Note

AGAINST INDIVIDUALLY SIGNED JUDICIAL OPINIONS

JAMES MARKHAM

INTRODUCTION

Supreme Court Justices have been known to guard their personal privacy and the mystique of the Court. In response to a congressional proposal to videotape the Court's oral arguments, Justice Souter remarked, "I can tell you the day you see a camera coming into our courtroom, it is going to be rolled over my dead body."[1] There was likewise anger from some members of the Court when Bob Woodward and Scott Armstrong published *The Brethren*[2] in 1979 using information obtained from former clerks, and again in 2004 when David Margolick penned a *Vanity Fair* exposé[3] (based on similar leaks) on how the Court came to its decision in *Bush v. Gore*.[4] The reasons typically given for this cloak of secrecy are sensible enough: to protect the uncensored and free flow of information between the Justices; to protect the independence of the Justices by shielding them from public opinion and politicization; and, as one commentator more humorously postulated, to preserve their

1. *On Cameras in Supreme Court, Souter Says, 'Over My Dead Body'*, N.Y. TIMES, Mar. 30, 1996, at 1.24.

2. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

3. David Margolick et al., *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310.

4. *See* Edward Lazarus, *The Supreme Court's Excessive Secrecy: Why It Isn't Merited*, FINDLAW.COM, Sept. 30, 2004, http://writ.news.findlaw.com/lazarus/20040930.html (last visited Aug. 24, 2006) ("Former Attorney General Richard Thornburgh, former Deputy Attorney General William Barr, former Solicitor General Theodore Olson, and close to 90 former law clerks . . . have written a letter excoriating the clerks who spoke to Margolick as traitors to the Court and to their profession.").

anonymity so they can "amble through antique shops unnoticed on summer mornings when the Court is in recess."[5]

Despite their efforts, however, the Justices often find themselves in the spotlight. 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[6] to their appearance[7] and personalities. The Court has certainly come a long way from its status during the early years of the Republic, when it was considered a posting of such obscurity that presidents had difficulty finding men willing to accept the nomination.[8] Today, by contrast, Supreme Court Justices and certain other federal judges have attained celebrity status.[9] 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.[10] Indeed, the Justices levy similar accusations against one another[11]—and when they do, the fuzzy contours of a problem begin to take shape.

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5. Dahlia Lithwick, *Justice Showtime*, AM. LAW., Dec. 2005, at 130, 130.

6. *See, e.g.*, Concurring Opinions, http://www.concurringopinions.com/archives/supreme_court (last visited Aug. 17, 2006); SCOTUSblog.com, http://www.scotusblog.com (last visited Aug. 17, 2006).

7. *See, e.g.*, Underneath Their Robes, http://underneaththeirrobes.blogs.com. This blog achieved notoriety with its rankings of the best-looking members of the federal judiciary. Bodacious Babes of the Bench: The Female Superhotties of the Federal Judiciary!, http://underneaththeirrobes.blogs.com/main/2004/07/index (July 20, 2004) (last visited Aug. 17, 2006); Big Swinging Gavels: The Male Superhotties of the Federal Judiciary!, http://underneaththeirrobes.blogs.com/main/2004/07/index (July 21, 2004) (last visited Aug. 17, 2006). The pseudonymous author of the blog, "Article III Groupie," revealed his identity as Michael Lat, an Assistant United States Attorney in Newark, New Jersey. Jeffrey Toobin, *The Bench*, NEW YORKER, Nov. 21, 2005, at 44, 44. Appropriately enough (in this Note arguing for anonymity for Supreme Court Justices), Mr. Lat chose to cease blogging anonymously because he "felt frustrated that [he] was putting a lot of time into this and was unable to get any credit for it." *Id.*; *see also* Adam Liptak, *Mystery of Gossipy Blog on the Judiciary Is Solved*, N.Y. TIMES, Nov. 16, 2005, at A14.

8. Scott Douglas Gerber, *Introduction* to SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 2, 2–3 (Scott Douglas Gerber ed., 1998). The first Chief Justice, John Jay, is said to have been so frustrated with the Court's lack of influence and activity that he resigned his post to assume the governorship of New York, and several potential successors turned down the nomination altogether. *Id.*

9. *See, e.g.*, Jeffrey Rosen, *It's the Law, Not the Judge; but These Days the Bench Is the Hot Seat*, WASH. POST, Mar. 27, 2005, at B1 ("Judges today are being catapulted into public view as personalities who seem fair game for attack rather than as anonymous oracles of the law.").

10. *Id.* ("Liberals routinely denounce such Supreme Court justices as Antonin Scalia and Clarence Thomas as partisan conspirators . . . .").

11. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected . . . .").

Although the names of the Supreme Court Justices are perhaps not household names,[12] they are certainly known well by anyone in the legal field. Consideration of an opinion's author is a common starting point for the scholar or practitioner who sets out to analyze a decision, and legal journals are replete with retrospectives of various Justices' jurisprudential legacies.[13] It is neither surprising nor unusual that patterns emerge in the Justices' votes. It is problematic, however, when opinions are written less for the litigants than for an external audience of like-minded devotees. Justice Ginsburg has called it playing to the "home crowd."[14] Judge Posner calls it "play[ing] to the gallery."[15] The notion that the Justices are beholden to ideological constituencies outside the Court is the problem this Note seeks to address.

Why do American appellate judges have such public personae at all? High court judges in many other democracies do not.[16] As a possible answer, this Note considers one of the key procedural differences between the American high court and its international counterparts: the use of individually signed opinions. In the United States, with the relatively rare exception of per curiam opinions and a handful of other procedural oddities,[17] each high court decision is issued under the name of the Justice who wrote it. The individually signed opinion has become such a cornerstone of American appellate judicial practice—some consider it a virtual *sine qua non* for judicial

12. A 2003 survey showed that 65 percent of Americans could not name even one current Supreme Court Justice; the most-named Justice in the survey was Justice O'Connor, who was named by 25 percent of those surveyed. Results of FindLaw's U.S. Supreme Court Awareness Survey, http://www.findlaw.com/survey/SCsurveyresults.html (last visited Aug. 17, 2006).

13. *See, e.g.*, Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987); Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988); *see also* Charles Lane, *In the Center, Hers Was the Vote That Counted*, WASH. POST, July 2, 2005, at A1.

14. *See* Bill Hord, *Ginsburg Sees Threats to Court*, OMAHA WORLD-HERALD, Apr. 8, 2006, at 8B ("'In some political circles,' Ginsburg said, 'it is fashionable to criticize and even threaten federal judges who decide cases without regard to what the home crowd wants.'").

15. Richard A. Posner, *The Supreme Court, 2004 Term—Forward: A Political Court*, 119 HARV. L. REV. 31, 81 (2005) ("[J]udges . . . play to the gallery, as our Justices do.").

16. *See infra* Part III. Justice Ginsburg relays a story told by Justice Scalia about an exchange between one of his daughters and her host family abroad: "When the Scalia child reported . . . that her father had become a federal judge . . . the change in occupation bewildered the foreign family. Why would a tenured professor want to join the ranks of the judiciary?" Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 136 (1990).

17. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (a joint opinion authored by Justices O'Connor, Kennedy, and Souter); *see also infra* note 103 and accompanying text.

accountability, transparency, and independence[18]—that one rarely stops to consider its origin, much less its costs and benefits in the administration of justice. As in other areas of American law, "[f]amiliarity breeds inattention."[19]

Nothing in the Constitution or any other source of American law mandates the current practice of identifying the author of each opinion published in a given case, including majority opinions, concurrences, and dissents. The system could have evolved in other ways, and even today the Court occasionally departs from its standard operating procedure in somewhat haphazard fashion. Having a Justice's name attached to an opinion brings a measure of accountability and control to an otherwise secretive institution, but this accountability carries with it a cost in the Court's ability to appear independent and above the political fray, and detracts from the notion of the Court as something greater than the nine individuals who comprise it. This Note considers whether the current practice is the best practice, or whether the individually signed opinion contributes to the "cult of the judge superseding the cult of the robe."[20]

Part I traces the origin and evolution of the practice of delivering opinions under the name of a particular Justice from the pre–John Marshall era of seriatim opinion delivery to the modern era of numerous separately authored concurrences and dissents.[21] Part II considers what can be learned from those instances in which the Court departs from its standard operating procedure and issues its decision by per curiam opinion or other procedural anomaly. Of particular interest is the Court's tendency to use the per curiam not

18. MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS 3–4 (2004).

19. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (observing that "substantive due process" is often overlooked as a contradiction in terms).

20. JOHN BRIGHAM, THE CULT OF THE COURT 64 (1987). As Professor Brigham points out, the phrase "cult of the robe" was used as early as 1828 to describe the aura of institutional wisdom—a notion of tradition, legal education, and independence—surrounding the Justices. *Id.* at 63.

21. This Note does not consider the increased frequency with which the Justices choose to write separately, a trend discussed in detail elsewhere. *See, e.g.*, John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137 (1999); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1989); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959) (reviewing the history of separate opinions).

only for the very easy cases, but also for some of its most difficult and politically charged cases, such as *Bush v. Gore*.[22]

Part III turns briefly to the realm of the comparative, highlighting foreign courts that do not use individually signed opinions but nevertheless maintain accountability and control of their judiciaries without a written record of each judge's work. Finally, Part IV considers the substantive effects of delivering opinions under an individual judge's signature: whether the benefit of accountability is outweighed by a cost in potential "playing to the gallery"; whether, as some have hypothesized, pride of authorship is an incentive necessary for judges to do their work conscientiously;[23] and whether the personal nature of the individually signed opinion comes at the expense of the Court's institutional legitimacy.[24] Would justice be more equal for all litigants if the judge assigned to author and deliver the outcome of the controversy remained anonymous? Would the Court's institutional strength be better protected if the Justices' votes were not revealed by name? Or would preserving the anonymity of an opinion's author simply darken the veil of secrecy around the Court—a veil that is already the subject of considerable criticism?[25] This Note seeks to address these questions, and concludes that the benefits of anonymous opinions would outweigh the costs.

I. THE ORIGIN AND EVOLUTION OF THE INDIVIDUALLY SIGNED OPINION

The individually signed opinion has been the mainstay of the Court's opinion delivery process for so long that it is difficult to imagine any alternative. It is second nature to analyze an opinion based on who wrote it, and most first-year law students can probably make an educated guess about the identity of an opinion's author based on style alone. Commentators use phrases like "vintage

22. Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

23. LASSER, *supra* note 18, at 312.

24. *See generally* Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988) (explaining the factors that lead to the increased use of individual opinions).

25. *See* Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 97 n.161 (2006) ("Justices are public officials exercising governmental power, and I believe that in a democracy, there should be transparency about all branches of government."); *see also supra* note 4 and accompanying text.

Scalia"[26] or "classic O'Connor"[27] to describe an opinion. Attaching an individual judge's name to an opinion was a practice inherited, at least in part, from England at the founding, but a look at the Court's early days shows that its opinion delivery practice has evolved considerably over time, due as much to the personalities and preferences of the early Justices as to America's common law heritage.

A. History

Opinion delivery during the Court's first decade (1790–1801) can best be described as unsettled, as the Court issued its early decisions in at least four different ways during this period.[28] First, in a practice similar to that used by the House of Lords at the time of the American Revolution, the Court would issue decisions seriatim. Each Justice would write his own independent judgment, with all of the opinions published in order from most junior to most senior Justice.[29] A summary order stating the Court's overall disposition of the case would sometimes follow the seriatim opinions.[30] Second, opinions would sometimes be filed simply under the heading "By the Court," although this method was generally reserved for uncomplicated cases in which the Court was unanimous or little legal reasoning was required.[31] Third, in a practice that would become the norm when John Marshall took the Court's helm, the Chief Justice would occasionally deliver an opinion under his name, but with an indication that he was speaking "for the Court."[32] And finally, there were initial forays into the practice of the Justices writing separately from the majority opinion of the Court,[33] though the first true dissent was not issued until 1806 by Justice Paterson in *Simms & Wise v. Slacum*.[34]

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26. *See, e.g.*, Bob Woodward & Charles Lane, *Scalia Takes a Leading Role in Case*, WASH. POST, Dec. 11, 2000, at A1 ("The justice's performance has been 'vintage Scalia' . . . . He does not mince words.").

27. *See, e.g.*, Posting of Jack M. Balkin to Balkinization, http://balkin.blogspot.com/2005_11_27_balkin_archive.html (Nov. 30, 2005) (last visited Aug. 17, 2006) ("So [everyone] wins and everybody loses—a classic O'Connor result.").

28. Kelsh, *supra* note 21, at 139.

29. ZoBell, *supra* note 21, at 192.

30. *Id.*; *see, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 480 (1793) (concluding with an order "By the Court").

31. Kelsh, *supra* note 21, at 140; ZoBell, *supra* note 21, at 192.

32. Kelsh, *supra* note 21, at 142. Chief Justice Marshall's delivery of the opinion did not necessarily mean that he authored it. *Id.* at 142 n.30.

33. *See, e.g.*, Sims v. Irvine, 3 U.S. (3 Dall.) 425, 457 (1799) (Iredell, J.) ("Though I concur

When John Marshall became Chief Justice, he sought to enhance the Court's institutional authority by presenting one opinion "for the Court," which he often (but not always) authored himself.[35] Marshall was adamant, in the name of the Court's power and dignity, that his be the only opinion issued, even when the Justices were not unanimous in their decision of the case.[36] Marshall brought the practice of seriatim opinion writing to an abrupt end: of the sixty-seven non–per curiam opinions issued by the Court between 1801 and 1806, Marshall's name alone was attached to sixty; the remaining decisions were delivered by another Justice or in the seriatim style, but only due to Marshall's absence or recusal from the matter.[37]

An obvious consequence of Chief Justice Marshall's desire to speak with a single voice was the fact that differences among the Justices became hidden from public view.[38] In this regard, the Marshall Court opinion delivery practice was akin to that used by the English Privy Council, which was the highest appeals court available for controversies arising in the Colonies.[39] Professor ZoBell describes the Privy Council practice as follows:

> The Privy Council, in the exercise of this appellate jurisdiction, adopted as its decision that favored by the majority of those present. Once the decision of the Council had been determined, however, it

with the other Judges of the Court in affirming the Judgment of the Circuit Court, yet as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly.").

34. Simms & Wise v. Slacum, 7 U.S. (3 Cranch) 300, 309 (1806) (Paterson, J.). There is some disagreement as to whether this is truly the first dissent. Justice William Johnson issued a separate opinion in the case of *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805), in which he "uttered a substantial dissent from the reasoning of the court," but his statements were made in what was actually a concurring opinion. *Id.* at 72 (Johnson, J.); ZoBell, *supra* note 21, at 195. In any event, Justice Johnson is widely considered the Court's first dissenter. *See generally* DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER (1954).

35. BRIGHAM, *supra* note 20, at 187.

36. ZoBell, *supra* note 21, at 193. Professor ZoBell notes examples of decisions that Marshall's single opinion portrayed as unanimous, but which were not. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), Marshall is alleged to have written the opinion and delivered it as if unanimous even when it was "contrary to his own Judgment and Vote." ZoBell, *supra* note 21, at 193 n.41 (internal quotation marks omitted) (quoting Donald G. Morgan, *Mr. Justice Johnson and the Constitution*, 57 HARV. L. REV. 328, 333 (1944) (quoting Justice Johnson)).

37. Kelsh, *supra* note 21, at 144.

38. Gerber, *supra* note 8, at 20.

39. ZoBell, *supra* note 21, at 187 (explaining the process for appealing to the Privy Council).

> was announced as the decision of the whole, regardless of what may have been the individual views of its members.[40]

President Jefferson, a proponent of seriatim opinion delivery, was opposed to Marshall's masking of the Court's internal workings in "secret, unanimous opinions"[41] because he believed that individual reputation was the only mechanism short of impeachment for maintaining a life-tenured judge's accountability to the public.[42] He wrote that when "nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself," then personal reputation is "shielded completely."[43] In further criticism, obviously directed at Marshall, Jefferson wrote that opinions other than those delivered seriatim were subject to being "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."[44] President Madison also called for a return to seriatim opinion delivery "so that Republican judges could record their position on the issues."[45] Neither president got his wish in terms of a return to seriatim opinion delivery,[46] but their comments are nevertheless relevant to the discussion that follows regarding use of the per curiam opinion[47] and the decisionmaking methodologies of other nations' high courts.[48]

Beginning in 1804, Chief Justice Marshall's preference for unanimity, publicly acknowledged in an 1819 newspaper article,[49] gradually gave way to the modern practice of one Justice writing for the Court majority with other Justices free to write separate

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40. *Id.* at 188 (citations omitted).

41. BRIGHAM, *supra* note 20, at 187; *see also* ZoBell, *supra* note 21, at 194 ("Jefferson favored a return to 'the sound practice of the primitive court' of delivering seriatim opinions." (quoting Letter from President Thomas Jefferson to Justice William Johnson (Oct. 27, 1822))).

42. Letter from President Thomas Jefferson to Justice William Johnson (Oct. 27, 1822), *in* MORGAN, *supra* note 34, at 169.

43. *Id.*

44. Letter from President Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *in* MORGAN, *supra* note 34, at 172.

45. BRIGHAM, *supra* note 20, at 187.

46. Some have argued that the modern-day proliferation of concurrences and dissents effectively represents a return to seriatim opinion delivery. *E.g.*, *id.* at 23.

47. *See infra* Part II.

48. *See infra* Part III.

49. 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 320 (1919).

concurrences or dissents. Although the frequency with which the Justices wrote separately fluctuated in the early nineteenth century, by 1832, all members of the Court, including Marshall, had written separately at least once.[50] By the time of Marshall's death in 1835, the current practice "had become firmly entrenched."[51]

What has changed in the last half century, however, is the Justices' tendency to write separately for seemingly personal (as opposed to purely jurisprudential) reasons. Separate opinions in the Court's early years were characterized by a reluctant, apologetic rhetoric—even, occasionally, from Chief Justice Marshall himself.[52] Modern separate opinions, however, have become so prevalent as to lead one critic to write that a Justice may choose to "write separately because this is a damned interesting case and the majority opinion was assigned to someone else."[53] Some have argued that Justice Frankfurter, "reluctant to surrender the intellectual independence he had enjoyed as a law professor at Harvard," opened the Pandora's Box of writing separately merely to express a personal observation; he often wrote concurrences even when in complete agreement with the majority.[54] The major spike in the Court's nonunanimity rate, however, did not take place until the mid-1940s, after Harlan Fiske Stone became Chief Justice.[55]

B. Modern Practice

Today, separate opinions are frequently emotionally charged and uniquely revealing of the Justices' personal feelings on the matter at issue. For instance, in the 1989 flag burning case, *Texas v. Johnson*,[56]

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50. Kelsh, *supra* note 21, at 150.

51. *Id.* at 152.

52. *See, e.g.*, Bank of U.S. v. Dandridge, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting) ("I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion . . . .").

53. David O. Stewart, *A Chorus of Voices*, A.B.A. J., Apr. 1991, at 50, 50.

54. Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2100 n.104 (1995). Ironically, Justice Frankfurter was also a strong proponent of judicial restraint, the view that judges should be hesitant to declare legislative enactments invalid, and once suggested that dissents only confused matters and made it difficult for lower courts and the American public "to make out where the Supreme Court really stands as an institution." BRIGHAM, *supra* note 20, at 193–94 (quoting ALAN WESTIN, THE SUPREME COURT: VIEWS FROM THE INSIDE 26 (1961)).

55. Kelsh, *supra* note 21, at 174–75. Roughly 75 percent of the Court's cases have been nonunanimous since that time. *Id.*

56. Texas v. Johnson, 491 U.S. 397 (1989).

Justice Kennedy voted with the majority but still chose to write separately "not to qualify the words Justice Brennan cho[se] so well . . . . but with a keen sense that this case, like others before us from time to time, exacts its personal toll."[57] More recently, in *Lawrence v. Texas*,[58] Justice Scalia tempered his dissent with a personal disclaimer: "Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means."[59]

The shift from the institutional to personal nature of opinion writing was also evidenced in Justice Breyer's subtle and inadvertent rhetorical slip in *South Central Bell v. Alabama*,[60] when he used the pronoun "I" instead of "we" in a majority opinion.[61] The fact that the pronoun was quickly noticed by Court observers[62]—coupled with the fact that Justice Breyer apologized for the mistake[63]—suggests that majority opinions are more closely guarded institutional territory than concurrences or dissents.

Scholars (and the Justices) have different views on the merits of modern opinion delivery practices.[64] Oliver Wendell Holmes, the Great Dissenter, was known to have considered dissents "undesirable"[65] due to their cost in institutional legitimacy, and Justice Brandeis was known to have a cache of completed separate opinions ("replete with the most exquisite detail of citation")[66] withheld from publication so as not to inhibit the Court's decisiveness.[67] Justice Scalia, on the other hand, has written that dissents augment the Court's stature by forcing "the majority to

57. *Id.* at 420 (Kennedy, J., concurring).

58. Lawrence v. Texas, 539 U.S. 558 (2003).

59. *Id.* at 603 (Scalia, J., dissenting).

60. South Cent. Bell v. Alabama, 526 U.S. 160 (1999).

61. *Id.* at 167 (the "I" has since been corrected to "we" in the U.S. Reports). The reverberations from this incident are detailed in Tony Mauro, *Breyer's "I" Scream*, LEGAL TIMES, Apr. 26, 1999, at 1. Vanderbilt Professor Barry Friedman said the incident was "like the Wizard of Oz stepping out from behind the curtain." *Id.*

62. *Id.*

63. *Id.*

64. *See infra* Part IV.

65. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

66. John P. Frank, *The Unpublished Opinions of Mr. Justice Brandeis*, 10 J. LEGAL EDUC. 401, 401 (1958) (reviewing ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957)).

67. *Id.* at 403–04.

refine its opinion"[68] and making the Court "not just the central organ of legal *judgment* . . . [but] center stage for significant legal *debate*."[69] At a minimum, it can be said that the Court's practice of using individually signed opinions for the majority opinion and any concurrences and dissents is now well-established, something that could not be said during its first two decades. A look, however, at some of the ways in which the Court periodically departs from its standard practice illustrates certain limitations of the individually signed opinion.

II. USE OF THE PER CURIAM OPINION AND OTHER PROCEDURAL ANOMALIES

Per curiam opinions—those issued "by the court" with no individual Justice's name attached[70]—have been alternatively praised and criticized by Court observers and by the Justices themselves. They have been at once lauded as an invaluable means of rapidly and apolitically dispensing with certain matters[71] and derided as "the handmaiden of law clerks."[72] Some have cited a high rate of per curiam opinions as a symptom of an overworked or overburdened court, arguing that the unnamed opinion is a shortcut through which a court can dispense with cases without giving them its full attention.[73] It makes sense for certain straightforward opinions to be disposed of in per curiam fashion, but if the "great legitimacy" of common law judicial decisionmaking rests so heavily on its "great transparency,"[74] then use of the per curiam in the very difficult or most politically charged cases becomes a curiosity. After defining the term, this Part argues that the Supreme Court's successful use of per curiam opinions

68. Justice Antonin Scalia, The Dissenting Opinion, Address Before the Supreme Court Historical Society (June 13, 1994), *in* 1994 J. SUP. CT. HIST. 33, 41.

69. *Id.* at 39.

70. BLACK'S LAW DICTIONARY 1125 (8th ed. 2004).

71. Henry S. Manley, *Nonpareil Among Judges*, 34 CORNELL L.Q. 50, 51 (1948).

72. Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41, 50 (1994–95).

73. *See, e.g.*, Peter L. Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME. L. REV. 43, 73 n.210, 74 (2000) (attributing a decline in the number of per curiams issued by the Nebraska and Utah supreme courts to the establishment of courts of appeal that reduced the high court workload in those states); Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 722 (1956) (suggesting that the per curiam opinion may provide "the most feasible method of enabling the Court to handle its present workload," despite the numerous problems the practice presents).

74. LASSER, *supra* note 18, at 3.

shows that opinion attribution is not essential to an opinion's legitimacy.

A. Defining Per Curiam

Before considering the Court's use of the per curiam opinion, it is useful to define precisely what a per curiam opinion is. In actuality, the Court has used the per curiam designation for a wide variety of purposes, and has not used it consistently over time. The Court's first published opinion to carry the per curiam heading was *Mesa v. United States*,[75] issued in 1862.[76] The per curiam was initially used for cases in which the issues of substantive law were so clear that no individual Justice needed to take time to craft a detailed opinion.[77] It developed into a useful method for quickly disposing of cases (often without briefing or oral argument) for lack of a substantial federal question; for granting or denying certiorari petitions or dismissing certiorari as having been improvidently granted; or, under the Burger Court in particular, for handling cases in which the Court granted review, vacated the lower court ruling, and remanded the case for reconsideration (an oft-criticized practice known as a "GVR").[78] The per curiam label has sometimes been used interchangeably with what might better be described as memorandum opinions, such as those offering stays of execution in death penalty cases. Decisions have also been labeled per curiam when the Justice to whom the opinion was initially assigned died or left the Court before publication.[79]

Although per curiam opinions have a somewhat higher rate of unanimity than signed opinions, they are not always unanimous. In fact, the sample of opinions in one study surprisingly showed them to

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75. Mesa v. United States, 67 U.S. (2 Black) 721 (1862) (per curiam).

76. *Id.* Professor Ray points out that an earlier opinion, *West v. Brashear*, 131 U.S. app. at lxvi (1839), was actually the first per curiam written by the Court, but that it was not published until 1889 in an appendix to the United States Reports along with a number of other previously omitted cases. Laura Krugman 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, 522 (2000).

77. *See* Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29, 30 (1992) (noting that the per curiam opinion was "[f]irst used only to indicate cases with 'indisputably clear' substantive law").

78. *Id.* at 32 & n.14. *See generally* Arthur D. Hellman, "*Granted, Vacated, and Remanded*"*—Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984) (discussing in detail the Burger Court's GVR practice).

79. *Id.* at 30. For example, the court used a per curiam opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), after Justice Fortas, the author of the opinion, resigned from the Court. *Id.*

be unanimous less than half the time.[80] Professor Wasby and colleagues note that Justice Thurgood Marshall was a vocal critic of the Court's practice of attaching the per curiam label to summary decisions lacking consensus among the Justices:

> He argued that because per curiam means "by the Court," it should be limited to situations where the opinion can "speak for the entire Court on a matter so clear that the Court can and should speak with one voice"; to hand down a per curiam over the dissent of justices who would set the case for plenary treatment is thus wrong.[81]

Certain of the Justices made a habit of dissenting from per curiam opinions; Justice William O. Douglas, for example, wrote seventy-one dissents, twenty-one concurrences, and five other opinions separate from per curiams during his time on the Court.[82] In *Bazemore v. Friday*,[83] a 1986 per curiam opinion, all nine Justices joined in Justice Brennan's concurrence,[84] four Justices joined Justice White's,[85] and three joined Justice Brennan's *second* separate opinion.[86] This odd array of opinions illustrates "a subtle but unexplained distinction between what the Court itself *held* and what all of its members *believed*,"[87] and there is little question that the per curiam has, at times, been used to give opinions an undeserved aura of consensus.[88]

B. Anonymous, yet Legitimate

Despite this criticism and disagreement about the proper role of the per curiam, it has served a valuable function at numerous times in the Court's history. Perhaps the most notable was the period after

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80. Wasby et al., *supra* note 77, at 35 (citing data from a sample of cases decided between 1969 and 1981, which showed that 30 percent of signed opinions were unanimous, whereas 44 percent of per curiams were unanimous).

81. *Id.* at 38 (quoting Montana v. Hall, 481 U.S. 400, 408–09 (1987) (Marshall, J., dissenting)).

82. Ray, *supra* note 76, at 527 ("Together, [Justices] Black and Douglas led the Court toward a model of decisionmaking that never hesitated to disturb consensus opinions with statements of individual views.").

83. Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam).

84. *Id.* at 388 (Brennan, J., concurring in part).

85. *Id.* at 407 (White, J., concurring).

86. *Id.* at 409 (Brennan, J., dissenting in part).

87. Ray, *supra* note 76, at 529 (emphasis added).

88. *Id.* at 546 (citing *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), as a case in which the use of a per curiam heading gave the opinion a "sense of inevitability" that its five-to-four decision did not merit).

Brown v. Board of Education[89] when the Court expanded desegregation from public education to public beaches,[90] golf courses,[91] bus systems,[92] and park facilities[93] through a series of short per curiam opinions. Per curiams have also been a means for the Court to act expeditiously in a time of war in *Ex parte Quirin*,[94] to answer a time-sensitive First Amendment issue in *New York Times Co. v. United States*,[95] to hold Georgia's capital punishment regime unconstitutional in *Furman v. Georgia*,[96] and most recently to resolve (albeit controversially) a presidential election in *Bush v. Gore*.[97] These decisions showcase the per curiam opinion's flexibility and seeming appeal in time-sensitive or politically-charged situations and—although some would argue to the contrary, particularly in the context of *Quirin* and *Bush v. Gore*[98]—its general record of success. Certainly in the post-*Brown* series of cases it was an effective strategy for expanding desegregation doctrine beyond the realm of the schools.

Given the high profile of these cases, one can argue that the individually signed opinion is not strictly necessary to preserve the Court's legitimacy. The questionable legacy of the *Bush v. Gore* per curiam opinion may, of course, temper this argument, but the Court does not appear to have suffered quite the irreparable damage feared by Justice Breyer in his *Bush* dissent.[99]

The occasional appearance of alternative opinion delivery mechanisms besides the per curiam also supports the notion that the

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89. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

90. Mayor of Balt. v. Dawson, 350 U.S. 877 (1955) (per curiam), *aff'g* 220 F.2d 386 (4th Cir. 1955).

91. Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam), *vacating* and *remanding* 223 F.2d 93 (5th Cir. 1955).

92. Gayle v. Browder, 352 U.S. 903 (1956) (per curiam), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956).

93. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam), *aff'g* 252 F.2d 122 (5th Cir. 1958).

94. *Ex parte* Quirin, 317 U.S. 1 (1942) (per curiam).

95. N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

96. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

97. Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

98. *See* Ray, *supra* note 76, at 576 ("The effort failed precisely because . . . students of the Court were not likely to be lulled by the per curiam label into the belief that this opinion represented an authentic consensus.").

99. *Bush*, 531 U.S. at 157 (Breyer, J., dissenting) ("[T]he appearance of a split decision runs the risk of undermining the public's confidence in the Court itself.").

individually signed opinion is unsuited for some of the Court's most daunting work. In *Cooper v. Aaron*,[100] for example, when the Court faced the possibility of "massive resistance"[101] by Southern states after *Brown*, all nine Justices signed the opinion which ordered the Little Rock, Arkansas, public schools to desegregate.[102] This unique showing of unanimity and institutional authority—going beyond the unanimous but individually attributed opinion in *Brown*—served its purpose, but it also raises several questions. Should an individually authored opinion, even one announcing a unanimous decision, be viewed as any less authoritative because it does not bear the actual signature of all nine Justices? Is not an opinion signed by all nine Justices the functional equivalent of a unanimous per curiam opinion signed by none of them? The joint opinion issued by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[103] underscores this point—the Justices sought to strengthen the Court's institutional legitimacy when adjudicating one of the country's most volatile controversies by moving away from the individually authored opinion. If nothing else, the three authors of the joint opinion may have avoided the intense personal burden felt by Justice Blackmun as *Roe v. Wade's* lone author, which one observer described as a kind of "post-traumatic stress disorder."[104]

Although some have argued that "Judge Per Curiam . . . has been drafted for too many hard cases,"[105] the institutional and strategic value of opinions not attributed to any particular author is clear from the previous discussion. If the per curiam (or other non–individually attributed) opinion works in difficult situations, why not use it more often, or even exclusively? In some legal systems, per curiam style opinion delivery is the rule rather than the exception, and identification of the judge who authored an opinion is not just irrelevant, it is anathema. The next Part considers how American opinion delivery practice compares with that used in countries whose

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

101. NAACP v. Patty, 159 F. Supp. 503, 515 (E.D. Va. 1958), *vacated sub nom.* Harrison v. NAACP, 360 U.S. 167 (1959).

102. *Cooper*, 358 U.S. at 4.

103. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

104. William Saletan, *Unbecoming Justice Blackmun*, LEGAL AFF., May/June 2005, at 35, 37 (reviewing LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005)).

105. Manley, *supra* note 71, at 51–52.

high courts do not rely on the individually signed judicial opinion, and what might be gained and lost by adopting a similar approach in the United States.

III. THE ANONYMITY OF THE JUDICIARY IN CONTINENTAL EUROPEAN SYSTEMS

Montesquieu wrote that "the national judges are no more, than the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or rigor."[106] To Americans, this conception of judges is, for lack of a better description, foreign. The most important passage in perhaps the most celebrated Supreme Court decision stands for very nearly the opposite: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[107] This fundamental difference in the way judges in the two systems are viewed stems not only from the differences inherent in the common and civil law systems, but also in part from the manner in which the judges' product is published—in many European judicial systems, majority opinions are issued anonymously. Such systems have been roundly criticized by American scholars: "In the American legal imagination . . . Civilian judicial decision-making has long stood for the very antithesis of transparently reasoned, individually accountable . . . and thus legitimate Common Law judicial decision-making."[108] Nevertheless, this Part argues that the American system, like its Continental analogues, depends on factors other than opinion attribution to maintain judicial accountability.

Before considering the potential applicability of European methodology to the American judiciary, it is helpful to set out a brief background on how a Continental high court operates, with a focus on its opinion delivery practices. Because the French high court for civil matters, the Cour de Cassation, has "long been the symbol of traditional Civilian judging,"[109] it will serve as the best example, although there are, to be sure, many differences among the civil law

106. CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 209 (David Wallace Carrithers ed., Thomas Nugent trans., Univ. of Cal. Press 1977) (1748).

107. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

108. LASSER, *supra* note 18, at 5.

109. *Id.*

countries of Continental Europe.[110] In France and other civil law countries, appellate opinions are published by "THE COURT," with no indication of the opinion's author or the membership of the panel that heard the case.[111] Rather, the decision is offered in the third person singular and issued in what U.S. observers would consider per curiam form—by the entire court as a unit. There are no dissenting or concurring opinions, and the total decision is usually about a page in length, citing the facts, the relevant provision from the Code, and a decision, unsupported by legal reasoning.[112] The Recueil Dalloz, roughly equivalent to the West reporters in the United States, publishes only a handful—about five—of Cour de Cassation conclusions each year, which means that the public is unaware not only of who writes the opinions, but also of what the opinions say.[113]

The obvious concern about such a system is judicial control and accountability. The following passage summarizes the typical criticism of the French system:

> They offer monolithic, unsigned, collegial judgments that refuse to disclose judicial votes, prohibit concurrences or dissents, and shun the overt discussion of policy in favor of syllogistic—or at least highly deductive—statements that downplay, if not mask or ignore, all meaningful judicial interpretive work.[114]

If not through transparency, how do the French police their judges who, like American federal judges, are appointed for life?

According to Professor Lasser, the French ensure judicial accountability and control through "[p]rofessional [n]ormative [m]anagement."[115] By making the judiciary a lifelong profession,

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110. *Id.* at 6.

111. *See id.* at 31 (providing an example of a typical French supreme court decision, one roughly half a page in length).

112. *See id.* at 31–33 (discussing the content of a sample French supreme court decision).

113. *Id.* at 48. In addition to the formal decision issued by the Court, there are parallel documents known as *rapports* (issued by "the reporting judge"). *Id.* These *rapports* generally recount the facts and procedural history of the case, legal analysis, and offer a recommendation for the court, such as "I therefore conclude in favor of quashing." *Id.* at 50. The name of the *rapporteur* in a given case is listed in small print at the end of the decision. *Id.* at 48 n.60. *Rapports* would be more recognizable to Americans as judicial opinions than the Cour's formal decisions, were they not generally secret and unpublished. *See id.* at 48–49 (noting that *rapports* are "rarely published" and "protected by the secrecy of judicial deliberations, and therefore sheltered by law as a part of the judicial system's internal workings").

114. *Id.* at 4.

115. *Id.* at 307.

carefully choosing its membership at an early age, and managing every facet of judges' education and training along the way, the French create a "particularly coherent *corps* of judicial magistrates"[116] who, in effect, police themselves:

> The French judicial system, in short, prepares the normative judicial ground extremely carefully, and then reinforces this preparation through an elaborate and effective system of professional carrots and sticks. The French mode of control of individual judges is therefore profoundly and rigorously *institutional*: mastery of the judicial institution's normative and professional values is the *sine qua non* for advancement through the ranks.[117]

Although there is no doubt a degree of collegiality among American judges, there is nowhere near the formalized institutional structure and uniform career path found in most of Continental Europe. American judges typically come to the bench after a career in academia, private practice, or government service and, the argument goes, therefore lack the common educational background shared by many of their European counterparts.[118] Because the American judicial career path is less formalized and generally unpredictable,[119] judicial accountability and control become a personal matter: judges must support their opinions with good judicial reasons, issued under their individual signatures as a sort of pledge that they "ha[ve] thoroughly participated in th[e] process and assume[] individual responsiblity [*sic*] for the decision."[120] Absent the "professional carrots and sticks"[121] present in the French system, the incentive for American judges to craft an opinion well is, Professor Lasser argues, grounded in a notion of pride of authorship in "all written work that goes out in [the judge's] name."[122] Lasser concludes that this form of accountability, with the individually signed opinion as its "cornerstone,"[123] places tremendous pressure on American

116. *Id.* at 308.

117. *Id.*

118. *Id.* at 311.

119. One judge wrote that the reasons some judges are elevated from trial to appellate courts are "factors known but to politics and God." Nygaard, *supra* note 72, at 46.

120. Owen Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983).

121. LASSER, *supra* note 18, at 311.

122. *Id.* at 312 (quoting Harry T. Edwards, *A Judge's View on* Justice, Bureaucracy, and Legal Method, 80 MICH. L. REV. 259, 266 (1981)).

123. *Id.* at 313.

judges to justify and rejustify the reasoning behind their decisions, to the extent that opinions become inordinately long and convoluted.[124] Moreover, he argues, the remarkable transparency of the American system forces judges to resort to a pragmatic and safe reasoning that produces a "stunningly powerful and monolithic centrism."[125]

Comparing common law and civil law judges is, of course, largely a matter of apples and oranges.[126] But despite oversimplifying the role of the Continental European judge,[127] this Part is included in the Note for two reasons, both of which serve to counter the normative power of the actual. First, it demonstrates that high courts in other democracies can and do operate without individually signed opinions. Second, it illustrates a mechanism of judicial accountability and control ("professional normative management"[128]) that does not rely on the individual signature and that, arguably, is already an important aspect of accountability and control in the United States.

Consider the Court's current Justices, along with the most recent nominees to fill its vacancies. Although there is no national judicial school in the United States as there is in France and most other European countries, of the current Justices, only Justice Stevens (a graduate of Northwestern) went to a law school other than Harvard, Yale, or Stanford.[129] Three members of the Rehnquist Court, including Justice Stevens, clerked for Supreme Court Justices, and Chief Justice Roberts clerked for then–Associate Justice Rehnquist during the 1980 Term.[130] Thus, despite the lack of a singular state training institution, those who reach the pinnacle of the American

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124. *See id.* at 321 ("Is it really so clear that such long, convoluted, and fractured judicial decisions reveal more or offer better guidance than do short, concise, impersonal, and collegial ones . . . ?").

125. *Id.* at 344.

126. *See* John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1865 (1988) ("The major difficulty in approaching such questions is the basic one of comparability. On one level, the United States, France and Germany are much alike . . . . [B]ut . . . French and German judges differ from American judges in their training, selection, tenure, advancement, discipline, and removal.").

127. For a more detailed review of the opinion delivery practices of certain European courts, see Ginsburg, *supra* note 16, at 145–47.

128. *See supra* note 115 and accompanying text.

129. Federal Judges Biographical Database, http://air.fjc.gov/public/home.nsf/hisj (last visited Aug. 18, 2006). Justice Ginsburg attended Harvard Law School for two years but ultimately graduated from Columbia. *Id.*

130. Biographies of Current Members of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Nov. 9, 2006).

judiciary certainly share a common background in terms of legal education. A cynical look at the failed nomination of Harriet Miers (a graduate Southern Methodist University Law School)[131]—especially when compared to the successful nomination of Samuel Alito (Yale Law School)—suggests that a nominee from outside a select group of institutions will be deemed unsuitable for the job.[132] Politics play a more prominent role in American judicial selection than in countries like France, where judges rise through a hierarchy based on test scores and evaluations,[133] but it is hard to argue that Supreme Court Justices are "untrained, politically selected, and largely uncontrolled"[134] as compared to their European counterparts, and therefore need the added accountability measure of signing their opinions.

IV. RECONSIDERING THE INDIVIDUALLY SIGNED OPINION

In a 1947 free speech case, Justice Jackson wrote: "I do not know whether it is the view of the Court that a judge must be thickskinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work?"[135] Six decades later, Judge Posner added: "Justices no more than other Americans can be expected to be content to be wallflowers."[136] To be sure, the Justices cannot be expected to operate in a vacuum. But there 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.

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131. Harriet Miers, Counsel to the President, http://www.whitehouse.gov/government/hmiers-bio.html (last visited Nov. 9, 2006)

132. *See, e.g.*, Ann Coulter, Does this Law Degree Make My Resume Look Fat? (Oct. 12, 2005), http://www.anncoulter.org/cgi-local/article.cgi?article=80 (last visited Aug. 16, 2006) (arguing that Harriet Miers was not the most qualified person President Bush could have nominated to the Supreme Court).

133. *See* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1676 (2004) ("[T]hey qualify for the bench by passing a merit examination and advance from one court to the next in the same way, or simply by seniority (as in Italy).").

134. LASSER, *supra* note 18, at 346.

135. Craig v. Harney, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting).

136. Posner, *supra* note 15, at 76 (suggesting the Court should be "nonpartisian" but not necessarily "nonpolitical").

One author argued that the tipping point was reached twenty years ago when he wrote that "a cult of the judge [now] supersed[es] the cult of the robe."[137] He cited anecdotal evidence such as Justice O'Connor's appearing on the cover of *People* magazine in a pink dress, or the fact that the Justices frequently make public appearances in "civilian" clothes instead of their robes, including on the cover of *The Brethren*.[138] He could not have foreseen today's proliferation of information about the Court on the Internet, including numerous influential blogs[139] and online magazines like *Slate*.[140] Sometimes these sites are simply "fan pages," recounting memorable passages from opinions written by a particular Justice.[141] Sometimes, however, they are something more than mere adulation. SCOTUSblog.com regularly includes "State of the Term" reports that summarize the number of opinions authored by each Justice in a given month and then predict case outcomes based on a presumption that opinion-writing workloads will be roughly equal among the Justices. For example, in a May 2005 posting, a contributor to the blog recapped an upcoming case and speculated that "[n]either Justice Stevens nor Justice Souter has issued a majority opinion for the sitting, so they presumably are the authors."[142] Discussing the same case the following month, the contributor wrote, "Justice Souter [is] likely writing the opinion, which presumably would be good news for Miller-El."[143]

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. More troubling, however, is

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137. BRIGHAM, *supra* note 20, at 64.

138. *Id.* at 63–64 (noting that judges are the "only nonmilitary government officials with distinctive dress," but that the "iconography has been shifting from the cult of the robe. Once unknown and short on authority without their robes, the justices have been stepping out . . .").

139. *See, e.g.*, SCOTUSblog.com, http://www.scotusblog.com (last visited Dec. 12, 2006); Underneath Their Robes, http://www.underneaththeirrobes.blogs.com (last visited Dec. 12, 2006); Ninomania, http://ninomania.blogspot.com (last visited Dec. 12, 2006).

140. SLATE, http://slate.com (last visited Dec. 12, 2006).

141. *See, e.g.*, Cult of Scalia, http://members.aol.com/schwenkler/scalia.

142. Posting of Tom Goldstein to SCOTUSblog.com, http://www.scotusblog.com/movabletype/archives/2005/05/state_of_the_te_2.html (May 24, 2005) (last visited Oct. 31, 2006).

143. Posting of Tom Goldstein to SCOTUSblog.com, http://www.scotusblog.com/movabletype/archives/2005/06/state_of_the_te_3.html (June 7, 2005) (last visited Oct. 31, 2006). As it turns out, Justice Souter did write the majority opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and that was indeed good news for Miller-El, *id.* at 235 ("Today we find Miller-El entitled to prevail . . . .").

when the Justices speak this way about each other, acknowledging one another's role as members (if not leaders) of political, cultural, and ideological interest groups in American society. In *Blakely v. Washington*,[144] for example, Justice Scalia's opinion for the Court included a footnote which jabbed at "Justice Breyer's academic supporters,"[145] as if Justice Breyer were the head of a particular school of legal thought regarding the Federal Sentencing Guidelines. Some have argued that the Justices have gone too far in their tendency to use their written opinions to "engage in public conflict."[146] Professors Ferejohn and Pasquino ask: "Does Justice Scalia . . . really think, or even hope, the publication of a strident dissent will move one of his fellow Justices to change his or her mind? Or is his target audience elsewhere?"[147] They conclude that the Justices are effectively using their opinions to speak over the heads of the litigants to a public constituency of sorts,[148] and that this strains the notion of the Court as an independent body.[149]

A. The Proposal

All of this raises the question, why attribute an opinion (especially a majority opinion) to a particular Justice at all? Why not issue opinions just as they are now, including a majority opinion, concurrences, and dissents—just without the names? The majority opinion could be labeled the opinion of "the Court," and concurrences and dissents could, for example, be labeled as "First Concurrence (with three Justices joining)," "Second Concurrence (with one Justice joining)," "First Dissent (with two Justices joining, except as to Part II.A)," and so forth. At least one author (himself a judge) has suggested that the practice of "issuing signed opinions is obsolete and counterproductive," and that "[i]t should be abolished."[150] The argument is that decisions representing the opinion

144. Blakely v. Washington, 542 U.S. 296 (2004).

145. *Id.* at 302 n.5 ("But nowhere is there the slightest indication that his general principle was *limited* to that example. Even JUSTICE BREYER's academic supporters do not make *that* claim.").

146. Ferejohn & Pasquino, *supra* note 133, at 1673.

147. *Id.* at 1697.

148. *Id.*

149. *See id.* at 1699 ("[T]he exposure of internal divisions in the Court may encourage political actors to respond politically by trying to reshape or pack the Court rather than persuade its members.").

150. Nygaard, *supra* note 72, at 41.

of the court as a whole but attributed to one author are subject to "an unfortunate blending of judicial ego into the institutional mixture."[151] Judge Nygaard of the Third Circuit argues that individually signed opinions lead to a "deterioration in the institutional diligence . . . leaving the judge who is assigned the opinion to write approximately as he or she pleases as long as the result represents the conference position."[152] He suggests that opinions ought to bear the imprimatur of an enduring court, not "the mark of an individual justice limited by mortal tenure,"[153] and further contends that unsigned opinions tend to be shorter, more to the point, and "statistically less windy" than signed ones.[154]

B. Benefits of Anonymous Opinions

Whether or not one accepts the notion that signed opinions encourage judges to wax poetic when their names are on the line, it is possible to envision benefits that would accrue from discontinuing the use of individually named opinions.

First, unnamed opinions would make it more difficult for the Justices to be adopted as spokespersons (willingly or otherwise) by political interest groups, and, as Judge Posner wrote, give "much less opportunity for the judges to play to the gallery, as our Justices do."[155] A diminution in the Justices' public identities would likely increase their ability to compromise among themselves on difficult cases. Indeed, the Italian Constitutional Court considered reforms designed to address this very issue: "[A] proposal was made to permit anonymous or unsigned dissents. In this way, it was hoped, individual judges would neither have the opportunity nor the temptation to form public judicial identities that might inhibit their willingness to compromise during the deliberative process."[156]

Professors Ferejohn and Pasquino suggest the Justices have ceased to accept "[internal] deliberative norms that urge compromise and accommodation" among their colleagues on the Court and have

151. *Id.*

152. *Id.* at 45.

153. *Id.*

154. *Id.* at 47 ("Without the allure of 'NYGAARD, Circuit Judge' at the beginning of an opinion, it might well be shorter and more to the point, and have fewer bursts of rhetoric. Judge Per Curiam is statistically less windy than its named colleagues.").

155. Posner, *supra* note 15, at 81.

156. Ferejohn & Pasquino, *supra* note 133, at 1696.

chosen instead to "speak to external audiences in their own names."[157] The two primary reforms they suggest are sensible. Appointing Justices for long, nonrenewable terms instead of life appointments would decrease the stakes of a high court nomination, and requiring a supermajority instead of a bare majority for confirmation by the Senate would encourage presidents to choose more moderate nominees.[158] But the additional step of removing the names from opinions would be a more direct means to the professors' desired end: a diminution of the Justices' ability to engage in public conflict by airing individual differences in published opinions.[159]

Second, anonymous opinions would better protect the Justices' "complete independence," cited by Hamilton as "peculiarly essential in a limited Constitution."[160] Scholars, politicians, and the public at large will, of course, always be free to criticize the Court's decisions and members as they see fit, but an all-too-common attack on certain Justices—Souter, Kennedy, and O'Connor in particular—is that their nominations were "mistakes" by the appointing president, and that they are somehow "traitors."[161] It would be naive to think of the Court as altogether apolitical, but the notion that Justices are appointed primarily to advance a political agenda, and that if they do not then they are failures, contributes to the zero-sum game mentality of the appointment process.[162] By design, life tenure offers the Justices their primary protection in this realm,[163] but if, as Justice Jackson admitted[164] and Judge Posner suspects,[165] the Justices are keenly aware

157. *Id.* at 1702.

158. *Id.*

159. *Id.* at 1673–74.

160. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

161. *See, e.g.*, Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 199–200 (2005) (discussing the idea that Justices Kennedy and Souter were "mistakes" by Presidents Reagan and Bush, and that these Justices fell victim to the so-called "Greenhouse Effect," the tendency to drift leftward to curry favor with *New York Times* Supreme Court reporter Linda Greenhouse).

162. *See, e.g.*, David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 512 (2005) (describing the potential "gridlock" of the judicial appointment process).

163. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 160, at 465 ("The standard of good behavior . . . . is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.").

164. *See supra* note 129 and accompanying text.

165. *See supra* note 130 and accompanying text.

of how the public perceives them,[166] then the ability to write anonymously would be a liberating and potentially moderating influence on the Justices. Naturally they would still be bound by stare decisis, but they would no longer be forced in the name of political ties or the need to advance an always-consistent interpretive method to feel painted into ideological corners. Scholars have expressed concern that "pride of authorship" of an earlier case could keep a Justice from making proper decisions in subsequent cases.[167] If opinions were anonymous, however, each case would stand a greater chance of being decided on its particular merits.

Third, from a procedural standpoint, anonymous opinions would likely bring greater clarity to the law by decreasing the number of separate opinions, especially what have been called "two-cents" opinions representing the personal views of the author.[168] Not only would the number of concurrences and dissents likely decrease, but unsigned majority opinions would also be more likely to reflect the collective opinion of each Justice who voted with the majority, as opposed to being primarily the work of the only Justice whose name is on the line.

Finally, anonymous opinions would also bring a measure of equality to the litigants by precluding the possibility that an opinion would be read differently because of its author. In any discussion about the Court, involving anything from questions at oral argument[169] to written opinions, reference to the name of a particular Justice is convenient shorthand for professors and other commentators for setting out the political underpinnings of a given decision. Chief Justices are no doubt aware of this fact, and have been

166. *See* Tushnet, *supra* note 161, at 200 (portraying Justice Kennedy as a person who "cares about his public persona").

167. *See* Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 461 (2003) ("We predict that not even [Chief Justice] Rehnquist's pride of authorship would commit him to *Dole* . . . .").

168. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 8 n.14 (1993) ("[I]n 'two-cents' concurrences, the author is willing to join in both the outcome and rationale sponsored by the majority, but wishes to add her own, presumably consistent, thoughts on the matter.").

169. As further anecdotal evidence of the "cult of the judge" superseding the Court as an institution, beginning in 2004 the Court Reporter began referring to the Justices by name in oral argument transcripts. Previously, the word "Question" had been used regardless of the speaker. Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 2d 59, 59 (2005).

known to assign opinion-writing duties accordingly. As Professor David O'Brien observes:

> A number of . . . cases illustrate that public relations may enter into a chief justice's calculations. The leading civil libertarian on the Court, Hugo Black, wrote the opinion in *Korematsu v. United States* (1944) . . . . A former attorney general experienced in law enforcement, Tom Clark, wrote the opinion in the landmark exclusionary rule case, *Mapp v. Ohio* (1961) . . . . And a former counsel for the Mayo Clinic, experienced in the law of medicine, Harry Blackmun, was assigned the abortion case *Roe v. Wade* (1973).[170]

It seems a laudable practice to take advantage of the Justices' individual expertise when certain cases arise, but a troubling corollary to this practice is that an opinion might be taken less seriously if *not* authored by one of the more highly regarded members of the Court, or more cynically if the writing Justice is perceived as having voted the party line. Judge Nygaard further describes the problem:

> There is . . . a temptation to give extra credit to or patronize the judge who authored the opinion; that is, to say "Judge X held in the *Blank* case" or "Judge X's opinion in the *Blank* case." Neither is legitimate. I believe that the use of per curiam opinions . . . would preempt the "new lords, new laws" approach to case analysis, make each opinion currency of equal value, and curb the temptation to remap old territory merely because new mapmakers, using the same old methods, have come along.[171]

As suggested in Part II, to a large extent the Court already acknowledges the limitations of the individually signed opinion when it uses per curiam opinions in politically charged, high profile cases like *Bush v. Gore*.[172] Although Justice Thurgood Marshall may have been correct that "per curiam" is not the proper term for opinions of a divided Court,[173] anonymous opinions would enhance the Court's independence, institutional authority, and ability to adjudicate a breadth of legal controversies more consistently.

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170. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 267 (7th ed. 2005).

171. Nygaard, *supra* note 72, at 45–46.

172. *See supra* notes 89–105 and accompanying text.

173. Montana v. Hall, 481 U.S. 400, 409 (1987) (Marshall, J., dissenting).

C. Counterarguments and Responses

Discontinuing the practice of using individually signed opinions is, of course, vulnerable to several counterarguments. Most obviously, the exclusive use of anonymous opinions would carry a cost in public accountability and control of the judiciary. Anonymous opinions would admittedly darken the veil of secrecy around the Court, but the decreased accountability argument is itself vulnerable on several grounds. First, when very few members of the general public know who the Justices are,[174] and fewer still actually read their opinions,[175] any ostensible evaluation of the Justices becomes a "form of worship,"[176] or, conversely, vilification. Public opinion based not on what the Justices write, but rather on sound bites reverberating through the echo chambers of the media and the Internet, is a poor mechanism for accountability, in any event.

Second, the "professional normative management"[177] method of judicial control and accountability employed by European systems is also at work in the United States, making the signed opinion a helpful but unnecessary control measure. Consider, for example, the confirmation of Chief Justice Roberts, who was criticized as a "stealth ideologue" for his lack of a written record as a judge.[178] He was nonetheless confirmed not because of what he had written during his two year stint as an appellate court judge, but largely because of his unassailable academic and professional qualifications.

Third, the use of anonymous opinions would encourage greater internal accountability by placing responsibility for an opinion's content on the collective doorstep of the Court instead of the Justice who happened to write for the majority.[179] Even if individual Justices were relieved of public scrutiny of their signed work, they would still have to answer to their colleagues on the bench.

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174. *See supra* note 12 and accompanying text.

175. *See* Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1463 (1995) ("[I]t can hardly be irrelevant that ordinary people simply do not read judicial opinions.").

176. BRIGHAM, *supra* note 20, at 86.

177. *See supra* notes 115–17 and accompanying text.

178. *See, e.g.*, Joan Biskupic et al., *Nominee's Views Aren't Clear in Work Representing Others*, USATODAY.COM, July 20, 2005, http://www.usatoday.com/news/washington/2005-07-20-roberts-record_x.htm (last visited Oct. 31, 2006) ("For the past two years, Roberts has been a judge on the U.S. Court of Appeals in Washington, D.C., but he has handed down few rulings on hot-button issues.").

179. *See* Nygaard, *supra* note 72, at 49 ("Judges would read opinions with greater care . . . because opinions could no longer be explained as that of 'SO-AND-SO, Circuit Judge.'").

The suggestion that anonymous opinions would bring increased unanimity by de-incentivizing separate opinions (predicated on the notion that they will only take the time to set forth an opinion when their name is in lights) could be perceived as insulting to judges. It is not intended to be. If anything, the feasibility of the argument for anonymous opinions rests squarely on a high degree of trust in judges based on their intellect, professionalism, and integrity, regardless of their ideological alignment.

CONCLUSION

By tracing the historical development of the Court's use of the individually signed opinion, this Note seeks to emphasize several points. First, nothing in the U.S. Constitution or any other source of American law requires judicial opinions to be attributed to an individual, and that the evolution of the practice was as much the product of personalities as of common law tradition or an express desire for accountability. Second, periodic departures from the practice (by use of per curiams or other alternative opinion delivery devices) demonstrate the Justices' awareness that anonymity can enhance institutional credibility. And third, certain foreign legal systems (Continental European ones in particular) can and do operate without individually signed opinions with no great cost in judicial accountability, based on institutional controls that are, to a large extent, also present in the United States.

To be clear, this Note does not advocate a return to the John Marshall facade of unanimity at all costs, and its author agrees with Judge Nygaard's "not-so-tentative hypothesis" that the practice of issuing individually signed opinions is not going to change any time soon.[180] Still, it posits that anonymity would help preserve the Court's image as a neutral and unbiased arbiter, and might have the welcome side effect of increasing unanimity without any real cost in accountability.

There may, however, be another cost associated with anonymity: a decline in public interest in the Court. Given that over 60 percent of Americans cannot identify a single Justice, if the occasional salacious post to a blog about a judge's personal life piques the public's attention, then perhaps, in the name of civic republicanism, it is worth the tradeoff in the Court's institutional legitimacy. But if, by virtue of

180. *Id.* at 41.

anonymity, opinions became shorter, more accessible, less fractured, and less susceptible to the perception that the Justices are no less divided than Congress and the country in general, then a de-emphasis on its individual parts might enhance the credibility and stature of the Court as a whole.