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## Goodbye to Concurring Opinions

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# GOODBYE TO CONCURRING OPINIONS

MEG PENROSE\*

## ABSTRACT

*Modern Supreme Court opinions are too long. They are too fractured. And they often lack clarity. Separate opinions, particularly concurring opinions, are largely to blame. Today's justices are more inclined to publish separate opinions than their predecessors. The justices do not want to read lengthy briefs but appear willing to publish lengthy opinions. Yet the justices owe us clarity. They should want the law to be understandable—and understood. In hopes of achieving greater legal clarity, this article calls for an end to concurring opinions.*

*The modern Court writes more separate opinions than past courts. It is becoming far too common that in a given term there will be more separate opinions than majority opinions. This is causing problems for judges, lawyers, law students, and ordinary Americans. Surely most cases do not necessitate separate writing. Whether these separate opinions are driven by ego, politics, law clerks, celebrity, a desire to be a part of the legal “conversation,” or the refusal to accept that a particular justice's approach failed to garner sufficient votes to serve as the majority opinion, they should stop. A return to seriatim opinions poses institutional risks. Rarely do concurring opinions become future law.*

*Little is gained through concurring opinions. It is time to discard the myth that an add-on opinion will one day become binding precedent. It rarely happens. And the regular costs are not worth the rare advantages.*

*This article seeks Supreme Court reform. The justices should voluntarily agree to stop writing concurring opinions. My thesis is simple: it is time to say goodbye to concurring opinions.*

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## INTRODUCTION

Quick! List the U.S. Supreme Court's five most impactful concurring opinions. Better yet, list the top ten. Do they readily come to mind? How long did it take you? Are these cases taught regularly? Have any more than the first five actually become the law? This article challenges the belief that separate opinions, particularly concurrences, are justified because they often become the law. That is factually untrue. And it is even less likely for modern cases decided by the Burger, Rehnquist, and Roberts Courts.

The current problem is easily shown. In analyzing whether a six-foot statue of the Ten Commandments could remain on the Texas State Capitol grounds, the Court introduced its decision as follows:

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.<sup>1</sup>

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1. *Van Orden v. Perry*, 545 U.S. 677, 679 (2005) (internal citations omitted). The justices' multiple opinions span 69 pages (including 3 pages of pictures) and nearly 23,000 words. Even after all this reading, because of the Court's fractured approach, the case offers a plurality opinion with insufficient guidance regarding religious monuments on public land. The companion case, decided the same day and addressing a similar question about the posting of the 10 Commandments on public property, spawned 3 separate opinions and covered 68 pages. See *McCreary County, Ky. v. Am. Civ. Liberties Union, Ky.*, 545 U.S. 844, 844–912 (2005).

This introduction, announcing multiple separate opinions, is becoming increasingly common.<sup>2</sup> In fact, the Burger, Rehnquist, and Roberts Courts have consistently averaged near 60% for decisions containing at least one dissenting opinion and roughly 40% for decisions containing at least one concurring opinion.<sup>3</sup> This individualized writing approach should stop.

My thesis is simple: it is time to say goodbye to concurring opinions.

Modern Supreme Court opinions are too long. They are too fractured. And they often lack clarity. Separate opinions, particularly concurring opinions, are largely to blame. Litigants practicing before the Court are not permitted to approach the law like the justices. Our writing is constrained.<sup>4</sup> In 2019 the Court shrunk the length of litigants' merits briefs from 15,000 to 13,000 words.<sup>5</sup> This proposal came as the Roberts Court itself continued to break verbosity records for average opinion length.<sup>6</sup> We are also required to be clear and concise.<sup>7</sup> Supreme Court Rule 14 permits denial of certiorari based solely on a Petitioner's lack of clarity.<sup>8</sup> What if the Court had to live by its own rules? Would opinions change, becoming more succinct and understandable? Would the law?

The modern Court has drifted far from John Marshall's unified and institutionally-minded Court.<sup>9</sup> Seeking institutional respect, Chief

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2. See Nancy Maveety, *The Era of the Choral Court*, 89 JUDICATURE 138, 138 (2005–06) (highlighting the increasing practice of issuing concurring opinions at the Supreme Court).

3. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 782 (2015).

4. See SUP. CT. R. 33(g) (July 1, 2019). Certiorari petitions are limited to 9,000 words. Merits briefs filed by the parties are limited to 13,000 words.

5. Prior to this Rule change, litigants had 15,000 words to argue their case. The Court felt this was too much. See SUP. CT. R. 33 (Proposed Revisions to the Rules of the Supreme Court of the United States, November 2018). The comment to this proposed change states:

Experience has shown that litigants in the Court are able to present their arguments effectively, and without undue repetition, with word limits slightly reduced from those under the current rule. Reductions similarly designed were implemented for briefs in the federal courts of appeals in 2016.

6. Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 17, 2010, at A24.

7. See SUP. CT. R. 24.6 (requiring that merits briefs “be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.”) *Id.*

8. SUP. CT. R. 14.4 states that “[t]he failure of a petition to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.”

9. See, e.g., Maveety, *supra* note 2, at 139 (“Apparently, the Rehnquist justices conceptualized both ‘the Court’s outputs’ and their contribution to them in a more individualistic fashion than the cohorts of justices from past eras.”).

Justice Marshall encouraged the justices to issue an Opinion of the Court—singular.<sup>10</sup> Our current Chief, John Roberts, laments that “during Marshall’s thirty years as chief, ‘there weren’t a lot of concurring opinions. There weren’t a lot of dissents. And nowadays, you take a look at some of our opinions and you wonder if we’re reverting back to the English model, where everybody has to have their say. It’s more being concerned with the jurisprudence of the individual rather than working toward a jurisprudence of the Court.’”<sup>11</sup> Today, despite Chief Justice Roberts’s hope for a more unified approach, the justices regularly issue individual concurring and dissenting opinions.<sup>12</sup> These separate opinions, often restating the objections of other concurring or dissenting justices, generally add length without adding clarity.<sup>13</sup> The tone can be overtly personal, lacking in professionalism and civility.<sup>14</sup> It is as if the Constitution’s promise of “one Supreme Court” has broken down into nine component parts. Have we returned to the days of seriatim opinions?

In the spirit of Justice Roberts’s call for “a jurisprudence of the Court,” this article calls for an end to concurring opinions. “In the 2009 Term, over three-quarters of the opinions published by the Supreme Court of the United States included a concurring opinion written by an individual Justice; an astounding record for the High Court.”<sup>15</sup> Unlike dissenting opinions, which at least take issue with the result, concurrences express disagreement while clinging to the majority’s result. In other words, the concurring justice, having lost the persuasive battle in having his or her opinion serve as the Court’s reasoning, seeks to publish that same discarded opinion and circumvent the Court’s vote. It is an anti-democratic approach to opinion writing. By definition, the concurring justice was not selected to draft the Court’s opinion.<sup>16</sup>

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10. *Id.*

11. Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC (Jan. 2007), <https://www.theatlantic.com/magazine/archive/01/robertss-rules/305559/>.

12. Chief Justice Roberts admonished, “I think 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.” *Id.*

13. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (featuring multiple separate opinions presenting the individual justices’ perspectives, but adding no new law).

14. *See* Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS, 237, 282 (2008) (“An opinion that veers into a personal attack on another judge is often deficient in legal analysis.”).

15. Ryan M. Moore, *I Concur—Do I Matter: Developing a Framework for Determining the Precedential Influence of Concurring Opinions*, 84 TEMP. L. REV. 743, 743 (2012).

16. *See* Maveety, *supra* note 2, at 138 (explaining concurrence-based opinions are not the result of majority opinion directives).

But, using his or her prerogative to draft an individual opinion, the justice refuses to yield and seeks to either limit, undermine, or actually argue against the law crafted by the Court's majority opinion. Sometimes the justice discusses issues neither raised nor briefed, providing readers with obiter dictum and added work.<sup>17</sup> Worse still, this individualized approach can lead to a plurality opinion that wastes the scarce judicial resources a Supreme Court opinion offers. Such was the case with the Ten Commandments example above.<sup>18</sup>

Varying arguments are given to support concurring opinions.<sup>19</sup> None are persuasive. Legal disputes are binary. In each case—which the Court is tasked with resolving—there is a winner and a loser.<sup>20</sup> Why should the justices be permitted to write separately if they side with the winner? What value is there in multiple individualized judicial opinions all reaching the same end result? “Concurrences destroy the clarity and authority of a majority opinion, without adding the principled disagreement of a dissent. Compared with dissents, concurrences appear as judicial sour grapes.”<sup>21</sup>

Arguments supporting individual opinions, including concurrences, claim that: (1) separate opinions appeal to the wisdom of a future day and eventually become law;<sup>22</sup> (2) separate opinions provide litigants

17. There are serious opportunity costs to lengthy, unfocused Supreme Court opinions. These include increased time needed by students to study the law and discern the holding of a case, practicing lawyers who have to ensure they remain up to date on the law, and lower courts which regularly have a much larger work (and opinion writing load) than Supreme Court Justices. See Lebovits et al., *supra* note 14, at 255.

18. See *supra* text accompanying note 1.

19. See *infra* text accompanying notes 22–26.

20. See U.S. CONST. art. III, § 2. Federal courts are limited to hearing cases involving disputes between parties and are not vested with any power to issue advisory opinions. *Id.*

21. Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 837 (2018).

22. Antonin Scalia, *The Dissenting Opinion*, SUP. CT. HISTORICAL SOCIETY J. 33, 35 (1994). Regarding dissents, Justice Scalia observed that:

When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern.

*Id.* In this same lecture, however, Scalia conceded that, “[a]t the Supreme Court level . . . a dissent rarely helps change the law.” *Id.* at 37. “Even more rarely does a separate concurring opinion have the effect of shaping the future law—rarely but not never.” *Id.* But see *Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring). Justice Thomas's concurrence in *Printz*, after noting that while the parties did not raise the question of whether “the substantive right safeguarded by the Second Amendment . . . is read to confer a *personal* right to ‘keep and bear arms,’” went on to footnote the growing historical evidence and commentary supporting such a reading. *Id.* at 938–939. He presciently, continued that “[p]erhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the

with road-maps for future cases;<sup>23</sup> (3) separate opinions improve and sharpen the majority opinion;<sup>24</sup> (4) separate opinions assure the losing party that all arguments were adequately considered;<sup>25</sup> and, (5) separate opinions ensure that the justices are not being “lazy” or protecting incompetent colleagues.<sup>26</sup>

These arguments are unconvincing when considering the added length and lost clarity of numerous separate opinions. First, separate decisions, particularly under the modern Court, rarely become law.<sup>27</sup> Second, a Court opinion should *decide* a case (or object to its decision), not provide legal signposts to gin up future litigation. Third, in a Supreme Court staffed with extraordinary thinkers—arguably the best legal minds in our country—arguments 3, 4 and 5 ring hollow. Surely, the justices do not need to publish multiple opinions in each case to sharpen one another’s thinking. In fact, overlapping opinions can confuse even the justices themselves, as noted by Justice Alito’s oral introduction of the Court’s plurality decision in *Williams v. Illinois*: “We granted certiorari and now affirm. Anyone interested in understanding the Court’s holding will have to read our opinions.”<sup>28</sup> Finally, the Court’s credibility can be undermined when a displeased justice suggests that something outside the arguments presented was considered or, worse still, motivated the decision. As one article noted, a published opinion should be a legal tool, not a spectacle.<sup>29</sup>

This article seeks Supreme Court reform. The justices should voluntarily agree to stop writing concurring opinions. Recognizing the justices are loath to restrict themselves,<sup>30</sup> the American Bar Association

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right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’” *Id.* at 939. Eleven years later, Justice Scalia’s majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), established a limited personal Second Amendment right.

23. See *Printz*, 521 U.S. at 936 (Thomas, J., concurring) (providing the template for *Heller*, 554 U.S. 570 (2008)).

24. See Scalia, *supra* note 222, at 41 (writing that dissents are “sure cures for laziness” and cause the writer of the majority opinion to refine its reasoning).

25. Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 FLA. L. REV. 394, 395–96 (1952).

26. See Scalia, *supra* note 22, at 34 (wherein President Thomas Jefferson openly stated that the practice of a single court opinion “is certainly convenient for the lazy, the modest and the incompetent”).

27. See Scalia, *supra* note 22, at 37.

28. Oral comments from Justice Alito introducing *Williams v. Illinois*, 567 U.S. 50 (2012).

29. Lebovits et al., *supra* note 14, at 250.

30. See, e.g., THE CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES (AM. BAR ASS’N 2019). This ethical code does not apply to the justices. *Id.* at 2. Instead, the code explicitly states that it only “applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.” *Id.*

(“ABA”) should consider reinstating Judicial Canon 19, seeking an end to excessive individualized opinions.<sup>31</sup> Lower courts need the clarity that a single Supreme Court majority opinion gives. Our country needs to retreat from an overly politicized judiciary compounded by emphasizing individual justices over the institution of the Court. It is time for the justices to put institutional needs above individuality.<sup>32</sup> Rather than return to the pre-Marshall era of seriatim opinions, it is time to return to the Marshallian approach restoring institutional faith in the Court. It is time for an end to concurring opinions.

## I. HISTORY OF SEPARATE OPINIONS

To help give perspective, a brief historical description is necessary. Early American courts often followed the British judicial approach. But, as American courts evolved, we began to adopt our own writing traditions. This section traces those developments.

### A. *The British Approach*

The early British system used two approaches for reporting decided cases.<sup>33</sup> The first, originating in an early 17<sup>th</sup> century Privy Council Order, prohibited separate opinions.<sup>34</sup> This tradition, which required that “[w]hen the business is to be carried by the most voices, no publication is afterwards to be made by any man, how the particular voices and opinions went,” was enshrined by Parliament in the 19<sup>th</sup> century.<sup>35</sup> Interestingly, this same approach took hold in Pennsylvania and Louisiana, where dissenting opinions in the state Supreme Courts were legislatively prohibited. In Pennsylvania, the rule could be

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Congress is currently seeking to change this and require that the justices also be bound by some ethical code.

31. American Bar Association, *Canons of Judicial Ethics* (1924). Canon 19, entitled Judicial Opinions, admonished that “[a] judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.” *Id.* Because concurring opinions were not a common feature in 1924, there was no similar dissuasion directed specifically at concurring opinions. However, the spirit of Canon 19 clearly envisions institutional interests will be placed above individual interests, if possible, when writing separate opinions.

32. This remedy was previously suggested, and ignored, in 1959. See Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 209–14 (1959) (advocating for the Court’s re-adoption of Canon 19).

33. For an excellent history on the British system, including the King’s Bench and Thomas Jefferson’s support of its seriatim approach, see *id.* at 187–91.

34. Alex Simpson, Jr., *Dissenting Opinions*, 3 U. PA. L. REV. 205, 207 (1923).

35. *Id.*



circumvented only when the dissenting justice individually paid for publication of the separate opinion.<sup>36</sup>

In contrast to the Privy Council decisions, the House of Lords would freely publish each judges' opinion, allowing the "antagonistic views" to be publicly aired.<sup>37</sup> Legal observers then combed through the separate opinions to determine what the Court (as an institution) decided.<sup>38</sup> The upside was transparency. The downsides were both a lack of clarity and the effort required to understand what the Court held.

### *B. The Supreme Court's Early Approach*

The early U.S. Supreme Court, though inconsistent in its practices, largely followed the British Law Lords' practice of separate, seriatim opinions.<sup>39</sup> Each justice, speaking for himself, would issue an opinion. Beginning with the junior justice, the justices in turn would state their individual reasons for deciding each case.<sup>40</sup> Lawyers were expected to discern the Court's holding by analyzing the separate opinions.<sup>41</sup>

Our fourth Chief Justice, John Marshall, abandoned the seriatim approach.<sup>42</sup> Early in his tenure Marshall determined there should be a single opinion "for the Court."<sup>43</sup> This approach emulated the British Privy Council. The Privy Council, in speaking for the King, necessitated a singular pronouncement.<sup>44</sup> And, while Chief Justice Marshall did not literally prohibit separate opinions, he successfully persuaded his colleagues that a single opinion would add credibility and authority to the Court's decisions.<sup>45</sup> Marshall's approach of a single opinion also

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36. *Id.* at 206. The Pennsylvania Act of 1845 mandated that "no minority opinion" of the Pennsylvania Supreme Court could be published. *Id.* at 207–08. This mandate, it appears, was often honored more in the breach. *Id.* at 208–09.

37. *Id.* at 207.

38. Laura K. Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 530–31 (2000).

39. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L. REV. 137, 139–41 (1999).

40. Evan A. Evans, *The Dissenting Opinion-Its Use and Abuse*, 3 MO. L. REV. 120, 120 (1938).

41. *See* Ray, *supra* note 38, at 531.

42. Unlike the British, where Lord Mansfield eliminated the seriatim approach only during his time on the King's Bench, Marshall instituted permanent change. Marshall's unusually long tenure on the Court may explain, in part, why the British returned to seriatim opinions and the Americans held on to Marshall's change. *See* ZoBell, *supra* note 32, at 190–193.

43. *Id.*

44. Simpson, Jr., *supra* note 34, at 207.

45. *See* Scalia, *supra* note 222, at 35 (noting Marshall himself dissented only 9 times in his 34-year career).

corresponded with the Constitutional command that there shall be “one Supreme Court.”<sup>46</sup>

Not everyone appreciated Marshall’s approach. President Jefferson, himself a distinguished lawyer,<sup>47</sup> famously assailed Marshall’s goal of a single Court opinion, lamenting:

An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning.<sup>48</sup>

Jefferson “favored a return to ‘the sound practice of the primitive court’ of delivering seriatim opinions.”<sup>49</sup> Jefferson was not only concerned with transparency. He appreciated that the only constitutional check on the justices was impeachment.<sup>50</sup> Jefferson believed the practice of a single court opinion shielded the justices from proper public scrutiny for impeachable conduct.<sup>51</sup> In a letter to Justice Johnson, Jefferson observed that the justices “holding their offices for life are under two responsibilities only: 1. Impeachment. 2. Individual Reputation. But this practice [of a single court opinion] completely withdraws them from both . . . . [T]he opinion therefore ever so impeachable, having been done in the dark it can be proved by no one.”<sup>52</sup>

Despite Jefferson’s frustration, the practice of a single Court opinion stuck. For most of Marshall’s tenure, the Court spoke with one voice.<sup>53</sup> And in that first instance where a justice wrote separately—in

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46. U.S. CONST. art. III, § 1. The Framers vested “[t]he judicial Power of the United States . . . in one Supreme Court.” *Id.* The Constitution does not establish, or even mention, the number of justices to be placed on this Court. *Id.* The only individualization provided is connected to the judge’s office (or job security): “Judges . . . shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” *Id.*

47. See generally FRANK L. DEWEY, THOMAS JEFFERSON LAWYER (1986).

48. ZoBell, *supra* note 32, at 194.

49. *Id.*

50. See U.S. CONST. art. III, § 1 (noting that justices receive lifetime appointments and are only removed from the Court for violating norms of good behavior).

51. ZoBell, *supra* note 32, at 194 (suggesting that each justice should be compelled to announce his own views in every case before the court).

52. See Scalia, *supra* note 222, at 34.

53. See Russell Smyth & Paresh Narayan, *Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court*, 3 J. EMPIRICAL LEGAL STUD. 79, 84 (2006) (“[F]or most of the first two decades of his period on the Court, Johnson acquiesced in Marshall’s unanimity rule. At the urging of Jefferson to resist Marshall’s centralization of power in Washington though, during his last 10 years on the Court, Johnson became more vocal in speaking out, issuing nine concurring and 18 dissenting opinions.”).

a concurrence, no less—his colleagues responded unfavorably.<sup>54</sup> The third governmental branch needed legitimacy and one opinion “for the Court” helped provide it.

### C. *The Dawn of Separate Opinions*

Not until the late 1930s did separate opinions become common.<sup>55</sup> Between 1912 and 1921, separate dissenting opinions were written in less than one half of one percent of all cases.<sup>56</sup> In fact, it was Justice Felix Frankfurter who opened the door to separate opinion writing in a 1939 concurring opinion. In *Graves v. New York*,<sup>57</sup> Justice Frankfurter wrote:

I join in the Court’s opinion, but deem it appropriate to add a few remarks. The volume of the Court’s business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society.<sup>58</sup>

This short concurring opinion resurrected the pre-Marshallian approach of expressing individual opinions. Shortly after Frankfurter’s call for individual opinions, Justice Black issued a lengthy eighteen-page dissent from a *per curiam* opinion.<sup>59</sup>

Justice Frankfurter also was the first to author a separate *dubitante* opinion—a rare drafting technique that is neither a concurrence nor a dissent.<sup>60</sup> Many court observers remain unfamiliar with the *dubitante*

54. See Meredith K. Lewis, *Justice William Johnson and the History of Supreme Court Dissent*, 83 GEO. L.J. 2069, 2077–78 (1995) (“In fact, he issued a substantial concurrence in one of his first opinions, only to be severely rebuked by other Justices.”).

55. Smyth & Narayan, *supra* note 53, at 79 (indicating that “most studies of decision-making on the U.S. Supreme Court have focused on the 1930s or early 1940s as the period at which the consensual norm on the Court broke down”).

56. See Simpson, Jr., *supra* note 34, at 10 (writing that of the 2349 opinions filed during the period, approximately 125 dissenting opinions were filed and dissents were noted for an additional 180 opinions but were not filed).

57. 306 U.S. 466 (1939).

58. *Id.* at 487.

59. See Ray, *supra* note 38, at 520 (“In a solitary dissent of almost eighteen pages, Justice Black strongly attacked the Court’s results on several grounds . . .”).

60. Jason J. Czarnecki, *The Dubitante Opinion*, 39 AKRON L. REV. 1, 3 (2006) (noting that the term *dubitante* has been written in 12 Supreme Court cases and was used in reference to a case disposition four times).

opinion. The *dubitante* opinion has been used four times in Supreme Court history.<sup>61</sup> Introduced in 1948 by Justice Rutledge,<sup>62</sup> Frankfurter was the first Justice to actually write a separate *dubitante* opinion.<sup>63</sup> Unlike a concurrence, the *dubitante* expresses doubt without otherwise diminishing the Court's majority opinion. A return to the *dubitante* practice seems preferable to the sea of lengthy, separate opinions currently populating the U.S. Reports.<sup>64</sup> This approach would allow those with principled concerns that fall short of dissension to note disagreement without adding to opinion length or institutional instability. A brief *dubitante* notation serves the law's binary approach better than a separate concurrence.

#### D. The Supreme Court's Current Approach

Today, separate opinions are far more likely than a united Court.<sup>65</sup> This remains true even in *per curiam* opinions—those handed down “by the Court” without assigning authorship of the opinion to any particular justice.<sup>66</sup> *Per curiam* opinions were historically used for simple cases, those lacking controversy or needing extensive explanation.<sup>67</sup> Yet today, the multiplicity of published opinions, even in

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61. See *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 403 (1967) (Douglas, J., *dubitante*); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.* 380 U.S. 359 (1965) (Douglas, J., *dubitante*); *Radio Corp. of America v. United States*, 341 U.S. 412 (1951) (Frankfurter, J., *dubitante*); *Rwy. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (Rutledge, J., *dubitante*).

62. See *Rwy. Express Agency, Inc.*, 336 U.S. at 110 (“Mr. Justice Rutledge acquiesces in the Court’s opinion and judgment, *dubitante* on the question of equal protection of the laws.”). Unlike Justices Frankfurter and Douglas, who are responsible for the three other *dubitante* opinions, Rutledge did not actually attach a separate opinion to his *dubitante* notation.

63. Frankfurter’s *dubitante* spanned 6 pages. *Radio Corp.*, 341 U.S. at 421–427. It began, “[s]ince I am not alone in entertaining doubts about this case they had better be stated[.]” *id.* at 421.

64. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 149 (1990) (describing Judge Richard Posner’s preference for the *dubitante* opinion over concurring opinions that simply suggest minor reservations, include additional reasons for the opinion, or criticize a dissenting opinion).

65. ZoBell’s observation is as accurate today as when it was written in 1959:

During the last thirty or thirty-five years, division and dissension have become increasingly notable characteristics of the work of the Supreme Court. Agreement by all of the Justices as to the proper decision in an important case comes as a pleasant surprise, when it comes at all.

ZoBell, *supra* note 32, at 203.

66. See Ray, *supra* note 38, at 520 (noting that beginning in the 1930s, *per curiam* opinions began using concurrences and dissents which created “an oxymoronic form, one that simultaneously insisted on both institutional consensus and individual disagreement”); see also, Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1199 (2012).

67. Robbins, *supra* note 66, at 1200.

*per curiam* cases, has rendered the *per curiam* label “meaningless.”<sup>68</sup> As Professor Laura Ray explained, beginning in “the 1970s the Court had adapted the *per curiam* to a purpose diametrically opposed to its original use, producing *per curiam* opinions accompanied by as many as nine separate opinions, each asserting a strong and independent position. In its most elaborate incarnations, the *per curiam* finally became its own antithesis, the vehicle for three of the Court’s most challenging and most splintered constitutional cases of this century.”<sup>69</sup> Perhaps the best example remains *Bush v. Gore*.<sup>70</sup>

The fractured approach continues despite modern justices themselves condemning the practice. In 1994, Justice Scalia wrote that he did not approve of “separate concurrences that are written only to say the same thing better than the court has done, or worse still, to display the intensity of the concurring judge’s feeling on the issue before the court.”<sup>71</sup> He regarded “such separate opinions as an abuse, and their existence one of the arguments against allowing separate opinions at all.”<sup>72</sup> Despite this sentiment, and the fact that many Americans consider Scalia to be the great modern dissenter,<sup>73</sup> he is, in fact, the “Great Concurrer.”<sup>74</sup> Justice Scalia authored more concurring opinions than any other justice.<sup>75</sup>

Justice Ruth Bader Ginsburg, while a judge on the D.C. Circuit, admonished that “appellate judges might profitably exercise greater restraint before writing separately.”<sup>76</sup> She noted that “jurists in the United States might serve the public better if they heightened their appreciation of the values so prized in the civil law tradition: clarity and certainty in judicial pronouncements.”<sup>77</sup> If only the justices heeded their own advice.<sup>78</sup>

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68. *Id.* at 1198.

69. Ray, *supra* note 38, at 520.

70. 531 U.S. 98 (2000).

71. Scalia, *supra* note 222, at 33.

72. *Id.*

73. See *Antonia Scalia*, OYEZ (Oct. 29, 2019), [https://www.oyez.org/justices/antonin\\_scalia](https://www.oyez.org/justices/antonin_scalia) (noting that Justice Scalia is ranked third in Supreme Court history for the most dissenting opinions written).

74. *Id.* (suggesting that Justice Scalia ranked first in Supreme Court history for the most concurring opinions written).

75. *Id.*

76. Ginsburg, *supra* note 64, at 134.

77. *Id.* at 150.

78. See *Maveety*, *supra* note 2, at 139 (noting that by 2005, Justice Ginsburg had written more concurrences than dissents and her separate writing activities rivaled those of Justice Scalia and Justice Stevens).

Chief Justice Roberts has also publicly noted the institutional risks associated with separate opinions.<sup>79</sup> “‘If the Court in Marshall’s era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have,’ [Roberts] said.<sup>80</sup> ‘That suggests that what the Court’s been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up.’ Roberts added, ‘I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn’t it’s going to lose its credibility and legitimacy as an institution.’”<sup>81</sup> Considering these remarks, one can’t help asking, what has changed for the justices? Both Justices Scalia<sup>82</sup> and Ginsburg<sup>83</sup> are known for their separate opinion writing. Justice Roberts, while not as prolific, has similarly contributed to the growing body of individual opinions.<sup>84</sup>

Why does this matter? To begin, the Roberts Court decides fewer cases than nearly all previous Courts.<sup>85</sup> Even with more law clerks than past Courts, fewer cases are argued and resolved.<sup>86</sup> Yet the lightened workload has had an inverse relation to opinion *length*, if not clarity. Roberts Court opinions are likely to be more voluminous than all past Courts. Empirically, Roberts Court opinions average longer than any prior Court.<sup>87</sup> They are longer—but not necessarily clearer.<sup>88</sup> Imagine if instead of writing separately, the Roberts Court put that time and energy into seeking consensus and deciding more cases. In the late 19<sup>th</sup> century, the Fuller Court—without any law clerks—issued 265 signed opinions.<sup>89</sup> In 1923, the Taft Court issued 208 opinions—with only 15

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79. Rosen, *supra* note 11.

80. *Id.*

81. *Id.*

82. See ANTONIN SCALIA & KEVIN A. RING, *SCALIA’S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS* (2016).

83. See Maveety, *supra* note 2, at 139.

84. See *Writings by Justice Roberts*, LEGAL INFORMATION INSTITUTE (Oct. 29, 2019), <https://www.law.cornell.edu/supct/justices/roberts.dec.html>.

85. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012) (“Today’s Supreme Court decides markedly fewer cases than its predecessors. Since the 2005 Term, the Court has decided an average of 80 cases per Term, far fewer than the roughly 200 cases it heard earlier in the twentieth century.”).

86. See *id.*

87. See Liptak, *supra* note 6.

88. See Meg Penrose, *Supreme Verbosity: The Roberts Court’s Expanding Legacy*, 102 MARQ. L. REV. 167, 181 (2018) (“Lawyers, and law students, are reading Supreme Court opinions that often lack clarity and concision.”).

89. William H. Rehnquist, *The Supreme Court: Past and Present*, 59 AM. BAR ASS’N J. 361, 362 (1973).

separate dissenting *and* concurring opinions.<sup>90</sup> Thus, one possible consequence of less individual writing could be a return to deciding more cases like past Courts.<sup>91</sup> Rather than huddle up with law clerks to respond to other justices' writings, the Court could accept more cases and seek to provide greater clarity in the cases it decides. The return to "one Supreme Court" as Marshall understood it has more up than downside.

## II. THE MYTH THAT SEPARATE OPINIONS BECOME THE LAW

Supporters of separate opinion writing often declare that separate opinions—both concurring and dissenting—become the law. The data does not bear this out. This claim, which champions Justice Hughes's appeal to the "brooding spirit of the law, the intelligence of a future day," is simply not true.<sup>92</sup> Separate opinions rarely become future law. Justice Oliver Wendell Holmes's statement that dissents are generally "useless" is far closer to the mark.<sup>93</sup> Holmes, dubbed "the Great Dissenter," issued only 72 dissenting opinions during his 32 years on the Court—an average of less than 3 dissents per term.<sup>94</sup> Because the courts that Holmes sat on decided significantly more cases than the Roberts Court, this number stands in even starker contrast today than it did during the Burger and early Rehnquist Courts. Holmes's

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90. *Id.* at 363.

91. *But see id.* ("Perhaps the Court in recent years has overindulged the tendency to write separate views, but certainly some increase in separate opinions is a natural and warranted result of the increase in constitutional decisions.").

92. *See* CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928) ("A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

93. *Northern Securities Co. v. United States*, 193 U.S. 197, 400–01 (1904) (Holmes J., dissenting) ("I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case, and to give my reasons for it. Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words.").

94. *See* Ray, *supra* note 38, at 524–31 (noting that Holmes issued his first dissent to a *per curiam* opinion in 1909 and this potentially started the trend of attaching separate opinions to decisions issued by the Court without individual attribution); *see also* Evans, *supra* note 40, at 142 ("[D]uring the first fifty volumes of decisions wherein Justice Holmes participated, he dissented or joined in dissents in 48 cases. He concurred in 19 additional cases. In the next period covering forty-eight volumes of Supreme Court Reports he dissented 130 times and wrote concurring opinions in 20 cases.").

assessment that dissents are “useless and undesirable” feels more accurate today with opinions in controversial cases spawning four, five, and six separate opinions—sometimes with the separate opinions simply repeating the objections of colleagues that are also authoring separate opinions.<sup>95</sup> These individual efforts rarely change the law.<sup>96</sup> Few separate opinions decided by the Burger, Rehnquist or Roberts Courts have later become law.<sup>97</sup>

When pressed on the point, scholars and lawyers recite a handful of cases to support the myth that separate opinions become law. What about *Dred Scott v. Sandford*<sup>98</sup> and *Plessy v. Ferguson*?<sup>99</sup> Or, *Lochner v. New York*,<sup>100</sup> *Abrams v. United States*,<sup>101</sup> and *Olmstead v. United States*?<sup>102</sup> Five impactful dissenting opinions – the most recent of which was decided in 1928. These rare instances—five cases dating back nearly a century—hardly create an applicable rule. Rather, as Justice Scalia acknowledged, “[a]t the Supreme Court level . . . a dissent rarely helps change the law.”<sup>103</sup> And, going further, Scalia observed that

95. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (including five separate opinions—one concurrence and four separate dissents); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (including four individually filed dissenting opinions); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (including five separate opinions—the majority, two concurrences and two dissents.).

96. But see Samuel Estreicher & Tristan Pelhma-Webb, *The Wisdom of Soft Judicial Power: Mr. Justice Powell, Concurring*, 25 CONST. COMMENT. 229, 231 (2008) (noting two important instances of change including ratification of the 11<sup>th</sup> Amendment in response to *Chisolm v. Georgia*, 2 U.S. 419, 429 (1793) and Congress’s action following the Roberts Court’s decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618, 661 (2007)).

97. But see *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J., dissenting). In this dissent, Justice Ginsburg directly called on Congress to remedy what the dissenting justices believed was an important legislative oversight. Her words were unequivocal: “Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.” *Id.* In a rare (and immediate) response, Congress passed the Lilly Ledbetter Fair Pay Act of 2009. Interestingly, this case was the classic decisional model presenting the majority and a single dissenting opinion. Unlike the more fractured opinions commonly seen in controversial Supreme Court decisions, this case involved a united call to Congress by the four dissenting justices.

98. 60 U.S. 393 (1857). The Civil War, and the resulting Fourteenth Amendment, essentially overturned *Dred Scott*.

99. 163 U.S. 537 (1896) (Harlan, J., dissenting). *Plessy* was overturned by *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954).

100. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting). The *Lochner* majority’s view that due process included protections of economic rights was overturned by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390 (1937).

101. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). The *Abrams* majority’s “clear-and-present danger” exception to First Amendment protections was replaced by the narrower “imminent lawless action” exception in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

102. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). *Olmstead* was overturned by *Katz v. United States*, 389 U.S. 347, 353 (1967).

103. Scalia, *supra* note 22, at 37.



“[e]ven more rarely does a separate concurring opinion have the effect of shaping the future law—rarely but not never.”<sup>104</sup>

To fortify the concurring opinion myth, most cite three noteworthy concurrences: the Steel Seizure case,<sup>105</sup> *Whitney v. California* (which was originally drafted as a dissenting opinion for the companion case),<sup>106</sup> and *Katz v. United States*.<sup>107</sup> These three impactful concurrences hardly validate the modern practice of justices attaching multiple concurring opinions to a decision. In fact, most defenders of the value of concurring opinions champion *Katz* without acknowledging that *Katz* itself spawned 5 separate opinions: Justice Stewart’s majority opinion,<sup>108</sup> Justice Douglas’s concurrence,<sup>109</sup> Justice Harlan’s concurrence,<sup>110</sup> Justice White’s concurrence,<sup>111</sup> and, Justice Black’s dissent.<sup>112</sup> Only Harlan’s view survived,<sup>113</sup> yet five justices felt compelled to voice their thoughts in separate opinions. While *Katz* was not as verbose as today’s fractured opinions, its design took hold—justices continue to air their separate ideas regardless of future (or even current) value.

It is time to discard the myth that a lengthy, add-on opinion will one day become binding precedent. It rarely happens. And the regular costs are not worth the rare advantages.

The justices unquestionably have the freedom to write. But many of their modern separate opinions do not read like an appeal to the brooding spirit of the law. Rather, they read—page after page—like an overtly political body seeking to change the law, not one tasked with “say[ing] what the law is.”<sup>114</sup> “The proper functions of an opinion are

104. *Id.*

105. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

106. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

107. 389 U.S. at 347 (1967).

108. *Id.*

109. *Id.* at 359.

110. *Id.* at 360.

111. *Id.* at 362.

112. *Id.* at 364.

113. *E.g. Terry v. Ohio*, 392 U.S. 1, 9 (1968).

114. Rosen, *supra* note 11. In this extensive interview, Justice Roberts praised justices who were willing to put the good of the Court above their own ideological agendas. “A justice is not like a law professor, who might say, ‘This is my theory . . . and this is what I’m going to be faithful to and consistent with,’ and in twenty years will look back and say, ‘I had a consistent theory of the First Amendment as applied to a particular area,’” [Roberts] explained. *Id.* Instead of nine justices moving in nine separate directions, Roberts said, “it would be good to have a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record.” *Id.*

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>115</sup> It is not to seek notoriety or forge an independent path.

Often it feels as if "opinions are written less for the litigants than for an external audience of like-minded devotees. Justice Ginsburg has called [this] playing to the 'home crowd.'"<sup>116</sup> The danger here is that such politicization of decisions can lead, and perhaps has led, to "a sort of vote-counting approach" detrimental to the Court as an institution and the Constitution itself.<sup>117</sup> The late Justice Scalia's tragically prescient comments in this regard are worth repeating:

Whenever one of the five Justices in a 5-4 constitutional decision has been replaced there is a chance, astute counsel must think, of getting that decision overruled. And worse still, when the decision in question is a highly controversial constitutional decision, the thought occurs not merely to astute counsel but to the President who appoints the new Justice, to the Senators who confirm him, and to the lobbying groups that have the power to influence both . . . . That could not happen, or at least it could not happen as readily, if the individual decisions of all the Justices were not known.<sup>118</sup>

The fight to fill Justice Scalia's own seat best illustrates his point. Having written the most concurrences and third most dissents in Supreme Court history, Scalia was vaguely familiar to many Americans. Upon his untimely death, the challenge to ensure a continued 5-4 political balance at the Court resulted in an unprecedented stand-off between the President and Congress. The genesis for this stand-off, as Scalia predicted, can be attributed—at least in part—to the increase in separate opinion writing.<sup>119</sup> As one article explained, "the level of dissension on the Court affects how it is perceived by the legislature and executive as well as by the public through the lens of the media."<sup>120</sup> No longer do we function with "one Supreme Court." Today, we rely

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115. Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41, 47 (1994–95).

116. James Markham, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923, 925 (2006) (internal citations omitted).

117. Scalia, *supra* note 22, at 39.

118. *Id.*

119. See Markham, *supra* note 116, at 924 ("Critics have accused judges of occupying center stage in the red state-blue state culture war and of promoting a cult of personality inappropriate for a neutral and unbiased arbiter."). Indeed, the Justices levy similar accusations against one another—and when they do, the fuzzy contours of a problem begin to take shape.

120. Smyth & Narayan, *supra* note 55, at 81.

on nine “separate law offices, with individual Justices elaborating their own views, and feeling freer to express those views in public.”<sup>121</sup>

Marshall’s approach of issuing a single court opinion saying “what the law is” was both truly democratic—only the winner wrote—and non-activist. Increasingly it seems that modern justices use their separate opinions to influence public opinion, press their individual brand, or seek to change settled law.<sup>122</sup> Sadly, this happens most in those cases where dissension only undermines the objectivity of the Court and its members.<sup>123</sup> The Pentagon Papers case,<sup>124</sup> *Bush v. Gore*,<sup>125</sup> *Lawrence v. Texas*,<sup>126</sup> *District of Columbia v. Heller*,<sup>127</sup> *Obergefell v. Hodges*<sup>128</sup> and *Trump v. Hawaii*<sup>129</sup> quickly come to mind. When the country needed certainty and assurance in the non-political nature of legal decision-making, the Court failed.<sup>130</sup> More accurately, the justices failed.

Rather than bring the country together like Chief Justice Earl Warren in ensuring that *Brown v. Board of Education* had the full support of “one Supreme Court,” the modern Court displays comfort in disagreement. When the country needed to know that the Court had done its job saying “what the law is,” the separate opinion writers—those whose intellectual arguments did not win the moment—struck out against their colleagues, attacked the process, undermined the institutional legitimacy of the Court and added instability rather than certainty.<sup>131</sup>

121. Sunstein, *supra* note 3, at 791.

122. See Linda Greenhouse, *Appealing to the Law’s Brooding Spirit*, N.Y. TIMES (July 6, 1997), <https://www.nytimes.com/1997/07/06/weekinreview/appealing-to-the-law-s-brooding-spirit.html>. (analyzing the Court’s “separate expressions of individual Justices, concurring or dissenting opinions that sought not so much to influence the outcome of the case at hand as to plant a thought or start a fresh conversation”).

123. See, e.g., Markham, *supra* note 116, at 943 (“Predicting a case’s outcome based on who might be authoring the opinion is symptomatic of a Court whose members are too easily placed in neat ideological categories.”).

124. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

125. *Bush v. Gore*, 531 U.S. 98 (2000). Much like the Pentagon Papers case, *Bush v. Gore* was styled as a *per curiam* opinion but spawned numerous, separate opinions. It spanned 61 pages.

126. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (spanning 49 pages).

127. See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (spanning 157 pages).

128. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (spanning 103 pages).

129. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (spanning 92 pages).

130. See Sunstein, *supra* note 3, at 808 (“The 5-4 division in *Bush v. Gore*, with a split along ideological lines, created serious concern in part for that reason. We could speculate that a unanimous decision, or an 8-1 decision, would have given more people the impression that the law, understood neutrally, compelled the result.”).

131. See Maveety, *supra* note 2, at 139 (observing that “[j]udicial intellectual integrity, it would seem, demands a revised understanding of judicial institutional integrity”).

Concurrences pose the greatest risk.

Unlike dissent, which is viewed as a cherished part of the common law tradition, concurrence receives a less warm reception from scholars and jurists alike. Not only is it more destructive of institutional integrity and more invidious with respect to legal clarity, aspects of the [concurrences] seem difficult to understand as anything other than judicial egoism.<sup>132</sup>

Little, empirically or institutionally, is gained through concurrences.

What good does this individual approach serve? Institutionally, concurrences can be discrediting.<sup>133</sup> Judge Learned Hand thought that on constitutional matters, division on the Court was “disastrous” because it cancelled “the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”<sup>134</sup> And in the larger civil society, separate opinions can polarize factions that rely on the Court to rise above politics and objectively decide legal disputes.<sup>135</sup> Whatever the driving factor, the Court is risking its institutional integrity as judicial individuality and celebrity rises. Are the justices simply becoming nine more political actors in our constitutional structure?

Chief Justice Roberts appreciates this risk. “In deciding to resist the politicization of the judiciary, Roberts acknowledged, he has set himself another daunting task; but he said he views it also as a ‘special opportunity,’ especially in our intensely polarized age. ‘Politics are closely divided,’ he observed. ‘The same with the Congress. There ought to be some sense of some stability, if the government is not going to polarize completely. It’s a high priority to keep any kind of partisan divide out of the judiciary as well.’”<sup>136</sup>

Unfortunately, today’s justices seemingly mirror our highly polarized society. We expect more from the Court. We need more.

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132. *Id.* at 138.

133. See Rosen, *supra* note 11 (“Throughout its history, [Chief Justice] Roberts argues convincingly, the Court has best served itself—and the nation—when its individual justices have been willing to subordinate their own agendas in the interest of building judicial consensus and institutional legitimacy.”).

134. Smyth & Narayan, *supra* note 55, at 81.

135. See Lebovits et al., *supra* note 14, at 262 (“A judge must also be careful not to stray into politics when writing an opinion. The decision should focus only on the issue before the court and not what the legislature should not be doing, or discuss political realities outside the case.”).

136. Rosen, *supra* note 11.

### III. THE ANTI-MAJORITARIAN NATURE OF SEPARATE OPINIONS

Separate opinion writing, particularly when undermining the majority opinion, is anti-democratic. In modern Supreme Court practice, the rule of five governs.<sup>137</sup> If five justices agree on an outcome, that result becomes legally binding on the parties then before the Court.<sup>138</sup> If five justices agree on both the outcome and the underlying reasoning for that outcome, the opinion becomes the law of the land.<sup>139</sup> Despite this rule of five, justices continue to write individually and undermine this majoritarian approach. Justices who disagree with the result should respect the fact that their preferred result or reasoning did not win the necessary votes. Theirs is the minority, and non-successful, opinion. The rule of five is democracy in action.

The risk of individual writing—beyond its anti-majoritarian spirit—is that either readers will be unable to ascertain the Court’s holding or the opinion will fail to muster the support of five justices, thereby creating a plurality opinion. As Justice Powell explained, “each Justice has a responsibility to the Court as an institution to help form a majority wherever this can be done without sacrifice of principle or conviction. The Court is not best served by plurality or fractionated opinions.”<sup>140</sup> The justices’ separate opinions expressing individual preferences heightens the risk of plurality opinions. “Plurality opinions were a rare thing in the early history of the Supreme Court—so rare, in fact, that fewer than forty-five of them were handed down between 1800 and 1956. Since then, they have become a fairly frequent occurrence, complicating the ability of lower courts and practitioners to determine what a majority of the Justices had agreed on in a particular case.”<sup>141</sup> Today plurality opinions are commonplace. In far too many cases, the Roberts Court disagrees amongst itself and

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137. See Note: *Judgments of the Supreme Court Rendered by a Majority of One*, 24 GEO. L.J. 968, 985–87 (1936) (observing that proposals to change the simple majority rule have been previously raised, and died, in Congress). In the early 19<sup>th</sup> Century, seven proposals were introduced that would require some version of a super-majority to overturn legislation. While these proposals all failed, they demonstrate that Congress has some role, even if that role is merely symbolic, in the Court’s rule of five.

138. Thomas B. Bennett et al., *supra* note 21, at 822.

139. See *id.* at 839–41 (reminding that under the Rule of Five, concurring opinions do not become binding precedent).

140. James F. Spriggs, II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 529 (2011).

141. Estreicher & Webb, *supra* note 96, at 237.

publishes multiple competing opinions. The curious thing remains that even though the Court disagrees, “it cannot settle on a reason why.”<sup>142</sup>

In *Marks v. United States*, the Court noted that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds.’”<sup>143</sup> The so-called “Marks” rule, or the “narrowest grounds” test, exposes the greatest mischief of concurring opinions—an ability to undermine decisional clarity. The Court had a chance to provide additional guidance on the “Marks” rule and plurality opinions during its 2019 Term.<sup>144</sup> However, the Court sidestepped the issue and refused to clarify the Marks test. The confusion created by plurality opinions supports my thesis: the justices should stop publishing concurring opinions.

The Court’s role is to decide cases—not make law or debate what the law *should be*.<sup>145</sup> *Marbury* properly explained that “it is emphatically the province and duty of the judicial department to say what the law is.” On this point, most agree.<sup>146</sup> Judicial activism has a negative connotation. It suggests that Court is just another political body without the ability to objectively evaluate our enduring constitution. Yet Justice Scalia argued that:

In our system, it is not left to the academicians to stimulate and conduct discussion concerning the validity of the Court’s latest ruling. The Court itself is not just the central organ of legal *judgment*, it is center stage for significant legal debate. In our law schools, it is not necessary to assign students the writings of prominent academics in order that they may recognize and reflect upon the

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142. *Williams v. Illinois*, 567 U.S. 50, 120 (2012) (Kagan, J., dissenting from plurality opinion).

143. *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citations omitted).

144. *Hughes v. United States*, 138 S. Ct. 1765 (2018).

145. See Lebovits et al., *supra* note 14, at 256 (“A judicial opinion should resolve only the pertinent controversy and not discuss superfluous matters.”).

146. See, e.g., Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1955 (2006) (“[L]et us begin with the hopefully not controversial statement that the principal job of the Supreme Court is to decide cases by making judgments. Coming in a strong second is the duty to issue opinions, which ‘are simply explanations of those judgments or those votes on judgments.’”) (internal citations omitted). *But see* Bennett et al., *supra* note 21, at 822 (observing that “[r]ather than the excess verbiage of judges who cannot control the need to speak separately, at the expense of the clarity and authority of the law, they are essential beacons and harbingers of legal stasis and legal change alike. They signal to litigants and lawyers where there are possibilities for movement in the law, and where there are not, which issues to bring to court and which to avoid.”). These authors see a positive role in concurring opinions, especially what they classify as the “pivotal” concurrence. *Id.* at 820.

principal controversies of legal method or of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself, and can be studied from that text.<sup>147</sup>

Scalia's vision was for the Court to serve as part of the ongoing legal conversation.<sup>148</sup> This approach expands Judge Aldisert's notion that judicial opinions are simply "performance utterances"—explanations for a legal ruling.<sup>149</sup> Judges that use their individual opinions to debate or stir brewing constitutional matters come dangerously close to issuing advisory opinions. The Court's job is not to openly debate and discuss what the law should be. It is to decide concrete cases and controversies. Expanding written opinions beyond decisional duties leads to more legal mischief than masterpiece.

"Opinions are not law-review articles, historical treatises, or op-ed pieces."<sup>150</sup> Justices wanting to contribute to the legal debate should consider whether drafting a separate opinion in a live case or controversy is the appropriate vehicle. "[T]here comes a point at which the Justices' individual personae eclipse their collective institutional role, and at which justice seems less equal when an opinion is read differently depending on who wrote it."<sup>151</sup> As legal opinions grow in individuality, length and confusion, perhaps a resort to legal journals—all of which would welcome a justice's individual ideas on debating the law—would better protect the Court's institutional integrity.

The role of the Court is not to engage in legal debate. Courts decide actual cases. The Court's primary role is not to appeal to the future but to ensure that today's Constitution is objectively evaluated. The move to a "system of separate opinions has made the Supreme Court the central forum of current legal debate, and has transformed its reports from a mere record of reasoned judgments into something of a History of American Legal Philosophy with Commentary."<sup>152</sup> This elevation of individual justices from the position of judicial decision maker to legal philosophic commentator seems far removed from the Founders'

147. Scalia, *supra* note 22, at 39.

148. *Cf.* Greenhouse, *supra* note 122.

149. See Ruggero J. Aldisert, *Golden Pen Award Acceptance Remarks of the Honorable Ruggero J. Aldisert*, 15 LEGAL WRITING 1 (2009).

150. Lebovits et al., *supra* note 14, at 262.

151. Markham, *supra* note 116, at 923.

152. Scalia, *supra* note 22, at 40. Most Court observers would find this comment more expansive than expected from Justice Scalia. But, it was Scalia who famously quipped that he writes his dissents for law students.

vision. The Court was formed to resolve cases and controversies—not simply, or even secondarily, to debate them.

As one author noted:

[The] people tend ordinarily to think of the Court as something much more than an aggregate of nine statesmen of high rectitude and learning in the law. They think of it as a court, as a tribunal, as an organic whole. For constitutional leadership they look not to an aggregation of nine individual leaders but to an organic unit of one tribunal, one court. To the extent of its inability to integrate into decisions and into opinions of the Court the best that individual justices have to offer, the Court fails the people and fails in fulfillment of its proper function of leadership.<sup>153</sup>

In the modern era where none of the arguments supporting separate opinion writing seemingly bear fruit, it may be time for the justices to evaluate their individual roles in opinion writing. Perhaps the time has come for self-reflection.

#### IV. THE CALL FOR REFORM

The Roberts Court has written five of the eleven longest Supreme Court opinions.<sup>154</sup> This statistic is even more pronounced when realizing that the Roberts Court is one of the least productive in history, deciding fewer cases than past Courts.<sup>155</sup> While the Roberts Court resolves fewer actual controversies, it seems dedicated to explaining those decisions with more words and more separate writings. Why the disconnect? These justices have more generous resources—from the most law clerks, to the most advanced technology for research and writing—than all previous Courts.<sup>156</sup> The case filings may be larger, but

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153. ZoBell, *supra* note 32, at 207.

154. See *Ten of the Longest Supreme Court Decisions*, N.Y. TIMES (Nov. 18, 2010), <http://www.nytimes.com/imagepages/2010/11/18/us/18rulingsGrfxB.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=EndOfArticle&pgtype=article>. The New York Times chart provides the following list: Buckley v. Valeo, 76,639 words; McConnell v. Federal Election Commission, 70,228 words; Furman v. Georgia, 66,233 words; McDonald v. Chicago (Roberts Court), 58,597 words; Communist Party v. Subversive Activities Bd., 58,404 words; Oregon v. Mitchell, 51,628 words; Hamdan v. Rumsfeld (Roberts Court), 50,096 words; Planned Parenthood v. Casey, 48,878 words; Citizens United v. Federal Election Commission (Roberts Court), 48,686 words; Parents Involved v. Seattle (Roberts Court), 47,235 words. This 2010 chart omits the 2012 decision in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), the so-called Obamacare case, which is 52,395 words.

155. Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. REV. FORUM 8, 8–10 and 13–14 (2019).

156. At least one author suggests that the law clerks are partially to blame for the increase in separate writing. See Maveety, *supra* note 2, at 145. The justices, however, are the ones that



there is more support than ever to help address these increases. And if the workload is overwhelming, why do these justices focus their limited energies on publishing so many separate opinions? When overextended and pressed for time, one would think the opportunity costs of writing separately would be seriously reconsidered.

The recent case challenging President Trump's Executive Order limiting foreign nationals' entry into the United States underscores the ongoing problem.<sup>157</sup> Much like this article's opening illustration, the Roberts Court continues the tradition of cases that open with the following designation:

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.<sup>158</sup>

In both illustrations, the Chief Justice wrote the majority opinion. In both illustrations, the Court is openly fractured. The *Trump v. Hawaii* justices, unable to muster more than a 5-4 majority, added unnecessary length and dialogue to the opinion in near seriatim fashion. And, in a much-anticipated opinion, the Court provided us with 5 separate opinions totaling 87 pages and nearly 26,000 words.<sup>159</sup> This trend is disheartening. Individual writing should yield to institutional clarity.

The modern urge to write separately seems unmoored from its historical legacy, one that was forever altered by Chief Justice Marshall's move toward an opinion of the Court.<sup>160</sup> Surely most cases do not necessitate separate writing. Whether these separate opinions

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ultimately sign on to an opinion. Thus, even if law clerks encourage separate writings, it is the justices themselves that bear the ultimate decisional (and writing) responsibilities.

157. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2017).

158. *Id.*

159. *Id.* The Chief Justice's majority opinion is 39 pages. Justice Kennedy filed a 2 page concurrence. Justice Thomas filed a 10 page concurrence. Justice Breyer filed an 8 page dissent. And Justice Sotomayor filed a 28 page dissent.

160. See Nygaard, *supra* note 115, at 41 (calling "dysfunctional" the fact that modern "appellate judges think of 'their' opinions rather than opinions 'by the court'"). "The consequence is an unfortunate blending of judicial ego into the institutional mixture." *Id.* Judge Nygaard continued, "each of us is tempted to make each opinion our own literary creation. The problem is that few among us are really literary creators; and what we produce is not literature." *Id.* at 42.

are driven by ego,<sup>161</sup> politics,<sup>162</sup> law clerks,<sup>163</sup> celebrity,<sup>164</sup> technology,<sup>165</sup> a desire to be part of the legal “conversation,”<sup>166</sup> or the refusal to accept democratically achieved defeat, they need to stop. A return to seriatim opinions poses institutional risks. And, the opportunity costs—borne both by the justices (in writing) and lawyers (in reading) lengthy opinions rife with obiter dictum—hardly seem worth the energy.<sup>167</sup> While technology has eased the ability to draft court opinions, the editorial pen should still be liberally employed.

Because the Roberts Court has a growing problem with its opinions, reform is necessary. Ideally, the justices would voluntarily agree to reign themselves in and stop publishing concurring opinions.<sup>168</sup> While dissents, particularly when drafted by every member of the dissent, pose similar problems regarding opportunity costs, clarity and civility, they are at least defensible as taking issue with the result. If justices feel

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161. See Ginsburg, *supra* note 64, at 139 (noting that separate opinions may “nourish a judge’s ego”).

162. See Lebovits et al., *supra* note 14, at 270 (“A judge must also be careful not to stray into politics when writing an opinion. The decision should focus only on the issue before the court and not what the legislature should not be doing, or discuss political realities outside the case.”).

163. See Ginsburg, *supra* note 64, at 148–49; see also Maveety, *supra* note 2, at 14 (describing notes from former clerks).

164. From the RBG phenomenon to Justice Scalia’s statement that he wrote his dissenting opinions for “law students,” one cannot deny that some of the modern justices enjoy popular notoriety. This issue is not new. Writing in 1938, Seventh Circuit Judge Evans lamented that some judges write separately due to the “publicity bug,” noting that the publicity usually goes to the dissenting justice rather than the majority. See Evans, *supra* note 40, at 134; see also Nygaard, *supra* note 115, at 43 (decrying “the personality cult of the signed opinion”); Markham, *supra* note 116, at 924 (“There is no shortage of attention paid to the Justices’ personal lives; a multiplicity of web logs (blogs) is devoted to everything from judges’ jurisprudence to their appearance and personalities.”).

165. See Ginsburg, *supra* note 64, at 149.

166. See Robert F. Blomquist, *Concurrence, Posner-Style: Ten Ways to Look at the Concurring Opinions of Judge Richard A. Posner*, 71 ALB. L. REV. 37, 40 (2008) (observing that sometimes a concurrence is written to compete “with other judges and academics in the legal marketplace of ideas”).

167. See, e.g., West, *supra* note 146, at 1956 (“Assuming that a separate writing indicates some amount of divergence from the majority opinion, whether greatly in substance or minimally in emphasis, the reader must then search for further clues to determine the extent of the justice’s departure.”).

168. See, e.g., Rosen, *supra* note 11. Chief Justice Roberts has noted the celebrity factor in issuing individual opinions. “The focus on justices as personalities—demanded by the public and cultivated by some justices—directly challenges Roberts’s view that justice itself should be impersonal.” *Id.* The current justices should heed his warning: “What you’re trying to establish—wearing black robes and, in earlier times, wigs—[is] that it’s not the person; it’s the law.” *Id.* (internal quotation marks omitted). “To persuade individual justices to resist the pressures to promote themselves rather than the interests of the Court as a whole, [Roberts] will have to appeal, in different ways, to their respective self-interests, and to a broader understanding of their judicial role.” *Id.*

the unyielding need to formalize their displeasure with the majority's reasoning, they should either dissent or simply *dubitante*. A short *dubitante* notation would relieve a justice of his or her principled disagreement with the majority approach while simultaneously accepting the majoritarian nature of the Court. And, when a justice feels strong enough that a *dubitante* falls short of their principled disagreement, they should consider dissenting or seeking the requisite 5 votes to make their opinion the Court's opinion.

In this era of celebrity justices,<sup>169</sup> with multiple law clerks and the technological ease of "cutting and pasting" litigants' and amici's briefs, it is unlikely the Court will rein itself in. Thus, more formalized reform is necessary. To underscore the legal profession's actual costs in reading, analyzing, and teaching the Court's complex and fractured opinions, the ABA should reinstate Judicial Canon 19.<sup>170</sup> Canon 19 was drafted in 1924, before concurring opinions were commonplace.<sup>171</sup> Still, the call for self-restraint in separate opinion writing rings true today:

#### 19. Judicial Opinions.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.<sup>172</sup>

The ABA has provided guidance to federal judges for many years. Today, the ABA plays a role in evaluating federal judicial nominees' qualifications to serve on the bench to which they are nominated. This recommendation, while not mandatory, is often regarded as an important factor in assessing a particular judge's suitability for an Article III, life-tenured position. And as the preeminent national

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169. See, e.g., Bennett et al., *supra* note 21, at 826 ("Suppressing separate opinions keeps the focus on the court as an institution. It is sometimes said that in systems allowing for separate opinions—particularly the United States—there is a cult of personality surrounding certain individual judges.").

170. American Bar Association, *Canon of Judicial Ethics* (1924), available at [www.americanbar.org](http://www.americanbar.org).

171. *Id.*

172. *Id.*

lawyers' organization, it may be time to return to the ABA's wisdom calling for judicial self-restraint.<sup>173</sup>

Like Chief Justice Rehnquist, I seek to “appeal to present and future brethren [and sistren] to see the light” about separate opinion writing.<sup>174</sup> The overindulgence of separate opinion writing should stop.<sup>175</sup> It is not merely a consequence of the substantive nature of the pending cases, since the Court controls its own docket. This has been true since 1925 when Congress gave the Court near complete control over the cases it decides. The country has grown, but the cases are no more complex. Past Courts dealt with world war,<sup>176</sup> war crimes,<sup>177</sup> the Japanese internment,<sup>178</sup> mandatory flag salutes,<sup>179</sup> desegregation,<sup>180</sup> abortion,<sup>181</sup> the Vietnam War and its attendant protests,<sup>182</sup> the Selective Service Act and the mandatory draft,<sup>183</sup> gender discrimination,<sup>184</sup> and other hot-button issues that divided our country. Ours is now an integrated society where the legal and social issues remain intensely debated. Modern cases, however, are no more consequential than those that preceded the Roberts Court. The cases aren't different. The justices' writing habits are.

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173. Nygaard, *supra* note 115, at 49 (lamenting that Canon 19 was “scrapped too soon”).

174. Rehnquist, *supra* note 89, at 363.

175. See, e.g., Nygaard, *supra* note 115, at 47. (observing that “nothing requires [appellate judges] to personify the opinion, to employ nifty zingers gleaned from the pages of *Roget's*, or to sprinkle it with apropos-sounding quotes, which unfortunately show less that the writer is well read than that he or she has a *Bartlett's*. All that is needed is an understandable, to-the-point explanation—preferably a short one.”).

176. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (finding unconstitutional President Truman's seizure of most of the nation's steel plants during wartime because neither the Constitution nor Congress afforded him such power).

177. See *Hirota v. MacArthur*, 338 U.S. 197 (1948) (deciding U.S. courts have no power to review Japanese citizens' convictions imposed by an international military tribunal located in Japan).

178. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding an Executive Order removing and relocating Japanese-Americans for national security purposes during wartime).

179. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding the First Amendment's Free Speech Clause protects students from being forced to salute the American flag or say the Pledge of Allegiance in public school).

180. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (striking down the “separate but equal” doctrine by finding segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment).

181. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding the Due Process Clause of the Fourteenth Amendment protects a woman's limited right to an abortion).

182. See *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969) (finding the First Amendment protected students' right to silent, non-disruptive protest in public schools).

183. See *Arver v. United States*, 245 U.S. 366 (1918) (upholding the Selective Service Act of 1917).

184. See *United States v. Virginia*, 518 U.S. 515 (1996) (striking down the Virginia Military Institute's longstanding men-only admissions policy).

## CONCLUSION

Today's justices are more inclined to publish separate opinions than their predecessors. They do not want to read lengthy briefs but appear willing to publish lengthy opinions. Yet the justices owe us clarity. They should want the law to be understandable—and understood. They should voluntarily return to functioning as “one Supreme Court” rather than continuing to publish increasingly individualized opinions. Justices, like their legislative and executive counterparts, should be forced to make difficult decisions. They should be forced to choose sides in a dispute. Either side with the majority or join the dissent. The middle ground permitting separate opinion writing may be uniquely American, but, if people cannot understand “what the law is,” the justices have failed us.

It is time for the Roberts Court to come together. The unconstrained ability to publish individual opinions in every case, for any reason, must yield to clarity and institutional responsibility. It is time to say goodbye to concurring opinions.