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Signed Opinions, Concurrences, Dissents, and Vote Counts in the U.S. Supreme Court: Boon or Bane? (A Response to Professors Penrose and Sherry)

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**SIGNED OPINIONS, CONCURRENCES, DISSENTS, AND
VOTE COUNTS IN THE U.S. SUPREME COURT:
BOON OR BANE?
(A RESPONSE TO PROFESSORS PENROSE AND SHERRY)**

*Joan Steinman**

I.	Response to Professor Penrose	526
II.	Response to Professor Sherry	543
	A. A Summary of Professor Sherry’s Arguments, and Preliminary Responses	543
	B. Rejoinders to Professor Sherry’s Arguments.....	548
	1. With Respect to the First Amendment	548
	2. With Respect to Separation of Powers and Article III	554
	3. Views to Contrast with Professor Sherry’s Evaluations of the Nonconstitutional Objections to her Proposed Prescriptions	560
	a. Concerning Separate Opinions	560
	b. Concerning Signed Opinions.....	562
	c. It Won’t Work	564
III.	A Nod to Professor Orentlicher	567
IV.	Conclusion	571

Some commentators recently have argued for changes in how United States Supreme Court Justices communicate with other federal courts, other branches of the federal government, state governments, lawyers, and the public at large; that is, with everyone, except (perhaps) other Justices of the Supreme Court and the Justices’ assistants. Specifically, some commentators have urged that signed opinions and separate opinions, such as concurrences and dissents, stop being published in the official

reporters.¹ One commentator also has advocated nonpublication of the vote count in Supreme Court decisions.² In this piece, I offer my thoughts in response to these proposals.³

I. RESPONSE TO PROFESSOR PENROSE

According to her article, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, the proposal by Professor Penrose of Texas A&M University School of Law to cease publication of signed opinions and separate opinions was motivated primarily by two concerns. First is the relatively small number of cases that the Court is deciding. Second is the set of effects on the Court as an institution that she posits are following from the combination of the relatively small number of cases that the Court is deciding and the

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1. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, (July 25, 2019) (revised Jan. 21, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3425998> [<https://perma.cc/E83D-Y5JV>]; Meg Mary Margaret Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. REV. F. 8 (2019) [hereinafter Penrose, *Overwriting and Under-Deciding*]; Meg Mary Margaret Penrose, *Goodbye to Concurring Opinions*, 15 DUKE J. CONST. L. & PUB. POL'Y 25 (2020) [hereinafter Penrose, *Goodbye to Concurring Opinions*].

2. Sherry, *supra* note 1.

3. There is a very substantial body of scholarship debating the virtues and vices of signed opinions, dissents, and concurrences by U.S. Supreme Court Justices. Professors Penrose's and Sherry's contributions are among the most recent. I cannot, in this space, address all of the arguments that have been made by multiple authors over decades, but I will do my best to evaluate these most recent forays into the debate by Professors Penrose and Sherry. Notable previous writings on these subjects include: Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986) (describing dissents as contributions to "the marketplace of ideas"); William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 105 (1948) (asserting that "[d]isagreement among judges is as true to the character of democracy as freedom of speech itself"); Evan A. Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 MO. L. REV. 120 (1938); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); Samuel Estreicher & Tristan Pelham-Webb, *The Wisdom of Soft Judicial Power: Mr. Justice Powell, Concurring*, 25 CONST. COMMENT. 229 (2008); Antonin Scalia, *The Dissenting Opinion*, 1994 SUP. CT. HIST. SOC'Y J. 33; Russell Smyth & Paresh Numar Narayan, *Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court*, 3 J. EMPIRICAL LEGAL STUD. 79 (2006); Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769 (2015); Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951 (2006); Karl M. ZoBell, *Division of Opinion in the Supreme Court A History of Judicial Disintegration*, 44 CORNELL L. Q. 186 (1959); Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L. J. 2235 (1996).

relatively large number of concurring and dissenting opinions that the Justices are writing and publishing.⁴

Professor Penrose has marshaled data concerning the low productivity of the Supreme Court, under Chief Justice Roberts, in terms of the number of signed opinions per year and of signed plus per curiam opinions per Term,⁵ and concerning the high number and length of concurring and dissenting opinions published by the Justices of the Roberts Court.⁶ This is not to say that the problem of what Professor Penrose sees as overwriting and underdeciding began with the Roberts Court, but it has worsened while Justice Roberts has been Chief Justice.⁷ I do not question the data that she cites. Part of what motivates Professor Penrose's proposal relates to her assumption that if Justices were spending a lot less time writing concurring and dissenting opinions, they could and would devote that time to considering, and hopefully resolving, many more cases.⁸ She writes that, "Were the Court simply to decide cases—without attributing names to its opinions—the notoriety [sic] incentive would disappear and more work would likely get done. . . . The shift . . . would help 'place emphasis on the serious nature of the Court's decisions . . .'"⁹ Then, "[t]he Court should publish only the decision 'of the Court' by 'the Court.'"¹⁰

I have a number of reactions to this reasoning. First (but not in order of importance), I seriously doubt that any of the Justices need to be reminded of the seriousness of the Court's decisions and the effects of those decisions. Indeed, the Justices' appreciation of the seriousness of their decisions is very likely reflected in the Justices' felt need to explain their thinking (in separate opinions) about the legal issues presented to the Court. Second, while a prohibition on publication of concurring and dissenting opinions might cause Justices to spend less time on writing such opinions, it might not. A prohibition on publication is not the same as a prohibition on writing. Justices might very well craft concurring and dissenting opinions that would be circulated among the Justices in an effort to persuade other Justices to change the Court's proposed opinions or even the Court's decisions. If so, little if any savings of Justices' time would flow from a ban on publication of the separate opinions. Professor

4. Penrose, *Overwriting and Under-Deciding*, *supra* note 1, at 8–10.

5. *Id.* at 8–9.

6. *Id.* at 9–10.

7. *Id.* at 8–13.

8. *Id.* at 15.

9. *Id.* at 17 (quoting Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41, 45 (1994–1995)).

10. *Id.* at 17.

Penrose says that the Justices should be working on collaborating and on reaching consensus, rather than working on writing separate opinions.¹¹ But an effort to reach consensus does not guarantee that the Justices will succeed. For reasons that I will elaborate later,¹² when the Justices do not reach consensus, burying their differences of opinion does not strike me as always (or even usually) preferable to articulating and communicating those differences.

Third, such a ban on publication of separate opinions might enable the Court to make more decisions by virtue of a savings of time and effort spent on the crafting of separate opinions, but whether the ban actually would yield more Court decisions is quite speculative. Justices might find no more cert-worthy cases than they do now. The Court's capacity to decide is not, at least formally, a criterion for whether certiorari should be granted.¹³ Regardless of whether more cert petitions were granted, a ban on publication of separate opinions might render the aggregate workload one that left Justices with time on their hands, but they could choose to spend that time in ways other than reaching consensus on decisions and majority opinion writing. Justices might, for example, devote more time to different work to the extent that laws and governing rules permit them to do so. In recent years, Justices have spent a considerable amount of time writing autobiographies and memoirs, doing book tours, lecturing, judging appellate moot court arguments at law schools, conducting mock trials of fictional and historical persons, teaching, talking to students in high school or college, and appearing in documentaries and on television.¹⁴ The Justices might choose to do more of all that. As of 1991, Regulations of the Judicial Conference of the United States under Title III of the Ethics Reform Act of 1989 Concerning Gifts, as amended, and Regulations of the Judicial Conference of the United States under Title VI of the Ethics Reform Act of 1989 Concerning Outside Income, Honoraria,

11. *Id.* at 19.

12. *See infra* text accompanying notes 24–27, 47–56, 61, 63–69.

13. *See* SUP. CT. R. 10 (stating the factors relevant to the grant of petitions for writs of certiorari, none of which relates to the Supreme Court's capacity or time to decide the questions presented). The considerations relate to conflicting decisions on important matters or important federal questions, decisions that so depart from—or sanction the departure from—the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory powers, and decisions of important questions of federal law that have not been, but should be, settled by the Supreme Court.

14. *See, e.g.*, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 37–38 (2013).

and Outside Employment¹⁵ did not apply to officers and employees of the Supreme Court. However, the Members of the Court resolved that officers and employees of the Court would comply with the substance of those regulations, subject to certain clarifications, including one that has to do with the circumstances under which the covered individuals may receive compensation for teaching.¹⁶ In the view of some in our society, Justices' greater engagement in such "extra-curricular" activities might not be positive. For those commentators and citizens who are concerned about Justices cultivating fan bases,¹⁷ those extra-curricular activities could contribute to the problem—even if not as much as separate-opinion-writing does. Such activities might even demean the Justices more widely and more profoundly than separate-opinion-writing does; that also would not be good for the Court's reputation and legitimacy. For all of these reasons, it is highly speculative whether prohibiting the publication, or even the writing, of separate opinions would increase the number of cases that the Supreme Court would decide, and it likely would be controversial whether the Justices' expenditure of more time on non-Court work (in time freed by a reduction in time spent on separate opinions) would be time well spent.

Moreover, to the extent that the goal (or *a* goal) of a prohibition on separate opinions (or the publication of such opinions) by Supreme Court Justices is motivated by the belief that such a ban would lead to the Court's decision of more cases, one can question the value judgment of the desirability of that result. Particularly in a time of deeply felt partisanship in this country and strongly held differences of opinion among Justices (which parallel some of those partisan divides), there may be benefits in the Court deciding *fewer* issues and controversies than it might. Those benefits would run particularly (but not only) to persons and viewpoints that would come out on the losing side if the Court were to decide additional issues and controversies. Decisions by a Court with a substantial number of Justices who hold "extreme" views would likely be at greater risk of being overturned or modified by a more moderate future Court. Such departures from precedent would likely feed criticisms of lawlessness, even if the future decisions were preferable "on the merits."

15. 2C THE JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY (1996), has chapters on gifts and outside earned income, honoraria and employment, including references to relevant statutes and regulations. *Id.* at Chs. 6, 10.

16. SUPREME COURT, RESOLUTION ¶ 3 (1991), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/1991_Resolution.pdf [<https://perma.cc/V9F6-APYP>].

17. *See, e.g.,* Sherry, *supra* note 1, at 3, 7–8, 10, 12, 16, 36–39.

In sum, fewer extreme decisions are preferable to many such decisions—so it is not at all clear that we should embrace “reforms” that are designed to increase the number of decisions that the current Court or a future, even more skewed Court, would reach. A related point is that a relatively low number of decisions by the current Court or a future, even more skewed Court, also might tend to tamp down (or at least not exacerbate) already overheated partisanship in the judicial selection process.

Professor Penrose’s other motivation in criticizing signed and separate opinions lies in a collection of pernicious effects that she attributes to the proliferation of separate opinions. Such opinions, she writes:

- “add[] . . . to a polarized and politicized society by focusing on individual Justices as opposed to one Supreme Court”;¹⁸ and
- undermine clear communication of the law, clarity of the law, uniformity of the law, accessibility of the law to the average person, the institutional integrity of the Court,¹⁹ and the Court’s decisional role.

These detriments are not outweighed by benefits of signed separate opinions, she says, because the individual opinions “will likely never become the law.”²⁰ Separate opinions “elevate writing over deciding.”²¹

While these criticisms contain some truth, some of them unfairly target separate opinions. Majority opinions often can clearly establish the law, clearly communicate the law, and make the law uniform. Other Justices’ disagreement with a majority’s reasoning and conclusion (or with just its reasoning) does not need to undermine the clarity or uniformity of the law or undermine its clear communication. But I should not overstate this point: although separate opinions *need not* undermine the clarity of the law (if and when it is clear), they sometimes may do so. Similarly, while readers of Supreme Court opinions need to remember that the opinions of concurring and dissenting Justices are not the opinion of the Court, and that dissents do not have precedential weight, the precedential weight of concurring opinions is a more controversial and subtle matter, particularly where there is a plurality, rather than a majority, opinion of the Justices.²²

18. Penrose, *Overwriting and Under-Deciding*, *supra* note 1, at 15.

19. *Id.*

20. *Id.* at 14.

21. *Id.* at 16.

22. *See, e.g.*, Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, *supra* note 3, at 847, 855, 875 (finding that lower courts do, and suggesting that they properly, follow the

In addition, the extent to which the law as established by opinions of the Supreme Court is accessible to the average person is, to a significant extent, distinct from what concurring and dissenting Justices have to say. In many areas, the law has become so complex that it is not easily comprehended by the average person, but the difficulties in making the law comprehensible are a function of the law's complexity and the Court's—and commentators'—ability (or inability) to explain it simply enough that the average American can understand it. The existence of concurring and dissenting opinions might either help or harm the understandability of either a majority opinion or the understandability of the set of opinions.²³

It is not entirely clear to me what Professor Penrose means when she speaks of the institutional integrity of the Court. If the Court has institutional integrity when, but only when, it speaks with one voice, then by definition there will be a loss of institutional integrity whenever Justices file separate opinions. Similarly, if the only role of the Court that is important is the Court's making of decisions (by a majority of Justices), then *a fortiori* separate opinions will be a waste of time and effort that potentially undermine the Court's making of decisions. For the reasons identified above and probably others as well—there is no guarantee that the Court would make more or better decisions if Justices ceased to write or publish separate opinions.

To the degree that separate opinions not only reflect but add to a polarized and politicized society, my own view is that the respectful airing of differing, even quite opposing, views is far more desirable than hiding the differences of opinions that Justices hold. Nastily stated disrespectful dialogue in published opinions of the Justices is unnecessary and may contribute to unleashing even more uncivil speech among people of the

guidance provided by “pivotal concurrences,” those in which a judge concurs in the judgment, thereby ensures the existence of a majority opinion, but also writes separately; and viewing pivotal concurrences as signaling the direction of legal change and smoothing the way for that change); PAMELA C. CORLEY, *CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT* 92 (2010) (finding evidence that concurrences affect the Supreme Court's interpretations of its own precedents and the extent to which lower courts positively interpret Supreme Court majority opinions); Igor Kirman, Note, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084 (1995) (observing that, “although technically without direct decisional force, concurring opinions have often exercised a greater effect on subsequent cases than the majority opinions that they accompany”).

23. See, e.g., CORLEY, *supra* note 22 (finding evidence that concurrences send a signal about the scope of the accompanying opinion, providing guidance to lower courts as to how to interpret and apply the Court's opinion); Kirman, *supra* note 22 (noting that, “concurrences provide a commentary on the decisions that they accompany and may aid lower courts in interpreting and applying such decisions”).

nation, so it should be discouraged; but honest and civil disagreement is healthful and demanded by integrity. Only through such interchange do we have a chance to reach new consensuses. To artificially block such interchange from the people is unwise, maternalistic, and contrary to the spirit of the First Amendment. The people of our country demand transparency.²⁴ To deny us the honest opinions of our Supreme Court Justices would be a big step in the wrong direction.

Professor Penrose's article also fails to credit the positive functions that dissents and concurrences serve. These include demonstrating flaws in the majority's legal analysis and offering a corrective; promoting the careful study of one's own and the opponent's position; emphasizing the proper limits of a majority opinion that appears to sweep too broadly; sowing seeds for harvest in the future when the majority (or other courts) are susceptible to persuasion that the Supreme Court's earlier decision was erroneous or no longer serves the values of the country; permitting Justices to take positions that are most consistent with their true views; and communicating with the executive and legislative branches and even with the people, who can seek change through the political process.²⁵ "By publishing dissents along with majority opinions[,] common law honors losing visions of justice; it suggests that it would be legitimate and appropriate for them one day to form a majority."²⁶

As stated by Charles Evan Hughes,

When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. . . . A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of

24. The demand for transparency is illustrated by requests for televised Supreme Court arguments, for cameras in the Supreme Court courtroom, the expectation of televised impeachment hearings, and the like.

25. Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative Judicial Civility*, 28 VAL. U. L. REV. 583, 590–91, 596 (1994); Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1618 (2005).

26. Jacobson, *supra* note 25, at 1631.

a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.²⁷

Even more recently, Professor Penrose wrote an article²⁸ advocating the elimination of concurring opinions by Supreme Court Justices. In that article, Professor Penrose reiterated her dissatisfaction with the length, lack of clarity, and fractured nature of Supreme Court opinions, as well as the unprofessional tone of some separate opinions. She held concurrences largely to blame, giving a “pass” here to dissents because they “add . . . principled disagreement.”²⁹ The primary focuses of her paper were the theses that:

- concurring opinions are “undemocratic” in that they seek to deny the “winners,” those who have persuaded a majority of the Justices (if there is a majority), of a supposed prerogative to state the reasoning of the majority without challenge; that is, without an effort by other Justices to limit or undermine the law as crafted by the majority opinion.³⁰ Professor Penrose argues that, even worse, Justices who concur in the Court’s decision but not in the opinion of other Justices can leave the Court with only a plurality opinion that makes it difficult to discern what precedent the decision makes;³¹ moreover,
- concurring opinions “destroy the clarity and authority of a majority opinion” without adding value.³²

Professor Penrose marshals and then seeks to rebut several arguments that other scholars and judges have made in support of concurrences and other separate opinions. She counters the arguments that such opinions:

- A. “appeal to the wisdom of a future day,” by noting that separate opinions rarely become law;³³
- B. “provide litigants with road-maps for future cases,” by asserting that Court opinions should “not provide legal sign

27. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67–68 (1928).

28. Penrose, *Goodbye to Concurring Opinions*, *supra* note 1.

29. *Id.* at 2–3, 5.

30. *Id.* at 4, 22, 24–25.

31. *Id.* at 4, 25–26, 28, 44–45.

32. *Id.* at 29, 56.

33. *Id.* at 5, 16–20, 29, 38–43.

posts to gin up litigation”;³⁴ and should not seek to change settled law;³⁵

- C. “improve and sharpen the majority opinion,” by asserting that this is wholly unnecessary—observing that the Justices are smart people;³⁶
- D. “assure the losing party that all arguments were adequately considered; and . . . that the justices are not being ‘lazy’ or protecting incompetent colleagues,” by averring that these arguments “ring hollow” and noting that separate opinions can undermine the Court’s credibility.³⁷

More generally, Professor Penrose offers (what I regard as) a very cramped view of the role of the Court in support of her opposition to concurring opinions. I will detail and respond to these aspects of her analysis below.³⁸

I will respond in the order in which I have summarized Professor Penrose’s arguments above. First, as the history set forth by Professor Penrose and others reveals,³⁹ the airing of “antagonistic views” in separate opinions dates back in England to the Privy Council and in the United States to the early days of the country when the “U.S. Supreme Court . . . largely followed the British Law Lords’ practice of separate, seriatim opinions.”⁴⁰ Starting in 1801 under Justice Marshall, the Supreme Court abandoned the seriatim approach and issued single opinions of the Court in an effort to add credibility and authority to the Court’s decisions and to enhance the power and prestige of the Court relative to the other branches of the federal government.⁴¹ But this move was controversial. President Jefferson (among others) criticized it, expressing concerns about lack of

34. *Id.* at 29–30.

35. *See id.* at 4, 22.

36. *Id.* at 30.

37. *Id.*

38. *See infra* text accompanying notes 39–80.

39. Penrose, *Goodbye to Concurring Opinions*, *supra* note 1, at 7–13. *See also* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 303–11; John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 144 (1999); Meredith Kolsky, *Justice William Johnson and the History of Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995); Nancy Maveety, *The Era of the Choral Court*, 89 JUDICATURE 138, 139 (2005) (discussing the history of and reasons for concurring opinions; asserting that “concurring voices produce the legal debate that furthers the intellectual development of the law on the Supreme Court”); ZoBell, *supra* note 3, at 193–94.

40. Penrose, *Goodbye to Concurring Opinions*, *supra* note 1, at 7–13, quotation at 8–9.

41. *Id.* at 9. *See supra* note 39 and other articles enumerated *infra* note 42.

transparency and interference with public scrutiny of judicial conduct.⁴² In general, the practice of issuing single opinions for the Court continued until the late 1930s or early 1940s, when separate opinions became common.⁴³ That history demonstrates that separate opinions by Supreme

42. See Kelsh, *supra* note 39, at 145–46 (quoting DONALD GRANT MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND PHILOSOPHY OF A JEFFERSONIAN JUDGE 169 (1954)) (quoting a letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), in which Jefferson argued that opinions of the Court, unaccompanied by separate opinions, deprive the citizenry of knowledge of the views of individual members, shielding the Justices' reputations and the Justices from impeachment and providing a curtain behind which Justices might be lazy or incompetent, and urging abandonment of the practice to restore confidence in the Justices). Other letters written by Jefferson in 1820 and 1821 delivered similar messages. See Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *quoted in* PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT 24 (1969); Letter from Thomas Jefferson to James Pleasants (Dec. 1821), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 198–99 (Paul Leicester Ford ed., 1892-1899).

43. The history of the Court's move from opinions of the Court that almost never were accompanied by separate opinions to majority opinions that increasingly were accompanied by concurring and/or dissenting opinions are described in articles that include those cited *supra* note 39. See also ZoBell, *supra* note 3, at 193–209. There were dissenting Justices before that, and after Chief Justice Marshall's reign (see ZoBell, *supra* note 3, at 195–203 (discussing the work of Justices William Johnson, Benjamin R. Curtis, John Marshall Harlan, and Oliver Wendell Holmes)), but the trend accelerated thereafter as more Justices came to view it as their duty to express their own opinions and came to recognize the potential power of dissenting opinions. See, e.g., Zobell, *supra* note 3, at 197, 202. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *supra* note 14, at 266–67, 289 (2013), finds the rate of dissenting and concurring opinions in the Supreme Court to have jumped suddenly and steeply in the early 1940's, likely because many dissents had become law (including the dissents in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Harlan, J., dissenting), *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting), *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J. dissenting), *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (Stone, J., dissenting), and *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J., dissenting)), so the perceived value of dissenting had gone up. Epstein et al. do not conjecture about the likely cause of the increase in concurring opinions, but the explanation may be the same: the perceived value of concurring opinions may have increased in part because separate opinions generally had proven their potency. Cass Sunstein finds 1941 to be the turning point in the increase of separate opinions. Sunstein, *supra* note 3, at 795–96 (“[T]he Judiciary Act of 1925 eliminated mandatory appeals and gave the Court its modern authority over the cases that it hears. As a result, the Court could focus on the difficult cases We might well expect that[,] after the enactment of the Judiciary Act of 1925, there would be a significant shift in the direction of division, because the Court would . . . be dealing with a much larger percentage of hard cases. Pamela C. Corley et al. insist that the establishment of the discretionary docket was ‘a key external development that helped usher in a new era of dissensus.’ (citing PAMELA C. CORLEY ET AL., THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT 27 (2013)). This is a tempting explanation, and it might provide part of the picture, but there are at least three reasons to think that it is inadequate. First, there was disagreement in the earliest periods of the Court, and . . . a norm of consensus was required to reduce its public expression. Second, . . . the docket books of Chief Justice Waite, from . . . 1874 through 1888, reveal substantial (private) disagreement within the Court. . . . Nonetheless, norms in favor of consensus ended up squelching public disclosure of their disagreements. Third, there was a significant lag between enactment of the Judiciary Act and the transformation of 1941. Because the relevant patterns were not much changed between 1925 and 1940, we cannot say that the Act was sufficient to produce the new patterns. As Walker et al. put it, “[s]imply stated, a radical jump in dissent following 1927 is not evident. Dissent rates did not begin

Court Justices have been common for roughly the past 80 years. They are not an aberrant modern innovation.

Nor is it at all clear that the practice is fairly criticized as being “undemocratic.” The federal courts, and the Supreme Court in particular, are not democracies. The Justices are not elected; they are nominated by the President and appointed with the consent of the Senate. Many of the rules by which the Court operates are not democratically determined. Although there are codified Supreme Court Rules that are promulgated by the Court but have to be approved by Congress,⁴⁴ the Court has important internal procedures that it determines for itself. Examples include the requirement that four Justices must vote to grant a writ of certiorari before the Court will hear a case that is not within its mandatory jurisdiction,⁴⁵ and the requirement of a majority vote to support a decision that the Court will describe as a decision “of the Court.”⁴⁶ Thus, in that sense, it seems to be a nonsequitur to charge that separate opinions, and concurrences in particular, are “undemocratic.” Moreover, in our democracy, people whose views differ from the majority at a given moment are under no obligation to “shut up.” They are free to voice their opinions and hope to change society’s perspective. The value that we place on such speech is

their major upward move until the early 1940s.” (Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 366 (1988).) None of these points deny that the Judiciary Act might have contributed to the new patterns. . . . [W]ithout the Act, the post-1940 Court might have been able to agree in a significantly higher percentage of cases. . . . Nor can we rule out the view that the Act was a necessary condition for the new the patterns. But because disagreement was common (but not expressed publicly) before the Act, and because the norm of consensus persisted for well over a decade after the Act became law, it is not an adequate explanation of what began to happen in 1941.”)

44. The Rules Enabling Act, 28 U.S.C. § 2072 (2018), authorized the Supreme Court Rules, among other sets of rules.

45. See John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10 (1983). For discussion of other internal procedures determined by the Court, see EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 323–30 (9th ed. 2007) (discussing practices of the Court including the rule of four, the practice of not stating reasons for denials of certiorari, and the practice of requiring agreement of a majority of eligible Justices for a judgment of the Court); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 41–51, 64–69 (1991). For a forthcoming work on the practice of majoritarianism, see Guha Krishnamurthi, *For Judicial Majoritarianism*, U. PA. J. CONST. L. (forthcoming).

46. See Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014). The Court in October 2019 published an updated *Guide for Counsel in Cases to Be Argued Before the United States Supreme Court*, in which it announced that the Court generally will not ask questions of lead counsel for petitioners or respondents during the first two minutes of argument. This is another example of the Court making procedure for itself. See CLERK OF COURT, SUPREME COURT OF THE UNITED STATES, *GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES* 7 (2019), https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf [<https://perma.cc/J43W-5J52>].

reflected in the First Amendment to the Constitution. Analogously, there appears to be nothing undemocratic about Justices sharing, in separate opinions, how their views differ from those of the majority of Justices, if any. Professor Kevin Stack,⁴⁷ when he was a law student, published a Note that argued quite to the contrary that the political legitimacy of the Supreme Court depends “on its consistency with democratic rule,”⁴⁸ and such rule “depends [in part] on the Court reaching its judgments through a deliberative process.”⁴⁹ That process, in turn, “connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed . . . to arriving at a reasonable answer . . .”⁵⁰ and reaching a collective—although not necessarily unanimous—decision.⁵¹ “Given the secrecy of the Court during the formation of its judgments,”⁵² the practice of dissent—importantly including “the practice of publishing dissenting opinions alongside the opinion of the Court, with notation of which Justices joined these opinions”⁵³—is necessary to manifest the deliberative character of the process through which the Court reaches its decisions.⁵⁴ “Without this practice, those of us outside the Court would have no way to see the Court as embodying a deliberative process of judgment.”⁵⁵ Everything that now-Professor Stack said about dissents applies as well to concurrences; they too are a significant part of the argumentative interchange among the Justices that is manifested in the publication of separate opinions.⁵⁶

Additionally, while it is true that the state of our law concerning how lower courts, and the Supreme Court itself, should interpret and apply Supreme Court *plurality* opinions is problematic and difficult to apply, our response should not be to disallow plurality decisions or disallow the

47. Lee S. & Charles A. Spier Chair in Law, Vanderbilt University Law School.

48. Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2246, 2247–55 (1996).

49. *Id.* at 2236.

50. *Id.* at 2251 (quoting Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989)).

51. *Id.* at 2253–55.

52. *Id.* at 2236. In regard to the secrecy of the Court’s internal processes, *see id.* at 2256 (pointing to the Justices’ private conferences, their private exchange of draft opinions, and the ensuing dialogue among the Justices).

53. *Id.* at 2256.

54. *Id.*

55. *Id.* at 2257.

56. Indeed, Stack notes that “The practice of ‘dissent,’ as [he] use[s] the term, includes concurring opinions that offer reasoning different from the reasoning of the Court’s majority opinion.” *Id.* at 2235 n.2. For further discussion of concurrences, *see supra* text accompanying note 23, text following note 24, note 43, text accompanying notes 47–55, *infra* text accompanying notes 58–62, text following notes 63 and 68, and text accompanying notes 175–76.

publication of concurring opinions. A better response would be to improve the law governing the interpretation and application of plurality opinions. A number of scholars have made an effort to do that,⁵⁷ and presumably, others will follow until the Supreme Court sees fit to make adequate improvements.

Professor Penrose also questions the value of concurring opinions, observing that separate opinions rarely have become law. She acknowledges, however, that some concurring opinions later *were* embraced by the Supreme Court.⁵⁸ And other scholars have noted that lower courts “often [go so far as to] ignore the rule of five and . . . look[] for the binding rule . . . in concurrences.”⁵⁹ Lower courts also frequently rely on concurring opinions when the concurrences are “pivotal” in the sense that if the separately writing Justice or Justices had not joined the Court’s opinion, there would be no majority.⁶⁰

I would add that we have not yet reached the end of time. That is, it remains possible that concurring opinions already written and concurring opinions yet to be written (if they are permitted) *will* prove to be persuasive to a future majority of Supreme Court Justices or to Congress or, where applicable, to state Supreme Courts or state legislatures or state Governors. Other scholars have found additional benefits in concurring opinions’ ability to encourage lawyers to focus their efforts in particular directions, thereby encouraging but also “smoothing” and foreshadowing the process of change in the law.⁶¹ Concurring opinions also may persuade Congress to change statutory law in accordance with the views of concurring Justices.⁶²

57. See, e.g., Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942 (2019); Adam Steinman, *Nonmajority Opinions and Biconditional Rules*, 128 YALE L. J. F. 1 (2018); Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL’Y 285, 285, 293, 302, 341 (2019) (noting that “procedures for interpreting and following plurality decisions vary considerably across courts and judges,” and suggesting that “when a majority of judges agrees on legal principle, that principle should have binding effect, even if the judges in principled agreement are divided on the judgment”); Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017).

58. Penrose, *Goodbye to Concurring Opinions*, *supra* note 1, at 18 nn. 98–115.

59. Thomas B. Bennett et al., *supra* note 3, at 845 (citing Tristan C. Pelham-Webb, *Powelling for Precedent: “Binding” Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 707–12 (2009) (describing instances in which lower courts treated as controlling Justice Powell’s pivotal concurring opinion)).

60. *Id.* at 855 (reporting empirical support for the proposition that lower courts “look[] to pivotal concurrences [defined *id.* at 847] for guidance as to the governing rule, rather than simply adhering to the rule of five.”).

61. *Id.* at 869–71.

62. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) (finding that “[O]pinions that invited congressional override were in fact twice as likely

Professor Penrose dismisses the arguments that separate opinions improve and sharpen the majority opinion, “assure the losing party that all arguments were adequately considered; and . . . that the justices are not being ‘lazy’ or protecting incompetent colleagues.” To her, these arguments “ring hollow,” and she points out that, if separate opinions can be reassuring in these respects, separate opinions equally can undermine the Court’s credibility.⁶³ In my experience, no matter how smart and able lawyers and judges are, the articulate statement of differing points of view helps to improve their writing. On courts, those articulate statements of differing point of view are delivered in separate opinions. Separate opinions may highlight something the author of another opinion did not think of; and separate opinions may make points that the author of another opinion recognizes should be addressed in his or her own opinion, whether or not the concurrence is published. It is clear to me beyond any doubt that separate opinions can and usually will improve majority opinions. As to the other points noted above, when you are a losing party and the majority opinion says nothing about some of your arguments, that silence can be frustrating and leave you wondering why the majority has not addressed those arguments. If a dissenting or concurring opinion does allude to your arguments, you know that at least some of the Justices paid attention to them and brought them back to the attention of the majority through their separate opinions. That is not a lot of solace, but it is some. Similarly, separate opinions prove that Justices, and more than the one who penned the deciding opinion, were paying attention, spent some energy on the case, and are seeking to hold the majority accountable. All of these have value in a system that seeks to assure litigants that they have been heard and are not only consistent with, but essential to, deliberative

to be overridden.”); Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162, 164 n. 4, 165–66, 178 n. 21 (1999) (finding that if one includes invitations to override in concurring or dissenting opinions as well as in majority opinions, then eleven percent of Supreme Court statutory interpretations followed strong invitations for Congressional override). See also Douglas Rice, *Placing the Ball in Congress’ Court: Supreme Court Requests for Congressional Action*, 47 AM. POL. RES. 803, 804–05, 808 (2018) (arguing and finding empirical support for the thesis that Supreme Court invitations for congressional action are designed to strategically frame subsequent debate at the Court by identifying Congress, rather than the Court, as the actor to reverse the Court majority’s policy preferences “at the cost of minor increases in the possibility of congressional review” but with the benefit of creating an additional barrier for those seeking to alter the policy through the courts). Rice also found that such invitations are most likely to occur in cases in which the Justices are divided and that such invitations “are associated with higher rates of ideological voting.” *Id.* at 805. Moreover, “[g]iven the contemporary ‘do-nothing Congress’ and political polarization, the ability to utilize invitations strategically becomes a yet more valuable tool, while a fractured Congress is unable to reply.” *Id.* at 825.

63. Penrose, *Goodbye to Concurring Opinions*, *supra* note 1, at 6.

decision making by the Court. I don't know why those considerations "ring hollow" to Professor Penrose. Moreover, rather than undermining the Court's credibility, the existence of concurring (and dissenting) opinions should demonstrate the serious attention that the members of the Court gave to a case. The fact that Justices have differing perspectives may reflect their differing life experiences and differing values, but it need not undermine their honesty, integrity, or credibility.

Professor Penrose also opines that Court opinions should "not provide legal sign posts to gin up litigation."⁶⁴ I see this point as related to her cramped view of the role of the Court. She sees the Court as an entity whose role is to objectively decide cases and to say what the law is.⁶⁵ In her view, the Court should not be "activist," should not "make" law or debate what the law should be, should not seek to influence public opinion or to change settled law.⁶⁶ Her view is that concurring opinions do not decide cases, do not say what the law is, and tend to do all the things she is opposed to the Court doing.⁶⁷ But (in response, I say that) while the Court's primary function is to decide cases, and in the course of doing so to say what the law is, many of the questions that the Court is charged with answering are not matters of settled law. If settled law answers a question, there typically is no need for the Court to grant certiorari. In deciding cases, the Court is compelled to make law, and in doing so it is entirely appropriate for the Justices to consider what the law should be. This is what Justices must do when they develop the law and think through their decision.⁶⁸ It is an illusion that the law is out there, available to be found, like a lost coin.⁶⁹ This reality leads the Justices to debate what the law should be held to be and can lead to different perspectives among the Justices, just as it can lead to differences of opinion among lower court judges, among other members of the legal

64. *Id.* at 30.

65. *Id.* at 30, 42, 45.

66. *Id.* at 41, 42, 45–46.

67. *Id.* at 43–44.

68. I allude to a quotation from Nygaard, *supra* note 9, at 47, that Professor Penrose cites approvingly; see Penrose, *Goodbye to Concurring Opinions*, *supra* note 1, at 41 n.117.

69. *But see* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 532 (2019) (arguing that judges can find law but only if there is something to find). Sachs also argues that, "Even when judges can't help breaking new ground in their decisions, they're still just making decisions; they don't have to be making law." *Id.* at 560. Moreover, even when it comes to courts of last resort, "[a]s a matter of legal theory, there's no reason why the holdings of a court like the Supreme Court of the United States must necessarily be taken to represent 'the law,' as opposed to 'the law of the Supreme Court,' binding on other courts within the reach of its appellate jurisdiction." *Id.* at 562–63. Even on Sachs' view, however, judges often have to make precedential decisions in the face of legal uncertainty; there often is not law simply waiting to be found.

profession, and among members of the public. In the course of explaining their reasoning, dissenters and concurring Justices may either intentionally or merely incidentally suggest other disputes and other litigation that might further clarify the law. Why is that problematic? Moreover, while the Justices do write opinions for audiences other than the litigants, this is as it should be. If a case raises issues that are important only to the parties to the current litigation, it usually will not belong in the Supreme Court. Aside from unusual occasions when the Court seeks to right a serious wrong in a particular case, the Court's function is to decide cases that raise issues that are important to segments of the society and that frequently have split the appeals courts that have faced those issues in distinct cases.⁷⁰ Thus, Professor Penrose's complaint that opinions, including concurrences, seem to be written more for an external audience than for the litigants⁷¹ seems to me misplaced. Whether or to what extent the opinions are written for "like-minded devotees"⁷² imputes a generally unknowable motivation; and, if it is true, that would not make the opinion any less the true, considered opinion of the issuing Justice.

Similarly, why is it necessarily wrong for the Court or individual Justices to seek to influence public opinion and to change settled law?⁷³ If the Court refrained from doing those things, *Plessy v. Ferguson* and other undesirable decisions still would be the law of the land.⁷⁴

Professor Penrose also launches broadside attacks that are little supported but hard to disprove, as when she asserts that "Modern justices . . . use their separate opinions to influence public opinion and seek to change settled law. . . . most in those cases where dissension only undermines the objectivity of the Court and its members."⁷⁵ She cites cases as examples but does not explain how these cases support the

70. See SUP. CT. R. 10 (regarding the criteria for the grant of certiorari).

71. Penrose, *supra* note 1, at 41.

72. *Id.*

73. *Id.* at 42. See generally Richard L. Hasen, *Anticipatory Overruling, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2011) (examining—and considering the audience for and the costs and benefits of—various tools other than overruling that Supreme Court Justices use to move the law). These include statements of intention—in judicial opinions—to change the law in the future, inviting Congress to overrule statutory precedents, inviting litigants to seek overruling from the Court, and adding dicta or unnecessary analysis in a judicial opinion with an eye toward influencing decision of a future case.

74. *Plessy v. Ferguson*, 163 U.S. 537 (1896); see *supra* note 43 for other cases in which dissents foreshadowed later changes in Supreme Court-made law.

75. See also Penrose, *Goodbye to Concurring Opinions*, *supra* note 1, at 42 (asserting that "[w]hen the country needs to know that the Court has done its job . . . [.] the separate opinion writers . . . strike out against their colleagues, attack the process, undermine the institutional legitimacy of the Court and add instability. . . .").

proposition. And how has she determined that these are cases where dissension undermined the objectivity of the Court and its members and did that “only”? I agree that when the country most desires certainty “in both result and the non-political nature of legal decision-making,”⁷⁶ unified decisions can be helpful, but Justices acting in good faith and in an intellectually honest manner may not be able to provide unified decisions. Sometimes legal disputes are inextricably intertwined with political questions and, whether that is the situation in a particular case or not, barring Justices from filing concurring opinions would provide a false and misleading impression of unanimity that (in my opinion) would seldom, if ever, be worth the price.

Professor Penrose believes that, “Surely most cases do not necessitate separate writing,”⁷⁷ but the Justices clearly do not agree. She wishes that the Justices would “voluntarily agree to reign themselves in,”⁷⁸ particularly when it comes to the writing of concurring opinions and that dissenters would frequently file a short “dubitante” notation instead of a full-blown dissent;⁷⁹ but she doesn’t believe it will happen. Thus, she urges the American Bar Association to reinstate Judicial Canon 19. It used to state:

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.⁸⁰

The Canon, part of the 1924 ABA Canons of Judicial Ethics, was replaced by the Model Code of Judicial Conduct, which the ABA adopted in 1972.⁸¹ Given the depth of Professor Penrose’s opposition to concurring

76. *Id.* at 42.

77. *Id.* at 48.

78. *Id.* at 49.

79. *Id.* at 50.

80. AM. BAR ASS’N, CANON OF JUDICIAL ETHICS (1924), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf [<https://perma.cc/LF4F-X9Z5>].

81. “In 1969, the ABA again began a comprehensive process to review, evaluate and update the judicial ethics canons. The resulting Model Code of Judicial Conduct, adopted by the ABA in 1972, changed the style and form of the rules, providing 7 canons in place of the original 36 canons, and cleaning up much of the hortatory language while maintaining the substance of the canons.” *About the Commission*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background/ [<https://perma.cc/6FQJ-6LT8>]. In 1990 and thereafter, the Code was further revised. *Id.* Specifically,

opinions, this strikes me as a quite modest response. Professor Sherry prescribes stronger medicine.

II. RESPONSE TO PROFESSOR SHERRY

A. *A Summary of Professor Sherry's Arguments, and Preliminary Responses*

Professor Suzanna Sherry has written a very thoughtful and comprehensive article⁸² arguing that the U.S. Supreme Court is “broken,” in large part because the Justices problematically have become celebrities who play to their fan base, with a variety of detrimental consequences.⁸³ She urges that to limit the Justices’ opportunities to continue to act in this way and thereby contribute to the dysfunctionality of the Court, Congress should pass a law that (1) requires each case in which the Court has agreed upon a majority opinion to be decided by an unsigned opinion that does not disclose the number of Justices who join it, (2) requires each case in which a majority of the Court agrees upon a decision but in which no majority of Justices subscribes to a single opinion to announce that the decision below is affirmed or reversed (as is appropriate in the particular case, and without disclosing the number of Justices who join the decision), but that the Court cannot agree on the reasons for that decision, and (3) prohibits the publication of concurring and dissenting opinions.⁸⁴ She concludes that that law would be constitutional and that, with respect to the nonconstitutional objections to her proposal, the proposal’s probable benefits outweigh its probable costs such that the country should try this system as an experiment.⁸⁵ I will summarize her main arguments concerning this proposal and explain where and why I disagree.

Professor Sherry finds dysfunction in several features of the Court, its work product, and in consequences of those two.⁸⁶ She points to the reduction in the number of cases that the Court is deciding, the increase

The Model Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association on August 7, 1990, was amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007, and August 10, 2010. It includes a preamble, a section concerning the persons to whom the Code applies, and four Canons. No part of the Code speaks to concurring, dissenting, or otherwise separate opinions.

82. Sherry, *supra* note 1.

83. *Id.* at 3, 7–8, 10, 12, 16, 36–39.

84. *Id.* at 13, 19 (arguing on the latter page that all parts of her proposal are necessary to accomplish its various goals).

85. *Id.* at 21–28 (addressing constitutional objections), 28–37 (addressing nonconstitutional objections).

86. *Id.* at 2–3, 6–9.

in the number of pages it writes to decide those cases, the abundance and characteristics of concurring and dissenting opinions, the increasing number of cases the Court disposes of without a majority opinion, the sometimes uncivil sniping of the Justices at one another, the polarization of the Court consistent with the views of the political party of the President who appointed the respective Justices, the media's and the public's view of the Court as largely a political institution that decides most cases on the basis of ideology and the consequent drop in public confidence in the Court, and the increased politicization of the nomination and confirmation processes.⁸⁷ She posits that Justices' evolution into celebrities who "market[] their brands"⁸⁸ and play to their bases—in public speeches, movies, books, television appearances and the like, as well as in their judicial opinions—exacerbates the other dysfunctionalities.⁸⁹ That evolution into celebrities, she says, undermines public confidence in the Justices' and the Court's impartiality⁹⁰ and encourages the Justices to "author more separate opinions and write more intemperately."⁹¹ This in turn increases the perception—of the media, the public, and politicians—of the Court as political and polarized, which then raises the stakes of confirmation hearings and endangers the Court's legitimacy.⁹² The behavior of the Justices outside the operations of the Court also may render the Justices "reluctant to engage in internal deliberation and unwilling to compromise" in the activities of the Justices as Justices.⁹³ It may cause their views to become more extreme, which will be reflected in their conduct on the Court at the same time as (and in part because of) a decline in loyalty to the Court as an institution.⁹⁴ Professor Sherry concludes that "If we can change the incentives and reduce the ability (or the temptation) to seek celebrity status, we might be able to make the Court at least somewhat less dysfunctional."⁹⁵

To that end, Professor Sherry advocates the requirements and prohibitions that I outlined above,⁹⁶ and explains why all parts of her proposed law are necessary to accomplish her goals.⁹⁷ In support of her

87. Sherry, *supra* note 1, at 2–4.

88. *Id.* at 4.

89. *Id.*

90. *Id.* at 6.

91. *Id.*

92. *Id.*

93. Sherry, *supra* note 1, at 7 n.33.

94. *Id.* at 9.

95. *Id.*

96. See *supra* text accompanying note 83.

97. Sherry, *supra* note 1, at 19. First, however, she considered other proposals to repair the Court and dismissed them as insufficient. Because this section of her Article does not directly relate

proposal, she identifies the “salutary effects on the current dysfunctions” for which she hopes and that she believes would follow.⁹⁸

In particular, Professor Sherry argues that effectuation of her proposal would:

(1) Enhance the authority and legitimacy of the Court by portraying it as in “monolithic solidarity.”

Professor Sherry argues that the desirable consequences of apparent solidarity are a likelihood of greater acceptance by and respect from the public, a greater likelihood of compliance by lower courts, a reduced chance of later overruling by the Supreme Court, reduced odds of a statutory overruling by Congress, and a lower likelihood of disparagement of Court decisions as political or ideological.⁹⁹

Response: In response, I would say that several of these ostensibly desirable consequences are not so desirable if a decision itself is problematic for any number of reasons. A decision might misread the law; it might be bad as a matter of policy; it might overrule a prior Supreme Court decision without good reason; etc. In those situations, greater acceptance and respect from the Supreme Court itself, the lower courts, Congress and the public actually might leave the country burdened by a bad decision longer than the country otherwise would be. Moreover, the “monolithic solidarity” on which these effects would be predicated might be an illusion. The decision in fact might reflect a vote by five Justices over the opposition of four Justices. In addition, the consequences that Professor Sherry attributes to apparent “monolithic solidarity” might or

to the proposal that I focus on, I will not discuss my reactions to her discussion of these other proposals.

98. *Id.* at 13.

99. *Id.* at 13–14. It is true that the presence of separate opinions does correlate positively with congressional overrides. *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions*, 101 *YALE L.J.* 331, 336–37, 349–50, 350 n.41 (1991) (finding that, in a study of federal court statutory interpretations that were the subject of overrides from 1967–90, “decisions subject to judiciary committee scrutiny were much more likely to have a dissenting opinion and to reflect a close division on the Court; this was particularly true of decisions that were ultimately overridden. Not surprisingly, issues that generate division in the Court are the ones most likely to generate serious congressional scrutiny.”); *see id.* at 349, Table 8. *Id.* at 349–50, n.41 reports in part that, “72% of the overridden decisions (13 of 18) reflected 6-3 or 5-4 votes, while only 47% of the examined-but-not-overridden decisions (41 of 87) reflected such votes”; Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 *TEMP. L. REV.* 425, 428, 446 (1992). Professors Solimine and Walker did a statistical study of the overruling of Supreme Court decisions between the years 1968 and 1988, noting that, “[B]ecause some of the fifty statutes modified more than one decision, there were a total of fifty-six decisions in the sample. . . . [The study found that] [o]f the fifty-five cases overridden, forty-four had at least one vote in dissent (and of those, eleven had two dissenting votes, seventeen had three dissenting votes, and ten were five-four decisions. Fifteen of the cases had at least one concurring opinion.”).

might not actually occur, for reasons elaborated below.¹⁰⁰ In brief, it may be that monolithic solidarity is not the key to enhanced authority and legitimacy of the Court.

(2) Alter the Justices' view of their roles so as to diminish their concerns with individual reputation and reinvigorate the importance that they place on the reputation of the Court as an entity.¹⁰¹

Response: Professor Sherry draws a direct line between reducing the Justices' opportunities to write separate opinions and helping to break down the Justices' partisan loyalties.¹⁰²

While it might be a good thing in and of itself for the Justices to rebalance their concerns with individual reputation and their concerns for the reputation of the Court as an entity, I have reasons to be leery of eliminating Justices' ability to communicate their individual views in individual opinions that accompany the Court's decision (if there is one). As described both earlier and later in this piece, the price of that silencing may be unacceptably high.¹⁰³

(3) Reduce the number of cases without a majority opinion.

Professor Sherry reasons that, under her proposal, Justices will have less reason to refrain from joining an opinion in order to create or bolster a majority, and the opinion-writer will have more reason to write the opinion in a way that will attract four or more others. Moreover, with the protection provided by anonymity, other Justices may be more open to compromise and amenable to persuasion than they now are.¹⁰⁴ The Court will want to avoid an embarrassing number of decisions without supporting opinions and, even if there come to be no more majority opinions than there are now, the opinionless decision "might be easier on lower courts: rather than having to divine the meaning of a fractured decision, they would . . . mak[e] and follow[] circuit precedent [presumably consistent with the prior Supreme Court decision]¹⁰⁵ until and unless the Supreme Court issued a ruling [*i.e.*, a majority opinion]"¹⁰⁶ inconsistent with the Circuit's prior decisions.

100. See *supra* text accompanying notes 47–56; see *infra* text accompanying notes 135, 158.

101. Sherry, *supra* note 1, at 14–15.

102. *Id.* at 15.

103. See *supra* text at notes 24–27, 47–56, 61, 63–99; *infra* text at notes 135, 158.

104. Sherry, *supra* note 1, at 15.

105. Without initially having been presented with Supreme Court reasoning, it sometimes might be quite difficult for intermediate federal appellate courts to know whether, in a particular case, they need to follow a Supreme Court decision. The uncertainty would be conflict generating, but that itself would tend to pressure the Supreme Court to arrive at a majority opinion. Compare *id.* at 18 n.97.

106. *Id.* at 16.

Response: This “excerpt” indicates that there is reason to believe that Professor Sherry’s proposal would likely increase the number of cases with a majority opinion, but there is no guarantee of that. Insofar as the proposal would *not* have that effect, the question whether lower courts—and other persons affected by the Court’s decisions—would be better off with an opinionless decision or with multiple opinions is a debatable one. As previously discussed,¹⁰⁷ multiple opinions unaccompanied by a majority opinion pose a challenge to lower courts that are trying to determine and apply the rules established by a Supreme Court case, but at least the multiple opinions provide indications of the Justices’ thinking. The absence of any Supreme Court opinion and the presence of a naked affirmance or reversal may leave even greater uncertainty as to how lower courts should decide cases that are not “on all fours” with the case previously decided by the Supreme Court.

(4) Provide “incentives for the Justices to reach consensus on an opinion that is just maximalist enough to provide guidance.”¹⁰⁸

Response: This is a hypothesis of Professor Sherry’s. She acknowledges that prohibiting concurrences might yield more minimalist opinions, so written in an effort to persuade a majority to sign on.¹⁰⁹ She further acknowledges that her proposal might produce “overly minimalist opinions to start.”¹¹⁰ But she notes that a majority *can* issue wide and deep opinions and that the (posited) absence of (otherwise feared and constraining) concurring and dissenting opinions will free majorities to write such wide and deep, guidance-providing opinions—assuming that five or more Justices would accept the opinion. The degree to which and the frequency with which that would happen remains an unknown. Professor Sherry argues that Justices freed from playing to their bases can devote more time and energy to providing guidance to the public and to lower courts, but even if they “can” it is not clear that they will, in part because the depth of their agreement may not go so far. Indeed, if a majority of the Justices can agree on a decision but not on an opinion, there will be no transparency at all. And, as noted, an opinion that is relatively skeletal (because that is all a majority of Justices can agree upon) will leave many open questions for the intermediate appellate courts to wrestle with.

107. See *supra* note 57 and accompanying text.

108. Sherry, *supra* note 1, at 17.

109. *Id.* at 17.

110. *Id.* at 18.

B. *Rejoinders to Professor Sherry's Arguments*

Professor Sherry begins from the premise that the Supreme Court would *not* adopt her proposals on its own. Internal efforts to motivate the Justices to seek consensus have not succeeded, and “the norm of separate opinion-writing . . . has become entrenched.”¹¹¹ Thus, she is convinced that “[o]nly Congress can successfully limit the Court to a single unattributed opinion,”¹¹² and I presume that she also would say that only Congress could successfully eliminate the publication of vote counts. The proposal to have Congress impose these requirements and restrictions on the Court provokes Constitutional objections grounded in the First Amendment, separation of powers, and Article III.

1. With Respect to the First Amendment

First, I want to state that I have no great expertise in First Amendment law. Nonetheless, I can bring some pertinent information and thoughts to bear. Professor Sherry's position is that litigants (and presumably therefore the citizenry at large) have no First Amendment right to receive either signed or reasoned opinions of the Court. *A fortiori*, litigants and the public have no First Amendment-based right to receive dissents or concurrences with or without attribution to their authors.¹¹³ In support of these conclusions, Professor Sherry cites both the Court's issuance of per curiam opinions on the merits, some with and others without reasoned explanations, and the common absence of explanations, vote totals, and dissents from denials of certiorari.¹¹⁴ Those are facts with which I cannot argue. However, there is a recognized First Amendment right to receive informed opinions. Justice Souter (joined by Justices Stevens and Ginsburg), dissenting in *Garcetti v. Ceballos*,¹¹⁵ remarked that:

[T]he individual and the public value of . . . speech . . . may well be greater . . . when [a government] employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties [than when the employee speaks about other matters]. . . . The interest at stake is as much the public's interest in

111. *Id.* at 20.

112. *Id.*

113. *See id.* at 21.

114. *Id.*

115. *Garcetti v. Ceballos*, 547 US 410, 428, 430–31 (2006) (Souter, J., dissenting).

receiving informed opinion as it is the employee's own right to disseminate it.¹¹⁶

When Justices of the Supreme Court write separate opinions expressing their informed opinions, they are government employees speaking pursuant to their duties as such—even though in our current system, they do not have a duty to write a separate opinion in any particular case—and a public interest exists in receiving those informed opinions. Thus, contrary to Professor Sherry's view, litigants and citizens at large may well have a First Amendment right to receive the separate opinions that Justices wish to write and publish, unlimited by interference from a distinct branch of the federal government such as Congress.¹¹⁷

Do Justices have a First Amendment right to write or publish dissents or concurrences? Professor Sherry relies on *Garcetti v. Caballos*¹¹⁸ in concluding that the Justices have no such right. For reasons that follow, I do not believe that *Garcetti* disposes of the issue, but no Supreme Court case explicitly affirms the right of judges or even Justices to write or publish dissents or concurrences either. In *Garcetti*, the Court distinguished between the speech of a government employee in his or her capacity as a citizen and the speech of a government employee speaking in his or her capacity as such. The Court found the former speech to be protected when the individual spoke (as a citizen) on a matter of public concern. But the Court held that “[w]hen public employees make statements pursuant to their official duties,” their speech may be punished or restricted by their government employer.¹¹⁹ The Court emphasized that a government entity has broad discretion to restrict speech when it acts in its role as an employer but that (even then) the restrictions it imposes must

116. *Id.* at 433 (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam)).

117. Regarding the First Amendment-grounded right to receive information, *see, e.g.*, *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (“Our precedents have focused ‘not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.’ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). . . . This right [to receive information and ideas] is an inherent corollary of the rights of free speech and press . . . [T]he right to receive ideas . . . follows ineluctably from the sender’s First Amendment right to send them: ‘The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.’ *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (citation omitted). . . . [T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas . . . is fundamental to our free society.”). *See generally* 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:73 (rev. ed. 2020).

118. *Garcetti v. Caballos*, 547 U.S. 410 (2006).

119. *Id.* at 424–26.

be directed at speech that has the potential to affect its operations.¹²⁰ Unlike the fact situation presented by *Garcetti*, Professor Sherry's proposal does not entail a restriction of the speech of Justices by their employer. Congress does not employ the Justices; it is not in a chain of command that encompasses the Justices; and the requirements and limitations on speech that Professor Sherry would have Congress impose on the Justices do not have the potential to directly affect Congress's operations.¹²¹ Thus, *Garcetti v. Caballos* does not control the issue posed by the proposal, and I disagree with Professor Sherry that *Garcetti* "means" that, within the bounds of separation of powers principles, Congress is free to specify what Justices may or not say.

It also is relevant that First Amendment jurisprudence generally recognizes utterances as speech protected by the First Amendment unless the speech falls into narrow, largely unprotected categories such as obscenity, "fighting words," speech that creates a clear and present danger of imminent harm, true threats, defamation with actual malice, and child pornography.¹²² Consequently, there is little reason to doubt that Justices enjoy a First Amendment right to express their opinions about the cases that the Court has either a statutory duty to decide or has chosen to decide via the exercise of its certiorari powers. Intermediate federal appellate courts have recognized this. For example, in *In re Kendall*¹²³ the Third Circuit reversed the contempt conviction of a superior court judge for publishing a judicial opinion that chastised a state supreme court for issuing a particular writ of mandamus. The Third Circuit noted that courts inferior to the U.S. Supreme Court repeatedly have held that a "judge does not check his First Amendment rights at the courthouse door."¹²⁴ It agreed, saying:

What a judge says in an opinion is sufficiently expressive to trigger First Amendment review. The judge "inten[ds] to convey a particularized

120. *Id.* at 419.

121. Nor would the proposed requirements and limits *indirectly* affect Congress's operations significantly more than they would affect the operations of the many others whom the Court's opinions may affect.

122. See generally ERWIN CHEREMINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 11.3 (4th ed. 2011) (elaborating upon categories of unprotected and less protected speech); Edward Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 2101, 1206 (2011) (discussing the evolution of free speech doctrine, including what categories of speech remain largely unprotected) (regarding "true threats" citing *Virginia v. Black*, 539 U.S. 343, 359 (2003)); Daniel Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 928–30 (2009).

123. *In re Kendall*, 712 F.3d 814 (3d Cir. 2013).

124. *Id.* at 824 (citing *In re Judicial Misconduct*, 632 F.3d 1289, 1289 (9th Cir. Jud. Council, 2011) (Kozinski, C.J., sitting alone)).

message” by explaining his legal analysis and conclusions Indeed, as pure speech on public issues, a judicial opinion “occupies the highest rung of the hierarchy of First Amendment values” and is thus “entitled to special protection.”¹²⁵

The Supreme Court itself has recognized that candidates for judicial office have First Amendment rights that need to be respected.¹²⁶

It similarly is worthy of note, by way of analogy, that the speech of United States Senators and Congresspersons in the House of Representatives is protected by the Constitution.¹²⁷ The Speech or Debate Clause of Article I, section 6, clause 1, provides that such Senators and Representatives “shall not be questioned in any other Place” “for any Speech or Debate in either House.”¹²⁸ The Speech or Debate Clause “was designed to assure a co-equal branch of the government broad freedom of speech, debate, and deliberation, without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.”¹²⁹ It prevents the “intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.”¹³⁰ Although the Speech or Debate Clause is viewed as primarily protecting separation of powers and only incidentally protecting individual legislators, it also has been recognized to be linked to the First Amendment.¹³¹ While there is not a parallel provision in the

125. *Id.* (citing *Snyder v. Phelps*, 562 U.S. 443 (2011)). *See generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 257 (2013) (noting the self-expressive character as well as instrumental effects of judicial opinions).

126. *See* *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (holding that Minnesota’s canon prohibiting candidates for election to judicial office from announcing their views on disputed legal or political issues that are within the province of the court for which the candidate is running violated the First Amendment).

127. U.S. CONST. art. I, § 6, cl.1; *but see* *Gravel v. United States*, 408 U.S. 606, 616, 626–28 (1972) (holding in part that the Speech or Debate Clause does not protect a legislator’s private republication of material from the Congressional Record for the benefit of constituents because informing citizens is not a “legislative” act entitled to constitutional immunity). Justice Douglas dissented, reasoning that liability for re-publication would be not only a violation of the speech or debate clause but also a violation of the first amendment. *See id.* at 636–48 (Douglas, J., dissenting).

128. U.S. CONST. art. I, § 6, cl.1. *See generally* Comment, *Brewster, Gravel, and Legislative Immunity*, 73 COLUM. L. REV. 125 (1973).

129. *Gravel*, 408 U.S. at 616.

130. *Id.* at 617.

131. *See, e.g., Gravel*, 408 U.S. at 616 (noting that, “The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.”). *See generally* Michael L. Shenkman, *Talking About Speech and Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL’Y REV. 351, 360–61 (2014) (“Given the broad impact of the First Amendment, it is striking to consider that the Speech or Debate Clause comprised the entirety of free speech protection in the Constitution as initially written in 1787. Indeed, the Framers of the Bill of Rights looked to parliamentary privilege

Constitution that applies to Justices or judges, the courts have long fashioned common law that similarly gives immunity from liability to federal judges and Justices for anything they say in their capacity as such.¹³²

Notwithstanding all of the foregoing however, no Supreme Court decision specifically upholds the right of Justices under the First Amendment to write or publish concurring or dissenting opinions. That absence of precedent may, however, be attributable to the absence of occasions when Congress or the Executive branch sought to restrict the speech of Justices¹³³ rather than being circumstantial evidence of an absence of First Amendment protection.

Before moving on, it is extremely important to acknowledge that Professor Sherry's proposal does not go so far so to recommend that Congress prohibit Supreme Court Justices from expressing their separate opinions (about the cases that the Court has heard) in any time, place, or manner *other than* in formal dissents or concurrences to be published in the authorized reporters of Supreme Court decisions.¹³⁴ It may be that this feature of her proposal would protect it from a First Amendment challenge, for the government is entitled to impose reasonable time, place, and manner restrictions on speech. On the other hand, the traditional

as embodied in the Speech or Debate Clause to find the principles that animated the First Amendment. Only later, in 1791, was the Bill of Rights submitted and ratified, providing for a direct free speech right in the citizenry. In practice, the free speech aspect of the Speech or Debate Clause has been virtually subsumed by First Amendment jurisprudence—that is, there is little effective legislative speech covered today that is not also protected by the First Amendment. There is, however, no indication that the Framers meant the First Amendment to reduce the Speech or Debate Clause to de facto surplusage by making the First Amendment a broader application of coextensive protection.”). Shenkman cites AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 125 (1998) (arguing for the importance of reading the Speech or Debate Clause and the First Amendment together, rather than taking a “clausebound” approach).

132. “As early as 1872, the [Supreme] Court recognized that it was ‘a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehensions of personal consequences to himself.’” *Stump v. Sparkman*, 435 U.S. 349, 355 (1978) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1871)). The doctrine of judicial immunity is rooted in English common law, and its primary purpose is to preserve judicial independence. *See Forrester v. White*, 484 U.S. 219, 225 (1988).

133. The First Amendment applies to the states through the Fourteenth Amendment, but it may be that state legislatures and executives have seldom tried to restrict the speech of judges, and any such efforts may not have been tested in the courts—or at least up to the United States Supreme Court. As part of a constitutional Article that provided for the publication of official case reports at public expense, the Louisiana Constitution of 1898 prohibited the publication of dissenting opinions. This was seen as an “economy measure,” and dissenting opinions continued to be published in a private publication, the *Southern Reporter*. The state Constitution of 1921 eliminated the prohibition. Justice Joe W. Sanders, *The Role of Dissenting Opinions in Louisiana*, 23 LA. L. REV. 673, 678 (1963).

134. Sherry, *supra* note 1, at 21 n.121, 26 n.155, 36.

placement of dissenting and concurring opinions in direct juxtaposition to the majority or plurality opinions of the Court has significant functionality that could lead to the conclusion that a congressional prohibition of such publication would violate the First Amendment rights of the Justices or the reciprocal, concomitant, correlative, and derivative right of would-be readers to gain convenient access to concurring and dissenting opinions that Justices want to publish.¹³⁵ Professor M. Todd Henderson has written an analysis that merits extended quotation:

Th[e] discourse among litigants, judges, lawyers, academics, students, and the public is greatly influenced by the manner in which appellate opinions are issued. The most important influence on this discourse is the presence or absence of separate opinions. . . . [By the 1940's] [d]issent had proved to be a powerful weapon for change. Furthermore, this era saw the rise of legal realism. . . . To increase the power of the Court specifically and the law generally, [Chief Justice] Stone encouraged debate and controversy, rather than suppressing it[.] . . . The issuance of unanimous, per curiam opinions “deciding” particularly thorny issues might provoke extrajudicial or even extralegal responses. . . . [D]issent allows judges in the future to overrule bad law based on the reasoning of their predecessors, in essence allowing the Court, and thus the law and lawyers, to play a more political role by essentially mollifying the losing parties and encouraging a continuing legal discourse. . . . Ironically, the practice of dissent provides the Court as an institution with a public and political acceptance it would be unable to achieve with per curiam opinions. . . . The credibility of the Court in general is enhanced when it reveals, at least to a degree, the integrity of its deliberative decision-making process. . . . With individual opinions, Justices expose their competence and legal analysis to the world for criticism. In this way, dissenting opinions arguably create better Justices. With their reputation or career on the line, Justices have the incentive to consider each case carefully. But . . . dissent is not just about modernity’s quest for deliberative democracy or necessary for the proper functioning of a Supreme Court. . . . [D]issent is the strategy that enables the Court and the law in general to maintain its institutional

135. It should be noted that, indeed, at times the right to receive information can be more important than the right to publish it, even though the two rights are in some sense two sides of the same coin. Would-be readers of judicial opinions that could directly affect the readers’ lives—in ways that the opinions do not affect the Justices—may well be among those whose interests in receiving information are greater than the interests of those who seek to speak. *Compare* *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring) (opining that, if doctors were deterred from communicating certain information to their patients, the harm to patients who suffered from disabilities in which marijuana offered one of the few hopes for therapy or relief would be far greater than the harm that would be suffered by the doctors whom federal policy threatened with sanctions if they recommended or prescribed marijuana for medical purposes).

power given the highly political nature of the cases the Court decides today. . . . Separate opinions not only show society that the process of decision making is legitimate, but also allow those who oppose a particular result to take comfort that the result may someday be reversed. . . . Dissents therefore preserve the ability of the Court to maintain its normalizing power. The vulnerability of precedents based on less than a unanimous judgment makes the Court and the law invulnerable.

Imagine a per curiam opinion . . . where the absence of dissent reflected mere conformity rather than actual agreement. Such an opinion would be criticized in part because of [Professor] Stack's notion of legitimacy, but also because opponents of the opinion would have no legal grounds to continue the fight. . . . [D]issent allows lower courts, lawyers, and politicians to measure the weight of the opinion and to plan a political or legal counterattack. Dissents lead to ambiguity and hope of change Without such possibilities for counterattack, the opinion would carry more weight, but the integrity of law and the Court might well come under siege from more dangerous political forces [leading to] . . . [p]ossible . . . impeachment, change in Court composition or jurisdiction, or a constitutional amendment. . . . Paradoxically[,] by undermining the authority of the Court, dissent increases the power of the Court and the law by insulating it from potential political attacks.¹³⁶

In short, we no longer live in a country that will accept unsigned purportedly majority opinions as if they came from an oracle. We all are legal realists. Our citizenry demands judicial opinions that show the views of each Justice who chooses to separately state his or her opinion. We need to see the reasoning processes. We need to see how the Justices grappled with the issues. We need to see the Justices take responsibility for their opinions, and we want to know the vote totals. The legitimacy and the power of the Court depend on it.

2. With Respect to Separation of Powers and Article III

Because the two dovetail, I will treat together the issues of the bearing of separation of powers and Article III policies on Professor Sherry's proposals.

I will not take issue with Professor Sherry's position, "borrowed" from Professor Gary Lawson and others, that "the Necessary and Proper Clause provides authority for 'congressional legislation with respect to the

136. Henderson, *supra* note 39, at 328–32, 338–41.

operations of the judicial department.”¹³⁷ But Professor Sherry agrees (with me) that the question whether Congress constitutionally can mandate anonymous Supreme Court opinions deserves attention and is not a “no brainer” (my language; not hers).¹³⁸ She also notes that no one has addressed the constitutionality of her proposal that Congress prohibit separate opinions,¹³⁹ although she simultaneously reports that Professor Michael Stokes Paulsen “‘tentatively concluded’ that because ‘Congress lacks power to control the content or manner of judicial opinion-writing,’ it could not prohibit the publication of concurrences or dissents.”¹⁴⁰

After distinguishing (from her proposal) the three types of laws that Professor Sherry finds the Supreme Court to have identified to be forbidden by Article III and its penumbra,¹⁴¹ Professor Sherry presents a defense of her proposal based on a discussion of “the scope of the judicial power and the essential attributes that are protected from congressional interference.”¹⁴² She quotes from the writings of a number of scholars who have attempted to describe the essence of judicial power or to distinguish matters that are not of the essence of judicial power such that legislatures may address those matters.¹⁴³ She infers that “Article III prohibits only congressional interference with the decisionmaking process,”¹⁴⁴ and argues that her proposal lies outside the decisionmaking function because it regulates merely “the manner in which the Court can communicate its decision.”¹⁴⁵ Moreover, as a temporal matter, her proposal relates to a matter or matters—nonpublication of concurrences and dissents plus nonpublication of the author of the Court’s opinion and the vote count of the Justices—that occur only after the decision making process is complete.¹⁴⁶ Her proposal does “not prohibit the Justices from *writing* concurrences or dissents and circulating them internally,”¹⁴⁷ something that she concludes *would* violate separation of powers as well as

137. Sherry, *supra* note 1, at 22, 22 n.123, 24–25.

138. *Id.* at 22 n.125.

139. *Id.*

140. *Id.* at 22 n.126 (emphasis added).

141. *Id.* at 22–24. Professor Sherry identifies as the three types of laws that the Supreme Court has held to be forbidden by Article III: (1) laws by which Congress dictates the result a court should reach in a particular case; (2) laws by which Congress vests review of decisions by Article III courts in executive branch officials; and (3) laws by which Congress retroactively compels federal courts to re-open final judgments. *Id.* at 22–23.

142. *Id.* at 24–27.

143. Sherry, *supra* note 1, at 23–24.

144. *Id.* at 25.

145. *Id.* at 26.

146. *Id.* at 26–27.

147. *Id.* at 26.

(probably) the First Amendment.¹⁴⁸ Nor, of course, does her proposal have Congress prohibit the writing of an opinion for the Court by an unidentified Justice. She concludes that for Congress to limit the types of opinions that the Supreme Court may publish, to prohibit attribution of opinions to named Justices, and to prohibit the publication of Supreme Court Justices' vote counts does not unduly interfere with "the Court's ability to make, explain, or justify its substantive decisions"¹⁴⁹ and thus would be constitutional.

Are there rebuttals to these arguments? I believe that there are. Some of the counterarguments fall within the realm that Professor Sherry assayed. Others look further afield, to a broader view of the functions of the Court and its decisions. In addressing the latter, I will be led to address Professor Sherry's anticipation of nonconstitutional objections to her proposal and her responses to those objections, features of her paper that I have not yet addressed.

First, counterarguments within the realm that Professor Sherry assayed: I agree that, on the surface, because Professor Sherry's proposal does "not prohibit the Justices from *writing* concurrences or dissents and circulating them internally,"¹⁵⁰ it does not affect the Court's decision making process. I say "on the surface" because it is quite possible that a Justice who is writing a separate opinion that s/he knows will not be published along with the Court's opinion (if any)¹⁵¹ might write differently than s/he would write if her or his separate opinion were going to be published along with the Court's opinion. Insofar as the separate opinions that are circulated among the Justices would be different than they otherwise would be, those differences might affect how, if at all, they would influence the Court's decision and opinion. Thus, the Court's decision and opinion might be different than they would be if the separate opinions were to be published as they historically have been, together with the Court's decision and opinion. Indeed, to make the internally circulated separate opinions and the Court's opinion different than they otherwise would be is a specific goal of Professor Sherry's.¹⁵² Under these circumstances, Professor Sherry's proposal for congressional action very much *would* affect the decision-making process itself. The proposal would

148. Sherry, *supra* note 1, at 26 n.155.

149. *Id.* at 27–28.

150. *Id.* at 26.

151. Under Professor Sherry's proposal, if five Justices cannot reach agreement on an opinion, the Court would note that the decision below is affirmed or reversed, but that the Court cannot agree on the reasons. *Id.* at 13. For ease of reading, I often will omit saying "if any."

152. *Id.* at 15–17.

very likely affect—and thus arguably interfere with¹⁵³—the process by which the Court makes, explains, and justifies its substantive decisions.¹⁵⁴ By Professor Sherry’s own concession, this very well might violate constitutional separation of powers.

Second, Professor Sherry’s concern with undue interference with the Court’s making, explaining, and justifying its substantive decisions¹⁵⁵ is telling. It suggests that we should be concerned not only with the Court’s *making* of its substantive decisions but also with its explanations for and justifications of its substantive decisions. While both of the latter inhere in what the Court says, they also entail a communicative element. They are predicated on an audience (or audiences) outside the Court whom the Court is addressing in its decision and opinion. Historically, it is not only “the Court” that has been given an opportunity to address these audiences; dissenters and writers of concurring opinions also have had the opportunity to explain their differences with other Justices and to attempt to justify their positions on the issues raised by the case at bar—and to do so in a publication that is contemporaneous with and found in the same volume (and using the same citation) as the Court’s opinion. If this were to change—if the Court’s opinion, if any, were to be published alone and unsigned; if concurring and dissenting Justices’ opinions could not be published contemporaneously with and in the same volume or through the same electronic citation as the majority decision or opinion—the communication would be very different and, I believe, impaired. For Congress to significantly interfere with the Court’s and the Justices’ communication of their views on the cases before the Court strikes me as something that *should* be held to violate separation of powers, for the significance of what the Supreme Court does and says is not limited to its majority opinions.

Professor Sherry also argues that “there is a strong argument that the democratic legitimacy of Supreme Court rulings comes not from the diversity of opinions but from the reasoned explanations given for the outcome,” so “the per curiam opinion would provide the same legitimacy.”¹⁵⁶ Moreover, since, on her proposal, the views of Justices who disagree with a majority opinion would merely be relocated, not

153. Because no Supreme Court decisions specifically address many aspects of what Congress must not do in relation to federal court opinions, it is unclear when the question whether Congress has impermissibly “interfered with” the Court’s making or explaining or justifying its substantive decisions is determinative or even relevant.

154. Sherry, *supra* note 1, at 26 n.150, 27.

155. *Id.* at 27–28.

156. *Id.* at 28–29.

eliminated, she sees no “substantial” limitation on the publicity given to the diversity of views of the Justices,¹⁵⁷ although she concedes that the writers of separate opinions would enjoy a less effective means of communication.¹⁵⁸ These positions are quite debatable. As discussed earlier, Professor Stack has argued strongly to the contrary that the democratic legitimacy of Supreme Court rulings depends fundamentally on the Court having *demonstrably* reached its judgments through a deliberative process that entails argumentative interchange among the Justices. He has written that:

The publication of a single opinion could be sufficient to demonstrate that the Court’s judgment is based on reasons, but the practice of . . . delivering [only] a single opinion would not demonstrate that the Court’s judgment is the product of a reasoned dialogue among the Justices. The publicity of dissenting opinions and the indication of Justices’ individual endorsement of particular opinions reveal that the Justices do confront each other with their disagreements about matters of principle”¹⁵⁹

Professor Stack seemingly would reject the view that the publication of a reasoned majority opinion, separated from dissenting and concurring opinions that Justices seek to communicate to persons other than other Justices, would suffice to maintain the legitimacy of the Court. I agree.

We also should remember that Professor Sherry’s proposal includes the recommendation that Congress provide that, when the Supreme Court cannot agree upon a majority opinion although a majority of the Justices agree on the decision of a case, only the latter should be published, with a notation that a majority could not agree on an opinion in support of that result.¹⁶⁰ In such a regime, the reasoned explanation for the outcome upon which Professor Sherry predicates the democratic legitimacy of the Supreme Court¹⁶¹ would be missing. That legitimacy problem also argues against this aspect of her proposal. A set of opinions that explains the ways in which the various Justices arrived at their decisions and that explains other Justices’ reasons for dissenting would promote far greater democratic legitimacy.¹⁶² Especially when there is no substantive

157. *Id.* at 29.

158. *Id.*

159. Stack, *supra* note 3, at 2257.

160. Sherry, *supra* note 1, at 13.

161. *See supra* text accompanying note 83.

162. Professor Sherry tries to distinguish among democratic, moral or political, and sociological legitimacy. I may not understand all the subtle differences among them, but all of these varieties of legitimacy probably would be promoted by greater transparency as to the thinking of the Justices after

transparency provided by a written opinion from the Court, the need for procedural transparency through the publication of competing opinions from differing Justices is all the more important—even if it does “politicize” the judiciary in some sense and in some cases.

With respect to separation of powers and Article III in general, it should be observed that Professor Sherry’s proposal contains no provisions for enforcing the statutory prohibitions and requirements that she recommends. If Congress statutorily conferred upon itself power (or without a statutory authorization sought) to enforce these statutory mandates, those acts too would raise serious separation of powers concerns. “The federal courts have long held that Congress may not act to denigrate the authority of the Judicial Branch.”¹⁶³ In *Hayburn’s Case*,¹⁶⁴ several Justices on circuit concluded that the Constitution did not authorize Congress to subject an Article III court’s opinion to revision or control by an officer of the Executive or Legislative branch.¹⁶⁵ In other cases, the Court has evaluated whether Congress impermissibly aggrandized its power at the expense of another branch or disrupted the proper balance between the branches by preventing another branch from accomplishing its constitutionally assigned functions.¹⁶⁶ It is not hard to

they have had time to consider briefs, arguments, additional research, and deliberations. This does not imply that public display of every aspect of the Court’s processes would be beneficial.

163. ELIZABETH BAZAN & MORTON ROSENBERG, CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES 29 (2005).

164. *Hayburn’s Case*, 2 U.S. 409 (1792).

165. *Id.*; discussed *inter alia* in RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 2.13 (b), (c) (5th ed. 2012).

166. *Morrison v. Olson*, 487 U.S. 654, 658 (1988) (upholding the independent counsel provisions of the Ethics in Government Act of 1979 against challenges based on separation of powers principles and allegedly impermissible interference with the functions of the executive branch). *See also* *Mistretta v. United States*, 488 U.S. 361, 397–412 (1989) (holding that the placement of the Sentencing Commission, established under Act of Congress, in the judicial branch did not violate separation of powers, and Congress’s decision to require at least three federal judges to serve on the Commission and to share authority with nonjudges did not unconstitutionally undermine the integrity of the judicial branch by assigning extrajudicial duties to Article III judges); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948) (stating that, “Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturn or refused faith and credit by another Department of Government.”). In a notable federal district court decision, the court held that a federal statutory requirement that the United States Attorney General report a district court’s grant of a downward departure under the United States Sentencing Guidelines to the House and Senate Judiciary Committees unconstitutionally interfered with judicial independence and violated separation of powers principles. It found a chilling effect on the judiciary and that, although the statute did not give either the legislative or the executive branch any coercive power over the judiciary, a threat was present. Moreover, it found that no legitimate purpose was served by the reporting requirement, which required specification of each case and disclosure of the district court judge, the court’s stated reasons for its departure from the Guidelines, and various other items of information. *United States v. Mendoza*, No. CR 03-730 DT, 2004 U.S. Dist. Lexis 1449, slip

imagine that efforts by Congress to enforce the proposed rules governing majority opinions, separate opinions, and vote counts could be held to violate these norms. Of course, the judiciary itself could try to enforce the requirements, also potentially prompting a test of their constitutionality, or Justices could voluntarily decide to abide by them.

3. Views to Contrast with Professor Sherry's Evaluations of the Nonconstitutional Objections to her Proposed Prescriptions

In addition to the considerations examined above, Professor Sherry evaluates nonconstitutional objections to her proposals. Professor Sherry discusses these arguments under the rubrics of: (1) separate opinions serve important purposes; (2) signed opinions serve important purposes; and (3) it won't work. I comment below.

a. Concerning Separate Opinions

In addition to arguably promoting the Court's legitimacy, the important purposes that separate opinions have been said to serve and that Prof. Sherry focuses upon revolve around their—presumably salutary— influence on the development of the law. Professor Sherry's answers are: that the cases in which this salutary influence is present are exceptional and rare; that the separate opinions were unnecessary—that is, the Supreme Court decisions that were overruled or discredited “would likely have been overruled or discredited even in the absence of dissenting opinions”;¹⁶⁷ that “pivotal concurrences”¹⁶⁸ consequently should be unnecessary;¹⁶⁹ and that, insofar as pivotal concurrences reduce the

op. at 12–14, 18 (C.D. Cal. Jan. 12, 2004). The case produced no appellate opinion, however. Most of the separation of powers cases that have gone to the Supreme Court have involved alleged infringement by the legislative branch upon the bailiwick of the executive branch. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 improperly assigned executive powers to the Comptroller General, who was subservient to Congress); *INS v. Chadha*, 462 U.S. 919 (1983) (upholding a challenge to a section of the Immigration and Nationality Act that authorized one House of Congress to invalidate an Executive Branch decision to allow a particular alien to remain in the U.S.).

167. Sherry, *supra* note 1, at 31.

168. A “pivotal concurrence” is defined by the scholars who coined the term as those written by Justices who join the majority opinion, and whose votes are necessary to make that opinion a majority, but which in some way undercut the majority's reasoning thereby smooth[ing] the process of change. Bennett et al., *supra* note 3, at 817–18, 820, 847.

169. *See* Sherry, *supra* note 1, at 31–32. I did not altogether follow Professor Sherry's reasoning here. She says that changes that appear to be “a bolt from the blue” should not be made. *Id.* at 32. I would think that some changes in the law are warranted and that pivotal concurrences and dissents, because they can make some changes in the law *not* “bolts from the blue,” therefore would be a good

political cost of overruling, they increase the likelihood of overruling, which negatively affects doctrinal stability.

I have not done an independent empirical study, but several scholarly writings on the beneficial effects of dissents and concurrences disagree with Professor Sherry's (and Professor Penrose's) views that those separate opinions' effects are rare.¹⁷⁰ Among the noteworthy articles of this ilk are *The Importance of Dissent and the Imperative of Judicial Civility*, in which Professor Edward Gaffney provided illustrations from every period in Supreme Court history, corresponding to the tenures of the Chief Justices through Chief Justice Rehnquist, demonstrating the "vital role [that dissents have played] in the growth and development of the law."¹⁷¹ Moreover, Professor Sherry's speculation that the Supreme Court decisions that were overruled or discredited "would likely have been overruled or discredited even in the absence of dissenting opinions" is just that—speculation—and it does not address whether, absent the prescient separate opinions, the changes that were made would have been made as quickly, nor whether and how the earlier separate opinions might have altered the precise changes in the law that the Court (or lower courts) made. These things are unknowable, and it seems to me there is no good reason to *presume* against the salutary effects of separate opinions—unless one has an ax to grind. Professor Sherry has one because she is advocating for Congress to prohibit the publication of separate opinions by United States Supreme Court Justices.¹⁷²

At bottom, I am not as cynical as Professor Sherry. I do not see that "dissents and concurrences . . . feed the view that precedent, principle, and legal reasoning exert no influence."¹⁷³ Nor am I Pollyannaish; I see world views and ideologies influencing the respect given (or not given) to

thing as they also reduce the political cost of overruling. But Professor Sherry apparently is more concerned with doctrinal stability, which causes her not to like pivotal concurrences. *Id.* at 32.

170. See, e.g., Bennett et al., *supra* note 3, at 866–71 (discussing the importance of separate opinions in signaling the possibility of a different constitutional vision and smoothing the path to legal change; discussing cases); Gaffney, *supra* note 25, at 592–623 (supporting at length the proposition that "dissents have played a vital role in the growth and development of the law [and] illustrat[ing] this conclusion with . . . examples from each period of Supreme Court history.").

171. Gaffney, *supra* note 25, at 592.

172. Professor Sherry also argues that the most polemic dissents are both the most likely to be cited in later majority opinions and the most likely to be perceived as evidence of a "political and polarized Court." Sherry, *supra* note 1, at 32. Her goal is to get rid of them. But, even if the data she relies on are correct, those may not be the dissents that most influence the development of the law. Hence, this point does not very effectively undercut the argument that separate opinions, or dissents in particular, have had (and presumably would continue to have) salutary effects on the development of the law.

173. *Id.* at 33.

precedent; I see legal reasoning, precedent, and principle distorted to reach desired outcomes. But I do not view the situation as having reached the point at which “suppressing dissents and concurrences is a necessary corrective.”¹⁷⁴ I see Justices in their opinions attempting to respond to points made by other Justices—although not always and not completely and perhaps not with the greatest intellectual honesty.¹⁷⁵ But if one desires to have “concurrences and dissents . . . improve the majority opinion by forcing the [authoring] Justice . . . to respond and therefore to produce the best possible opinion,”¹⁷⁶ the way to foster such behavior is not to shunt concurring and dissenting opinions into separate publications.

b. Signed Opinions

Professor Sherry identifies the arguments in favor of signed opinions as avoiding decisions by a faceless bureaucracy; holding judges and Justices accountable; preserving judicial legitimacy; and ensuring “that the judge has engaged in an appropriate dialogue in the decisionmaking process.”¹⁷⁷ Signed opinions also enhance the reputations of individual Justices.¹⁷⁸ She responds that the Court already issues unsigned opinions, often uncontroversially, and she views the “costs” of signed opinions as now outweighing their benefits. Among the costs she identifies are that signed opinions may encourage Justices to “dig in their heels” and refuse to compromise; may encourage undesirable accountability to a fan base more than (or rather than) desirable accountability to a broader swath of society; and through that mechanism and others, may cause the reputation and legitimacy of the Court as an institution to suffer.

One could elaborate on the arguments in favor of signed opinions, articulating them in ways that are (perhaps) more persuasive, still focusing largely on accountability, transparency, legitimacy, and perhaps independence.¹⁷⁹ One might suggest that the pride of authorship provides

174. *Id.*

175. *Cf. id.* at 33–34.

176. Sherry, *supra* note 1, at 33.

177. *Id.* at 34.

178. *Id.* at 34–35.

179. *See, e.g.,* Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO L.J. 49 (2006) (“[A]lmost every group that creates anything adopts a process for attributing responsibility”); *id.* at 55 (“Attribution is, first, a reward and an incentive for future creativity. Second, it is a form of discipline that punishes unacceptable work. Third, attribution enables consumers to assess quality and sellers to create a brand. Finally, attribution serves a humanizing function, linking the products of work to the reality of human endeavor. Each of these functions requires that the right to attribution be inalienable, at least in some contexts, so that the people who are credited or blamed for a work are in fact the ones behind its creation. Attribution matters differently in different contexts,

an incentive to do the work conscientiously.¹⁸⁰ One similarly could elaborate on downsides of anonymous decisions and opinions, some of which would point to the reduced accountability and transparency that would characterize such a system. The costs of signed opinions that Professor Sherry identifies go to how the signing of opinions may adversely influence the dynamics of the Court as well as its reputation as an entity and its legitimacy.¹⁸¹ Individuals will vary in how they weigh the pros and cons. But it strikes me as a very big step to move to uniformly unsigned opinions—a step that is very much in tension with our history and our culture, and hence a step that should not be taken lightly, even on an experimental basis.¹⁸² As noted in a comparative study of legal systems, “the U.S. system generates its legitimacy primarily by publicly argumentative means.”¹⁸³

Moreover, it is not at all clear to me that Professor Sherry’s proposal effectively would do away with signed opinions. Just as the demand for access to ostensibly nonprecedential “unpublished” opinions of the intermediate federal courts of appeals led to the publication of those opinions in “Federal Appendix” advance sheets and volumes and on mainstream databases such as Westlaw and Lexis, it is predictable that the demand for access to concurring and dissenting opinions by Justices of the Supreme Court would lead to the publication of those opinions in suitably titled West advance sheets and volumes and on mainstream databases. Especially if those opinions were signed, what would have been accomplished? Not only would the prohibition on signed opinions have been circumvented, but the prohibition on the publication of separate opinions effectively would have been defeated. Even if not signed, some votes could be inferred from the opinions. Other votes and the name of

however.”); *id.* at 56. With respect to judicial opinions, Professor Fisk opines that “a strong norm of non-attribution is problematic because there should be some transparency about how the Justices of the Supreme Court do their work. Justices are public officials exercising governmental power, and . . . in a democracy, there should be transparency about all branches of government.” *Id.* at 97 n.161. Although Professor Fisk very largely has in mind contexts other than judicial opinion-writing, a moment’s thought makes clear that the functions of attribution to reward and provide incentives for good work, to provide a necessary prerequisite to “punishment” for poor quality or otherwise unacceptable work, to permit outsiders to assess the quality of work and Justices to “create a brand,” and to link the Justices’ work product to their individual efforts all fit very well in the judicial context.

180. See MITCHEL DE S.-O.-L’E. LASSER, JUDICIAL DELIBERATIONS, A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 312–13 (2004) (observing that the signed judicial opinion “creates an environment and expectation of individual judicial responsibility for the judicial opinion and for its reasoning” and therefore has reputational consequences).

181. Sherry, *supra* note 1, at 13–19.

182. I do not mean to imply that Professor Sherry takes that step lightly.

183. LASSER, JUDICIAL DELIBERATIONS, *supra* note 179, at 338.

the author of the majority opinion might or might not be leaked. Professor Sherry hopes for restraint from the same Justices whom she does not trust to try her proposals without the intervention of Congress¹⁸⁴ and hopes that “playing to the base might . . . be less visible (and therefore less damaging) if not conducted on the Supreme Court’s website, the pages of the United States Reports, or other official or semi-official sources.”¹⁸⁵ These hopes seem unrealistic to me.

If the only way to truly ensure unsigned majority opinions is to prevent the Justices from knowing who authored the opinions, and the only way to truly eliminate publication of separate opinions is to prohibit their writing (or perhaps to make punishable their disclosure and the disclosure of their authors’ names), and the only way to prevent the disclosure of vote counts is to allow only the Chief Justice (or perhaps the author of a majority opinion, where there is one) to know the vote counts, then it is hard for me to see how Congress could enact such measures without violating the principles of separation of powers. Professor Sherry has not argued to the contrary.

c. It won’t work

Professor Sherry articulates certain of the practical objections to her proposal this way:

[I]t won’t work at all, either because vote counts will leak and Justices will just publish their dissenting and concurring opinions elsewhere, or because the sniping and signaling and pandering that currently takes place in separate opinions will be displaced into oral argument instead. The second is that, in a sense, it will work too well, reducing transparency and suppressing any dissent that exists. That would allow an unaccountable majority to impose its will unfettered by minority criticism, and perhaps lead the public to discount the Court’s opinions by assuming that every case is five to four.¹⁸⁶

Her first response is that, if the foregoing prediction is accurate, Congress can just repeal the law. Implicitly, the proposal still will have been worth trying. Beyond that, Professor Sherry says that she is fine with separate opinions being published outside the official reporters (perhaps because she recognizes the strong reasons to believe that a complete ban on them would be unconstitutional) and takes solace in such publications’

184. Sherry, *supra* note 1, at 10, 33, 37.

185. *Id.* at 37.

186. *Id.* at 36.

carrying less weight than an official dissent or concurrence would have.¹⁸⁷ I have presented some of my responses above.¹⁸⁸ In addition, if Justices would publish these separate opinions under their names or if their names were inferable,¹⁸⁹ I don't know why the influence of the separate opinions would "be more directly related to [their] persuasiveness and less [directly related] to [their] author."¹⁹⁰ Nor would it necessarily be true that editors would not provide syllabi or headnotes to facilitate readers' understanding of these opinions and enable the readers to capture the essence without having to carefully read through the opinions.¹⁹¹ Indeed, for the reasons stated above,¹⁹² it seems to me that Professor Sherry's proposal would not work because the attempted separation of dissents and concurring opinions from the Court's decision or majority opinion will be just cosmetic—the separation will merely require a few extra quick clicks on the computer to put the pieces together—even apart from any increased "leakage" of individual Justices' positions into the oral arguments.¹⁹³

Professor Sherry posits alternatively that her proposal might not work because it may "reduc[e] transparency and suppress[] any dissent That would allow an unaccountable majority to impose its will[,] unfettered by minority criticism, and perhaps lead the public to discount the Court's opinions by assuming that every case is five to four."¹⁹⁴ Professor Sherry acknowledges this risk and that "[b]road, deep rulings on highly contested issues . . . could generate a backlash against

187. *Id.* at 15, 21 n.121, 36.

188. *See supra* text accompanying note 134 and following text at note 135.

189. *See supra* text following note 184.

190. *See Sherry, supra* note 1, at 36 (stating that "A dissent that lacks the imprimatur of the United States Reports and that is somewhat remote in time and place from the single majority opinion . . . will be more directly related to its persuasiveness and less so to its author. As it stands, a polarized public need only look at the syllabus to decide whether to support or reject a decision . . .").

191. *Id.* at 36 (observing that, "If the elites who read opinions and translate them for the public (including legal academics and journalists) actually have to read the opinions to find out what they say – and then search out dissenting voices – that is already an improvement.").

192. *See supra* text following note 184.

193. Professor Sherry discounts the dangers of such leakage in light of hope for restraint by the Justices, by noting that the Justices are likely to temper their disagreements in face-to-face interactions, and by observing that comments made in oral arguments are unlikely to get the attention from media and the public that written dissents and concurrences get. *Sherry, supra* note 1, at 36–37. While those consequences are possible, it seems to me that the more successful Professor Sherry's proposed constraints on written dissents and concurrences would be, the greater would be the incentives and temptations for the Justices to make their points during oral arguments and the less reason there would be to hope for restraint from the Justices. The less successful the proposed constraints, the less need the Justices would have to use oral argument as a platform for their viewpoints—to the detriment of time for and attention to what the lawyers have to say.

194. *Sherry, supra* note 1, at 36.

the Court and make those rulings harder to enforce,”¹⁹⁵ particularly if “there is a persistent minority[,] and winners and losers turn out to track political divides”¹⁹⁶ or people believe that to be happening. She does not believe that this is a significant cost of her proposal because the Court rarely is unanimous in controversial cases (in which the public is particularly interested) anyway. Here too I cannot agree that her proposal would not impose significant costs. There is evidence that when the Court enters a unanimous or nearly unanimous decision in a high profile, controversial case, the high level of Justices’ support for the decision will not change the minds of persons in society who strongly disagree, but the existence of dissent may tend to undercut the strength of popular opposition to the decision and support the legitimacy of the Court because this evidence of debate on the court may lead those who disagree with the decision to infer a “fair, democratic decision-making process in which both sides were heard.”¹⁹⁷ The combination of near-unanimity which

195. *Id.* at 37.

196. *Id.*

197. Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RES. Q. 320, 322 (2014) (finding no evidence that majority size affects individuals’ level of agreement with Court decisions with respect to decisions that are highly salient, and no evidence that persons who already agree with the outcome of a decision are moved by the number of Justices who dissent; but finding that, on issues that are somewhat less salient to particular individuals, those individuals may be more accepting of a decision when separate opinions show that the Court has members who are receptive to the individuals’ position, i.e., *in those circumstances*, “large majorities are likely to persuade ex ante opponents to accept adverse opinions.”). *See id.* at 331–332. Salamone concludes that “the implications of these findings are that a Court strategically trying to build . . . public confidence is not best off acting unanimously as much as possible; rather[,] it is better off acting unanimously selectively. *Id.* at 332. *See generally* Henrik Litleré Bentsen, *Dissent, Legitimacy, and Public Support for Court Decisions: Evidence from a Survey-based Experiment*, 53 LAW & SOC’Y REV. 588, 589 (2019) (“Despite the presumed harmful effect of judicial dissent on public support, only a handful of empirical studies from the United States exist on this relationship. The results of these studies are also inconsistent. Whereas some studies show no effect of unanimity or dissent on public opinion (Gibson et al. 2005, Marshall 1987, Peterson 1981), other studies suggest that unanimity does in fact bolster support (Zink et al. 2009). In a recent study, . . . Salamone (2014) . . . argues that dissents may help increase support of issues of higher salience among the court’s policy opponents by suggesting evidence of procedural justice. Hence, the dynamics of how dissent might influence public support appear contingent upon individuals’ preexisting attitudes toward the issues at stake.”); Scott S. Boddery, Laura P. Moyer & Jeff Yates, *Naming Names: The Impact of Supreme Court Opinion Attribution on Citizen Assessment of Policy Outcomes*, 53 LAW & SOC’Y REV. 353, 354, 366, 377 (2019) (finding support for its hypothesis that when legal decisions are attributed to the United States Supreme Court—as opposed to a specific justice—more people are likely to agree with it; but also confirming that this relationship is conditioned on citizens’ ideological identity, that is, the study confirmed the hypothesis more for self-identified conservatives than for self-identified liberals). It also should be noted that the study focused on decisions concerning criminal procedure and its results may not reach beyond that sphere. *See also* Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769 (2015) (concluding in part that, “With respect to the normative issues, the standard arguments in favor

“sends a strong signal of the correctness of the decision”¹⁹⁸ and the presence of dissents that sends a message that at least the process leading to the decision was fair and democratic could *not* be sent under Professor Sherry’s proposal.¹⁹⁹

III. A NOD TO PROFESSOR ORENTLICHER

In April, 2020, I became aware of an essay by Professor David Orentlicher, entitled “Judicial Consensus,” that he posted on SSRN earlier this month.²⁰⁰ Professor Orentlicher questions why the Supreme Court, and other appellate courts, decide cases by majority vote, noting that that system exacerbates polarized politics.²⁰¹ He argues that it is “important for the Supreme Court, as well as other appellate courts, to decide cases unanimously. In particular, to satisfy the due process requirement of a neutral court, justices and judges should decide their cases by a consensus of the full bench so that decisions reflect both sides of the ideological spectrum.”²⁰² He later adds that unanimity is required to satisfy principles of due process “[b]ecause it is unfair for litigants to have their cases decided by an ideologically skewed court.”²⁰³ Further, “[i]t is important to have justices with a range of backgrounds and ideological perspectives who reach a consensus decision after careful deliberation”²⁰⁴ [as] “the collective wisdom of the full group is superior to that of a single justice or a mere majority of justices.”²⁰⁵ Moreover, “[d]ecisions that are representative of the full court have another important virtue. They have greater legitimacy.”²⁰⁶

of a higher level of consensus within the Court—pointing to the values of legitimacy, stability, and minimalism—rest on fragile empirical foundations.); *see also* PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 77, 92–93 (2010) (finding that a precedent accompanied by an expansive concurrence, that is one that “attempts to expand the holding or to supplement the reasoning of the majority opinion” increases the likelihood that the Supreme Court will positively treat the precedent . . . and influence lower court compliance).

198. Sherry, *supra* note 1, at 37.

199. A 1979 study failed to support the hypothesis that “the greater the original support for a decision at the Supreme Court level, the greater the subsequent compliance with that decision by the lower courts.” C. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792 (1979). Compliance by the lower courts is a different matter, however, than how the public reacts to United States Supreme Court decisions.

200. David Orentlicher, *Judicial Consensus* (UNLV William S. Boyd School of Law Research Paper 2020), <https://ssrn.com/abstract=3569058>.

201. *Id.* at 1.

202. *Id.* at 2.

203. *Id.* at 9.

204. *Id.* at 4.

205. *Id.* at 5.

206. *Id.* at 8.

Many of these arguments are appealing, although the Supreme Court never has held that it violates due process for litigants to have their cases decided by an ideologically skewed court. If that were the law, it might well invalidate a great many decisions, depending upon the circumstances in which courts would find that the deciding court was “ideologically skewed”! Professor Orentlicher’s argument for legitimacy when decisions are unanimous is much stronger than an argument for legitimacy when Justices disagree with a holding but their views are forcibly withheld from the public (or shunted off to a separate publication) and when nothing requires their views to be taken into account by a majority. The latter would be the situation under Professor Penrose’s and Professor Sherry’s proposals.

As I read this portion of Professor Orentlicher’s essay, I wondered how in the world unanimity would be attained. Professor Orentlicher replied to what he must have known many people would wonder. Despite the fact that he recognizes that “justices [now] dissent in about 60 percent of rulings”²⁰⁷—and that doesn’t even count concurrences, in which the reasoning differs from that undergirding the primary opinion—Professor Orentlicher opines:

[W]e need not worry about a requirement of unanimity. First, justices are carefully screened before nomination for their training, experience, and perspectives, and the vetting process excludes candidates with views that are too extreme and not adequately based on an understanding of the U.S. legal system. In addition, principles of game theory provide reassurance that each justice would choose cooperation over conflict. . . . [W]hen people must work with a group of peers on a frequent basis to decide matters, they realize that they are better off developing collegial rather than oppositional relationships.²⁰⁸

He adds that:

Cooperation is also more likely in relationships with an indefinite time horizon, as with justices who have lifetime appointments Finally, cooperation is more common among individuals who come to their relationship with equal status and authority. That is true about Supreme Court justices, except perhaps with chief justices.²⁰⁹

I don’t know a lot about game theory. But my experience is not consistent with Professor Orentlicher’s reassurances. For example, at least in recent years, I do not think it has been true that “justices [have been]

207. *Id.* at 13.

208. *Id.* at 8.

209. *Id.* at 25–26.

carefully screened before nomination for their training, experience, and perspectives, and [that] the vetting process [has] exclude[d] candidates with views that are too extreme and not adequately based on an understanding of the U.S. legal system.”²¹⁰ We have seen candidates carefully vetted only by highly politicized groups that hold views that many informed Americans would consider extreme and that have pushed candidates with extreme views. We have seen Presidents nominate such individuals and we have seen the minority party unable to block the appointments of such individuals. On lower courts we have seen the appointment of candidates who have been rated “unqualified” by the American Bar Association. Moreover, while my lack of knowledge of game theory prevents me from appraising how accurately it predicts that judicial candidates will strive to develop collegial, rather than oppositional, relationships as a general matter, the numbers of concurring and dissenting opinions over the last 80 years suggest that the theory has not been borne out in Supreme Court consensus. Moreover, the nasty and disrespectful judicial opinions of certain judges and Justices, including Justice Scalia, strongly suggest that game theory is inadequate to predict or guarantee how judges or Justices will behave in this regard. Nonetheless, I acknowledge that neither the vetting process nor the judicial decision-making process have occurred in a context in which Supreme Court judicial decisions and opinions have had to be reached unanimously or not at all. We therefore cannot know what the consequences for judicial appointments or for judicial decision making would be in a world in which unanimity would be required for a judicial decision to be reached or a judicial opinion to be announced.

Professor Orentlicher also contends that the potential for gridlock will be small, partly because of the degree of congruence of viewpoints among the Justices, in part because of the Justices’ obligation to decide critical legal questions, and in part because the self-interest of the Justices would push them to find ways to resolve their differences so they could resolve cases.²¹¹ “[D]ecision-makers adjust their behavior to their decision-making rules.”²¹² I suspect that I do not see as much congruence of viewpoints among the Justices as Professor Orentlicher does.²¹³ And it would remain to be seen whether and when the Justices’ obligation to

210. *Id.* at 8.

211. *See id.* at 21.

212. *Id.* at 22.

213. He concludes that, “Functionally under a requirement of unanimity, a Court of nine will generally have only two true veto players, though the identities of those players will vary somewhat from case to case.” *Id.* at 21.

decide critical legal questions and the Justices' self-interest in fact would lead them to find ways to resolve their differences so they could resolve cases. If those compromises occurred infrequently enough, the Justices might throw up their hands and choose (or lobby for) a different system, whether that different system would be a reversion to our current system or something else. I suspect that the very ability to change the system (or to seek to change the system) would likely lead to a less successful transition than if the Justices understood that they were stuck with the need to reach unanimous decisions or make no decision at all. Before getting to that point, however, Justices would have to decide in which cases they could live with compromise and in which they would rather not decide (and leave the lower court's decision standing) than compromise. That decision presumably would be affected by how intolerable a circuit split would be, when such a split was an important factor in the grant of certiorari, and whether it was more critical to provide an answer to the question posed by a case than to provide the or a "right" answer. I am sure that other factors also would prove to be influential in whether the Court would reach a compromise that culminated in a unanimous decision.

Finally, Professor Orentlicher asks: "If the justices had to find middle ground, would the Supreme Court change from a leader of social change into a follower of social change that is championed by the president or Congress?"²¹⁴ After volunteering reasons why it might be a good thing for the Supreme Court to become such a follower, Professor Orentlicher opines that "even if major change is important, the Supreme Court's history demonstrates that Justices and judges from different sides of the ideological spectrum can come together to issue path breaking decisions. In fact, many of the Court's landmark decisions enjoyed broad support among the Justices."²¹⁵ "In short, requiring consensus probably would not have a significant effect on the likelihood that the Court would champion social reform. However, it would provide a fairer process for litigants, promote a more deliberative and sounder decision-making process, and greatly reduce the political maneuvering that has made for a drawn-out and highly partisan judicial[-] selection process."²¹⁶ I subscribe to the goals stated in that last sentence, but whether a demand for unanimous decisions would bring them about remains an open question, as do the questions whether the change to a Court that had to decide unanimously if at all would change the Supreme Court from a leader of social change

214. *Id.* at 27.

215. *Id.*

216. *Id.* at 31.

to a follower of such change, and whether that role change, if it occurred, would be for good or evil, or sometimes one and sometimes the other.

IV. CONCLUSION

Publicity of Professors Penrose's and Sherry's arguments will be a good thing. It should spark debate and conceivably might prompt the Justices to change behaviors that are not serving the Court or the country well. But Professor Penrose's ultimate recommendation that the ABA restore Judicial Canon 19—urging “self-restraint to promote solidarity of conclusion”—would be merely hortatory; it would lie in the Justices' discretion how much that Canon should alter their behavior. More importantly, for the many reasons cited in this Article, *adoption* of Professor Sherry's proposals and Professor Penrose's similar ideas would be not beneficial to the Court or the country. Despite the unruliness of our current system, signed Supreme Court concurrences and dissents, published contemporaneously with signed opinions of a majority or plurality of Supreme Court Justices, give us the most thoughtful and transparent exchange of views that our Court is capable of delivering. They do more to support the legitimacy of the Court than purportedly univocal utterances and silenced disagreements (even if feasible) could do in our present world or in any world for which we should hope. Professor Orentlicher's proposal to require unanimous decisions is an interesting one and would moot a number of the problems with Professor Penrose's and Professor Sherry's proposals—particularly if there were not only unanimous decisions but opinions of the Court in which all of the Justices joined. Then there would—or could—be no concurrences, no dissents, and no uncertainty about the number of Justices joining. But the degree to which unanimous decisions would be attainable, and at what costs, remain very open questions.