



**SCHOOL OF LAW**  
TEXAS A&M UNIVERSITY

Texas A&M University School of Law  
**Texas A&M Law Scholarship**

---

Faculty Scholarship

---

8-2023

## **Legal Clutter: How Concurring Opinions Create Unnecessary Confusion and Encourage Litigation**

Meg Penrose

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Legal Profession Commons](#), [Legal Writing and Research Commons](#), and the [Supreme Court of the United States Commons](#)

---

---

---

## Legal Clutter: How Concurring Opinions Create Unnecessary Confusion and Encourage Litigation

*Meg Penrose\**

Good judges are clear writers. And clear writers avoid legal clutter.<sup>1</sup> Legal clutter occurs when judges publish multiple individually written opinions that are neither useful nor necessary. This essay argues that concurring opinions are the worst form of legal clutter. Unlike majority opinions, concurring opinions are legal asides, musings of sorts—often by a single judge—that add length and confusion to an opinion often without adding meaningful value. Concurring opinions do not change the outcome of a case. Unlike dissenting opinions, they do not claim disagreement with the ultimate decision. Instead, concurring opinions merely offer an idea or viewpoint that failed to garner support from the rest of the Court. They are cries for attention that are, usually, better left unwritten. Concurring opinions are legal clutter.

This essay challenges judges—particularly Supreme Court Justices—to refrain from subjecting lawyers and law students to legal clutter. Court opinions are already too long.<sup>2</sup> They can be complex. Distracting readers from the actual holding of a case causes unnecessary confusion, even for other judges. Two recent examples, Justice Kavanaugh’s individual concurrence in *NCAA v. Alston*<sup>3</sup> and Justice Thomas’s individual concurrence in *Dobbs v. Jackson Women’s Health Organization*,<sup>4</sup> illustrate the problem. Journalists and lawyers, eager to see systematic change at the NCAA, have latched on to one sentence in Justice Kavanaugh’s *Alston*

---

\* Professor of Law, Texas A&M University School of Law.

<sup>1</sup> *Clutter*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020) (“a crowded or confused mass or collection”); *Clutter*, COLLINS ENGLISH DICTIONARY (13th ed. 2018) (“a lot of things in a messy state, especially things that are not useful or necessary”). Both definitions are useful, but the Collins definition better expresses this author’s perspective of the Justices’ penchant for publishing individual opinions in a messy state that are neither useful nor necessary.

<sup>2</sup> Meg Penrose, *Enough Said: A Proposal for Shortening Supreme Court Opinions*, 18 SCRIBES J. LEG. WRITING 49, 51–52 (2018) (the Roberts Court accounts for five of eleven lengthiest opinions in Supreme Court history).

<sup>3</sup> 141 S. Ct. 2141, 2166 (2021) (Kavanaugh, J. concurring).

<sup>4</sup> 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring).

concurrency—repeating lines that are neither the Court’s holding nor controlling.<sup>5</sup> Similarly, Justice Thomas’s solo concurrence in *Dobbs* suggesting the entire line of substantive due process cases should be overturned, left some wondering if overturning *Roe* was just the beginning of a stare decisis regression.<sup>6</sup> Worse still, both Justice Kavanaugh and Thomas seemingly invite new litigation to ensure that their individual viewpoints ultimately become the law.<sup>7</sup> This is the danger of concurring opinions. Below the surface, many concurring opinions are nothing more than a latent form of judicial activism.<sup>8</sup> On the surface they are mere legal clutter.

The Roberts Court has become a court filled with individual opinion writers.<sup>9</sup> During the 2020-2021 Term, the Court issued a mere fifty-seven signed opinions.<sup>10</sup> This low productivity appears to be the new normal for

---

<sup>5</sup> See e.g., Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh’s Concurrence*, TIME (June 21, 2021, 6:24 PM), <https://perma.cc/YP6G-WQEP>; Paul Myerberg, *Supreme Court Justice Brett Kavanaugh rips NCAA in antitrust ruling, says it ‘is not above the law’*, USA TODAY (June 21, 2021, 1:30 PM), <https://perma.cc/58VY-QXR3>; Ryan Gaydos, *Justice Kavanaugh delivers blistering opinion after SCOTUS ruling: ‘The NCAA is not above the law’*, FOX NEWS (June 21, 2021, 12:28 PM), <https://perma.cc/U9KA-9JCX>.

<sup>6</sup> See e.g., Madeleine Carlisle & Julia Zorthian, *Clarence Thomas Signals Same-Sex Marriage and Contraception Rights at Risk After Overturning Roe v. Wade*, TIME (June 24, 2022, 2:45 PM), <https://perma.cc/9YJQ-E4UN>; Ed Kilgore, *Clarence Thomas Threatens Contraception, LGBTQ+ Rights Could Be Next to Go*, N.Y. MAG. (June 24, 2022), <https://perma.cc/ALU9-6LUT>; Adam Edelman, *Thomas Wants the Supreme Court to Overturn Landmark Rulings that Legalized Contraception, Same-sex Marriage*, NBC NEWS (June 24, 2022, 1:26 PM), <https://perma.cc/B4TV-XHF4>.

<sup>7</sup> Megan McArdle, *Kavanaugh’s Concurrence in the NCAA Case is an Open Invitation for Another Lawsuit*, WASH. POST (June 22, 2021, 7:15 PM), <https://perma.cc/SY4N-DBZZ>.

<sup>8</sup> See Michael Gentithes, *Check the Invitation: The Trouble with Appeals Invited by Supreme Court Justices*, 82 MO. L. REV. 339, 341 (2017) (describing these approaches as “opinion-briefs”).

<sup>9</sup> Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court’s Shrinking Docket*, 72 SMU L. REV. F. 8, 15 (2019) (“Since 2005, the Roberts Court’s Justices have consistently written more separate opinions than dispositive opinions.”). These numbers remain the same today, nearly twenty years later. Harvard Law Review’s “Statistics,” a statistical analysis of Supreme Court decisions, have been continually published since 1949. During the 2019–2020 Term, the most recent group of “Statistics,” the Court issued sixty-two decisional opinions of the Court and a combined eighty-one non-majority opinions. *Statistics*, 135 HARV. L. REV. 491, 491 (2021), <https://perma.cc/98RJ-JD8C>. The Court invested more time in adding reasons for its agreement with the majority—forty-two separate concurring opinions—than adding reasons for its disagreement—thirty-nine separate dissenting opinions. These statistics bear out my thesis that the Court’s output contains too much legal clutter. *Id.*

<sup>10</sup> Angie Gou, Ellenna Erskine & James Romoser, *Stat Pack for the Supreme Court’s 2021-2022 term*, SCOTUSBLOG 17 (July 1, 2022), <https://perma.cc/FTW4-C5K9>. The Supreme Court issued fifty-seven signed opinions. Its Justices, however, also published forty-three concurrences and fifty-one dissenting opinions. *Id.*

the Supreme Court.<sup>11</sup> While previous Courts regularly issued hundreds of opinions each Term,<sup>12</sup> the Roberts Court has averaged less than sixty-eight signed opinions for the past decade.<sup>13</sup> These same Justices have no problem drafting concurring opinions, averaging forty-two concurring opinions per Term during this same period.<sup>14</sup> The Justices most likely to draft concurrences are Justices Thomas, Kavanaugh, and Alito.<sup>15</sup> Thus, a Court with an ideologically conservative 6–3 majority voluntarily chooses to muddy the legal waters by having half its majority-leaning Justices regularly publish individual concurring opinions.

The Roberts Court claims to be collegial.<sup>16</sup> Its opinion writing is not.<sup>17</sup> *Dobbs*, one of the longest opinions in nearly eighty years, spanned two hundred pages.<sup>18</sup> There were five separate opinions.<sup>19</sup> Three of these five opinions were concurrences.<sup>20</sup> All three concurrences were written by an individual Justice with no other Justice signing on.<sup>21</sup> These three

---

<sup>11</sup> *Id.* at 19.

<sup>12</sup> Penrose, *supra* note 9 at 9–10. In comparison, the 1930 Taft Court issued 235 signed decisional opinions—over four times the decisional output of the Roberts Court’s most recent Term. And the Taft Court was far, far less likely to publish concurring opinions. The Burger Court averaged around 150 signed opinions most years. *Id.* at 12. Even the Rehnquist Court in the mid-1980s was issuing closer to 150 signed opinions. See Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <https://perma.cc/NQV3-92RW>. Liptak remarked in this article that the Roberts Court had set the record for publishing the most concurring opinions of any Supreme Court. *Id.*

<sup>13</sup> Gou et al., *supra* note 10, at 19.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 17. Justice Sotomayor, in contrast, is the Justice most frequently writing in dissent. *Id.* See also, e.g., Judge Robert S. Smith, *Why I Admire Justice Thomas*, 4 N.Y.U. J.L. & LIBERTY 648 (2009) (discussing a few of Justice Thomas’s concurring opinions).

<sup>16</sup> Joan Biskupic, *John Roberts Touts Collegiality, but Supreme Court’s Record Suggests Otherwise*, CNN (Oct. 17, 2018, 3:03 PM), <https://perma.cc/R3DC-KYWX>. See also Debra Cassens Weiss, *Chief Justice Says Court Is Collegial, But Compromise Can Be Difficult*, A.B.A. JOURNAL (Apr. 8, 2010), <https://perma.cc/93F5-MQH3>. Weiss reported that the Chief Justice’s explanation for strident language in published decisions “reflects strong positions rather than personal animosity” and continued to extol what he believes is a very collegial court. *Id.*

<sup>17</sup> Ariane de Vogue, *Supreme Court Justices Insist All is Well, but Their Caustic Written Opinions Say Otherwise*, CNN (Feb. 10, 2022), <https://perma.cc/2GPT-SVAX>.

<sup>18</sup> 142 S. Ct. 2228 (2022). The page count of the opinion, and all page counts hereinafter, refer to the page count of the Slip Opinion.

<sup>19</sup> *Id.* at 2239.

<sup>20</sup> *Id.* Justice Alito wrote the majority opinion. Chief Justice Roberts concurred in the judgment, writing a separate opinion. Justices Kavanaugh and Thomas each wrote concurring opinions. Thus, in a 6–3 majority decision, the majority coalition accounted for four separate opinions. All four Justices agreed on the outcome.

<sup>21</sup> *Id.* at 2300–17. Justice Thomas’s individual concurrence is seven pages. Justice Kavanaugh’s individual concurrence is twelve pages. And Chief Justice Roberts individual concurrence is twelve pages. These three Justices added thirty-one pages of length to an already extremely long opinion.

concurrences span thirty-one pages.<sup>22</sup> To put this in perspective, *Brown v. Board of Education* was ten pages long.<sup>23</sup> Two of the three concurrences in *Dobbs* were *longer* than the Court's landmark decision in *Brown*. The Roberts Court, it seems, has a writing addiction.

*Dobbs* underscores the Roberts Court's legal clutter problem. It seems everyone wants to have a say. In far too many cases, the Justices appear willing to go it alone to add their individual perspective even when no other Justice lends their support.<sup>24</sup> This essay argues that the Justices need to focus more on decision making and less on individualized decision writing. The Justices owe the public clarity. Rather than clarity, the modern Justices seem inclined to chart their own paths and build an individualized brand.<sup>25</sup> This is seen in the increasing number of Justices writing memoirs shortly after confirmation,<sup>26</sup> teaching during the summers,<sup>27</sup> and speaking at conferences to friendly audiences who cheer

---

<sup>22</sup> See *id.*

<sup>23</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486–96 (1954) (excluding the Syllabus, the decision spans pages 486–496).

<sup>24</sup> See, e.g., *Borden v. United States*, 141 S. Ct. 1817, 1834–37 (2021) (Thomas, J., concurring); *Riley v. California*, 573 U.S. 373, 404–08 (2014) (Alito, J., concurring); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1822–37 (2020) (Kavanaugh, J., dissenting); *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment); *Heien v. United States*, 574 U.S. 54, 71–80 (2014) (Sotomayor, J., dissenting).

<sup>25</sup> Kimberly Strawbridge Robinson, *Gorsuch Joins Justices 'Lifting the Veil' With Memoirs*, BLOOMBERG LAW (Sept. 13, 2019, 4:56 AM), <https://perma.cc/3EVC-F2XC>. Professor Artemus Ward summed it up this way: “The fact is that recent justices have been increasingly preoccupied with seeking the spotlight in order to build their brand.” *Id.* He continued, “They want to be considered important players on the contemporary legal and political scenes. [In that sense] choosing to write a book is not unlike choosing to write a separate opinion in a high profile case.” *Id.*

<sup>26</sup> *Id.* (noting that Justices Rehnquist, O'Connor, Thomas, and Ginsburg waited over fifteen years before publishing their memoirs. In contrast, Justice Sotomayor waited only four years). See also Greg Stohr, *Ketanji Brown Jackson Book Deal Joins Trendy Supreme Court Side Hustle*, BLOOMBERG (Jan. 7, 2023, 9:00 AM), <https://perma.cc/2M2G-BMKG>; Debra Cassens Weiss, *These 3 Supreme Court Justices Each Earned More Than \$100,000 From Book Projects Last Year*, ABA JOURNAL (June 13, 2022, 8:38 AM), <https://perma.cc/CA9H-3P9V> (noting Justice Coney Barrett received \$425,000, Justice Gorsuch received \$250,000, and Justice Sotomayor received over \$120,000—but has received over \$3.4 million in book advances and royalties since joining the Supreme Court).

<sup>27</sup> Amy Howe, *Justices Earned Extra Money from Books and Teaching in 2021, Disclosures Show*, SCOTUSBLOG (June 9, 2022, 7:08 PM), <https://perma.cc/53TF-K93B> (detailing how Justices Gorsuch, Kavanaugh, Thomas, and Barrett were all paid to teach law courses); Amy Howe, *Alito's Financial Disclosure Shows Teaching Income, Speaking Engagements, and Stock Ownership*, SCOTUSBLOG (Sept. 2, 2022, 5:38 PM), <https://perma.cc/P333-ESQW>. Justices that do teach are limited to earning no more than \$30,000 for outside teaching. See Madeleine Carlisle, *Here's How Much the Supreme Court Justices Made Last Year*, TIME (June 9, 2022, 5:47 PM), <https://perma.cc/WF6Q-ABLR>.

their presence.<sup>28</sup> And while there is growing displeasure with the Court and its members for their outside activities,<sup>29</sup> this article's focus is on the damaging role of concurring opinions. Concurring opinions are symptomatic of a larger problem—inaccessible legal writing. The Roberts Court, or at least its Justices, should evaluate the value of concurring opinions at a time when the Supreme Court's institutional image is at an all-time low.<sup>30</sup> Self-restraint in avoiding legal clutter may help the Court regain societal trust and institutional credibility.<sup>31</sup> Our country is best served by one Court, not nine individual Justices.

### I. *NCAA v. Alston*—One Justice Goes Rogue

On June 21, 2021, the Supreme Court issued a unanimous opinion in *NCAA v. Alston*.<sup>32</sup> All nine Justices agreed that the NCAA violated antitrust rules by limiting student athletes to “cost-of-attendance” benefits for participating in college sports.<sup>33</sup> The decision was expected after student athletes spent years litigating the NCAA's amateurism rules.<sup>34</sup> The

---

<sup>28</sup> See Joan Biskupic, *Analysis: Supreme Court Justices Respond to Public Criticism with Distance and Denial*, CNN (Sept. 13, 2022, 5:08 AM), <https://perma.cc/KRD5-SQSG>; Austin Sarat & Dennis Atergut, *Supreme Court in Crisis: Justices Keep Digging Themselves Deeper*, THE HILL (Feb. 7, 2022, 8:00 PM), <https://perma.cc/4TMT-T59X>.

<sup>29</sup> The issue of extra-judicial conduct is not new. In a 1970 Comment, Peter Alan Bell perfectly summarized the concern:

The independence, strength, and decisional quality of the Court may be endangered by extrajudicial activities. Activities that give a Justice a stake in what persons outside the judiciary do or tie him to interests which become involved in litigation before the Court threaten the Court's independence. Any activity that gives even the appearance of partiality, that involves the Court or an individual Justice in controversy, or that in some other way harms the public image of the Court as the neutral guardian of the Constitution, jeopardizes the Court's power to persuade.

Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 589 (1970).

<sup>30</sup> Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://perma.cc/6S5J-NHA2>; Public's View of Supreme Court Turned More Negative Before News of Breyer's Retirement, PEW RSCH. CTR. (Feb. 2, 2022), <https://perma.cc/6LQJ-ZK9C>.

<sup>31</sup> The recent Marquette Law School poll showed public approval of the Supreme Court to be at historic lows. Only forty-one percent of those surveyed approve of the job the Court is doing. See *Marquette Law School Supreme Court Poll May 8-18, 2023*, MARQUETTE LAW SCHOOL (2023), <https://perma.cc/R63A-RV36>.

<sup>32</sup> 141 S. Ct. 2141 (2021). The Supreme Court's refusal to adhere to a formal ethics code, coupled with the Justices' myriad of paid outside activities, undermines confidence in the Court as an institution. Couple these issues with low productivity and one can understand, regardless of whether one agrees, with the Court's poor public image.

<sup>33</sup> *Id.* at 2166.

<sup>34</sup> See, e.g., *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

unexpected issue was Justice Kavanaugh's five-page concurrence.<sup>35</sup> No other Justice joined his opinion. In what has become an increasing common acknowledgement of separate opinion writing, the Court's Syllabus ends with the following notation: "GORSUCH, J., delivered the opinion for a unanimous Court. KAVANAUGH, J., filed a concurring opinion."<sup>36</sup> In other words, one Justice went rogue.

The *Alston* opinion is forty-five pages long.<sup>37</sup> That seems verbose for a unanimous opinion on a rather straightforward issue. Recall that *Brown v. Board of Education* was only ten pages long. The Roberts Court is the wordiest, yet least productive, Court in the modern era.<sup>38</sup> Averaging less than eighty cases per Term—less than seventy over the last decade—the Court writes lengthy, complex opinions with Justices investing far too much energy into individual opinions.<sup>39</sup> This approach, issuing long and fractured opinions, means the law is less accessible to ordinary people.<sup>40</sup> And, despite *Alston*'s straightforward holding, much of the press coverage centered on Justice Kavanaugh's unnecessary legal aside.<sup>41</sup>

Justice Kavanaugh's concurrence begins, ironically, noting that he joins "the Court's excellent opinion in full."<sup>42</sup> That agreement should have been sufficient to avoid drafting a separate opinion. When a colleague's work is admittedly "excellent," what is left to add? What motivated Justice Kavanaugh to write? In his words, he explains that he is writing not on *the issue* then pending before the Court. Rather, he "add[s] this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws"—rules that were neither briefed nor argued in this appeal.<sup>43</sup> The entire purpose of Justice Kavanaugh's concurring opinion in *Alston* is to discuss issues that were not before the Court. His concurring opinion contains dicta that is

---

<sup>35</sup> *Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

<sup>36</sup> *Id.* at 2147.

<sup>37</sup> *Id.*

<sup>38</sup> Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <https://perma.cc/7EQL-VQMW>.

<sup>39</sup> See Penrose, *supra* note 9, at 10.

<sup>40</sup> Meg Penrose, *Supreme Verbosity: The Roberts Court's Expanding Legacy*, 102 MARQ. L. REV. 167, 175 (2018).

<sup>41</sup> See e.g., Andrew Brandt, *Business of Football: The Supreme Court Sends a Message to the NCAA*, SPORTS ILLUSTRATED (June 29, 2021), <https://perma.cc/57TP-RUJC>. Despite Justice Kavanaugh's concurring opinion having zero legal impact on the litigation disposed of by the case, Sports Illustrated highlighted Justice Kavanaugh's opinion in its article. Brandt uses a subheading entitled, "Kavanaugh cut deep." *Id.* The inclusion of a concurring opinion confuses lay readers who think that one Justice's individual contribution may matter—legally speaking. Usually, it doesn't.

<sup>42</sup> NCAA v. *Alston*, 141 S. Ct. 2141, 2166 (2021) (Kavanaugh, J., concurring).

<sup>43</sup> *Id.* at 2166–67.

nothing more than an advisory opinion inviting other student-athletes to sue the NCAA.<sup>44</sup> Justice Kavanaugh's concurrence makes for great sound bites but shows little judicial restraint. It is veiled judicial activism. This opinion fully illustrates what Professor Suzanna Sherry criticized as our "Kardashian Court."<sup>45</sup> Modern Justices write to increase their profile at the cost of clarity and conciseness. Legal clutter.

Justice Kavanaugh spends five unnecessary pages explaining how he will decide the next antitrust issue relating to the NCAA's rules on student compensation.<sup>46</sup> This explanation comes before the issue is even briefed. Kavanaugh's concurrence is the textbook definition of dicta and feels like an advisory opinion advocating for change.<sup>47</sup> He acknowledges that *Alston* "does not address the legality of the NCAA's remaining compensation rules."<sup>48</sup> That is correct. And that acknowledgement should have ended any discussion on unbriefed, un-litigated matters. It didn't.

Perhaps the most obvious distinction between *Alston's* majority opinion and Justice Kavanaugh's concurrence is that the majority's decision was bound by Article III to decide only the case and controversy before it.<sup>49</sup> Majority opinions generally do not invite further litigation or show the Court's hand on how it will rule on future issues.<sup>50</sup> Concurrences do not appear to be equally constrained. The point of Justice Kavanaugh's concurrence was to move beyond the facts of the case and appeal to future litigants. He essentially provided a road map for what *one Justice* perceives will be the winning approach for a different, unrepresented issue. This separate opinion might be helpful, if at all, for future litigants in some future case. Otherwise, these five pages took unnecessary time and energy from its readers.<sup>51</sup>

---

<sup>44</sup> See *id.* at 2166–69. "Justice Kavanaugh seemed to be inviting the next plaintiff—and there are already many circling—to 'bring it on' to the Supreme Court, where he will be waiting to rule on a much bigger and broader issue than education-related benefits." Brandt, *supra* note 41. Reporters understood the purpose of the concurrence.

<sup>45</sup> Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181 (2020).

<sup>46</sup> *Alston*, 141 S. Ct. at 2166 (2021) (Kavanaugh, J., concurring).

<sup>47</sup> See Ryan S. Killian, *Dicta and the Rule of Law*, 41 PEPP. L. REV. 1, 7–10 (2013).

<sup>48</sup> *Alston*, 141 S. Ct. at 2167 (2021) (Kavanaugh, J., concurring).

<sup>49</sup> See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)) ("Although the Constitution does not fully explain what is meant by '[t]he judicial Power of the United States,' Art. III, § 1, it does specify that this power extends only to 'Cases' and 'Controversies,' Art. III, § 2. And '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'").

<sup>50</sup> See Gentithes, *supra* note 8, at 346 (noting how a majority opinion carries stare decisis effect and can require horse-trading that a dissent does not).

<sup>51</sup> Despite this article's negative characterization of Justice Kavanaugh's *Alston* concurrence, Justice Kavanaugh reportedly told an audience at Notre Dame Law School that "If you asked me, you



The most troubling aspect of Justice Kavanaugh's concurrence is that it generated more attention than Justice Gorsuch's unanimous majority opinion.<sup>52</sup> The Roberts Court reaches true consensus far less often than predecessor courts, with more individual opinions being written by Justices agreeing on the result.<sup>53</sup> Rarely is anything gained by writing separately. This act of going it alone when the rest of the Court was united is further proof that modern Justices prefer to write decisions rather than decide cases. Justice Kavanaugh's unnecessary legal monologue wastes important judicial resources. This writing squanders lawyers' and law students' scarce time without adding corresponding value. The concurrence portrays legal clutter, not legal value.

## II. *Dobbs v. Jackson Women's Health Organization*—More Justices Go Rogue

*Dobbs* was destined to be a controversial opinion. Cases that overturn settled precedent remind society that Supreme Court membership can, rather quickly, change settled expectations.<sup>54</sup> Even after the *Dobbs* opinion leaked, the official decision caused shock waves in the United States and around the globe. Its publication was an event unto itself. So why did three

---

know, you've been on the court four years. What's your favorite opinion? The opinion you think, you know, you'd like the most it would be no surprise that *NCAA versus Alston*, my concurrence, and that would be right at the top of my list . . . ." Josh Blackman, *Why Does Justice Kavanaugh Write Concurrences?*, REASON: THE VOLOKH CONSPIRACY (Jan. 27, 2023, 1:29 AM), <https://perma.cc/52H4-SWKS>.

<sup>52</sup> See, e.g., Paul Myerberg, *Supreme Court Justice Brett Kavanaugh Rips NCAA in Antitrust Ruling, Says It Is Not Above the Law*, USA TODAY (June 21, 2021, 1:30 PM), <https://perma.cc/58VY-QXR3>. From this title, one would presume that Justice Kavanaugh either wrote the majority opinion or played an important role in the decision. He didn't. His solo concurrence, however, overshadowed the majority due to its tone. See also, e.g., Chuck Burton, *The NIL Mess Part One: How Brett Kavanaugh Set the Wheels in Motion with One Concurring Opinion*, COLL. SPORTS J. (May 5, 2022), <https://perma.cc/TT6J-MT5Z>.

<sup>53</sup> See, e.g., Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIFTYEIGHT (July 5, 2022, 1:08 PM), <https://perma.cc/6Z7F-TZK7>. The article notes:

Usually, around half of the court's rulings are unanimous and decisions that pit the conservative and liberal blocs against each other are much rarer. Not this year. According to SCOTUSBlog data analyzed by FiveThirtyEight, 21 percent of rulings were polarized by party of the appointing president, with all Republican appointees voting one way and all Democratic appointees voting the other way, and only 29 percent were unanimous.

*Id.*

<sup>54</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)); *Lawrence v. Texas*, 539 U.S. 558, 564, 577–78 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

Justices in the majority feel the need to write individually, adding length and, in the case of Justice Thomas, controversy to an already seismic event? Chief Justice Roberts, Justice Kavanaugh, and Justice Thomas each published their individual thoughts in concurring opinions. Yet it was Justice Thomas's opinion that garnered the most attention, in some ways even more attention than Justice Alito's lengthy majority opinion.

No other Justices joined the concurring Justices' separate opinions.<sup>55</sup> Chief Justice Roberts, writing for himself, published a twelve-page concurrence.<sup>56</sup> Justice Kavanaugh, also writing for himself, published a twelve-page concurrence.<sup>57</sup> What justifies adding one's individual voice when no other colleague agrees to sign on to your legal monologue? Justice Kavanaugh's *Dobbs* concurrence aptly illustrates the problem: solo concurrences often fail to add valuable contribution to the law. Much like his approach in *Alston*, Justice Kavanaugh writes his *Dobbs* concurrence "to explain my additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of today's decision."<sup>58</sup> In other words, this concurrence is what Justice Kavanaugh would have presented had his opinion garnered another four votes. But it didn't. In fact, it didn't get any other votes even though both Justices Roberts and Thomas also felt the need to write separately. Apparently, these Justices wanted to have their individual perspectives recorded. And nothing, outside of individual restraint, stops Justices from publishing individual opinions that have no other colleagues' support.

It is hard to find institutional value in Justice Kavanaugh's concurrence. His first several paragraphs are dedicated to the obvious point, stated in nearly every abortion decision since *Roe*—that abortion presents "a profoundly difficult and contentious issue."<sup>59</sup> He tries to characterize both sides of the debate and then states the oft repeated dilemma that, "[w]hen it comes to abortion, one interest must prevail over the other at any given point in a pregnancy."<sup>60</sup> Justice Kavanaugh then suggests that the Constitution and Court must be "neutral" on the issue.<sup>61</sup> Even his discussion of *stare decisis* is unnecessary. *Dobbs* overruled a long-standing case. And Justice Alito's majority decision explained the reasons for doing so, including the appreciation for *stare decisis*.<sup>62</sup> This

---

<sup>55</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2300, 2304, 2310 (2022) (Thomas, J., concurring) (Kavanaugh, J., concurring) (Roberts, J., concurring in the judgment).

<sup>56</sup> *Id.* at 2310–17 (Roberts, J., concurring in the judgment).

<sup>57</sup> *Id.* at 2304–10 (Kavanaugh, J., concurring).

<sup>58</sup> *Id.* at 2304.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2305.

<sup>62</sup> *Dobbs*, 142 S. Ct. at 2279–80.

concurrency illustrates all that is wrong with concurring opinions. It adds nothing meaningful. It adds length without substance. It doesn't change the outcome or even seek to change the reasoning. It is simply an individual opinion that failed to secure four other votes. It epitomizes legal clutter.

Justice Thomas's concurrence, in contrast, moves beyond mere legal clutter and achieves more of a mischief-maker status.<sup>63</sup> Much like Justice Kavanaugh's lone concurrence in *Alston*, Justice Thomas's *Dobbs* concurrence starts by admitting the litigants did not ask the Court to do what the writing Justice is about to recommend.<sup>64</sup> It is almost as if certain concurrences should now come with a disclaimer: "warning—you are about to read an advisory opinion written by an individual Justice." Thomas's seven-page concurrence seeks to push *Dobbs'* impact significantly past that envisioned by the majority. He unequivocally declares: "[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."<sup>65</sup>

And just like that, a concurring opinion written by a single Justice drew an oversized reaction.<sup>66</sup> Justice Thomas opined on a non-presented issue to tell us what he thinks the law *should* be, not what the law is now. His concurrence invites future litigants to take his legal approach and present his argument more directly to the Court than the *Dobbs'* litigants did. Lest observers think this approach is new or anomalous, this is precisely the approach Justice Thomas used to invite litigants to expand Second Amendment rights in his *Printz* concurrence.<sup>67</sup> *Printz*, a case about federalism, saw Justice Thomas concur to invite future litigants to consider raising an individual rights argument under the Second

---

<sup>63</sup> *Id.* at 2300 (Thomas, J., concurring).

<sup>64</sup> *Id.* ("I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause.")

<sup>65</sup> *Id.* at 2301 (internal citations omitted).

<sup>66</sup> Justice Thomas's call to eliminate all forms of substantive due process would include overruling decisions providing Constitutional protection to birth control and same-sex marriage, among others. *See id.* at 2301–03. Justice Thomas called for reconsidering three individual rights cases, *Griswold v. Connecticut* (birth control), *Lawrence v. Texas* (intimate relations among same-sex couples in the privacy of their home), and *Obergefell v. Hodges* (same-sex marriage). *Id.* at 2301. For many, these few pages writing in favor of "jettisoning the [substantive due process] doctrine entirely" caused more alarm than the singular act of overturning *Roe v. Wade*. *Id.* at 2302.

<sup>67</sup> *Printz v. United States*, 521 U.S. 898, 937–38 (1997) (Thomas, J., concurring). *Printz*, like *Alston* and *Dobbs*, epitomizes the problem of individual opinion writing. The opinion, which is a combined eighty pages, saw four Justices write opinions including concurrences published by Justices Thomas and O'Connor.

Amendment.<sup>68</sup> That advice was not lost on litigants.<sup>69</sup> And as the Court's membership changed, *Printz* stands as one of the few instances where an otherwise irrelevant concurrence became a roadmap to a new line of legal reasoning. The advisory concurrence succeeded.

Justice Thomas's *Printz* concurrence was not joined by any other Justice.<sup>70</sup> It is only three pages long. Similar to his *Dobbs* concurrence, Justice Thomas wrote primarily to direct recommended legal changes for future litigants.<sup>71</sup> Justice Thomas acknowledged that because the parties did not raise a Second Amendment argument to a personal right to keep and bear arms, "we need not consider it here."<sup>72</sup> But rather than stop where the parties stopped, he continued with prescient advice:

Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." In the meantime, I join the Court's opinion striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment.<sup>73</sup>

Justice Thomas has thus witnessed that rare measure of success in placing litigation strategies in a rogue concurrence that, years later, bear fruit. This advisory-opinion style concurrence goes beyond Article III's textual restraint for cases and controversies in a mischievous way.<sup>74</sup> These seemingly benign legal monologues are worse than legal clutter. They reach beyond the facts and issues in each dispute. And, in Justice Thomas's case, his solo concurrence offers a legal invitation from a single Justice to generate litigation and change the law. It oversteps the usual role of the Supreme Court by transforming individual Justices into partisan advisors on legal issues. In this way, concurrences operate as judicial activism seeking to motivate outside litigators to help a Justice land the right case to fit their desired constitutional views. This, like the legal clutter concurrence, has no place in an Article III court.

---

<sup>68</sup> *Id.* at 938–39 (Thomas, J., concurring) ("If, however, the Second Amendment is read to confer a *personal* right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here.").

<sup>69</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 776–77 (2010).

<sup>70</sup> *Printz*, 521 U.S. at 936 (Thomas, J., concurring).

<sup>71</sup> *Id.* at 938–39.

<sup>72</sup> *Id.* at 939.

<sup>73</sup> *Id.* (citation omitted).

<sup>74</sup> See *Gentithes*, *supra* note 8, at 339–40.

### III. Concurring Opinions versus Dissenting Opinions

Concurring opinions are often unnecessary because they rarely become majority opinions.<sup>75</sup> They do not seek an alternate outcome or, necessarily, provide alternate reasoning. Concurring opinions are legal asides that add individualized perspective on the Court's opinion. The voice of one, or a few, seek to comment on what *the majority* actually did. This lone Justice, or small group of Justices, may even have the gumption to tell the world what the majority opinion *actually meant*, suggesting that the concurring Justice views the majority opinion as incomplete or poorly written. It is the ultimate Monday-morning quarterbacking by the back-up quarterback. Imagine the locker room conversation going like this: "Yes, we won the game. But if I had been playing, this is what I would have done to win the game we just won." At their core, concurring opinions are draft opinions that were not good enough to command a majority. They are back-up opinions. And, yet, far too many judges and journalists recite lines—or reasoning—from concurring opinions as if they were the majority.

In contrast, dissenting opinions have some inherent value. Dissenting opinions call into question the majority's outcome. Dissenting opinions call on the majority to draft a better opinion by challenging the Court's decision and, often, its reasoning. These decisions explain the Justices' disagreement with the majority and assure litigants that the case was thoroughly reviewed. On occasion, dissenting opinions will become the majority when the Court changes personnel.<sup>76</sup> So while dissenting opinions may shed light on the two sides of a legal debate, concurring opinions rarely do. Concurring opinions are the "yes, but" opinion rather than the "no, and here's why" opinion.

Both concurring and dissenting opinions add length to the Court's published decision. They make the reader work harder to find out what the Court did. They can make it difficult to understand the basic holding and render a decision inaccessible to the general public. Thanks to technology, the average American can now access every Supreme Court opinion—often within minutes of a decision being issued. But that access doesn't ensure understanding. Today, trying to figure out why same-sex

---

<sup>75</sup> Antonin Scalia, *The Dissenting Opinion*, J. SUP. CT. HIST. 33, 37 (1994). "[R]arely does a separate concurring opinion have the effect of shaping the future law." See also Meg Penrose, *Goodbye to Concurring Opinions*, 15 DUKE J. CONST. L. & PUB. POL'Y 25, 38–40 (2020).

<sup>76</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

marriage is a constitutionally protected right<sup>77</sup> or how the Second Amendment confers an individual right to possess a handgun in the home for self-defense<sup>78</sup> requires laboring through hundreds of pages of individually written, separately published opinions. The Court no longer has *one* voice. The current Supreme Court has nine individual voices.

The Court has unfortunately wandered far from the time when Justices understood the importance of a Court opinion and have returned to the era of seriatim opinions. Every Justice appears willing to speak solely for themselves, despite the role that one Supreme Court plays in our nation. Each Justice can, and often does, comment individually about their views on a case. But individual views do not create a decision, much less precedent. The Court would be well advised to reconsider its individual writing addiction. Regardless of the Justice, the only relevant decision is the binding decision rendered by five Justices. The modern trend of individual Justices writing to frame and influence future litigation is a new, and disturbing, form of judicial activism.<sup>79</sup> Article III's text only permits the Justices to render decisions on actual cases and controversies.<sup>80</sup> When any member of the Court exceeds that power, they have exceeded their Constitutional mandate.<sup>81</sup> The Court's writing—and not merely its decisions—should strive to align with the Founder's design.<sup>82</sup> Judicial restraint is best observed in restrained writing.<sup>83</sup>

#### IV. Stop with the Legal Clutter—Stop with the Mischief Making

There is an important distinction between writing opinions and publishing opinions. The Supreme Court is expected to issue legal opinions—"to say what the law is."<sup>84</sup> Increasingly, Americans believe the Court is a group of opinionated individuals, often politically motivated,

---

<sup>77</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015). There were five separate opinions in *Obergefell*. Justice Kennedy drafted the majority opinion and each of the four dissenting Justices drafted a dissent (Roberts, Scalia, Thomas, and Alito).

<sup>78</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008). There were *only* three opinions in *Heller*—Justice Scalia's majority opinion and two dissenting opinions by Justices Stevens and Breyer.

<sup>79</sup> Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 783, 825 (2000).

<sup>80</sup> U.S. CONST. art. III, § 2.

<sup>81</sup> *Id.*

<sup>82</sup> See Jill Barton, *So Ordered: The Techniques of Great Judicial Stylists*, 18 SCRIBES J. OF LEGAL WRITING 1, 1 (2018).

<sup>83</sup> See FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 1 (Penny Hill Press, 2d ed. 2013).

<sup>84</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

that decides cases based on personal ideology.<sup>85</sup> The perception of the Court is that, increasingly, Justices may not care as much about the institutional value of the Supreme Court as much as their own individual brands. Modern Justices invest their time in speaking at outside events, writing personal memoirs, and publishing individual opinions. While past Justices often *circulated* concurring opinions, they regularly withheld these opinions from publication.<sup>86</sup> Those Justices understood that one individual's thoughts might be better left unpublished.<sup>87</sup> There was more humility, more institutional allegiance. This essay does not begrudge the drafting of a concurring opinion. The Justices should point out—during the drafting process—any perceived weakness in the Court's majority opinion. But this essay does call for careful consideration before *publishing* concurring opinions.

Supreme Court Justices are understandably busy rendering decisions in the country's most difficult legal disputes.<sup>88</sup> The Court receives roughly 5,000 certiorari petitions each year.<sup>89</sup> And someone—or a group of individuals—must evaluate these petitions to distill down the most pressing and worthy cases to be heard. It is important to note that it is not usually the Justices reading these petitions. Instead, most Justices rely on their law clerks or the “cert pool” to draft brief memos on each case and

---

<sup>85</sup> Annenberg Public Policy Center, *Over Half of Americans Disapprove of the Supreme Court as Trust Plumets*, ANNENBERG SCH. FOR COMM'N (Oct. 10, 2022), <https://perma.cc/S57Y-QC3D>; *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), <https://perma.cc/LJV8-YC77>; Taylor Orth & Kathy Frankovic, *Most Americans Think Supreme Court Decisions Often are Influenced by Justices' Political Beliefs*, YOU GOV (Mar. 02, 2023, 4:23 PM) <https://perma.cc/X72D-23FP>.

<sup>86</sup> See, e.g., MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE* 209–26 (2015); James F. Spriggs II, Forrest Maltzman & Paul J. Wahlbeck, *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485, 488 (1999).

<sup>87</sup> See, e.g., Ronald D. Rotunda, *The Fall of Seriatim Opinions and the Rise of the Supreme Court*, VERDICT (Oct. 9, 2017), <https://perma.cc/SX6F-4PQF>.

<sup>88</sup> See Caroline Burke, *Here's What a Supreme Court Justice's Schedule Generally Looks Like*, BUSTLE (Oct. 13, 2018), <https://perma.cc/69B6-QQ3Z>.

<sup>89</sup> See SUPREME COURT OF THE UNITED STATES, CHIEF JUSTICE'S YEAR-END REPORT ON THE FEDERAL JUDICIARY (2022), <https://perma.cc/EVM8-GKD8>. The most recent report issued by Chief Justice Roberts indicates that the Court saw a decrease in cert petitions in 2021. The total filings during the 2020 Term were 5,307. The most recent Term, the 2021 Term, saw only 4,900 filings. The Chief Justice's 2021 year-end report indicates that the Court received 5,411 filings during the 2019 Term. Much like the number of decisions being rendered, the number of cases being filed before the Supreme Court appears to be decreasing. In 2018, the Court received 6,444 filings. That is nearly a 1,500 drop in Supreme Court filings in just four years. And the Court's production decrease appears to be mirroring this trend.

make a recommendation.<sup>90</sup> Unlike the early Supreme Court Justices that rode circuit<sup>91</sup> and worked without law clerks, printers, and computerized research tools, these Justices have all the advantages that modern technology and the cert pool provides.<sup>92</sup> The increase in cert petitions is met with better resources, faster technology, and a lighter decisional load. The current Court hears less than eighty cases each Term.<sup>93</sup> The Justices have more resources and, objectively speaking, are doing less work.<sup>94</sup>

So, what are the Justices doing with all the time that their predecessors invested in reading, evaluating, and deciding cases? When they are not traveling, teaching, speaking, or writing books, the Justices appear to be writing lengthy, largely irrelevant, concurring opinions. The opportunity costs are wasteful on both an individual and systemic level. Why not hear more cases? Why are the Justices themselves not reading through the cert petitions and, instead, delegating critical case selection to second- or third-year lawyers? If the Justices were truly overburdened, they would not be drafting prolix majority opinions and publishing separate opinions in two-thirds of its decided cases. If the Justices prefer to invest time in outside endeavors, that is fine.<sup>95</sup> But the practice of filling time inside the court with publishing unnecessary concurring opinions needs to stop.

The Supreme Court is entrusted with saying what the law is. The Court's legal opinions should follow the simple A, B, Cs of good legal writing—accuracy, brevity, and clarity. Yet modern Supreme Court

---

<sup>90</sup> Barbara Palmer, *The "Bermuda Triangle?" The Cert Pool and Its Influence over the Supreme Court's Agenda*, 18 CONST. COMMENT. 105, 107–08 (2001).

<sup>91</sup> Joshua Glick, *On the Road: The Supreme Court and the History of Riding Circuit*, 24 CARDOZO L. REV. 1753, 1754 (2003). See also *Early Supreme Court Justices Ride the Circuit*, U.S. NAT. PARK SERV., <https://perma.cc/V7X7-HEUP> (reminding that early Supreme Court Justices also served as Circuit Court judges and traveled throughout the United States to hear cases). Justices spent anywhere from six to nine months riding Circuit in the late eighteenth century. *Id.*

<sup>92</sup> Congress first authorized Justices to hire law clerks and stenographers in 1919. Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 54 (2008). Peppers and Zorn report that by the middle of the twentieth century, each Justice was entitled to hire up to two law clerks, a secretary, and a messenger. *Id.* at 55. "Today, each Justice may hire up to four law clerks, while the Chief Justice may employ five clerks, plus two administrative assistants." *Id.*

<sup>93</sup> Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225, 1228 (2012) (noting that the Court decided 177 cases per Term in the 1940s, 124 cases per Term in the 1950s, 137 cases per Term in the 1960s, and by the 2000 Term, was hearing only eighty-seven cases per Term).

<sup>94</sup> *Id.* at 1225 (noting that in 1972, Justice Douglas criticized the Court as being "overstaffed and underworked").

<sup>95</sup> See S.M., *What Supreme Court Justices Do During Their Summer Vacation*, THE ECONOMIST (July 4, 2017), <https://perma.cc/C8XF-QDWY>.



opinions are longer, more fragmented, and difficult even for lawyers to follow. One of the reasons that Justice Alito's *Dobbs* opinion mushroomed to over a hundred pages is that he found himself addressing the arguments raised by the concurrences and dissents. This is a recurring theme with the Roberts Court. Each Justice who publishes an opinion seeks to point out flaws in the other Justices' opinions. The Court appears caught in a vicious cycle of overwriting and publishing individual disagreements among the Justices. Justice Roberts surely appreciates that this approach is causing institutional harm and reputational damage. The Court seems, from the outside looking in, fractured. Even members of the majority can't seem to go along with important decisions without adding their own commentary. These "yes, but" opinions are unmitigated legal clutter and mischief makers.

Justice Kavanaugh's *Alston* concurrence overshadowed an otherwise unanimous opinion. He used five pages to present his individual opinion inviting new litigation.<sup>96</sup> Justice Thomas's *Dobbs* concurrence unnecessarily threw additional kerosene on a case that repudiated half a century of settled precedent.<sup>97</sup> Justice Thomas's concurrence asks the Court to go further than simply overturning *Roe*.<sup>98</sup> He—but apparently, he alone—wants to dismantle the entire line of privacy cases.<sup>99</sup> These two concurrences, published by members of a 6–3 conservative majority, are unhelpful. They add length without adding value. They urge the majority to go further—and beyond the facts of a given case. They are advisory opinions disguised as concurrences. They cause unnecessary confusion or, worse still, raise concern that the Court is willing to go further and faster than need be. These opinions wreak havoc on a sacred institution at a fragile time. Concurring opinions are the new judicial activism.

Justice Roberts wants the public to be more respectful of a Court that is creating damaging new norms.<sup>100</sup> The Roberts Court issues fewer opinions than its predecessors.<sup>101</sup> It publishes more individual opinions than its predecessors.<sup>102</sup> The Robert's Court is willing to eschew precedent in much the same way the 1960s Warren Court did.<sup>103</sup> And, through

---

<sup>96</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).

<sup>97</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring).

<sup>98</sup> *Id.* at 2304 (“[B]ecause this case does not present the opportunity to reject substantive due process entirely, I join the Court’s opinion.”).

<sup>99</sup> *Id.* In sending a pretty clear warning sign for future litigants, Justice Thomas opines that the Court should eliminate substantive due process “from our jurisprudence at the earliest opportunity.”

<sup>100</sup> *Chief Justice John Roberts Defends the Supreme Court – As People’s Confidence Wavers*, NPR (Sept. 10, 2022, 11:05 AM), <https://perma.cc/547P-4TF5>.

<sup>101</sup> Owens & Simon, *supra* note 93, at 1225.

<sup>102</sup> See Penrose, *supra* note 40, at 181.

<sup>103</sup> See *e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022).

---

---

individual concurring opinions, we are witnessing a new form of judicial activism—individually published advisory opinions inviting future litigation. While the Warren Court understood the importance of unanimity for the sake of institutional integrity and the good of the country,<sup>104</sup> the Roberts Court seemingly fails to appreciate that a divided Supreme Court in a divided nation is a recipe for disaster. The problem may not be with the divided nation. The problem may be within the Court itself.

There is little institutional value in a majority opinion followed by multiple “yes, but” opinions. The Court should return to the practice of drafting clear, understandable “for the Court” opinions. It is strange that at a time when the Justices’ writings are more physically accessible than ever before—all one needs is a smart phone or iPad—their written work product is becoming less accessible in the ways that matter most. Opinions are too long, too complicated, and require advanced legal training to sift through multiple individual decisions that may, or may not, prove relevant. It is as if the Court is out of touch with the rest of the world. Now that everyone can immediately access important legal decisions, those decisions are being written in a fashion that is incomprehensible to the average person. The fragmented, individualized approach to decision making characterizing the Roberts Court leaves us drowning in legal clutter.

It is time for the Court to invest more time into deciding actual cases and less time writing and responding to individual concurring opinions. The Court plays an instrumental role in our society. It is tasked with deciding the country’s most important legal questions. It is filled with the country’s greatest legal minds. But this Court no longer confines itself to decisions. Its members go beyond their Article III mandate to *decide* cases and controversies. The members of this Court appear to be focused on individual brands and individualized attention. Concurring opinions epitomize individuality at the cost of clarity. It is time to stop with the individual opinions. It is time to stop with the legal clutter.

---

<sup>104</sup> See *e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In both the desegregation cases and the busing cases, the Court fully appreciated the importance of a unanimous Court. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 40 (1979). If the Court reflected the fractures of society, its decisions would be less likely to garner support. See *id.* Chief Justice Warren knew this. See *id.* Much like Chief Justice Warren, Chief Justice Burger fully appreciated the importance of unanimity in important decisions impacting matters on which society was divided. See *id.*