreme Court is organized into two parts. Part I offers a general framework for categorizing the kinds of contributions sitting justices have made to the public discourse beyond their written opinions. I consider examples of extrajudicial speech from throughout the Court's history, although I focus particularly on the period since Justice Black's appointment.⁴⁰ My goal here is twofold: to highlight the various genres of off-the-bench commentary, and to refute the commonplace assertion

35. Homer Bigart, *Black Believes Warren Phrase Slowed Integration: Black Believes Warren Phrase Slowed Integration*, N.Y. TIMES, Dec. 4, 1968, at 1.

36. *Justice Black and the Bill of Rights*, *supra* note 30, at 950. "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." 309 U.S. 227, 241 (1940).

37. NEWMAN, *supra* note 1, at 586.

38. *Id.* at 587. The interview clearly resonated with many viewers. Justice Black received some 1,500 letters in response to the broadcast. MR. JUSTICE BLACK AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 209-10 (1986).

39. *Mr. Justice Black Goes on Camera*, BOS. GLOBE, Dec. 8, 1968, at 22A.

40. My decision to focus on the Supreme Court since 1937 is made for reasons of convenience, source accessibility, and its more direct relevance to the present. It should not be read to imply that this date marks any sort of categorical shift in extrajudicial speech practices for Supreme Court justices.

that there exists a historical tradition of justices refraining from extrajudicial speech.

This taxonomy of extrajudicial commentary in past and present perspective lays the groundwork for Part II, in which I assess the risks and opportunities for justices who go beyond their written opinion in order to speak to the American people. Too often our understanding of the extrajudicial contributions of the justices has been clouded by idealized, historically inaccurate assumptions about the Court and by exaggerated assessments of the potential costs of substantive, controversial extrajudicial speech. My goal in this section is not to offer yet another refinement of the line of judicial propriety, or to warn conscientious justices away from that line, wherever it lies. Rather, my goal is to broaden our understanding of the unique place of extrajudicial commentary in our constitutional tradition. In contrast to the typical Supreme Court written opinion, extrajudicial speech allows for, even encourages, more personalized, more accessible, and potentially more effective pathways of communication with the American people.

The power of extrajudicial speech also derives from the atmosphere of potential transgression that sometimes accompanies the off-the-bench writings and public appearances of Supreme Court justices. A key to understanding the distinctive phenomenon of extrajudicial speech is the relationship between the perceived propriety of the extrajudicial statement and its impact on our public constitutional discourse. Extrajudicial speech's most significant contributions often come when the speech is near, perhaps at times over, that contested line between appropriate and inappropriate judicial behavior.

With a discussion that is not obscured by inaccurate claims about tradition and that includes a better appreciation of extrajudicial speech's potential benefits, not just potential risks, I intend this Article to serve as an invitation for a more constructive discussion about the role of Supreme Court justices in our constitutional democracy.

I. A FRAMEWORK FOR ANALYZING EXTRAJUDICIAL SPEECH

More than any other institution in our constitutional system, the Supreme Court's legitimacy rests on the written justifications that accompany its rulings. Justices regularly express concern that they do not want to confuse or take away from the force of their written opinions

by offering extraneous commentary on their judicial work.⁴¹ It is this conception of the judicial role, fortified by a persistent idealized vision of justices as somehow detached from the rest of society, that leads the justices toward a measure of circumspection with regard to their contributions to the public discourse. Relative to other public officials, their public statements and writings tend, on the whole, to be sporadic. Measured by overall word count, most of their contributions are also rather banal.

This is not the end of the story, of course. For, as Justice Black's story demonstrates, justices do venture beyond their written opinions in order to talk to the American people about themselves, about their ideas about the law, about the Court, and sometimes even about contemporary policy issues.⁴² They write books and articles. They deliver lectures and give interviews. They offer up impromptu comments (and on one occasion, a much disputed gesture⁴³) in public settings that gain media attention.

It is important to make clear from the outset a simple historical point: from the earliest days of the Court, justices have spoken out, beyond their opinions, on matters large and small, political and personal.⁴⁴ Members of the Court have rarely been satisfied letting their

41. See, e.g., *Nonjudicial Activities of Supreme Court Judges and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers, S. Comm. on the Judiciary*, 91st Cong. 162 (1969) (statement of Hon. Arthur J. Goldberg) (stating that judges should not discuss their opinions because "decisions should speak for themselves"); SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 223, 461-62 (2010) (Justice Brennan expressing similar sentiment); Westin, *supra* note 8, at 633 (same).

42. A distinct but related branch of commentary that would fit the category of "beyond the written opinion," but which this Article will not discuss, are comments Justices make from the bench during the course of their official duties. These include engaging with lawyers and each other in oral arguments and their bench opinions (announcements of the results of decisions with a summary of their reasoning). See generally Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS J. 75 (2010).

43. Justice Antonin Scalia sparked a brief media flurry in 2006 when he dismissed an unwelcome reporter's question by flicking his hand under his chin. *Day to Day: Justice Scalia's Under-the-Chin Gesture* (NPR, Mar. 30, 2006),

<http://www.npr.org/templates/story/story.php?storyId=5312065>; "Leave it to Justice Antonin Scalia to trigger a nationwide debate about the hermeneutics of chin flips," commented Dahlia Lithwick. Dahlia Lithwick, *How Do You Solve the Problem of Scalia?*, SLATE (Mar. 30, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/03/how_do_you_solve_the_problem_of_scalia.html). Scalia amplified the chin-flick debate when he wrote a letter to the editor of the *Boston Herald* criticizing the paper for describing the gesture as "obscene." *Id.* He complained that "[f]rom watching too many episodes of the Sopranos, your staff seems to have acquired the belief that any Sicilian gesture is obscene—especially when made by an Italian jurist." *Id.*

44. Writing in the early 1960s, Westin identified a "basic tradition" as "one of wide-ranging and frank out-of-court commentary." Westin, *supra* note 8, at 635-36. He also noted that there were two periods in which this tradition was broken by a relatively reticent bench, one in the two decades following the Civil War, *id.* at 650-54, and the other in the 1920s and 1930s, *id.* at 654-56.

written opinions speak for themselves. They have always felt the need to speak in a more direct manner to the American people. Although the frequency and notoriety of off-the-bench statements have waxed and waned over the course of the Supreme Court's two centuries of history, and although each Court has had justices more or less interested in speaking to the public, throughout the Court's history justices have chosen to contribute, often quite substantively, to the public discussion through off-the-bench commentaries. Perhaps, as some have argued, the current Court is more engaged in the public sphere than previous Courts have been. If so, the change is not a qualitative one: contemporary practices are best understood as a continuation of a long tradition of off-the-bench public activities by Supreme Court justices. This lesson of history, obvious to anyone who has considered the issue, runs contrary to the dire warnings of lost tradition and declining standards of behavior that are sounded whenever a justice makes news headlines for some off-the-bench statement.⁴⁵ (These dire warnings also have precedent as old as the Court.⁴⁶)

See also Leslie B. Dubeck, *Understanding "Judicial Lockjaw": The Debate over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 587-601 (2007).

Of course there are, and always have been, exceptions. Most recently, Justice Souter was known for his eschewal of the public spotlight. Linda Greenhouse, *David H. Souter: Justice Unbound*, N.Y. TIMES, May 3, 2009, at WK1; *see also* Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES, May 12, 2009, at A13 ("Justice David H. Souter's retirement may deprive the Supreme Court of a careful judge, but he was never good material for newspaper columnists looking for scraps of color.") Souter has been more outspoken after retirement, however. *See infra* note 158. Justice Thomas regularly speaks off the bench, but he tends to limit his public appearances to those with sympathetic audiences. *See, e.g.*, KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 227 (2007) ("After taking his seat on the court, Thomas went on a kind of conservative thank-you tour that lasted several years.").

Going back further into history, many of the most famous Justices of the twentieth century avoided giving public commentary or carefully circumscribed its content. Louis D. Brandeis, a major public figure prior to joining the Court, refused to speak publicly on matters relating to the Court after his appointment. Westin, *supra* note 8, at 635; BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 8-9 (1982) (Behind the scenes, however, Brandeis was remarkably active on both political and Court-related issues. *See id.*) Justice Benjamin N. Cardozo turned down practically all speaking invitations, a practice he described as "a self-denying ordinance" that Justices must adopt. Westin, *supra* note 8, at 635 (quoting GEORGE SIDNEY HELLMAN, BENJAMIN N. CARDOZO: AMERICAN JUDGE 271 (1940)). According to Westin, Justice Oliver Wendell Holmes Jr. "thought it best to keep his gems for opinions, letters, and conversation." Westin, *supra* note 8, at 655. Justice Frankfurter spoke and wrote quite prodigiously while on the bench, although his commentary on the Court focused largely on historical biographies of earlier Justices; he insistently refused to engage directly with current legal issues while off the bench (and he coined the phrase "judicial lockjaw" to describe this self-imposed restriction). *Id.* at 633, 656-57.

45. *See, e.g.*, Bill Press, *Scalia Has No Right to Rule on Same-Sex Marriage*, CHI. TRIBUNE (Dec. 13, 2012), http://articles.chicagotribune.com/2012-12-13/news/sns-201212131730—tms—bpressst—m-a20121213-20121213_1_supreme-court-opinions-or-dissents-justice-antonin-scalia ("Once upon a time, Supreme Court justices were seen but not heard. The only time they spoke in

Because of the relatively limited sustained attention to this subject, an initial order of business in this Article is to construct a framework for considering the varieties of public extrajudicial speech—which I define to include writings, lectures, and extemporaneous remarks by Supreme Court justices.⁴⁷ I approach this task by considering what I see as the obvious question to be considered when analyzing this kind of activity: What motivates justices to go beyond their opinions and speak directly to the American people? To offer some purchase on this potentially unruly topic, I present a rough taxonomy of off-the-bench statements and writings, broken down into five basic categories, each illustrated with selected examples from the modern era of the Supreme Court (since 1937). This section provides an introduction to the basic phenomenon of public extrajudicial speech; the section following then offers an analysis of the phenomenon.

A. *The Personal*

Autobiography is a common theme for justices in their writings, interviews, and public speaking engagements. Sometimes they do so only reluctantly. Hugo Black's radio address about his membership in the Klan was the most famous example of a reluctant turn to autobiography. More recently, Justice Scalia felt pressured to issue a statement about his relationship with Vice President Cheney (and about his hunt-

public was to ask a question at oral arguments. Otherwise, they kept their counsel and spoke through written opinions or dissents. Sadly, that's no longer the case."); Jonathan Turley, *Our Loquacious Justices*, L.A. TIMES (Mar. 28, 2006), <http://articles.latimes.com/2006/mar/28/opinion/oe-turley28> (noting that "the justices have been entering the public debate recently in a way that would have been viewed as scandalous just a couple of decades ago" and lamenting the loss of "a long-held tradition of [Justices] avoiding public speeches"); David L. Kirp, *The Justices Might Find a Gag's in Order*, WALL ST. J., Mar. 23, 1983, at 30 ("The strong tradition of letting judges' opinions speak for themselves has been publicly maintained.").

46. Dubeck, *supra* note 44, at 596-601.

47. The kinds of extrajudicial speech on which I focus in this Article is just one strand in the larger category of "extrajudicial activities" of Supreme Court Justices. The most controversial strand of extrajudicial activity is judicial involvement in the affairs of the executive and legislative branches. This issue is not considered in this Article. It is worth noting, however, that similar to the mythologies regarding past practices of extrajudicial speech, there is a mythology regarding past practices of extrajudicial political activity. See, e.g., DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 86 (7th ed. 2005) ("The reality is that justices are political actors and find it more or less hard to refrain from outside political activities. Off-the-bench activities are the norm."); MURPHY, *supra* note 44, at 7 ("On close examination, the whole notion of a judiciary totally secluded from politics appears to be more myth than history.").

Furthermore, as I am primarily concerned in this article with Justices consciously reaching out to general audiences, I do not consider private extrajudicial speech, writings, and activities of the Justices. See, e.g., *id.* (examining the behind-the-scenes political engagement of Justices Brandeis and Frankfurter).

ing habits) in order to justify his decision not to recuse himself from a case involving the Vice President.⁴⁸ These kinds of disclosures under pressure are the exceptions, of course. Justices often are eager to tell their personal stories. The reasons for doing this may be self-aggrandizing, they may be financial,⁴⁹ they may be a belief that their story is worth sharing. In most instances, they are likely some mixture of all these factors.

Some justices are more interested in talking about themselves than others. On one end of the spectrum we have Justice William O. Douglas, easily the most prolific author ever to sit on the High Court.⁵⁰ Early in his career on the Court, Douglas desperately wanted to be President,⁵¹ and some of his writing and many of his speeches in the 1940s and early 1950s had the feel of campaign advocacy (in 1948 he published a book titled *Being an American*⁵²). Once he gave up on his political aspirations, Douglas turned his attentions to other pursuits: three divorces and subsequent alimony payments left him chronically short of money, which drove him to write more books, several of them autobiographical.⁵³ Furthermore, Douglas had a remarkable story to tell about his life—some of which apparently was true.⁵⁴

Toward the other end of the spectrum, we have individuals such as Chief Justice Rehnquist. While Rehnquist wrote a good deal while on the bench, publishing several volumes of history and even producing a novel manuscript that in the mid-1970s he tried unsuccessfully to have published,⁵⁵ he recoiled at the idea of writing about himself.⁵⁶

48. *Cheney v. D.D.C.*, 541 U.S. 913 (2004) (memorandum of Scalia, J.)

49. Justice Thomas earned a reported \$1.5 million to write his memoir. David D. Kirkpatrick & Linda Greenhouse, *Memoir Deal Reported for Justice Thomas*, N.Y. TIMES, Jan. 10, 2003, at A20. Justice Sotomayor also earned a generous advance for her memoir. Adam Liptak, *\$1.175 Million To Sotomayor For Memoir, Forms Reveal*, N.Y. TIMES, May 28, 2011, at A16.

50. Ronald Collins, *353 Books by Supreme Court Justices*, SCOTUSBLOG (Mar. 12, 2012, updated Nov. 7, 2012), <http://www.scotusblog.com/2012/03/351-books-by-supreme-court-justices/>.

51. See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 184-86, 188-96, 209-32, 314, (2003).

52. WILLIAM O. DOUGLAS, *BEING AN AMERICAN* (1948); see also WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* (1950); WILLIAM O. DOUGLAS, *STRANGE LANDS AND FRIENDLY PEOPLE* (1951).

53. MURPHY, *WILD BILL*, *supra* note 51, at 287-99, 392.

54. WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975* (1980); WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* (1974). On the fictional elements of Douglas's autobiographical writing, see MURPHY, *WILD BILL*, *supra* note 51, at 473-80.

55. JOHN A. JENKINS, *THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 177-87* (2012). "According to his biographer, "the writing was amateurish, the plot anything but compelling," *id.* at 181, an assessment echoed by the numerous editors who rejected the manuscript, *id.* at 181-85.

56. *Id.* at xv.

Several justices recorded oral histories about their lives and careers.⁵⁷ Thurgood Marshall recorded an oral history⁵⁸ and also gave a series of long interviews about his life toward the end of his time on the bench.⁵⁹ Memoirs continue to be common among sitting justices: Justice O'Connor wrote a book about her upbringing;⁶⁰ Justice Thomas published his memoir in 2007;⁶¹ and Justice Sotomayor recently added her name to the list.⁶²

B. *The Interpersonal*

Justices sometimes use extrajudicial settings to pass along personal observations about their colleagues. In recent years we have had a High Court that, by most accounts, gets on with each other remarkably well, a point that the justices frequently highlight.⁶³

The more memorable—and potentially consequential—kind of interpersonal comments are those that are less friendly. Sometimes these comments can be strategic. When, for instance, Justice Harlan Fiske Stone was concerned about what he considered the sub-standard work of Justice Black early in the Alabama Justice's time on the Court, he decided to leak his concerns to a well-known Washington, D.C., journalist, Marquis Childs.⁶⁴ Childs subsequently wrote a series of articles that included sharp critiques of Black's inexperience.⁶⁵ Black was committing "blunders which have shocked his colleagues," he wrote.⁶⁶ Although Childs did not name his source, it became widely known that it was in fact Stone, despite his vociferous public denials.⁶⁷

57. See, e.g., FELIX FRANKFURTER REMINISCES: RECORD IN TALKS WITH DR. HARLAN B. PHILLIPS (1960) (transcribed interview with Frankfurter on his life up to his appointment to the Court); THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT, Interviews with Prof. Harold Hongju Koh, Yale Law School (1994-1995), available at <http://www.loc.gov/r/r/mss/blackmun/>.

58. *The Reminiscences of Thurgood Marshall*, in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 413 (Mark V. Tushnet ed., 2001).

59. See, e.g., Carl T. Rowan, 'Tart-tongued' Justice Marshall Speaks Out Again, CHI. SUN-TIMES, Dec. 11, 1987, at 58.

60. SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002).

61. CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007).

62. SONIA SOTOMAYOR, *MY BELOVED WORLD* (2013).

63. These comments I place in the "Institutional" grouping. See *infra* Part I.D.

64. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 472 (1956).

65. *Id.* at 472-73.

66. Marquis W. Childs, *The Supreme Court To-day*, 176 HARPER'S MONTHLY MAG. 581, 582 (1938).

67. MASON, *supra* note 64, at 474-76.

Justice Black was caught up in another notable episode of publicized intra-Court tension during this period. Justice Robert H. Jackson lashed out at Black for what he saw as his efforts to block Jackson's ascendance to the Chief Justiceship following Justice Stone's death in 1946.⁶⁸ Jackson took the rather puzzling approach of writing an anguished letter defending himself to President Truman, which he released to the press, thereby turning the internal dispute into front page news.⁶⁹ Black, characteristically, kept his grievances out of the public spotlight.⁷⁰

As these episodes demonstrate, justices who publicize their interpersonal grievances often have some kind of strategic agenda: Stone sought to shame Black into writing more lawyerly opinions; Jackson thought he was going to salvage his promotion. These kinds of strategic deployments of public attention generally do not work, however. At least in these episodes, their ultimate effect was nothing more than displaying to the public the frustrations and tensions that invariably percolate within the Court. Justices may feel the need to vent their anger and to discredit a fellow justice, even when the comments are unlikely to improve the situation. Chief Justice Burger was known by his colleagues as a somewhat annoying micromanager, too caught up in his own importance and unable to effectively run the justices' conference; his tenure was marked by periodic leaks from the other justices about his shortcomings.⁷¹ More recently, stories about Chief Justice Roberts' late switch in the Affordable Care Act Case⁷² were attributed to leaks from frustrated conservatives within the Court.⁷³

A particularly controversial variant of this genre of extrajudicial speech is when justices attack their colleagues for acting in a manner that is partisan or excessively ideological. Justice Blackmun spoke out about how conservative the Court was becoming due to President

68. For accounts of the affair, see FELDMAN, *supra* note 7, at 296-302; NEWMAN, *supra* note 1, at 341-48; Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203 (1988).

69. See, e.g., *Feud Rips the Court!*, CHI. DAILY TRIBUNE, June 11, 1946, at 1.

70. FELDMAN, *supra* note 7, at 300.

71. See, e.g., BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

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

73. It remains unclear whether the leaks derived from a Justice, a clerk, or someone from outside the Court with knowledge of what was happening inside the Court. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS.COM (July 1, 2012), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

Reagan's appointments.⁷⁴ When Thurgood Marshall began speaking out more frequently and bluntly toward the end of his tenure on the High Court, he expressed concern at the outcomes of recent decisions in which his conservative colleagues secured a majority.⁷⁵ Some of Justice Ginsburg's comments on *Bush v. Gore* implied that the majority was motivated by its partisan leanings.⁷⁶

When it comes to interpersonal commentary, Justice Blackmun belongs in a class to himself. He appeared to embrace the role of a kind of Supreme Court gossip, offering commentary about his colleagues in interviews and lectures, which he justified as an effort to humanize the institution.⁷⁷ It is unlikely his fellow justices appreciated his efforts. According to one account of a speech he gave, "Although Blackmun said he has been discouraged from offering observations on his fellow justices, he did so anyway." His comments tended to be impressionistic and scattershot. They included the admiring (Souter "is conservative but he's independent, and one must respect that"⁷⁸); the humorous (when Justice White hears a lawyer making a point with which he disagrees, "he starts to grunt and mumble"⁷⁹); the biting (Chief Justice Burger "always looks tired, always overweight"⁸⁰); and the downright strange (Justice Souter is "perhaps . . . the only normal person on the Supreme Court"⁸¹).

74. *Blackmun Has Sharp Opinions Of Colleagues*, N.Y. TIMES, July 18, 1988, at A10 (quoting Blackmun as stating, "All the appointees of the present Administration are voting one way . . . When I started, we tried to just be good judges."); *id.* ("For better or for worse, the 1988 election will be a very significant one." With a Republican victory, "[t]he court could become very conservative well into the 21st Century.").

75. Tom Shales, *Superior "Sorrell": And on WUSA, a Superb Session with Marshall*, WASH. POST, Dec. 12, 1987, at D1 ("A couple of more decisions like that Georgia sodomy case [Bowers v. Hardwick, 478 U.S. 186 (1986)], and we won't have any privacy left.").

76. Charles Lane, *Ginsburg Critical of Bush v. Gore*, WASH. POST, Feb. 3, 2001, at A2.

77. Justice Breyer recalled that when he arrived on the Court, Blackmun told him that "the American public has an unquenchable thirst to find out what this institution is," and "[w]hen you have the chance, tell people what you do." *Supreme Court Associate Justice Stephen Breyer in Conversation with Jeffrey Rosen and Paul Holdengräber*, NEW YORK PUBLIC LIBRARY (September 20, 2010), <http://www.nypl.org/audiovideo/supreme-court-associate-justice-stephen-breyer-conversation-jeffrey-rosen-p>.

78. Donna Halvorsen, *Blackmun Foresees Fall of New Abortion Standard*, STAR TRIB. (Minneapolis), July 25, 1992, at A1.

79. Harry A. Blackmun, *Tales of Rehnquist's Days on the Left Wing of the Court*, L.A. TIMES, Aug. 6, 1986, at B5.

80. Associated Press, *Blackmun Assesses the Court*, N.Y. TIMES, July 28, 1985, at 1.

81. Halvorsen, *supra* note 78; *see also* John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, at 6; Associated Press, *Blackmun Has Sharp Opinions Of Colleagues*, N.Y. TIMES, July 18, 1988, at A10 (commenting on colleagues—Justice White's writing is "hard to understand"; Justice Marshall can be "sullen and at times overbearing" to lawyers at oral argument; Justice Stevens was "a maverick, unimaginative"; Justice Scalia, "the professor at work," "asks far too many questions" at oral argument). The Associated Press report misreported Blackmun's

C. *The Educational*

A great deal of extrajudicial commentary is educational in nature. Here we see the Supreme Court justices as civics teachers. “Read the Constitution,” Justice Black urged his audiences.⁸² Read the Constitution and the Federalist Papers, Justice Scalia tells anyone and everyone.⁸³ Justice Breyer recently wrote a book whose stated objective is “to increase the public’s general understanding of what the Supreme Court does.”⁸⁴ Justice Sotomayor has been a guest on Sesame Street, where she talked about resolving disputes and offered advice on career paths for young girls.⁸⁵ Many of the justices’ public appearances seem motivated by a desire to increase public awareness of the workings of the constitutional system.⁸⁶

Also in this category would fall the writings of Supreme Court justices about American history. Chief Justice John Marshall established a precedent of sort on this front, publishing a five-volume biography of George Washington.⁸⁷ Justices of the modern era have followed (if less

description of Justice Stevens: he had described him as “a maverick, imaginative” (not “unimaginative”). Stuart Taylor, Jr., *Blackmun’s Office Assails Report that he Criticized His Colleagues*, N.Y. TIMES, July 22, 1987, at B6. Blackmun sent a letter to the other Justices explaining that his comments were intended to be humorous and blaming the press for misreporting their content. *Id.*

Blackmun’s tendency to dish on his colleagues (and himself) earned him ample press coverage. See, e.g., Fred Barbash, *Blackmun Discusses His Court: In Rare TV Interview, He Talks of Justices, Stresses*, WASH. POST, Dec. 5, 1982, at A2 (“Only three justices—Hugo Black, William O. Douglas and, when he announced retirement, [Potter] Stewart—have allowed themselves to be questioned for television while sitting on the high court although others have given speeches or interviews to print journalists. Blackmun’s comments were unusual beyond that because of his willingness to talk about his rulings and another justice.”); Stuart Taylor Jr., *Washington Talk: The Supreme Court; Blackmun Provides a Peek at the People Under Those Robes*, N.Y. TIMES, July 25, 1988, at B6 (“[Blackmun] has become in some ways the most outspoken Justice in recent times, poking holes in the Court’s image of stuffy propriety, in speeches and interviews that add up to a rich archive of insights into the Court’s inner workings and personalities.”); *Justice Gives Details on the Inner Workings of the High Court*, N.Y. TIMES, Dec. 5, 1982, at 49.

82. *Justice Black and First Amendment “Absolutes”: Public Interview*, *supra* note 17, at 563 (“I do hope that this occasion may cause you to think a little more and study a little more about the Constitution, which is the source of your liberty; no, not the source—I will take that back—but a protection of your liberty.”).

83. See, e.g., David G. Savage & Kathleen B. Hennessey, *Scalia Gives Talk on Constitution to Members of House: Justice Urges Them to Hem Framers’ Intent; Critics Decry Meeting*, CHI. TRIB., Jan. 25, 2011, at 12.

84. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGES VIEW* ix (2010).

85. *Sesame Street: Sonia Sotomayor: “The Justice Hears a Case”* (PBS 2012), available at <http://www.youtube.com/watch?v=FizspmIjbAw>; *Sesame Street: Sonia Sotomayor: Career* (PBS 2012), available at http://www.sesamestreet.org/play#media/video_226ad788-3377-405a-aa84-1875120c51b1.

86. See, e.g., *THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS passim* (Brian Lamb et al. eds 2010); Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court’s Work*, 29 LOY. U. CHI. L.J. 275 (1998).

87. JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON (1804-1807)* (Fredericksburg ed. 1926).

ambitiously) in his footsteps. Justice Frankfurter spoke and published extensively while on the Court, focusing mostly on studies of past justices.⁸⁸ Justice Harold Burton gave a series of lectures framed around “reconstructions” of great cases from the Court’s history.⁸⁹ Chief Justice Rehnquist published numerous books on political and legal history designed for a general audience.⁹⁰ Justice Breyer’s recent book includes extended analyses of major moments in Supreme Court history.⁹¹

D. The Institutional

A primary purpose evident in much of the justices’ off-the-bench commentary has been an effort to defend the Supreme Court as an institution. It is a relatively uncontroversial agenda, but it is also one that is particularly well suited for extrajudicial speech, since defending the Court can be difficult to accomplish directly through written opinions.⁹²

External challenges to the independence or institutional integrity of the Court have often spurred a justice to respond. When Justice Black agreed to his famous television interview, it was in response to the attacks on the Court from the campaign trail of the 1968 presidential election.⁹³ Similarly, when the justices feel that the media is failing to accurately capture what the Court is doing, they are likely to seek more direct forums through which to air their views.⁹⁴ Justice Scalia

88. See, e.g., Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957); Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955).

89. See Westin, *supra* note 8, at 657, 662.

90. WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004); WILLIAM H. REHNQUIST, *THE SUPREME COURT* (rev. ed. 2002); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* (1987).

91. BREYER, *supra* note 84.

92. This is not to say that written opinions cannot be vehicles for defending the institutional legitimacy of the Supreme Court. Some of the most significant statements about the Court as an institution do appear in the U.S. Reports. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864-69 (1992) (defending decision to not overrule *Roe v. Wade*, 410 U.S. 113 (1973), on grounds of institutional legitimacy).

93. See *supra* note 26 and accompanying text.

94. Complaints about press coverage have been around as long as the Court has existed. Even when a public statement is not necessarily inspired by concerns about press coverage, this is often a topic that Justices talk about. See, e.g., John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 945 (1963) (noting that “the quality of legal news reporting is generally not as good as it should be” and urging the member of the American Bar Association “to explore with some of the principal news media ways and means of improving the situation”).

has been notoriously scathing in his criticism of press coverage of the Court.⁹⁵ Law, he declared in a speech, “is a specialized field, fully comprehensible only to the expert,” and hence the general news media can never adequately capture the work of the Court.⁹⁶ Justice Scalia said that the liberal bias of the mainstream press meant that “much of the press is hostile to my message.”⁹⁷ Justice Kennedy has also lashed out at newspaper editorial writers (who, he noted, do not have the excuse of writing on short deadline as do the daily Court reporters).⁹⁸ More recently, several justices have refuted press reports of animosity among the justices related to the ruling on the Affordable Care Act,⁹⁹ emphasizing that the justices are getting along just fine.¹⁰⁰

Negative press coverage of the Court seems to be the surest way to inspire even normally reserved justices to enter the public arena. Justice Powell was so exercised about a *Newsweek* article (it was titled “A Rudderless Court”¹⁰¹), which he considered “sophomoric,” that he publicly dismissed the article as “nonsense”¹⁰² and, along with Justices Rehnquist and White, conspired to leak information to reporters at *Time* on the condition that they portray the justices as supportive of Chief Justice Burger.¹⁰³ Justice William Brennan (who followed the Black pattern of generally avoiding press interviews and controversial

95. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 145-46, 274, 340 (2009).

96. BISKUPIC, *supra* note 95, at 145 (Antonin Scalia, *Is Law Too Complicated for General Media to Cover?* CHI. DAILY L. BULLETIN (Oct. 1, 1990)). Scalia said he never gave this speech again because of the sharply negative media reaction it received. “The press is very thin-skinned,” he explained in a 2007 interview. “They can dish it out but they can’t take it . . .” BISKUPIC, *supra* note 95, at 274. *See also, e.g.*, Associated Press, *Antonin Scalia Says Abortion, Gay Rights Are Easy Cases*, POLITICO (Oct. 5, 2012), <http://dyn.politico.com/printstory.cfm?uuid=8CF586BE-9777-4DCB-89B9-0030CCED1EC1> (“Look it, do not believe anything you read about the internal workings of the Supreme Court . . . It is either a lie because the press knows we won’t respond—they can say whatever they like and we won’t respond—or else it’s based on information from someone who has violated his oath of confidentiality, that is to say, a non-reliable source. So one way or another it is not worthy of belief.”).

97. BISKUPIC, *supra* note 95, at 146, 340 (quoting from 2009 interview with author).

98. Charles Lane, *Kennedy’s Assault on Editorial Writers*, WASH. POST, Apr. 3, 2006, at A17.

99. Nat’l Fed’n of Indep. Buss. v. Sebelius, 132 S. Ct. 2566 (2012).

100. *See, e.g.*, Lauren Abdel-Razzaq, *Supreme Court’s Kagan gives U-M Students a Look Behind the Curtain*, DETROIT NEWS, Sept. 7, 2012; Adam Liptak, *Scalia Says He Had No ‘Falling Out’ With Chief Justice*, N.Y. TIMES, July 19, 2012, at A21. Justice Scalia offered one of his typical dismissals of the press, declaring on a CNN show: “You should not believe what you read about the court in the newspapers. It’s either been made up or been given to the newspapers by somebody who’s violating a confidence, which means that person is not reliable.” Liptak, *supra*.

101. Diane Camper, *A Rudderless Court*, NEWSWEEK, July 23, 1979, at 67.

102. Lewis F. Powell Jr., *What Really Goes on at the Supreme Court*, 66 A.B.A. J. 721, 723 (1980).

103. Evan Thomas, *Inside the High Court After a Decade, It Is Burger’s in Name Only*, TIME, Nov. 5, 1979, at 60; JENKINS, *supra* note 55, at 159-60.

public statements until late in his tenure¹⁰⁴) gave an unusually blunt defense of the Court in a 1979 address¹⁰⁵ in response to a flood of press criticism of a recent Court rulings allowing judges to order certain pre-trial proceedings closed to press and public.¹⁰⁶ He accused the press of “misapprehending the fundamental issues at stake” in these cases, and therefore “fail[ing] in its important task of illuminating these issues for the Court and the public.”¹⁰⁷ (He went on to list specific newspapers, even particular journalists.¹⁰⁸) The press, he concluded, “can be of assistance only if bitterness does not cloud its vision, nor self-righteousness its judgment.”¹⁰⁹ (The *Washington Post* ran an editorial titled, “Justice Brennan Tells off the Press.”¹¹⁰) Brennan was not alone on this issue, either. Four of his colleagues spoke out in an effort to clarify and explain their controversial ruling.¹¹¹

Some of the justices’ statements following *Bush v. Gore*¹¹² would seem to be designed to defend the Court as an institution. Chief Justice Rehnquist and Justice Thomas spoke out against accusations that the Court was acting in a political manner.¹¹³ “I think one of the ways our process is cheapened and trivialized is when it’s suggested we have sort of a way to make decisions that have more to do with politics,” Thomas said.¹¹⁴ Justice Scalia has developed his own stock response to criticism of *Bush v. Gore*, which usually begins with a dismissive “Get over it!” before noting that the Court’s intervention was needed to end an election debacle that was making the United States “look[] like a fool in the eyes of the world.”¹¹⁵

And sometimes it is just hard to figure out what a justice is trying to accomplish, such as when, in 1985, Justice Blackmun described the

104. STERN & WERMIEL, *supra* note 41, at 461-62.

105. *Address by William J. Brennan*, 32 RUTGERS L. REV. 173 (1979).

106. *Gannett v. Depasquale*, 443 U.S. 368 (1979).

107. *Address by William J. Brennan*, *supra* note 105, at 175.

108. *Id.* at 178-80.

109. *Id.* at 182.

110. *Justice Brennan Tells Off the Press*, WASH. POST, Oct. 22, 1979, at A22.

111. Curt Matthews, *Justices Break with Tradition in Comments on Trial Press-Ban Ruling*, SUN, Sept. 14, 1979, at A6.

112. 531 U.S. 98 (2000).

113. Tim Bryant, *Thomas Says Election Case Caused No Court Rift*, ST. LOUIS POST-DISPATCH, July 14, 2001, at 7; *Rehnquist Hopes Courts Can Avoid Election Fights*, WASH. POST, Jan. 1, 2001, at A2.

114. Bryant, *supra* note 113.

115. Margaret Talbot, *Supreme Confidence*, NEW YORKER, Mar. 28, 2005, at 40, 43.

current Court as “not a great Court, but I think not the worst Court we have had in history.”¹¹⁶

In recent years, it has become commonplace for justices to assure their audiences that they all get along, despite their sharply divided opinions and the occasional attacks on each other’s reasoning in their written opinions.¹¹⁷ This can be seen as another way in which justices attempt to bolster the perception of the Court as an institution. Indeed, in his latest book, Justice Breyer treated collegiality as simply another taken-for-granted aspect of the Court’s operation, like, say, the requirement of five justices for a majority.¹¹⁸ Justices speaking off the bench regularly emphasize the percentage of unanimous decisions the Court issues as evidence of both the constraining power of the law and the under-reported collegiality within the Court.¹¹⁹ They also regularly insist that partisan factors do not influence their daily work on the Court.¹²⁰

E. The Jurisprudential

Finally, there is the category of extrajudicial speech in which justices engage the same basic questions about interpretation and the role

116. *Blackmun Assesses the Court*, N.Y. TIMES, July 28, 1985, at 1. Assumedly, Blackmun’s comments had something to do with the ideological leanings of the Court. In his extrajudicial remarks, he often praised the Court for not straying too far from the ideological mainstream. See, e.g., Halvorsen, *supra* note 78 (stating that October Term 1991 “was not a bad term and went down somewhere in the center”).

117. See, e.g., Abdel-Razzaq, *supra* note 100 (“As for relationships between the court’s members, Kagan said the atmosphere is ‘in some ways, the most intimate, warmest institution I’ve participated in.’”); Bill Rankin, *Justice Ginsburg Foresees Clash of Freedoms, Security*, ATLANTA J. CONST., Feb. 14, 2003 at 16D (Justice Ginsburg explaining in a speech at Georgia State Law School that the justices “remain good friends, people who respect and even like each other” and describing her close relationship with Justice Scalia); Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45, 58 (Brennan noting that he had never had “a cross word” with a fellow Justice); Powell, *supra* note 102, at 722 (“At the personal level, there is genuine cordiality. No justice will deny this.”).

118. BREYER, *supra* note 84, at 232 (“However closely divided and controversial a decision may be, the justices maintain good personal relations with one another.”).

119. See, e.g., Ruth Bader Ginsburg, Remarks for the American Constitution Society, 8 (June 15, 2012), available at <http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx> (“[W]e agreed, unanimously, on the bottom-line judgment in 26 (45%) of the already-announced cases. In twenty of the twenty-six unanimous judgments, opinions were unanimous as well. Quite collegial, would you not say?”).

120. See, e.g., Abdel-Razzaq, *supra* note 100 (quoting Kagan as saying, “There is not a single member of this court at a single time who has cast a ballot based on ‘Do I like this president or not?’ ‘Do I like this legislation or not?’ ‘Will this help the Democrats or not?’”); *On the Record; Rehnquist on Justices*, N.Y. TIMES, Oct. 20, 1984, at 1 (excerpting remarks by Justice Rehnquist at University of Minnesota Law School in which he emphasized the limited role a President has in influencing the Court through appointments and described the forces in the Court “pushing towards individuality and independence”).

of the courts that they address in their written opinions. The key difference between the written opinion and these kinds of extrajudicial statements is more the presentation than the content. Whether an interview, a speech, a short essay, or a book, to work in the setting of a general audience, the technical, formal language that characterizes written opinions needs to be made accessible, the technicalities pared down, the principles behind the doctrine allowed to come through more clearly.

Some justices seem to find off-the-bench statements liberating in that they do not need to be tied to a particular case or controversy, thus allowing a more wide-ranging and general approach to predominate. They also allow for a more direct response to criticism. These were clearly factors in Justice Black's late-in-life turn to public forums to express his views on the Constitution.¹²¹

In the late 1970s and 1980s, several justices spoke out to challenge the conservative campaign to promote originalism as their preferred method of constitutional interpretation.¹²² Justice Brennan in particular emerged as a powerful public voice on this issue.¹²³ (“[L]ittle more than arrogance cloaked as humility” was Brennan's often-quoted dismissal of originalism.¹²⁴) For most of his career on the bench, Brennan refused most interview requests¹²⁵—he would not talk to reporters “at any time, at any place, on any subject,” he once boasted.¹²⁶ But toward the end of his time on the Court, he, like Black before him, made a conscious decision to become a more engaged public figure. In public speeches and interviews, he pressed his views about the role of the Court and the proper way to read the Constitution.¹²⁷ After Brennan made the rounds giving interviews with most

121. See *supra* notes 13-26, and accompanying text.

122. See, e.g., Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); John Paul Stevens, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 15 (1985); William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1985); Morton Mintz, *At the Court: Behind Marble Majesty, a Debate of Referees*, WASH. POST, Nov. 20, 1979, at A3 (describing interview in which Justice Powell criticized originalism).

123. Stuart Taylor Jr., *Brennan Opposes Legal View Urged by Administration*, N.Y. TIMES, Oct. 13, 1985, at 1 (front page story on a speech Justice Brennan gave at Georgetown); Editorial, *The 20th-Century Justice*, N.Y. TIMES, Oct. 15, 1985 (editorial praising Brennan's remarks and emphasizing the rarity of such public statements by Justice).

124. Brennan, *supra* note 122, at 435.

125. STERN & WERMIEL, *supra* note 41, at 223, 461-62.

126. Lincoln Caplan, *Justice from Lobbies and Chambers: Beyond the Court, Justices Speak Out on Law and Nation*, L.A. TIMES (Oct. 4, 1987) http://articles.latimes.com/1987-10-04/opinion/op-32903_1_u-s-supreme-court-justices.

127. STERN & WERMIEL, *supra* note 41, at 509.

major news organizations, Justice Blackmun jokingly referred to him as “my movie star.”¹²⁸ According to his biographers, all the public attention Brennan received for his public appearances made him “feel relevant in the central constitutional debate of the time.”¹²⁹

More recently, Justice Scalia has become a regular presence on the public stage in his efforts to promote and defend his brand of textualism and originalism;¹³⁰ he has also written extensively on these issues.¹³¹ Justice Breyer also has spoken and written at length about his approach to constitutional interpretation.¹³²

Oftentimes, jurisprudential are narrower in conception, focusing on the resolution of particular issues. Although always controversial, justices do sometimes discuss recently decided cases. Justice Black’s television interview included a defense of the Warren Court’s recent decisions in the area of criminal rights, as well as his criticism of the Court’s implementation of *Brown*.¹³³ The previously discussed attacks on the media by Justice Brennan and others in the late 1970s, which were prompted by what they saw as misreporting of a decision, included efforts to explain that decision.¹³⁴

Following the highly controversial decision in *Engel v. Vitale* (1962),¹³⁵ in which the Court held that the reading of a nondenominational prayer in public school violates the Establishment Clause, Justice Tom C. Clark repeatedly explained and defended the opinion of the Court, which he had written. He gave a speech in which he noted that while discussing a specific decision broke with Supreme Court custom, he believed the extraordinary controversy that accompanied the ruling—caused, he contended, by the public’s misunderstanding of the ruling (which, in turn, he blamed on poor news coverage)—justified his unusual tactics.¹³⁶ Notably, in defending the ruling he also empha-

128. *Id.*

129. *Id.* at 506.

130. *See infra* note 184 and accompanying text.

131. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989).

132. *See* BREYER, *supra* note 84; STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

133. *See supra* note 34 and accompanying text.

134. *See supra* note 107-114 and accompanying text.

135. 370 U.S. 421 (1962).

136. *Justice Clark Says Ruling on Prayer ‘Misunderstood’*, BOS. GLOBE, Aug. 4, 1962, at 5. At least one journalist rose to his profession’s defense, writing that “the fault is not with the press or with the public, but with the complex and often ambiguous language in which the opinions of the

sized his own religious commitment;¹³⁷ he even published a personal testament of his religious faith combined with a defense of *Engel*.¹³⁸

In 1968, Justice Potter Stewart went so far as to write a letter to the editor of the *Wall Street Journal*¹³⁹ responding to a critical editorial the paper ran¹⁴⁰ in response to his opinion for the Court in *Jones v. Alfred H. Mayer Co.*¹⁴¹ which held that a century-old civil rights statute prohibited racial discrimination in private real estate transactions. Defending the Court against the editor's accusation that it was acting like an "alternate legislature," Stewart quoted from the statute at issue and explained that the Court did nothing more than hold "(1) that this law means what it says, and (2) that Congress had constitutional power to pass it."¹⁴² He added that Congress remained free to change the statute.¹⁴³

Justice Blackmun defended his opinion in *Roe v. Wade* repeatedly during his time on the Court.¹⁴⁴ "[T]he world's view that he was the creator of abortion rights in America gradually, perhaps inevitably, shaped his self-image," writes his biographer Linda Greenhouse.¹⁴⁵ "Certainly, he saw himself from the beginning as *Roe's* primary defender."¹⁴⁶ Following the ruling in *Planned Parenthood v. Casey*,¹⁴⁷ for example, he challenged the Court's new standard for judging the constitutionality of abortion regulations.¹⁴⁸ "What is an undue burden?" he asked.¹⁴⁹ Over time, he predicted, its creators would find this standard is "unworkable."¹⁵⁰

justices themselves are presented." David Lawrence, *Complex Language of Supreme Court Sometimes is Confusing*, L.A. TIMES, Aug. 15, 1962, at A6.

137. John Wicklein, *Clark Questions Praying in Public*, N.Y. TIMES, Sept. 24, 1962, at 58 ("Supreme Court Justice Tom C. Clark, speaking as a Presbyterian layman, expressed [sic] a preference today for private prayers said by children in the home."); *High Court's Ruling on Prayer Defended*, N.Y. TIMES, Aug. 4, 1962, at 9.

138. Tom C. Clark, *A Supreme Court Justice Speaks of God*, L.A. TIMES, Dec. 23, 1962, at TW2.

139. Potter Stewart, Letter to the Editor, *Justice Stewart Dissents*, WALL ST. J., July 3, 1968, at 6.

140. Editorial, *The Alternate Legislature*, WALL ST. J., June 20, 1968, at 16.

141. 392 U.S. 409 (1968).

142. Stewart, *supra* note 139.

143. *Id.*

144. See, e.g., Halvorsen, *supra* note 78; Jenkins, *supra* note 81 ("Justice Blackmun, who staunchly defends *Roe*, feels that he probably will be remembered for that ruling alone: 'I suppose I'll carry *Roe* to my grave.'").

145. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 138 (2005).

146. *Id.*

147. 505 U.S. 833 (1992).

148. Halvorsen, *supra* note 78.

149. *Id.*

150. *Id.*

Of current members of the Court, Justice Scalia is the most willing to discuss off the bench particular cases the Court has decided. In remarks at Chicago-Kent College of Law in 2011, Scalia identified three cases in which the Court made “mistake[s] of political judgment”—*Dred Scott*, *Roe v. Wade*, and *Kelo v. City of New London*—and predicted that he did not think that *Kelo*, in which he dissented, is “long for this world.”¹⁵¹ More recently, Scalia has drawn attention for his aggressive defense of his dissent in *Lawrence v. Texas*,¹⁵² in which the majority of the Court held unconstitutional state laws that criminalized sodomy. When a student, who identified himself as gay, challenged the Justice at a Princeton University event about his dissent’s comparison of sodomy and bestiality,¹⁵³ which the student found personally offensive, Scalia fired back in his characteristically defiant, blunt manner: “I don’t apologize for the things I raised. I’m not comparing homosexuality to murder. I’m comparing the principle that a society may not adopt moral sanctions, moral views, against certain conduct. I’m comparing that with respect to murder and that with respect to homosexuality.”¹⁵⁴ Scalia’s comments captured the media’s attention for a time,¹⁵⁵ much of the commentary critical of not only the substance of Scalia’s position but also the supposed impropriety of the forum and Scalia’s willingness to defend a specific opinion.¹⁵⁶

151. Debra Cassens Weiss, *Scalia Lumps Kelo Decision with Dred Scott and Roe v. Wade*, A.B.A. J. (Oct. 19, 2011),

http://www.abajournal.com/news/article/scalia_lumps_kelo_decision_with_dred_scott_and_roe_v_wade/; Abdon M. Pallasch, *Scalia Offers Ruling: Deep Dish v. Thin Crust?*, CHI. SUN-TIMES (Oct. 18, 2011), <http://www.suntimes.com/news/nation/8286260-418/scalia-offers-ruling-deep-dish-v-thin-crust.html>.

152. 539 U.S. 558 (2003).

153. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision . . .”); see also *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct. Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct . . .”).

154. Ushma Patel, *Scalia Favors ‘Enduring,’ Not Living, Constitution*, NEWS AT PRINCETON (Dec. 11, 2012),

<http://www.princeton.edu/main/news/archive/S35/52/39050/index.xml?section=featured>.

155. See, e.g., David G. Savage, *Justice Antonin Scalia Defends Writings on Anti-Gay Laws*, L.A. TIMES (Dec. 12, 2012), <http://articles.latimes.com/2012/dec/11/nation/la-na-scalia-gays-20121212>; Geoff Mulyihill, *Confronted by NJ Princeton Student, Scalia Defends Arguments That Strike Some as Anti-Gay*, WASH. POST, Dec. 11, 2012.

156. See e.g., Dorothy J. Samuels, *Scalia’s Gay Marriage Problem*, N.Y. TIMES (Mar. 25, 2013), <http://takingnote.blogs.nytimes.com/2013/03/25/scalias-gay-marriage-problem/> (Taking Note Blog); Press, *supra* note 45.

Jurisprudential writings and remarks are generally the most significant of the categories of extrajudicial speech, considered from the perspective of the potential value-added of the speech and the potential risks justices are assumed to run when venturing into this territory. For this reason, in the following section, where I assess the opportunities and costs of extrajudicial speech, I focus predominantly on jurisprudential speech. Yet the other categories—personal, interpersonal, educational, and institutional—remain highly relevant to this discussion. Indeed, one of the distinguishing characteristics of some of the most significant efforts to advance a jurisprudential position from off the bench—as Justice Black’s public statements demonstrated—has been the ability of the justices’ to interweave these categories together.

II. ASSESSING EXTRAJUDICIAL SPEECH: TENSIONS AND POSSIBILITIES

In this section I examine a paradox that lies at the heart of the practice of justices going beyond their opinions to engage with the public. Much of the significance of extrajudicial speech derives from the perception that there is something exceptional, perhaps even inappropriate, about the act itself. The more a justice steps outside the idealized image of the detached judge writing abstruse opinions in closed chambers, the sharper these concerns become. The more substantive, controversial, personalized, and direct the off-the-bench commentary, the more there is a sense that something potentially illicit is taking place.

Yet this paradox is also the foundation of the unique opportunities that extrajudicial speech offers. The very risk of transgressing the line between judicial propriety and impropriety is what gains attention—attention above and beyond what a controversial written opinion alone might garner. If we are thinking about the possible value added of judicial speech, of the ways in which it can bring something distinct to the discussion or engage with a broader audience, then we need to recognize the indispensable role that the risk of transgression serves. It is in this tension that one finds the unique opportunities and potential costs for justices who go beyond their written opinions to speak directly to the public.

A. *Assumption of Reticence*

One constant in the modern history of the Supreme Court has been the assumption, shared by commentators and justices alike, that

justices should not make regular practice of going beyond their opinions to give substantive interviews or speeches. These events should be relatively infrequent and they should be carefully managed. Most justices, as well as scholars and Court reporters, seem to believe that the default assumption for a justice should be that they let their official work product, their published opinion, speak for itself.¹⁵⁷ They should be careful not to risk clouding or confusing their written opinions with extraneous commentary. If a written opinion has some problematic ambiguity, if it contains insufficient or flawed reasoning, or if a justice no longer agrees with a prior decision, then the proper remedy is to address the issue in another written opinion—not to speak out on the subject from off the bench.¹⁵⁸

Furthermore, the assumption of reticence is bolstered by the common belief that the dignity of the Supreme Court, that essential requirement of judicial legitimacy, depends on a certain perception of detachment from the roiling waters of American political life. Hence, forays into these waters must be done carefully, if at all. Off-the-bench commentary about the Court, law, politics—about anything directly related to the work of a Supreme Court justice—should be done hesitantly and not too often. The assumption of reticence derives from the resilient idea that in exercising their “extrajudicial” voice, justices should be judicious. This assumption is more a normative commitment to a belief of how justices *should* act than an accurate description of

157. See *supra* note 41 and accompanying text.

158. The focus of this Article is on extrajudicial speech by sitting Supreme Court Justices. Retired Justices who seek to update or clarify their positions face the distinctive dilemma of no longer having the opportunity to speak through published opinions. Thus retired Justices necessarily rely on extrajudicial forums to make their points. Perhaps the most famous recent example of this was Justice Powell’s confession of mistake, three years after leaving the bench, in voting with the majority in *Bowers v. Hardwick*, 478 U.S. 186 (1986). JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 530 (1994). A more recent example was the retired Justice Stevens offering his views on a case in which he had recused himself. John Paul Stevens, *The Ninth Vote in the “Stop the Beach” Case*, 88 CHI-KENT L. REV. 553 (2013) (discussing *Stop the Beach Renourishment, Inc. v. Fla. Dep’t. of Env’tl. Prot.*, 560 U.S. ___, 130 S.Ct. 2592 (2010)).

Retirement not only forces Justices to look to extrajudicial forums to publicize their positions, but it also can have a liberating effect when it comes to their willingness to speak out on issues relating to the Court and legal issues. This was surely the case when Justice Souter, soon after leaving the Court, delivered a sharp critique of textualism and originalism in his 2010 commencement address at Harvard University. David H. Souter, *Text of Justice David Souter’s speech*, HARVARD GAZETTE (May 27, 2010), available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>; see also Dahlia Lithwick & Sonja West, *Unplugged: When Do Supreme Court Justices Need to Just Sit Down and Be Quiet?* SLATE (Dec. 14, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/12/unplugged.single.html.

how the justices have acted.¹⁵⁹ As a practice, judicial reticence has ebbed and flowed somewhat over the Court's history,¹⁶⁰ but as a norm of expected behavior it has remained relatively constant.

Examples of this norm in action are readily evident. Justice Black's response to the scandalous exposure of his Klan membership is a case in point. Following his dramatic 1937 radio address, he retreated back into the role of a detached judge for the following decades.¹⁶¹ And even when his off-the-bench appearances made him a kind of public celebrity in the 1960s, he never shook the feeling that his activities pressed the limits of judicial propriety.¹⁶²

Justice Thomas, who faced his own scandalous entrance to the Court, also retreated for a time from the public stage. Whereas Black tended to his "knittin'" for several decades, Thomas's self-imposed off-the-bench reticence lasted less than two years. He declined practically all interview requests during his first years on the Court,¹⁶³ and in public events he carefully steered clear of addressing the one topic everyone had on their mind when they saw him: his thoughts on the bruising confirmation hearings, in which Anita Hill's accusations of sexual harassment nearly derailed his chances of reaching the Court.¹⁶⁴ Then he gave a lecture at a small Georgia law school in which his anger and resentment at his treatment during his confirmation hearing burst forth.¹⁶⁵ The fact that he decided to aggressively defend himself and attack his critics was itself a significant event; the fact that it was Justice Thomas, who had said so little in public up to this point, made it even more so.¹⁶⁶

Even when justices do not have particular reasons to avoid public attention, they have tended to avoid interviews and substantive public

159. Political Scientist David M. O'Brien has written critically about the "myth of the cult of the robe—that justices are 'legal monks' removed from political life." O'BRIEN, *supra* note 47, at 85-86 (citing FROM THE DIARIES OF FELIX FRANKFURTER 155 (Joseph P. Lash ed., 1974) ("When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery.")). Justice Frankfurter described a self-imposed "judicial lockjaw" that justices necessarily suffer. Felix Frankfurter, *Personal Ambitions of Judges: Should a Judge "Think Beyond the Judicial"?*, 34 A.B.A.J. 656, 658 (1948).

160. See Westin, *supra* note 8.

161. See *supra* note 8-11, and accompanying text.

162. See *supra* note 25-27, and accompanying text.

163. Jeffrey Toobin, *The Burden of Clarence Thomas*, NEW YORKER, Sept. 27, 1993, at 38 (noting that the only interview Thomas has granted at that point was to an internal Supreme Court publication).

164. *Id.*

165. *Id.*

166. *Id.*

comments early in their tenures, only opening more to the public and the press after they are on the bench for a time. Justice Brennan, for instance, refused most interviews and limited his major statements on the law during his first two decades on the high court.¹⁶⁷ For Justice Blackmun, it was only after a decade or so on the Court that he began his string of gossipy interviews and public remarks.¹⁶⁸ “We shouldn’t talk out of school,” he said in one of his early interviews.¹⁶⁹ “The rule around here is no interviews at all.”¹⁷⁰ As an Associate Justice, Rehnquist also avoided interviews. When, in the mid-1980s, he finally sat for one (telling the journalist he was only doing it “under duress”¹⁷¹), he was unhappy with the result and steered clear of interviews for most of the rest of his time on the Court.¹⁷² Only under pressure from his literary agent did he eventually agree to some televised interviews to discuss his books.¹⁷³

One way in which commentators and justices reinforce the norm of reticence is by lauding a justice’s ability to resist the lure of the public limelight. The trope of the justice as standing above public controversy has long been and remains today a powerful ideal. Writing in 1968, Justice Harlan lauded Justice Black for having “scrupulously eschewed extra-judicial pronouncements of his own views upon any of the great issues of the times”¹⁷⁴—a somewhat inaccurate statement, considering Justice Black’s major public lectures, and, as it turned out, an ironic one as well, as just months later Justice Black had his national

167. STERN & WERMIEL, *supra* note 41, at 223, 461-62.

168. Jenkins, *supra* note 81.

169. *Id.*

170. *Id.* In the early 1990s, Justice Scalia gave the following response to an interview request: Since being a judge, I have had a uniform policy of declining interviews for articles about me. That policy undoubtedly has its costs, but is in accord with our judicial tradition of avoiding publicity. (As you know, for a big on tradition.) It is tempting to make an exception for a piece of the rare sort you describe, but a rule is a rule. (I am also big on rules.) I am sorry to disappoint—and wish both of us good luck in your article. Jeffrey Rosen, *The Leader of the Opposition*, NEW REPUBLIC (Jan. 18, 1993), <http://www.newrepublic.com/article/politics/the-leader-the-opposition-0>.

171. John A. Jenkins, *The Partisan: A Talk with Justice Rehnquist*, N.Y. TIMES MAG., Mar. 3, 1985, at 28, 30. The journalist did not find Rehnquist a responsive interview subject. “Replies were confined to the specific question; information was seldom volunteered.” *Id.*

172. See JENKINS, *supra* note 55, at xvi; David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996 (noting that Rehnquist had not sat for an interview since 1985).

173. JENKINS, *supra* note 55, at 192-93.

174. John M. Harlan, *Mr. Justice Black: Remarks of a Colleague*, 81 HARV. L. REV. 1, 2 (1967). Harlan continued: “No Justice, whether coming from the political arena or otherwise, has worn his judicial robes with a keener sense of the limitations that go with them than has Mr. Justice Black.” *Id.*

Perhaps Harlan, who was writing in 1968, would distinguish Black’s discussion about the meaning of the Constitution from commentary on the political of the day. If so, even this would no longer be an accurate description of Justice Black by the end of 1968.

television debut. Or consider the even more striking appraisal of Justice Thurgood Marshall by one of his clerks. The Justice “had a firm rule against speaking extrajudicially on public issues,” this clerk noted.¹⁷⁵ The only problem was that, at least toward the end of his time on the Court, Justice Marshall had thoroughly abandoned this commitment. Prior to leaving the bench in 1991, he publicly lashed out at specific rulings of the Court;¹⁷⁶ he attacked the sitting President and members of the Justice Department;¹⁷⁷ and he referred to his critics as “bas-tards” whom he was determined to outlive.¹⁷⁸

Today, Justice Kennedy carries the banner of the ideal of judicial reticence with particular passion.¹⁷⁹ “The point of writing an opinion is to command some allegiance to the result, and we have no army,” he explained in a 2010 interview.¹⁸⁰ “We do not have press conferences, and we don’t give speeches, saying how wonderful my dissent was or how bad the majority. We don’t do that.”¹⁸¹ (Except, of course, when they do.)

B. *What is Different about Extrajudicial Speech?*

The unique value of extrajudicial speech lies in those components of extrajudicial speech that do not exist, or at least exist in much more

175. Janet Cooper Alexander, *TM*, 44 STAN. L. REV. 1231, 1234 (1992).

176. Shales, *supra* note 75 (“A couple of more decisions like that Georgia sodomy case [Bowers v. Hardwick, 478 U.S. 186 (1986)], and we won’t have any privacy left.”).

177. *Justice Marshall Says Reagan Among Worst on Civil Rights*, NEW PITTSBURGH COURIER, Sept. 26, 1987, at 3; Stuart Taylor Jr., *Marshall Puts Reagan at ‘Bottom’ Among Presidents on Civil Rights*, N.Y. TIMES, Sept. 9, 1987, at A1; Associated Press, *Marshall Faults the Justice Dept.*, N.Y. TIMES, Dec. 13, 1987, at 137 (accusing members of the Reagan administration of trying to undermine the Court as an institution and singling out Attorney general Edwin Meese as lacking an understanding of separation of powers).

Even the *New York Times*, generally supportive of Justice Marshall and his jurisprudence, took issue with Marshall’s remarks about the Reagan administration. “Give Justice Thurgood Marshall a rap on the knuckles for violating the tradition inhibiting political remarks by members of the Supreme Court,” its editorialists wrote. Editorial, *Complacency and the Constitution*, N.Y. TIMES, Sept. 14, 1987, at A18. Respect for the Court “depends on the justices’ painstaking impartiality. Whatever diminishes that respect diminishes the Court. In this case, Justice Marshall’s comments about Mr. Reagan seem gratuitous, hardly worth the cost.” *Id.*

178. Stephen Labaton, *Justice Marshall Vows to Outlive His Critics*, N.Y. TIMES, Oct. 18, 1987, at 133.

179. Kennedy frequently takes part in various public events—he is particularly fond of various kinds of mock trials, *see, e.g.*, Karen Wada, *Murder? Madness? Hamlet Will Get His Day in Court Before Justice Kennedy*, L.A. TIMES (Jan. 7, 2011), <http://latimesblogs.latimes.com/culturemonster/2011/01/murder-madness-hamlet-will-get-his-day-in-court-before-justice-kennedy.html> —although he does seem to avoid jurisprudentially significant extrajudicial commentary more than many of his colleagues.

180. THE SUPREME COURT, *supra* note 86, at 97.

181. *Id.*

muted form, in written opinions. The most salient of these are: (1) the risk of transgression that accompanies extrajudicial commentary about substantive issues relating to the Court's business; (2) the personalization that more informal, public forums allow, even encourage; and (3) the more accessible, less technical language demanded in public forums.

1. Possibility of Transgression

The possibility of transgression is what can make extrajudicial speech such compelling theater. It was this possibility, for instance, that made Justice Black's public statements in the 1960s so powerful; similar dynamics can be found in the reception to some of the more notable extrajudicial remarks of Justices Brennan, Marshall, and Blackmun in the 1980s and 1990s. And today it is this possibility of transgression that makes Justice Scalia such a forceful speaker. He comes across as so confident and uninhibited, as a man who, like Black before him, was going to reveal the simple truths of constitutional interpretation. One feels like this is not quite the way justices are supposed to act. Of the justices who regularly engage with public audiences, Scalia, according to one journalist, "is the most likely to offer the jurisprudential equivalent of smashing a guitar onstage."¹⁸² He entertains; he is a showman. "He will be funnier, more sarcastic, and more explicit about his beliefs than most people expect a Supreme Court Justice to be."¹⁸³ What makes him so riveting in these public settings is not just his skills as a showman; it is that he is speaking about things that perhaps he should not.

In his extrajudicial contributions, Scalia regularly addresses substantive questions of the role of the Court, approaches to constitutional interpretation, and sometimes even the merits of decided cases. He does so with his characteristic blunt combativeness, dismissing alternative arguments as silly and presenting his own mixture of social conservatism, textualism, and originalism, as nothing more than common sense.¹⁸⁴ And he does not shy away from provocative issues. In recent years, he has questioned whether gender discrimination should be accorded heightened scrutiny in equal protection analysis (which he

182. Talbot, *supra* note 115, at 40.

183. *Id.*; see also Patel, *supra* note 154 (describing positive student response to Scalia's appearance at Princeton); SUPREME COURT, *supra* note 86, at 114 (Justice Ginsburg describing her first impression of Justice Scalia: "I was so taken by his wit and his wonderful sense of humor. I heard a lecture he gave. I disagreed with most of what he said, but I loved the way he said it.").

184. See, e.g., Liptak, *supra* note 44.

sees as in tension with the original meaning of the Fourteenth Amendment).¹⁸⁵ He has categorized contentious constitutional issues such as the death penalty, abortion, and gay rights as “easy” cases to resolve, based on his interpretive beliefs.¹⁸⁶ Most recently, he has dismissed attempts to prohibit laws based solely on moral condemnation by analogizing the constitutional basis for prohibitions on murder and prohibitions on gay sexual relations.¹⁸⁷ He seems to take pleasure in walking right up to the line of propriety for what a justice can say. His critics say he regularly goes well beyond this line.¹⁸⁸

2. Personalization

Making the story a personal one, talking about one’s basic values and commitments, resonates in public contexts (witness any presidential campaign). But such an embrace of particularity and partiality is precisely what judges are not supposed to do (witness any recent confirmation hearing).

Public statements allow for (perhaps even invite) a degree of personalization of the role of judging that opinion writing rarely allows.¹⁸⁹

185. Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME (Sept. 22, 2010), <http://www.time.com/time/nation/article/0,8599,2020667,00.html>.

186. Associated Press, *Antonin Scalia Says Abortion, Gay Rights Are Easy Cases*, *supra* note 96 (“The death penalty? Give me a break. It’s easy. Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state.”).

187. *See supra* note 154 and accompanying text.

188. *See, e.g.*, Michael Tomasky, *Michael Tomasky on Antonin Scalia, the Lawless Supreme Court Justice*, DAILY BEAST (June 26, 2012), <http://www.thedailybeast.com/articles/2012/06/26/michael-tomasky-on-antonin-scalia-the-lawless-supreme-court-justice.html> (“[F]or the conservatives, and for Scalia most of all, legal propriety is absurdly quaint. He doesn’t answer to a nation. He answers to a cadre, a vanguard, of which he is a cherished member . . .”).

189. There are occasional exceptions in which a written opinion becomes a forum for a personalized statement. Perhaps the most famous example is the opening of Justice Frankfurter’s dissent in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646-47 (1943):

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.

Some of Justice Blackmun’s written decisions also have a distinctive autobiographical element. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 943 (1992) (opinion of Blackmun, J.) (“I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirma-

Speaking off the bench often encourages a more personalized tone to one's approach to the act of judging. Black was brilliant at this—at putting before the American people a person who had developed this particular, distinctive bond with the nation's Founding Document. Black could present himself as a kind of embodiment of the rule of law itself. His intensely personal veneration of the Constitution (“my deep respect and boundless admiration and love for our Constitution and the men who drafted it”¹⁹⁰) becomes, through his self-presentation, an object of veneration itself. Here is Justice Black in his public interview at the American Jewish Congress in 1962.

If there is any man in the United States who owes a great deal to this Government, I am that man. Seventy years ago, when I was a boy, perhaps no one who knew me thought I would ever get beyond the confines of the small country county in which I was born. There was no reason for them to suspect that I would. But we had a free country and the way was open for me. The Government and the people of the United States have been good to me.¹⁹¹

In the epilogue to his published version of his Columbia Law School lectures, he pressed even further the linkage between his personal story and his fidelity to the Constitution:

It is a long journey from a frontier farmhouse in the hills of Clay County, Alabama, to the United States Supreme Court, a fact which no one knows better than I. But this nation, created by our Constitution, offers countless examples just like mine. My experiences with and for our government have filled my heart with gratitude and devotion to the Constitution which made my public life possible. That Constitution is my legal bible; its plan of our government is my plan and its destiny my destiny. I cherish every word of it, from the first

tion process for my successor well may focus on the issue before us today.”); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting):

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. (footnote omitted)

On Blackmun's change of heart on the death penalty, political scientist David M. O'Brien wrote: “That Blackmun sought publicity for his switch remains at the heart of the matter. There are few comparable issues on which justices have said they erred and then sought public recognition of that.” David M. O'Brien, *The Death-Penalty Decision: Blackmun's Very Public Shift*, L.A. TIMES (Mar. 6, 1994), http://articles.latimes.com/1994-03-06/opinion/op-30496_1_death-penalty. Prior to his emotional dissent in *Callins*, Blackmun had indicated his growing discomfort with the Court's death penalty jurisprudence in an interview on television's *Nightline* new program. *Id.*

190. BLACK, A CONSTITUTIONAL FAITH, *supra* note 19, at 65.

191. *Justice Black and First Amendment “Absolutes”: A Public Interview*, *supra* note 17, at 554-55.

to the last, and I personally deplore even the slightest deviation from its least important commands.¹⁹²

On the current Court, perhaps no one speaks more personally about his personal experiences and how they shaped his core convictions, both jurisprudential and otherwise, than Justice Clarence Thomas. At the speech he made when he first publicly addressed the experience of his confirmation, he stated:

As a black person, straying from the tenets of this orthodoxy meant that you were a traitor to your race, you were not a real black, and you would be forced to pay for your ideological trespasses, often through systematic character assassination, the modern-day version of the old public floggings. Instead of seeing signs on public doors saying 'No Coloreds Allowed,' the signs I saw were 'No Nonconforming Ideas Allowed.'¹⁹³

His memoirs revealed much the same sentiment.¹⁹⁴ Although he tends not to speak as directly about particular legal issues as Justice Scalia or Breyer, for example, he does offer a striking portrait of the personal roots of his professional identity.

Justice Scalia is the current master of the linkage between the personal and the jurisprudential. Scalia likes to reveal to audiences that he does not favor the lifestyles of "bearded, sandal-wearing weirdoes" who like to burn the American flag, but he defends their constitutional right to do so, thus making the point that legal principle must trump policy preferences.¹⁹⁵ "If you play the old way, you often have to reach decisions you don't enjoy."¹⁹⁶ Then he often tells a story to bring home the point: When he came to the breakfast table the day after the flag burning decision, there on the table was a copy of the paper, with front page coverage of the Court's ruling. His wife, who Scalia describes as more conservative than he is, was fixing breakfast and humming "Stars and Stripes Forever." "I don't need that," he tells his audience—a sure laugh line.¹⁹⁷ Then the moral of the story: "The living Constitutional judge never has to put up with that. Whatever he thinks is good, is in the Constitution."¹⁹⁸ Justice Scalia has turned his breakfast into a lesson on constitutional theory and judicial integrity.

192. BLACK, A CONSTITUTIONAL FAITH, *supra* note 19, at 65-66.

193. Toobin, *supra* note 163.

194. THOMAS, *supra* note 61.

195. Brian Whitson, *Justice Antonin Scalia: The Case for a 'Dead Constitution'*, WILLIAM & MARY NEWS (Mar 21, 2004), <http://web.wm.edu/news/archive/index.php?id=3486>.

196. *Id.*

197. *Id.*

198. *Id.*

3. Language

Extrajudicial speech is also generally more accessible than written opinions. The often technical language in written opinions does not work in public speeches; and certainly not in an interview. There is a particular language that resonates for justices speaking in public settings.

Again, Justice Black offers a model. He had a reputation for writing direct, accessible opinions, and his extrajudicial statements took this a step further. They were colorful and folksy. "I have . . . a kind of an old-fashioned trust in human beings," he explained once. "I learned it as a boy and have never wholly lost that faith."¹⁹⁹ They were humorous. They were frank. They were straightforward, and they were accessible. As he put it, "My intention in delivering the [Carpentier] lectures was to describe, in as simple and clear language as I could use, my constitutional faith."²⁰⁰ In *New York Times* reporter Anthony Lewis' account of Justice Black's first major address, he spoke with obvious emotion, intent on persuading his audience. He threw in touches of humor. It was almost a stump speech in style, perhaps reminiscent of his days as a Senator from Alabama.²⁰¹ One of his biographers thought the more apt analogy came not from politics but religion: "Black could expound the Bill of Rights with the same fire, faith and categorical literalism that a fundamentalist preacher might reserve for a favorite passage of Scripture."²⁰²

Justice Black's speech and interviews could also be simplistic. He insisted that certain quite controversial claims were obvious, nothing more than common sense. He became almost playful in putting forth his provocative brand of legal fundamentalism. In a 1962 public interview, he asserted: "My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write."²⁰³ (Jeffrey Rosen has aptly noted that Justice Black had a "tendency to substitute italics for argument."²⁰⁴) Justice Black was not above creating caricatured portraits of his opponents in order to poke fun at them. One of

199. *Justice Black and First Amendment "Absolutes": A Public Interview*, *supra* note 17, at 555.

200. BLACK, A CONSTITUTIONAL FAITH, *supra* note 19, at xv.

201. Lewis, *supra* note 15.

202. DUNNE, *supra* note 26, at 29.

203. *Justice Black and First Amendment "Absolutes": A Public Interview*, *supra* note 17, at 559.

204. Jeffrey Rosen, *The Forgotten Formalist*, NEW REPUBLIC, Dec. 5, 1994, at 40, 43.

Justice Black's reasons for going beyond his written opinions in the first place was a desire to not have to present his views in the form of a rebuttal, as he so often did in his dissenting opinions. But this desire to not have to share the stage with anyone else did not prevent him from extensively quoting, if only to skewer, the views of his main jurisprudential rival on the Court, Felix Frankfurter, who he referred to with the barely veiled label "Judge X."²⁰⁵ His references to "Judge X" brought out "laughter and applause" from the audience.²⁰⁶ It was in part his tendency toward simplicity, even caricature, that made these such compelling public theater.

On the current Court, Justices Scalia and Breyer seem to put the most effort into translating complex legal ideas into more accessible language. Justice Breyer's most recent book, while not without its analytical sophistication and nuances, is quite readable, giving the impression of a smart but patient professor going out of his way to discuss the law in a non-technical manner.²⁰⁷ While eschewing the pose of the professor he once was, Justice Scalia too speaks in a distinctly accessible way. As his biographer wrote: "Scalia's willingness to talk about constitutional issues and express moral judgments in public forums outside the Court—and his ability to do it with clarity and fervor—separated him from other justices."²⁰⁸

205. Black, *supra* note 12, at 877.

206. Lewis, *supra* note 15.

207. BREYER, *supra* note 84.

208. BISKUPIC, *supra* note 95, at 221; *see also id.* at 275. The premium on clarity and simplicity in discussing the Constitution and the judicial function before general audiences invites the following question: Do certain approaches to constitutional interpretation translate better than others to extrajudicial settings? The evidence, while limited, is suggestive. Justice Black and Justice Scalia, both uniquely adept at articulating their jurisprudential views off the bench, share a commitment to textualism and originalism, theories of constitutional interpretation that are premised on a belief that the Constitution contains clear, determinate, stable requirements and prohibitions. These theories, with their oft-asserted accompanying claims of deference to the expressed will of the people (through the ratified words of the Constitution), also lend themselves to populist-styled defenses. As both Black and Scalia demonstrate, textualism and originalism can provide particularly resonant platforms for extrajudicial performances.

In contrast, those Justices who recognize the Constitution as susceptible to varied, evolving interpretations, and whose theories of constitutional interpretation revolve around complex multi-factored balancing tests or nuanced exercises in judicial discretion, might face more of a challenge in explaining themselves to the public. One might hypothesize a connection between the reticence of certain Justices and their conception of the appropriate role of a judge. Or, perhaps certain Justices recognize the difficulty of explaining the subtleties of the craft of judging to the public, and for this reason choose not to actively engage a broader audience. Justice Frankfurter's embrace of "judicial lockjaw," *supra* note 159, likely stemmed from these factors. Yet there are also exceptions to this pattern. On the current Court, for example, Justice Breyer, who embraces a pragmatic, eclectic, and subtle approach to constitutional interpretation, has made a concerted effort to discuss and defend his approach to the general public.

C. Assessing the Risks and Benefits of Going Beyond the Opinion

Most of the critical commentary on extrajudicial speech focuses on its potential downsides.²⁰⁹ The threat extrajudicial speech poses to conceptions of judicial propriety is generally presented as a problem. According to the standard line of critique, there is a significant risk to the integrity of the Supreme Court and the judicial process when a justice gets too close to the contested line between appropriate and inappropriate extrajudicial speech. Critics of extrajudicial speech categorize their objections as based in various concerns: protecting public respect for the Court; preserving separation of powers; and ensuring impartial judicial proceedings.²¹⁰ Some critics also raise the question of judicial ethics, particularly when some off-the-bench statement might be seen as prejudging a forthcoming case. As there are no formal rules of recusal that can be enforced against Supreme Court justices,²¹¹ these debates general play out in the press.²¹²

Violating some norm of judicial propriety, perhaps even judicial ethics, is not the only risk to the institutional integrity of the Court associated with extrajudicial speech. The tendency of extrajudicial speech to personalize the act of judging might also be seen as operating to undermine the ideal of impersonal justice and the belief that we

I suspect that certain jurisprudential approaches do indeed translate more effectively to public settings, and that interpretive theories that can more readily be distilled into clear, bold precepts are at an advantage in this regard. Yet I would hesitate to stake this claim too strongly. There is the problem of even measuring a Justice's effectiveness at promoting his or her jurisprudential views. Disaggregating the role of extrajudicial appearances and writing from written opinions only further complicates matters. Furthermore, there simply have not been that many Justices, and fewer still who have engaged in significant extrajudicial discussion of their jurisprudential views. So drawing generalized conclusions is difficult. Perhaps the nature of their jurisprudential views made Justices Black and Scalia more effective and enthusiastic in their off-the-bench appearances. Perhaps it had more to do with their personalities. In addition to sharing certain views about the Constitution, Justices Black and Scalia also share both a disarming self-deprecation and a supreme self-confidence, a potent mixture that makes for particularly engaging public personas.

209. See, e.g., Lithwick & West, *supra* note 158 ("Even outside the courthouse . . . sitting justices should exercise serious caution before going off-script. The more the commentary involves matters that have been, are, or may be before the court, the more suspect it becomes. Caution lights should flash over any remarks that cast doubt on the validity of a decision, a colleague, or the judicial process."); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *GEO. J. LEGAL ETHICS* 589, 601 (1989) ("[J]udges should tenaciously and categorically refrain from making such comments about any decision that is the subject of a written opinion." (footnote omitted)); see also Press, *supra* note 45; Turley, *supra* note 45.

210. See, e.g., Dubeck, *supra* note 44, at 574-83 (summarizing common criticisms of extrajudicial speech).

211. The standard for all other federal judges is found in 28 U.S.C. § 455 (a) (2006) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

212. See, e.g., Turley, *supra* note 45.

live under a government of laws, not of men. Although the justices often emphasize the constraints of the law, some might argue that if the justices begin to loom too large as individual personalities the black-box mystique of the Court might be compromised. Similarly, the ways in which extrajudicial speech encourages simplification of complex topics might also be seen as undermining the complex craft of judicial decision making. There is, some have said, something disingenuous or misleading about Scalia dismissing controversial legal issues as “easy” cases²¹³ or Black speaking in such sweeping, categorical terms about constitutional interpretation.²¹⁴

The image of the judge as separated from society, as a monk residing in some sort of monastery of the law is, in some sense, an attractive ideal. That such an image is contradicted by reality, past and present (not to mention its problematic normative implications), does not take away from the valuable legitimating role it plays for the courts. At many a crisis moment in the life of the law, representatives of the legal system have found advantage in retreating behind its metaphorical walls. As Justice Black memorably insisted in reference to a controversial decision in his 1968 television interview: “[T]he Court didn’t do it. The Constitution did it.”²¹⁵ The idealized vision of the justice as detached from public life is at once inaccurate and valuable.

While we should not ignore the risks of extrajudicial speech, two counterpoints need consideration. First, warnings of the costs of judicial speech are, as a general matter, exaggerated. Although measuring such things are difficult, and maybe even impossible, the claimed costs associated with justices talking too much “out of school” have never been supported by any effort to see if there is, in fact, a linkage between extrajudicial speech and the institutional legitimacy of the Court. There simply is no empirical scholarship on this question.²¹⁶ This is not to say that these impressionistic claims are wrong, necessarily. But if we consider the one clear lesson of history on this question, which is that there has always been a relatively robust tradition of extrajudicial involvement of the justices in the public affairs of the nation, then it is hard to escape the conclusion that the commonly aired warnings exaggerate the risks.

213. Associated Press, *supra* note 186.

214. See, e.g., Bickel, *supra* note 16.

215. Justice Black and the Bill of Rights, *supra* note 30, at 947.

216. Dubeck, *supra* note 44, at 579-80.

Second, we need to give more attention to the possible value of robust and substantive judicial forays beyond the written opinion. Judges, observes Ninth Circuit Judge Stephen Reinhardt, “cannot stand above the public dialogue that is so essential to the proper functioning of a true democracy.”²¹⁷ Judge Reinhardt’s observation might profitably be given a more normative emphasis. Not only is it unrealistic to insist that judges isolate themselves from public dialogue, but perhaps judges *should* not do so. They are (or should be) important figures in American life not solely for their ability to adjudicate disputes, but also for their ability to explain the role of law and judges in a constitutional democracy, to spark discussion, and to force audiences to think more about the issues that the Court confronts.

Consider, for instance, the recent controversy over Justice Scalia’s remarks on gay rights.²¹⁸ Surely the more useful critique of Scalia’s comments is not to wish that the justice just keep his positions to himself, only expressing them when there is a case properly before the Court in which he has an opportunity to write an opinion. Rather, his public provocation should be welcomed, by allies and critics alike, as an opportunity to consider the content of the justice’s position.²¹⁹ To insist that there are questions of judicial propriety or ethics at issue when the real concern is not the context in which the words were spoken but their content needlessly clouds the discussion.²²⁰ This is precisely the kind of constitutional question that we as a nation should be debating—in dialogue with the members of our judicial institutions.

Furthermore, there may be benefits to having justices face public challenges to their positions. Perhaps members of the Court should be placed in publicly uncomfortable positions on occasion. Although Scalia is dismissive of being challenged about whether his originalism

217. Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 *LOY. L.A. L. REV.* 805, 805 (1995).

218. See *supra* notes 152-156 and accompanying text.

219. The Princeton student who challenged Justice Scalia later published an op-ed in the *Los Angeles Times* describing his perspective on the incident. Duncan Hosie, *Antonin Scalia’s anti-gay words are poison; so I confronted him*, *L.A. TIMES* (April 14, 2013), <http://www.latimes.com/news/opinion/commentary/la-oe-scalia-doma-proposition-8-20130414,0,1717650.story>.

220. To be sure, Scalia does his cause a disservice in the tone he adopts and with some of his overwrought rhetorical tendencies. This is a problem that characterizes his written opinions too, of course. And commentators have rightly taken him to task for this. But a good deal of the criticism towards Scalia for crossing some boundary of judicial propriety is really just another way of criticizing the substantive positions he is staking out. See, e.g., Tomasky, *supra* note 188. Accord Dubeck, *supra* note 44, at 601 (suggesting that attacks on judicial propriety are, at base, rhetorical arguments employed to discredit the judge and the substance of his or her extrajudicial speech).

would have put him on the wrong side of *Brown v. Board of Education* (“waving the bloody shirt of *Brown*,” he derisively terms this²²¹), he should be put in positions to struggle with the issue.²²² He should be challenged on whether sex discrimination is entitled to heightened scrutiny under Equal Protection Clause doctrine.²²³ It might not be a bad thing—for the justice or for the nation—for Justice Scalia to be standing in front of an unsympathetic audience when he declares that the Constitution allows for repression of gay rights. Although one hardly expects Justice Scalia to change his views on these matters, there are benefits to ensuring that the members of the Supreme Court regularly are put in dialogue with audiences, both friendly and hostile. Justice Scalia should be forced to recognize that his position on gay rights increasingly out of step with the American people. Extrajudicial speech can offer important opportunities to inform (and, perhaps, under the right circumstances, to change) the judicial mind. As Justice Douglas once wrote, “a lifetime diet of the law alone turns most judges into dull, dry husks.”²²⁴

With all the sound and fury about Scalia’s off-the-bench activities,²²⁵ we risk losing touch with the big thing that Scalia is doing well. He is reaching out to diverse audiences, engaging with them on a substantive yet accessible level about his deeply held beliefs about the Constitution and the role of the judge. One need not abandon a commitment to a judiciary largely insulated from majoritarian pressures to recognize the benefits, both for the Court and for the national discourse, of justices taking more time to talk to the American people—in a manner direct, accessible, engaging, and, at times, controversial—about their work. The justices are uniquely situated to play a uniquely useful role in public understanding of the role of judges in a constitu-

221. Talbot, *supra* note 115, at 54.

222. See, e.g., Adam Liptak, *From 19th-Century View, Desegregation Is a Test*, N.Y. TIMES, Nov. 10 2009, at A16 (Scalia refusing to directly apply his theory of constitutional interpretation to *Brown* in public debate with Justice Breyer). In a 1995 interview, Justice Scalia said he would have voted with the unanimous Court in *Brown*, but did not explain how this could be squared with his originalist methodology. Talbot, *supra* note 115, at 54.

223. See *supra* note 185 and accompanying text.

224. DOUGLAS, GO EAST, YOUNG MAN, *supra* note 54, at 469.

225. See e.g., Dahlia Lithwick, *Scaliapalooza: The Supreme Court’s Pocket Jeremiah*, SLATE (Oct. 30, 2003),

http://www.slate.com/articles/news_and_politics/assessment/2003/10/scaliapalooza.html (“Is this brilliant jurist losing his mind? . . . What possesses Justice Scalia to eschew the reclusive public life of many justices, or at least the blandly apolitical public lives of most, to play the role of benighted public intellectual and knight gallant in the culture wars? . . . [J]udges who give controversial speeches imploring listeners to espouse certain views and values undermine the appearance of judicial neutrality . . .”).

tional democracy. Perhaps instead of chastising justices for sparking public debate, we should applaud them—and expect more.

D. A Useful and Resilient Fiction

If a core value of extrajudicial speech lies in its perceived rarity and sense of transgression, then might more frequent and more controversial extrajudicial speech risk normalizing those exceptional characteristics that give it value? One can only step out of an expected role so often before that role becomes redefined. At some point transgression become normalized, and then the ideal disappears, or it morphs into some other ideal. And with the loss of the ideal of the monkish justice is the loss of the power of transgression of that ideal. Never again, for example, will the mere fact of a Supreme Court justice giving a lengthy televised interview merit a primetime slot and national media attention, as we saw with Black's pioneering experience in 1968. Too much extrajudicial speech might lead to a deflation of its value. Expanding the practice in order to capitalize on its potential benefits for public constitutional discourse might ultimately prove counterproductive.

At least two factors are likely to limit this potential problem, however. First is the professional identity of the justices, as both internalized and policed externally by the still powerful expectations of judicial behavior. Accordingly, it is unlikely that a justice will step too far outside of standard practice, even if he or she does seek to take more advantage of the opportunities of off-the-bench speech.

Second, the media has its own interest in promoting and defending the mythology of the Court-as-monastery ideal, even in the face of a contrary reality. Journalists want to have it both ways. They want outspoken justices, because they make for interesting stories.²²⁶ But they also want the idealizing vision of the Court as distinct and mysterious. They want to report on the "rare" and "unprecedented." Nearly every contemporary assessment of Justice Black's public appearances emphasized how exceptional these events were.²²⁷ In his published account of his 1983 interview with Justice Blackmun, John A. Jenkins noted, "That a sitting Justice has decided to discuss his tenure is nearly

226. See, e.g., Liptak, *supra* note 44.

227. See, e.g., *Justice Black and the Bill of Rights*, *supra* note 30, at 937 ("So far as we know, there is no precedent for a television interview with a sitting judge, who talks about the law, the Constitution and the Court."); see also Zion, *supra* note 18 (describing Black's Carpentier Lectures as an "an unusual address by a member of the Supreme Court").

without precedent in a proscribed world where Justices' inaccessibility is formidable and legendary."²²⁸ (The title of the article, *A Candid Talk with Justice Blackmun*, hit home the same point.) Jenkins could not have asked for a better quote to sell his article when Blackmun confided that the "rule" at the Court was never to grant interviews.²²⁹ Two years later the same reporter was able to convince Justice Rehnquist to "break[] his silence" and sit for an extended interview.²³⁰ The press, for its own purposes, emphasizes, and often exaggerates, the novelty of extrajudicial speeches, thereby strengthening the myth of the justice as separate from the world.²³¹

CONCLUSION

Even today, in a world of twenty-four-hour news cycles and overexposed public figures, there is something distinctly powerful about a Supreme Court justice coming off the bench in order to express, directly to American public, his or her views on the Court, on the Constitution, on the role of a judge in a democracy. To be sure, a good deal of what justices say on these matters is banal and uninteresting—a kind of road tour of confirmation hearing talking points. But on occasion, a justice seems interested in doing something more. These moments, while not as rare as the justices and the press tend to claim, are uncommon enough so that when they do occur, the press, and a segment of the general public, take note. It is here that we find the potential of extrajudicial speech to add something distinctive to the public discourse.

The value of extrajudicial speech comes from the stepping out of an established role that it can entail. It is the very existence of the question of whether justices should be doing this kind of thing that gives these moments their power. It is when justices insist that complicated legal issues are actually not complicated at all, but can be resolved by common-sense reasoning. It is when justices find a way to connect their personal story with their judicial role. It is when justices show some emotion about their work, or when they lash out at something. In these situations the justices step outside their expected roles; they act

228. Jenkins, *supra* note 81.

229. *Id.*

230. Jenkins, *supra* note 171.

231. Much the same dynamic can be seen in both the Justice's attitude toward and press reporting of oral dissents, where the extraordinary nature of the oral dissent is invariably highlighted, and often exaggerated. Schmidt & Shapiro, *supra* note 42, at 79.

in ways that are an uncomfortable mixture of law, politics, and self-reference. And it is in these situations that we—the media, legal academics, engaged citizens—pay attention.