

1993

Book Review: The Intelligible Constitution. by Joseph Goldstein.

Thomas E. Baker

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Baker, Thomas E., "Book Review: The Intelligible Constitution. by Joseph Goldstein." (1993). *Constitutional Commentary*. 1087.
<https://scholarship.law.umn.edu/concomm/1087>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Book Reviews

THE INTELLIGIBLE CONSTITUTION. By Joseph Goldstein.¹ Oxford: Oxford University Press. 1992. Pp. xx, 201. Cloth, \$22.95.

*Thomas E. Baker*²

Professor Goldstein is to be congratulated for publishing a book for a primary audience numbering only nine (his “nonet”) with a wider secondary readership. As a member of his secondary readership, I found his basic premise appealing and his critique persuasive. Regrettably, his proposed reforms are neither. I am therefore doubtful that his book will influence his primary audience, at least not as much as he hopes or as much as I wish it would.

The author derives his basic premise from Chief Justice Marshall’s admonition in *McCulloch*: “[W]e must never forget, that it is *a constitution* we are expounding.”³ In performing this “expounding” function, Professor Goldstein insists that Supreme Court “communications [Supreme Court opinions] *on behalf of and to We the People* who ‘decided’ to establish the Constitution must be something that We can understand if We are to remain sovereign, if Our consent to the government is to be sustained.” (author’s emphasis and capitalization). The “thesis of this book,” in the words of the author, “is that the justices, as members of a collective body, have an obligation to maintain the Constitution, in opinions of the Court and also in concurring and dissenting opinions, as something intelligible—something that We the People of the United States can understand.” Functionally, this intelligibility is essential to allow “Us, the governed and the governors, a basis for discovering ‘faults’ in the Constitution and for deliberating and deciding whether to speak out and to seek the correction of its ‘errors’ in controversy before the Court or by amendment.” The author

1. Sterling Professor of Law, Yale University.

2. Alvin R. Allison Professor of Law, Texas Tech University.

3. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in the original).

likens the High Court's proper role to the Committees of Detail and Style at the Constitutional Convention of 1787.

Who could argue with Professor Goldstein's premise? Who could disagree with his prototypical examples: holding up Chief Justice Marshall's *McCulloch*⁴ as the successfully intelligible opinion and the various opinions in *Webster*⁵ as the failures? My only concern is that the author's premise might be misunderstood by some to claim an exaggerated role for judicial review, going beyond those two duly-constituted Committees. It seems clear to me that he is not advocating that the Supreme Court perform as a Council of Revision for the Constitution, a role the Philadelphia Convention wisely rejected.⁶ Properly understood, the obligation of intelligibility is an essential limitation on the power of the Court. It can act legitimately only within "the province and duty of the judicial department."⁷ The power of the sword and the purse were denied the federal judiciary so that it could demonstrate judgment; Supreme Court decisions should be well-grounded and not merely acts of will.⁸ Opinions that are intelligible help us to discern the difference.

The real strength of this book is Professor Goldstein's critique of four different lines of Supreme Court decisions. His four "opinion studies," presented in as many chapters, are meant "to provide a basis for assessing the adequacy of judicial opinions as communications about the Constitution." The author is *not* concerned with the result reached on the merits. Instead, his focus is the coherency of the Justices' written workproduct.

Discussing *Usery*⁹ and *Garcia*,¹⁰ the author complains that the opinion writing in this line of federalism decisions is characterized by obfuscation and disingenuousness. Analyzing *Cooper v. Aaron*¹¹ and its aftermath, he concludes that the unanimous opinion for the

4. *Id.* It is somewhat ironic that in his own time Chief Justice Marshall felt compelled to explain and defend this exemplar opinion with a letter to the editor signed "A Friend to the Union." Gerald Gunther, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of McCulloch v. Maryland*, 21 *Stan. L. Rev.* 449 (1969).

5. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

6. There is a profound difference between "expounding" and "expanding" on the Constitution. Professor Goldstein thought enough of the difference to insist that the *New York Times* publish a correction in an op-ed essay he wrote to support the confirmation of Judge Bork. Joseph Goldstein, *That Was the Real Bork Who Testified*, *N.Y. Times*, Sept. 27, 1987, at 23, col. 2, as corrected Oct. 3, 1987.

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See generally Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 *Tex. L. Rev.* 789 (1987).

8. *Federalist* 78 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 464, 472 (Mentor, 1961).

9. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

10. *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985).

11. *Cooper v. Aaron*, 358 U.S. 1 (1958).

Court was written with a purposeful and misleading ambiguity regarding the difference between desegregation and integration. Comparing *Brown I*¹² and *Brown II*,¹³ he chides the Justices for their equivocation between the first holding that racially segregated public schools violated the Constitution and the second holding that the equitable remedy was to be implemented "with all deliberate speed." Finally, he argues that the oral summary Justice Powell read from the bench, announcing the *Bakke*¹⁴ decision, was much more accessible and comprehensible than the various, lengthy published opinions.

These four chapters are thoughtful and thorough accounts. Professor Goldstein carefully examines the opinions themselves—majority, concurring and dissenting—along with much of the previously published scholarship about these decisions. The reader is made to feel as if she is a student in the seminar the author has taught at the Yale University Law School for the last decade. It is as if Professor Goldstein has turned over to us his lecture notes. And we should be grateful.

It seems to me that Professor Goldstein should have chosen the better part of intellectual valor, and should have ended his book about twenty-five pages sooner. He could have chosen to conclude with his exhortation that "the justices consider fashioning for themselves canons of comprehensibility to guide their opinion-writing" and "provide themselves with an occasion to review . . . what they have written." Then this book review would have ended here, probably with the typical reviewer's cheap shot, wide of the mark to mix metaphors, to say that the author was long on criticism and short on constructive suggestions. Whether out of hubris or naivete, Professor Goldstein chose to go on to "proffer, for purposes of illustration, some canons of comprehensibility and a process for making them operative." I found this last chapter at best unhelpful and at worst unrealistic. It detracts from the rest of the book.

My reader can decide just how helpful are the author's "five overlapping and intertwined canons of comprehensibility":

1. Use simple and precise language "level to the understanding of all."
2. Write with candor and clarity.

12. *Brown v. Board of Education*, 347 U.S. 483 (1954).

13. *Brown v. Board of Education*, 349 U.S. 294 (1955).

14. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The regular publication that most resembles Justice Powell's bench summary is *Preview of United States Supreme Court Cases*, published by the American Bar Association with the cooperation of the Association of American Law Schools and the American Newspaper Association Foundation. The author of this review serves as a Contributing Editor to *Preview*.

3. Acknowledge and explain deliberate ambiguity.
4. Be accurate and scrupulously fair in making attributions to another opinion in the case.
5. Incorporate in the text, rather than relegate to footnotes, material that is directly related to the reasons for the decision or to the meaning or breadth of the holding.¹⁵

I will briefly make the case for a "reality check."

It seems to me that the real problem with Supreme Court opinions is shared by this book. It is a problem of *audience* and *emphasis*. A Supreme Court opinion is written for multiple audiences.¹⁶ The Justices, not infrequently, seek to communicate, to persuade and to guide the coordinate political branches at the national level and policymakers at the state level. On occasion, the Court speaks to scholars, historians and interested others.¹⁷ There are three primary audiences, however, for every Supreme Court opinion: the citizenry, the parties before the Court and the Justices themselves.

The thesis of this book is that the citizenry audience—We the People—is ill-served by most of the opinion writing of the contemporary Justices. Professor Goldstein's premise is that the Supreme Court has a constitutional responsibility to perform the role Ralph Lerner once described as the "republican schoolmaster."¹⁸ The contemporary Court most certainly confronts the citizenry on the important issues of the day. There is a "proper connection between judicial power and public opinion."¹⁹ One essential role for the High Court is to engage in "high political education,"²⁰ always to be distinguished from the logical fallacy *argumentum ad populum* at the opposite extreme. While I agree that it can and should perform better in this role, I must defend the Court. The other two primary audiences ought to take precedence.²¹

15. This canon seems to be more particular and less significant than the others and it is at least footnoteworthy to observe that it is found in a book which features both footnotes and endnotes.

16. See Abner J. Mikva, *For Whom Judges Write*, 61 S. Cal. L. Rev. 1357 (1988).

17. What role scholars should play—writing for their audiences of justices, each other and others—is a complex and difficult question. See *Conference on Constitutional Law: Constitutional Theory and the Practice of Judging*, 63 U. Colo. L. Rev. 291 (1992); *The Idea of the Constitution*, 37 J. Legal Educ. 153 (1987). See also Fred Rodell, *Goodbye to Law Reviews - Revisited*, 48 Va. L. Rev. 279 (1962).

18. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 S. Ct. Rev. 127. See also Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1 (1979).

19. Lerner, 1967 S. Ct. Rev. at 129 (cited in note 18).

20. *Id.*

21. See generally Joseph M. Hassett, *Should Supreme Court Justices Deliberate More Before They Begin to Write*, 63 *Judicature* 414 (1980); Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979); Robert A. Leflar, *Quality in Judicial Opinions*, 3

Consider the audience of the litigants. The *raison d'être* for the written appellate opinion is to decide the "case or controversy" before the Court and to communicate the result and reasoning to the party litigants and their advocates. The power of judicial review itself springs from this essential judicial duty to interpret and to decide.²² Evaluated from this perspective, the Justices' opinions are effective communications. Read the briefs in some cases before the Court. Then read the different opinions from the Court. They are written in the same language of the law and the same dialect of a *court constitutionnel*. The Justices themselves have little patience with an advocate who narrowly focuses on the facts and issues of a particular case and ignores their larger import.²³ We should expect the same wide-angled decisionmaking from the Justices. Indeed, the present Court seems inclined to decide cases on the broadest basis.²⁴ The audience of litigants and advocates arguably is well-served by contemporary opinion writing.

Consider the audience of the Justices. The implicit but telling criticism in this book is the somewhat paradoxical complaint that the Justices are writing too much for themselves and then are not taking their writings seriously. My somewhat inadequate response is that this problem is inherent in the common law methodology. The technique of *stare decisis* is in the control of the individual Justices who constitute the Court that is called on to decide the particular case. The deciding Court identifies the past precedents that apply and goes on to follow them or distinguish them, as it deems appropriate. Unlike the deference afforded an earlier Congress when the issue is one of statutory interpretation, what the earlier set of Justices intended in their previously published opinions does not control. The deciding Court's understanding of those earlier decisions, the principle the deciding Justices discern in past volumes of *United States Reports*, is all that matters.²⁵ This is how Constitutional Law, to be distinguished from the Constitution, is written

Pace L. Rev. 579 (1983); Joseph W. Little, *The Workload of the United States Supreme Court: Ruling the Pen with the Tongue*, 6 J. Legal Prof. 51 (1981); Robert A. Prentice, *Supreme Court Rhetoric*, 25 Ariz. L. Rev. 85 (1983); Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 Mich. L. Rev. 248 (1981); Irving Younger, *On Judicial Opinions Considered as One of the Fine Arts: The Coen Lecture*, 51 U. Colo. L. Rev. 341 (1980); James Boyd White, *Judging the Judges: Three Opinions*, 92 W. Va. L. Rev. 697 (1990).

22. See *Marbury*, 5 U.S. (1 Cranch) at 177-78.

23. See Robert L. Stern, Eugene Gressman and Stephen M. Shapiro, *Supreme Court Practice* § 14.1 at 577-80 (BNA, 6th ed. 1986). But see Lyle Denniston, *The Judicial Politics of Abortion*, Am. Lawyer, June 1992 at 95; *Abortion and the Law: A Day in Court After Years of Skirmishing: Excerpts From Supreme Court Arguments on Pennsylvania Abortion Law*, N.Y. Times, Apr. 23, 1992, at B10, col. 1.

24. See *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2542 n.3 (1992).

25. See generally Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Thinking* 7-

and revised. It is understandable, at least, and arguably appropriate, therefore, that the Justices writing opinions should be preoccupied with the audience of future Justices deciding future cases. While I agree with Professor Goldstein's criticism that the Justices may be slighting the audience of the general citizenry, I submit this is a matter of degree or emphasis and, furthermore, there is a good reason for it.²⁶

Professor Goldstein suggests that the Justices enforce the canons of comprehensibility with a "final-phase conference", a confidential meeting with only the Justices present, patterned after the traditional conference, presently held after oral argument, at which the Justices discuss the merits of the cases, take tentative votes, and assign opinion writing:

The conference would provide members of the court with a focused opportunity to review together one another's work. It would be an occasion for meeting their institutional responsibility to ensure that the totality of opinions is comprehensible before the Court goes public.

Not!

The greatest opinions of Benjamin Cardozo, one of our greatest appellate judges, would not fare well under the canons.²⁷ Justice Holmes's dissent in *Lochner*,²⁸ the "greatest judicial opinion of the last hundred years," would fail Professor Goldstein's final examination.²⁹ If such judicial giants would not earn an Honors grade, what grade can our incumbent Justices expect and what can we expect from them? I do not wish to join the debate over the strengths and weaknesses of the current Justices.³⁰ I would suggest that some of them are not constitutionally able to write succinct and clear

18 (C. Boardman Co., 1989); Edward H. Levi, *An Introduction to Legal Reasoning* 1-8 (U. of Chi. Press, 1949).

26. Whether the Justices are sufficiently respectful of precedent is a more difficult question and beyond the pale of a book review. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-16 (1992); *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-11 (1991). See generally David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 63 (W.W. Norton Co., 3d ed. 1993) (number of overrulings of Supreme Court precedents since 1953 exceeds total for all the years prior).

27. Richard A. Posner, *Cardozo: A Study in Reputation* 33-57 (U. of Chi. Press, 1990).

28. *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

29. It is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched, does not exploit the factual record, and is highly unfair to poor old Herbert Spencer. . . .

Richard A. Posner, *Law and Literature: A Misunderstood Relation* 285 (Harv. U. Press, 1988) (footnote omitted).

30. Compare, e.g., Bruce Fein, *A Court of Mediocrity*, 77 A.B.A. J. 74 (Oct. 1991) with Paul R. Baier, *Charges of Mediocrity Unfounded*, 78 A.B.A. J. 59 (Feb. 1992).

opinions.³¹ Others, who might be able, likely are not motivated to do so.³² And still others likely could not care less.³³ Gathered together at a California-style editing session, I do not understand how the whole will be greater than the sum of its parts. I cannot imagine that the Justices would be willing even to try it. Earth to Yale: it ain't gonna' happen.

This leads me finally to consider what the Justices might do differently or better in an effort to respond to the criticisms Professor Goldstein levels at their opinions. I think that the worst logistical problem that needs to be solved is the so-called "June Crunch." When the Supreme Court holds about 40 percent of its nine-month caseload, including many of its most controversial and controverted cases, until the last month of the Term, as it did this past June, this phenomenon results in "an avalanche of hastily completed and poorly crafted decisions."³⁴ A recent issue of *Judicature*, the official publication of the American Judicature Society, contained an editorial which concluded, "The end-of-term deluge of Supreme Court decisions makes it difficult for the press to report, and the public to understand, the work of the Court."³⁵ The editorial suggested some examples of ways the Court might adjust its intramural procedures to avoid the June crunch: adopting an eight month deadline for all opinions; adjusting the tenure of law clerks; announcing some decisions during the summer recess; and even reconsidering the practice of being in recess during the summer months.³⁶

31. With all due respect for a jurist who has made important contributions to Constitutional Law, have you ever heard Justice White deliver a speech? See generally John M. Rogers, "I Vote This Way Because I'm Wrong": *The Supreme Court Justice as Epimenides*, 79 Ky. L. J. 439 (1990-91).

32. "Acknowledging his frustration in a humorous vein, Justice Scalia periodically asks his own clerks: 'What's a smart guy like me doing in a place like this?'" Paul M. Barrett, *The Loner: Despite Expectations, Scalia Fails to Unify Conservatives on Court*, Wall St. J., Apr. 28, 1992, at A1, A6. When he does write an opinion reminiscent of *The Federalist Papers*, Justice Scalia's colleagues do not seem impressed, or at least are not persuaded. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting "solo voce").

33. In an interview about how the Court operates, Justice Rehnquist was quoted to say: I used to think, you know, if there were an expression in a footnote in an opinion that I disagreed with, that we're going to be stuck with that footnote for years. Well, it turns out that any time five people decide that we're not stuck with the footnote, we're not stuck with the footnote! And things have a way of evolving on much more of a common-sense reaction to things than a strictly doctrinal approach, where A follows from B from C.

John A. Jenkins, *The Partisan*, N.Y. Times, Mar. 3, 1985, § 6 (Magazine), at 28. See also *Payne v. Tennessee*, 111 S. Ct. at 2611. *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).

34. Linda Greenhouse, *Washington Talk; In Surprise, High Court Appears Less Solid*, N.Y. Times, May 31, 1992, at 18, col. 1.

35. Editorial, *Promoting Public Understanding of the Supreme Court*, 76 *Judicature* 4 (June-July 1992).

36. *Id.*

I would hope that veteran Court-watchers will focus on this problem and propose creative solutions. Critiques like Professor Goldstein's will help to draw attention to the problems with the June opinions. The Justices seem to have solved past problems with screening cases, as evidenced by the notable fall-off in the number of cases granted review in the last few Terms.³⁷ We can hope that Professor Goldstein's audience next will address the problems caused by the June Crunch:

There are ways for the Court to maintain a current docket without the cost associated with the end-of-term onslaught of opinions. If, and as, the Court fashions an alternative, it will again demonstrate leadership in accommodating the demands of the judicial process to the public's interest in keeping abreast of the work of its government.³⁸

This kind of leadership would result in real progress towards the goal of making the Constitution intelligible to We the People.³⁹

LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE. Edited by Gregory Leyh.¹ Berkeley: University of California Press. 1992. Pp. xix, 325. \$45.00.

*Paul Campos*²

I

Seven hundred years ago, amid the orange groves of Catalonia, there lived a man named Abraham ben Samuel Abulafia. He was a Spanish Jew whose only passion was the study of God's words, and on a languid Mediterranean afternoon his sleep was troubled by a voice in a dream:

The words of the Holy One, blessed be He, are not like our words. Men speak and write with whatever signs chance might

37. Linda Greenhouse, *Washington Talk; Mystery for Court: Case of the Dwindling Docket*, N.Y. Times, July 9, 1990, at 10, col. 4; Tony Mauro, *Light Schedule Leads to Tight Deadlines*, Legal Times, Feb. 17, 1992, at 8. See generally Samuel Estreicher and John Sexton, *Redefining the Supreme Court's Role* (Yale U. Press, 1986); Thomas E. Baker, *Siskel and Ebert At The Supreme Court*, 87 Mich. L. Rev. 1472 (1989) (book review).

38. Editorial, 76 *Judicature* at 42 (cited in note 35). Not everyone is sanguine. See Tony Mauro, *Relieving the Pain of the "June Crunch"*, Legal Times, July 20, 1992, at 12 (concluding "nothing can be done").

39. See also *Report of the Federal Courts Study Committee* 164-65 (Apr. 2, 1990) (discussing the importance of effective judicial communications with the press and public).

1. Judicial Clerk, United States Court of Appeals for the Sixth Circuit.
2. Associate Professor of Law, University of Colorado.