Notes

The Jurisprudence of “As Though”: Democratic Dialogue and the Signed Supreme Court Opinion

Peter Bozzo*

I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it as judges make it, which is to say as though they were ‘finding’ it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.¹

—Supreme Court Justice Antonin Scalia

On March 23, 1999, Supreme Court Justice Stephen G. Breyer committed a major breach of etiquette: he used the word “I.”² Justice Breyer’s singular pronoun attracted public scrutiny because it occurred not in a casual conversation or personal anecdote, but rather in a Supreme Court majority opinion.³ Typically, a Justice who authors a majority opinion speaks in the first person plural; “we” is the pronoun of choice, with “I” reserved

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3. Mauro, I Scream, supra note 2; Mauro, Supreme Use, supra note 2.
for concurrences or dissents. Yet when the Court handed down its decision in *South Central Bell Telephone Co. v. Alabama*, Justice Breyer’s unanimous opinion contained the prohibited pronoun. The incident sparked what one journalist called a “legal frenzy,” and a prominent law professor—Mark Tushnet, then of Georgetown University Law Center—sent a note to Justice Breyer, expressing dismay at the opinion’s loose language. In his reply, Justice Breyer assured Professor Tushnet that “I (we?) promise correction,” and the official version of the case in the *United States Reports* contains no trace of the singular pronoun; “I” surreptitiously morphed into “we.” As Professor Barry Friedman aptly summarized the bizarre incident, “[i]t’s like the Wizard of Oz stepping out from behind the curtain.” For a moment, the Justices had given the public a glimpse behind the united front of a unanimous opinion, hinting at the individual author behind the Court’s words.

The attention generated by Justice Breyer’s slip-up illustrates a mild contradiction in the way the Court conducts its business. The majority attempts to speak with one voice, but it chooses an individual Justice to express that voice. The creation of a majority opinion is undoubtedly a collaborative process, and the author frequently modifies drafts based on her colleagues’ suggestions. Nonetheless, when the Justices hand down an “Opinion of the Court,” it is labeled as the work of a single author. This process might seem to be the result of an administrative imperative; the Court needs to produce a collective decision, and it makes sense—simply as a matter of efficiency—for one person to write the opinion. But a puzzle remains: why does the Court *label* its opinions as the product of one author? In other words, why do the Justices not publish their decisions as

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4. Mauro, *I Scream*, supra note 2 (“No one was certain whether it was completely unprecedented, but no one can remember ever seeing ‘I’ in a majority opinion in the modern era.”); Mauro, *Supreme Use*, supra note 2 (“Normally, court opinions use ‘we’ or no pronoun at all.”). Notably, in the very same case in which Justice Breyer’s “I” drew public scrutiny, Justice O’Connor used “I” three times in a two-sentence concurrence. S. Cent. Bell Telephone Co. v. Alabama, 526 U.S. 160, 171 (1999) (O’Connor, J., concurring). Similarly, Justice Clarence Thomas wrote “I” twice in his own two-sentence concurring opinion. Id. at 171 (Thomas, J., concurring).

5. Mauro, *I Scream*, supra note 2; Mauro, *Supreme Use*, supra note 2. The offending sentence read, “In Richards [v. Jefferson County], we considered an Alabama Supreme Court holding that state-law principles of res judicata prevented certain taxpayers from bringing a case (which I will call Case Two) to challenge on federal constitutional grounds a state tax that the Alabama Supreme Court had upheld in an earlier case (Case One) brought by different taxpayers.” See *Bell Telephone*, 526 U.S. at 167.


“Opinions of the Court” without identifying the specific writer? Widening the lens to consider concurrences and dissents, a broader question emerges: why does the Court issue signed opinions at all? Like Justice Breyer’s use of “I,” concurring and dissenting opinions draw back the curtain on the Court, revealing the nine individual Justices who comprise the collective judicial body.11

Responding to these concerns, Owen Fiss has powerfully defended signed opinions on the ground that they enhance the Court’s legitimacy:

[One] aspect of the legitimating process . . . [is] the obligation of a judge to engage in a special dialogue—to listen to all grievances, hear from all the interests affected, and give reasons for his decisions. By signing his name to a judgment or opinion, the judge assures the parties that he has thoroughly participated in that process and assumes individual responsibility for the decision. We accept the judicial power on these terms . . . .12

In other words, courts maintain legitimacy to the extent that they engage in dialogue with litigants, lawyers, and the American public. The Justices’ signatures are their assertion that they take this dialogue seriously.

Fiss’s comment rings true in the realm of American jurisprudence, but it immediately raises questions in the comparative context. Courts in many civil law countries—such as France, Belgium, Italy, Luxembourg, and the Netherlands—prohibit signed opinions (as well as separate concurrences and dissents), yet these nations’ courts do not appear to have difficulty

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11. Chief Justice Roberts has suggested that separate opinions undermine the Court’s institutional integrity. During his confirmation hearings, then-Judge Roberts stated, “The Supreme Court speaks only as a court. Individually, the [Justices] have no authority. And I do think it should be a priority to have an opinion of the [Court].” Hearings on the Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 303 (2005) [hereinafter Roberts Confirmation Hearings] (statement of John G. Roberts, Jr., Nominee for Chief Justice of the United States).


maintaining public approval. As a result, civil law opinion-writing practices provide a rich source for comparative analysis, offering insights into how judicial systems maintain legitimacy in the absence of individually authored opinions. The Cour de Cassation, France’s highest civil court, is a particularly fruitful site for comparison because its opinions present a dramatic counterpoint to American judicial writings. The French court’s decisions are unsigned, separate concurrences or dissents are forbidden, and opinions are written in a formalist, terse style that contrasts with the more discursive tone of the Supreme Court’s judicial rhetoric.

In the absence of the Fissian legitimacy that emerges from signed opinions, the Cour de Cassation maintains credibility by functioning like a bureaucracy. It is hierarchical: its judges adopt a modest tone that expresses their deference to the legislature, which is regarded as the supreme lawmaker in the French political system. Its work is driven by expertise: judges undergo a rigorous training program that prepares them for a life of civil service. And it produces rules: the Court’s opinions read more like a set of agency regulations than like the outcome of a judicial process. By conforming to societal expectations about the role of courts vis-à-vis legislatures, drawing on formal training, and crafting definitive rules, French jurists establish themselves as constrained and credible legal experts. The Court’s formalist, unsigned opinions further enhance the sense that its judges are drawing on legal knowledge and not simply imposing their per-

15. See, e.g., LASSER, supra note 14, at 331-37 (offering a theory about how the French judicial system maintains legitimacy in the absence of signed opinions).
17. “Formalism” is a term that comes loaded with the weight of previous analyses and critiques. In this Note, I will use “formalism” to refer to a judicial style that does not treat decisions as if they reflect underlying value judgments; formalist judges view themselves as strictly applying the law to the facts at hand. Following Cass R. Sunstein, “formalism” in this sense entail[s] three commitments: to ensuring compliance with all applicable legal formalities (whether or not they make sense in the individual case), to rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case), and to constraining the discretion of judges in deciding cases.

18. Ginsburg, supra note 14, at 133-34. See also JOHN P. DAWSON, THE ORACLES OF THE LAW 410 (1968) (“In [its] highly technical and laconic style the Court of Cassation surpasses all others.”).
19. Building on the archetypal Weberian conception of the term, I define “bureaucracy” as an institution possessing the following six characteristics:

(1) [J]urisdictional areas are clearly specific with rules defining the regular activities of personnel as official duties; (2) the organization is arranged hierarchically with supervision of subordinates by superiors, but the scope of superiors’ authority is circumscribed; (3) a system of abstract rules governs official actions, these rules are stable and can be learned, and official decisions are recorded in permanent files; (4) the means for carrying out administrative functions (such as equipment and privileges) belong to the office not the officeholder, and personal property is demarcated from official property; (5) officials are selected on the basis of technical qualifications, appointed rather than elected, and compensated by salary; (6) employment in the organization is a lifetime career, with the employee (after a trial period) gaining a tenured position with salary protection, protection from arbitrary dismissal, and a pension after retirement.

sonal values on the French populace. In this sense, far from undermining the Cour de Cassation’s legitimacy, unsigned opinions promote the bureaucratic norms that justify the French judiciary’s authority.

The Supreme Court’s signed opinions demonstrate a fundamentally different set of commitments. In the United States, where students are taught since elementary school that the judiciary is a co-equal branch of government, extreme deference to the legislature is not a significant source of legitimacy—and might, in fact, be viewed as an abdication of the Court’s obligation to perform judicial review. In addition, American judges do not receive nearly as much specialized preparation as their French counterparts, which means that training programs do not confer the same sense of authority that they do in the French system. Instead, the judicial opinion itself is the primary source of the Court’s legitimacy: it is the expression of the Justices’ rationales, the outcome of their deliberations, and their missive to the American public. The Court draws its authority from the depth of its reasoning, the quality of its writings, and its ability to convincingly articulate the public values that underlie its decisions. Since value articulation depends less on legal expertise than on political commitments, the Court’s legitimacy does not depend on its adoption of bureaucratic norms. In many ways, the Justices must eschew the trappings of bureaucracy, acting not as mechanistic, interchangeable administrators but as adjudicators whose personal values matter a great deal. Under this conception, Justices’ signatures amount to their assurance that they have produced a high-quality, legally sound, morally defensible opinion. Whereas bureaucratic norms justify unsigned opinions in the Cour de Cassation, the ideal of value articulation justifies signed opinions in the United States’ highest court.

In the past two or three decades, however, encroaching bureaucratization at the Supreme Court has begun to undermine the justifications for signed opinions in the American context. The Justices increasingly come from similar backgrounds and have undergone similar types of legal training; if they are viewed as jurists who primarily draw on legal expertise (rather than personal values), their identities may not matter, and their opinions may not need to bear their signatures. As the Supreme Court increasingly bureaucratizes—as it comes to resemble the Cour de Cassation—it correspondingly undermines the justifications for signed opinions.

20. Note that the Cour de Cassation does not have the authority to declare acts of Parliament unconstitutional; that power is reserved to the Conseil Constitutionnel. See infra Part I.A.

21. “Political” is here distinguished from “partisan.” A political commitment is a preference for a particular policy outcome or set of values; a partisan commitment is an attachment to a particular political party. Richard A. Posner, The Supreme Court, 2004 Term: Foreword: A Political Court, 119 HARV. L. REV. 31, 76 (2005).

22. Throughout this paper, I use the term “adjudicative” to indicate that the judicial process involves making a judgment—in this instance, a value judgment—about how to decide a case.
This mismatch between the rationales for signed opinions and the reality of increasing bureaucratization gives rise to a deeper critique of the Supreme Court’s opinion-writing practices: signed opinions may not even achieve the objectives to which they are ostensibly committed. As Fiss notes, signing an opinion amounts to a Justice’s assurance that she has fully engaged with the case. The signed judicial opinion is the opening shot in a dialogue among the Court, the litigants, the legal academy, the other branches of government, and the American public. This dialogue would be undermined by unsigned, French-style opinions, which are soopaque that they give the public few openings to engage with the Cour’s reasoning. Yet this conventional understanding of the unsigned opinion is an impoverished one. The Justices’ willingness to transparently articulate public values—to fill in all the blanks in their opinions by expounding on their reasoning—creates the sense that their views are authoritative. The opinion becomes the final word on the subject rather than the opening volley. Under this conception, the Cour de Cassation’s opacity becomes an asset. By leaving much unsaid, judges generously open up space for legal academics and French citizens to fill in the blanks, promoting national conversations about legal controversies.

The debate over signed and unsigned opinions emerges from a fundamental tension that defines all judicial work—the tension between staying true to the traditional formulation of the judiciary’s role (applying the law to the facts) and maintaining transparency (openly expressing the value judgments that underlie some legal arguments). This is the challenge that Justice Scalia articulated in the epigraph to this paper: the gap between the judicial obligation to “find” law and the need to acknowledge that it is not always there to be found. The American and French judicial writing styles represent characteristically divergent responses to this dilemma. The French approach involves a sharp separation between the act of “applying” the law—a task reserved for judges—and the act of expressing values that underlie legal decisions—a task confined largely to academic discourse. The Supreme Court takes a different tack. In its opinions, it attempts to both “apply” the law and convey the public values underlying its decisions. In other words, the French Cour de Cassation, much more than its American counterpart, achieves Justice Scalia’s ideal. The Cour’s judges employ the jurisprudence of “as though,” acting as if they were finding law even when they are, in fact, reshaping and developing it. The counterintuitive conclusion of this Note is that, in doing so, the Cour de Cassation

23 See Robert F. Nagel, The Formulaic Constitution, 84 Mich. L. Rev. 165, 167 (1985) (describing courts’ “formulaic” style of opinion writing, in which judges employ “apparently definitive formulations” to reach conclusions); id. at 184 (“The simple announcement of a judgment (no matter how unsatisfactory in other respects) is generous to the reader, for it allows room for other judgments.”); id. at 190 (describing the comprehensiveness of judicial opinions, in which “[n]early any criticism or doubt is sufficiently important to deserve a reply, if only in a footnote”).
may be facilitating public engagement in a way that the more comprehensive, transparent—and signed—Supreme Court opinion never could.

I. THE COMPARATIVE CONTEXT

Since the birth of modern comparative law in the early twentieth century, American legal scholars have been almost united in their assessment of the French judicial system: it is the embodiment of civil law-style judging, in which judges are anonymous administrators tasked merely with applying the legislature's Code. In this view, civil law jurists conform to the Montesqueueian ideal: "[T]he national judges are no more than the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or rigor." A quick perusal of French judicial decisions seems to confirm this assessment. The Cour de Cassation's opinions self-consciously emphasize that they are merely applying the legislative Code. Most decisions are less than a page long and consist of a series of "whereas" clauses that relentlessly lead to what is portrayed as the inevitable conclusion. Because the decisions are so brief, a representative opinion bears reprinting in full:

THE COURT:—On the only issue:—Given art. [article] 1382 c. civ. [Civil Code];—Whereas the author of a [tort] is responsible for the complete reparation of the damage that he has caused;—Whereas, according to the decision under appeal (Court of Appeals of Rouen, 2d chamber, 25 June 1992), Mrs. Annick X was hit and injured by the automobile of Mr. Y while riding her bicycle; Whereas Miss Catherine X, acting on her own behalf and on behalf of Mrs. Annick X, her

24. Peter de Cruz, A Modern Approach to Comparative Law 12 (1993) ("Modern comparative law is usually recognised as having begun in 1900 at the International Congress of Comparative Law held in Paris, where the first serious and organised attempts were made to formulate the functions and aims of comparative law.").

25. E.g., Dawson, supra note 18, at 415 ("The central conviction [of modern French law], which still lies deep, is that judges cannot be lawmakers; from this the conclusion seems to follow that they have no responsibility for shaping, restating and ordering the doctrine that they themselves produce."); Duncan Kennedy, A Critique of Adjudication [Fin de Siecle] 36 (1997) ("[T]he official story [of the civil law version of adjudication] is that the role of the judge is to apply the relevant Code to the facts of the case using a presumption of gaplessness [i.e., that the text of the Code covers every possible factual situation that could arise]."); John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 39 (1969) ("[The civil law judge's] function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union."); Alec Stone Sweet, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective 26 (1992) ("The judge's role in [France's] fragmented but centralized system is subservient and bureaucratic . . . . The codes, being clear, literal expressions of sovereignty, must by treated [by judges] as providing a series of sovereign commands binding upon the whole of the body politic [sic].").

26. Baron de Montesquieu (Charles de Secondat), The Spirit of Laws 209 (David Wallace Carrithers ed., Thomas Nugent trans., Univ. of Cal. Press 1977) (1748); see also Merryman, supra note 25, at 38 ("The [civil law] judge becomes a kind of expert clerk. . . . The net image is that of the judge as an operator of a machine designed and built by legislators.").

mother, brought suit against Mr. Y and his insurer, the Norwich Union Co., the Elbeuf primary medical insurance fund, and the Elbeuf Transport Company for reparations;

Whereas, in denying Mrs. X reparations for her personal injury, the [appellate court] decision stated that, according to its expert, the victim, who is reduced to a vegetative state, is absolutely unable to feel anything at all in the way of existential concerns, be it pain, or the sentiment of diminution due to disfigurement, or the frustration of [life’s] pleasures; Whereas the appellate court thereby deduced that there was insufficient proof of general damages; Whereas, by so deciding, although the vegetative state of a human being does not exclude any type of indemnification, the damages must be repaired in full, and the court of appeals thus violated the above text;

On these grounds, quashes [the appellate decision], but only with regard to the issue of the personal injury of Mrs. X, and remands the case to the Court of Appeals of Paris.28

The opinion begins by referring to the relevant provision of the Code, suggesting that the remainder of the reasoning follows directly from that provision (“Given art. 1382 . . .”).29 The statement of facts is straightforward and vague. The reader learns only that a male driver hit a female bicyclist, who then fell into a vegetative state.30 The legal reasoning in the second paragraph is even more opaque. The court simply states—without justification or elaboration—that “the vegetative state of a human being does not exclude any type of indemnification” and that “the damages must be repaired in full.”31 The decision provides little guidance for lower court judges who will have to apply the holding and calculate damages. Because the French judiciary does not attach significant weight to precedents, the opinion mentions no prior cases,32 and the judges do not make any effort

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28. For the original opinion in French, see Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Feb. 22, 1995, Bull. civ. II, No. 61 (Fr.). For the translated version used in the text, see LASSEK, supra note 14, at 31.


30. Id.

31. Id.; see LASSEK, supra note 14, at 32 (“The judgment’s legal analysis is, if anything, even less satisfying [than the statement of facts].”).

32. The French Code of Civil Procedure forbids judges from using precedents as the sole basis for their legal conclusions. CODE DE PROCÉDURE CIVILE [C.P.C.] art. 455 (Fr.). See also DAWSON, supra note 18, at 407, 414-15 (“In the opinions of the Court of Cassation what is mostly missing is any reference whatever to prior decisions, either its own prior decisions or those of any other court.”); LASSEK, supra note 14, at 36-37 (“[T]he Cour de cassation has established a series of complex rules limiting how . . . references to past judicial decisions may be made.”); Michel Trops & Christophe Grzegorczyk, Precedent in France, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 103, 115 (D. Neil MacCormick & Robert S. Summers eds., 1997) (“There is no formal bindingness of previous judicial decisions in France. One might even argue that there is an opposite rule: that it is forbidden to follow a precedent only because it is a precedent.”).
to address counterarguments to their claims.\textsuperscript{33} The legal outcome is presented as the irrefutable conclusion to a sound syllogism. The absence of judges’ signatures seems like a logical extension of this formalist rhetoric: unsigned opinions drive home the point that the judicial task is a deferential, mechanistic, anonymous one.

Then-Professor Elena Kagan once stated that “we are all realists now,” and her adage is borne out—at least in the American context—by U.S. scholars’ caustic assessments of the Cour de Cassation’s opinions.\textsuperscript{34} These scholars tend to regard French formalism as artificial and incoherent, if not downright dishonest. Under this conception, unsigned opinions embody the unfortunate impenetrability of the French system, concealing judges’ identities and reasoning. In \textit{The Oracles of the Law}, John P. Dawson argues that the syllogistic style of French opinions—intended to restrict judicial power by requiring jurists to simply apply the law—actually results in greater flexibility.\textsuperscript{35} By eschewing broad pronouncements and limiting their reliance on precedent, judges avoid making commitments that will bind them in future cases.\textsuperscript{36} John Henry Merryman makes a similar critique, arguing that the French legal system rests on a “fiction.”\textsuperscript{37} Because the Code cannot conceivably cover every situation that arises before the courts, judges must engage in creative interpretations when they face a case with unusual facts; however, they cannot acknowledge that they are doing so, because their claims to legitimacy rest on the false belief that they are mechanistically applying legislative provisions.\textsuperscript{38} Dawson evocatively summarizes the criticisms by comparing the modern French judiciary to the Ancien Régime’s appellate courts, which possessed both legislative and adjudicative powers\textsuperscript{39}: “Behind the cascades of whereas clauses one can still see stalking the ghostly magistrates of the Parlements, majestic in their moldy red robes.”\textsuperscript{40}

These scholars are right to point out the formalist style of French decisions, but they miss the point when they denounce Cour de Cassation
opinions for their straightforward, open-and-shut style. Within the French governing structure, the Cour’s formalism—and the unsigned opinions that are associated with it—makes eminent sense as a strategy for maintaining judicial legitimacy. Below, after outlining the structure of the French court system, I analyze several specific means by which the Cour’s opinion-writing style enhances the judiciary’s status in the eyes of the French populace.

A. A Note on the French Judiciary

The French judicial system consists of two segments: civil courts and administrative courts.\(^{41}\) The civil courts hear criminal prosecutions as well as cases between private parties; the administrative courts hear cases in which the state is a party.\(^{42}\) The Cour de Cassation is the court of last resort for the civil system,\(^{43}\) while the Conseil d'État acts as the highest court for the administrative side.\(^{44}\) As Nicolas Kublicki has noted, the French Cour de Cassation and the American Supreme Court should not be thought of as cross-national counterparts: “In contrast to the Supreme Court, the Cour de Cassation reviews neither administrative nor constitutional controversies. . . . Instead, the mission of the Cour de Cassation is to maintain uniformity in the application of French law.”\(^{45}\) The Cour also differs from the Supreme Court in its size and workload: whereas the nine-member American high court hears about seventy-five to ninety cases each term,\(^{46}\) the 100-member Cour de Cassation takes on nearly 4,000 cases each year.\(^{47}\)

B. Legislative Supremacy

The Cour de Cassation operates within a political system founded on the principle of legislative supremacy.\(^{48}\) To students of American politics, this principle is a foreign one. In the United States, the language of “checks and balances” and “separation of powers” pervades political conversation; these terms reflect a commitment to a form of government in which each

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42. Id. at 60.
43. Id. at 65.
44. Id. at 70.
45. Id. at 65.
46. Although the Court used to hear many more cases per term, this figure has held in recent years. David B. Stras, The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process, 89 TEx. L. Rev. 947, 965 (2007).
47. Kublicki, supra note 41, at 66.
48. Martin A. Rogoff, A Comparison of Constitutionalism in France and the United States, 49 Me. L. Rev. 21, 23, 61-62 (1997); see also id. at 58-59 (“[T]he Revolution extracted as one of the great principles of the modern public law of France, the primacy and the supremacy of the legislative power.”) (quoting 2 R. CARRÉ DE MALBERG, CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L’ÉTAT 49 (1922)).
branch—possessing its own distinct brand of authority—balances the powers exercised by the others. Only moments of acute constitutional crisis call the branches’ co-equal status into question. But in the French political system, the legislature reigns supreme: it does not balance executive or judicial authority but rather dominates it. As a result, when the Cour de Cassation decides a case, it must rely on the legislature’s Code; even the Cour’s own precedents are not a valid source of law when referenced as an independent basis for a ruling. This helps to explain the syllogistic style of many opinions: “The given legislative provision constitutes the major premise; the facts constitute the minor premise; and the ‘declaration of what the statutory law commands regarding the controversy’ forms the conclusion.” In this sense, the Cour’s formalism seems like a sensible response to the constraints imposed by the French governing structure. To fulfill the French citizenry’s expectations about legislative supremacy and the role of the courts in a democratic society, the judiciary must adopt a writing style that self-consciously emphasizes its subservience to the legislative will. The price of legitimacy is deference to the Code.

C. Technocratic Training

Formalism also seems sensible as a strategy for emphasizing the legal expertise on which French judges’ legitimacy is founded. France has adopted a “civil service model” for the selection and training of judges. Individuals are chosen based on their performance on a series of exams, and they advance through the judicial hierarchy based on evaluations by their superiors. All aspiring jurists begin by enrolling in France’s prestigious post-graduate judicial college, École Nationale de la Magistrature (ENM). The admissions examination is extremely competitive: typically, only six to nine percent of students who take the test are admitted to

49. Dawson, supra note 18, at 415; see supra note 32.
50. Lasser, supra note 14, at 34 (quoting Serverin Evelyne, De La Jurisprudence En Droit Privé 70 (1985)).
52. Jacqueline Lucienne Lafon, Judicial Career in France: Theory and Practice Under the Fifth Republic, 75 Judicature 97, 98 (1991) (“ENM has acquired a solid reputation throughout the years . . . .”). There are three avenues for admission to ENM: (1) those under the age of twenty-eight must complete “at least two years of preparatory studies” and take an admissions exam; (2) those under the age of forty who have worked for at least five years in a civil service position may take a different admissions test; and (3) individuals with significant legal experience—such as service on an academic faculty or at least three years of legal work—are automatically granted admission. Marc T. Amy, Judiciary School: A Proposal for a Pre-Judicial LL.M. Degree, 52 J. Legal Educ. 130, 134-35 (2002).
ENM.\textsuperscript{53} Accepted students then undergo a rigorous twenty-seven-month training program, in which they receive instruction on legal doctrines and perform internships.\textsuperscript{54} The students take a series of comprehensive examinations, including a final placement test.\textsuperscript{55} Based on their performance, the aspiring judges receive a ranking, which helps determine the court on which they begin their judicial service.\textsuperscript{56} The Conseil Supérieur de la Magistrature, which consists of senior judges and administrative officials, monitors judges once they are on the bench and makes promotion decisions.\textsuperscript{57} 

This process of selecting judges relies on a particular view of the judicial role—specifically, a technocratic one.\textsuperscript{58} Successful judges embody particular qualities, such as sharp analytical abilities, critical interpretive skills, and legal expertise—skills that can be developed through training. Moreover, instructors and senior judges can evaluate students based on the degree to which they demonstrate these skills.\textsuperscript{59} To get a sense of the contrast between this technocratic view of the judge and a typical American perspective on the judicial role, consider then-Senator Barack Obama’s 2007 comments on his criteria for making judicial appointments: “We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old.”\textsuperscript{60} These

\textsuperscript{54} Id. at 134; Buhai et al., supra note 51, at 180.
\textsuperscript{55} Lasser, supra note 53, at 45; Buhai et al., supra note 51, at 180.
\textsuperscript{56} Lasser, supra note 53, at 45; Buhai et al., supra note 51, at 180 (“This [judicial placement process] is basically a merit-based system: the better the score, the more impressive the court to which a lawyer is assigned.”).
\textsuperscript{57} Bell, supra note 51, at 1759.
\textsuperscript{58} Drawing on a definition developed by Daniel A. Crane, I here use “technocratic” to refer to “the insulation of a governmental function from popular political pressures and its administration by experts rather than generalists.” Daniel A. Crane, Technocracy and Antitrust, 86 Tex. L. Rev. 1159, 1162 (2008).
\textsuperscript{59} See Richard A. Posner, How Judges Think 198 (2008) (“A career judiciary requires performance criteria that can be used to make objective promotion decisions, and the accuracy of a literal interpretation of a legislative text is easier to evaluate than the soundness of a pragmatic interpretation.”).
\textsuperscript{60} Carrie Dann, Obama on Judges, Supreme Court, NBC News (July 17, 2007, 7:21 PM), http://firstread.nbcnews.com/_news/2007/07/17/4439758-obama-on-judges-supreme-court?lite. Perhaps characterizing this statement as “typical” overstates the point: it became the subject of much controversy when President Obama made his first nomination to the Supreme Court. See, e.g., Richard A. Epstein, Beware of Empathy, Forbes (May 5, 2009, 12:00 AM), http://www.forbes.com/2009/05/04/supreme-court-justice-opinions-columnists-epstein.html (“It might be smart politics for Obama to play to his natural constituencies, but there is, I think, no worse way to go about the selection process. Empathy matters in running business[es], charities and churches. But judges perform different functions.”); John Paul Rollert, Reversed on Appeal: The Uncertain Future of President Obama’s “Empathy Standard”, Yale L.J. Online (Oct. 15, 2010), http://www.yalelawjournal.org/forum/reversed-on-appeal-the-uncertain-future-of-president-obamas-empathy-standard (“To the Right, empathy was nothing less than a code word for judicial activism, a dog whistle to the Democratic base that the President would choose judges who would put the counsel of a bleeding heart above the demands of impartial justice.”). However, the point is that the state of

https://digitalcommons.law.yale.edu/yjlh/vol26/iss2/3 12
comments would be incomprehensible to French jurists, who are selected on the basis of their scholastic achievements rather than their personal characteristics or empathetic attitude. President Obama was articulating the antithesis of the technocratic view of the judiciary, claiming that characteristics beyond legal expertise or intellectual pedigree should influence judicial appointments.

Therefore, one of the ways in which the French judiciary maintains legitimacy is by emphasizing judges' legal expertise—their training, their knowledge, and their consistency in decision-making. Once expertise becomes the salient metric for measuring jurists' ability—and once prestigious educational institutions are established to instill such expertise—judges have an instant measure of legitimacy: those who graduate from ENM have passed through a rigorous training program and have proven themselves as credible legal authorities. A formalist writing style fits well with a technocratic conception of the judiciary. The judges' straightforward rhetoric emphasizes that they are simply applying their knowledge to reach a foregone legal conclusion. In addition, if a different set of judges had decided the case, they would have drawn on the same fount of knowledge to reach the same ruling. The judges' identities are irrelevant, which means that they do not need to sign their opinions.

D. Dialogic Engagement

Formalism plays a crucial role in ensuring that judges stay true to what the French public regards as the traditional judicial role—employing expert legal knowledge to apply the legislative Code. The Cour de Cassation's syllogistic rhetoric also upholds the court's legitimacy by responding to another imperative—the need to engage the public in dialogue about the law. This claim is a counterintuitive one. The traditional conception is that the Cour's formalism, by obfuscating the rationales behind its decisions, limits the public's ability to engage with judicial rulings. Far from restricting criticism, however, the Cour's terseness leaves space for legal academics and public commentators to contribute to the development of the law.

The Recueil Dalloz and the Juris-Classeur Périodique are prominent (but unofficial) French case reporters, and they contain notes authored by prominent academics. These notes—many of which appear directly after political discourse in the United States permitted President Obama to make these comments about empathy; his statement was comprehensible to American citizens, many of whom recognize that judges' personal characteristics influence their judicial decisions. In fact, in a 2010 poll, about two-thirds of American respondents stated that the President should consider "empathy" in making judicial appointments, while only eight percent stated that empathy should play no role whatsoever in the judicial selection process. James L. Gibson, Expecting Justice and Hoping for Empathy, PAC. STANDARD (June 20, 2010), http://www .psmag.com/legal-affairs/expecting-justice-and-hoping-for-empathy-17677/.
the cases on which they comment—consciously eschew the formalist style of French judicial rhetoric. They discursively discuss the value judgments that underlie decisions, methodically analyzing the rulings’ implications for French jurisprudence. For example, an academic note authored by Yves Chartier followed the “vegetative state” case discussed earlier.

The note argues that the Cour’s decision was based on the principle of human dignity—the idea “that every person is and remains a human being, however gravely injured (s)he may be.” Chartier also takes up significant counterarguments to the Cour’s ruling, which notably went unaddressed in the opinion itself:

It is, however, true that if the rule of complete reparation of damage imposes complete indemnification of all types of damage incurred, only such damage must be retained. This may lead to an objection, because, precisely, the appellate court had ruled that the victim was not able to “feel anything at all in the way of existential concerns, be it pain, or the sentiment of diminution due to disfigurement, or the frustration of [life’s] pleasures.” This explains, furthermore, how it has been very logically held in the academic literature that a victim in a vegetative state had to be denied certain types of damages, not because (s)he was not “worthy” of them, but because (s)he did not incur them . . .

Chartier addresses the objection by once again referring to the principle of human dignity. Once the court has acknowledged that the victim is a “human being,” the harm to her dignity must be compensated regardless of her subjective experience of that harm. In this sense, the academic note articulates the values behind the decision and addresses important objections, filling in the gaps that might otherwise plague the Cour’s opinion.

For an American unversed in the style of French jurisprudence, the discovery of academic notes placed next to cases is startling: imagine skimming through the West Federal Reporter and finding numerous articles filled with criticisms of the Supreme Court’s jurisprudence. The placement of these academic notes in a case reporter confutes some of the conventional wisdom advanced by comparative scholars. French academics do not treat the Cour’s conclusions as the inevitable outcome of applying

61. DAWSON, supra note 18, at 398; LASSER, supra note 14, at 40. Some of the notes are contained in a separate section of the reporter; at the end of each case, the text refers readers to the section containing any notes relevant to that case. Id.

62. For the original version of the note, see Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Feb. 22, 1995, D. 1996, 69, 69-70, Yves Chartier (Fr.). For the translation used in the text and in the appendix, see LASSER, supra note 14, at 40-42.

63. See supra note 28 and accompanying text.

64. See supra note 62.

65. See supra note 62.

66. See supra note 62.

67. See LASSER, supra note 14, at 341.
law to facts, but instead hold the rulings up to detailed scrutiny. The scholars' writings implicitly concede that the law is subject to varying interpretations and that judges' interpretations might not always be the best ones. Comparativists who emphasize the Cour de Cassation's formalism, therefore, are simply looking in the wrong place. By focusing on the Cour's vague opinions, comparative scholars miss the academic critiques that sit directly beside those opinions in public reporters.

When French academics write detailed commentaries on judicial decisions, they indicate that they are taking the Cour's jurisprudence seriously. In this sense, the very existence of powerful, engaged criticism enhances the judiciary's credibility. Moreover, criticism holds the Cour accountable, subjecting judicial decisions to the plaudits or censure that they deserve. When the judiciary withstands academic scrutiny—and especially when it receives praise from the critics—it demonstrates that it is adequately fulfilling its duties within the French governing structure. By engaging the Cour in dialogue about the law, academic criticism enhances the judiciary's legitimacy.

E. The Paradoxical Nature of Judicial Legitimacy

In the previous sections, I have outlined three specific mechanisms by which the Cour de Cassation maintains legitimacy: judges defer to the supreme legislature, undergo technocratic training programs, and endure rigorous academic criticism. Drawing these three mechanisms together, the Cour's legitimacy depends on its bureaucratic norms. Like a typical bureaucracy or administrative agency, the Cour defers to its hierarchical superiors (the French legislature) and relies on experts (trained judges). Its opinions read more like the outcome of a notice-and-comment rulemaking procedure than like the product of a normatively charged adjudicatory process; the Cour leaves the investigation of policy implications to academic commentators. Within a judicial system that draws its legitimacy from these sources, unsigned opinions are a sensible tool, cementing the view that judges are anonymous bureaucrats administering the legislature's Code.

At first glance, the bureaucratic bases of French judicial legitimacy might seem contradictory: legitimacy emerges from the perception that judges are technocratic experts reaching the "correct" legal conclusions, but the Cour's authority also rests on academic scrutiny that calls the correctness of those conclusions into question. The French judiciary reconciles this seeming paradox by "bifurcating"69 judicial decision-making

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68. See supra note 19 and accompanying text for a discussion of the definition of "bureaucracy."
69. I take the term "bifurcation" from LASSE, supra note 14, at 27. See generally id. at 27-61 (applying the concept of "bifurcation" to analyze opinion-writing practices in the French Cour de Cassation).
from academic criticism. Unlike the Supreme Court, the Cour de Cassation could not permit concurrences or dissents, because doing so would allow some judges to reprove others—undermining the impression that judges are interchangeable machines applying mathematical formulas. Nonetheless, some form of criticism is important to hold the Cour accountable and ensure the development of the law. As a result, the French judiciary delegates the task of criticism to a less visible source than the judges themselves: academics. The Cour uses its terse opinions to establish its legal bona fides, while scholarly notes entrench the legitimacy that comes from dialogic engagement—without calling as much attention to legal flaws as would a concurrence or dissent authored by another jurist. In other words, bifurcation allows the Cour to have its cake and eat it too—to draw on two distinct sources of legitimacy (technocratic and critical) that rest on the backs of two distinct institutions (the judiciary and the academy).

II. THE AMERICAN CONTEXT

The Cour de Cassation has adopted a number of tactics to maintain its legitimacy while negotiating the tensions underlying judicial work. These tactics depend on the specific constraints and opportunities presented by the French governing structure—for example, the need to defer to the legislature and the ability to engage with legal academics. Facing similar challenges but operating within a distinct political context, the United States Supreme Court has deployed a different approach. Rather than bifurcating judicial decision-making from academic criticism, the Court integrates both elements in its opinions. These opinions include formalist applications of the law, broader discussions of the values underlying decisions, and detailed responses to counterarguments—many of which are raised by the author’s fellow Justices in separate concurrences or dissents. Unsigned opinions, which mesh well with the Cour de Cassation’s rhetoric, are less suitable in an American context that emphasizes the value judgments on which judicial rulings are based. Because judges are not merely bureaucrats butvaluearticulators, their personal preferences—their identities—matter. They acknowledge this point each time they place their names atop a majority, concurring, or dissenting opinion.

A. The Sources of American Judicial Authority

The Supreme Court draws its authority from different sources than the French Cour de Cassation. For example, while American judges often hail judicial modesty and deference to the legislature as virtues,70 these charac-

70. See, e.g., Roberts Confirmation Hearings, supra note 11, at 163 (statement of John G. Roberts, Jr., Nominee for Chief Justice of the United States) ("I think [my opinions as a judge on the Dis-

https://digitalcommons.law.yale.edu/yjlh/vol26/iss2/3
teristics do not confer legitimacy to the same extent as in the French system. The concept of "legislative supremacy" holds less weight for an American public that accepts judicial review and regards the three branches of government as coequal partners. Perhaps the most famous sentence in American constitutional law comes from Chief Justice Marshall’s opinion in *Marbury v. Madison*71: "It is emphatically the province and duty of the judicial department to say what the law is."72 This statement is directly antithetical to the French view, in which the legislature has sole authority to "say what the law is."73 Similarly, the technocratic character of judges does not provide the same sense of credibility in the American context as it does in France. Beyond law school, jurists are not required to undergo significant preparation for the work of judging; although some law schools and the Federal Judicial Center74 offer training programs, these sessions are typically optional and informal.75 While judges’ law school educations prepare them for their work, lawyers often follow different paths—including stints in the public sector, private law practice, or legal academia—before attaining a judgeship. The road to the judiciary does not include the detailed signposts that French jurists must follow.76

In the absence of formal training programs or strong presumptions of legislative supremacy, the Supreme Court relies on its opinions to establish its authority. Simply reading a decision indicates the centrality of the judicial opinion to the Court’s work. Decisions frequently span many pages,77 separate concurrences and dissents abound,78 and the rationales behind rulings are explicitly outlined. When an opinion is published in the

71. Markham, supra note 13, at 938.
73. Lasser, supra note 14, at 171-74 (explaining that judicial decisions do not have the status of law in France).
75. Amy, supra note 52, at 130-31 (discussing the scant training options available for newly appointed judges); see also id. at 130 (advocating for an LL.M. degree program that would prepare judges-in-training for the bench).
76. See infra Part III.A for a qualification of this point, relating to the relatively similar career tracks of recent appointees to the Supreme Court.
78. John P. Kelsh, The Opinion Delivery Practices of the United States Supreme Court 1790-1945, 77 Wash. U. L.Q. 137, 175 (1999) (noting that the ratio of separate opinions to majority opinions began to increase in the early 1940s, hovering between 1.2 and 1.7 during the past fifty years).
United States Reports or unofficial reporters, it appears sans academic commentaries: the opinion speaks entirely for itself. 79

Because the Court’s opinions play such a crucial role in establishing legitimacy, they must simultaneously fulfill multiple functions. First, they need to demonstrate the Court’s adherence to the rule of law. 80 They must provide strong legal justifications for the ruling, indicating that the Justices are not imputing their personal views to the Constitution or to a statute. 81 At the same time, opinions must incorporate mechanisms for holding the Justices accountable. Since academic commentaries are consigned to law journals (instead of appearing in case reporters themselves), scholarly writings may not provide an accountability check to the same extent as French academic notes. Instead, the Supreme Court internalizes criticism. The Justices actively address possible counterarguments to their claims, and the publication of separate concurrences and dissents forces those who sign onto the majority opinion to defend themselves against attacks launched by their peers. 82 Finally, the Court’s opinions typically provide some indication of the values underlying the holding. 83 This is another function fulfilled by academic notes in the French system. In the United States, however, the Justices take up the task themselves, incorporating a discussion of public values into their already hefty opinions. 84

B. The Dual Objectives of American Judicial Opinions: Missouri v. McNeely

As in the French context, a representative opinion illustrates the point. Consider Missouri v. McNeely, 85 one of the Court’s recent cases. 86 In contrast to the Cour de Cassation’s unanimity, the Justices issued four separate opinions in McNeely—the opinion of the Court (part of which commanded a majority, part of which commanded only a plurality), a partial concurrence, a partial concurrence/partial dissent, and a dissent. 87 The syl-

79. LASSER, supra note 14, at 341.
80. See Kevin M. Stack, The Practice of Dissent in the Supreme Court, 105 YALE L.J. 2235, 2235 (1996) (“The United States Supreme Court’s connection to the ideal of the rule of law is often taken to be the principal basis of the Court’s political legitimacy.”).
81. Id.
82. E.g., Ruth Bader Ginsburg, The Role of Dissenting Opinions, 95 MINN. L. REV. 1, 3 (2010) (“My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation.”); Antonin Scalia, Dissents, OAH MAGAZINE OF HISTORY, Fall 1998, at 22 (“The most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion. . . . [T]he first draft of a dissent often causes the majority to refine its opinion, eliminating the more vulnerable assertions and narrowing the announced legal rule.”).
83. LASSER, supra note 14, at 338-39.
84. Id.
85. 133 S.Ct. 1552 (2013).
86. Oral arguments occurred on January 9, 2013, and the opinion came down on April 17, 2013. Id. at 1552.
87. Id. at 1556.
labus lists the author of each opinion, as well as the names of the Justices who signed onto it.Justice Sotomayor’s opinion for the Court begins with a detailed account of the facts. Although the case involved a simple traffic stop, the decision devotes nearly two pages to describing exactly what happened—longer than the entirety of most Cour de Cassation opinions. The majority also lays out the procedural history of the case in exacting detail, discussing rulings by the trial court, the Missouri Court of Appeals, and the Missouri Supreme Court.

By the time the majority reaches its legal analysis, it has provided a thorough factual background to contextualize its reasoning. The question in the case was whether the Fourth Amendment permitted police officers to perform a warrantless, nonconsensual blood test on a possible drunk driver. The majority’s answer commences with a clause that might appear at the beginning of a Cour de Cassation opinion ("Given art. XXX ... "): the Court quotes part of the Fourth Amendment. However, the writing immediately deviates from the French model by referring to the Supreme Court’s precedents: "Our cases have held that a warrantless search of the person is reasonable [under the Fourth Amendment] only if it falls within a recognized exception." The subsequent paragraphs analyze one such exception (the "exigent circumstances" rule), citing no less than eighteen precedents that outline the contours of the exemption. Based on these prior rulings, the Court rejects the State’s argument for a per se rule, concluding that a "totality of the circumstances" test must be applied to determine when exigent circumstances exist. The next four pages of the opinion respond directly to counterarguments raised by the State and the Chief Justice’s partial dissent.

In some ways, the opinion adopts a formalistic tone that would not seem out of place in a Cour de Cassation opinion. By beginning with the language of the Fourth Amendment, the majority emphasizes that it is drawing its analysis from the constitutional text rather than from the Justices’ own political preferences. The Court’s discussion of precedents, which occupies the bulk of the opinion, is precise and detailed; the question is

88. Id.
89. In the words of the Missouri Supreme Court, the facts presented “a routine DWI case.” State v. McNeely, 358 S.W.3d 65, 74 (2012).
90. McNeely, 133 S.Ct. at 1556-58.
91. Id.
92. Id. at 1556.
93. Id. at 1558. The quoted portion of the Fourth Amendment reads, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .” Id.
94. Id.
95. Id. at 1558-60.
96. Id. at 1559-63.
97. Id. at 1563-67.
whether nonconsensual blood tests during DWI stops are per se permissible under the exceptions outlined in previous decisions, and a canvas of those decisions indicates that the answer is no.98 Yet at certain moments, the Court gives the reader a glimpse of the value judgments underlying its holding. In a sentence that sounds like it could come from Chartier’s academic note, the majority states that nonconsensual blood tests constitute “an invasion of bodily integrity [that] implicates an individual’s ‘most personal and deep-rooted expectations of privacy.’”99 The Court is signaling that its reasoning—and some of its hesitance to impose a per se rule—springs from its concerns about individual privacy. The majority is not merely engaging in a formalistic application of the law but is explicitly articulating the values—in this case, personal autonomy and bodily integrity—that underlie its decision.

The values that pervade the Court’s holding are also evident in the majority’s response to the State’s counterarguments. Missouri’s attorneys argued that the compelling need to prevent automobile accidents justified a per se rule allowing police to perform warrantless, nonconsensual blood tests on suspected drunk drivers. In this sense, the case embodied a classic conflict between the State’s need to implement its laws and the individual’s right to privacy.100 The Court confronted the conflict head-on:

We have never retreated . . . from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests. . . . [T]he general importance of the government’s interest in [eradicating drunk driving] does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case.101

These sentences would have no place in a Cour de Cassation opinion. They explicitly articulate the value judgments—the balance between personal privacy and law enforcement—that underlie the majority’s analysis. The Court’s writing indicates that it is no longer simply “applying” the Fourth Amendment or the Court’s precedents. It is expressing a considered judgment that (in this context) individuals’ privacy interests outweigh the government’s need to prevent drunk driving.102 The other Justices di-

98. Of course, the explicit reliance on precedents distinguishes the decision from a Cour de Cassation opinion; however, the formalistic interpretation and application of those precedents mirrors the Cour’s analysis of the French Code.


100. Id. at 1565-66.

101. Id. at 1565.

102. The value judgments implicit in the Court’s analysis are also evident in the majority’s discussion of the trade-offs between per se rules and “totality of the circumstances” tests. Id. at 1564. While choosing between these two tests may depend on empirical judgments about which will be more effective in enforcing the Fourth Amendment’s requirements, it also depends on a value judgment about the best balance between hard-line rules and privacy interests. The majority makes this value analysis explicit: “While the desire for a bright-line rule is understandable, the Fourth Amendment will
rectly engage with the majority's value weighing. For example, Chief Justice Roberts's partial concurrence/partial dissent and Justice Thomas's dissent emphasize the importance of law enforcement needs without ever using the word "privacy." Those who did not join the Court's opinion evidently had different views on the appropriate balance. Their disagreements with the majority emerge not only from divergent interpretations of precedent, but also from incompatible perspectives on the weight that should be accorded to bodily integrity in the face of police imperatives.

C. The Pseudo-Formality of the Supreme Court Opinion

Several other scholars have confirmed what the frequent reader of Supreme Court decisions has probably observed: like McNeely, many of the Court's opinions represent a dissonant meld of formalist and value-centric reasoning. For example, Mitchel de S.-O.-l'E. Lasser has examined the Supreme Court's use of multi-pronged tests in constitutional cases. These tests outline a set of elements ("prongs") that the Justices consider when applying a given constitutional provision. At first glance, multi-pronged tests appear to embody formalist ideals: they outline clear factors that can be used to predictably apply the law. Moreover, the Justices often emphasize the connection between the test and the constitutional provision that they are interpreting, implying that the prongs emerge directly from the Constitution's language. According to Lasser, however, multi-pronged tests often take on a life of their own, displacing the text from which they are drawn. In future cases, the Justices tend to refer back to the test itself rather than to the relevant constitutional provision. Because judicially crafted tests can be narrowed or expanded more easily than can the canonical words of the Constitution, multi-pronged standards give the Justices leeway to develop the law in desired directions. The Court often uses—even manipulates—its own multi-pronged tests to elevate favored

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not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." Id. Once again, the need to protect privacy outweighs the State's interest in crafting a broad rule that will categorically allow law enforcement officers to conduct warrantless, nonconsensual blood tests.

103. Id. at 1571 (Roberts, C.J., concurring in part and dissenting in part) ("Evidence [i.e., alcohol in the bloodstream] is literally disappearing by the minute. . . . And that evidence is important. A serious and deadly crime is at issue.").

104. Id. at 1577 (Thomas, J., dissenting) ("Nothing in the Fourth Amendment requires officers to allow evidence essential to enforcement of drunk-driving laws to be destroyed while they wait for a warrant to issue.").

105. LASSER, supra note 14, at 101-02.


107. Id. at 702.

108. Id. at 715-16.

109. Id. at 702.

110. Id.

111. Id. at 703.
values and subordinate others.\footnote{112}

In a particularly vivid example, Lassera analyzes a series of cases interpreting the Sixth Amendment's Counsel Clause.\footnote{113} The Clause reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."\footnote{114} In a 1984 opinion, Justice O'Connor crafted a two-pronged test to explain the Clause's application in cases involving ineffective assistance of counsel:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.\footnote{115}

Justice O'Connor's formalist analysis directly references the Sixth Amendment; she claims that the term "counsel" means effective counsel, although this is not entirely clear from a reading of the provision at issue.\footnote{116} In future cases, the Court referred directly to Justice O'Connor's test rather than to the Counsel Clause itself.\footnote{117} Her analysis displaced the constitutional text, allowing the Supreme Court to entrench a value—defendants' entitlements to effective counsel—that was protected in the Court's precedents but not necessarily in the Sixth Amendment.\footnote{118} In other words, the Justices used the tools of formalism to make—and perhaps to conceal that they were making—a value judgment about the requirements of a fair trial.\footnote{119}

Lassera demonstrates the convergence of the Court's formalistic and value articulation functions in several other lines of precedents, including Dormant Commerce Clause decisions\footnote{120} and cases involving "plain meaning" debates on statutory interpretation.\footnote{121} These findings confirm what a

\footnote{112} Id.; see also Nagel, supra note 23, at 203 (discussing the "formulaic style" of opinion writing, which emphasizes "formalized doctrine expressed in elaborately layered sets of 'tests' or 'prongs' or 'requirements' or standards' or 'hurdles'": "Rather than binding, the formulaic style frees the Court, like some lumbering bully, to disrupt social norms and practices at its pleasure.").

\footnote{113} Lasser, supra note 106, at 713-18.

\footnote{114} U.S. CONST. amend. VI.


\footnote{116} Lasser, supra note 106, at 717.

\footnote{117} In Darden v. Wainwright, for instance, Justice Powell wrote, "Petitioner contends that he was denied effective assistance of counsel at the sentencing phase of the trial. That claim must be evaluated against the two-part test announced in Strickland v. Washington . . . ." Darden v. Wainwright, 477 U.S. 168, 184 (1986). Justice Powell leapfrogs the Sixth Amendment itself, jumping straight to the judicially created test. Lasser, supra note 106, at 719-20.

\footnote{118} Lasser, supra note 106, at 717-18, 719-20, 739.

\footnote{119} Id. at 739.

\footnote{120} Id. at 704-10.

\footnote{121} LASSER, supra note 14, at 88-101. Robert F. Nagel has reached similar conclusions. He ar-
close analysis of Justice Sotomayor's opinion in *McNeely* suggested: the Court's opinions strive to be "all things to all people." The Justices integrate formalist analysis with value articulation, emphasizing that they are staying within their judicial role even as they subtly chisel at the boundaries of that role.

Lasser's study comes with several caveats and subtleties. To suggest that the Supreme Court's opinions integrate formalism and value articulation is not to suggest that all of its opinions do so to an equal degree. Lasser's analysis seems like it might have the most to say about constitutional adjudication—cases in which the Court is interpreting a relatively vague provision from the foundational text and must resort to value judgments to reach its conclusions. As Judge Posner has noted, "a constitution tends to deal with fundamental issues," and "fundamental issues in the constitutional context are political issues: they are issues about political governance, political values, political rights, and political power." In contrast, when faced with statutory questions, the Court may be better equipped to reach decisions that eschew value judgments—for example, by deferring to congressional intent or invoking interpretive canons. Yet even in statutory cases, the Court must sometimes rely on contestable value judgments to interpret unclear provisions. As William N. Eskridge, Jr., has demonstrated, many interpretive canons "demand normative analysis and, therefore, discretionary choices on the part of judges." For example, when a judge invokes the "purpose canon"—to use Eskridge's term—she is making a normative judgment about the role that Congress's purpose should play in statutory construction. In this sense, there are reasons to suspect that formalism and value articulation might interact differently in constitutional and statutory cases; nonetheless, there are also reasons to

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122. Lasser, supra note 14, at 341.

123. Posner, supra note 21, at 39-40 (also noting that "constitutional provisions tend to be both old and vague—old because amendments are infrequent (in part because amending is so difficult) and vague because when amending is difficult a precisely worded constitutional provision tends to become an embarrassment because it will not easily bend to changed circumstances, and circumstances change more over a long interval than over a short one").

124. James F. Spriggs II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. Pol. 1091, 1103 (2001) (providing data to suggest that courts may be more hesitant to overrule precedents in statutory than in constitutional cases). Judge Posner took this study to indicate that "the Court behaves in a more conventionally lawlike manner in statutory, as distinct from constitutional, cases—for example, it is much more likely to follow precedent in statutory cases." Posner, supra note 21, at 49 n.52.


126. Id.
believe that formalism and value articulation will play a role in both sets of cases, influencing the Court’s decisions regardless of the underlying text that it is interpreting.

Viewed in this light, the signed opinion fits well with the American style of jurisprudence. The Supreme Court opinion must not only demonstrate judges’ adherence to legal doctrines, but must also indicate the public policy rationales that justify the decision. Because values matter in these opinions, identities matter, too. Understanding the ideals embraced by a particular judge requires knowing the perspective from which the judge is coming; it requires knowing who that judge is. By revealing the Justice’s identity, the signed opinion becomes the American answer to the French academic note—indicating that the Supreme Court assigns to judges, rather than legal scholars, the task of articulating the values that underlie judicial reasoning.127

III. THE PROBLEM WITH SIGNED OPINIONS

The previous section suggested that the Supreme Court Justices’ work includes bureaucratic, formalist elements, but it also includes a task that would never be assigned to the typical bureaucrat—namely, the articulation of fundamental societal values. This work is not guided by the straightforward rules or hierarchical regulations that define technocratic duties; it is not an administrative task but an adjudicative one.

A. A Contingent Critique of the Signed Opinion

Over the past several years, however, encroaching bureaucratization at the Supreme Court has begun to belie some of the justifications for the signed opinion. As Richard J. Lazarus notes, the last two decades have seen the rise of a Supreme Court bar—an elite group of lawyers who often argue cases before the Justices.128 The Solicitor General’s frequent involvement in the Court’s cases only compounds the trend. Since 1986, the SG’s Office has participated in seventy-five percent of cases that reach the merits stage, either as a party or as an amicus.129 As a result of these changes (coupled with the Court’s decreasing caseload130), the Justices

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127. See Scalia, supra note 82, at 21 (“In our system, it is not left to the academicians to stimulate and conduct discussion concerning the validity of the Court’s latest ruling. The Court itself is not just the central organ of legal judgment; it is center stage for significant legal debate. In our law schools, it is not necessary to assign students the writings of prominent academicians so that they may recognize and reflect upon the principal controversies of legal method or of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself. . . .”).


130. Ryan J. Owens & David A. Simon, Explaining the Supreme Court’s Shrinking Docket, 53 WM. & MARY L. REV. 1219, 1228-29 (2012) (“In the 1960s, the number [of cases on the docket] rose
hear fewer voices during oral arguments, and the voices they do hear tend to come from similar backgrounds—service in similar government offices, educational credentials from similar schools, work in similar law firms.  

Relatively, the Justices themselves seem to come from comparable backgrounds. All nine of the current Justices attended either Harvard or Yale Law School (as well as private undergraduate colleges), three served as Supreme Court law clerks, three worked in the Solicitor General’s Office, eight served as federal appeals court judges, and eight hail from one of three states (New York, New Jersey, or California).  

In these ways, the Justices are beginning to resemble their French counterparts. Like a French jurist graduating from ENM, the Justices have attended the same prestigious schools and have moved through the same judicial hierarchy. In addition, the relatively defined career paths of the current Justices—coupled with the fact that they are reading briefs from lawyers with similar backgrounds—creates the impression that a select group of skilled jurists has a monopoly on legal knowledge. This trend reinforces the bureaucratic ideal that judges should distinguish themselves by their legal expertise rather than by the values that they express through their jurisprudence. Increasing bureaucratisation brings the Justices closer

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131. Lazarus, supra note 128, at 1492-502 (explaining how members of the Supreme Court bar cultivated expertise in the Solicitor General’s Office and elite law firms like Sidney Austin or Jones Day). Heightened levels of amicus participation might mitigate the trend toward an increasingly concentrated Supreme Court bar; the submission of amicus briefs provides an opportunity for non-parties to ensure that the Justices hear their perspectives. See Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. PA. L. REV. 743, 751-56 (2000) (“The Court received some 4907 amicus briefs in the last decade [of the study] (1986-1995), as opposed to 531 briefs in the first decade (1946-1955)—an increase of more than 800%.”). Nonetheless, studies have been inconclusive as to whether the increased levels of amicus participation influence the Court’s rulings. See, e.g., Padideh Ala’i, Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience, 24 FORDHAM INT’L L.J. 62, 93 (2000) (“The practical result of an open door policy [toward amicus submissions] has been that many amicus curiae submissions are ignored and have little impact on the Supreme Court’s decision making.”). But see Kearney and Merrill, supra, at 819 (“We do believe . . . that our study provides evidence that amicus briefs that speak to the requirements of the law exert some influence on the outcomes reached by the Court.”).  


133. Justice Breyer clerked for Justice Goldberg during the 1964 term; Chief Justice Roberts clerked for then-Justice Rehnquist during the 1980 term; and Justice Kagan clerked for Justice Marshall during the 1987 term. Id.  

134. The three are Chief Justice Roberts, Justice Alito, and Justice Kagan. Id.  

135. The exception is Justice Kagan. Id. See Alleman & Mazzone, supra note 19, at 1358-62 (explaining that a judicial background appears increasingly important for appointment to the Supreme Court); see also Benjamin H. Burton, An Empirical Study of Supreme Court Justice Pre-Appointment Experience, 64 FLA. L. REV. 1137, 1148-71 (2012) (detailing the backgrounds of Justices on the Roberts Court).  

136. Justice Thomas was born in Georgia. Biographies of Current Justices, supra note 132.  

137. Markham, supra note 13, at 941-42.
to the model of the Cour de Cassation and thus undermines the case for signed opinions. To the extent that the Justices are distinguished more by their legal knowledge and career achievements than by their ability to articulate fundamental values, their identities may not matter—and their names may not need to appear atop their opinions.\textsuperscript{138}

Of course, this is not to suggest that the Court has completely morphed into a bureaucracy, eschewing all semblance of its former self. The Justices’ opinions—as evidenced by McNeely—still include detailed discussions of public values; some commentators even point to the contentiousness of Supreme Court confirmation hearings as evidence that judicial appointments are politically charged decisions—rather than bureaucratic elevations or civil-service-style promotions.\textsuperscript{139} But the fact remains that the Supreme Court Justices—and the lawyers who argue in front of them—have become an increasingly similar group, potentially calling into question the justifications for the signed opinion.\textsuperscript{140}

\textbf{B. Comprehensiveness as Judicial Vice}

The previous section gives rise to a contingent critique of the signed opinion—one that depends on the degree to which the Court has bureaucratized, edging ever closer to the French model. However, signed opinions also raise deeper concerns about American public discourse. These worries depend less on other elements of the judicial system than on the incentives that naturally arise when judges’ names are associated with their opinions.

As Fiss noted, the signed opinion signifies that the Justices have engaged with their cases, and it provides a mechanism for holding them accountable if they fail to do so.\textsuperscript{141} This accountability emerges from both internal and external sources: from the personal pride that asserts itself when one’s name is attached to one’s work, and from the knowledge that the opinion’s readers will know its author—and therefore know where to direct any praise or criticism. Accountability, in turn, promotes legitimacy, ensuring that the Justices do not exceed the bounds of judicial prerogative and remain faithful to their obligations in a democratic polity.

\textsuperscript{138} None of this is to comment on the increasing bureaucratization at the Court as a normative matter. These recent trends—relating to the backgrounds of the Justices, the development of the Supreme Court bar, and the participation of the Solicitor General’s Office—may represent positive movements that promote the development of a more professionalized, expert, elite class of lawyers. The point is simply to illustrate the inconsistencies between these trends and some of the justifications for the signed opinion.

\textsuperscript{139} See, e.g., Edward C. Dawson, \textit{Kagan Confirmation Contentiousness Continues Partisan Trend}, HOUSTON LAWYER, Sept.-Oct. 2010 ("[E]ven more contentious [confirmation] battles are likely yet to come, particularly when there is a nomination that could seriously shift the political center of the Court.").

\textsuperscript{140} Barton, \textit{supra} note 135, at 1187 ("It is empirically demonstrable that the current Supreme Court Justices have had different collective experiences than past Supreme Court Justices.").

\textsuperscript{141} Fiss, \textit{supra} note 12, at 1443.
But accountability also has its downsides, and scholars have recently begun to highlight some of these latent disadvantages. For example, Craig S. Lerner and Nelson Lund argue that the signed opinion—the same tool that promotes accountability—encourages the American public to view the Justices as individuals rather than as members of a collective judicial body,\(^\text{142}\) while James Markham has suggested that signed opinions encourage the Justices to focus excessively on developing their personal jurisprudence.\(^\text{143}\) While these commentators have pointed to the downsides of the Court’s opinion-writing practices, there is another, perhaps more damning, disadvantage to the accountability that springs from signed opinions. Individual authorship brings attention—and sometimes praise—to the Justices, but it also raises the possibility of backlash. When a Justice writes a majority holding, she is forever tied to the decision; it is not uncommon to refer to “Justice X’s opinion,” even when she was speaking for a unanimous Court.\(^\text{144}\) The author of the majority opinion often garners praise for a well-received ruling, but she also becomes a target for the holding’s detractors—the name mentioned in venomous op-eds and inscribed on protestor’s banners. The writer’s best defense against this infamy is to craft an unassailable opinion. She must muster as many relevant arguments as possible, dismiss every conceivable objection, discuss even the most remotely applicable precedents, and then—the cherry on top—articulate the foundational values that underlie the decision. The Justices’ integration of formalism and value articulation represents an adaptive response to this imperative. They must defend themselves on all fronts—from formalists and realists, liberals and conservatives—and so they write opinions that attempt to be all things to all people. In other words, they strive to be comprehensive.

At first glance, comprehensiveness might seem to be a virtue of the Supreme Court opinion. Because the Justices are not elected, they must justify their authority; detailed explanations of their reasoning constitute a means of doing so. Moreover, thorough opinions give the American people a foothold, ensuring that they can engage with the Court’s arguments and contribute to democratic debates about the shape of the law. But there are dangers in the type of comprehensiveness practiced by the Supreme

\(^{142}\) Lemer & Lund, supra note 13, at 1281.

\(^{143}\) Markham, supra note 13, at 945-47.

\(^{144}\) Justice Blackmun learned this lesson better than perhaps any other Justice in the twentieth century, when he became inextricably associated with the cause of abortion rights after authoring the Court’s majority opinion in \textit{Roe v. Wade}, 410 U.S. 113 (1973). Despite speaking for a seven-to-two majority, Blackmun quickly came to be regarded as “the creator of abortion rights in America”: “The world attached [\textit{Roe}] to Blackmun in a manner that few Supreme Court decisions are ever linked to their authors. The popular attribution of \textit{Roe} to Blackmun alone was a distortion of the Court’s reality that baffled him at first, and he resisted the notion that he was \textit{Roe}’s only creator.” \textsc{Linda Greenhouse}, \textsc{Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey} 118, 251 (2005).
Court. First, the comprehensive opinion’s discordant blend of formalism and value articulation conceals the true ethical debates that underlie the Court’s decisions. In addition, the comprehensive opinion promotes the internalization of democratic debate, encouraging the Justices to address as many arguments and objections as possible—and potentially crowding out other participants from this debate.\footnote{See Lasser, supra note 14, at 341; Nagel, supra note 23, at 184.} Whereas the Cour de Cassation makes space for academics to contribute to the development of the law, Supreme Court decisions leave no room for argument: the issue has been resolved, the opponents crushed, the battlefield barren.

None of this is to suggest that academics have abdicated their role in the development of the American legal system. In contrast, the Court’s comprehensive rhetoric has not dissuaded academics from attempting to contribute to significant legal debates, and law journal volumes are filled with those contributions. In fact, some scholars have famously attempted to “rewrite” crucial judicial opinions, explaining how they would have authored the opinion if they had been on the Court.\footnote{See, e.g., Jack M. Balkin et al., \textit{What \textsc{Brown v. Board of Education} Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision} (Jack M. Balkin ed., 2002); Jack M. Balkin et al., \textit{What \textsc{Roe v. Wade} Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Most Controversial Decision} (Jack M. Balkin ed., 2007).} My point relates not to the messages that academics are conveying to judges through their scholarly writings—but rather the message that judges are conveying to academics through their opinions. The Court’s comprehensive style implies that the Justices themselves have done all the work; although there may, in fact, be additional work to do—and although scholars often prove that this is the case by offering significant assessments of legal developments—the Court’s opinions do not promote that kind of dialogue. They do not indicate an openness to critique from the outside, and they do not necessarily reflect a willingness to alter judicial doctrines in response to academic writing.\footnote{Cf. Adam Liptak, \textit{When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant}, \textit{N.Y. Times}, March 19, 2007, http://www.nytimes.com/2007/03/19/us/19bar.html (noting that federal courts are citing fewer and fewer law review Articles in their decisions).}

The first difficulty posed by comprehensive opinions is that they overlay ethical debates with a veneer of objectivity—in other words, they discordantly meld the Justices’ dual roles as formalist judges and value articulators. The Justices cannot explicitly reveal that their decisions reflect their value commitments, and the formalistic tools that characterize many opinions—balancing tests, multi-pronged inquiries, “plain meaning” analyses—may conceal the fundamental debates that underlie the Court’s decisions. These tools create the impression that the majority’s reasoning is “right”; the Justices’ rationales do not simply express their value judgments, but rather reflect the results of an impartial, formalist analysis. The
Court's decision in *McNeely* illustrates the point. The majority not only discussed the importance of weighing privacy interests against law enforcement concerns, but also announced that the Court's precedents required a particular balance—which, in this case, came out on the side of privacy. This tendency defines the Court's balancing tests more generally: the Justices weigh values and then announce that the Constitution or the Court's precedents mandate a certain outcome.\(^{148}\) The use of seemingly technical tactics—balancing, after all, sounds like a quintessentially scientific task\(^{149}\)—creates the impression that the decision resulted from a neutral assessment of the case. In fact, however, the debate between conflicting values—between privacy and law enforcement—relates less to the objective "weight" that these values carry than to competing visions about "the sort of society we are to be."\(^{150}\) Does our conception of society promote warrantless blood tests that secure essential law enforcement objectives, or do we seek to protect individuals' bodily integrity from nonconsensual invasions? The majority and the dissenters were not only balancing factors differently; they were outlining fundamentally different visions of how American society should function.

The problem with signed opinions—with comprehensive opinions—is that they elide this point. In *McNeely*, neither the majority's nor the minority's constitutional vision is inherently correct; if I assign a certain weight to the value of "privacy," no one can tell me that this weight is wrong (although they can, of course, advance arguments attempting to convince me to change my view). Yet this is exactly what the opinion-writers in *McNeely* attempted to do. In the penultimate section of its decision, the majority rejected the State's argument that the "privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal."\(^{151}\) The Court responds, "[T]he fact that people are 'accorded less privacy in . . . automobiles because of th[e] compelling governmental need for regul-
tion, ' . . . does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin.' 152 The majority cannot fully respond to Missouri's argument, because the only answer is that the Court weighs privacy and security interests differently than does the State. Yet instead of leaving the objection alone—instead of simply outlining its constitutional perspective and admitting that other perspectives might be equally tenable—the Court succumbs to its desire to respond to every claim advanced by the litigants' attorneys. Rather than allow competing visions to coexist, the Court rejects all alternatives—claiming that the State's arguments not only express different value commitments than those heralded by the Court, but also reflect inaccurate interpretations of the Constitution. Viewed in this light, comprehensiveness becomes judicial vice rather than virtue, because it delegitimizes those who attempt to contribute to national debates—telling them that their views do not belong in our public discourse and, in certain cases, that their views are contrary to the Constitution. The signed opinion is not the only cause of these problems, but it undoubtedly facilitates judges' desire to be comprehensive. Judges cannot afford to be modest when their reputations are at stake. They cannot afford to acknowledge that their opponent has a point when doing so will expose them to personal attack. They cannot afford to admit what every judge knows—that he or she might be wrong—when everyone else, in their own individually authored opinions, makes a claim to irrefutable rightness. The signed opinion, justified as a tool for promoting accountability, becomes a means of eschewing humility.

In this conception, the Cour de Cassation becomes an unlikely paragon for promoting democratic discourse. At first glance, the French judges' vagueness appears to be superficial and dishonest, a technique for covering up the political ideals that truly justify the ruling. But if the Cour is not ignoring these ideals—if it is instead opening up space for academics to expound on them—then nothing is going unsaid: there are simply more people speaking. Ideally, the Cour and the academy will exchange ideas, building on each other's observations and dynamically contributing to the development of the law. Because the Cour's opinions do not read like authoritative dismissals of opponents' views, people with diverse ideological commitments can read their own values into the holding. 153 Instead of ex-

152. Id. at 1565.
153. Cf. Dan M. Kahan, Culture, Cognition, and Consen: Who Perceives What, and Why, in Acquaintance-Rape Cases, 158 U. Pa. L. REV. 729, 804 (2010) (suggesting that certain forms of legislative or judicial "obfuscation," by enabling individuals with varying cultural commitments to read those commitments into the law, promote classically liberal objectives: "By striving to formulate laws in a manner that admits of a variety of potential—even potentially contradictory—cultural justifications, officials can furnish persons of diverse persuasions with the resources necessary to see affirmation of their identities no matter what position the law takes.").
cludes groups, the Cour encourages those with conflicting perspectives to uncover unnoticed overlaps—i.e., consensus. The French opinion, which seemed so empty, was simply waiting to be filled—not by judges imposing their own values, but by citizens engaging in democratic self-governance and debate.

The comprehensiveness of the signed opinion, in contrast, cuts off democratic dialogue before it begins. In an ironic reversal of the criticism launched at French judges, the comprehensive opinion promotes the use of seemingly impartial tools that conceal the value judgments underlying judges’ decisions. In doing so, these opinions cover value commitments with a cloak of formalism and potentially prevent citizens from engaging with judicial rulings.

CONCLUSION

Over the past decade, several theorists have urged the Supreme Court to abandon signed opinions. This Note has attempted to build on their arguments by looking more comprehensively at the justifications for signed opinions and considering how they fit within the broader story of American jurisprudence. In doing so, I arrive at a critique of signed opinions that fundamentally differs from those advanced previously. I have focused on the mismatch between the non-bureaucratic justifications for signed opinions and the realities of increasing bureaucratization at the Court. This gave rise to a deeper worry: the comprehensiveness of judicial opinions, promoted by the individual accountability that arises when Justices’ names are attached to their decisions, may undermine the productive dialogue between courts and academics that characterizes French judicial discourse.

In reaching this conclusion, the Note also attempted to complicate the standard understanding of French jurisprudence. American theorists tend to draw a distinction between the French Cour de Cassation, which sees itself as mechanistically applying the law, and the American Supreme Court, which more forthrightly acknowledges its function as a value articulator. However, the truer distinction might be between a French Court that bifurcates formalism from value judgments and an American Court that integrates them in its opinions. Both courts are attempting to navigate the tension articulated by Justice Scalia—the tension between “finding” law (staying true to the judicial role) and “making” law (acknowledging the value judgments that underlie some decisions). The Cour de Cassation and

154. Id.
155. Id.
156. See Nagel, supra note 23, at 177-203 (explaining that the Court’s “formulaic” style, by integrating formalist and legal realist reasoning, creates an impression of authoritativeness that may conceal the Court’s legal innovations).
157. See supra notes 143-44 & accompanying text.
the Supreme Court have responded to this tension in distinct ways, and their responses demonstrate characteristic features of French and American jurisprudence.

Given this analysis, the question arises: should the Supreme Court continue to issue signed opinions? I may disappoint the expectant reader by stating that I am agnostic on this point—not because I believe that the problems with signed opinions are trivial, but because it is unclear whether the alternatives to this opinion style are superior. Certainly, the French system of anonymous opinions comes with its own set of tradeoffs, and signed opinions make sense as a pragmatic acknowledgment that judges’ identities matter. But this Note has given us reason to urge judges to write as if they were issuing unsigned opinions—to seek an opinion-writing style that emulates the best elements of the French practice, leaving space for democratic debate and engagement. By opening up room for counterarguments and acknowledging that different “balances” of values can fit within American debate, less comprehensive opinions might promote the rigorous academic exchanges that characterize French legal discourse.

This Note began with a statement from Justice Scalia, who argued that judges should adhere to a jurisprudence of “as though”—always acting as if they were finding law even when they are, in fact, making it. Justice Scalia’s style of jurisprudence risks creating a Court that is less transparent in acknowledging the value judgments that justify its opinions. Nonetheless, the Justice has a point for those who believe that judges should not have the final word in defining societal values. By leaving much unsaid—by obfuscating rationales, embracing ambiguity, sacrificing comprehensiveness—the Supreme Court might better serve its role as a single player in the expansive public conversation that comprises American legal discourse.

158. Mark Tushnet argues that the Court’s rhetorical flourishes and “memorable phrases” serve an important educative role. These phrases became associated with particular decisions and provide the public with a way of understanding those decisions. Mark Tushnet, Style and the Supreme Court’s Educational Role in Government, 11 Const. Comment. 215, 223 (1994). By ensuring that the Justices receive credit for the opinions they author, signed opinions may encourage such rhetorical flourishes and thus promote the Court’s educative role.