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## *BRENNAN LECTURE*

### TRYING TO WRITE FAIR OPINIONS

THE HONORABLE ROY W. MCLEESE III\*

INTRODUCTION .....	1353
I. I MIGHT BE WRONG.....	1356
II. THEY ARE CALLED “OPINIONS,” NOT “TRUTHS”.....	1357
III. EXPLAIN RATHER THAN ARGUE.....	1359
IV. YOU DON’T NEED TO PITCH A SHUTOUT.....	1361
V. HUMILITY IN PUBLIC SERVICE .....	1362
VI. SHOW YOUR WORK.....	1364
VII. DON’T GET LOCKED INTO CONCLUSIONS .....	1365
VIII. CARE, BUT NOT TOO MUCH .....	1366
IX. BE SELF-CRITICAL AND OPEN TO CRITICISM FROM OTHERS .....	1367
X. STAY IN YOUR LANE .....	1369
XI. CLARITY AND SIMPLICITY.....	1369
XII. JUSTICE DELAYED .....	1370
XIII. FAIRNESS HELPS TO IMPROVE ACCURACY .....	1371
CONCLUSION: IT’S NOT ABOUT YOU .....	1371

#### INTRODUCTION

Good evening. I am very happy to be here to give the twenty-seventh Institute of Judicial Administration William J. Brennan, Jr.

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\* Copyright © 2022 by the Honorable Roy W. McLeese III, Associate Judge, District of Columbia Court of Appeals. J.D., 1985, New York University School of Law; B.A., 1981, Harvard University. A version of this lecture was presented at the New York University School of Law on October 25, 2022. Thanks to my spouse, Virginia Seitz, for extremely helpful editorial suggestions and to the members of the *New York University Law Review* for their skillful assistance in preparing this lecture for publication.

Lecture on State Courts & Social Justice. Justice Brennan was one of the earliest and most influential advocates for recognizing and enhancing the central role of state courts in helping to achieve social justice.<sup>1</sup> A lecture series on that topic could have no better name. It is also very fitting that the Institute for Judicial Administration (IJA) at the New York University School of Law sponsors this lecture series. The IJA has long supported the activities of state courts, including by, among other things, conducting an annual seminar for new appellate judges, both state and federal.

I feel connected to this lecture series in many ways. I am a graduate of NYU School of Law. I also am a direct beneficiary of the IJA's efforts, having attended the IJA's seminar as a new judge. I now serve on the faculty for that seminar. My spouse, Virginia Seitz, clerked for Justice Brennan. Her father, Collins Seitz, had a long and distinguished tenure on the United States Court of Appeals for the Third Circuit.<sup>2</sup> Before that, he was for many years a state-court judge in Delaware.<sup>3</sup> In that role, Judge Seitz courageously demonstrated how state courts can help achieve social justice by desegregating the Delaware public schools before the decision in *Brown v. Board of Education*.<sup>4</sup> In fact, one of Judge Seitz's rulings was the first such decision in the United States and the only decision affirmed by the Supreme Court in *Brown*.<sup>5</sup> My brother-in-law, Collins J. Seitz, Jr., is the Chief Justice of Delaware, and he continues the efforts of the courts of that state to achieve social justice.<sup>6</sup>

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<sup>1</sup> See generally, e.g., William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225 (1966); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

<sup>2</sup> See, e.g., William J. Brennan, Jr., *Collins Jacques Seitz*, 132 U. PA. L. REV. 1279, 1280 (1984) (describing Judge Seitz's distinguished career).

<sup>3</sup> *Id.*

<sup>4</sup> 347 U.S. 483 (1954); see *Belton v. Gebhart*, 87 A.2d 862, 866, 871 (Del. Ch. 1952) (concluding that state-imposed racial segregation in public elementary schools and public high schools inherently resulted in inferior educational opportunities for Black students, calling for the Supreme Court to overrule the "separate but equal" doctrine, ruling that in any event schools available to Black students were in fact unequal to those available to white students, and ordering the immediate desegregation of the schools at issue); *Parker v. Univ. of Del.*, 75 A.2d 225, 234 (Del. Ch. 1950) (reaching the same conclusions as *Belton* in the context of state universities). See generally, e.g., Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 WASH. & LEE L. REV. 1259, 1274–85 (2019) (discussing Judge Seitz's rulings in *Belton* and *Parker*).

<sup>5</sup> 347 U.S. at 486 n.1, 494 n.10.

<sup>6</sup> See, e.g., NAT'L CTR. FOR STATE CTS., IMPROVING DIVERSITY IN THE DELAWARE BENCH AND BAR: STRATEGIC PLAN (2022), <https://courts.delaware.gov/forms/>

Prior talks in this series have addressed many important and sweeping issues on the general topic of state courts and social justice.<sup>7</sup> This talk takes a more concrete and particular perspective, focusing on the writing of judicial opinions. Judicial opinions form a key building block of a just legal system. When evaluating opinions, we naturally focus on outcome: Did the opinion reach a just result? A basic premise of this talk, however, is that justice is not only a matter of outcome. Rather, achieving justice also requires that opinions be procedurally fair. As Justice Robert Jackson put it, “Procedural fairness and regularity are of the indispensable essence of liberty.”<sup>8</sup>

A vast literature discusses the importance of procedural fairness and debates many complex and interesting issues about how to define, understand, and measure that concept.<sup>9</sup> I will not try to explore those more general topics this evening. For current purposes, I hope it will suffice to quote a brief summary of some key aspects of achieving “procedural fairness” (also sometimes called “procedural justice”):

- Neutrality: consistently applied legal principles, unbiased decisionmakers, and transparency about how decisions are made;
- Respect: the treatment of individuals with dignity and explicit protection of their rights; and
- Trust: that authorities are benevolent, caring, and sincerely trying to help the litigants—a trust garnered by listening to individuals and by explaining or justifying the decisions that address litigant needs.<sup>10</sup>

I also will mostly take as a given that it is important to try to write procedurally fair opinions. I do have two brief introductory observations on that point, though. First, by demonstrating through their opinions that the facts, the law, and the arguments of the parties have been considered carefully and evenhandedly, judges make a vital con-

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download.aspx?id=135148 [<https://perma.cc/N6EN-XBAG>] (establishing a Diversity Strategic Planning effort to address issues surrounding diversity in the Delaware legal community).

<sup>7</sup> E.g., Maite D. Oronoz Rodríguez, *Gender Equality and the Rule of Law*, 95 N.Y.U. L. REV. 1599 (2020); Eric T. Washington, *State Courts and the Promise of Pretrial Justice in Criminal Cases*, 91 N.Y.U. L. REV. 1087 (2016).

<sup>8</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

<sup>9</sup> See generally, e.g., Kevin S. Burke & Steve Leben, *Procedural Fairness in a Pandemic: It’s Still Critical to Public Trust*, 68 DRAKE L. REV. 685 (2020) (stressing the importance of procedural fairness and the need to focus on procedural fairness notwithstanding the challenges created by the COVID-19 pandemic); *Procedural Fairness for Judges and Courts*, NAT’L CTR. FOR STATE CTS., <https://www.proceduralfairness.org> [<https://perma.cc/JCM6-4LN8>] (encouraging courts and judges to promote procedural fairness).

<sup>10</sup> Burke & Leben, *supra* note 9, at 696 (italics omitted) (citing Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30–31 (2007)).

tribution to justice. Opinions that demonstrate procedural fairness foster respect for the legal system by the parties, their attorneys, and the public.<sup>11</sup> Second, as I will suggest later, the techniques for writing procedurally fair opinions also tend to improve accuracy and substantive justice.<sup>12</sup>

Writing procedurally fair opinions is of course important in both federal courts and state courts. There are two respects, however, in which procedural fairness in opinions has particular significance in state courts. First, state courts often have very heavy caseloads.<sup>13</sup> As I will note later, those heavy caseloads make writing procedurally fair opinions particularly challenging. Second, state courts issue the overwhelming majority of judicial decisions in this country.<sup>14</sup> That makes it particularly important to foster procedural fairness in state courts.

From those starting points, this talk addresses two related questions, taking a practical approach: First, what makes an opinion procedurally fair? Second, what techniques can judges use to try to write procedurally fair opinions?

## I

### I MIGHT BE WRONG

I assume that each of you has had the experience of being completely certain that you were right about something, only to later learn that you were completely wrong. In my view, keeping that experience in the forefront of your mind is the single most important technique

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<sup>11</sup> See *id.* at 696–97 (“[A]dherence to procedural fairness principles leads to a greater sense of . . . legitimacy . . . .”)

<sup>12</sup> See Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3, 35 n.137 (2009) (“[P]rocedural fairness ‘may improve the quality of the decision . . . [or] increase the likelihood of an accurate substantive outcome.’”) (quoting LORD WOOLF, JEFFREY JOWELL & ANDREW LE SUEUR, *DE SMITH’S JUDICIAL REVIEW* 318–19 (6th ed. 2007)).

<sup>13</sup> See NAT’L CTR. FOR STATE CTS., APPENDIX I: PROBLEMS AND RECOMMENDATIONS FOR HIGH-VOLUME DOCKETS 2 (2016), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0017/25721/ncsc-cji-appendices-i.pdf](https://www.ncsc.org/_data/assets/pdf_file/0017/25721/ncsc-cji-appendices-i.pdf) [<https://perma.cc/GPJ8-LZQ6>] (discussing how heavy caseloads in state courts present “enormous challenges to litigants, judges and court administrators” and can “threaten the integrity of judicial processes and . . . thwart meaningful examination of basic facts and claims”), *appended to* NAT’L CTR. FOR STATE CTS., *CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL* (2016); *Johnson v. Williams*, 568 U.S. 289, 300 (2013) (“The caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind.” (footnote omitted)).

<sup>14</sup> See Loretta H. Rush & Marie Forney Miller, *Cultivating State Constitutional Law to Form a More Perfect Union—Indiana’s Story*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 377, 383 n.58 (2019) (citing statistics indicating that more than ninety-five percent of cases in United States are filed in state courts).

for trying to write fair opinions. It is also a useful technique in many other contexts.

I will explain later why that frame of mind is so helpful. At present, I would like to make a related, overarching point. In this talk, I express views on topics about which reasonable people (and more specifically reasonable judges) disagree.<sup>15</sup> In expressing my views, I mean no disrespect to those whose approaches to opinion writing differ from my own. For one thing, I might be wrong. Also, there may not be a one-size-fits-all approach to opinion writing. For example, techniques that work well when writing as a single judge may not work as well when writing an opinion for a multimember court of highest resort, and vice versa. In this talk, however, I focus on principles and techniques that I believe are generally applicable to judicial opinion writing.

One other overarching point: It is not humanly possible to write opinions in every case that are perfectly procedurally fair. Some of the considerations I discuss tonight are crosscutting, so they must be balanced against each other. Judges also write opinions under substantial caseload and time pressures. Finally, like everyone, judges are fallible. I know that I have made mistakes in opinions and that I have written opinions that could have been procedurally fairer. Those inevitable shortcomings, however, do not undermine the importance of thinking about procedural fairness when writing opinions and trying to achieve it.

## II

### THEY ARE CALLED “OPINIONS,” NOT “TRUTHS”

Black’s Law Dictionary defines “opinion” as “[a] court’s written statement explaining its decision in a given case . . . .”<sup>16</sup> I like that definition, and in particular I like its use of the word “explaining” (as I will discuss later). For the moment, I want to turn to ordinary-language definitions of “opinion,” which can be summed up as belief that falls short of knowledge.<sup>17</sup>

Philosophers and law professors have long debated questions of belief and knowledge, whether there is or is not legal truth, and the

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<sup>15</sup> Much has been written about judicial opinion writing. *See generally* Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 J. LEGAL WRITING INST. 197 (2011). I have not attempted to survey that literature, but even a quick look makes clear that writers on the topic disagree on many points.

<sup>16</sup> *Opinion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>17</sup> *See, e.g., Opinion*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1582 (2002) (providing one definition of opinion as “belief stronger than impression and less strong than positive knowledge”).

like.<sup>18</sup> We will not explore those complexities tonight. In brief, I believe that (1) there are objectively better and worse answers to the legal questions judges are required to decide; and (2) no matter how certain they feel, the judges in any given case may be wrong about what that better answer is.<sup>19</sup> In other words, when judges write opinions explaining their decisions, they are stating beliefs (short of certain knowledge) about the legal questions they are deciding.

I think that opinions are fairer when they reflect that their authors are stating and explaining beliefs, rather than revealing truths known with absolute certainty. To be clear, I do not suggest that each sentence in an opinion should end with the words “but we might be wrong.” But I do suggest mentally adding those words when writing opinions. That approach will favor formulations such as “we conclude” or “in our view,” as opposed to ones like “appellant’s arguments lack merit” or “that is not the law.”

In my view, writing opinions in this more modest style contributes to fairness in several ways. To illustrate how, imagine a case presenting a difficult issue, where the relevant legal materials point in differing directions, other courts have divided on the issue, and the members of the deciding court disagree. In such a case, writing an opinion with a tone of dogmatic certainty seems to me to be particularly unwarranted. If reasonable people can disagree about an issue, it can undermine rather than enhance credibility to write an opinion that sounds as though the author or authors believe that they are revealing indisputable truth.<sup>20</sup> Also, by candidly acknowledging the reasonable force of contrary arguments, the court shows appropriate respect to the parties and their attorneys.<sup>21</sup>

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<sup>18</sup> See, e.g., Emad H. Atiq, *Reasonable Moral Doubt*, 97 N.Y.U. L. REV. 1373 (2022) (discussing the “controversial” nature of moral judgment and how it is out of step with how the public thinks about morality); Steven D. Smith, *The (Always) Imminent Death of the Law*, 44 SAN DIEGO L. REV. 47, 52–53 (2007) (discussing legal indeterminacy and whether or not objective meaning can be ascribed to the law).

<sup>19</sup> For an outstanding discussion of the many ways in which human decisions are subject to unconscious influence or are otherwise less than entirely rational, see generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

<sup>20</sup> See, e.g., Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 63–64 (2011) (discussing a study concluding that readers responded more favorably to opinions acknowledging strength of arguments on both sides than to opinions addressing only arguments supportive of opinions’ results). *But cf.* James A. Macleod, *Reporting Certainty*, 2019 B.Y.U. L. REV. 473, 481–83 (2020) (extensively discussing statements of certainty in judicial opinions and arguing, among other things, that in some circumstances expressions of judicial certainty can be valuable).

<sup>21</sup> See Macleod, *supra* note 20, at 478 & n.12 (stating that overstatements of certainty can demonstrate “inadequate respect for litigants”).

I acknowledge a possible objection to writing opinions that forgo a tone of certainty. There is a longstanding debate about the proper role of judicial decisionmaking in our system of government.<sup>22</sup> One strand of concern in that debate is that judicial decisionmaking can be countermajoritarian or can usurp authority rightly belonging to the executive or legislative branches.<sup>23</sup> It has been suggested that a tone of certainty might promote judicial legitimacy, by conveying that judges are engaged in the more modest task of merely announcing “conclusions that are unavoidable and clearly correct.”<sup>24</sup> I share the view, however, of those who doubt that exaggerated expressions of certainty are an effective way of increasing judicial legitimacy.<sup>25</sup> Rather, as previously noted, such expressions seem more likely to undermine credibility.<sup>26</sup>

### III

#### EXPLAIN RATHER THAN ARGUE

As I have mentioned, Black’s Law Dictionary defines an opinion as a written statement “explaining” a court’s decision. It does not define an opinion as a hard-hitting, no-holds-barred argument in support of a court’s decision. I think opinions are fairer when they explain and do not argue.

We have an intuitive sense of the difference between an explanatory approach and an argumentative one, but here is one concrete illustration. It is common wisdom that an effective advocate presents the facts to the court not in a neutral way, but rather in a way designed to persuade the court to rule in the advocate’s favor.<sup>27</sup> For example, a good advocate might include logically irrelevant factual information, hoping to make the court like the advocate’s client or

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<sup>22</sup> See generally, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001) (providing an extensive account of the history of judicial review in the United States). That debate also is well outside the scope of this lecture.

<sup>23</sup> For a discussion of that concern, see for example, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

<sup>24</sup> Macleod, *supra* note 20, at 492.

<sup>25</sup> See, e.g., *id.* at 492–93 & nn.72–74 (suggesting that overstatements of certainty are not effective in increasing legitimacy).

<sup>26</sup> *Supra* notes 20–21 and accompanying text.

<sup>27</sup> See, e.g., Albert Tate, Jr., *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIG. 11, 14 (1978) (“[T]he objective of the advocate must be so to write [the] statement [of facts] that the court will want to decide the case [the advocate’s] way after reading just that portion of the brief.” (quoting Frederick B. Weiner, *Essentials of an Effective Appellate Brief*, 17 GEO. WASH. L. REV. 143, 145 (1949))).

dislike an adversary.<sup>28</sup> I think it is fairer for opinions to take the opposite approach. Ideally, in my view, the factual discussion in an opinion should present the relevant facts in a balanced way, without any effort to skew them to support the legal conclusions the opinion reaches.

The same issue arises in presenting legal argument. For example, if a court has several ways of formulating a legal rule, a good advocate will select the formulation most favorable to the advocate's client and ignore or minimize the rest. I think it fairer for opinions to take the opposite approach, by candidly acknowledging such differing formulations and providing an explicit rationale for choosing among them. More generally, the discussion of background legal principles in an opinion should be balanced, without any effort to skew that general legal discussion to support the more specific legal conclusions the opinion reaches.

Relatedly, I think that opinions are fairer when they forgo all rhetorical devices intended to persuade through nonrational means.<sup>29</sup> Examples of such devices include ad hominem arguments, sarcasm, and hyperbole.<sup>30</sup>

Those who take a different view sometimes reason as follows. One important goal of judicial opinions should be to persuade readers that the court's ruling is correct.<sup>31</sup> The techniques of argument are designed to persuade, and failing to use those techniques will weaken opinions rather than improve them.<sup>32</sup> I acknowledge that concern, but on balance I end up unconvinced by it. First, it seems to me more important for opinions to be procedurally fair, and to be seen to be procedurally fair, than it is for any given opinion to persuade a reader that the substantive outcome of that case is correct. Second, well-written opinions in an explanatory tone can be quite persuasive. Put

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<sup>28</sup> See, e.g., Jane R. Roth & Mani S. Walia, *Persuading Quickly: Tips for Writing an Effective Appellate Brief*, 11 J. APP. PRAC. & PROCESS 443, 445–46 (2010) (recommending presentation not only of legally relevant facts but also of facts that portray the advocate's client in a positive light).

<sup>29</sup> Trying to develop a precise definition of concepts such as “rational” and “nonrational” is also far beyond the scope of this talk. See generally, e.g., Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733 (2004) (discussing various forms of legal reasoning).

<sup>30</sup> See *id.* at 779 & n.143 (discussing ad hominem arguments); Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 164 (2021) (citing IOWA CT. R. 33.5(2) (2022)) (citing an Iowa court rule stating that judges will abstain from “sarcastic or demeaning comments about another judge”); RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 86 (2d ed. 1991) (defining “hyperbole” as “[e]xaggerated or extravagant terms used for emphasis and not intended to be understood literally; self-conscious exaggeration”).

<sup>31</sup> See, e.g., Varsava, *supra* note 30, at 125 & n.86 (2021) (discussing but not endorsing this idea).

<sup>32</sup> *Id.*



differently, if an evenhanded explanation of the reasons for a decision is insufficiently persuasive, then perhaps the decision should be rethought.

Another possible concern is that opinions written in an explanatory tone will be boring, and it is important to encourage broader readership of opinions.<sup>33</sup> That too is a legitimate consideration. In my view, though, a well-written and clear explanation of the reasons for a decision need not be boring. Conversely, if broader readership of opinions is driven by interest in rhetorical fireworks rather than actual reasoning, such attention may not be beneficial.

I acknowledge that an argumentative approach often comes most naturally to judges (myself very much included). Many judges are former litigators,<sup>34</sup> used to arguing zealously on behalf of clients, not giving evenhanded, fair-minded explanations of the reasons for a conclusion. So it can take persistent and conscious effort to achieve an explanatory tone in opinions. I think the effort pays substantial dividends.

#### IV

#### YOU DON'T NEED TO PITCH A SHUTOUT

Some cases are entirely one-sided, and nothing can reasonably be said in support of the losing side. Many cases are not, however. In such cases, opinions are fairer when they evenhandedly acknowledge the points on both sides and explain why on balance the court is ruling as it does. That is quite different from the argumentative approach one would take in a brief. In briefs, advocates often try to utterly demolish every point that arguably cuts against their position. In my view, judicial opinions need not and should not do that.

When each side has some legitimate points, an opinion that fails to acknowledge that can seem unfair, both to the losing side and to a neutral reader. Such opinions can make it seem as though the court did not hear or understand the losing side's arguments. Such opinions also can make it seem that the court is more concerned about fighting for a desired result than about working through the relevant considerations to reach a reasoned conclusion.

The same point applies to majority and dissenting opinions. In my view, opinions are fairer when they acknowledge legitimate points made by disagreeing colleagues, rather than reflecting a scorched-earth approach.

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<sup>33</sup> *Id.* at 120–21.

<sup>34</sup> See Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 719 (2014) (“Most American judges were at one time litigators . . .”).

## V HUMILITY IN PUBLIC SERVICE

Judges are public servants.<sup>35</sup> We should keep that in mind at all times, including when we are writing opinions. Judges hold a position of prestige and authority, and counsel and court personnel tend to treat judges with deference and respect.<sup>36</sup> That creates a risk that we will start thinking of ourselves as standing above the parties, giving them the benefit of our wisdom as we exercise authority over them and their disputes. A colloquial term for this is “th[e] dreaded disease, ‘robe-itis,’ defined . . . as ‘an affliction suffered by some robed judges who assume a god-like attitude and power, forgetting that [a judge] is a servant to the law and the facts.’”<sup>37</sup>

Keeping in mind that we may be wrong, however sure we feel, is one strong counterweight to robe-itis. Writing from a perspective of service is another. In my view, opinions are fairer when they reflect the virtues of a good public servant.

It seems self-evident that good public servants should strive to do excellent work for those whom they serve. Judges writing opinions should focus on that goal. In writing opinions, we are trying to serve multiple audiences: the parties and their lawyers; the decisionmakers whose rulings are on review; future decisionmakers, legal advisors, and primary actors who may need to understand and apply the reasoning and holding of the opinions; and the general public. When writing opinions, judges should be asking themselves: Will the opinion serve those audiences well? Have we understood the parties’ arguments correctly? Have we fairly addressed the principal arguments of the losing side? Have we clearly explained our holding and our reasoning? The list of such questions goes on, but the broader point is one of attitude: Opinion writing should focus on trying to do excellent work for the people whom the court serves.

Writing from a perspective of public service also reminds judges to be polite and respectful. Good public servants generally would not

<sup>35</sup> See *Ferri v. Ackerman*, 444 U.S. 193, 202–03 (1979).

<sup>36</sup> See, e.g., Barry R. Schaller, *Ethical Aspects of Political Dilemmas Faced by Appointed Judges*, YALE L. & POL’Y REV. INTER ALIA (Jan. 22, 2012, 10:30 AM), [https://ylpr.yale.edu/inter\\_alia/ethical-aspects-political-dilemmas-faced-appointed-judges](https://ylpr.yale.edu/inter_alia/ethical-aspects-political-dilemmas-faced-appointed-judges) [https://perma.cc/FZJ8-5S9W] (“Judges tend to be the center of attention at their courthouses and receive expressions of respect and deference from attorneys, staff personnel, and the public.”).

<sup>37</sup> John W. deGravelles, *Personal Reflections on Certain Intersecting Ethical Obligations of Lawyers and Judges*, 66 LA. BAR J. 410, 411 (2019) (brackets and internal quotation marks omitted) (quoting Barry Popik, *Robe-itis*, THE BIG APPLE (Dec. 9, 2015), [https://www.barrypopik.com/index.php/new\\_york\\_city/entry/robeitis](https://www.barrypopik.com/index.php/new_york_city/entry/robeitis) [https://perma.cc/7RL5-HVRE]).

speak harshly about, or to, those whom they are trying to serve. I think opinions are fairer when they are consistently polite and respectful in tone. I take this to an extreme. I avoid saying that I “reject” arguments or that arguments “lack merit,” preferring instead to explain that we “disagree” with them or “are not persuaded” by them. I would rather not call a ruling by a decisionmaker “improper” or an “abuse” of discretion. For example, “acted outside the scope of discretion” is a gentler formulation.

I do not mean to suggest that the facts need to be sugarcoated, and at times a substantive rule of law will require conclusions about parties or their arguments that are highly critical (whether a party acted in bad faith, for example). I am suggesting, though, that when judges have a choice about whether to speak harshly or gently in our opinions, we should generally take the latter option. In other words, in our opinions we should try to be not only respectful but also kind, to the parties, to their advocates, to the decisionmakers whose decisions we are reviewing, and to colleagues with whom we may be disagreeing.

Writing in a respectful tone serves fairness in additional ways. For example, harsh judicial criticism in opinions poses a particular risk of unfairness because of the disparity in power that generally exists between judges and those whom judges may criticize. A harsh comment in a judicial opinion can have grave consequences for a party or an advocate.<sup>38</sup> And parties and attorneys have very limited recourse if they feel that the criticism is unwarranted.

Finally, I think it is particularly important that judges who are disagreeing be polite and respectful towards each other in their opinions. When we disagree with a colleague about an important matter, it is all too easy to get worked up. It can be hard to resist being caustic or dismissive and to instead, as the saying goes, disagree without being disagreeable.<sup>39</sup>

I have an excellent group of colleagues on the District of Columbia Court of Appeals. When I disagree with one or more of them on a point, I almost always think that the disagreement is about something that reasonable people can see differently. (I hope that my

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<sup>38</sup> See, e.g., Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 864 (1989) (“Public criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer’s reputation.”).

<sup>39</sup> See, e.g., Jennifer M. Grieco, *A Renewed and Much-Needed Conversation on Civility*, 97 MICH. BAR J. 8, 11 (2018) (“As former United States Supreme Court Justice Sandra Day O’Connor once noted, ‘civility is hard to codify or legislate, but you know it when you see it. It’s possible to disagree without being disagreeable.’”).

colleagues generally think the same way about our disagreements.) Every once in a while, though, I find myself thinking that a colleague's position is unreasonable. (I am quite sure that my colleagues sometimes think the same about me.) When that happens, I try to remind myself of two things: I have felt very sure about things before and been completely wrong, and reasonable people sometimes disagree about what is reasonable.

Respectful disagreement among judges in their opinions seems to me critically important for a simple reason: If judges do not respect each other when they disagree, how can they reasonably expect such respect from others? In my view, opinions are generally fairer when they refrain from harsh attacks on prior decisions or on disagreeing colleagues.

## VI

### SHOW YOUR WORK

I want to discuss two benefits of showing your work in opinions. The first is transparency. We write judicial opinions so that judges' reasons for resolving a given dispute are laid out publicly for everyone to see and assess. This will sound obvious, but opinions fulfill that purpose only if they state the actual reasons for the court's decision.

It may be somewhat less obvious how this idea should affect how judges write opinions and decide cases. To illustrate, imagine that I am sitting on an appeal challenging a particular trial-court ruling. As I read the briefs, I see that the trial judge was Judge Smith. The thought pops into my head that Judge Smith is an experienced and careful judge. Should that affect my ruling? Perhaps that depends on the law of the particular jurisdiction, and I do not mean to focus on the answer to that exact question. My point is that if my favorable impression of Judge Smith is going to actually influence my decision, then I need to say so in my opinion. If my impression of Judge Smith is not a permissible consideration, however, then I need to try to set that impression aside in deciding the case. In other words, an opinion should explicitly state all of the court's reasons for ruling as it does. Courts should not have unstated reasons for their decisions.

As another illustration, advocates often make numerous arguments in support of a conclusion, unsure which will prove persuasive to the court. In contrast, opinions generally should not include "make-weight" points that the court is not really relying upon in reaching its conclusion. Including such points can tend to obscure the actual grounds for the court's decision. (Omitting such points also makes

opinions shorter, which is not an issue of fairness but is in my view an important bonus.)

The second benefit of showing your work in an opinion is that doing so helps to demonstrate that the court has carefully considered the parties' arguments. To do this, a fair opinion tries to explain the court's reasoning in adequate detail. An "opinion" that simply says "reversed" or "affirmed" is not much of an opinion at all. This is one of the most challenging aspects of trying to write fair opinions. Judges cannot possibly address every single assertion of fact and law that the unsuccessful side makes in its briefs and at oral argument. On the other hand, opinions that do not come to grips with the principal arguments of the losing party can be seen as very unfair. The key is to identify the strongest and most important points made by the unsuccessful party and to address those points explicitly and with sufficient specificity, so that a reader can understand why the court was not persuaded.

Similar principles apply to responding to the views of disagreeing colleagues. In my view, a majority opinion should address the differing views of a dissenting colleague, and a dissenting opinion should address the main points made by the majority. When majority and dissenting opinions are more like ships passing in the night, readers may take away the impression that the judges are not listening to each other and trying to reach a reasoned conclusion, but instead are simply fighting for their desired result.

## VII

### DON'T GET LOCKED INTO CONCLUSIONS

Judge Frank Coffin wrote an excellent book about appellate judging: *The Ways of a Judge: Reflections from the Federal Appellate Bench*.<sup>40</sup> After describing the judge's thought process from reading the briefs through finalizing an opinion, Judge Coffin said the following: "The guarantee of a judge's impartiality lies not in suspending judgment throughout the process but in recognizing that each successive judgment is tentative, fragile and likely to be modified or set aside as a consequence of deepened insight."<sup>41</sup> I have found this idea extremely valuable. As I begin working on a case, I often have an initial reaction about the best answer to a given question in the case. But that initial reaction—no matter how strong—might well be wrong. So I try to keep a tentative frame of mind, which I think is

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<sup>40</sup> See generally FRANK COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* (1980).

<sup>41</sup> *Id.* at 63.

captured nicely by the word “leaning”: At any given point, I might be leaning toward one view of the case, but I try to remain open to being swayed in the other direction. The key is not to get locked into a conclusion. A Seventh Circuit decision explained why this is so important: “[B]ehavioral research [shows that] once an individual or group has made a decision to take a particular course of action, it becomes harder and harder to change course, even in the face of powerful conflicting evidence and reasons.”<sup>42</sup>

Here are some specific illustrations of keeping an open mind throughout the opinion-writing process. I have drafted a majority opinion affirming on a point but then been persuaded by a colleague’s draft dissent that we should instead reverse. I have started drafting what was to be a majority opinion, decided that I was on the wrong side of the case, and drafted and circulated an opinion coming out the other way. In many other cases, my leanings on issues large and small changed during the course of a case as a result of further thought, research, or consideration of points made by the parties or my colleagues. This could uncharitably be viewed as waffling, but I prefer to think of it as desirable open-mindedness.

In sum, opinions are fairer when, all the way through to the end of the case, judges keep listening to, and thinking about, the arguments of the parties and the views of their colleagues.

## VIII

### CARE, BUT NOT TOO MUCH

A well-known negotiator had the theory that hired negotiators can be effective in resolving disputes because they care about their clients’ interests, but not so much that they are unable to work out compromise solutions.<sup>43</sup> Obviously, opinion writing is quite different from negotiation. In my view, though, opinions are fairer when they reflect real care for the parties and their interests, but not too much.

The proper role of empathy in judging has become a matter of public controversy.<sup>44</sup> That is yet another minefield we will not try to traverse tonight. I do have two brief comments about this topic and procedural fairness.

First, lawsuits arise out of conflicts among people. Those conflicts are generally very important to the parties involved. A sympathetic and concrete understanding of the perspectives and interests of the

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<sup>42</sup> *Carmody v. Bd. of Trs.*, 747 F.3d 470, 475 (7th Cir. 2014).

<sup>43</sup> HERB COHEN, *NEGOTIATE THIS! BY CARING, BUT NOT T-H-A-T MUCH* 3–9 (2003).

<sup>44</sup> See, e.g., Susan A. Bandes, *Empathetic Judging and the Rule of Law*, *CARDOZO L. REV. DE NOVO* 133, 134–35 (2009), <https://cardozolawreview.com/empathetic-judging-and-the-rule-of-law> [<https://perma.cc/575E-D65T>].

parties can be vitally important to resolving legal disputes fairly and accurately. For example, at least in my court, it is well settled that when interpreting statutes we will consider, among other things, “the potential consequences of adopting a given interpretation.”<sup>45</sup>

Second, to state the obvious, judges are not tasked with picking a favorite side or resolving disputes by choosing the outcome that might seem most just to us as an original matter. Rather, in words carved on the building that houses the Supreme Court of the United States, judges are bound to render “equal justice under law.” More specifically, numerous legal rules constrain judicial decisions, such as rules requiring deference to prior decisions made by others, including factfinders, legislators, and other judges.<sup>46</sup>

In writing opinions, it is vital to keep these considerations in mind. Both in their substance and in their tone, opinions ideally should reflect an awareness of the importance of the case to the parties. To take an example focused on tone, I believe that opinions are fairer when they forgo all efforts at humor. Such efforts run the risk of communicating that the court has overlooked the importance and seriousness of the dispute to the parties.<sup>47</sup> Opinions also can seem unfair, however, when they appear to disregard legal constraints out of solicitude for the interests of a given party or out of a desire to reach a particular outcome. Navigating these sometimes-crosscutting considerations is yet another challenging aspect of trying to write fair opinions.

## IX

### BE SELF-CRITICAL AND OPEN TO CRITICISM FROM OTHERS

People tend to think of themselves as highly rational. However, we all (specifically including judges) are subject to many different unconscious influences.<sup>48</sup> We need to try to become aware of those unconscious influences, in order to attempt to correct for them.<sup>49</sup>

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<sup>45</sup> *Augustin v. United States*, 240 A.3d 816, 822 (D.C. 2020) (internal quotation marks omitted).

<sup>46</sup> *See, e.g., Hernandez v. United States*, 129 A.3d 914, 918 (D.C. 2016) (stating that appellate courts defer to credibility determinations of fact finder in certain situations).

<sup>47</sup> For a particularly forceful expression of this view, see *In re Rome*, 542 P.2d 676, 685 (Kan. 1975) (“Judicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it.” (internal quotation marks omitted) (quoting George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 210 (1967))).

<sup>48</sup> *See, e.g., KAHNEMAN, supra* note 19, at 79–88 (discussing unconscious influences on judgment).

<sup>49</sup> *See, e.g., id.* at 185–95, 417–18 (discussing cognitive biases and how they can be alleviated through conscious effort).

This is another broad topic, but here are some specific tools I have found helpful. First, because others may not share our unexamined assumptions, listening with an open mind to differing views can play a vital role. The opportunity to learn from colleagues is one of the great advantages of sitting on an appellate court that decides cases collectively.<sup>50</sup> Second, being self-critical is key. Your initial reaction may not be the best reaction. Be willing to challenge your initial reactions and see if they bear up under more careful and skeptical scrutiny. Third, be alert to the problem of confirmation bias. That basic trait of human psychology tends to cause people “to discount contradictory evidence or interpret information in a way that supports their existing beliefs.”<sup>51</sup>

Confirmation bias can creep into opinions in many ways, but I will mention two examples. First, I once was doing research to determine whether the court should review a particular trial-court ruling for abuse of discretion or instead *de novo*. I did a computerized search and found some cases suggesting that the abuse-of-discretion standard applied. I later came across a case that seemed to point in the opposite direction, and I wondered why I had not found that case initially. As it turns out, my computerized search had used the term “abuse of discretion” but not the term “*de novo*.” I think that was because I had unconsciously assumed an answer to the question. Second, when deciding a case where our court has no clear precedent, I often end up reading numerous decisions from other jurisdictions to try to get guidance. I have noticed that, if I am not careful, I can end up focusing more closely on cases that align with my initial leaning and glossing over cases that point in the other direction. So I consciously counteract that tendency by making sure to give particular attention to the cases that seem to point against my leaning.

Another technique I have found helpful in trying to combat confirmation bias is to call on my prior experience as an advocate. I place myself on the side opposite to my leaning, thinking, “How would I argue this case if I were representing the party I am leaning against?” For me at least, it helps to personalize things in that way. Trying on a different point of view can help reveal the unexamined assumptions in your own.

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<sup>50</sup> See, e.g., Harry T. Edwards, *The Effect of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1683–85 (2003) (explaining numerous respects in which collegiality on multi-member appellate courts can improve the quality of judicial decisions).

<sup>51</sup> Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 99 (2015).



## X STAY IN YOUR LANE

Our function as judges is to decide particular matters. The function of opinions, in turn, is to explain those decisions and the reasons for them. In my view, opinions are fairer when they are tied closely to that function.

The power to write opinions can be viewed as a sort of megaphone. It can be tempting to use that megaphone not only to explain our decision but also to send other messages we think are important. Perhaps we think the legislature should amend a statute, or we do not approve of a given exercise of lawful authority by an executive-branch official. In my view, opinions are generally fairer when they resist the temptation to express such views, instead focusing on the task for which judges have been given a megaphone. Among other things, that can help to avoid conveying the impression that a decision has been affected by interests or concerns that are not directly relevant to the case at hand.

## XI CLARITY AND SIMPLICITY

To be understood as fair, an opinion must be understood. Opinions are fairer when written in clear and simple language, as free from jargon as is feasible.

Parties typically are not attorneys, and many parties are not even represented by attorneys.<sup>52</sup> Ideally, therefore, opinions should not assume any legal knowledge, and instead should define and adequately explain all legal concepts so that they are comprehensible to lay parties.<sup>53</sup> Moreover, in an ideal world, opinions would also be easily understandable by the general public.<sup>54</sup>

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<sup>52</sup> See, e.g., Gerard E. Lynch, *Complexity, Judgment, and Restraint*, 95 N.Y.U. L. REV. 621, 628 n.6 (2020) (“A strikingly high percentage of civil appeals are brought by pro se litigants . . . .”); Judith Resnick, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1913 (2016) (noting that in federal courts, “the percentage of self-represented litigants rose at the appellate level from about forty percent in 1995 to more than fifty percent since 2012”); see also Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO J. ON DISP. RESOL. 659, 665 n.21 (2013) (citing statistics on self-represented litigants in state courts).

<sup>53</sup> See Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 17–18 (2009) (“The basic purpose of a judicial opinion is to tell the participants in the lawsuit why the court acted the way it did. . . . The lay parties . . . will understand a decision if the opinion writer’s explanation is . . . clear, logical, unambiguous, and free of [jargon].”).

<sup>54</sup> See Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. L. ETHICS 237, 247 (2008) (“The public becomes an audience for a

I have been unable to achieve that ideal, however, for two main reasons. First, as I have already noted, opinions have many audiences. My sense is that writing opinions to be completely comprehensible to a lay audience would make them very unsuitable for use by other important audiences. Second, writing opinions in that way would take quite a bit of additional time. I will discuss the pressures created by heavy caseloads in a moment, but for now I will simply say that I would not be able to keep up with my work if I tried to write opinions that would be completely comprehensible to a lay audience.

That does not mean, however, that judges should not try to the extent feasible to make opinions more readily comprehensible and less jargon-ridden. To the contrary, making such an effort seems to me to be an important part of trying to do excellent work for the parties whom we serve.

## XII JUSTICE DELAYED

Paraphrasing earlier formulations of the idea, Martin Luther King Jr. said, “[J]ustice too long delayed is justice denied.”<sup>55</sup> I take it as a given that issuing opinions without undue delay is a crucial part of procedural fairness. Of course, it also is crucial that opinions are substantively accurate and procedurally fair in other respects. Unfortunately, it often is not possible to fully realize all of those crucial objectives.

Many courts in the United States carry extremely heavy caseloads.<sup>56</sup> State courts are particularly overburdened.<sup>57</sup> I will speak from my own experience, but my sense is that judges on other courts face similar challenges.

In a typical year, my colleagues and I (almost always sitting in divisions of three judges) are each responsible for deciding over 150 cases after full briefing.<sup>58</sup> My experience has been that it is not pos-

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judicial opinion when the opinion changes the law or its application. That change, in turn, changes the way people or entities interact. . . . Important decisions should be written so that people can easily understand how their rights are affected.”).

<sup>55</sup> Martin Luther King, Jr., *Letter from Birmingham Jail—April 16, 1963* (1963), reprinted in *AFRICAN AMERICAN RELIGIOUS HISTORY* 519, 523 (Milton C. Sernett ed., 2d ed. 1999).

<sup>56</sup> See, e.g., Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 *LOY. L.A. L. REV.* 587, 607 (2021) (“Data from federal and state courts demonstrate that although caseloads fluctuate, the workload for federal and state judges is high.”).

<sup>57</sup> See *supra* note 13.

<sup>58</sup> We are responsible for deciding many more cases through summary disposition motions. We also have many other judicial and administrative duties.

sible to do everything in each case that I would like to do in deciding the case. That means I am always balancing and trading off between the conflicting demands of doing high-quality work on each case and getting cases decided in a reasonably timely manner.

Different courts and different judges strike that balance in various ways, but we all must strike it. What I have found works best for me is to set a rigid but realistic deadline by which my opinions will be circulated and do the best job I can in each case consistent with that deadline.

As previously noted, state courts have heavy caseloads, making the tension between quality and timeliness particularly acute in the state courts. And because the vast majority of litigants will have their cases decided in state court, striking the right balance is particularly important in that setting.

### XIII

#### FAIRNESS HELPS TO IMPROVE ACCURACY

My primary focus tonight has been on the procedural benefits of writing fair opinions. I mentioned at the outset, however, that in my view, the techniques for writing fair opinions also tend to improve the substantive accuracy of opinions. I have touched on that idea several times tonight, but I think it is worth emphasizing. Many of the techniques I have discussed tonight are directed at keeping an open and receptive frame of mind, which will allow us to carefully consider the parties' arguments, the relevant facts and law, and the possibly different views of our colleagues. Other techniques are directed at helping us identify and counteract assumptions or unconscious influences. Utilizing such strategies can help us deepen our thinking and reach sounder and better-reasoned decisions.<sup>59</sup>

#### CONCLUSION: IT'S NOT ABOUT YOU

One way of summing up the main point I am trying to make is that opinion writing should be about service to the parties and to the law, not about the judges who are writing the opinions. An opinion should not be viewed as an opportunity for judges to show how smart they are. It should not be viewed as an opportunity to demolish the views of those who argue for or reach conclusions different from those reached by the court. Instead, a procedurally fair opinion should, in an evenhanded and respectful way, explain what the court is deciding and why.

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<sup>59</sup> See *supra* notes 15, 50–53.

In an ideal world, an unsuccessful party or advocate would read a procedurally fair opinion and think, “I am persuaded that I was wrong and that I am (or my client is) not entitled to prevail.” My experience as an advocate leads me to think that is an unrealistic objective. More realistically, though, one can hope that an unsuccessful party or advocate might read a procedurally fair opinion and think, “I do not agree with this decision, but I can see that the court heard my arguments, considered them respectfully, and did its best to explain its conclusions.” One can also hope that neutral readers—even those who disagree with the substantive outcome of the case—would have a similar reaction.

In my view, writing procedurally fair opinions can make a critical contribution to the legal system. Such opinions can demonstrate that judges treat the parties and their arguments thoughtfully and respectfully, and that judges do the same with the views of disagreeing colleagues. By giving respect to others in that way, courts make a strong case for receiving such respect in return. The Supreme Court of the United States has emphasized the judiciary’s vital interest in safeguarding public respect for the judicial system: “Unlike the executive or the legislature, the judiciary ‘has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.’ The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions.”<sup>60</sup>

Thank you all for being here tonight. I appreciate the opportunity to share some thoughts with you.

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<sup>60</sup> *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445–46 (2015) (quoting *THE FEDERALIST* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).