THE WEAKNESS OF THE CASE FOR CAMERAS IN THE UNITED STATES SUPREME COURT

JONATHAN R. BRUNO†

ABSTRACT

Many people regard it as obvious that Supreme Court proceedings should be open to video cameras, and should be broadcast live on television and online. After all, the activities of Congress and the Presi-

† Graduate Fellow, Edmond J. Safra Center for Ethics, Ph.D. Candidate, Department of Government, M.A., Harvard University; J.D., Harvard Law School; B.A., Oberlin College. I gratefully acknowledge Eric Beerbohm, Archon Fung, Jonathan Gould, Tomer Perry, Michele Rapoport, Nancy Rosenblum, Dennis Thompson, and participants in the Safra Center Graduate Seminar for their constructive criticism of my thinking about political transparency, the ongoing project from which this Article emerges. Discussion with Tomer Perry of the arguments advanced here saved me from multiple errors. And my students in a recent seminar on secrecy and transparency helped me to grapple with these issues in classroom discussion. The Article would not have been written without support from Laura Hartmann and Daria Van Tyne, or published here without the advice of John Goldberg; I am grateful to them all. Finally, I wish to thank the staff and editors of the Creighton Law Review, especially Leanne Carberry, for their skillful and generous editorial assistance. I alone am liable for any errors or shortcomings that remain.
dent are routinely publicized in this way, as are the proceedings of many state and lower federal courts. The benefits of such broadcasting seem manifest, and by stubbornly resisting this trend the Supreme Court apparently runs afoul of the basic demands of democratic transparency. In this Article, I show that these familiar positions are very difficult to sustain. On close inspection, all of the common arguments for cameras in the Supreme Court fail to persuade, either because they rest on speculative empirical premises or because they extrapolate unconvincingly from generic propositions about government openness. Not only is video not required by our commitment to transparency, I argue, but there are no reasonable grounds for confidence that it would promote any of the goods claimed in its name, including public understanding, accountability, and legitimacy. In fact, there are affirmative reasons to doubt that video, at least as ordinarily experienced in our present social context, would improve the public’s understanding of the Court and its process. In short, the case for cameras in the Supreme Court turns out to be surprisingly weak. My analysis suggests that, at least for now, Congress should defer to the Court’s prudential judgment on this issue, and that the Justices are right to regard video skeptically. Nevertheless, I conclude by explaining why the Court may eventually find itself with compelling reasons to reverse that judgment and to embrace cameras.

I. INTRODUCTION

“[T]he trajectory is that it is inevitable that television will be in the Supreme Court . . . .”

–Tom Goldstein, founder of SCOTUSBlog

Mr. Goldstein’s assessment is very likely correct. In the long run, it is hard to imagine a public institution as prominent as the United States Supreme Court remaining exempt from the expectations of a public so thoroughly immersed in the medium of digital video. But what is inevitable is not necessarily justifiable. Despite the momentum behind proposals to video record and broadcast Supreme Court proceedings, the arguments advanced on behalf of such proposals turn out to be remarkably weak. This Article offers a critical perspective on those arguments, as well as on the various objections that have been advanced against cameras thus far. It adds what I take to be weightier (though not incontestable) considerations against video

2. See infra Part III.
3. See infra Part IV.A-B.
broadcasting Supreme Court proceedings. The Article concludes by considering where the debate now stands. I argue, in short, that the case for cameras in the Court is uncertain at best, and that Congress should defer to the Court’s judgment. Although in my view the Justices are correct to resist cameras at this juncture, I end by identifying one reason why prudence may ultimately require reversing that judgment.

II. TRANSPARENCY AT THE SUPREME COURT

Today’s Supreme Court is a very transparent institution. The rules and practices that govern its conduct are matters of public record. Its membership and the Justices’ votes on most decisions in cases heard are publicized. Records of those decisions—as well as dispositions of petitions for certiorari and requests for injunctions, stays, and other forms of interim relief—are always public. Moreover, judgments are ordinarily issued with public, written opinions setting forth a legal basis for the Court’s decision. When the Court is not unanimous in its ruling or in its reasoning, one or more concurring or dissenting opinions are also issued. At its best, this practice effectively publicizes reasoned explanations (and critiques) of nearly every judgment rendered by the Court. Finally, at least a portion of the panel’s decision process is public. Merit briefs filed by the parties (and by amici curiae) are collected and published online. Oral arguments

4. See infra Part IV.C.
5. See infra Part V.
8. Shapiro et al., supra note 6, at 16-17. Unattributed per curiam opinions are the exception. See generally Ira P. Robbins, Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions, 86 Tulsa L. Rev. 1197 (2012).
10. Shapiro et al., supra note 6, at 30-32.
11. Id.
are also made public by several means. For example, a limited number of seats—generally between two and three hundred—are made available to live attendees.\textsuperscript{13} In addition, transcripts and audio recordings are published on the Court’s website shortly after oral arguments conclude.\textsuperscript{14}

Of course, the Court is not wholly transparent. As we just noted, some of its decisions are issued with per curiam opinions to which no individual Justices’ names are attached.\textsuperscript{15} Many others are issued with opinions that may sometimes strike commentators as insincere or intellectually dishonest.\textsuperscript{16} And, more rarely, judgments can be rendered without any reasoned opinion at all.\textsuperscript{17} Moreover, not all of the Court’s proceedings are public. For example, its internal, pre-judgment deliberations are strictly confidential.\textsuperscript{18} And, of course, even its public proceedings are presently off-limits to video cameras.\textsuperscript{19}

Whether or not the Court is wholly transparent may not be the right question, however. Complete transparency would not be entirely salutary, at least in this context; it would mean, among other things, the rejection of all forms of confidentiality in the Court’s operations. Rather, it seems that exactly how much, and what kinds, of judicial transparency we should seek to promote is a matter for reasoned deliberation. In any event, it cannot be denied that today’s Supreme Court is meaningfully transparent along a number of important dimensions. It is arguably among the most transparent institutions of government in the contemporary United States.\textsuperscript{20}

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\item \textsuperscript{13} See, e.g., Adam Liptak, Seeking Justice? Try the Courtroom, Not the Line Outside, N.Y. TIMES, Apr. 16, 2013, at A13 (discussing availability of public seating); Visitor’s Guide to Oral Argument, \textsc{Supreme Court of the United States}, http://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx [http://perma.cc/MM59-VWKJ] (last visited Dec. 4, 2014) (“All oral arguments are open to the public, but seating is limited and on a first-come, first-seated basis.”).
\item \textsuperscript{14} See Marjorie Cohn, Let the Sun Shine on the Supreme Court, 35 Hastings Const. L.Q. 161, 162 (2008).
\item \textsuperscript{15} See supra note 8.
\item \textsuperscript{18} See Shapiro \textit{et al.}, supra note 6, at 11-16, 22-23; Visitor’s Guide to Oral Argument, supra note 13 (“During an argument week, the Justices meet in a private conference, closed even to staff, to discuss the cases and to take a preliminary vote on each case.”).
\item \textsuperscript{19} See Tony Mauro, Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism, 1 Reynolds Cts. & Media L.J. 259 (2011).
\item \textsuperscript{20} Compare Sonja R. West, \textit{The Monster in the Courtroom}, 2012 BYU L. REV. 1953, 1954 (arguing that the Court is “not secretive” and must be considered “a rela-
To understand the context of recent calls for cameras in the Court, a bit of history is instructive. I focus mainly on the Court’s oral arguments, which have been the main target of camera proponents. Since the Supreme Court’s beginning, oral arguments have ordinarily been open to the public in the literal sense that observers were permitted to be physically present in the chamber, subject to the limitations of space. Prior to 1849, arguments were unrestricted in time and sometimes attracted large numbers of spectators. Nevertheless, reporting of the proceedings was limited and inconsistent. While records of oral arguments were in principle available through the Court’s courtroom reporter, it was not until the twenty-first century that transcripts of these proceedings were made easily accessible. Since the Court first published a website on April 17, 2000, transcripts have been made available online shortly after oral argument days. Not until the October 2004 term, however, did these transcripts begin identifying individual Justices by name.

If the Court seemed eager to make available written transcripts of its oral arguments, its attitude toward audio and video has been decidedly more tepid. In 1955, the Court began audio recording oral arguments and sending those recordings to the National Archives at the end of each term. It is clear, however, that the Justices did not feel sanguine about the broadcasting of these recordings. When the CBS television network did just that in 1971, airing clips from that year’s oral arguments in the Pentagon Papers case, the Court ceased submitting audio to the National Archives altogether. The practice was not resumed until 1986—and with a new restriction. Thenceforth, any patron of the Archives seeking access to the Court’s audio recordings would first need the Court’s written permission and would have...
to sign a contract promising not to use the recordings for commercial purposes. Just a few years later, the Court made waves by threatening to take legal action against a scholar who violated these terms, publishing several audio clips with a companion book for sale to the public. Ultimately, the Court reversed course, instructing the National Archives in 1990 that its audio recordings could be consulted by anyone, “on a generally unrestricted basis.”

Of course, live or almost-live broadcasting of audio is another matter. Upon request by several media organizations, the Court allowed immediate access to its audio recording of oral arguments in *Bush v. Gore* following the 2000 elections. But the panel also made clear that it was making an exception due to the extraordinary circumstances surrounding that case; immediate release of audio would not become the Court’s standard operating procedure. Nevertheless, in 2010, under Chief Justice Roberts, the Supreme Court adopted a new policy of releasing audio of its oral arguments at the end of each argument week.

These changes have followed changing public expectations about access to the Court’s public proceedings. Two recent polls showed that over 70% of respondents favored live video broadcasting of oral arguments. Public opinion on this issue has not shifted in isolation. Unsurprisingly, the years during which support for cameras has rapidly grown are also the years in which video media have taken on an increasingly central role in the lives of most ordinary people in the United States, thanks in large part to broadband and mobile technology. Gone are the days when watching video meant watching television.

31. Id.
33. Id.
34. 531 U.S. 98 (2000).
35. Cohn, supra note 14, at 162.
36. See Tony Mauro, “In Other News. . .”: Developments at the Supreme Court in the 2002-2003 Term That You Won’t Read about in the U.S. Reports, 39 TULSA L. REV. 11, 14 (2003) (“[I]n various contacts between journalists, Justices, and Court officials, the cautionary advice from inside the Court building was this: do not expect that the experiment will be repeated routinely or anytime soon.”). 37. Mauro, supra note 19, at 267.
Online video-sharing platforms Vimeo and YouTube were founded in 2004 and 2005, respectively. Meanwhile, mobile devices offering broadband Internet access have rapidly proliferated. Apple’s iPhone hit the market in 2007. By May 2011, 35% of all U.S. adults owned smartphones, while that proportion reached 46% by February 2012, and 56% by May 2013. Over roughly the same period of time, consumption of online video has ballooned. A 2001 Pew Research study did not even identify watching video as among the possible “online activities” that respondents might report practicing. Just three years later, thanks in large part to the expansion of broadband connectivity, some 56% of Internet users had accessed audio or video clips online. By 2007, 57% of all adult Internet users and three quarters of young adult users (18-29 years old) had watched online video alone. By 2009, the number of adult Internet users had risen to 69%, and by 2013 it had risen to 78%. Simply put, streaming video now permeates the everyday experience of most U.S. Internet users (which is to say a very large majority of U.S. residents).

[41] Id. at 14.
Nor are cat videos the only show in town. The public has become highly accustomed to watching government officials—especially high-ranking federal officials—on screen: the President and members of the executive cabinet, legislators on and off Capitol Hill, and state and federal judges are routinely seen on camera.\(^{50}\) C-SPAN has broadcast sessions of the House of Representatives since 1979 and of the Senate since 1986.\(^{51}\) And state and federal judicial proceedings have long been broadcast on television.\(^{52}\) More recently, they have been streamed online directly from court websites.\(^{53}\) All of this footage of public officials reverberates around the digital media environment. The upshot is that now, perhaps more than ever before, political action is encountered by most ordinary people as spectacle, generally viewed on a screen.\(^{54}\)

All of this helps to explain why pressure on the Supreme Court to embrace video has been growing not only among ordinary citizens, but also among journalists, scholars, and public officials. Calls for an opening up to cameras have multiplied in the popular and scholarly literatures. In the past few years, no fewer than five major newspapers have published editorials advocating cameras.\(^{55}\) Scholarly support for Supreme Court video seems to be stronger than ever.\(^{56}\) And since at least the year 2000, several members of Congress have been pushing for the same change. In that year, Senators Arlen Spector (R-

\(^{50}\) See generally ALISON DAGNES, POLITICS ON DEMAND: THE EFFECTS OF 24-HOUR NEWS ON AMERICAN POLITICS 69-118 (2010).

\(^{51}\) STEPHEN FRANTZICH & JOHN SULLIVAN, THE C-SPAN REVOLUTION 40, 64 (1996).


\(^{53}\) See, e.g., Maura Dolan, Court Embraces Video, L.A. TIMES, Dec. 3, 2013, at AA3 (discussing the United States Court of Appeals for the Ninth Circuit’s decision to livestream video of all en banc proceedings).


\(^{55}\) See Editorial, SCOTUS on YouTube, L.A. TIMES, Mar. 2, 2014, at A23; Editorial, Supreme Court: Big crowds, closed theater, BOSTON GLOBE, Nov. 12, 2013, at A12; Editorial, You shouldn’t have to camp out to see the Supreme Court, USA TODAY, Mar. 28, 2013, at 8A; Editorial, Live, From the Supreme Court, N.Y. TIMES, Feb. 2, 2012, at A26; Editorial, Ready for its close-up: The Supreme Court should end the ban on cameras in its court, WASH. POST, Nov. 27, 2011, at A18.

\(^{56}\) See, e.g., ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 317-21 (2014); Keith J. Bybee, Open Secret: Why the Supreme Court Has Nothing to Fear from the Internet, 88 CHI.-KENT L. REV. 309 (2013); Cohn, supra note 14; West, supra note 20; Eric Segall, Supreme Court Puts Its Legitimacy at Risk, CNN Opinion (May 12, 2014, 2:09 PM), http://www.cnn.com/2014/05/12/opinion/segall-supreme-court-political [http://perma.cc/56U9-XQLA]; see also RonNell Andersen Jones et al., The Press, the Public, and the U.S. Supreme Court, 2012 BYU L. REV. i, iii (noting broad agreement among symposium participants that allowing cameras in the Court’s public proceedings is now the “top priority” for reform).
PA) and Joe Biden (D-DE) introduced Senate Bill 3086, which proposed that:

The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court.

On September 21, 2000, Senator Specter took to the Senate floor to introduce the measure. The case for cameras was predicated, he said, on the public’s “right to know what the Supreme Court is doing,” a right that “would be substantially enhanced by televising [its] oral arguments.” Courtroom sketches might have sufficed in bygone days, Specter said. “But in the year 2000, when the public gets a substantial portion, if not most, of its information from television . . . print media [are] insufficient to give the public a real idea as to what is going on in the Supreme Court of the United States.”

Senate Bill 3086 was referred to the Judiciary Committee, but that panel never examined it; the bill died the silent death that is the fate of most legislative proposals. Nevertheless, Specter stayed the course. In 2005, he again introduced a bill to require the televising of the Court’s public proceedings. This time, a companion bill appeared in the House, and Specter gained several cosponsors for his measure from both major political parties. The proposal also occasioned a hearing by the Senate Judiciary Committee in which several rationales for the introduction of cameras were articulated. Specter also took his case to the public, arguing in a *Washington Post* column that the Court’s judgments evinced disrespect for congressional authority and asserting that the time had come for “shining a televised

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58. *Id.*
60. *Id.* at 18,920.
light on the justices.”66 Despite the best efforts of Specter and his colleagues, however, the proposal again went nowhere.67

The legislature has continued to make noise. Bills similar to Specter’s have been introduced in every subsequent Congress.68 None has moved beyond the Judiciary Committee, though additional hearings have been convened, most recently in 2011.69 A less stringent approach has also been proposed. The Transparency in Government Act of 2014 would mandate “a study on the effect on the Supreme Court of the United States of video recording oral arguments” and of publishing those videos on the Court’s website “at the same time that [they are] recorded.”70 Among other things, legislators may fear sparking a constitutional controversy by actually directing the introduction of cameras into the Supreme Court. As witnesses warned legislators at the most recent hearing on this matter, such a requirement would trigger obvious separation-of-powers issues, while an instruction that the Judicial Conference and Comptroller General should study the matter does not.71

Finally, the Court has recently faced intensifying pressure from transparency activists. In late 2014, for example, an organization called Fix the Court placed television ads on major networks decrying the Court’s lack of accountability and calling for several reforms.72 According to a spokesperson for the campaign, “[t]he Supreme Court’s outsized power is only matched by its disdain for transparency.”73 Cameras for video broadcasting oral arguments are therefore urgently needed, the campaign suggested.74

66. Arlen Specter, Op-Ed., Hidden Justice(s), WASH. POST, Apr. 25, 2006, at A23. The logic of Specter’s column is almost punitive in its emphasis on cameras as a tool to redress the Court’s misdeeds and to vindicate a dishonored Congress.

67. See S.1768, supra note 64 (“Latest Action: 03/30/2006 Placed on Senate Legislative Calendar under General Orders.”).


69. 2011 Hearing, supra note 1.


71. See 2011 Hearing, supra note 1, at 13 (statement of Maureen Mahoney, Of Counsel, Latham & Watkins, LLP).


73. Id.

74. Id.; see also Reforms, Fix the COURT, http://www.fixthecourt.com/reforms/ [http://perma.cc/ACS5-JN23] (last visited Dec. 4, 2014) (“Despite the Court’s immense power, the men and women who sit on the Court shroud themselves in secrecy, . . . and keep their supposedly public exercises out of view from the American people. . . . Supreme Court justices should grant . . . greater access to oral arguments and opinion announcements through the live broadcast of those events . . . .”).
3. THE CASE FOR CAMERAS

Such proposals to video record and broadcast the Supreme Court clearly have momentum. In addition to congressional support, they now bear the weighty imprimatur of ‘common sense,’ as opinion polls suggest. But are the arguments for cameras in the Court actually any good? Are they rationally persuasive, apart from their rhetorical appeal? What follows is an attempt to answer these questions. Unfortunately for video proponents, I find that the case for cameras is in fact quite weak.

A. CAMERAS WOULD EDUCATE THE PUBLIC ABOUT THE COURT

One of the central rationales for cameras is civic education. It is said that video of Supreme Court proceedings would teach the public about the Court and its role in the U.S. constitutional system. Tony Mauro writes, for instance, that in barring cameras the Court is “depriv[ing] the public of an undeniable educational feast.”

Let’s consider the structure of the education argument. Notice first that this particular rationale defends cameras on instrumental grounds. The claim is that video would promote an independently desirable good: civic education or public understanding. We can grant for the sake of argument that such education is indeed an end worth promoting. Assuming that much, the argument now turns on the empirical claim that it would be an effect of cameras to improve public knowledge of the Supreme Court and its activities. In other words, the civic education rationale posits that if oral argument video were publicly disseminated, there would be (1) some public uptake and (2) resultant epistemic gain.

What is the evidence for such gain? As it turns out, almost none has been offered. One scholar asserts that the Supreme Court “could have significantly increased public understanding of [its] decision-making process” had oral argument proceedings in National Federation of Independent Business v. Sebelius been broadcasted by C-SPAN.

Cited in support of this claim is a single 1996 study that found a positive association between C-SPAN viewership and performance on “a five-item political knowledge quiz.”

75. See supra note 38 and accompanying text.
77. 132 S. Ct. 2566 (2012).
79. Id. at 1736, 1751 n.167.
with such evidence is that it says absolutely nothing about the empirical claim at issue here, which is a claim about causation. Did C-SPAN improve viewers’ “political knowledge” or do the kinds of people who watch C-SPAN regularly—a mere seven percent of participants in the study\textsuperscript{80}—tend to know more about U.S. politics than their non-C-SPAN-viewing peers in the first place? The research does not answer this question.

Others have cited anecdotal evidence about cameras’ educational effects in other judicial contexts. For example, one state Supreme Court Justice stated that the video broadcasting of two high-profile proceedings by the Florida Supreme Court “riveted” and “transfixed” the public, and that “[b]oth oral arguments were educational.”\textsuperscript{81} Somewhat more cautiously, one federal circuit court judge has written that his experience with courtroom cameras suggests a potential for civic learning: “the [video] broadcasting of oral arguments may help educate the public about the work that we do as appellate judges.”\textsuperscript{82} Without denying the sincerity of such impressions (or the value of the experience on which they are based), it would be foolish to place very much confidence here. For one thing, it is not clear on what basis these assessments could rest, absent some attempt to gauge public understanding before and after video broadcasting.

Moreover, even taking this anecdotal evidence at face value, it is important to remember that not all appellate courts are relevantly equivalent. The educational impacts of oral argument video may not be context-neutral, particularly given that public interest in the Supreme Court is far more charged and intense than it is in state and lower federal courts.\textsuperscript{83} Finally, it is not difficult to identify cases in which the supposed educational value of cameras has failed to materialize. Take the rather infamous example of Congress. Scholars have found no evidence whatsoever that the video broadcasting of House and Senate proceedings has improved public understanding of the national legislature.\textsuperscript{84} In the end, then, the supposed evidence for a pos-

\textsuperscript{80} Id. at 1751 n.167.

\textsuperscript{81} Robert L. Brown, Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts, 9 J. APP. PRAC. & PROCESS 1, 9 (2007).

\textsuperscript{82} Diarmuid F. O'Scannlain, Some Reflections on Cameras in the Appellate Courtroom, 9 J. APP. PRAC. & PROCESS 323, 328 (2007).

\textsuperscript{83} High courts outside the United States that exercise strong powers of judicial review, akin to the Supreme Court's, may be more apt comparators here. See generally Kyu Ho Youm, Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?, 2012 BYU L. REV. 1989. However, I am not aware of any evidence of positive educational effects in these contexts.

\textsuperscript{84} See, e.g., Donald R. Wolfensberger, Congress and the People: Deliberative Democracy on Trial 122 (2000) (discussing lack of evidence); Michael Schudson, Congress and the Media, in The American Congress: The Building of Democracy 650, 654 (Julian E. Zelizer ed., 2004) (“There is no clear indication what difference, if
itive educational effect of Supreme Court video is scant and speculative at best.\textsuperscript{85} Below I suggest some additional reasons why such an effect seems particularly dubious, given what we know about the medium of video and the expectations and practices that attend its reception.\textsuperscript{86}

At this point, proponents of cameras may protest that whatever the substantive outcomes, cameras would at least produce educational opportunities. I concede the point. In principle, video of the Court’s oral arguments could provide viewers with an opportunity to learn about the Court’s activities. But that is very different than the claim that such learning will in fact occur. Moreover, the opportunity argument can be deceiving if we forget the wider context. Opportunities to learn about the Court’s oral arguments are not scarce. The press often covers cases of broad public interest, and anyone with access to the Internet can read full transcripts or hear audio recordings of any argument session within just a few days.\textsuperscript{87} Were these media less accessible than they are, the opportunities afforded by video would constitute a significant gain. As it is, however, they give us a relatively weak pro tanto reason to adopt cameras. To the extent that video might have adverse consequences, it is a reason that could easily be outweighed. This is hardly a decisive argument for cameras in the Court.

\section*{B. CAMERAS WOULD MAKE THE COURT ACCOUNTABLE}

Another claim commonly advanced in support of cameras is that they would render the Supreme Court and its Justices accountable. Senator Specter has expressed confidence, for example, that “if the Court were televised, there would be an understanding and an accountability . . . .”\textsuperscript{88} This too is an instrumental rationale for video: it

\textsuperscript{85}Senator Specter himself, though committed to the educational rationale, almost admits as much. After criticizing some of the Court’s recent decisions, he laments that “[n]obody really understands what is happening in these cases, and it is hard to have it conveyed even if there is television.” \textit{2011 Hearing, supra} note 1, at 17 (statement of Hon. Arlen Specter, Former United States Senator from the State of Pennsylvania).

\textsuperscript{86}See \textit{infra} Part IV.C. As Cristina Carmody Tilley rightly emphasizes, we cannot assume that cameras simply amplify the typical effects of in-person, public attendance; instead, we need to think about the medium of video and its context specifically. See Cristina Carmody Tilley, \textit{I Am a Camera: Scrutinizing the Assumption that Cameras in the Courtroom Furnish Public Value by Operating as a Proxy for the Public}, \textit{16 U. PA. J. CONST. L.} 697 (2014).

\textsuperscript{87}See \textit{supra} notes 13-14 and accompanying text.

\textsuperscript{88}2011 Hearing, \textit{supra} note 1, at 17 (statement of Hon. Arlen Specter, Former United States Senator from the State of Pennsylvania).
asserts that cameras would promote the distinct good of judicial accountability. There are two premises here, one normative and one empirical. I want to consider them in turn.

In one sense, it is beyond question that judicial accountability is a good to be promoted. We want judges—even and perhaps especially judges who are appointed for life—to be accountable for failures to carry out official duties and for abuses of power.\textsuperscript{89} In the federal courts, such accountability is made possible by the “good behaviour” proviso on judges’ appointments\textsuperscript{90} and, above all, by the authority vested in Congress to impeach and try judges for such violations.\textsuperscript{91} It is equally clear, however, that some familiar forms of accountability are inappropriate to the judiciary. When we speak of legislators and other elected officials being ‘held to account,’ we usually have in mind their liability to being voted out of office.\textsuperscript{92} Such accountability is calculated to produce a high degree of responsiveness, in more or less real time, to the demands of the electorate.\textsuperscript{93} In a constitutional system committed to judicial independence and the rule of law, however, such electoral accountability cannot be appropriate to judges, in my view.\textsuperscript{94} This is not to say that judges should be wholly immune from the influence of the public sphere. It is right that there should exist an active (if occasionally tense) relationship between the decision-making of our courts, particularly the Supreme Court, and the public’s constitutional understandings.\textsuperscript{95} But this must be a looser and less

\textsuperscript{89} See generally Shimon Shetreet, Judicial Independence and Accountability: Core Values in Liberal Democracies, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 3 (H. P. Lee ed. 2011).

\textsuperscript{90} U.S. CONST. art. III, § 1.


\textsuperscript{92} See, e.g., John M. Carey, Legislative Voting and Accountability 1-20 (2009).

\textsuperscript{93} See, e.g., The Federalist No. 52, at 256 (James Madison) (Terrence Ball ed., 2003) (describing the House of Representatives as that branch of the federal government that “ought to be dependent on the people alone”). Contemporary circumstances demonstrate how utterly such responsiveness can be undermined by political money. See Lawrence Lessig, Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It (2011); Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America (2012).

\textsuperscript{94} But see Jed Handelsman Shugerman, The People’s Courts: Pursuing Judicial Independence in America 5-6 (2012) (arguing that judicial elections can promote evolving conceptions of judicial independence, not only judges’ electoral accountability). For a helpful discussion of the relationship between judicial independence and accountability, see Shetreet, supra note 89.

coercive relationship than the one between legislators and the electorate. Judges should have to render accounts of their decisions to the public, as they do in written opinions, while remaining aware of public values and interests—yet without the threat of electoral sanctions. In sum, then, I want to accept the premise that judicial accountability is a political good worth pursuing, provided that such accountability does not entail reducing judges to mere conduits of popular opinion.

Having approved with qualifications the normative premise at issue, let us turn to the second, empirical premise. Would cameras in the Court actually promote judicial accountability? Would they make the Justices accountable in the ways just discussed? On first glance it is difficult to make sense of this question, for the Justices are already accountable in these ways. As we noted, they are subject to impeachment by Congress for crimes, abuses of power, and so on.\textsuperscript{96} And they stand in active relationship with the public: so far from being secluded, the Court publishes written opinions accounting for (and, in the case of dissents, critiquing) its own decisions\textsuperscript{97}—something that can be said of few other government institutions—while also retaining broad access to the public sphere, and therefore to the people’s values and understandings.\textsuperscript{98} Moreover, the availability of oral argument transcripts and audio empowers the public to call the Justices to account for their conduct during those proceedings. Given these facts, it seems strange to suggest that cameras would ensure forms of judicial accountability already secured by other, existing practices.

One charitable interpretation of the argument might emphasize the potential of video to spur more oppositional public activism. On this view, such activism could, over time, reshape the Court by helping to secure judicial appointments in line with public constitutional understandings. Senator Specter seems to have something like this in mind when he ventures that:

If the public understood the extent of the court’s power, perhaps the electorate would insist that Congress do its job on a variety of issues—including desegregation, Guantanamo Bay detainees, eminent domain and defendants’ rights—instead of punting to the court. Or perhaps the public would insist that our presidents nominate justices with sensitivity to these matters.\textsuperscript{99}

\begin{itemize}
  \item \textsuperscript{96} See supra notes 90-91 and accompanying text.
  \item \textsuperscript{97} See supra notes 10-11 and accompanying text.
  \item \textsuperscript{98} See, e.g., BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 3-18 (2009) (discussing the nature of the Supreme Court’s access to public values).
  \item \textsuperscript{99} Specter, supra note 66.
\end{itemize}
Unfortunately, this returns us to the civic education claim considered in the previous section. Even supposing that video of the Court’s oral arguments could in fact promote popular activism and electoral movements of the kind Specter imagines, this would presuppose (as his conditional clause does) an improvement in public understanding. Yet we just concluded that the evidence for such an educational effect is lacking.\(^{100}\)

Perhaps the idea is that video images would at least educate the public about the Justices’ basic fitness to serve—their capacity to remain awake and alert, for example\(^{101}\)—and thereby facilitate accountability in that very limited sense. But we already have sources of such information. Journalists can and do report on the Justices’ involuntary slumbers,\(^{102}\) and members of the public who attend the Court’s sessions can also monitor and assess the Justices’ basic fitness.\(^{103}\)

C. CAMERAS ARE REQUIRED BY THE PRINCIPLE OF TRANSPARENCY

Yet another common argument for cameras invokes the principle of transparency. A typical expression of this argument can be found in a recent letter sent to Chief Justice Roberts by a group called the Coalition for Court Transparency.\(^{104}\) The letter suggests several reasons why the Court should allow video recording and broadcasting of its proceedings. Its lead argument is that “the Supreme Court should embrace contemporary expectations of transparency by public officials.”\(^{105}\) In the most recent congressional hearing on cameras in the Court, Senator Amy Klobuchar made a similar point: “The public has a right to see how the Court functions and how it reaches its rulings,” she declared.\(^{106}\) “It is the same argument for televising speeches on the Senate floor, press conferences by the President, or for that matter

\(^{100}\) See supra Part III.A.

\(^{101}\) See, e.g., West, supra note 20, at 1967 (“Members of the viewing audience could take in the physical appearance of the members of the Court and decide for themselves if the Justices look healthy, alert, confused, or attentive.”).


\(^{103}\) See supra note 13 and accompanying text.


\(^{105}\) Id.

\(^{106}\) 2011 Hearing, supra note 1, at 2 (statement of Hon. Amy Klobuchar, United States Senator from the State of Minnesota).
hearings like this one. Democracy must be open."107 In other words, whatever the actual impacts of cameras, they are required simply in virtue of our commitment to democratic transparency.108

This is an important argument, for it articulates a very common line of thought in the debate over cameras in the Court. It reflects a healthy respect for an important democratic ideal. But it is also a perennial source of confusion. Does our commitment to political transparency mean that we should maximize the exposure of every public institution? Does it mean that such institutions should ordinarily be required to act under public observation? Does it mean, in the case of the Supreme Court, that the Justices’ internal deliberations are illegitimate because they take place behind closed doors? Simple appeals to transparency cannot answer these questions. We can make progress, however, by reflecting on which sorts of transparency are valuable and why. While our examination of these questions will necessarily be circumscribed here, it should nevertheless give us some critical traction on the idea that cameras in the Court are mandated by the principle of transparency.

To begin, notice that context matters. In general, what constitutes a desirable form of transparency in one institutional setting may not be appropriate to others. As between courts and legislatures, for example, or between the White House and independent regulatory agencies, some of the rationales for transparency will vary. So too will the strength of the reasons we may have for constraining it in favor of limited opacity. For present purposes, then, we should be sensitive to considerations bearing on transparency’s proper scope that may be relevant to the judiciary (or to the Supreme Court) in particular.

Having said that, I do not mean to deny that a more general presumption in favor of government transparency is warranted. I believe that it is. Briefly, a certain minimum of transparency is required in a democratic state simply by virtue of the government’s claim that ‘the

107. Id.; see also Cohn, supra note 14, at 168 (“It is in the SupremeCourtroom that the law of the land is made. When the Court argues about [issues of national importance], the public has a right to be there. There is no cogent reason to deny the public a window into the high court.”).
108. This sort of argumentation is not new. A half-century ago, Robyn Day, the dean of British political broadcasting, published a pamphlet advocating the televising of Parliament on very similar grounds (though without invoking the word “transparency,” which had not yet entered the political lexicon). A student of the political theorist Bernard Crick replied by insisting that cameras could not be justified by any general appeal to principle. On the contrary, “[t]he claims of the camera to a place in the Press Gallery . . . must be such as to outweigh the disadvantages that many think will accrue from such a venture.” Allan Segal, The Case for Not Televising Parliament, in BERNARD CRICK, THE REFORM OF PARLIAMENT 262, 269 (1964). It is my intention to offer a similar reply to camera proponents who would settle the question by generic appeals to transparency.
rule of the people’ is what it realizes, not what it displaces.\footnote{109} In other words, the state’s democratic character can only be illusory if its official institutions (and the officers who direct them) operate in such total seclusion that the public can know nothing about their conduct or the reasons for it.\footnote{110} So a presumption in favor of transparency makes good sense from the point of view of constitutional democracy.\footnote{111} The question is: what is the proper scope of that presumption? What sorts of transparency should it embrace?

In my view, the best answer to that question is something like the following: By presumption, state institutions should have to engage in whatever disclosive and discursive practices are necessary to render official conduct publicly comprehensible.\footnote{112} This means requiring that state institutions publicly explain their goals and purposes, the rules and practices governing their conduct, and the substance of and reasons for their decisions. These, I think, are the essential disclosures that must (presumptively) be made by state actors in a democratic polity. These disclosures together form a core minimum of transparency, a kind of baseline that is oriented toward making state action knowable and intelligible. Additional disclosures may be required in particular contexts where further justifications for transparency apply. But “transparency as intelligibility,”\footnote{113} as we might

\footnote{109. See, e.g., Pierre Rosanvallon, Democratic Legitimacy: Impartiality, Reflexivity, Proximity 103, 210 (Arthur Goldhammer trans., 2011) (discussing relationship between democracy and transparency).}

\footnote{110. Of course, many other rationales for transparency might be offered instead of, or in addition to, this one. I have very briefly summarized here a non-instrumental argument. It makes no claims about the salutary consequences to which transparency would give rise, but suggests instead that transparency is partially constitutive of democracy itself. Readers will notice that this argument assumes democracy is something more than what a bare ‘authorization’ theory would suggest. On the authorization view, a state is sufficiently democratic so long as it has been authorized to act by majority vote. A bare mandate in this sense is the only relevant requirement; once authorized, its conduct in office is unconstrained (at least for purposes of evaluating the state’s democratic character). This view takes inspiration from Hobbes. See Thomas Hobbes, Leviathan 111-15 (Richard Tuck ed., 1991). Yet it seems to me a formula not so much for democracy as we value it, but for “electoral authoritarianism” or its equivalents. See, e.g., Yonatan L. Morse, The Era of Electoral Authoritarianism, 64 World Pol. 161 (2012). In any event, it is important to be clear that my argument does assume a more robust conception of democracy than the one that arises from Hobbes’s theory of authorization.}

\footnote{111. Cf. Sissela Bok, Secrets: On the Ethics of Concealment and Revelation 179 (Vintage Books 1982) (advancing another argument for presumptive transparency in democratic government).}

\footnote{112. My current research project attempts to develop this thought in rethinking the value of democratic transparency more generally. Cf. Mark Fenster, The Opacity of Transparency, 91 Iowa L. Rev. 885, 942 (2006) (discussing the relationship between the value of government transparency requirements and the notion of comprehensibility).}

\footnote{113. Adrian Vermeule, Mechanisms of Democracy: Institutional Design Writ Small 187, 202 (2007). Vermeule uses this phrase in a somewhat narrower way than I have used it here.}
call it, constitutes an appropriate democratic baseline that can be demanded across institutional contexts.

Of course, this is not the only possible view. A rival conception of minimally-adequate transparency is probably more familiar to readers. Call it “transparency as visibility.” Here the idea is that, again as a matter of presumption, state institutions should act openly in the sense that they should conduct official business in the public eye, subject to real-time surveillance by ordinary citizens. This articulates a conception of transparency that is deeply embedded in the history of democratic theory. Most stridently championed by Jeremy Bentham under the more traditional label “publicity,”\(^\text{114}\) it is alive and well in contemporary political discourse,\(^\text{115}\) boosted by a kind of linguistic default bias.\(^\text{116}\) The value of such transparency is usually supposed to lie in its capacity to restrain the watched (officials) and to keep them accountable to the watchers (the public).\(^\text{117}\)

Advocates of cameras in the Court often invoke this view of transparency.\(^\text{118}\) For example, in his brief for video broadcasting oral arguments, Erwin Chemerinsky asserts that “there should be a strong...
presumption that people are entitled to watch government proceedings.” The verb ‘to watch’ is clearly doing some important work here, but it goes undefended in Chemerinsky’s text. Is it appropriate? Should we endorse the presumption as framed here? In my view, this particular emphasis claims both too much and too little in transparency’s name—at least for purposes of delineating a minimally adequate baseline. It claims too much because there are simply too many legitimate reasons why a state institution might not be able to conduct business effectively under live public monitoring (as distinguished from post-decision disclosure). On the other hand, it claims too little because ‘watchability’ does not entail anything like intelligibility. One might observe a government proceeding and understand nothing if, for instance, the institution’s rules and procedures are obscure, or if the scope of the proceeding is unclear, or if the particular proceeding is not situated or contextualized relative to the institution’s work more generally. Given this mismatch, I would reject Chemerinsky’s proposal. I do not believe that any defensible general presumption in favor of transparency can do the work of justifying cameras in the Supreme Court.

That is not the end of the story, however. As noted above, context matters when thinking about transparency, and we should ask whether there are any ‘local’ considerations especially relevant to the judicial context (or to the Supreme Court more particularly) that might ground the case for cameras.

Consider some familiar arguments for public, visible proceedings. According to traditional notions of public justice, hearing cases “in open court” can bear two kinds of fruit. First, it can help to protect against abuses of power by judges and juries—part of what we now mean by accountability. Second, it can help to secure public confidence in their judgments. Both of these rationales are neatly intimated in a 1677 colonial charter, which guaranteed public trials “that justice may not be done in a corner nor in any covert manner” and “that all and every person . . . shall . . . be free from oppression and

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120. Id.
121. See Bok, supra note 111, at 175-76, 184-85 (discussing several examples). Once again, this is not to say that live public monitoring of government is never appropriate in any institutional context. But we are talking here about a generally applicable presumption.
122. See supra notes 112-13 and accompanying text.
124. Id. at 22-25.
125. Id. at 26-27.
slavery.”126 A rather different argument for public proceedings was recently elaborated by Judith Resnik.127 The courts’ visibility, she writes, can empower the democratic public by “undermining the ability of the government or the disputants to control the social meaning of conflicts and their resolutions.”128 In this way, the openness of judicial proceedings to public observation “enable[s] people to watch, debate, develop, contest, and materialize the exercise of both public and private power.”129 If we care about this kind of democratic empowerment, Resnik argues, then we have a reason to insist on public proceedings.

For argument’s sake, let me accept all three of these considerations. Suppose that opening judicial proceedings to public observation does promote accountability, public confidence, and the capacity of ordinary citizens to define and challenge how social agents wield power. Now consider whether the promotion of these goals requires video specifically (as distinguished from other forms of mass publication). I do not believe that it does. Only if one makes the unwarranted assumption that cameras merely amplify the impacts of public attendance, without otherwise affecting them,130 can a case for video be made out from such arguments. What is missing is some explanation of cameras’ ‘value added’ here, beyond whatever is accomplished by the Court’s existing practices of allowing public attendance and promptly publishing transcripts and audio recordings of oral arguments. Generic appeals to transparency—even if by that we mean judicial proceedings held publicly—cannot suffice.

D. CAMERAS WOULD IMPROVE (OR AT LEAST NOT UNDERMINE) THE COURT’S LEGITIMACY

Yet another common defense of cameras points to the Court’s legitimacy. Here the issue is what may be called empirical or ‘sociological’ legitimacy: the extent to which the public in fact regards the Court’s decision-making as legitimate and acceptable.131 Proponents of cameras are quick to point out that the Court’s legitimacy is flagging.132 Polls suggest that public confidence in the institution has
been in fairly steady decline since the late 1990s, even if the Court does routinely outperform Congress and (often) the presidency.\textsuperscript{133} Cameras, we are told, would improve this situation. By putting the Court on the public’s radar, video of oral arguments and opinion announcements would portray a highly professional and responsible government institution at its best. “To the extent that the public learns about or understands how the Court does its work,” writes one commentator, “its perception is that of an institution that strives to be fair and get it right, even if the result is unpopular.”\textsuperscript{134} Justice Elena Kagan, then Solicitor General of the United States, made a similar point during her 2010 Senate confirmation hearing.\textsuperscript{135} So did Senator Chuck Grassley (R-IA) in a letter to the Court requesting that oral arguments in \textit{National Federation of Independent Business v. Sebelius}\textsuperscript{136} be televised.\textsuperscript{137} And in testimony before Congress, SCOTUSblog founder Tom Goldstein expressed similar confidence:

I think that televising would be good for the Supreme Court because experience shows that sunshine increases public confidence. It does not decrease it. The Justices are tremendously serious people doing the public’s work. . . . And for the public to understand what is going on and to see the serious questions and the serious answers I think would make the public believe in the Justices and the good work that they are doing even more than it does now.\textsuperscript{138}


\textsuperscript{133} See \textit{Confidence in Institutions}, \textsc{Gallup}, \url{http://www.gallup.com/poll/1597/confidence-institutions.aspx} [http://perma.cc/3GQG-PGD6] (last visited Dec. 4, 2014) (showing that the proportion of respondents expressing a “great deal” or “quite a lot” of confidence in the Supreme Court fell from 50% in 1997 to 30% in 2014, with fairly consistent decline and only a few upticks over the period).

\textsuperscript{134} \textsc{Mauro}, \textit{supra} note 19, at 271.

\textsuperscript{135} “I think it would be a terrific thing to have cameras in the courtroom. . . . [W]hen you see what happens there, it’s an inspiring sight. . . . [A]ll nine Justices, they’re so prepared, they’re so smart, they’re so thorough, they’re so engaged, their questioning is rapid-fire. You’re really seeing an institution of government at work, I think, in a really admirable way. . . . And so I think it would be a great thing for the institution . . . .”

\textsc{2011 Hearing}, \textit{supra} note 1, at 8-9 (statement of Tom Goldstein, Partner, Goldstein & Russell, P.C.).
In other words, the result of cameras would be greater legitimacy than the Court can manage without them. Or at least no less legitimacy: according to a more modest variant of this argument, cameras should be permitted because while loss of legitimacy results from the Court’s reputation for shallow partisanship, cameras would not exacerbate that reputation.139

Unfortunately, there is little evidence to support these predictions. Advocates of cameras have not succeeded in offering relevant empirical evidence for the legitimacy claim. This is in part, admittedly, because producing effective studies on this issue poses difficult challenges.140 Proponents generally resort to anecdotal evidence from other courts’ experience of video broadcasting. Here, several voices have come to the defense of cameras. In testimony before Congress, for example, the Chief Justice of Iowa’s Supreme Court asserted that “[t]he more the public sees our courts operate, the more they like and respect the court system.”141 The Chief Justice of Ohio’s Supreme Court has made a similar argument, observing that “the public today distrusts what it cannot observe,”142 and that video broadcasting appellate arguments is one means by which “to increase public trust and confidence in the courts.”143 Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit seems to agree. Under his leadership, the Ninth Circuit recently decided to begin streaming live video of its en banc proceedings on the court’s website,144 and it had earlier voted to allow television broadcasts of oral arguments

139. One scholar writes that the Supreme Court “has little to fear” from video and other forms of “digital information” because “the greatest potential delegitimizing factor for the Court” is the sense that it renders decisions on a narrowly partisan basis. Yet “the distribution of more information [including video] will not create a political perception of the Court because this perception is already widely held.” Bybee, supra note 56, at 312.


141. 2011 Hearing, supra note 1, at 47 (statement of Hon. Mark Cady, Chief Justice, Supreme Court of Iowa).


144. See Dolan, supra note 53.
upon request. Judge Kozinski has noted that despite some initial trepidation among his fellow circuit judges, “we have had a very good experience” with televised proceedings. As he wrote to the Judicial Conference, “the public has demanded greater access to our court-rooms, we have provided it and it has not caused problems.” Judge Diarmuid O’Scaíllain, also of the Ninth Circuit, has further spelled out how video could boost legitimacy, observing that cameras “might depoliticize appellate proceedings and the public’s perception of the appellate legal process, not the other way around.”

One piece of empirical research casts doubt on the positive thrust of this testimony. Two scholars recently analyzed data from a 2006 randomized survey of 1,002 adults across the United States. Respondents were asked to express their level of trust in the courts of their home state. They were also asked how often (if at all) they watch “actual court proceedings on Court TV.” The researchers found that states televising high court proceedings on local public access channels do not appear to garner higher levels of public trust than do states without such broadcasting. Furthermore, the researchers found a very slight—though, by conventional measures, statistically significant—negative association between Court TV viewership and trust in courts. In other words, “[a]s a respondent consumes more [Court TV], she is less likely to have a favorable opinion about state courts, and more likely to have a negative one.” These findings should be taken with a very large grain of salt. First of all, as the researchers point out, watching Court TV is an imperfect

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146. Id.
150. Id. at 12.
151. Id. at 13.
152. Id. at 12-13.
153. Id. at 17 (“[T]he mere existence of public affairs televising of state supreme court proceedings in a state . . . does not appear to affect trust in the courts to make decisions in the public interest . . . .”).
154. Id.
155. Id.
proxy for watching state courts’ own broadcasts of their proceedings on public access channels.\textsuperscript{156} Second, and more fundamentally, the negative association found by the scholars is just barely statistically significant and, at any rate, demonstrates a correlation but not necessarily causation. These are major caveats. Nevertheless, such empirical analysis at least counsels against placing too much confidence in the anecdotal reports of judges who believe, on uncertain and usually unarticulated grounds, that video broadcasting of their courts’ proceedings builds legitimacy.

Moreover, even if we take such anecdotal reports at face value, there is little reason to assume similar effects from cameras in the federal Supreme Court. For one thing, the degree of public interest in that Court’s rulings is fundamentally distinct in scale and intensity.\textsuperscript{157} Its decisions have the same national scope as do the major broadcast television networks and the familiar online video sharing platforms, suggesting that the Court’s likely exposure would vastly exceed that experienced by state courts and lower federal courts that allow cameras. Moreover, the Supreme Court’s decisions have a public significance rooted in their finality, which the decisions of federal circuit courts and state high courts sometimes lack. This too suggests that more and qualitatively different sorts of exposure would result from cameras at the Supreme Court, even if commentators have sometimes glossed over this difference.\textsuperscript{158}

Given these considerations, more appropriate comparators might be found in the highest judicial panels of other nations, or even in Congress, a federal government institution at least as prominent as the Supreme Court. In the former case, I am not aware of any evidence that the video broadcasting of proceedings builds public confidence.\textsuperscript{159} As for Congress, the impact of cameras has been uncertain at best. At the very least, it is worth noting that the legislature’s embrace of cameras coincided with the modern period of sharply declining public confidence in Congress as an institution.\textsuperscript{160} Of course, this hardly proves causation, and there were plenty of other developments during the same period that likely contributed to Congress’s falling confidence.

\textsuperscript{156} Id. at 13.
\textsuperscript{157} \textit{See supra} text accompanying note 83.
\textsuperscript{158} \textit{See, e.g.}, West, \textit{supra} note 20, at 1987 (“The state and lower courts have allowed cameras in courtrooms—many of them for decades—without encountering problems. Similarly, there is no reason to think the Supreme Court is different.”).
\textsuperscript{159} \textit{See supra} note 83.
\textsuperscript{160} \textit{See Confidence in Institutions, supra} note 133 (proportion of respondents expressing a “great deal” or “quite a lot” of confidence in Congress fell from 41% in 1986, the first year in which both chambers regularly televised floor proceedings, to 7% in 2014, with fairly consistent decline and only a few upticks over the period).
approval ratings. Nevertheless, some commentators have assigned a causal role to the legislature's video broadcasts. For instance, the congressional scholar Norman Ornstein has suggested that television only "added to the negative perceptions" about Congress, because the picture that emerges from such broadcasts is usually confusing, obnoxious, or both. Another political scientist puts an even finer point on it: video broadcasting of legislative proceedings, which conveys the sights and sounds of ideological discord, is itself a "source of public distrust." Accordingly, I think the least that can be said of the congressional experience is that, contrary to Mr. Goldstein's assertion, "sunshine" need not always increase public confidence and might in some circumstances undermine it.

In the end, we lack persuasive evidence either that cameras in the Supreme Court would build institutional legitimacy or that they would damage it. The possible impacts on public confidence are highly speculative, and different comparators suggest either outcome or both. For our purposes here, the important point is that as an affirmative case for cameras, the legitimacy rationale does not stand up to scrutiny. There just is no firm basis for the belief that video of the Court's oral arguments would in fact strengthen public confidence in the institution.

E. THE COURT IS ALREADY COMMITTED TO CAMERAS

These four rationales for cameras in the Supreme Court—education, accountability, transparency, and legitimacy—are the weightiest that proponents have advanced. But they do not always stand alone. I now want to consider two common auxiliary arguments that advocates of cameras occasionally press. First is the claim that the Court is already committed to allowing video of its proceedings. This argument comes in two varieties. One variety insists that by virtue of engaging in a wide range of disclosure and transparency practices, the Court can no longer reasonably resist cameras. As one scholar urges,

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164. See supra text accompanying note 137; see also Walter Pincus, Op-Ed., The Case for Keeping Cameras Out of the Supreme Court, WASH. POST, Mar. 29, 2013, at A12 ("In 1985, based on my experience as a Senate committee staffer and journalist . . . I . . . support[ed] gavel-to-gavel TV coverage of the Senate floor activity. What a mistake. With cameras trained on them, senators and House members now almost never confront each other face to face, facts vs. facts anymore.").
“if people can hear the [audio] tapes just minutes after the arguments conclude, it is impossible to see the harm in allowing them to watch the proceedings live an hour or two earlier.”

Equally, if the Court allows the public to attend its oral arguments in person, then it would seem inconsistent to prohibit live video broadcasting. Public (attendance) is public (audio) is public (video), the claim goes. The second variety of the argument suggests, generally by implication, that the Court’s favorable dicta on television in prior cases examining cameras in the lower courts apply equally to itself and that it cannot now reject cameras without inconsistency, hypocrisy, or smug exceptionalism.

In its recent letter, for example, the Coalition for Court Transparency confronts Chief Justice Roberts with language from a prior case: “we [the Coalition] believe the ‘day’ has long since passed ‘when television [has] become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.’” The implication seems to be that if a member of the Court staked out such a position nearly fifty years ago, then the current Justices cannot consistently reject video, which today is not merely “commonplace,” but ubiquitous.

These are very poor arguments. The first depends on ignoring potentially relevant differences between different media. It proposes, in effect, that we abandon deliberation about cameras altogether and assume that the legal system’s generic commitment to public proceedings implies maximal exposure through any and all media. This is not a reasonable proposal. The fact is that we know there is important variation across the range of methods that can be used to publicize a proceeding. Allowing observers to attend in person will likely produce different impacts than will publishing a transcript or broadcasting audio or video. This is not to say that one means is necessarily superior or inferior to any other; only that these differences are relevant and must be fair game for deliberation. To prohibit looking under the hood

165. Chemerinsky, supra note 56, at 318.

166. See, e.g., 2011 Hearing, supra note 1, at 21 (statement of Tom Goldstein, Partner, Goldstein & Russell, P.C.) (arguing that because the Court has already made the “threshold decision” that oral arguments are public proceedings, cameras, like any other means of enabling public access, must be permitted “absent some compelling reason to believe that [they] really would be distortive of how oral argument works . . . .”).

167. Cf. Mauro, supra note 19, at 259, 263 (discussing the role of the Court’s exceptionalist self-understanding in motivating its resistance to video cameras, despite its own holdings “let[ting] a thousand flowers bloom at the state level . . . .”).

168. CCT Letter, supra note 104, at 1 (quoting Estes v. Texas, 381 U.S. 532, 595 (1965) (Harlan, J., concurring)).

169. Id. (internal quotation omitted).

170. Cf. Tilley, supra note 86, at 698 (criticizing the “press-as-proxy conceit,” according to which video broadcasting is simply assumed to promote the same civic values that actual attendance is thought to promote).
of the concept ‘public’ in order to reveal such differences, to pretend that they do not exist or that they are immaterial, may be rhetorically expedient, but it is not reasonable. Generic appeals to the public character of the Supreme Court’s proceedings simply cannot suffice here. Cameras must be defended on their own terms.  

The second version of the argument has even less merit. It pretends that the Court is already committed to cameras by implying that its statements about television in prior cases are binding in the matter of oral argument video. This does not pass the straight face test. The relevant prior cases, Estes v. Texas172 and Chandler v. Florida,173 dealt with cameras in state trial courts’ criminal proceedings, and their holdings pertained to defendants’ due process rights under the Fourteenth Amendment.174 So far from announcing a general endorsement of courtroom cameras, these cases stand for the proposition that although television publicity may sometimes violate due process (Estes),175 it does not necessarily do so, and therefore the Constitution does not categorically forbid state initiatives for televising criminal proceedings (Chandler).176 However expedient it may be to suggest otherwise, these cases have no bearing whatsoever on proposals to video broadcast appellate proceedings at the Supreme Court.

F. Video Is the Medium of the 21st Century

Finally, consider the auxiliary argument that the Court should allow video broadcasts of its proceedings simply because the times demand it. Here, too, we can identify a couple different variations on the theme. One version of the argument emphasizes the imperative to keep pace with changing technology. “The U.S. Supreme Court,” one author laments, “is now one of the last major institutions of Western civilization that has not entered the 21st century technologically.”177

171. As camera proponent Sonja West rightly argues, “[t]he focus of the debate about cameras belongs in the gap between the status quo and what video might offer.” It must address this “video differential.” West, supra note 20, at 1966.
174. Estes, 381 U.S. at 534-35 (“The question presented here is whether the petitioner . . . was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial.”); Chandler v. Florida, 449 U.S. 560, 574-82 (1981) (holding that televised “broadcast coverage of criminal trials” does not necessarily violate defendants’ constitutional right to due process).
175. Estes, 381 U.S. at 587 (Harlan, J., concurring) (“[T]here is no constitutional requirement that television be allowed in the courtroom, and . . . what was done in this case infringed the [defendant’s] fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.”).
176. Chandler, 449 U.S. at 582 (“Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment.”).
177. O’Connor, supra note 20.
In a similar vein, Chief Judge Kozinski of the Ninth Circuit admonishes the Judicial Conference to face up to reality: “Like it or not, we are now well into the Twenty-First Century, and it is up to those of us who lead the federal judiciary to adopt policies that are consistent with the spirit of the times and the advantages afforded us by new technology.”\textsuperscript{178} In other words, the Zeitgeist calls for cameras.

Another version of the argument underscores the centrality of online video to contemporary culture in the United States. One commentator observes that while “the information age has brought almost every government institution into greater public view—even the Central Intelligence Agency has a YouTube channel—the Supreme Court remains hidden, at least in terms of visual coverage of its proceedings.”\textsuperscript{179} In testimony before Congress, the founder of SCOTUSblog expanded on video’s particular salience:

[T]he United States is culturally a visual nation, with television (and more recently, webcasting) by far the most common way that Americans experience significant events. It is a culturally pervasive means of communication; there are televisions and computers in the vast majority of American homes. Broadcasts of [Supreme] Court proceedings will reach segments of the public in a way that transcripts and audio recordings cannot.\textsuperscript{180}

Given what we know about the dominance of video, there is at least a prima facie case for embracing cameras as the most effective means of placing the Court’s public proceedings before the actual public. Or so these claims suggest.

The basic empirical premise insisted upon here is indisputable. Digital video is indeed the favored medium of our time and place. Along with television, online video does offer greater exposure and the promise of larger audiences, than can text or audio. Video is culturally dominant.\textsuperscript{181} It would be silly to deny this. But we need to recognize that, taken alone, this fact cannot justify anything. “The times, they are a’changing” is not a reason to take one course of action rather than another.\textsuperscript{182} It is a description of cultural momentum, perhaps, but not an argument about how things ought to be.

\textsuperscript{178} Kozinski Letter, supra note 147, at 5.

\textsuperscript{179} Mauro, supra note 19, at 261. Notice the rather quaint assumption that online video expands meaningful public oversight by bringing the government “into greater public view.” Is that why the CIA maintains a YouTube presence? I have my doubts.

\textsuperscript{180} 2011 Hearing, supra note 1, at 57-58 (statement of Tom Goldstein, Partner, Goldstein & Russell, P.C.).

\textsuperscript{181} Cf. West, supra note 20, at 1970 (“[V]ideo is not just any medium—it is the medium. Americans watch, on average, five hours and eleven minutes of television a day.”).

\textsuperscript{182} O’Connor, supra note 142.
Perhaps a charitable way to interpret these claims is to see them as resting on the principle that transparency practices should correspond to public habits and preferences. In other words, whenever possible, institutions should follow the public audience. On this view, cameras may be considered essential just because, as we have noted, so many people in the United States now watch video on a regular basis. On its face, this principle seems sensible enough. It appears to account for some of our basic intuitions about how government institutions ought to make public disclosures, given prevailing modes of communication. In the case of the Supreme Court, for example, most of us would agree that in light of the overwhelming dominance of electronic communication, there is a strong case for publishing argument transcripts, opinions, and the like on the Court’s website, rather than restricting them to print. Similarly, there is a strong case that the Court should post its audio recordings of oral argument sessions online rather than restricting broadcast to traditional radio.

Nevertheless, as articulated here, the ‘follow the audience’ principle is overbroad and in at least some instances misleading. It wrongly implies that different media are neutral, interchangeable carriers of the same inert product—‘information’—and that what distinguishes one medium from another is simply its range: how widely or how effectively it can disseminate that product. In fact, we know that text, audio, and video are not mere ‘information’ vessels. They have distinctive characteristics, engage us in distinctive ways and can reasonably be expected to produce distinctive impacts. These particularities need to be a part of our deliberation about the appropriate modes of disclosure and publicity. Certainly the prospect that more people would watch video than listen to audio recordings or read transcripts is relevant. But it is not the only relevant consideration. Below I attempt to introduce a couple of reasons for thinking that, despite this prospect, video is unlikely to promote public understanding of the Supreme Court and its decision-making and is therefore not the sort of transparency practice that we have reason to affirm.

183. See supra notes 39-49 and accompanying text.
184. See, e.g., 2011 Hearing, supra note 1, at 37 (statement of Tom Goldstein, Partner, Goldstein & Russell, P.C.) (“Substantively, I do believe that audio and visual broadcasts are the same, because there is not visual ‘action’ in an appellate court argument. . . . But the simple matter of fact is that more people will watch than will listen [or read a transcript].”).
185. See supra notes 170-71 and accompanying text.
186. See infra Part IV.C.
187. See supra Part III.C.
IV. DISSENTING VIEWS

If the affirmative case for cameras in the Supreme Court proves flimsy on examination, video proponents can take solace in the fact that the same critique applies to most of the arguments on the other side of the matter. In this section, I briefly examine those objections to cameras and then identify what I take to be some less familiar but weightier considerations that counsel against video recording and broadcasting the Court’s proceedings.

A. THE WEAKEST OBJECTIONS

In articulating the case against cameras, the Justices of the Supreme Court have sometimes been their own worst enemies. Former and current Justices have advanced a wide range of arguments on this issue. I begin here with two that have not only failed to persuade, but have tended to provoke scorn, because they seem to rest on premises that no democratic citizen should endorse. For example, Chief Justice Rehnquist once suggested that cameras would be detrimental because they would undermine the Court’s “mystique and moral authority.”188 Interpretive charity suggests that we should excuse this poor choice of words and understand Rehnquist as expressing a concern about the Court’s legitimacy or its ability to sustain public confidence. Nevertheless, it should be said unequivocally that no institution of constitutional democracy should traffic in ‘mystique,’ an unsuitable ground for legitimacy in this context. The Justices would do well to disavow this particular version of the case against cameras.

A second worrisome argument is advanced by Justice Scalia, who has suggested that judicial proceedings air issues too complex for the public to understand: “the law is a specialized field, fully comprehensible only to the expert.”189 This is a controversial claim about the nature of law that need not delay us here. We need only observe that,
even if one accepts Scalia’s premise—which I do not—such a claim cannot justify the prohibition on cameras. Indeed it cannot justify any form of opacity in state institutions (including courts), at least not in a democratic polity. Autocrats may cite the supposed incapacity of the masses to rationalize their seclusion, but democratic governments cannot legitimately do so. To appeal to such incapacity is not merely “elitist” or “troubling”; it is utterly at odds with the ground commitments of collective self-government. Again, the Justices would do well to abandon and publicly reject this particular argument against cameras.

Now consider two objections somewhat more plausible than these, but not much more compelling upon scrutiny. First, several Justices have challenged cameras by arguing that video of oral arguments would be unfairly excerpted or remixed for ‘sound-bites,’ leaving viewers with a false impression of the Justices’ and the Court’s activity. This prediction may well be correct, but as Erwin Chemerinsky recently observed, the argument—at least in these terms—proves too much. The very same worry would counsel against releasing transcripts or audio recordings of oral arguments, which could also be excerpted and misquoted, yet we would not find it acceptable if the proceedings were completely closed on this ground. In fairness, it may be that video presents a special case. Below, I explore some reasons why excerpting and remixing in this medium may be more likely

Judicial Address, at 48:47. The comment about 7-Eleven did not in fact disparage “the public’s ability to understand the Court’s work,” but its interest in what Scalia portrayed as the minutiae of Supreme Court decision-making. West, supra note 20, at 1983 (emphasis added). I am highly dubious of the conclusion that Justice Scalia wants to draw from this example. Nevertheless, his remark here has been misrepresented—without doubt unwittingly—as a denial of the public’s epistemic capacities. (Of course, given Scalia’s earlier claim that law is incompletely comprehensible to non-experts, the error may not actually distort his more general view of the matter.)

190. West, supra note 20, at 1985.


192. See Adam Liptak, Supreme Court TV? Nice Idea, but Still Not Likely, N.Y. TIMES, Nov. 29, 2011, at A18 (“In an interview, [C-SPAN Chairman] Mr. [Brian P.] Lamb said he had heard one main objection from the justices. ‘It’s the sound bite,’ he said. ‘They don’t like, in the modern age, that people can sound bite them.’”).

193. C HEMERINSKY, supra note 56, at 318 (“I have always felt that many of the arguments against allowing cameras in the courtroom are really arguments against allowing the public and reporters to be there at all . . . .”).

to produce the sorts of false impressions that worry the Justices.\footnote{195}{See infra Part IV.C.}
But if those reasons are not articulated, the 'sound-bite' objection, absent further elaboration, is not persuasive.\footnote{196}{Justice Scalia has tried to explain the uniqueness of video in this context by noting that "when you see [an oral argument] live . . . it has a much greater impact." Laura Moyer & Matthew Thornton, What the Justices Think of the Press, in Covering the United States Supreme Court in the Digital Age 198, 205 (Richard Davis ed. 2014). But the notion of 'greater impact' is vague, and fails to explain any special tendency of video to leave viewers with misperceptions or misunderstandings.}

Second, several Justices have explained their opposition to cameras in terms of protecting their own anonymity and personal security.\footnote{197}{See, e.g., Mauro, supra note 19, at 274.} This objection similarly fails to persuade. For one thing, it seems doubtful that video of oral arguments would significantly aggravate the risks to the Justices' personal security. As high-ranking public officials who wield immense constitutional authority, Supreme Court Justices inevitably will become targets of harassment and threats, whether or not cameras are permitted. This is a lamentable truth, to be sure, but the proper response is to take reasonable precautions for the Justices' safety, not to insulate them from public scrutiny. On its own, a concern for the Justices' personal anonymity and security cannot outweigh the public interest in being able to know about and to understand the Court's activity. The argument either proves too much, if security is treated as trump on the basic demands of transparency, or else it fails to explain why video in particular poses an unreasonable risk to the Justices' safety.

### B. Some Stronger Arguments Against Cameras

Not all of the Court's objections to cameras are so easily swept aside. Here, I want to consider some more substantial arguments advanced from the bench. It is helpful to divide these into two broad categories. One is concerned with what might be called internal harms; that is, the various ways in which the integrity or effectiveness of the Court's proceedings could be compromised if participants were aware of a large, remote viewing audience. The other category is concerned with external harms: the various ways in which broadcasting and publishing video might mislead the viewing audience about the nature of the Court's activities. Let me take up each category in turn.

Worries about internal harms are very familiar, as the Justices have often sought to explain their opposition to cameras in these terms. For example, Justice Kennedy has expressed concern that cameras would "alter the way in which we hear our cases, the way in which we talk to counsel, the way in which we talk to each other, the
way in which we use that precious hour [of oral argument] . . . ." In part, the suggestion here seems to be that participants might speak for the entertainment or other benefit of the remote viewing audience, thereby undermining the integrity of the legal colloquy.\textsuperscript{198} Chief Justice Roberts has said that his colleagues on the bench might succumb to the same temptation of “grandstanding,” with similarly adverse consequences for the integrity of oral arguments.\textsuperscript{199}

On their face these concerns are not implausible. But again the evidence for them is weak, and there are some compelling reasons to doubt that video would in fact contribute to such internal harms. For one thing, Supreme Court advocates are generally concerned above all with winning cases. Given that fact, it seems unlikely that many advocates would risk annoying or neglecting the Justices by grandstanding or otherwise addressing the remote viewing audience.\textsuperscript{200} Because this seems entirely inimical to the advocates’ own interests, we should not expect it to occur very often.\textsuperscript{201} Moreover, the Court has an effective means of policing such behavior: the Chief Justice could simply instruct an offending advocate to sit and be silent.\textsuperscript{202} As for grandstanding by the Justices themselves, it is hard to deny that this is a concern. Whether bench or bar is to blame, such behavior risks undermining the Court’s ability to develop a critical understanding of its cases in oral argument. Yet, as Sonja West points out, the risk of judicial grandstanding is already high.\textsuperscript{203} Even now, the Court’s proceedings occur in an intense public glare, and the Justices act in full awareness of the publicity that their remarks—including strange hy-


\textsuperscript{199} See Mauro, supra note 19, at 271.

\textsuperscript{200} I would suggest that the great fear in the back of every advocate’s mind is the possibility of a rebuke from the Court, which is very close to happening to any lawyer, especially one in the position of trying to use it as a public grandstand, so to speak, from one of the nine Justices, and any nine of them can offer that rebuke. So I think that the fear of [such grandstanding] is greatly overstated . . . .


\textsuperscript{201} See id. at 32 (statement of Tom Goldstein, Partner, Goldstein & Russell, P.C.) ("[T]he great fear of being slapped down for grandstanding is a really serious one. And nobody wants to lose their case or embarrass themselves."). By contrast, it makes perfect sense that such behavior occurs regularly on the televised floor of Congress, since pandering to the viewing audience is often wholly consistent with legislators’ interests in raising their profiles, building public support for their positions, and demonstrating loyalty to their constituents.

\textsuperscript{202} Chief Justice Beverley McLachlin of the Supreme Court of Canada has explained that this method worked very effectively in her courtroom on the sole occasion when a lawyer seemed to be grandstanding for the television audience. See Mauro, supra note 19, at 272.

\textsuperscript{203} West, supra note 20, at 1973-74.
potheticals and attempts at humor—may garner. Given all this, it is unclear how significantly (if at all) video would exacerbate the problem. In any event, here too the Court already possesses the tools necessary to guard against such harms. With or without video, the Justices could develop and strengthen behavioral norms that would preserve the effectiveness and integrity of oral arguments. In the end, then, these objections from internal harms, which seem plausible at first glance, are not very compelling. The evidence for such harms is weak, and there are too many reasons to doubt that they would actually materialize in the case of the Supreme Court, particularly given the available safeguards.

The matter is somewhat different when it comes to what I am calling external harms—the various ways in which video might mislead the viewing audience about the nature of the Court’s activities. Several of the Justices have expressed this concern. Justice Scalia has said that he is certain that oral argument video would “miseducate the American people, not educate [them].” While Scalia emphasized the risk that viewers would see only short “takeouts [that] would not be characteristic of what we do,” Justice Breyer has explained the concern rather differently. For Breyer, even assuming that viewers see oral arguments ‘gavel to gavel,’ they are liable to exaggerate the importance of oral argument relative to those parts of the Court’s decision-making process that are not video-recorded. Here is Breyer before Congress:

> [W]ill understanding be promoted if you can—because you can only show the oral argument, which is 1 percent of what goes on. And people relate to what they see much more than they relate to what is in writing. And we are deciding cases that we have results for 300 million people, and only 6 of them are in front of us, and we have to worry a lot about what our ruling will do to the 299,999,000, et cetera, that aren’t there, and so will there be misunderstanding about that?

Justice Breyer’s point seems to be that video will invite two types of confusion, each arising from what the camera’s lens fails to capture.

204. Id. at 1973 (“[T]he Justices . . . are well aware that members of both the media and the academy will analyze their every word, looking for clues as to how the Justices might vote.”).
206. Id.
First, video will tend to obscure the fact that oral arguments actually play a comparatively minor role in the Court’s decision-making process. Second, Breyer suggests, video will obscure the fact that in reaching its decisions, the Court considers repercussions not only for the named parties (who are represented by attorneys) but also for the people writ large (who are not). In his testimony before Congress, Breyer went on to suggest that whereas professional journalists can prevent such confusions by placing oral arguments in their wider context, raw video leaves viewers particularly vulnerable to them.208

We can imagine several other ways in which oral argument video might mislead viewers about the Court’s work. One commentator has suggested, for example, that cameras would wrongly imply that the Justices always reach a conclusion, at least internally, during the oral argument in any given case.209 In addition, video might lead the audience to regard the Justices as narrowly partisan or political in their questioning (and ultimately in their decision-making).210

The first point to make in response to these objections is that the risk of such external harms is already present.211 The transcripts and audio recordings that the Court routinely releases have, in principle, similar potential for confusions of the sort just identified. Lacking a broader understanding of the Court’s decision-making process, a reader of oral argument transcripts may develop an exaggerated sense of the importance of these proceedings. Or she might suppose that the Court considers the possible consequences of its decisions only for the named parties or that the Justices always make up their minds in the course of oral argument. The same is true of an audio listener who lacks an understanding of the broader context. So the question is not so much whether recording and broadcasting video would introduce a previously unknown risk of public confusion, but whether doing so would increase the likelihood of such confusion.

Justice Breyer suggests an answer when he remarks that “people relate to what they see much more than they relate to what is in writing.”212 In other words, video may indeed present a special risk of

208. Id. (“[W]e have a group of people in our press room who know how the Court works, and when you read what they say, you know it is being written about by someone who knows how the Court works. That isn’t always so [with video]. The cameras don’t always have the time, and will there be misperception given?”).


210. Id.

211. Cf. West, supra note 20, at 1983 (“Does video create a risk of miscomprehension by the public? Current circumstances present the same danger.”).

212. Appropriations Hearing, supra note 207, at 93 (statement of Hon. Stephen Breyer, Associate Justice, United States Supreme Court).
misunderstanding, because of its ‘relatability’ or what Justice Scalia calls its “greater impact.” This may be correct, but it is also vague and for that reason not particularly compelling. In response to this gesturing at video’s alleged tendency to produce misunderstanding, West cites the testimony of a judge who disagrees, as well as the Justices’ own alacrity to speak on camera when they are outside the courtroom. “The experiences of other courts and the Justices’ off-the-bench activities do not,” she concludes, “support the argument that video results in less public comprehension.” Unfortunately, though, neither point adequately addresses the objection. We have already noted that comparisons to other courts are of dubious value in this context, given that the scope and intensity of public interest in the Supreme Court’s activity is so exceptional. Moreover, West cites a single judge’s personal impression, without additional evidence, that “‘television coverage had, overall, improved the public’s understanding of the judicial process’” in his state. This testimony may not be wrong in the particular case, but it cannot bear much weight here. As for the Justices’ embrace of cameras in confirmation hearings, in interviews, and in other circumstances, this is simply beside the point. The objection at issue is that video of oral argument proceedings in particular—not any footage of the Justice whatsoever—would tend to produce confusion about the Supreme Court’s activity. West fails to distinguish this objection from the much weaker (and, as I argued, unacceptable) objection grounded on “the alleged lack of sophistication by the public . . . .” Properly distinguished and elaborated, the worry that argument video would tend to mislead viewers—not because of any epistemic incapacity on their part, but because of the medium’s own limitations—might in fact be warranted. As yet, however, neither the Justices nor the few commentators who oppose cameras have explained why that should be the case. In the pages that follow, I want to explore two peculiar features of video (as typically experienced in our present context) that cast doubt on the medium’s educative potential.

213. Moyer & Thornton, supra note 196, at 205.
215. See supra text accompanying notes 157-58.
217. See supra notes 81-82 and accompanying text.
C. CONSIDERATIONS ON THE 'VIDEO DIFFERENTIAL'

Sonja West rightly focuses our attention on what she calls the “video differential.”220 In order to properly evaluate the arguments about cameras in the Court, we need to examine the particularities of the proposed medium. It is not adequate to conceive the significance of introducing video merely as increasing the Court’s exposure in some generic way.221 The question is what would be the added value of video in particular.

West sees two major advantages: video offers “vividness” and “accessibility.”222 The first of these qualities West explains by the proposition that “video cameras would bring the people more fully and more authentically into the courtroom.”223 Viewers would have more information than could be gleaned from transcripts or audio recordings—namely, information about the whole range of “nonverbal activities” and other silent modes of communication in which the Justices engage on the bench.224 Viewers could scrutinize the Justices’ body language and facial expressions, and “decide for themselves if the Justices look healthy, alert, confused, or attentive.”225 In addition, video’s vividness would mean increasing “the power with which information registers an impact” on the audience.226 Because video allows the viewer to experience the captured event “in a way nearest to real life,” West writes, it leaves the audience with a deeper, more lasting impression than can text or audio.227

Second, video’s accessibility means that the Court’s oral arguments would find a wider audience if those proceedings were filmed. West points out that “[m]ore people watch television than read newspapers and certainly more than those who attend oral arguments or download transcripts.”228 Given the public’s practices and preferences, she writes, far greater numbers than under present circumstances would be exposed to the Court. Moreover, those additional audience members would be “far more likely to learn about the Court” through video, we are told.229 Central to West’s assessment is the premise that video would not only increase the Court’s exposure, but

220. See supra note 171.
221. See supra note 86.
222. West, supra note 20, at 1966.
223. Id. at 1969.
224. Id. at 1967.
225. Id.
226. Id.
227. Id.
228. Id. at 1970.
229. Id. at 1972.
would transmit information and tend to produce learning in audiences.

This analysis of video strikes me as both highly selective and excessively sanguine. It exaggerates video’s added value in several respects. First, as West concedes at one point, the additional “information” that video can convey is in fact already available to the public. With oral arguments open to public attendance, the Justices’ “nonverbal activities” on the bench are routinely reported and discussed in the legal community and in the public press. Second, while ordinary experience does indeed suggest that video can make deeper and more lasting impressions on us than can nonvisual media, West assumes that it must be “information” that so powerfully “registers an impact.” The hidden premise is that video’s vividness could serve only to promote, and never to impede, epistemic gain by the audience. As I suggest below, the evidence does not warrant such confidence. West herself claims that “viewers turn to television in large part to seek images,” which is of course not equivalent to seeking information. I would not attempt to divine audiences’ motives, which are inscrutable in any event. Ultimately, what draws us to visual media is far less important than what tends to result from our watching, and the evidence suggests that that is not necessarily (and not even likely) edification. Third and finally, West’s assessment exaggerates video’s value by implying that it would be more accessible than online transcripts and audio recordings. In fact, if the Court were to allow cameras, each of these three would be readily available to anyone with an Internet connection. What West really means is that, relative to text and audio, video would likely be more accessed by (though not more accessible to) the public. This is probably true. But it is a much more modest point than West’s ‘accessibility’ label suggests. And it hardly guarantees an increase in public understanding of the Court.

Consider two reasons to doubt that result. First, notice that high-quality video offers viewers a limited, mediated perspective that nevertheless appears impartial and complete. As it is generally exper-

\textsuperscript{230} Id. at 1967.
\textsuperscript{231} Id.
\textsuperscript{232} Id.; see also supra note 102.
\textsuperscript{233} West, supra note 20, at 1967.
\textsuperscript{234} See infra notes 237-41, 245-49 and accompanying text.
\textsuperscript{235} West, supra note 20, at 1971.
\textsuperscript{236} See infra notes 245-49 and accompanying text.
\textsuperscript{237} The traditional view of cameras is as the all-seeing eye: they are turned on and they simply record what is before them. What is missing from this account is that the placement of the camera, the focus on a particular subject to the exclusion of all others, the editing of the images, and the voice-over that accompanies the images, give shape to the story. Because images are powerful and
enced in our contemporary social environment, video embeds the audience in a first-person point of view, producing a sense of immanence, as if one were truly present and seeing everything that is to be seen. Accordingly, the images that we encounter when watching video bear the marks of immediacy, verisimilitude, and completeness. But this vivid perspective—familiar to anyone who has seen a televised press conference, baseball game, standup routine, or congressional hearing—rests on an illusion. It rests on the hiddenness of the reality outside the camera’s frame. It rests on the hiddenness of the frame’s very existence and of the fact that the viewer’s perspective is thereby limited and constrained.

In this regard, transparency—as distinguished from its simulacrum—is precisely what video typically fails to provide. Relative to other media, particularly text and audio, high-quality video is curiously opaque in its concealment of the partiality and finitude that limit the viewer’s perspective. One result of this opacity is that video audiences may not, in fact, grow in understanding of the Court. Viewers might develop unwarranted confidence that they have seen and understood the whole story, at least insofar as the existence of a relevant off-screen reality remains hidden. For that reason, video may be liable to produce false impressions about the Court’s activity, even assuming that viewers are perfectly sophisticated.

Shrewd politicians can create such misleading impressions deliberately, as Newt Gingrich famously did when, noting the fixed position of C-SPAN’s cameras, he spoke as if the near-empty House chamber in which he stood was in fact filled with Democrats, stunned into silence by his accusations. In the case of the Justices of the Supreme Court, one would not, presumably, have to worry about such antics. (In any event, one could protect against that specific sort of manipulation by providing for multiple camera angles.) But once we

the story is woven seamlessly, it is easy to lose sight of what has been omitted and what choices have been made in the process.

Marder, supra note 219, at 1566.

238. Katrina Hoch rightly points out that such characteristics are not necessarily intrinsic to the medium, but are partially constituted by the surrounding social context. See Hoch, supra note 219, at 295-96 (“It’s often not a technology or communicative mode that causes problems, but the practices that embed them. The competitive commercial media structure encourages aggressive, sensational or entertainment-oriented news-gathering and production practices. These practices are often associated with images, but are not unique or inevitable to them.”).

239. Cf. G. Daniel Lassiter et al., Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect, 18 Psychol. Sci. 224 (2007) (even sophisticated judges are more likely to regard a simulated criminal confession as voluntary, and the suspect as guilty, when the camera’s frame is focused tightly on the suspect rather than panned more widely).

recall the regularity and ease with which digital video is excerpted and remixed online, it is not a stretch to imagine that misleadingly aggregated footage—apparently authentic but deeply deceptive in its portrayal of the Court—could appear and even occasionally 'go viral' on the Internet. Setting that particular worry to one side, the more general point is that video of Supreme Court proceedings would offer a perspective on the institution's activity that would tend to appear complete and comprehensive, despite its limitations.

To press this objection may seem like making the perfect the enemy of the good. But the point is rather that, on net, and given the alternative, such video may not constitute a good at all. It would render a small subset of the Court's activities more visible (literally) to more viewers, but at the risk of promoting misunderstanding of the Court, effectively concealing the existence of its off-camera processes of deliberation and adjudication.\textsuperscript{241} If the alternative were no public access whatsoever, then video would have to be regarded as a net good despite this disadvantage. However, complete opacity is not the alternative. At present, the Court provides for live, in-person observation by a few hundred members of the public, for near-immediate release of oral argument transcripts, and for the publication of audio recordings of those proceedings within a few days.\textsuperscript{242} Given the ready accessibility of oral arguments under current practice, and given what I have identified as the peculiar opacity of video media, there is simply no basis for confidence that cameras would add anything of value to the public's understanding of the Supreme Court.

More positively, camera proponents might draw a constructive lesson from my argument here.\textsuperscript{243} If the problem with video is, as I have suggested, its opacity relative to other media, then what we need are techniques for making explicit what is typically hidden: the frame's limited perspective, the existence of a contiguous off-screen reality, the way in which a clip has been excerpted, and so on. Over time, techniques of this kind have been developed for use in textual media. Writers and readers have gradually perfected norms of citation to ensure that it is apparent when another's words have been borrowed, cropped, omitted, or rearranged. This allows the reader to

\textsuperscript{241}. See supra notes 238-39 and accompanying text. Notice that my claim here is not premised on any notion of viewer incapacity. The argument runs even assuming that hypothetical audiences of oral argument video are perfectly sophisticated.

\textsuperscript{242}. See supra notes 13-14 and accompanying text. For the record, I believe that the Court could and should do even more, including permitting live audio broadcasting of its oral arguments. This position is perfectly consistent with the objection to cameras that I am trying to articulate here. But see CHEMERINSKY, supra note 56, at 318 ("If people can hear the tapes just minutes after the arguments conclude, it is impossible to see the harm in allowing them to watch the proceedings live an hour or two earlier.").

\textsuperscript{243}. For this suggestion I am indebted to Tomer Perry.
recognize immediately that she is getting a limited, perspectival take on the cited text. It also enables the reader to have recourse to the original if she so desires. There is no reason in principle why techniques that are functionally equivalent could not be developed for visual media. Some already exist—consider, for example, the informative caption identifying the speaker who appears on screen. Yet many more are needed for substantial mitigation of the opacity I have identified. Proponents of oral argument video might consider refocusing their efforts on the development of such techniques. Imagine if we had devices sufficient to ensure that, for example, a hypothetical question from the bench or a comment by a Justice playing ‘devil’s advocate’ could be identified as such in any remixed video ripped from the Court’s official recording. Were such techniques available for deployment in video recording of the Supreme Court’s oral arguments, at least one source of hesitation might be eliminated.244

Nevertheless, there is a second aspect of video (as typically experienced in our social environment) that is particularly relevant here—the way in which it engages the viewer’s perception and cognition. Research lends credibility to what ordinary experience suggests: that video effectively absorbs us, but not in ways that are especially conducive to critical thinking and learning.245 Noting that “every medium develops some cognitive skills at the expense of others,” the psychologist Patricia Greenfield notes that although video impressively deepens viewers’ “visual intelligence,” it also tends to impair what she labels as “deep processing: mindful knowledge acquisition, inductive analysis, critical thinking, imagination, and reflection.”246


245. See, e.g., Manuela Glaser et al., What Do We Learn from Docutainment? Processing Hybrid Television Documentaries, 22 LEARNING & INSTRUCTION 37 (2012) (finding that viewers process educational video in a narrative mode, with less effective learning of information that is not embedded in the overarching narrative frame); Patricia M. Greenfield, Technology and Informal Education: What Is Taught, What Is Learned, 323 SCI. 69 (2009) (observing that video tends to build viewers’ visual-spatial skills but is not conducive to forms of “deep processing” like reflection, critical thinking, and imagination); Rohindra Basu Roy & Graham T. McMahon, Video-Based Cases Disrupt Deep Critical Thinking in Problem-Based Learning, 46 MED. EDUC. 426 (2012) (finding that in medical education, relative to outcomes observed when traditional text materials are used, the introduction of video in case-based learning is associated with reduced critical thinking).

audio are apparently much better suited to such critical cognitive engagement.\textsuperscript{247}

The differences in our experience of these various media are nicely illustrated by a famous episode from the early days of televised politics. It was the 1960 presidential election, and John F. Kennedy and Richard Nixon squared off in a live debate.\textsuperscript{248} The contest was broadcast by radio and on national television. Audiences’ reactions were telling. Radio listeners felt that the candidates had been more or less equally matched; each had advanced strong arguments, and each had seemed like a strong leader. But television viewers took away a very different impression. Nixon had been visibly sweating and bore a noticeable five-o’clock shadow during the broadcast. When the camera focused tightly on his face, he looked nervous and unsteady, while the debonair Kennedy seemed calm and collected. Prospective voters who watched the debate on television went away regarding Nixon as the less successful candidate and reported that Kennedy had won the debate.\textsuperscript{249} These two audiences heard the exact same exchange between the candidates. The difference was that the video had drawn viewers’ attention to Nixon’s appearance, and their judgment evidently followed.

I readily concede that this illustration, like the empirical research cited here, suggests a tendency rather than an iron law. Some viewers, some of the time, might indeed engage deeply and critically with video of the Court’s oral arguments, were it made available. But that hardly invalidates the more general implication. What the research cited above calls into question is the notion that cameras would enhance the public’s understanding of the Court. Under current practice, fully critical engagement with the Court’s work is made possible by ready access to transcripts and audio recordings of the Court’s oral

\textsuperscript{247.} See, e.g., Richard E. Mayer, Multimedia Learning 259-60 (2d ed. 2009) (finding in a series of experiments that adding the image of a speaker to a screen produced no substantial improvement in viewers’ learning); Adrian Furnham et al., Children’s and Adults’ Recall of Children’s News Stories in Both Print and Audio-Visual Presentation Modalities, 16 APPLIED COGNITIVE PSYCHOL. 191, 191 (2002) (“Research into the efficiency of different media in conveying information to adults, has largely supported the idea that memory for information presented in audio-visual media is poorer than that for the same information presented in audio-only or print media.”); Martin Merkt et al., Learning with Videos vs. Learning with Print: The Role of Interactive Features, 21 LEARNING & INSTRUCTION 687 (2011) (finding that while video is generally associated with less effective learning than print, the addition of interactivity may allow better learning outcomes if viewers use pausing and browsing functions for “self-regulated information processing”); Mor Regev et al., Selective and Invariant Neural Responses to Spoken and Written Narratives, 33 J. NEUROSCIENCE 15978 (2013) (finding no significant difference in the effectiveness of linguistic processing or learning as between reading written text and listening to spoken text).

\textsuperscript{248.} See Marder, supra note 219, at 1507.

\textsuperscript{249.} Id.
arguments (not to mention the publication of written opinions explaining and criticizing its judgments). Admittedly, the addition of video might sometimes expand the size of the Court’s audience. But the evidence suggests that this additional exposure would be unlikely to improve public understanding of the Court.

Here readers might object that the expected character of public response is immaterial. The issue at stake, it might be supposed, is the Court’s obligation to render its public proceedings accessible and transparent, however people might tend to encounter (or not) the media published in service of that goal. The issue, in short, is transparency. As I argued above, however, the principle of transparency does not necessarily require video of the Court’s proceedings. In fact, video seems a rather unsuitable instrument for promoting what I called “transparency as intelligibility.” This is both because it tends to produce a false impression of completeness and neutrality and because it deeply engages our visual perception without effectively engaging our capacity for learning or critical thinking. Notice that these claims are entirely distinct from the worry that video reduces its objects to entertainment or spectacle. That is not my argument. My argument has been, instead, that given what we know about the medium’s typical characteristics, video of the Court’s oral arguments is unlikely to produce any meaningful benefits in terms of public understanding.

V. CONCLUSION

In these pages I have tried to show that, despite its momentum, the case for cameras in the Supreme Court is in fact surprisingly weak. There is no general principle requiring that the Court should permit video recording and broadcasting of its public proceedings. In particular, I have argued that transparency—the leading candidate for that role—does not in fact require video, except on simplistic conceptions of the transparency principle that we ought to reject. The various prudential arguments advanced on behalf of cameras are also unpersuasive. Each rests on a highly speculative claim, unsupported by evidence, that video of the Court’s proceedings would promote one
political good or another—public understanding, accountability or legitimacy. There are simply no reasonable grounds for confidence that such consequences would result from the introduction of cameras. In fact, a thoughtful consideration of the particular features of video suggests affirmative reasons to doubt that cameras would improve public understanding of the Court.

Nevertheless, I have stopped short of advancing a positive case for the Court’s prohibition on cameras. That prohibition is not justifiable on the basis of any general ethical or political principle, but reflects the Justices’ prudential judgment that the likely advantages of video in this context are outweighed by its likely disadvantages. In my view, that judgment is correct. But I would not pretend that it can be demonstrated conclusively to be so. Precisely for that reason—precisely because the matter cannot be resolved by appeal to principle, and because the likely impacts of cameras are uncertain (even if more or less credible predictions about those impacts can be advanced)—Congress should defer to the Court’s judgment on this issue, at least for the time being.

Let me end by identifying one reason why, notwithstanding everything I have just argued, the Court may soon feel compelled to reconsider its judgment about cameras. As we have noted, opinion polls show that a substantial majority of the public believes the Court’s proceedings ought to be available on video. What I fear is that, for many ordinary citizens, this belief is coupled with another, much more pernicious one: namely, that the Court’s rejection of video is illegitimate in principle or is evidence in itself of corruption or misconduct. It is not unusual to find such beliefs expressed in popular media. And regrettably, some of the commentary published by camera proponents may be (mis-)read as providing a basis for these

256. See supra Part III.A.
257. See supra Part III.B.
258. See supra Part III.D.
259. See supra Part IV.C.
260. Cf. Brandon Smith, Note, The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televising the Supreme Court, 97 Geo. L.J. 1409 (arguing that Congress should defer because legislation requiring the Court to adopt cameras would violate the separation of powers).
261. See supra note 38 and accompanying text.
262. Cf. Segall, supra note 56 (“The American people feel that the justices are hiding from them, and that cannot do anything but damage the confidence we have in the justices.”).
263. See, e.g., The Daily Show with Jon Stewart (Comedy Central television broadcast Apr. 3, 2014), available at http://thedailyshow.cc.com/episodes/zwgap/april-3—2014—pele [http://perma.cc/84GK-EHBR] (“Televised Supreme Court hearings. Apparently the one thing so corrosive to the process that it can never be allowed to exert an unholy influence upon our sacred democratic institutions is—transparency.”).
beliefs. This should be a source of grave concern to all of us. The notion that by prohibiting cameras the Court somehow defies the basic demands of democratic transparency, or shows that it has something to hide, poses a very real threat to the Court’s legitimacy. However the Justices respond to growing public pressure for video in the years ahead, they should remain especially vigilant in the face of that threat. Eventually, the harm to the Court’s legitimacy may reach such proportions that the prudential calculus ought to come out the other way, recommending a permissive approach to cameras. Ironically, if and when that day comes, it will have come in part through the influence of those simplistic criticisms of the Court’s stance toward video that I hope, in these pages, I have managed at least to blunt.

264. See, e.g., 2011 Hearing, supra note 1, at 2 (statement of Hon. Amy Klobuchar, United States Senator from the State of Minnesota) (presenting cameras as a straightforward requirement of the public’s “right to see how the Court functions”); Cohn, supra note 14, at 168 (presenting cameras as a straightforward requirement of the public’s “right to be there” when the Court is in session); Mauro, supra note 19, at 260 (calling the Court a “secret society”); O’Connor, supra note 20 (charging the Court with acting “like an ancient Greek soothsayer”); Specter, supra note 66 (“[I]t is in the public interest for the public to at least know what the court is doing.”); Segall, supra note 56 (“The American people have a right to see on their televisions, tablets and smartphones the oral arguments and decision announcements of the Supreme Court.”); see also supra notes 72-74 and accompanying text.