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## Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket

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## OVERWRITING AND UNDER-DECIDING: ADDRESSING THE ROBERTS COURT'S SHRINKING DOCKET

*Meg Penrose\**

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I have expressed the view—and it may be a view that I'll have to be educated on further if I am confirmed, and I am not stating it as a solid view. I do think there is room for the Court to take more cases. They hear about half the number of cases they did 25 years ago. There may be good reasons for that that I will learn if I am confirmed, but just looking at it from the outside, I think they could contribute more to the clarity and uniformity of the law by taking more cases.<sup>1</sup>

- Chief Justice John G. Roberts Jr.

### I. THE PROBLEM: THE DUTY TO DECIDE

“The duty to decide is the primary judicial duty.”<sup>2</sup> If one agrees with Judge Posner, then the Roberts Court is shirking its primary duty. Empirically, the Roberts Court is the least productive of any Supreme Court.<sup>3</sup> It averages less than

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 337 (2005) [hereinafter *Confirmation Hearing*] (statement of John G. Roberts Jr.).

2. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 56 (2005).

3. See generally Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term*, 1930, 45 HARV. L. REV. 271 (1931). In 1926, then-Professor Frankfurter began reporting

70 signed opinions per year.<sup>4</sup> When per curiam<sup>5</sup> opinions are included, the decisional average rises to 76 cases per Term.<sup>6</sup> These numbers are less than one-third the decisional average for the 1926<sup>7</sup> and 1930 Taft Courts.<sup>8</sup> The Roberts Court fares no better when compared to recent predecessor Courts, falling well below the averages of the Warren, Burger, and Rehnquist Courts.<sup>9</sup> Even as the Roberts Court decides fewer cases, it continues to write a record number of non-decisional opinions.<sup>10</sup> These separate concurring and dissenting opinions have

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annual Supreme Court statistics for the *Harvard Law Review*. See generally Felix Frankfurter, *Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 HARV. L. REV. 1046 (1926). Professor Frankfurter's statistics remind that in the late nineteenth century, the Supreme Court decided far more cases due to its mandatory appellate jurisdiction. For example, in 1885, the Court disposed of 440 cases; in 1886, the Court disposed of 451 cases; and, in 1890, the Court disposed of 610 cases. Frankfurter & Landis, *supra*, at 272 n.3. These numbers are hard to digest today where the Court's jurisdiction is almost entirely discretionary. However, even when comparing the Roberts Court to Courts with mostly discretionary jurisdiction, the Roberts Court lags in productivity. Compared to the Taft Court during the 1926 Term through the 1930 Term, the Roberts Court's decisional output is one-third that produced by a less modernized, less professionally staffed institution. *Id.* at 273, 290.

4. When averaging the number of signed opinions, which exclude per curiam opinions, from the 2005 through the 2017 Term, the Roberts Court has averaged 67 signed opinions per Term. These figures come from the Chief Justice's Year-End Report on the Federal Judiciary issued annually and available on the United States Supreme Court website. *Chief Justice Year-End Reports on the Fed. Judiciary*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> [<https://perma.cc/R9B3-ZWUC>] (last visited July 14, 2019). The low mark was 59 signed opinions in 2017. The high mark was 75 signed opinions in 2010. In only four of these thirteen Terms has the Roberts Court exceeded 70 signed opinions (2008, 2009, 2010, and 2012).

5. SCOTUSblog defines "per curiam opinion" as "an unsigned opinion, written for the court as a whole by an unidentified justice." (In Latin, "per curiam" means "by the court.") *Glossary of Supreme Court Terms*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/> [<https://perma.cc/XC90-ES671>] (last visited July 14, 2019). In contrast, "written dissents from per curiam opinions are signed." *Id.*

6. This average is taken from the *Harvard Law Review's* "Statistics," which has been compiling Supreme Court data since 1928. The modern statistics reports are available on *Harvard Law Review's* webpage. *Statistics*, HARV. L. REV., <https://harvardlawreview.org/category/statistics/> [<https://perma.cc/S662-QQ4X>] (last visited July 14, 2019). The Roberts Court's annual record is 81 total opinions in 2005; 73 in 2006; 70 in 2007; 78 in 2008; 87 in 2009; 82 in 2010; 75 in 2011; 78 in 2012; 72 in 2013; 74 in 2014; 75 in 2015; 69 in 2016; and 71 in 2017. *Id.*

7. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 (2006). Dean Starr created a table detailing "The Supreme Court and Its Docket: 1926-2004." *Id.* Per this table, the 1926 Taft Court issued 223 signed opinions. *Id.* That year, 1,183 cases were on the docket. *Id.* Of these, nearly 19% were disposed of through signed opinions. *Id.*

8. *Id.* Per Starr's table, the 1930 Taft Court issued 235 signed opinions. *Id.* That year, 1,304 cases were on the docket. *Id.* Of these, nearly 18% were disposed of through signed opinions. *Id.* Although case filings rose nearly 100 cases from 1926 to 1930, the Taft Court also responded with an increase of 12 additional decisions. *Id.*

9. *Id.* Notably, the decisional numbers peaked under Justice Taft and have vacillated—though with a steady output experienced during the Warren and, particularly, Burger Courts. *Id.* It was not until the Rehnquist Court that the Supreme Court consistently fell below 100 signed opinions per Term. *Id.*; see also Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES (Dec. 7, 2006), <https://www.nytimes.com/2006/12/07/washington/07scotus.html> [<https://perma.cc/48MQ-WA8B>] (noting that the Roberts Court's 2005 decisional output of 69 signed opinions "was the lowest since 1953 and fewer than half the number the court was deciding as recently as the mid-1980s").

10. Adam Liptak, *Justices are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <https://www.nytimes.com/2010/11/18/us/18rulings.html> [<https://perma.cc/6UTE-F9SL>] (observing that the Roberts Court set the record for concurring opinions). "In the last term, there was at least one concurring opinion in 77 percent of unanimous rulings. That is a record." *Id.*

outnumbered majority opinions in all but one Term that Roberts has served as Chief Justice.<sup>11</sup> In fact, in 2007, the Court issued more dissenting opinions (72) than majority opinions.<sup>12</sup>

How do we evaluate a Supreme Court that writes more than it decides?<sup>13</sup> Despite having the lowest decisional output in the modern era, the Roberts Court is the most verbose Supreme Court in history.<sup>14</sup> The current Justices are more likely than past Justices to have their individual say in cases, writing more concurring and dissenting opinions than prior Courts.<sup>15</sup> These opinions are longer, often strongly worded, and rarely add clarity to the underlying decision.<sup>16</sup> The Roberts Court has shifted from being a decisional body to becoming an institution that comments on more cases than it decides.

This article critiques the Roberts Court's tendency to overwrite and underdecide. Despite Chief Justice Roberts's Senate testimony asserting that the Supreme Court should take more cases, the Roberts Court has fallen below the previous recorded lows of the Rehnquist Court.<sup>17</sup> Returning to Chief Justice Roberts's goal for the Court to be more productive,<sup>18</sup> this article offers two

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11. See *Statistics*, *supra* note 6. For example, in 2005, the Roberts Court issued a total of 176 written opinions, but only 81 opinions of the Court. *Id.* The 2006 numbers were similar: a total of 175 written opinions, but only 73 opinions of the Court. *Id.* In both years, there were more than 60 dissenting opinions and more than 35 concurring opinions. *Id.* The greatest output in both years, which is characteristic of the Roberts Court, was individualized opinions—95 in 2005 and 102 in 2006. *Id.* In 2013, the Court issued the same number of total majority opinions as separate opinions—72 each. *Id.* In every other year, separate opinions outnumbered majority opinions. *Id.*

12. *Id.* In 2007, the Court also issued 45 concurring opinions. *Id.* In 2008, the Court issued just one more majority opinion than dissenting opinion—78 majority opinions and 77 dissenting opinions. *Id.* That same year, the Court issued 43 concurring opinions. *Id.*

13. This article analyzes decisional output by signed opinion—not simply case disposition. This is similar to the Harvard format that keeps statistics on actual written opinions (opinions of the court, concurrences, and dissents). It does not include per curiam opinions. Interestingly, the author's capturing statistics do not appear to use any one governing statistical model since the numbers often vary among authors.

14. Meg Penrose, *Supreme Verbosity: The Roberts Court's Expanding Legacy*, 102 MARQ. L. REV. 163, 175–76 (2018).

15. Historically, other Courts were less likely to publish their dissenting and concurring opinions. Keeping with the Taft Court example, only four of the nine Justices issued any concurring opinion. Frankfurter & Landis, *supra* note 3, at 290. And, in 1926, of the 199 non-per curiam opinions, those four Justices only published 7 concurring opinions—or a concurring opinion in 4% of the total cases. *Id.* The numbers are even starker in subsequent years. In 1927, two Justices accounted for a total of 2 concurring opinions out of 175 non-per curiam opinions. *Id.* In 1928, one Justice accounted for a total of 2 concurring opinions out of 129 non-per curiam opinions. *Id.* In 1929, one Justice accounted for a total of 3 concurring opinions out of 134 non-per curiam opinions. *Id.* Finally, in 1930, one Justice accounted for a single concurring opinion out of 166 non-per curiam opinions. *Id.* To help place these numbers in perspective, in 2007 every Justice on the Roberts Court filed at least 1 concurring opinion. *Statistics*, *supra* note 6. In fact, three Justices (Stevens, Scalia, and Thomas) individually issued more concurring opinions in one Term than the entire Taft Court did in 1926. *Id.* An even more remarkable comparison is the Roberts Court's 2009 Term in which Justice Scalia himself issued as many concurring opinions in a single year (15) as the entire Taft Court issued over a five-year period (1926–1930). See *id.* Justice Thomas also equaled the Taft Court's five-year total, issuing 15 concurring opinions in 2017. See *id.*

16. Meg Penrose, *Enough Said: A Proposal for Shortening Supreme Court Opinions*, 19 SCRIBES J. LEGAL WRITING 50, 54–56 (2018–2019).

17. See Greenhouse, *supra* note 9. “The sharpest drop in opinions came after William H. Rehnquist became Chief Justice in 1986.” *Id.*; see also Starr, *supra* note 7, at 1368.

18. See Greenhouse, *supra* note 9 (noting that the Roberts Court's 2005 decisional output of 69

solutions: the Court should stop publishing (1) signed opinions and (2) separate opinions. At a time when government feels strained, if not broken, the Supreme Court's reluctance to decide actual controversies—but allowing each Justice to publish their separate ideas on each decision—merits serious discussion. Should the average number of dissents (56) rival the average number of signed majority decisions (67)? And what are the opportunity costs of a Court that averages 31 more separate opinions each Term (98 total, comprised of 56 dissenting opinions and 43 concurring opinions) than decisional opinions?

Ironically, Chief Justice Roberts has spoken on his Court's tendencies to individualize the law. In a 2007 interview, Chief Justice Roberts admonished that “every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution.”<sup>19</sup> Looking at the numbers, it truly is time to worry. It is also time for the Justices to return to the Court's primary duty—the duty to decide.

## II. THE HISTORY: STATISTICS, LEGISLATION, AND DECISIONAL OUTPUT

In the late 1920s, then-Professor Felix Frankfurter<sup>20</sup> began keeping “statistics” on the business of the Supreme Court.<sup>21</sup> The format he selected included, among other things, the total number of cases decided, the number of majority opinions written by each individual Justice, the number of concurring opinions written by each Justice, and the number of dissenting opinions written by each Justice.<sup>22</sup>

Frankfurter's work is remarkable for two reasons: (1) its content and (2) its longevity. With little change, the current *Harvard Law Review* has carried on Frankfurter's tradition of keeping decisional statistics on the Supreme Court.<sup>23</sup> Following each Term, interested readers can go to the *Harvard Law Review* statistics and gather empirical data on the preceding Court Term.

Frankfurter's early statistics provide dramatic comparison between the Court's nineteenth-century productivity and its modern record. Where once Justices were reluctant to issue separate concurring and dissenting opinions,<sup>24</sup> the individual

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signed opinions “was the lowest since 1953 and fewer than half the number the court was deciding as recently as the mid-1980s”); see also *Confirmation Hearing*, *supra* note 1 (statement of John G. Roberts Jr.).

19. Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan.–Feb. 2007, at 105.

20. Felix Frankfurter was appointed to the U.S. Supreme Court by President Franklin D. Roosevelt in 1939. He served as a Justice until 1962. See *About the Court*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [https://perma.cc/K94Q-ZSXH] (last visited July 14, 2019).

21. See generally Frankfurter, *supra* note 3.

22. See, e.g., Frankfurter & Landis, *supra* note 3, at 290–91.

23. Richard J. Lazarus, *Back to “Business” at the Supreme Court: The “Administrative Side” of Chief Justice Roberts*, 129 HARV. L. REV. F. 33, 33–36 (2015). Professor Lazarus notes that “*The Business of the Supreme Court* deliberately focused on the statistics of the Court's work, rather than on the substance of the Court's rulings.” *Id.* at 35.

24. See, e.g., William H. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361, 362–63 (1973). Justice Rehnquist noted that the 1923 Taft Court handed down 208 signed opinions with only 15 separate concurring or dissenting opinions. *Id.* Compared to today's Justices, the Taft Court

Justices on the Roberts Court often write more (sometimes twice as many) concurring and dissenting opinions as they do majority opinions.<sup>25</sup> The Court's movement from over-deciding to overwriting did not take place at once, or even under a single Chief Justice.<sup>26</sup> Since Chief Justice William Howard Taft petitioned Congress to pass the Judiciary Act of 1925, Justices have continued to lament their workload.<sup>27</sup> Chief Justice Taft encouraged Congress to pass what became known as "the Judges' Bill," legislation that removed much of the Supreme Court's mandatory appellate jurisdiction.<sup>28</sup> This change enabled the Supreme Court to manage its growing docket by allowing it to largely select the cases it would resolve. Even with this change, the Taft Court continued to decide a large number of cases—nearly three times as many as the Roberts Court does today.<sup>29</sup>

The Judges' Bill, however, did not sufficiently address the Supreme Court's increasing docket. Chief Justice Warren E. Burger and others lobbied Congress to again act to stem the growing tide of cases. While the Taft Court struggled to manage 1,200 to 1,300 annual filings, the Burger Court was wrestling with approximately 5,000.<sup>30</sup> And each year those totals grew.<sup>31</sup> The Burger Court, however, managed to annually resolve nearly 3% of the cases filed, averaging around 150 signed opinions most years.<sup>32</sup> The advancement of writing technology may have helped, but the Court was still struggling.<sup>33</sup>

Then, William H. Rehnquist was elevated to Chief Justice. During his Senate

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issued separate opinions only 7% of the time.

25. In 2007, both Justices Stevens and Scalia drafted more than twice the number of separate opinions as they did majority opinions for the Court. Justice Stevens authored 7 majority opinions but 8 concurring opinions and 13 dissents. Similarly, Justice Scalia authored 8 majority opinions but 10 concurring opinions and 8 dissents. See *The Statistics*, 122 HARV. L. REV. 516, 516–17 (2008) [hereinafter *The Statistics* 2008]. The following Term—2008—Justices Breyer and Alito posted similar numbers. Justice Breyer authored 8 majority opinions with 8 concurring opinions and 14 dissents. Justice Alito authored 7 majority opinions with 8 concurring opinions and 7 dissents. See *The Statistics*, 123 HARV. L. REV. 382, 382–84 (2009). The 2009 Term was a particularly bad year, as four of the nine Justices issued at least twice as many separate opinions as majority opinions. Justice Stevens wrote 13 concurrences and 14 dissents to accompany his 6 majority opinions. Justice Scalia wrote 15 concurrences and 6 dissents while authoring 8 majority opinions. Justice Thomas, who authored 8 majority opinions, wrote 13 concurrences and 5 dissents. And Justice Alito wrote 10 concurrences and 7 dissents, compared to his 8 majority opinions. See *The Statistics*, 124 HARV. L. REV. 411, 411–13 (2010). These trends are neither changing nor slowing. In 2014, Justice Thomas authored 7 majority opinions while also writing 10 concurring opinions and 20 dissents. That same Term, Justice Alito drafted 8 majority opinions to go with his 8 concurring opinions and 14 dissents. See *The Statistics*, 129 HARV. L. REV. 381, 381–83 (2015). And finally, during Justice Gorsuch's first Term on the bench in 2016, he wrote 1 majority opinion but 2 concurrences and 2 dissents. See *The Statistics*, 131 HARV. L. REV. 403, 403–05 (2017).

26. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228 (2012).

27. See Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 937 (1925).

28. *Id.*; see also Michael Schwartz, *Our Fractured Supreme Court*, HOOVER INST. (Jan. 29, 2005), <https://www.hoover.org/research/our-fractured-supreme-court> [https://perma.cc/JRZ5-TRUU].

29. See Starr, *supra* note 7, at 1369.

30. *Id.*

31. *Id.*

32. *Id.*

33. See Owens & Simon, *supra* note 26, at 1228. Owens and Simon explain that while the Supreme Court was deciding "roughly 177 cases per term" during the 1940s, the numbers dropped to an average of 124 per Term during the 1950s. *Id.*

confirmation testimony, Justice Rehnquist was asked about the Court's docket. He was specifically asked whether the "volume of cases preclude[d] wise adjudication" and whether the Court was "overburdened."<sup>34</sup> In response, Justice Rehnquist indicated that he thought "the 150 cases that we have turned out quite regularly over a period of 10 or 15 years is just about where we should be at."<sup>35</sup> Following his confirmation, Chief Justice Rehnquist's viewpoint apparently changed. He successfully lobbied Congress to eliminate the remaining vestiges of the Supreme Court's mandatory jurisdiction.<sup>36</sup> In an act "to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review," Congress gave near-complete license to the Court to select its docket.<sup>37</sup> Thereafter, the Rehnquist Court began deciding fewer and fewer cases.<sup>38</sup> It cut its decisional output by 50%, going from 146 signed opinions during its first Term to 74 in its last.<sup>39</sup> Despite constant increases in case filings, Supreme Court productivity—measured in decisional opinions—went down.<sup>40</sup>

Enter Chief Justice John Roberts Jr.

### III. THE CONUNDRUM: INCREASING RESOURCES, DECREASING OUTPUT

The Roberts Court holds the record for saying the most (the longest average length for opinions) and deciding the least.<sup>41</sup> Its modest decisional output is inversely related to its increased resources over past Courts. Even as case filings have dropped below their height at the end of the Rehnquist Court and the beginning of the Roberts Court, the Court has not improved its decisional activity.<sup>42</sup> The past eight Terms have actually seen a significant decrease in case filings—from a high of 8,857 cases filed to the new normal of around 6,300 to

34. *Nomination of Justice William Hubbs Rehnquist: Hearings Before the Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 143 (1986) (question from Senator Mathias).

35. *Id.* (response of Hon. William H. Rehnquist).

36. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988).

37. *Id.*

38. *See also* Owens & Simon, *supra* note 26, at 1228 ("By the 2000 Term, the [Rehnquist] Court heard only 87 cases.").

39. Starr, *supra* note 7, at 1368.

40. Posner, *supra* note 2, at 35 (noting that, even as the number of reviewable decisions was growing, the number of "decisions reviewed by the [Supreme] Court" declined).

41. *See, e.g.*, Liptak, *supra* note 10 ("In decisions on questions great and small, the [Roberts Court] often provides only limited or ambiguous guidance to lower courts. And it increasingly does so at enormous length."). Liptak further noted that the Roberts Court "decides perhaps 75 cases a term these day, down from about 150 in the mid-1980s." *Id.*

42. Relying on the Chief Justice's Year-End Reports maintained on the Supreme Court website, the Rehnquist Court saw filings increase in 1999 (7,377), 2000 (7,852), 2001 (7,924), and 2002 (8,255). *See Chief Justice Year-End Reports on the Fed. Judiciary*, *supra* note 4. Filings, however, decreased the next two years: 2003 (7,814) and 2004 (7,496). *Id.* The highest number of cases ever filed occurred during Chief Justice Roberts's first two Terms: 2005 (8,521) and 2006 (8,857). *Id.* During the next three years, case filings remained steady: 2007 (8,241), 2008 (7,738), and 2009 (8,159). *Id.* Since 2009, case filings have continually declined: 2010 (7,857), 2011 (7,713), 2012 (7,509), 2013 (7,376), 2014 (7,033), 2015 (6,475), 2016 (6,305), and 2017 (6,315). *Id.*

6,400.<sup>43</sup> While past Justices “rode circuit,” had minimal administrative staff, and wrote decisions in longhand, the Roberts Court has modern advantages prior Courts lacked.<sup>44</sup> There are more law clerks than ever before, providing assistance not only with screening incoming certiorari petitions but also with opinion drafting.<sup>45</sup> The Justices and their clerks need not leave their desks to do research or review briefs—they can perform word searches, electronically read the record, and cut and paste their writing on computers. Today’s Court personnel have the easiest burden when it comes to research and writing. There is no need to pull books from the shelves or check citations manually. Everything, literally, is a click away. So, why are we experiencing such low decisional output?

The strange juxtaposition of decisional output with optimal resources is troubling. Now that writing is easier—and support staff far greater—shouldn’t the Justices be deciding more cases rather than writing more individual opinions? Shouldn’t the Court be striving to perform its primary decisional duty rather than seeking to write individual opinions that, as Justice Scalia noted, will likely never become the law?<sup>46</sup> The problem of overwriting and under-deciding is only exacerbated by society’s ability to gain access to the Justices’ written work. What are citizens to make of these lengthy—and varied—individual opinions that seem to undermine decisional clarity? When turning to the Court to learn “what the law is,” how will citizens be able to know with any measure of certainty what the law is when the Justices spend more time on drafting separate opinions than on finding consensus? Where is the clarity and uniformity that Chief Justice Roberts spoke of?

“The Justices now do decide fewer cases and thus have more time to spend discussing each one—should they desire to.”<sup>47</sup> Unfortunately, those discussions—if they are occurring—are only made visible in increased separate filings rather than greater consensus. Other scholars have noted that “matters are made much worse by the fact that there is too little genuine internal deliberation on the Supreme Court.”<sup>48</sup> In their view, “this is at least partly due to the efforts of individual Justices to develop and exhibit their own personal views of the Constitution and to resist accommodation with others on the Court.”<sup>49</sup>

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43. *Id.*

44. Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court’s Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1264 (2010) (noting that the early Justices “had no clerks, no secretaries, no librarians; and yet they issued opinions within days, or at most weeks, after oral argument”).

45. *Id.* at 1268. In comparing the early Court, Lerner and Lund remind that:

Between 1874 and 1924, the Court was burdened with a workload that would be regarded as staggering today, usually hearing more than 200 or even 250 cases per year. Some Justices had a single clerk to assist, but most had none. Today’s Supreme Court occupies a brave new world: a docket of eighty-odd cases, with four law clerks and two secretaries assigned to each Justice.

*Id.*

46. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 37. Justice Scalia noted that, at the Supreme Court level, dissents rarely help change the law. *Id.*

47. Posner, *supra* note 2, at 66.

48. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1700 (2004).

49. *Id.*



Since 2005, the Roberts Court's Justices have consistently written more separate opinions than dispositive opinions.<sup>50</sup> Each January, the Chief Justice issues an annual report detailing the Supreme Court's workload.<sup>51</sup> But one detail that is missing from this report is captured by *Harvard Law Review's* annual end-of-Term statistics—the number of separate opinions written by each Justice. Looking just at Chief Justice Roberts's 2008 annual report, we learn that the Supreme Court filings decreased that year by 7% (from 8,857 cases filed in 2006 to 8,241 cases filed in 2007).<sup>52</sup> The Court disposed of 72 cases in 67 signed opinions.<sup>53</sup> Yet, this number is remarkably incomplete. The 67 signed opinions refer solely to majority opinions.<sup>54</sup> What Chief Justice Roberts does not reveal is that eight of the nine Justices, including the Chief Justice, wrote *more separate opinions* in 2007 than majority opinions.<sup>55</sup> Every Justice but Justice Kennedy invested more time responding to the Court's decision in a given case than issuing decisional opinions.<sup>56</sup> Three of the Justices wrote at least twice as many separate opinions as majority opinions (Justices Stevens, Scalia, and Thomas).<sup>57</sup> And one Justice, Justice Stevens, wrote three times as many separate opinions as majority opinions.<sup>58</sup> In total, the Justices drafted 187 separate opinions to resolve 72 cases.<sup>59</sup>

Imagine the additional cases that could be considered, if not resolved, with that time investment. The proliferation of individual opinions adds, unnecessarily, to a polarized and politicized society by focusing on individual Justices as opposed to one Supreme Court. Clarity suffers. Law suffers. Institutional integrity suffers. The Justices are increasingly judging in their individual capacities rather than speaking with one voice—opting for individual expression over institutional clarity. The Court with more resources than any in history is deciding less but saying more. The Justices largely choose the cases they want to resolve and then often decide to each comment at length about their respective constitutional

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50. See *Statistics*, *supra* note 6.

51. The United States Supreme Court keeps this information. See *Chief Justice Year-End Reports on the Fed. Judiciary*, *supra* note 4. In addition, annual case load statistics are available from the Supreme Court under its Journal tab. See *Journal*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/orders/journal.aspx> [<https://perma.cc/59YN-AG7W>] (last visited July 14, 2019).

52. See JOHN G. ROBERTS JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10, <https://www.supremecourt.gov/publicinfo/year-end/2008year-endreport.pdf> [<https://perma.cc/V72B-P43U>].

53. *Id.*

54. This number also excludes the 3 per curiam opinions noted by *Harvard Law Review* for 2007. *The Statistics 2008*, *supra* note 25, at 516–17.

55. See *id.*

56. *Id.* During the 2007 Term, every Justice wrote at least 1 concurring opinion and at least 4 dissenting opinions. *Id.* In total, the Justices drafted 45 concurring opinions and 72 dissenting opinions. *Id.* While the Chief Justice's Year-End Report indicates that 72 cases were resolved, the Harvard statistics indicate that only 70 opinions of the Court were drafted to resolve those cases. *Id.*

57. *Id.* Justice Stevens wrote 21 separate opinions compared to 7 majority opinions. *Id.* Justice Scalia wrote 18 separate opinions compared to 8 majority opinions. *Id.* Finally, Justice Thomas wrote 17 separate opinions compared to 7 majority opinions. *Id.*

58. *Id.*

59. *Id.* Harvard notes that while 72 decisions may have been rendered, the Court only issued 70 opinions “of the Court” to do so. *Id.*

interpretations. The Justices increasingly shine the light on themselves, not the Constitution. This practice should stop.

#### IV. THE SOLUTION: NO MORE SEPARATE OPINIONS

The Court should return its focus to its decisional responsibilities. Article III vests the Supreme Court with the power to resolve cases and controversies.<sup>60</sup> And, while the Constitution does not direct how the resolution of those cases and controversies should be communicated, the Roberts Court's approach of writing lengthy, fractured opinions is not helping to clearly communicate the law. The Court's numerous separate opinions are making the law less accessible to the average person. When each Justice has to have his or her say, readers struggle to know what the law is and whether a majority opinion means what it says. This is particularly problematic when the Court is unable to provide a united front in controversial and complicated cases. The most recent example happened this Term.

On June 20, 2019, Justice Alito read his "majority" opinion from the Supreme Court bench in one of the Term's most anticipated First Amendment cases.<sup>61</sup> Upon finishing, and before announcing the separate opinions in the case, he jokingly indicated that "my colleagues and I have been quite prolific in our writing."<sup>62</sup> This line would be funny were it not so emblematic of the Roberts Court's legacy. The case begins:

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B, II-C, III, and IV, in which ROBERTS, C. J., and BREYER, KAGAN, and KAVANAUGH, JJ., joined, and an opinion with respect to Parts II-A and II-D, in which ROBERTS, C. J., and BREYER and KAVANAUGH, JJ., joined. BREYER, J., filed a concurring opinion, in which KAGAN, J., joined. KAVANAUGH, J., filed a concurring opinion. KAGAN, J., filed an opinion concurring in part. THOMAS, J., filed an opinion concurring in the judgment. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.<sup>63</sup>

Seven of the nine Justices wrote individual opinions in the case. This separate writing approach subverts the Court's decisional role by emphasizing the Justices' individual ideas over their institutional positions. Worse still, it elevates writing over deciding. "The proper functions of an opinion are to succinctly express the court's reasons why it decided as it did, to develop the law, and to force the author to think through the decision."<sup>64</sup> The Court's many opinions in the *American*

60. See U.S. CONST. art. III, § 2, cl. 1.

61. See generally *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

62. Mark Walsh, A "View" from the Courtroom: "Quite Prolific in Our Writing", SCOTUSBLOG (June 20, 2019, 5:54 PM), <https://www.scotusblog.com/2019/06/a-view-from-the-courtroom-quite-prolific-in-our-writing/> [https://perma.cc/7PF5-BEKF].

63. *Am. Legion*, 139 S. Ct. at 2067.

64. See Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5

*Legion* case failed on all points: seven Justices, eighty-one pages. It is time for change.<sup>65</sup>

This article proposes a solution to the Court's problem of overwriting and under-deciding: eliminate both signed opinions and separate opinions. Were the Court simply to decide cases—without attributing names to its opinions—the notoriety incentive would disappear and more work would likely get done.<sup>66</sup> The Court should issue only a single *unsigned* majority opinion. The shift to issuing *per curiam* opinions, or unsigned opinions for the Court, would help “place emphasis on the serious nature of the Court's decisions, not on how scintillating or sparkling the language and writing style of its individual members might be.”<sup>67</sup> Separate opinions have yielded little fruit in the modern era and are distracting from the Court's decisional duties.

The Court should publish only the decision “of the Court” by “the Court” without attributing a decision to any particular Justice.<sup>68</sup> The Supreme Court is a governmental institution. And the Justices should strive to fulfill their institutional duties by agreeing to lend their talents, not their name, to its final decisions.

Like Chief Justice John Marshall, this author believes it is the voice of the Court, not the individual author, that matters.<sup>69</sup> In calling for an end to the “culture of signed majority opinions,” Professors Craig S. Lerner and Nelson

SCRIBES J. LEGAL WRITING 41, 47 (1994–1995).

65. In 2005, right before Chief Justice Roberts joined the Court, a similar decision was rendered in a First Amendment case involving the Ten Commandments. The start of that opinion is nearly identical:

REHNQUIST, C.J., announced the judgment of the Court and delivered an opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. O'CONNOR, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined.

*Van Orden v. Perry*, 545 U.S. 677, 679 (2005). In *Van Orden*, the Supreme Court analyzed whether a six-foot tall statute of the Ten Commandments on the Texas State Capitol grounds was constitutionally permitted. This case, like the *American Legion* case, produced seven separate opinions and spanned seventy-one pages. *Id.*

66. Lerner & Lund, *supra* note 44, at 1231.

67. Nygaard, *supra* note 64, at 45.

68. The author is not the first person to call for this change. Judge Richard Lowell Nygaard did so in the mid-1990s, with the immediate disclaimer the change would never occur. *See id.* at 41. Judge Nygaard began “by stating [his] not so-tentative hypothesis that the practice by appellate courts of issuing signed opinions is obsolete and counterproductive. It should be abolished.” *Id.* Similar calls for eliminating signed opinions have been made by Lerner and Lund. Lerner & Lund, *supra* note 44, at 1231 (“The solution we propose is a simple one: by statute, Justices should no longer be permitted to affix their names to the opinions—majority, concurring, or dissenting—that they file.”); *see also* Peter Bozzo, *The Jurisprudence of as Though: Democratic Dialogue and the Signed Supreme Court Opinion*, 26 YALE J.L. & HUMAN. 269, 299 (2014); James Markham, *Against Individually Signed Opinions*, 56 DUKE L.J. 923, 927 (2006); Scott S. Bodderly, *How to Turn Down Political Heat on the Supreme Court and Federal Judges: Stop Signing Opinions*, USA TODAY (Dec. 7, 2018, 9:02AM), <https://www.usatoday.com/story/opinion/2018/12/07/political-attacks-judges-unsigned-opinions-turn-down-heat-column/2207443002/> [https://perma.cc/YA2J-DTFU]; Suzanna Sherry, *Our Kardashian Court (and How to Fix It)* 10–20 (July 29, 2019) (unpublished article), <https://ssrn.com/abstract=3425998>.

69. Nygaard, *supra* note 64, at 45.

Lund note:

Today, one Justice writes an “opinion for the Court” (or tries to do so—sometimes there is no majority opinion at all), and other Justices trumpet their disagreements, from the trivial to the profound, in multiple concurring and dissenting opinions. This practice can create tensions with the traditional ideal of the rule of law, and it does not consistently produce much in the way of compensating benefits.<sup>70</sup>

The *American Legion* case serves merely as the most recent example. Lerner and Lund, like others calling for the end to signed opinions, argue that eliminating individual attribution will lead to greater institutional credibility.<sup>71</sup> It might also lessen the incentives for separate writing.<sup>72</sup>

The modern practice of separate writing has grown out of control. Justice Scalia famously said he writes his dissents “for law students.”<sup>73</sup> But that approach has moved far afield from Chief Justice Charles Evans Hughes’s “appeal to the brooding spirit of the law, to the intelligence of a future day.”<sup>74</sup> Separate opinions should not be the occasion to undermine the majority opinion, chastise fellow Justices, or further politicize the Supreme Court. All opinions are not equal. Only majority opinions are the law—regardless of whether at some later time another idea might become the law. In contrast to separate opinions and their aspirational nature, the majority opinion being issued is not contingent. The opinion of the Court is the law.

Yet under the current framework, every opinion appears outwardly equal and is printed seriatim to allow each Justice to share his or her respective thoughts. This is true even if a Justice speaks alone in an attempt to discredit the majority’s legal decision—or comments on matters not even before the Court. In true democratic fashion, there should be a singular opinion “for the Court” that provides only the opinion voted on by the largest number of Justices signing on to that opinion. Separate, signed opinions add little institutional value while adding a great deal of mischief. The law needs to be clear and needs to be clearly communicated. Concurring and dissenting opinions add uncertainty without adding corresponding value.

As Justice Rehnquist wrote in 1973, “There are those who suggest that today’s Court is too prone to produce separate opinions, and that if there were fewer of them, there would be more time to deliberate and to write opinions for the Court.”<sup>75</sup> The author is one of those individuals. Chief Justice Marshall’s characterization of the Supreme Court’s duty “to say what the law is” has been transformed into a modern exercise of overwriting and under-deciding. And, while some might argue that a separate opinion “is an appeal to present and future

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70. Lerner & Lund, *supra* note 44, at 1276.

71. In fairness, Lerner and Lund do not call for an end to separate opinions. *See id.*

72. *Id.* at 1283.

73. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> [https://perma.cc/PR73-NY74].

74. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).

75. Rehnquist, *supra* note 24, at 363.

[Justices] to see the light,” there are more effective methods of persuasion.<sup>76</sup> More importantly, the Court’s duty is to say what the law *is*—not what it should be.

The cacophony of voices is muddying the waters—not clarifying the law.

#### V. SOMETHING WORTH STRIVING FOR: CLARITY, READABILITY

During his confirmation proceeding, Chief Justice Roberts professed his desire to write accessible opinions and take more cases.

I hope we haven’t gotten to the point where the Supreme Court’s opinions are so abstruse that the educated lay person can’t pick them up and read them and understand them. You shouldn’t have to be a lawyer to understand what the Supreme Court opinions mean. . . . I hope we haven’t gotten to the point where that is an unattainable ideal. . . . But I do think that’s something that it’s worth shooting for, at least in most cases, that opinions should be accessible to educated people without regard to whether they’re lawyers or not.<sup>77</sup>

Thus far, Chief Justice Roberts has not delivered. But there is time to change. Were the Court to place its energies on simply saying what the law is, society would benefit from shorter and clearer opinions. Without collectively drafting thirty-one more separate opinions than majority opinions each Term, the Court will have more time to decide the important legal matters of the day. Without spending twice as much time drafting non-decisional opinions, the Justices will have time to work on collaboration—on reaching consensus and returning the Court to its decisional roots. After all, the primary duty of the Supreme Court is to decide. And the author thinks that’s something worth shooting for.

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76. *Id.*

77. *Confirmation Hearing*, *supra* note 1, at 385 (statement of John G. Roberts Jr.).