

# A Court with No Names: Anonymity and Celebrity on the “Kardashian Court”

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Suzanna Sherry is not the first to identify individual “celebrity” Justices as a problem for the Supreme Court.

Chad Oldfather argues that “the Notorious RBG” (the moniker for Justice Ginsburg within the cult of personality surrounding her final decade on the Court)<sup>1</sup> dominates over the “Inconspicuous DHS” (Oldfather’s reference to the unassuming Justice Souter, who served and retired from the Court without fanfare and who was not moved by the social and political environment).<sup>2</sup> Craig Lerner and Nelson Lund argue that “the Court has become almost totally bereft of the kind of collective identity that Chief Justice

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1. Chad M. Oldfather, *The Inconspicuous DHS: The Supreme Court, Celebrity Culture, and Justice David H. Souter*, 90 MISS. L.J. 183, 213–14 (2020); see IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015).

2. NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 96 (2019); Oldfather, *supra* note 1, at 224–25.

Marshall worked so hard to create,” becoming an aggregation of individuals with a personal jurisprudence and practical commitment to judicial individualism.<sup>3</sup> Allison Orr Larsen argues that Justices seek to elevate “individual jurisprudence (and perhaps individual legacy?)” while denigrating consistency or at least coherence in the Court’s doctrine.<sup>4</sup> Former Seventh Circuit Judge Richard Posner attributes judicial celebrity to a reduced caseload, which creates greater opportunity and fewer opportunity costs to engage in “public intellectual” activities of writing books, giving speeches, and speaking to the media.<sup>5</sup>

Nor is Sherry the first to link celebrity to the Court’s longstanding way of deciding cases—issuing one judgment announcing the result, supported by an opinion for the Court explaining the result, usually signed by one author, sometimes with separate signed concurring and dissenting opinions. The connection is obvious. Each judge creates signed opinions and seeks to adhere to that jurisprudence, at the expense of the Court’s jurisprudence, in future opinions.<sup>6</sup> Celebrity flows from the expression and defense of that individual jurisprudence and the accolades it brings to its author.

Nor is Sherry the first to prescribe anonymity as the remedy. Lerner and Lund propose that all opinions—majority, plurality, concurrence, dissent—should be filed without names of authors or joiners attached.<sup>7</sup> Readers know the type of each opinion and the number of people joining each, but not the identities of any Justice on any opinion.

Sherry is the first to attach a modern celebrity name to the problem—the Kardashians.<sup>8</sup> They represent the quintessential publicity-seeking media personalities—people more famous for being famous through books, television and movies, and public appearances than for productivity in their jobs. That Justices should seek and find celebrity is unsurprising—judges are human and the search for recognition and adulation is inherent in human nature. But judicial celebrity represents a unique product of our time, when the internet, ideologically stratified media, the American Constitution Society, and the Federalist Society accord Justices the opportunity to become celebrities with separate fan bases.<sup>9</sup>

And she goes one step further in resolving the problem to establish a Court (and a judicial work product) with no names. The Court issues one majority opinion identified as the *per curiam* opinion of the Court, with no names attached. It does not indicate how many or which Justices joined the

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3. Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court’s Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1270 (2010).

4. Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 469 (2008).

5. Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 301–02 (2013).

6. Larsen, *supra* note 4, at 469; Lerner & Lund, *supra* note 3, at 1270–72, 1278.

7. Lerner & Lund, *supra* note 3, at 1281.

8. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 181 (2020).

9. *Id.* at 222; *see also* Oldfather, *supra* note 1, at 224–25; Posner, *supra* note 5, at 301–02.

opinion or the judgment, only that it reflects the views of a majority of the Court. Justices do not write separate opinions, whether concurring or dissenting. Where the majority supporting a result cannot agree on a rationale, the Court summarily reverses or affirms the lower court judgment, with no indication of the votes, no opinion, and no precedent.<sup>10</sup>

This is a fascinating and original proposal, regardless of whether Congress would, could, or should pursue it. Taking the proposal at face value, this Essay explores additional benefits of the plan, unexpected drawbacks, and whether Sherry might extend it further.

## I. THE PROPOSAL

Sherry's proposal consists of three pieces: anonymity—no names attach to any opinions; unity—the Court produces one opinion; and non-enumeration—no disclosure of how many Justices joined the Court's single opinion.<sup>11</sup>

The Justices detach all names from all opinions. No Justice writes or joins any signed opinion—majority, plurality, concurring, dissenting. The Justices vote on a result in each case—whether to affirm or reverse the lower-court judgment. One Justice writes one opinion for the Court. If the opinion gains a majority, it is published as a *per curiam*, with no indication of who wrote or joined it. No Justice, in or outside the majority, writes separately. If a majority does not agree on the reasoning behind the judgment, the Court decides the case without an opinion; it summarily affirms or reverses the judgment below in a one-line order, without explanation and without producing precedent.<sup>12</sup> Although Sherry does not address the point, presumably current opinion-assignment practices continue under the plan, with the Chief Justice assigning the opinion when in the majority for the judgment and the senior associate Justice in the majority assigning the opinion when the Chief is not in the majority.<sup>13</sup> Of course, because no one outside the Court knows how anyone voted, no one outside the Court knows who assigned which opinions.

Sherry identifies a number of ways in which her proposal addresses the problem of judicial celebrity and the dysfunctionality it creates on the Court.

The Court enhances its authority and legitimacy by speaking with one voice, furthering the perception of the Court as an institution rather than a collection of individuals. This Court produces singular decisions that the public and lower courts are more likely to accept as correct and as apolitical; the opinions are protected from partisan assumptions based on the identity (and appointing party) of the author of the Court's opinion, the identity of the Justices joining that opinion, or the identity of the Justices writing separately.<sup>14</sup>

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10. Sherry, *supra* note 8, at 197.

11. *Id.*

12. *Id.*

13. Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1731 (2006).

14. Sherry, *supra* note 8, at 198–99.

Removing the opportunity for Justices to write for themselves shifts the focus from their individual jurisprudence and judicial legacy to the coherence of the Court's doctrine. Justices no longer "perpetually dissent" by refusing to accept precedent with which they disagree (because they cannot dissent at all), nor will Justices hesitate to associate with majority opinions inconsistent with their previously expressed preferences.<sup>15</sup> And Justices may be less concerned with enhancing individual reputations by playing to their bases and more interested in preserving the reputation of a unified rather than atomistic Court.<sup>16</sup>

This new system should produce more majority opinions. With no opportunity to write separately, a would-be concurring Justice has less individual incentive to go it alone and greater institutional incentive to join the Court's opinion, even where she disagrees with dicta or pieces of its reasoning. At the same time, the author of the Court's opinion may do more to keep fellow Justices happy and on board, lest the writing Justice lose a majority. The system makes Justices more willing to compromise and collaborate, encouraging them to create beneficial precedents—"maximalist" enough to provide genuine guidance to parties and lower courts without being too broad or too deep.<sup>17</sup> The consequence of failing to keep a majority opinion incentivizes compromise and cooperation; too many one-line summary orders embarrass the Court by highlighting the Justices' inability to agree, to create new law, and to provide guidance to litigants and lower courts.<sup>18</sup>

Even if the Justices cannot be shamed into greater compromise, no opinion is preferable to the current system, which requires lower courts to identify the "narrowest" opinion as controlling, a difficult and confusing task.<sup>19</sup> If the absence of a majority means no opinion and no precedent, lower courts proceed as always in the absence of a Supreme Court ruling, relying on their precedent.<sup>20</sup> The unexplained resolution offers limited guidance. Summary affirmance gives some precedential force to the lower court's result but not its reasoning,<sup>21</sup> while summary reversals eliminate the precedential force of the lower court's ruling.

Finally, Sherry insists that all pieces—anonymity, unity, non-enumeration—are necessary for the proposal to work. Allowing separate opinions, even unsigned (as Lerner and Lund propose), undermines anonymity; individual Justices can play to their bases, achieve celebrity, and

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15. *Id.* at 199.

16. *Id.*

17. *Id.* at 200–01, 203, 226.

18. *Id.* at 201.

19. *Id.* at 200–01 & n.95; see *Marks v. United States*, 430 U.S. 188, 193 (1977); See generally Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943 (2019) (analyzing the *Marks* rule and its shortcomings).

20. Sherry, *supra* note 8, at 201.

21. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 424–26 (2019).

further their individual jurisprudence. Disclosing vote counts dilutes the opinion's institutional force and allows for games of "guess who" among the media and law professors.<sup>22</sup> Identifying the author of a single majority opinion allows individual Justices to play to their base in claiming (or disclaiming) authorship of the Court's statement.

## II. DUELING JURISPRUDENCE

Sherry links signed decisions to the problem identified by Larsen and by Lerner and Lund—Justices create, adhere to, and seek to further personal or individualized precedents and jurisprudence at the expense of coherent institutional precedent and jurisprudence.<sup>23</sup> Authored and separate writings also arm Justices to accuse one another of inconsistency within their personalized jurisprudence<sup>24</sup> or to engage on whose personal jurisprudence produces superior results. Consider a fresh example of the latter.

In *Ramos v. Louisiana*, the Court held that the Sixth Amendment requires unanimous juries in state prosecutions.<sup>25</sup> Justice Kavanaugh agreed with the judgment, joined the majority in part, and wrote a solo opinion concurring in part.<sup>26</sup> Justice Kagan joined Justice Alito's dissenting opinion,<sup>27</sup> although she did not write separately. The following year, the Court held in *Edwards v. Vannoy* that *Ramos* does not apply retroactively on federal habeas corpus review, holding that no "watershed" new rules of criminal procedure could apply retroactively on federal habeas challenges to convictions that became final before the constitutional rule was announced.<sup>28</sup> Kavanaugh wrote the majority opinion,<sup>29</sup> while Kagan wrote the dissent for herself and Justices Breyer and Sotomayor.<sup>30</sup>

Kagan's dissent criticized the majority for "[t]aking with one hand what it gave with the other."<sup>31</sup> *Ramos* gave defendants the benefit of requiring unanimous juries, then *Edwards* stripped those benefits from a class of prisoners whose convictions had, by happenstance, become final prior to the day the Court decided *Ramos*. The *Edwards* Court left a swath of defendants

22. Sherry, *supra* note 8, at 204–05.

23. Larsen, *supra* note 4, at 469; Lerner & Lund, *supra* note 3, at 1278; Sherry, *supra* note 8, at 199.

24. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 820–21 (1982); see, e.g., Jones v. Mississippi, 141 S. Ct. 1307, 1336 (2021) (Sotomayor, J., dissenting); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 564 (1985) (Powell, J., dissenting).

25. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397, 1408 (2020).

26. *Id.* at 1393; *id.* at 1410 (Kavanaugh, J., concurring in part).

27. *Id.* at 1425 (Alito, J., dissenting). Kagan did not join one portion of the dissent, in which the Court compared recent cases overruling precedent. *Id.* at 1439–40 (Alito, J., dissenting).

28. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1551–52, 1560 (2021).

29. *Id.* at 1551.

30. *Id.* at 1573 (Kagan, J., dissenting).

31. *Id.* at 1581 (Kagan, J., dissenting).

without recourse in federal court despite having been convicted under a rule—non-unanimous jury—found not to produce fair and reliable verdicts.<sup>32</sup>

Kavanaugh took exception to Kagan “impugn[ing]” the majority for short-changing defendants.<sup>33</sup> Kagan, after all, had dissented in *Ramos* while (although he did not say so) he had joined the judgment and most of the majority opinion. He argued that criminal defendants are better off under his approach across the cases than under Kagan’s. Under *Ramos* and *Edwards*, both of which he joined, future criminal defendants and those whose convictions remain on direct appeal gain the protections of unanimous juries, even if some contingent of defendants (those whose convictions had become final) do not enjoy those protections. Under Kagan’s approach in *Ramos*, by contrast, “no defendant would ever be entitled to the jury-unanimity right—not on collateral review, not on direct review, and not in the future.”<sup>34</sup> The criticism was individual, focused on the effects and defects of Kagan’s personal jurisprudence as reflected in the opinions she had written or joined, compared with the effects and benefits of Kavanaugh’s personal jurisprudence as reflected in the opinions he had written or joined.

Kagan responded from an institutional perspective. She had dissented in *Ramos*. But once *Ramos* became the law, she must “take the decision on its own terms, and give it all the consequence it deserves.”<sup>35</sup> One such consequence should have been retroactive application on habeas. Kagan did not engage in perpetual dissent by carrying her disagreement with a prior decision into future cases. However she voted in *Ramos*, that decision became the law and she, as a member of the Court, must accord it *stare decisis* effect. She also rejected Kavanaugh’s “scorekeeping” in considering which Justice’s personalized approach leaves a group of rights-holders better or worse off.<sup>36</sup>

Sherry’s proposal preempts this dispute. Each case stands alone and no individual Justice “gets to bank capital for future cases.”<sup>37</sup> Kagan cannot write a dissent in *Edwards*, so Kavanaugh, with his name removed from the majority opinion, has nothing to which to respond. But there also is nothing to discuss. No one knows that Kavanaugh had joined the majority in *Ramos* or that Kagan had not. No individual Justice banks capital because no individual Justice takes a public position in any case. No Justice can accuse another of inconsistency or of blunting the effects of precedent. And individual Justices cannot keep score of the effects of “their” decisions compared with the effects of other’s decisions. No Justice makes any decision—the Court does.

The sniping between the Justices illustrates a separate connection between celebrity and separate opinions. Sherry writes:

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32. *Id.* at 1581–82 (Kagan, J., dissenting).

33. *Id.* at 1562.

34. *Id.*

35. *Id.* at 1573 n.1 (Kagan, J., dissenting).

36. *Id.* at 1581 n.8. (Kagan, J., dissenting).

37. *Id.* (Kagan, J., dissenting).

[T]he more emotional or distinctive language (read: polemic) in a dissent, the more likely it is to be cited in later majority opinions. Thus, the same dynamic that allows dissents to influence the course of the law also produces exactly the types of dissents that are most likely to be seized on by the press and the public as evidence of a political, and polarized, Court.<sup>38</sup>

So it was in *Edwards*. Partisan media highlighted the Kavanaugh-Kagan back-and-forth in reporting on the case,<sup>39</sup> noteworthy in the wake of other media accounts describing Kagan's efforts to woo Kavanaugh as a possible swing vote.<sup>40</sup> Sherry's proposal eliminates the opportunity for this behavior, the media attention it attracts, and the individual celebrity and notoriety it accords the Justices.

### III. LOST MYTHS

Sherry acknowledges that her proposal deprives us of famous and canonical dissents and concurrences, some of which became law.<sup>41</sup> But she argues that this may be a loss more rhetorical than practical—actual examples in which dissents become law are relatively rare and take years.<sup>42</sup> The ultimate change in law may have been prompted less by the dissent than by public rejection of the principles underlying the Court's opinion.<sup>43</sup> The dissent prophesies what the law might become and provides "quotable support" for the new decision, but precedent would change without the dissent.<sup>44</sup>

Sherry's proposal therefore eliminates one breed of mythical celebrity justice—"the Heroic Justice as Great Dissenter" who produces the influential-dissent-redeemed-as-majority.<sup>45</sup> No one exemplifies this judicial archetype better than Justice Holmes, who became the original celebrity Justice on the strength of his dissents.<sup>46</sup> That celebrity increased and expanded when he publicly changed his mind about the meaning of the freedom of speech in

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38. Sherry, *supra* note 8, at 220 (footnote omitted).

39. Mark Joseph Stern, *Elena Kagan Has Had Enough of Brett Kavanaugh's Judicial "Scorekeeping"*, SLATE (May 17, 2021, 5:15 PM), <https://slate.com/news-and-politics/2021/05/edwards-vannoy-kagan-kavanaugh-scorekeeping.html> [<https://perma.cc/9FQS-M8PS>].

40. McKay Coppins, *Is Brett Kavanaugh Out for Revenge?*, ATLANTIC (May 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/06/brett-kavanaugh-supreme-court/618717> [<https://perma.cc/L9JT-3CVH>].

41. Sherry, *supra* note 8, at 218–19.

42. *Id.* at 219.

43. *Id.*; Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 247–48 (1998).

44. Sherry, *supra* note 8, at 219; Primus, *supra* note 43, at 288.

45. Primus, *supra* note 43, at 259, 269.

46. *Id.* at 250–51; BRAD SNYDER, *THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM* 274 (2017); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* 257 (2013); Brad Snyder, *The House that Built Holmes*, 30 L. & HIST. REV. 661, 677 (2012).

1919, authored his most-canonical dissent,<sup>47</sup> and created what would become the modern speech-protective First Amendment, albeit a half-century later<sup>48</sup> and after more than a hint of revisionism.<sup>49</sup>

The pieces of this story are well known. While traveling by train to Massachusetts in June 2018, Holmes had a chance encounter with Judge Learned Hand (then on the Southern District of New York), prompting a conversation and summer-long correspondence about the freedom of speech and the value of protecting unpopular ideas.<sup>50</sup> In spring 1919, Holmes authored three opinions for a unanimous Court affirming convictions for pure political speech opposing World War I, the draft, U.S. munitions manufacturing, and U.S. foreign military interventions.<sup>51</sup> He established the concept of “clear and present danger” as the legal line<sup>52</sup> and “falsely shouting fire in a theatre” as the metaphorical line<sup>53</sup> for protected speech, the latter morphing into an abused, misunderstood, and unfortunate analogy.<sup>54</sup> That November, however, Holmes dissented in a fourth prosecution of anti-war pamphleteers, establishing the idea that the best test of an idea is its ability to get itself accepted in the competition of the market and “that we should be eternally vigilant against attempts to check the expression of opinions that we loathe.”<sup>55</sup>

The story of Holmes and his First Amendment conversion connects to Sherry’s larger point about judicial celebrity within the Court. Holmes had established a degree of celebrity by 1919. His celebrity contributed to the rhetorical influence of his *Abrams* dissent, which in turn expanded his celebrity.

Thomas Healy and Brad Snyder have written about Holmes and the “House of Truth,” a Washington, D.C. rowhouse that became a salon for a collection of progressive scholars, lawyers, policymakers, artists, and journalists of the 1910s. His compatriots included Felix Frankfurter, then a professor at Harvard Law School working in the Wilson Administration; Harold Laski, a British-Jewish immigrant and lecturer at Harvard; Walter

47. *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

48. THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 243–45 (2013).

49. Primus, *supra* note 43, at 288.

50. HEALY, *supra* note 48, at 16–27; *see also* GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 161–64 (1994); Thomas E. Baker, *Clear and Present Dangers: The Importance of Ideas and the Bowels in the Cosmos*, 16 CONST. COMMENT. 485, 485–86 (1999).

51. *Debs v. United States*, 249 U.S. 211, 212 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205 (1919); *Schenck v. United States*, 249 U.S. 47, 48–50 (1919).

52. *Schenck*, 249 U.S. at 52.

53. *Id.*; *see* Carlton F.W. Larson, “Shouting ‘Fire’ in a Theater”: *The Life and Times of Constitutional Law’s Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 212 (2015).

54. Snyder, *supra* note 46, at 682–83; Trevor Timm, *It’s Time to Stop Using the Fire in a Crowded Theater’ Quote*, ATLANTIC (Nov. 2, 2012), <https://www.theatlantic.com/national/archive/2012/11/its-time-to-stop-using-the-fire-in-a-crowded-theater-quote/264449> [https://perma.cc/NN7H-WHUL].

55. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).



Lippmann, journalist and founding editor at the New Republic; Harvard legal scholar Zachariah Chafee; and free-speech advocate Ernst Freund. Within the salon, they discussed and debated visions of progressive law and politics; they sought to gather information, influence public policy, and experiment with new ideas.<sup>56</sup> Holmes was the celebrity in their midst—substantially older, honored for his dissents in *Lochner* and other Progressive-Era cases that furthered the political causes many of the members pursued.<sup>57</sup>

This intellectual network influenced Holmes' change of mind on the First Amendment. Between summer 1918 and fall 1919, Chafee, Laski, and others pushed Holmes on the need for society to tolerate unpopular ideas.<sup>58</sup> Their criticisms of his trio of early 1919 decisions stung.<sup>59</sup> And Holmes witnessed the real-world effects of intolerance for and public attacks on unpopular speakers and ideas when Harvard alumni sought to have Laski, Chafee, and Frankfurter fired for their speech and political activities.<sup>60</sup>

*Abrams* made Holmes more of a hero within the House of Truth and brought him broader public recognition outside of it.<sup>61</sup> That cycle continued, leading to dissents in later First Amendment cases that drew more praise from his acolytes in the academy and journalism.<sup>62</sup> Snyder argues that the praise before and after *Abrams* convinced the Justice, nearing 80 and contemplating retirement in 1919, to remain on the Court for another decade, during which he burnished that celebrity. And “[t]he House of Truth shared his goal. There was important work ahead, and his young friends were counting on their beloved justice.”<sup>63</sup>

Sherry's proposal eliminates the setting that allows a judicial legend such as Holmes to emerge. But Holmes also proves her point about the incentives of judicial celebrity. As much as we laud *Abrams* and where it led, Holmes “played to his base” within the House of Truth and was happy that his base praised and spread the word about his work. He acted as a lone judge (or one joined by friend and collaborator Justice Brandeis),<sup>64</sup> rather than as part of an institution. Healy opens his book on Holmes' jurisprudential conversion with the story of three members of the Court visiting Holmes in his

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56. See HEALY, *supra* note 48, at 10–11; SNYDER, *supra* note 46, at 2–3; Thomas Healy, *The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind Abrams v. United States*, 39 J. SUP. CT. HIST. 35, 38 (2014); Snyder, *supra* note 46, at 670–71.

57. HEALY, *supra* note 48, at 10–11, 137; SNYDER, *supra* note 46, at 70; Snyder, *supra* note 46, at 677.

58. HEALY, *supra* note 48, at 98–100; SNYDER, *supra* note 46, at 279–80.

59. HEALY, *supra* note 48, at 108–14, 134–35; SNYDER, *supra* note 46, at 278–80.

60. HEALY, *supra* note 48, at 194–96; SNYDER, *supra* note 46, at 274, 280–85, 288–91.

61. SNYDER, *supra* note 46, at 304, 318.

62. *Id.* at 318–21.

63. *Id.* at 321.

64. See, e.g., *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting).

Washington home and urging him not to dissent in *Abrams* but to “close ranks and set aside his personal views.”<sup>65</sup>

*Abrams* also illustrates Sherry’s point about the attenuation between a critical dissent and acceptance as the majority, such that the law does not suffer without great dissents.

Holmes continued to dissent in First Amendment cases for his remaining decade on the Court, but never saw his vision become law.<sup>66</sup> *Abrams* has never been formally overruled. Forty-five years passed before the Court in *New York Times v. Sullivan*<sup>67</sup> adopted something like Holmes’ vision (albeit without naming Holmes) that public debate “should be uninhibited, robust, and wide-open.”<sup>68</sup> Marking the beginning of the modern First Amendment, *New York Times* halted a concerted effort by Southern governments to use crushing defamation judgments as a functional seditious-libel law to stop criticism of Jim Crow.<sup>69</sup> Another five years passed until *Brandenburg v. Ohio*,<sup>70</sup> when the Court recast “clear and present danger” to require intentionality, likelihood, and temporal imminence.<sup>71</sup>

Holmes did not directly drive the shift to greater speech protection. He did not write for the Court when it accepted free-speech claims towards the end of his tenure. His *Abrams* dissent was more in the ether than the source of the Court’s analysis in later cases. *New York Times* mentioned Holmes only as one of several Justices and scholars to argue that the court of history had determined that the Sedition Act of 1798 was invalid.<sup>72</sup> In celebrating the decision as “an occasion for dancing in the streets,” Harry Kalven cheered the death of Holmes’ great metaphor, happy that First Amendment analysis no longer focused on “the sterile example of a man falsely yelling fire in a crowded theater.”<sup>73</sup> The *Brandenburg* majority did not mention Holmes. Justice Douglas discussed Holmes in his concurring opinion; he traced Holmes’ evolution on the First Amendment, then rejected the idea of “clear and present danger,” something Holmes never did.<sup>74</sup> And Brandeis’ concurring opinion in *Whitney*—labeled “arguably the most important essay

65. HEALY, *supra* note 48, at 5.

66. HEALY, *supra* note 48, at 244–45.

67. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

68. *Id.* at 270.

69. See ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 35–36 (1991); Harry Kalven, Jr., *The New York Times Case: A Note on “the Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 192, 200; Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 79; Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 816 (2016); Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 NW. U.L. REV. 901, 909 (2013).

70. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

71. *Id.* at 447–48.

72. *New York Times Co.*, 376 U.S. at 276.

73. Kalven, Jr., *supra* note 69, at 221 n.125.

74. *Brandenburg*, 395 U.S. at 452, 454 (Douglas, J., concurring).

ever written, on or off the bench, on the meaning of the first amendment”<sup>75</sup>—carries greater weight in modern free speech jurisprudence than does Holmes’ *Abrams* dissent.<sup>76</sup>

Sherry’s proposal presumes that the Court and the law will be better off without outward-looking individualism by a member (to say nothing of multiple members) of the Court. Separate opinions are unnecessary to move or change the law; the law will change on its own in time—someone would have invented the modern freedom of speech, even had Holmes never changed his mind or been able to announce his change of mind.<sup>77</sup> And the risks associated with individual judicial celebrity outweigh any incremental benefits that separate opinions might offer.

#### IV. TOO LATE IN THE GAME?

Sherry’s proposal may represent the best way to operate a multi-member court in a time of celebrity and partisanship. But perhaps it is too late because judicial celebrity is ingrained in the Court. Perhaps the historical moment has passed. And there is no going back.

A single opinion with no names or numbers works on a Court with greater unpredictability about members’ party affiliations, case outcomes, and reasons for reaching conclusions. It works less well on a stratified and party-aligned Court.

The Burger Court of the mid-1970s through mid-1980s featured a large middle, fewer 5–4 decisions, and some unpredictability in how individual Justices would vote in particular cases. Republican appointees Potter Stewart, Lewis Powell, and Sandra Day O’Connor were not judicial liberals, but they were less conservative than the Republican appointees on the current Court. Prior to his 2018 retirement, Republican appointee Anthony Kennedy joined the four Democratic appointees on issues such as reproductive-freedom and LGBT rights.<sup>78</sup> For most of the Rehnquist Court, Republicans Harry Blackmun, John Paul Stevens, or David Souter were part of the liberal bloc. During the heart of the Warren Court in the 1960s, Republican appointees Earl Warren and William Brennan led the liberal bloc while Democratic appointees Tom Clark and Byron White voted more conservatively. During the early New Deal, the dissenting “three musketeers” included Democratic appointee Louis Brandeis and Republican appointees Harlan Fiske Stone and Benjamin Cardozo.<sup>79</sup>

75. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988).

76. Ashutosh A. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in CONSTITUTIONAL LAW STORIES 406 (Michael C. Dorf ed., 2d ed. 2009).

77. HEALY, *supra* note 48, at 244–45; Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 830–34 (2016).

78. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (Justice Kennedy joined in the majority written by Justice Breyer); *Obergefell v. Hodges*, 576 U.S. 644, 648 (2015) (Kennedy, J., for the Court).

79. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 93 (2010).

But the plan fits less well on the Court of 2021. Prior to 1937, in only one case with multiple dissenters was every member of the majority appointed by presidents of one party and every dissenter appointed by presidents of the other.<sup>80</sup> Since 2010 and for the first time in the modern Court, judicial ideology aligns with the political party of the appointing President—all members of the Court’s “conservative” wing were appointed by Republican Presidents and all members of the “liberal” wing by Democratic Presidents. And the conservative members are among the most conservative in the Court’s history.<sup>81</sup> Numerous 5–4 decisions over the past decade split along appointing-party lines.<sup>82</sup>

Moreover, the connection between appointing party and judicial ideology is sharper. As Neal Devins and Lawrence Baum explain, “prospective Republican nominees are part of a conservative-leaning elite network when nominated, and they can gain validation from that network after joining the Court. Similarly, Democratic-appointed Justices are part of a liberal-leaning network.”<sup>83</sup> And these elite networks keep the Justices in ideological “check,” reifying their political or ideological commitments and ensuring they do not “drift” from those commitments.<sup>84</sup> “No more Souters” became a rallying cry within the Republican network, reflecting a desire to avoid ideologically unreliable or unpredictable appointees.<sup>85</sup> These networks “are attentive and informed audiences, and, given the polarized state of American politics, they do not tend to be especially tolerant.”<sup>86</sup> It is impossible that Justices do not notice and account for the criticism from these networks in their jurisprudence.

This is not different in kind than the House of Truth’s influence on Justice Holmes as to free speech, where the internal criticism carried greater sting and affected his outlook because of his desire to be adored by the group.<sup>87</sup> But it is different in degree. It has become explicitly ideological—Holmes did not share the political preferences of his fans within the House of Truth,<sup>88</sup> while modern Republican appointees are committed conservatives, with networks reinforcing those principles before and after

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80. DEVINS & BAUM, *supra* note 2, at 66.

81. *Id.* at xii, 4–5, 101, 119; Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 412–13 (2021).

82. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020); *Shelby County v. Holder*, 570 U.S. 529, 532 (2013); *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 400 (2013); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 32 (2012).

83. DEVINS & BAUM, *supra* note 2, at xi.

84. *Id.* at 133, 145.

85. Oldfather, *supra* note 1, at 186, 212.

86. *Id.* at 215.

87. HEALY, *supra* note 48, at 61–62, 134–35, 154–57; SNYDER, *supra* note 46, at 278–81, 318; Snyder, *supra* note 46, at 667–68; *supra* notes 58–63 and accompanying text.

88. HEALY, *supra* note 48, at 32; SNYDER, *supra* note 46, at 113.

confirmation.<sup>89</sup> And it is not limited to one iconoclast; it occurs on a grander scale and affects every member of the Court.

The death of Justice Ginsburg and appointment of Justice Barrett in October 2021—several weeks prior to publication of Sherry’s article—exacerbated the Court’s presumed predictability. Barrett’s appointment produced a Court with a clear six-Justice majority whose partisan appointments align, whose ideological and jurisprudential views are well known, and who operate within the shared network of conservative elites.<sup>90</sup> They are opposed by a clear three-Justice minority whose partisan appointments align, whose ideological and jurisprudential views are well known, and who operate within a shared network of liberal/progressive elites. And the new Court’s 6–3 decisions break along those appointing-party lines.<sup>91</sup>

Had Congress implemented Sherry’s system and imposed anonymity, unity, and non-enumeration 50 or 75 years ago, it might have prevented the modern celebrity-culture problem from evolving through the 1990s and taking the firm root it has. That culture having taken hold, it may be impossible to break its grip.

A forthcoming case for October Term 2021 may test the point. *Dobbs v. Jackson Women’s Health Organization* involves a challenge to the validity of a Mississippi law banning abortions after 15 weeks.<sup>92</sup> The expected judgment is obvious—a 6–3 Court, split on appointing-party lines, reversing the court of appeals and declaring Mississippi’s law valid. The only drama appears to be the details and rationale around which some or all of those six Justices settle—whether to roll the relevant line for state regulation earlier than fetal viability, to eliminate health benefits from the undue-burden balancing test, or to overrule *Roe* and *Casey* and eliminate constitutional protection for abortion.

Anonymity would be impossible on this Court in this case, at least in broad strokes. Everyone would know who supported the judgment and who did not. If there were no majority for a narrower opinion (for example, rolling back the line but not overruling *Roe/Casey*), everyone would have a good guess who of the six wanted a broader decision. The author might be a mystery, although experience with familiar writing styles yields clues;<sup>93</sup> the line-up of Justices would not be. Absent a relatively even Court with genuine swing votes, less appointing-party cohesion, and no established history, Court watchers can identify how Justices behaved. The lack of true anonymity means Justices

89. DEVINS & BAUM, *supra* note 2, at 145.

90. Epps & Sitaraman, *supra* note 81, at 413.

91. See, e.g., *Edwards v. Vannoy*, 141 S. Ct. 1547, 1551 (2021), *Jones v. Mississippi*, 141 S. Ct. 1307, 1310 (2021), *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2063 (2021), *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2373 (2021), *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2321 (2021). But see *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1868 (2021).

92. *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019), *cert. granted in part*, *Dobbs v. Jackson Women’s Health*, 2021 WL 1951792 (U.S. May 17, 2021) (No. 19-1392).

93. See generally Jill Barton, *So Ordered: The Techniques of Great Judicial Stylists*, 18 SCRIBES J. LEGAL WRITING, 1 (2018).

retain incentives to play to their ideological bases through the judgments and opinions they join.

## V. TOO LITTLE ON ITS OWN?

That anonymity has become impossible (or at least difficult and unlikely) in most cases does not defeat or render unnecessary Sherry's proposal on the merits. Rather, it suggests that her solution might better combine with other changes to the Court's structure and decision-making processes.

### A. COMPOSITION AND STRUCTURE

The more publicized solutions to polarization call for changing the composition of the Court and the methods of selecting Justices. Proposals include expanding or altering the Court's size, structure, or composition (derided as "court-packing").<sup>94</sup> President Biden appointed a commission to study the question.<sup>95</sup>

Four scholarly proposals for structural change are worth highlighting:

- When Justice Scalia died in February 2016, it left an evenly divided eight-person Court whose ideological votes followed appointing-party lines. Eric Segall proposed making that permanent—reduce the Court to eight seats, designate four seats for each major party, and require that a member of that party fill a vacancy in that seat, regardless of the appointing president.<sup>96</sup> The appointment of Justice Gorsuch returned the Court to nine and the appointment of Barrett created a 6–3 partisan divide; the historical moment passed. Segall revised his plan in 2021, proposing that Congress add three seats, to be filled by Democrats, to create an evenly divided 12-member Court, the same proposal with a larger Court.<sup>97</sup>

- Daniel Epps and Ganesh Sitaraman offer two proposals. The "Supreme Court lottery" creates a Supreme Court without permanent members. The Court would be comprised of every court of appeals judge designated as an associate justice, sitting in rotating, randomly selected panels of nine (with no more than a 5–4 divide for either major party) for two weeks at a time.<sup>98</sup> The

94. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151 (2019).

95. *Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/09/executive-order-on-the-establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states> [<https://perma.cc/GE23-4UFB>].

96. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 553–55 (2018).

97. Eric Segall, *Serious Court Reform: Partisan Balance is the Only Way Out*, DORF ON LAW (Apr. 19, 2021, 7:30 AM), <http://www.dorfonlaw.org/2021/04/serious-court-reform-partisan-balance.html> [<https://perma.cc/HH37-2HS5>]. Segall viewed this as a compromise with Democrats arguing for adding four seats to create a 7–6 Democratic majority. *See also* Howard Wasserman, *The Segall Court and a Stopping Point to Court-packing*, PRAWFSBLAWG (Sept. 22, 2020, 11:28 AM) <https://prawfsblawg.blogs.com/prawfsblawg/2020/09/the-segall-court-and-a-stopping-point-to-court-packing.html> [<https://perma.cc/2WAS-2XDG>].

98. *See* Epps & Sitaraman, *supra* note 94, at 181.

“Balanced Bench” establishes an evenly divided Court of ten permanent Justices supplemented by five lower-court judges chosen unanimously by the permanent Justices to sit by designation each Term.<sup>99</sup>

- The most widely discussed proposal would create functional 18-year term limits, without a constitutional amendment. This system was proposed more than a decade ago by Paul Carrington, endorsed by a cross-ideological section of legal scholars, and introduced in legislation that went nowhere.<sup>100</sup> Each president makes an appointment in the first and third years of every term. Cases are heard by a panel of the nine junior-most Justices, with remaining Justices assuming “senior” status, sitting on lower courts and filling in, in reverse seniority, when any core Justice recuses or otherwise cannot participate. Each Justice serves on the core panel for 18 years. Sherry has criticized this proposal, demonstrating the wild jurisprudential swings and destabilizing effects it would have produced on *Roe* and the right to reproductive freedom.<sup>101</sup>

These proposals share a common theme. All recognize and institutionalize the political nature of the Court, the selection of Justices, and the work of the Court, then seek to create some partisan equity by associating seats with parties or by giving each party equal opportunities to fill seats and to influence case outcomes.

Like Sherry’s proposal, all are designed to foster cooperation and compromise and all require it to function. By definition, Segall’s balanced Court requires one group of six Justices to convince at least one member of the other group of six Justices to cross over, lest the Court fail to obtain a majority and affirm the judgment by an evenly-divided Court. The 14-month period from Scalia’s February 2016 death to Gorsuch joining the Court in April 2017 provided a natural experiment, in which the Court worked harder, was less divided, and issued narrower opinions.<sup>102</sup> Epps and Sitaraman’s lottery requires a 6–3 supermajority to declare federal (and possibly state) laws constitutionally invalid, forcing partisan cooperation among the nine randomly selected judges.<sup>103</sup>

Sherry discusses these alternative proposals but argues that they address the wrong problem. They reduce partisan divides but fail to address the

99. See *id.* at 193. Epps and Sitaraman proposed this when the Court had a 5–4 divide and one additional seat filled by a Democratic appointee would have produced an even Court. The appointment of Barrett and the resulting 6–3 Court would require some tweaking to that piece of the proposal.

100. See e.g., Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020); Steven G. Calabresi, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html> [https://perma.cc/6UU8-NJ5J]; Jack Balkin, *How to Reform the Supreme Court*, BALKINIZATION (Oct. 10, 2020, 10:20 AM), <https://balkin.blogspot.com/2020/10/how-to-reform-supreme-court.html> [https://perma.cc/B58C-82LH].

101. Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121, 122–23 (2019).

102. Segall, *supra* note 97.

103. See Epps & Sitaraman, *supra* note 94, at 182 & 182 n.133.

distinct and immediate problem of judicial celebrity and its corrosive effects.<sup>104</sup> At the same time, the Court's present partisan composition undermines the effectiveness of Sherry's proposal.<sup>105</sup>

The solution is to combine Sherry's anti-celebrity rules with changes to Court structure and composition, allowing each to fill gaps in the other. Sherry's proposal improves the composition proposals by stripping, or at least hiding, their inherent naked partisanship. A balanced-but-expressly-partisan Court bound by anonymity, unity, and non-enumeration produces an institutional rather than individual work-product, disconnected from the identity or partisan affiliations of any member or group of members. No one knows which Court members voted which way or why. The Court, partisan-by-design though it may be, speaks as a single voice with no individual voices signaling co-partisans or expressing agreement or disagreement with the institutional result. And the elimination of names and numbers makes it easier for one group to convince a member of the other to cross over and create a majority.

Sherry recognizes the potential drawbacks to her proposal. Cloaked in anonymity, unity, and non-enumeration, "an unaccountable majority [can] impose its will unfettered by minority criticism," the overbearing majority "exploiting the lack of separate opinions to impose controversial broad and deep rulings."<sup>106</sup> Or at least the public will believe that to be the case, assuming every case is a politically divided partisan ruling.<sup>107</sup>

But those criticisms highlight why her proposal complements compositional or structural change rather than offering a stand-alone fix. Altering the Court's composition and eliminating stable 5-4 (or 6-3) majorities addresses the public perception concerns. Anonymity, unity, and non-enumeration remove celebrities from within that differently composed Court.

### B. CHANGING DECISION-MAKING

Sherry's proposal complements a different approach to constitutional interpretation that Zachary Price labels "symmetric constitutionalism:"

[J]ustices and judges should self-consciously push back against forces of division and polarization in constitutional law by instead favoring, when possible, outcomes, doctrines, and rationales that distribute benefits across major partisan divides, as opposed to those that frame constitutional law as a matter of zero-sum competition between competing partisan visions.<sup>108</sup>

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104. See Sherry, *supra* note 8, at 194-97.

105. *Supra* Part IV.

106. Sherry, *supra* note 8, at 225-26.

107. See *id.* at 225-26.

108. Zachary S. Price, Polarization or Symmetry?: The Court's Current Choice, 11 (Sept. 1, 2020) (unpublished manuscript) (UC Hastings Research Paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3838924](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3838924) [<https://perma.cc/Q3F6-9R5Q>].



The Court should “articulate general doctrinal and interpretive principles with potential cross-partisan benefits—and then stick to them, even when the results are unpopular.”<sup>109</sup> Price offers this new approach as a solution to increased polarization; it reinforces shared legal commitments among the Justices<sup>110</sup> and allows the Court to issue decisions that appeal in principle to those within the elite networks otherwise disappointed by the decision’s immediate political valence.<sup>111</sup>

Anonymity, unity, and non-enumeration make it easier for the Justices to pursue Price’s interpretive model. Freed of express connection to those elite networks and polarizing forces in deciding any case, Justices may be better able to pursue outcomes and rationales that spread constitutional benefits across partisan divides. Sherry’s plan disconnects any Justice from any judgment and opinion in the name of greater internal compromise and cooperation. That compromise can include a greater willingness to decide cases in ways that spread doctrinal advantages as Price imagines.

## VI. LOWER COURTS?

Sherry aims her proposal at the Supreme Court, whose members are the real legal celebrities. She does not apply it to lower-court judges. The question is whether she should.

### A. COURTS OF APPEALS

Differential treatment of Justices and court of appeals judges makes sense, as the former “are Supreme Court Justices, a semantic distinction that points to a yawning chasm, both in status and behavior.”<sup>112</sup> Court of appeals judges continue to work in the “relative obscurity” in which all but select Justices previously operated.<sup>113</sup> They are less likely to use their writing and their separate opinions to grasp at celebrity or to succeed in obtaining it. Lerner and Lund argue that lower-court judges reflect the Hamiltonian ideal—scholarly, cautious, boring, immersed in precedent, and deeply self-effacing—unlike Justices.<sup>114</sup>

The structure of the courts of appeals and their members contributes to the difference. Supreme Court Justices sit as one *en banc* Court. They hear fewer than 100 cases each Term.<sup>115</sup> Every member hears every case, almost all selected by the Justices for discretionary review. And many cases draw national

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109. *Id.* at 17.

110. *Id.*

111. *Id.* at 11–13.

112. Lerner & Lund, *supra* note 3, at 1257–58.

113. Oldfather, *supra* note 1, at 212–13.

114. Lerner & Lund, *supra* note 3, at 1257–58.

115. See *FAQs – General Information*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/faq\\_general.aspx#:~:text=How%20many%20cases%20are%20appealed,argument%20in%20about%2080%20cases](https://www.supremecourt.gov/about/faq_general.aspx#:~:text=How%20many%20cases%20are%20appealed,argument%20in%20about%2080%20cases) [https://perma.cc/HB92-Y98C]. The Court heard fewer than 60 cases in October Term 2020, the fewest since the Civil War.

attention and publicity, focusing the eyes of the country and the media on the Justices.

Courts of appeals consist of more than 180<sup>116</sup> judges on 13 courts spread across the nation, hearing a larger number of cases, most of lesser importance, in randomly assigned panels of three. The docket is largely mandatory, meaning they do not select which cases or issues to hear and must decide all that come before them. No case, court, or judge attracts the same public attention. Even when courts of appeals decide important cases working through the judicial hierarchy, chance determines whether any “celebrity” judge would be on the three-judge panel. And that panel does not provide the final answer on a legal issue; it provides one point of view as the issue percolates through multiple courts rendering multiple decisions on its way to final resolution in the Supreme Court.<sup>117</sup>

Writing practices on the courts of appeals also differ. Concurrences and dissents are less common.<sup>118</sup> And judges act on different incentives in deciding whether and when to write separately. Dissenting requires effort by the dissenter, so the burdens must be offset by benefits, such as the likely influence of the dissent. But court of appeals dissents or concurrences are even less likely to become law over time than Supreme Court dissents. Writing separately also imposes greater costs on a small panel within a larger court with a larger mandatory caseload. Beyond the work of drafting the separate opinion and forcing a colleague to rewrite the majority to address the separate opinion, there are collegiality costs, as a consistent dissenter becomes less well liked, and thus less influential, among their colleagues.<sup>119</sup>

Court of appeals judges thus engage in more of what Richard Posner calls “going-along” voting (a judge who does not feel strongly on an issue joins with a judge who does) and “live and let live” opinion-joining (a judge signs onto dicta with which they may disagree in deference to their writing colleague).<sup>120</sup> These time-saving mechanisms ease workloads and the risk of inter-personal tensions on lower courts, where the corresponding benefits of writing separately are decreased.<sup>121</sup>

But celebrity culture has reached the courts of appeals. Lower-court judges operate within and achieve similar levels of celebrity within the same elite networks.<sup>122</sup> And Justices come from the ranks of lower-court federal judges—since 1980, all but Justice Kagan joined the Court from the judiciary and all but Justice O’Connor from the federal courts of appeals. Court of

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116. This covers 179 active court appeals judgeships, plus any number of senior judges. Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1229, 1232 (2021).

117. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017).

118. EPSTEIN, LANDES & POSNER, *supra* note 46, at 264.

119. *Id.* at 256–57, 261–64.

120. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 22 (1993).

121. Lerner & Lund, *supra* note 3, at 1274.

122. DEVINS & BAUM, *supra* note 2, at 145; Price, *supra* note 108, at 9.

appeals judges thus have an incentive to “audition” for promotion by demonstrating through their signed opinions, including joiners, concurrences, and dissents, that they are committed to politically favorable positions and will not stray from the course upon reaching the Court.<sup>123</sup>

Lower court judges emulate the Justices’ celebrity-induced and celebrity-seeking behavior, playing to the same elite-and-partisan cheering sections and “expand[ing] the boundaries of what is permissible and appropriate in judicial opinions.”<sup>124</sup> Moreover, the Court’s increasingly limited docket<sup>125</sup> makes the courts of appeals the final word in most cases.<sup>126</sup> That enhances the power of the judges who decide those cases and issue those opinions, enhancing the opportunity for celebrity within those networks and the incentive to pursue that celebrity.

If so, Sherry’s proposal should extend to the courts of appeals. Recall the benefits this system provides—more compromise and collaboration among court members, more majority opinions, more coherent court doctrine, and greater institutional legitimacy.<sup>127</sup> If court of appeals judges may be tempted to behave like Supreme Court Justices—whether with the goal (however unlikely<sup>128</sup>) of becoming one or of achieving celebrity within elite networks—they will benefit from this system. Anonymity, unity, and non-enumeration enhance and strengthen the “going along” and “live and let live” voting that prevails on these courts.

Extending the system to the courts of appeals also should enhance its positive effects on the Supreme Court. With no opportunity to dissent, Justices might engage in the “going-along” and “live and let live” voting that keeps lower courts functioning. Eliminating individualized opportunities among current Justices and among the pool of likely future Justices will, in time, produce a body of federal jurists unaccustomed to writing individual opinions and to the resulting celebrity and focused on institutional outcomes rather than individualized positions. This also should stop fanbases from guessing and reading tea leaves as to who wrote or joined which opinions on any court; no one will have sufficient familiarity with voting patterns or writing styles of any judge or Justice, separate from her co-panelists.

Operating courts of appeals under this approach creates one unique problem—lower-court judges would have no judicial record to consider when nominated to the Supreme Court. Any nominee would have been one silent member of a three-judge panel (or *en banc* court of appeals) that reached a

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123. DEVINS & BAUM, *supra* note 2, at 145–46; EPSTEIN, LANDES & POSNER, *supra* note 46, at 351–52, 359; Oldfather, *supra* note 1, at 224. Epstein, Landes, and Posner find that “auditioning” judges vote certain ways on certain hot-button issues, although they do not discuss whether or how often those votes become separate opinions.

124. Oldfather, *supra* note 1, at 224–25.

125. *Id.* at 213; Posner, *supra* note 5, at 301.

126. Carl Tobias, *The Federal Appellate Court Appointments Comundrum*, 2005 UTAH L. REV. 743, 750.

127. *Supra* notes 11–14 and accompanying text.

128. EPSTEIN, LANDES & POSNER, *supra* note 46, at 348.

particular decision on particular grounds. Presidents, Senators, and advocates could not determine where a nominee stood on the issue or the position they might take as a Justice. This might take anonymity too far. Removing the temptation to audition for promotion through explicit ideological or partisan commitments to avoid being labeled “another Souter” is one thing. Complete ignorance is another.

A nominee might break anonymity during the confirmation process. They might reveal which opinions they authored, which they joined, and which they disagreed with and why, stepping away from their role on the lower court and positioning themselves as a viable nominee within the network concerned with Court appointments.

Sherry recognizes that her plan does not eliminate all opportunities for Justices and judges to make their views known or to seek celebrity. Separate opinions are not the lone mechanism for speaking to polarized fan bases; Justices create and enhance their celebrity off the bench by writing books, giving speeches, and appearing on television and in movies.<sup>129</sup> And Justices can (and likely will) continue to use these off-bench activities to reveal how they voted and what they would have said about a case or issue.<sup>130</sup> But signed and named opinions carry greater force. Extra-judicial speech is less notable, carries less weight, and is more remote in time, reducing its efficacy and leaving the judges’ unsigned and un rebutted work product space to function as law.<sup>131</sup> For lower-court judges, moreover, the collegiality costs to disagreeing publicly with colleagues<sup>132</sup> may extend to such off-bench activities and writings.

Confirmation hearings provide another forum for extra-judicial speech, in which a nominee makes known positions and disagreements with colleagues that they did not express in deciding the case. But a Supreme Court confirmation hearing is rare and unlikely to happen to most judges,<sup>133</sup> so any disclosure by one potential nominee should not affect the weight of the court’s decisions or their continued use as precedent. The rare promotion-related reveal of one judge’s votes over many years and many cases on the court of appeals does not undermine the benefits that Sherry’s proposal brings to the courts of appeals.

### B. DISTRICT COURTS

Sherry’s proposal cannot extend to district courts. District judges hear and decide cases alone.<sup>134</sup> Anonymity becomes impossible, as the author of

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129. Sherry, *supra* note 8, at 182, 185–86; *see also* Posner, *supra* note 5, at 300–01.

130. Sherry, *supra* note 8, at 199–200, 225.

131. *Id.* at 200.

132. EPSTEIN, LANDES & POSNER, *supra* note 46, at 263–64.

133. *Id.* at 337, 348.

134. The limited exception is three-judge district courts for certain unique cases. 28 U.S.C. § 2284(a) (2019). Dissents are more likely on three-judge district courts, at least in voting cases, than in the courts of appeals. *See* Michael E. Solimine, *Congress, the Solicitor General, and the Path of*

the opinion is obvious; unity and non-enumeration are inherent, as there is no one to join or not join and no opportunity to write separately. This leaves the anomaly that one of three levels of judicial decisionmaker would remain identifiable and identified with a judgment and opinion.

That anomaly could be problematic. There have been celebrity district judges;<sup>135</sup> although fewer in number, opportunities exist. District judges are drawn from the same influential partisan elite networks as Justices and court of appeals judges, therefore possess the same incentives to audition for promotion and to show their ideological commitments through their identifiable judgments and opinions.<sup>136</sup>

But while the similarities between Justices and court of appeals judges warrant similar treatment, unique treatment of district judges is less problematic.

The most basic reason is the practical concern—there is no way to make the source of a district court judgment and opinion anonymous. Due process concerns for transparency and fairness require that the identity of the judges hearing and deciding a case be known. The author or joiner of an opinion can be hidden on a multi-member panel. If a case is heard by one judge, that assigned judge wrote the opinion.

But district judges differ in other respects. They decide cases in a different posture than multi-member reviewing courts. They write one type of opinion—the opinion for the court. In writing that opinion, they are bound by and unable to change two layers of precedent—from the Supreme Court and the regional court of appeals.<sup>137</sup> And their opinions do not establish binding precedent, even within the district.<sup>138</sup> District judges take the first pass at legal issues, but their opportunities to make lasting law are more fleeting, as everything a district judge writes is merely persuasive and always subject to review and reversal, at least eventually.

District judges also spend much of their time performing the unique, non-adjudicatory trial-court function of “managerial judging”—supervising

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*Reapportionment Litigation*, 62 CASE W. RES. L. REV. 1109, 1144 (2012). Sherry’s proposal thus should apply to three-judge districts.

135. See Laura Mansnerus, *Jack B. Weinstein, U.S. Judge With an Activist Streak, is Dead at 99*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/nyregion/jack-b-weinstein-dead.html> [https://perma.cc/8MDA-YVQF].

136. In April 2020, Judge Justin Walker of the Western District of Kentucky enjoined enforcement of a municipal order prohibiting in-person Church services as a COVID-19 restriction. The opinion began: “On Holy Thursday, an American mayor criminalized the communal celebration of Easter. That sentence is one that this Court never expected to see outside the pages of a dystopian novel, or perhaps the pages of *The Onion*,” and went from there, ending with a footnote containing Judge Walker’s and his law clerks’ initials. *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 905, 915 n.86 (W.D. Ky. 2020). The opinion was criticized as an audition for a higher court. Ian Millhiser, *The Controversy Over a Trump Judge’s Oddly Partisan “Religious Liberty” Opinion, Explained*, VOX (Apr. 14, 2020, 8:30 AM), <https://www.vox.com/policy-and-politics/2020/4/14/21218939/trump-judge-justin-walker-religious-liberty-on-fire-partisan-klan>. Walker was nominated to the D.C. Circuit one month later and confirmed in June 2020. *Id.*

137. Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460–61 (2010).

138. *Id.* at 1463.

case preparation; negotiating with parties about the course, timing, and scope of pretrial and posttrial litigation; and learning more about cases at an earlier stage.<sup>139</sup> Overseeing the “pretrial process”—pleading, discovery, and summary judgment to narrow and sharpen legal issues—consumes district judges’ attention.<sup>140</sup> Chief Justice Roberts argues that district judges must be “capable administrator[s]” and “active and astute problem solver[s].”<sup>141</sup> This is an important process. But it does not create judicial celebrity.

## VII. CONCLUSION

There is a sense, certainly from one side of the political spectrum, that the Supreme Court is broken. The debate and point of departure among legal scholars is how to fix it. The past several years have produced a wave of creative ideas. Sherry’s proposal of anonymity, unity, and non-enumeration—a single per curiam ruling, no vote counts, no separate opinions, no signed opinions—fits among the most creative approaches.

Sherry offers two unique benefits. Her plan can operate alone or in cooperation with other proposals across the federal judiciary. And her plan withstands charges of partisan motivation. Judicial celebrity exists across the partisan and ideological spectrum. Kardashian Justices on both wings of the Court are as likely to hate Sherry’s plan or to embrace it as a welcome precommitment against their common and unavoidable human instincts.

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139. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–78 (1982).

140. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 522 (1986); ROBERTS, 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (Dec. 31, 2016), <https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf> [https://perma.cc/L6G G-JKSS].

141. *Id.*