

Our Kardashian Court (and How to Fix It)

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ABSTRACT: The Supreme Court is broken. After cataloging its dysfunctions, this Article suggests a contributing cause and proposes a solution. The contributing cause is that Justices have become celebrities, and, like other celebrities, play to their fan base. The solution is to limit their opportunities to use their official status to do so: Congress should pass a law prohibiting concurring or dissenting opinions and requiring each case to be decided by an unsigned opinion that does not disclose the number of Justices who join it. The Article outlines the advantages of such a law and considers possible objections to it, including both constitutional and nonconstitutional objections. It ultimately concludes that it would be constitutional and that although there are significant risks, the probable benefits outweigh the probable costs. And because it is a statutory solution rather than a constitutional one, it can be viewed as an experiment that can easily be terminated if it does not work out. In the current climate, it is a risk worth taking.

I.	INTRODUCTION.....	182
II.	WHAT’S WRONG WITH THE SUPREME COURT?.....	183
	A. A DYSFUNCTIONAL SUPREME COURT.....	183
	B. JUSTICES AS CELEBRITIES.....	185
	C. CONNECTING CELEBRITY JUSTICES AND COURT DYSFUNCTIONALITY.....	187
III.	HOW DO WE FIX IT?	193
	A. OTHER SCHOLARS’ SOLUTIONS.....	194
	B. MY SOLUTION.....	197
	1. The Practical Benefits of Single Unsigned Opinions	198
	2. Single Opinions and Judicial Minimalism.....	201
	3. Partial Measures Won’t Work.....	204

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IV.	POTENTIAL OBJECTIONS.....	207
A.	CONSTITUTIONAL OBJECTIONS.....	207
B.	OTHER OBJECTIONS.....	215
	1. Separate Opinions Serve Important Purposes.....	215
	2. Signed Opinions Serve Important Purposes.....	223
	3. It Won't Work.....	224
V.	CONCLUSION	227

I. INTRODUCTION

The Supreme Court is broken. Public confidence in the Court has dropped; both the institution and individual Justices are accused of playing politics with the Constitution by allowing ideology to trump the rule of law. Calls for change—everything from term limits to court-packing to impeachment—are increasing in volume. Some scholars and pundits warn of a crisis of legitimacy. In this Article, after arguing that most of these critiques have missed an important contributing cause of the Court's current dysfunctionality, I propose and defend a novel statutory solution.

The contributing cause is that individual Justices have become celebrities akin to the Kardashians.¹ Television appearances, books, movies, stump speeches, and separate opinions aimed at the Justices' polarized fan bases have created cults of personality around individual Justices. In Part II of this Article, I catalogue the Court's dysfunctions and the Justices' status as celebrities, and show how the two are linked. Part III then begins by explaining why none of the solutions offered by others can solve the Court's problems. The heart of Part III is a description and defense of my own solution: Congress should pass a law prohibiting concurring or dissenting opinions and requiring each case to be decided by an unsigned opinion that does not disclose the number of Justices who join it. In other words, no concurrences, no dissents, no attribution, and no vote counts. In Part IV, I consider, and respond to, possible objections to my proposal: both constitutional and nonconstitutional. I conclude that my proposed legislation is constitutionally valid and that its benefits outweigh its potential costs. Part V offers a brief conclusion.

To be clear: I recognize the risk that my proposal might backfire and make things worse rather than better. After I lay out the potential advantages and disadvantages, readers will then have to decide for themselves whether the Court's current dysfunctions warrant taking that risk.

1. Ironically, Kim Kardashian West is planning to take the California bar exam. See Claudia Koerner, *Kim Kardashian West Is Studying to Take the Bar Exam and Become a Lawyer*, BUZZFEED NEWS (Apr. 10, 2019, 5:57 PM), <https://www.buzzfeednews.com/article/claudiakoerner/kim-kardashian-west-bar-exam-lawyer-alice-johnson> [<https://perma.cc/S7SP-ZDYY>]. At some point in the future, we may have not only a Kardashian Court, but a Kardashian *on* the Court.

II. WHAT'S WRONG WITH THE SUPREME COURT?

A. A DYSFUNCTIONAL SUPREME COURT

The Supreme Court is dysfunctional in many ways. It is deciding half as many cases as it did a generation ago, and using twice as many pages to do so.² Concurrences and dissents abound, including such absurdities as “Justice Scalia joins this [unanimous] opinion, except as to footnotes 6 and 7.”³ The number of cases, especially controversial cases, without a majority opinion at all is increasing.⁴ The Justices snipe at each other in dueling opinions, often well beyond the bounds of civility.⁵ The Court is polarized: “Since 2010,

2. See, e.g., Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI-KENT L. REV. 299, 301 (2013); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1459–60 (1995); Joshua B. Edelman, *One Case, 900 Pages 2–5* (unpublished manuscript) (on file with author) (graphically displaying data on number of cases and number of pages and extrapolating both to the year 2159).

3. Levin v. United States, 568 U.S. 503, 505 n.* (2013); see also Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018) (Thomas, J., concurring in part) (“Justice Thomas, with whom Justice Gorsuch joins except for footnote 6, concurring in Part I and Parts III–VI and concurring in the judgment.”); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017) (“Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3.”); Bank of Am., N.A. v. Caulkett, 135 S. Ct. 1995, 1998 n.* (2015) (“Justice Kennedy, Justice Breyer, and Justice Sotomayor join this opinion, except as to the footnote.”); Loughrin v. United States, 134 S. Ct. 2384, 2395 (2014) (Scalia, J., concurring in part) (“I join Parts I and II of the Court’s opinion, Part III–A except the last paragraph, and the last footnote in Part III–B. I do not join the remainder of Part III–B.”); Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 548 n.* (2014) (“Justice Scalia joins this opinion except as to footnotes 1–3.”); Sandifer v. U.S. Steel Corp., 571 U.S. 220, 222 n.† (2014) (“Justice Sotomayor joins this opinion except as to footnote 7.”); Milavetz, Gallop & Milavetz, P. A. v. United States, 559 U.S. 229, 253 (2010) (Scalia, J., concurring in part) (“I join the opinion of the Court, except for footnote 3”); Montejo v. Louisiana, 556 U.S. 778, 815 (2009) (Breyer, J., dissenting) (“I join Justice Stevens’ dissent except for footnote 5.”); Fry v. Pliler, 551 U.S. 112, 127 (2007) (Breyer, J., concurring in part and dissenting in part) (“I therefore join the Court’s opinion except as to footnote 1 and Part II–B, and I join Justice Stevens’ opinion in part.”); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 441 (2007) (“Justice Ginsburg delivered the opinion of the Court, except as to footnote 14.”). That many of these nitpicky refusals to join colleagues’ opinions are in cases that are neither high profile nor politically salient reinforces the notion that something is very wrong at 1 First Street.

4. See, e.g., Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799–800 (2017); James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011); Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 207, 231.

5. See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1754–57 (2020) (Alito, J., dissenting) (calling the majority opinion “deceptive,” “preposterous,” of “breathhtaking” arrogance, and “like a pirate ship”); Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from denial of certiorari) (accusing the majority of denying certiorari because “respondents . . . are named ‘Planned Parenthood,’” and stating that “[s]ome tenuous connection to a politically fraught issue does not justify abdicating our judicial duty”); Miller v. Parker, 139 S. Ct. 399, 399 (2018) (Sotomayor, J., dissenting from denial of certiorari) (labeling the results of the majority’s decision “madness” that “should not continue”); Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (“The majority’s decision is an act of will, not legal judgment.”); *id.* at 2630 n.22 (Scalia, J., dissenting) (“If . . . I ever joined an opinion for the Court that began [as this one does,] I would hide my head in a

... all of the Supreme Court's Republican-nominated Justices have been to the right of Democratic-nominated Justices.⁷⁶ The public, with a little help from the media and some academics,⁷⁷ believes the Court is almost entirely a political institution, deciding most cases on the basis of ideology with little or no regard for "law."⁷⁸ Unsurprisingly, public confidence in the Supreme Court has dropped.⁷⁹ The nomination and confirmation process has been described as "[a]n unhealthy regime of scheming, posturing, and gamesmanship."⁸⁰

bag."); *United States v. Windsor*, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting) (calling the majority opinion a "disappearing trail of . . . legalistic argle-bargle").

6. NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 4 (2019); *see also id.* at 157 ("Justices now act more as adherents to one ideological side, a side increasingly identified in partisan terms, than they did for most of the Court's history.").

7. The media are more likely to report on—and label as political rather than legal—cases in which the Court is closely divided. *See* MICHAEL F. SALAMONE, PERCEPTIONS OF A POLARIZED COURT: HOW DIVISION AMONG JUSTICES SHAPES THE SUPREME COURT'S PUBLIC IMAGE 66–116, 148–49 (2018). For the seminal academic work suggesting that Justices vote primarily on the basis of ideology (as modified by strategic concerns), *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); and LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998). For contrary evidence, *see generally* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671 (2016); Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129 (2012); Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369 (2008); Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321 (2007); and Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135 (2006).

8. A survey 15 years ago found that "75% [of Americans] say a judge's ruling is influenced by his or her politics to a great or moderate extent." Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 900 (2007); *see also* Dan M. Kahan, David Hoffman, Daniel Evans, Neal Devins, Eugene Lucci & Katherine Cheng, "Ideology" or "Situation Sense"? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 351 (2016) ("[A]bout three-quarters of Americans believe that judges—U.S. Supreme Court Justices and lower court jurists alike—base their decisions on their 'personal political views.'").

9. *See, e.g.*, RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 156–57 (2018); Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157, 170 & n.32 (2016). For a connection between media portrayal of the Justices as politically motivated and a decrease in public confidence in the legitimacy of the Court, *see generally* Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403 (2015).

10. FALLON, *supra* note 9, at 165; *see also* CARL HULSE, *CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH* 7–8 (2019) (discussing the Republican push for appointing conservative judges in 2016); DEVINS & BAUM, *supra* note 6, at 109 (discussing the Kavanaugh hearings as typical of the current era); Jane S. Schacter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 SUP. CT. REV. 209, 252–54; Michael Scherer & Robert Costa, *Rock Bottom: Supreme Court Fight Reveals Country on the Brink*, WASH. POST (Oct. 6, 2018, 6:01 PM), https://www.washingtonpost.com/politics/rock-bottom-supreme-court-fight-reveals-a-country-on-the-brink/2018/10/06/426886e2-c96f-11e8-b1ed-1d2d65b86doc_story.html [https://perma.cc/2CQH-TPAJ]. *See also generally* STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994) (describing "what is wrong with our confirmation process, how it got this way,

Chief Justice Roberts has opined that neither Justice Ginsburg nor Justice Scalia would be confirmed today.¹¹ All of this has led to what some are calling a crisis of legitimacy.¹² Even if things are not quite as dire as a crisis of legitimacy, the Court and the rule of law certainly seem to be in trouble.

B. JUSTICES AS CELEBRITIES

Despite these well-rehearsed criticisms of the Court, most scholars have overlooked one further problem, which exacerbates the others and contributes to the Court's dysfunctionality: Justices have become celebrities who bask in their fame and market their brands. As Richard Hasen put it in a blog post, some Justices have become "rock star Justices, drawing adoring crowds who celebrate [them] as though they were teenagers meeting Beyoncé."¹³ There are not one but two movies centered on Justice Ginsburg; one of them was written by her nephew with her consultation¹⁴ and the other included an appearance by the Justice herself.¹⁵ Journalist Nina Totenberg's live interview of Justice Ginsburg sold out a 15,500-seat stadium in Little Rock, with an additional 16,000 people on a waiting list.¹⁶ Justice Ginsburg was even the theme subject of a daily New York Times crossword puzzle, with answers including not only her name but also "the notorious RBG," "Columbia"

and what we can do to fix it"). *But cf.* MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* (2004) (concluding in 2004 that the process was working well).

11. Brent Martin, *Chief Justice Roberts: Scalia, Ginsburg Wouldn't Be Confirmed Today* (Audio), NEB. RADIO NETWORK (Sept. 19, 2014), [https://perma.cc/RQ6Z-MRT4]; *see also* DEVINS & BAUM, *supra* note 6, at x ("[T]he days of lopsided bipartisan [confirmation] votes are behind us."); Joan Biskupic, *Justice Ginsburg Reflects on Term, Leadership Role*, USA TODAY (June 30, 2011, 10:48 PM), http://usatoday30.usatoday.com/news/washington/judicial/2011-07-01-supreme-court-ginsburg_n.htm [https://perma.cc/VBQJ-MCF9] (interviewing Justice Ginsburg, who suggested the bipartisan vote on her nomination would not occur today).

12. *See, e.g.*, Ganesh Sitaraman & Daniel Epps, *How to Save the Supreme Court*, 129 YALE L.J. 148, 148 (2019) (describing Justices' tendency "to vote along party lines more consistently than ever before in American history" as a "development [that] gravely threatens the Court's legitimacy"); Zack Beauchamp, *The Supreme Court's Legitimacy Crisis Is Here*, VOX (Oct. 6, 2018, 4:02 PM), <https://www.vox.com/policy-and-politics/2018/10/6/17915854/brett-kavanaugh-senate-confirmed-supreme-court-legitimacy>. "Legitimacy" may mean either what Fallon labels "sociological legitimacy" or legitimacy in the eyes of the public. *See* FALLON, *supra* note 9, at 156–57. Whether or not there is such a crisis, claiming a legitimacy crisis is a good way to generate what two scholars have called "existential politics," a willingness to flout constitutional or political norms. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 974–76 (2018).

13. Richard L. Hasen, *Siloed Justices and the Law/Politics Divide*, BALKINIZATION (Apr. 2, 2019), <https://balkin.blogspot.com/2019/04/siloed-justices-and-lawpolitics-divide.html> [https://perma.cc/8TMM-ZERA]. Hasen has documented an eight-fold increase in public appearances by the Justices over the past decade or so. *See* Hasen, *supra* note 9, at 158.

14. *See* Anne Thompson, *Ruth Bader Ginsburg Guided 'On the Basis of Sex,' Say Armie Hammer and Felicity Jones*, INDIEWIRE (Dec. 26, 2018, 12:00 PM), <https://www.indiewire.com/2018/12/on-the-basis-of-sex-ruth-bader-ginsburg-armie-hammer-felicity-jones-1202030147>.

15. *See* Kate Harloe, *How Two Filmmakers Convinced RBG to Let Them Film Her Workout*, MOTHER JONES (May 4, 2018), <https://www.motherjones.com/politics/2018/05/how-two-filmmakers-convinced-rbg-to-let-them-film-her-workout> [https://perma.cc/J4Q5-GPTD].

16. Nina Totenberg (@NinaTotenberg), TWITTER (Sept. 4, 2019, 2:26 PM), <https://twitter.com/NinaTotenberg/status/1169330870458757125>.

(clued as where she finished law school), Flatbush (clued as where she grew up), and her movie “On the Basis of Sex.”¹⁷ Justice Scalia gave so many public speeches—most in non-legal forums—that a former clerk and the Justice’s son collected, edited, and published the “best” ones in a 400-page book after the Justice’s death.¹⁸ As if the movies and carefully curated collection of speeches weren’t enough to ensure their continuing legacies, there is also an opera about Justices Ginsburg and Scalia.¹⁹ A recent New York Times article speculated that Justice Thomas might soon become “the kind of pop-culture icon to his followers that Justice Ruth Bader Ginsburg has become to hers.”²⁰ Justices Thomas, Ginsburg, and Sotomayor have all appeared on mainstream television, just as Justice Scalia did.²¹ During the past five years, Justice Sotomayor has made almost 200 public appearances.²² Justices Sotomayor and Thomas have both written politically tinged autobiographies and gone on promotional book tours.²³ Justice Gorsuch has written a book that includes a discussion of his controversial confirmation battle.²⁴ Justice Thomas’ wife published a magazine article defending him after his contentious

17. See 0630-20 NY Times Crossword, NYX CROSSWORD (June 30, 2020), <https://nyxcrossword.com/2020/06/0630-20-ny-times-crossword-30-jun-20-tuesday.html> [<https://perma.cc/7XTN-UL2G>].

18. ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED (Christopher J. Scalia & Edward Whelan eds., 2017).

19. See Derrick Wang, *Scalia/Ginsburg*, DERRICK WANG, <http://www.derrickwang.com/scalia-ginsburg> [<https://perma.cc/V7J9-JYHC>].

20. Nicholas Casey, *Passed by for Decades, Clarence Thomas Is a New Symbol of the Trump Era*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/05/18/us/politics/clarence-thomas-supreme-court.html> [<https://perma.cc/4JDD-P7A7>].

21. See Hasen, *supra* note 9, at 160–61 (noting that Scalia, Thomas, and Sotomayor have all appeared on 60 Minutes); Ariane de Vogue, *In Rare Interview, Clarence Thomas Calls Gorsuch ‘Outstanding’*, CNN (Nov. 2, 2017, 9:16 AM), <https://www.cnn.com/2017/11/02/politics/clarence-thomas-neil-gorsuch/index.html> [<https://perma.cc/7TSC-TZ47>] (describing an interview on Fox News); Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. TIMES (July 14, 2016), <http://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html> [<https://perma.cc/FP9M-SFL4>]; *Supreme Court Justice Sonia Sotomayor Visits ‘Sesame Street’ to Talk About Careers (VIDEO)*, HUFFPOST (Nov. 12, 2012), https://www.huffpost.com/entry/supreme-court-justice-sonia-sotomayor-sesame-street_n_2113625 [<https://perma.cc/QLT7-VSXA>]; *Justice Scalia on the Record*, CBS 60 MINUTES (Sept. 12, 2008), <https://www.cbsnews.com/news/justice-scalia-on-the-record> [<https://perma.cc/GFM9-NPCY>]. Many of the modern Justices have appeared on C-SPAN, see RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 173–74 (2011), but given C-SPAN’s reputation as the boring channel reporting on government generally, these appearances are distinguishable from appearances on news shows, especially on partisan channels like Fox News. Justice Douglas appears to be the only precursor to today’s celebrity Justices. See Hasen, *supra* note 9, at 160.

22. Richard Wolf, *‘The People’s Justice’: After Decade on Supreme Court, Sonia Sotomayor Is Most Outspoken on Bench and Off*, USA TODAY (Aug. 12, 2019, 6:18 PM), <https://www.usatoday.com/story/news/politics/2019/08/08/justice-sonia-sotomayor-supreme-court-liberal-hispanic-decade-bench/1882245001> [<https://perma.cc/AXF4-7ZEY>].

23. SONIA SOTOMAYOR, MY BELOVED WORLD (2013); CLARENCE THOMAS, MY GRANDFATHER’S SON (2007).

24. NEIL M. GORSUCH, JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 6–7 (2019).

confirmation hearings.²⁵ Half the Justices are lionized and adulated at Federalist Society conferences, and the other half at American Constitution Society conferences.²⁶

This publicity for individual Justices represents a significant change. Two decades ago, Justices worked in relative obscurity, much like most court of appeals judges today and judges in many other countries.²⁷ Few Americans knew the Justices' names: only 24 percent could name a single Justice and only six percent knew the name of the Chief Justice.²⁸ To the extent that the public was interested in the Court at all, it was mostly as an institution rather than as individual Justices. The Justices largely wrote for, and spoke to, legal audiences. Now their celebrity extends to the broader public and is more like a personality cult. By 2018, almost half the population could name at least one Justice.²⁹ Today, the Court's Justices are viewed as star players on their respective political teams.

C. CONNECTING CELEBRITY JUSTICES AND COURT DYSFUNCTIONALITY

Celebrity status is not only an under-appreciated problem in itself, it also contributes to several of the dysfunctional aspects of the current Court.³⁰ First,

25. Virginia Lamp Thomas, *Breaking Silence*, PEOPLE (Nov. 11, 1991, 12:00 PM), <https://people.com/archive/cover-story-breaking-silence-vol-36-no-18> [<https://perma.cc/6R7K-HV5S>].

26. See Adam Liptak, *Justices Get Out More, but Calendars Aren't Open to Just Anyone*, N.Y. TIMES (June 1, 2015), <https://www.nytimes.com/2015/06/02/us/politics/justices-get-out-more-but-calendars-arent-open-to-just-anyone.html> [<https://perma.cc/AZ58-F7Z8>]. This is a change from prior norms; as late as 2006 one scholar could write that only a "small minority" of judges participated actively in organizations such as the Federalist Society or the American Constitution Society. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 129 (2006). The Judicial Conference's Committee on Codes of Conduct has recently circulated a draft advisory opinion suggesting that judges should not be members of either the Federalist Society or the American Constitution Society. See COMM. ON CODES OF CONDUCT, ADVISORY OPINION NO. 117: JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION 7 (2020), <http://eppc.org/wp-content/uploads/2020/01/Guide-Volo2B-Cho2-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf> [<https://perma.cc/RDX3-6T96>]. The draft opinion has been highly criticized. See, e.g., Susan Crabtree, *Critics: Senate Ready to Fight Draft Rule Targeting Federalist Society*, REAL.CLEAR.POL. (Jan. 24, 2020), https://www.realclearpolitics.com/articles/2020/01/24/rule_change_would_ban_judges_federalist_society_membership_142230.html [<https://perma.cc/RSK9-YC3G>]. In any case, the Codes of Conduct do not currently apply to Supreme Court Justices.

27. See NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* 28–29 (2015) (describing judges of UK, France, Japan, and Germany as "anonymous").

28. In 1989, only 24 percent of Americans could name at least one Justice other than the Chief, and in 1995 only six percent could name the Chief Justice. *Washington Post Poll: Supreme Court*, *Question 6*, WASH. POST (June 14, 1989) (on file with author); *Trust in Government Survey [11/28/1995–12/4/1995]*, HENRY J. KAISER FAM. FOUND. (Nov. 28, 1995) (on file with author).

29. See ROBERT GREEN & ADAM ROSENBLATT, *C-SPAN/PSB SUPREME COURT SURVEY: AGENDA OF KEY FINDINGS* 7 (2018), <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%208%2027.pdf> [<https://perma.cc/Q4E2-G5N2>].

30. A handful of commentators have noticed the phenomenon but have drawn different (and limited) conclusions from it. See Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1259, 1284 (2010) (concluding that it causes "political activism" and "adventurous" judging); Hasen, *supra* note 9, at 170 ("[T]he controversies

it directly undermines public confidence in the impartiality of the Court and its Justices. As Justice Aharon Barak of the Israeli Supreme Court has pointed out, public confidence rests on the belief that judges are acting *as* judges; and that belief in turn depends on judges who understand that judging “is a way of life that does not include the pursuit of material wealth or publicity.”³¹ Unseemly celebrity-seeking by Supreme Court Justices raises the suspicion that their actions are self-serving rather than evidence of a commitment to impartial judging and the rule of law.

Second, the seductiveness of fame indirectly changes the public’s view of the Court. It creates incentives for Justices to maintain and enhance their standing with their adoring (and ideologically polarized) followers and to create a lasting legacy both with and beyond their judicial opinions. In other words, they play to their fans. This attention-seeking leads them to author more separate opinions and write more intemperately, increasing both the number of opinions and at least the appearance of polarization. They write for their polarized base, not for lawyers or even the general public.

The media take notice, and, in translating the Court’s opinions for the public, highlight the negative and political aspects of the Court. Recent confirmation hearings and the public reactions to them are a prime example of both a cause and an effect of this perception of polarization. The perception also endangers the Court’s legitimacy, as Justice Kagan has recently pointed out.³² The danger to legitimacy is especially sharp when their outside activities telegraph their views on important constitutional questions, leading the public to believe that the Justices have prejudged the issues on the basis of their political views.³³ Eventually, as Stephen Burbank argues, the

that Justices spark can undermine public confidence in the Supreme Court.”); Posner, *supra* note 2, at 305 (concluding that “there are no consequences” to Justices’ increased celebrity); Hasen, *supra* note 13 (concluding that “cult-like worship can only make the assured even surer in their convictions”); Jeffrey Rosen, *Judicial Exposure*, N.Y. TIMES (Jan. 29, 2006), <https://www.nytimes.com/2006/01/29/books/review/judicial-exposure.html> [<https://perma.cc/QMC4-BRWg>] (stating that Justices courting celebrity status might “squander the sense of impersonal respect on which their legitimacy depends”). Most of the discussion of Justices as celebrities has occurred—where else?—online, in short pithy posts designed for maximum impact rather than careful exploration. *See, e.g.*, Hasen, *supra* note 13; Jonathan Turley, *Ruth Bader Ginsburg and the Problem of Celebrity Justices*, HILL (Sept. 2, 2018, 6:00 PM), <https://thehill.com/opinion/judiciary/404784-ruth-bader-ginsburg-and-the-problem-of-celebrity-justices> [<https://perma.cc/Z2LV-5ABB>].

31. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 110 (2006).

32. Sophie Tatum, *Justice Kagan Worries About the ‘Legitimacy’ of a Politically Divided Supreme Court*, CNN (Oct. 5, 2018, 10:06 PM), <https://www.cnn.com/2018/10/05/politics/supreme-court-elena-kagan-legitimacy/index.html> [<https://perma.cc/EgVF-92C6>] (“Part of the court’s legitimacy depends on people not seeing the court in the way that people see the rest of the governing structures of this country now. In other words, people thinking of the court as not politically divided in the same way, as not an extension of politics, but instead somehow above the fray.”).

33. For example, the autobiographies of Justices Sotomayor and Thomas are unequivocal about their personal views of affirmative action (in different directions). *See, e.g.*, THOMAS, *supra* note 23, at 54–57, 74–75 (criticizing affirmative action programs at Holy Cross and Yale Law School, his alma maters); SOTOMAYOR, *supra* note 23, at 145–47 (describing affirmative action at Princeton, her alma mater, as necessary but not sufficient); *id.* at 188–89 (describing her

public's diffuse support for the Court (that is, support independent of its particular decisions³⁴) will be replaced by support that depends on individual decisions, and "the people [will] ask of the judiciary not, 'What does the law require?' but rather, 'What have you done for me lately?'"³⁵ We are already seeing the beginning of this transformation in public reaction to individual Justices' decisions: Conservatives lambasted Justice Gorsuch as a traitor to the cause for upholding LGBTQ rights.³⁶

In short, when Justices play to their base, popular reactions to the Court and its decisions begin to resemble popular reactions to politics generally. People become what one political scientist has labeled "hooligans":

Hooligans are the rabid sports fans of politics. They have strong and largely fixed worldviews. They . . . consume political information, although in a biased way. They tend to seek out information that confirms their preexisting political opinions, but ignore, evade, and reject out of hand evidence that contradicts or disconfirms their preexisting opinions. . . . For them, belonging to the Democrats or Republicans, Labor or Tories, Social Democrats or Christian Democrats matter to their self-image in the same way being a Christian or Muslim matters to religious people's self-image. They tend to despise people who disagree with them, holding that people

defending affirmative action to a law-firm partner). Even a cursory perusal of Justice Scalia's speeches gives the reader his views on pretty much everything.

34. For a discussion of diffuse and specific support, see, for example, James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 204–05 (2014). The relationship between specific and diffuse legitimacy is contested. See, e.g., Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636 (1992) (arguing that specific policy disagreement does not directly diminish diffuse support); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 197 (2013) (arguing that specific policy disagreement does directly diminish diffuse support); see also BAUM, *supra* note 26, at 65 ("[W]e do not have a clear picture of . . . the impact of the Court's decisions on diffuse support for the Court.").

35. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 916 (2007).

36. The case is *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). For reactions, see, for example, Jeremy Stahl, *Conservative Activists and Pundits are Melting Down Over Gorsuch's Embrace of LGBTQ Rights*, SLATE (June 15, 2020, 2:04 PM), <https://slate.com/news-and-politics/2020/06/carrie-severino-meltdown-neil-gorsuch-lgbtq-rights.html> [<https://perma.cc/K7TC-HTFW>] (describing "activists [as] feeling betrayed" and including a tweet from a prior Gorsuch supporter calling him "an imposter"); Howard Kurtz, *Gorsuch Draws Personal Attacks for Breaking Ranks on Gay Rights*, FOX NEWS (June 17, 2020), <https://www.foxnews.com/media/gorsuch-draws-personal-attacks-for-breaking-ranks-on-gay-rights> [<https://perma.cc/E5QF-YJ7D>] (describing comments including accusations that Gorsuch was "appealing to college campuses and editorial boards"); Josh Hammer, *Neil Gorsuch Slapped Conservatives by Creating New Gay Rights*, N.Y. POST (June 15, 2020, 8:28 PM), <https://nypost.com/2020/06/15/neil-gorsuch-slapped-conservatives-by-creating-new-gay-rights> [<https://perma.cc/DMW8-49NZ>] (calling *Bostock* a "blow . . . delivered from the Federalist Society-vetted Neil Gorsuch"); and Hadley Arkes, *A Morally Empty Jurisprudence*, FIRST THINGS (June 17, 2020), <https://www.firstthings.com/web-exclusives/2020/06/a-morally-empty-jurisprudence> [<https://perma.cc/5WFM-5VRZ>] (calling Gorsuch's vote a "defection").

with alternative worldviews are stupid, evil, selfish, or at best, deeply misguided.³⁷

So some people “know” that an opinion written by Justice Scalia must be wrong and others believe the same thing if the opinion is written by Justice Ginsburg. Over the last decade, the number of Americans who could name at least one Supreme Court Justice has increased while the number who could name at least one Supreme Court case has decreased.³⁸ *Who* decides is more important than *what* they decide. Public consumption of the Supreme Court’s output begins to mirror public consumption of polarized news outlets: Republicans believe Fox News and Democrats believe NPR.³⁹ The Court becomes just another place where the home team, the good guys, battle against the evil other.

The lure of celebrity (and the resulting plethora of separate opinions) may also reduce decisional deliberation and compromise among the Justices themselves. John Ferejohn and Pasquale Pasquino have suggested that “internal and external deliberation are at least partly in conflict.”⁴⁰ To the extent that Justices are engaged in public debates (whether through their separate opinions or otherwise), they may be reluctant to engage in internal deliberation and unwilling to compromise.⁴¹

And when Justices aim their opinions directly at their zealous fans, it affects not only what they write and how they write it but whether they write at all. As an example of choosing to write in order to play to the base, consider *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation*.⁴² In this case the Supreme Court declined to review a state supreme court decision upholding, against First and Fourteenth Amendment challenges, a state law prohibiting historic preservation grants for religious buildings. Justice Kavanaugh, joined by Justices Alito and Gorsuch, issued a “statement . . . respecting the denial of certiorari.”⁴³ The statement reads like either a dissent from the denial or an opinion on the merits. It cites numerous precedents as creating and applying a “bedrock principle of religious equality,”⁴⁴ and analogizes the state law at issue to other state statutes previously invalidated. It suggests that deciding in favor of petitioners (against the state law) “should not be . . . difficult.”⁴⁵ And it closes by saying that the state law “raise[s] serious questions under this Court’s precedents and the

37. JASON BRENNAN, AGAINST DEMOCRACY 5 (2016). Brennan argues that about half of American citizens are hooligans. *Id.* at 24.

38. See GREEN & ROSENBLATT, *supra* note 29, at 6, 27.

39. See CASS R. SUNSTEIN, REPUBLIC.COM 2.0, at 52–53 (2007) (describing study).

40. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1698 (2004).

41. *Id.* at 1698, 1700.

42. *Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found.*, 139 S. Ct. 909, 910–11 (2019).

43. *Id.* at 909.

44. *Id.* at 910.

45. *Id.* at 911.

Constitution's fundamental guarantee of equality."⁴⁶ Less than a month later, Justice Kavanaugh cited his own "statement" in *Morris County Board* for the proposition that "[t]he government may not discriminate against religion generally or against particular religious denominations."⁴⁷

But Justices Kavanaugh, Alito, and Gorsuch in fact *agreed* that certiorari should be denied in *Morris County Board*, primarily because "the factual details" were not clear.⁴⁸ In that case, why write at all? A similar question can be asked about Justice Thomas' concurring opinion in *Box v. Planned Parenthood of Indiana and Kentucky*.⁴⁹ The Seventh Circuit had struck down two provisions of Indiana's law restricting abortion. A divided Court—with Justice Thomas in the majority—issued a per curiam opinion remanding one provision and denying certiorari on the other. Justice Thomas agreed with the cert denial on the ground that the Court should wait until other courts of appeals confronted the same issue (a ban on abortions sought for reasons of gender, race, or disability). He nevertheless wrote a 20-page opinion linking proponents of eugenics—especially its racist aspects—with the birth control movement of the early twentieth century, and then arguing that abortion is also a eugenicist tool. None of the opinion was relevant to what the Court, with Thomas' agreement, actually decided.

The most plausible answer to why these Justices spent time drafting irrelevant opinions is that they were both explaining to their political acolytes why this was not a betrayal despite appearances, and assuring those acolytes that the Justices will vote the right way when a case actually comes before the Court. They also seem to be encouraging their political compatriots to *bring* such a case to the Court. These excess opinions can read like breadcrumbs left as directions for future plaintiffs. The Court then becomes, more and more, just another political forum for partisan battles.

Achieving and maintaining celebrity status thus creates an insidious version of what was once dubbed the Greenhouse effect. In its original version, the Greenhouse effect—named after longtime New York Times Supreme Court reporter Linda Greenhouse—was said to cause Justices to drift leftward as they rubbed shoulders with, and emulated or sought approval from, Washington's liberal elite.⁵⁰ In today's version—call it the Hannity–Maddow effect—each Justice emulates or seeks the approval of his

46. *Id.*

47. *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring).

48. *Morris Cnty. Bd.*, 139 S. Ct. at 911.

49. *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring).

50. See DEVINS & BAUM, *supra* note 6, at 89–91; BAUM, *supra* note 26, at 139–55. The effect was probably mythical. Devins and Baum suggest that the "Greenhouse effect" writ large might have played some role but was unlikely to have been the only factor. DEVINS & BAUM, *supra* note 6, at 95–101. One study suggests that most Justices appointed between 1937 and 1993 drifted, some to the left and some to the right (and a few "in more exotic ways"). Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1504 (2007).

or her own ideologically-polarized in-group. Today's celebrity Justices are not drifting; they are firmly anchored at opposite ends of the political spectrum. And part of what keeps them anchored is the adulation from the base, as they dig in their heels to prove their loyalty and steadfastness.

The effects I am describing are a form of—or at least analogous to—group polarization. To the extent that the Justices' social identities are predicated on being members of particular groups, their views are likely to become both more polarized and more extreme as a way of differentiating themselves from other groups.⁵¹ Or, as Cass Sunstein puts it, “[w]hen people find themselves in groups of like-minded types, they are especially likely to move to extremes.”⁵² When Justices seek, and find, celebrity status among a polarized fan base, they are essentially increasing the extent to which they interact with like-minded groups (and concomitantly decreasing the extent to which they interact with others). They effectively “sort themselves into enclaves in which their own views and commitments are constantly reaffirmed.”⁵³

Judicial polarization becomes a larger problem when coupled with the modern trend of declining institutional loyalty (and the concomitant increased emphasis on individual reputation instead).⁵⁴ Justices seeking to enhance their own reputations ignore the potential effect on the institutional legitimacy and reputation of the Court. They overinvest in their individual reputations at the expense of the reputation of the judiciary as a whole. The effect on the Court is more detrimental the more that individual reputations are dependent on the approval of divergent groups with little or nothing in common. The result is a Court even more dysfunctional than most critics realize.

Celebrity status is certainly not the only cause of the current dysfunctions, but it exacerbates them and creates exactly the wrong incentive structure. Justices have little or no incentive to collaborate or cooperate. Compromise is off the table because while it enhances the institutional reputation of the Court, it weakens the individual reputations of the Justices. Celebrity status makes it in the best interests of all the Justices to act like independent contractors competing for business by advertising the purity of their brand. Dysfunctionality is inevitable when Justices care more about themselves than

51. See, e.g., CHARLES STANGOR, *PRINCIPLES OF SOCIAL PSYCHOLOGY* 487–90 (1st Int'l ed. 2011); SUNSTEIN, *supra* note 39, at 231 n.19.

52. CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* 2 (2009) (emphasis omitted).

53. SUNSTEIN, *supra* note 39, at xii.

54. This phenomenon is not limited to the judiciary. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 443 (2012) (“party affiliation” is a much better prediction of policy stance than is “institutional identity”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323 (2006) (government officials are motivated by “partisan goals” and “indifferent to the powers and interests of the branches”); David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 4 (2018) (“[P]artisan and ideological loyalty often eclipse institutional loyalty . . .”).

about the Court as an institution. 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. The next Part turns to possible solutions.

III. HOW DO WE FIX IT?

Many scholars have offered proposals to repair the broken Court. Before I turn to my own suggestion, I should explain why these other proposals are insufficient. The most common reason is that they are aimed at solving only part of the problem. None would have any effect on celebrity status or change the Justices' attention-seeking incentives, and are unlikely—for that reason as well as others—to solve the Court's dysfunctions.

First, however, I must consider the possibility that no external solution is needed. One response to the Court's "crisis of legitimacy" is that because the problem is of the Justices' making, they should be the ones to fix it. A number of commentators have suggested that one or more Justices should "moderate" their views, voting contrary to their true positions in order to make the Court's decisions seem less polarized and more palatable to a majority of citizens.⁵⁵ They often point to purported historical examples of Justices doing just that, from Justice Owen Roberts' "switch in time"⁵⁶ to Chief Justice John Roberts' vote in *NFIB v. Sebelius*.⁵⁷ A slightly different version of that approach is the *Screws* rule, named after a case in which Justice Rutledge voted contrary to his own legal views in order to avoid having a case without any majority judgment at all.⁵⁸ But, as Tara Leigh Grove has pointed out, voting contrary to one's belief about what the law requires is "deeply troubling" because it is inconsistent with our norms of adjudication and thus lacks what Richard Fallon has labeled "legal legitimacy."⁵⁹ Moreover, we cannot expect Justices to deviate from their current individual preferences for a highly speculative

55. See Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2243 n.16 (2019) (reviewing FALLON, *supra* note 9).

56. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3–5 (1998) (describing and critiquing the idea that Roberts changed his vote for political reasons).

57. See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (upholding the individual mandate provision of the Affordable Care Act under the taxing power while limiting the reach of Congress' Commerce Clause power and striking down the Medicaid expansion provision). For skepticism about whether these are in fact examples of Justices voting contrary to their own views, see Grove, *supra* note 55, at 2255.

58. See *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring). For a discussion of other Justices' similar votes, see Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1998–2000 (2019).

59. Grove, *supra* note 55, at 2262–63 (following FALLON, *supra* note 9, at 165). See generally Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008) (defending judicial duty of "sincerity" or "truth-telling"). Re defends the use of the *Screws* rule against such a charge on the ground that it "applies only . . . when a Justice believes that she can more fully or reliably achieve outcomes consistent with her own legal views by voting against those views." Re, *supra* note 58, at 1999.

future collective benefit⁶⁰—especially Justices driven by aspirations of celebrity. We therefore must look outside the Court for solutions.

A. OTHER SCHOLARS' SOLUTIONS

The most common suggestion is term limits for Supreme Court Justices.⁶¹ Proponents suggest that by giving every president an equal opportunity to name Supreme Court Justices, term limits would reduce the stakes of confirmation hearings and make compromise more likely. That might be true, but it might also cause presidents to choose the most extreme nominees they can find in order to maximize the extent of their influence. It might also mean that the Supreme Court becomes an issue for *every* presidential election, further politicizing the process.⁶² In addition, one study suggests that term limits would increase doctrinal instability.⁶³ Most important, however, is that imposing term limits would not change the incentives of the Justices themselves to seek approval from their ideologically homogeneous fan base and thus would not reduce any of the problems I have identified (other than, possibly, the confirmation mess). Indeed, a term-limited Justice might instead try to make the most of his or her short time in office by courting favor even more assiduously—especially if he or she might want a post-retirement

60. See BAUM, *supra* note 26, at 65–66.

61. See, e.g., ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 310–12 (2014); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 123–39 (2006); *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 127 (Roger C. Cramton & Paul D. Carrington eds., 2006); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771–76 (2006); James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1094–98 (2004). The proposal apparently has broad bipartisan public support. See STAN GREENBERG, JAMES CARVILLE, ERICA SEIFERT, ANDREW BAUMANN & JAMES HAZZARD, *DEMOCRACY CORPS, BROAD BI-PARTISAN CONSENSUS SUPPORTS REFORMS TO SUPREME COURT: AMERICANS VIEW COURT AS TOO POLITICAL* 1, 3 (2014), <https://democracycorps.com/wp-content/uploads/2014/05/DCorpsSCOTUS-Memo-FINAL-050614.pdf> [<https://perma.cc/P43T-YJEX>]. Thomas Jefferson actually first proposed term limits back in 1822 after concluding that life tenure was inconsistent with the American republic. Letter from Thomas Jefferson to William T. Barry (July 2, 1822), in 7 *THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE* 255, 256 (H.A. Washington ed., 1854).

62. For support for the conclusion that term limits would increase rather than decrease the contentiousness of the appointment process (and would consequently undermine the Supreme Court's legitimacy), see Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1542–44 (2006). As Devins and Baum point out, changes in the role of ideology in the appointments process also means that “presidential elections will become even more important for the Court than they have been throughout American history.” DEVINS & BAUM, *supra* note 6, at 156; see also Charles M. Cameron, Jonathan P. Kastellec & Lauren A. Mattioli, *Presidential Selection of Supreme Court Nominees: The Characteristics Approach*, 1, 2 (July 18, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216757 [<https://perma.cc/DTQ9-W74Y>] (suggesting that it is easier now than in the past for presidents to find “ideologically reliable candidates”).

63. See generally Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade's Whiplash*, 98 TEX. L. REV. 121 (2019) (using computer simulations to model judicial voting on abortion rights after 1973 under a hypothetical regime of 18-year term limits).

position at a political or quasi-political entity.⁶⁴ In short, imposing term limits would undercut the very real benefits of lifetime tenure for judges: Judges without life tenure are less likely to act independently of the political branches or of public opinion, as both the Founding generation and modern scholars have recognized.⁶⁵ Term-limited Justices would not as effectively serve their primary function in our constitutional democracy: to hold the tyranny of the majority in check.

Another possibility is to reinstate circuit riding by Justices, which I suggested more than a decade ago and others have proposed subsequently.⁶⁶ That might help if, as I once thought, the primary cause of Supreme Court dysfunction was that the Justices thought of themselves as constitutional demigods: Exposing them to a broader range of legal questions might disabuse them of that misapprehension. Unfortunately, the problem is broader and deeper, reflecting not only the Justices' own views of their exalted status but also their stardom. Forcing them to ride circuit might take them down a peg, but it would not reduce their incentive to seek adulation from their base.⁶⁷ Again, it might even increase it as they chafe against sharing the obligations of mere ordinary judges. Or riding circuit might give them even more of an opportunity to be seen, heard, and adored.

One partial solution might be to change the confirmation process by imposing a supermajority requirement for confirmation. That might yield

64. See GAROUPA & GINSBURG, *supra* note 27, at 40 (suggesting that “private sector opportunities after retirement” lead to “branding” attempts by judges).

65. See, e.g., THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (E.H. Scott ed., 1902) (explaining life tenure for judges is “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws”); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495 (Merrill Jensen ed., 1976) (“The servile dependence of the judges . . . has happened [when their] appointment has been for a less period than during good behavior . . . for if every five or seven years, the judges are obliged to make court for a reappointment to office, they cannot be styled independent.”); Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 853 (2012) (“[I]f the judge has life tenure, it is thought that the judge will feel free to enforce constitutional restrictions on public preferences. [But] if the judge has to come before the public or even elected officials periodically, it is thought that the judge may not feel so free.”); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 624–25 (2001) (“[T]he judicial power is vested in the judiciary because its decisionmakers have protections that assure their independence—lifetime tenure and salary.”). See generally Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965 (2007) (defending lifetime tenure as a necessary safeguard of judicial independence).

66. Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 986 (2005) [hereinafter Sherry, *Politics*]; DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 120 (2009); see also Lerner & Lund, *supra* note 30, at 1295–99.

67. The same might be said of enlarging the Court’s mandatory jurisdiction, which I and others have also suggested. See sources cited *supra* note 66; Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 731 & n.172 (2018); Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1323 n.74 (2010); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 591 (2009).

more centrist judges and reduce polarization on the Court,⁶⁸ but unless it eliminated ideological diversity altogether it would not change the Justices' incentives. And given the Senate's recent elimination of the filibuster for judicial appointments,⁶⁹ a supermajority requirement seems highly unlikely to be adopted.

Finally, no one has suggested the most directly responsive approach: Stop the Justices from speaking, writing books, or otherwise communicating other than through their published opinions. Of course, the First Amendment forecloses that option.

Other scholars have made suggestions that are designed to solve *different* problems, and thus are unlikely to have any effect on the problems I have identified. For example, some scholars have suggested imposing a supermajority requirement before the Supreme Court invalidates an act of Congress.⁷⁰ This suggestion, however, is primarily offered in response to a perception of too much "judicial activism," and "activism" is not the problem.⁷¹ Requiring a supermajority might reduce the number of federal laws struck down as unconstitutional, but it would not change the Justices' politically-polarized behavior.

Some commentators are resurrecting the possibility of Court-packing if the Democrats win back Congress and the presidency, this time to solve the perceived problem of an overly conservative Court.⁷² The problem with this suggestion, of course, is that it has a political valence and for that reason would inevitably lead to escalating retaliation the next time the government changes hands. It would also play directly into the public perception of the Court as just another political institution, vulnerable to the usual political manipulation.

Daniel Epps and Ganesh Sitaraman have recently made two truly novel proposals.⁷³ The first is to appoint all court of appeals judges as Supreme Court Justices and then have random panels of nine sit as the Supreme Court for two weeks at a time.⁷⁴ The second is to create a politically balanced Supreme Court by making five Democratic Justices and five Republican

68. See, e.g., Ferejohn & Pasquino, *supra* note 40, at 1702–03. See generally John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543 (2005) (describing likely consequences of adopting such a rule).

69. For a description of the two-part (and two-party) elimination of the filibuster, with Democrats eliminating it for lower-court appointments in 2013 and Republicans eliminating it for Supreme Court nominees in 2017, see Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 105–09 (2017).

70. See, e.g., Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 951 (2003). One scholar makes a similar suggestion about overturning precedent. See Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1175 (2015).

71. See Suzanna Sherry, *Why We Need More Judicial Activism*, in CONSTITUTIONALISM, EXECUTIVE POWER, AND THE SPIRIT OF MODERATION 11, 11–12 (Giorgi Areshidze, Paul O. Carrese & Suzanna Sherry eds., 2016).

72. See Sitaraman & Epps, *supra* note 12, at 164 n.64.

73. *Id.* at 181–202.

74. *Id.* at 181.

Justices agree (unanimously) on five additional Justices, chosen from among sitting lower-court judges, to sit for a year at a time—under pain of lacking a quorum if they cannot agree on the five new judges.⁷⁵ These proposals are unlikely to reduce either polarization or attention-seeking by Justices, but will simply create balance between the polarized extremes. The failure to address polarization (or attention-seeking) is unsurprising: The authors are essentially proposing a second-best approach to solving a different problem. The problem, according to Epps and Sitaraman, is a nomination process “in which the Court has become a political football, and in which each nominee can be expected to predictably vote along ideological lines.”⁷⁶ In particular, they are worried about the damage to the Court “by clashes between the conservative majority and progressive politicians, if and when Democrats regain power.”⁷⁷ Thus, they see the problem as arising primarily from a broken nomination process that has produced a conservative Court. And because they see no way to fix the nomination process, they instead try to fix the conservative Court. Not only is this a second-best solution, it is also avowedly partisan. It is also likely to wreak havoc on stability and predictability: In the first scenario, multiple panels would have little reason to respect the opinions of prior panels, reducing the stabilizing effect of *stare decisis*; in the second, there is a strong possibility that the Court would lack a quorum and be unable to decide anything at all, leaving circuit splits on crucial issues.

B. MY SOLUTION

The problem with all these proposals is that their authors have either incorrectly diagnosed the Court’s dysfunctional aspects or overlooked celebrity status as one important cause of the dysfunctionality. And the only way to reduce the Justices’ grasping for celebrity is to place it out of reach. To do that, we have to make it impossible for them to use their official authority to enhance their own reputations. Taking away the opportunity for them to write opinions playing to their base removes their primary tool for, and reduces the efficacy of, extracurricular attention-seeking.

Congress should enact the following into law: For each case, the Court must issue one, and only one, per curiam opinion. No attributions, no concurrences or dissents permitted. No one outside the Supreme Court would know who wrote the opinion or whether the vote was unanimous, five to four, or anything in between. If five Justices cannot reach agreement on an opinion, the Court should issue a boilerplate opinion similar to the ones issued now when the Court is evenly divided: noting that the decision below is affirmed or reversed (depending on which way the vote goes) but that the Court cannot agree on the reasons why.⁷⁸

75. *Id.* at 193.

76. *Id.* at 152.

77. *Id.*

78. If there is more than one issue in the case, each issue can be treated separately; the per curiam opinion might, for example, analyze one issue but declare that no majority opinion could be written regarding a second issue. My proposal would also require changes in how opinions

1. The Practical Benefits of Single Unsigned Opinions

Such a law would have a number of salutary effects on the current dysfunctions. One probable result would be enhanced authority and legitimacy of the Court in the eyes of the public. By speaking with one voice, the Court increases its authority as an institution, as both John Marshall and Earl Warren recognized.⁷⁹ As Judge Learned Hand put it, “disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”⁸⁰ Thomas Jefferson also recognized the power of a unitary voice: Seeking to diminish the Court’s—and Marshall’s—power, he advocated a return to the English tradition of seriatim opinions.⁸¹ More recently, Chief Justice Roberts has suggested that “closely divided, 5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.”⁸² Public opinion polls bear this out. One poll found that people are more likely to agree with and accept unanimous decisions than divided rulings, even when they are ideologically predisposed against the result,⁸³ while another found that a majority of Americans believe that a 5–4 decision carries less precedential weight than a unanimous one.⁸⁴ Even lower courts are less likely to comply with a majority opinion if there is also a concurring opinion that criticizes the majority opinion.⁸⁵ Decisions that include a concurring opinion are also more likely to

are announced from the bench; the Court could make clear that the Justice announcing the judgment and reading excerpts from the opinion is not necessarily the Justice who wrote it. The early Chief Justices apparently announced opinions that they did not author (and might not have agreed with). See G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1467–69, 1474 (2006).

79. See JOHN V. ORTH, HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? 34–37, 51 (2006) (Marshall, and univocal opinions generally); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 89–90, 105–06, 305 (1983) (Warren and the importance of a single opinion in segregation cases); RICHARD KLUGER, SIMPLE JUSTICE 679, 683 (1976) (same); see also SALAMONE, *supra* note 7, at 46–50 (describing concerns of these and other Justices about the effect of Court divisions on public perception).

80. LEARNED HAND, THE BILL OF RIGHTS 72 (1958).

81. ORTH, *supra* note 79, at 35–36 & n.43; see also Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 787–88 (2015) (providing Thomas Jefferson’s views).

82. Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC (Jan./Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559> [<https://perma.cc/W33C-EWG2>].

83. James R. Zink, James F. Spriggs II & John T. Scott, *Courting the Public: The Influence of Decision Attributes on Individuals’ Views of Court Opinions*, 71 J. POLITICS 909, 923 (2009).

84. Jamieson & Hennessy, *supra* note 8, at 900; see *infra* note 87 and accompanying text. But see SALAMONE, *supra* note 7, at 117–50 (noting that the level of division has no negative effect and may have a positive effect on public acceptance); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 197 (2005) (stating that the level of division has no effect on public acceptance).

85. PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 73, 84–86 (2010); see also Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smecler, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 853–58 (2018) (noting that lower court judges often rely on such concurrences even though they are not supposed to have precedential effect).

be overruled by the Supreme Court itself.⁸⁶ And making the unitary voice anonymous and hiding the number of Justices who agree with it magnifies the perception of the Court as an institution rather than as a collection of individuals. Finally, without attribution, concurrences, or dissents—or even a vote count—the media and the public would be less likely to disparage particular decisions as political or ideological.⁸⁷ It would no longer be possible to dismiss an opinion out of hand just because it was written by a member of the “wrong” side—no one would know who wrote it. Just as the presence of dissenting opinions makes it more likely that Congress will override a statutory ruling by the Court,⁸⁸ dissensus draws the negative attention of the media and the public; eliminating it might reduce that negative attention.

More important for my purposes, limiting the Court to a single unsigned opinion would have an effect on the Justices’ views of their roles, their opportunities to embellish their reputations, and their incentives. The link between how Justices view their roles and opinion-writing norms is complex. But one scholar has marshalled the historical record of separate opinions to suggest that beginning in the late Taney era, Justices began to think of the Court as atomistic rather than unified.⁸⁹ This spurred a change in separate opinions: Although they remained rare until the 1940s, the *reasons* Justices gave for writing separately changed. Earlier separate opinions stressed the importance of the case; later ones focused on individual Justices “defending their own judicial records” by refusing to be associated with the majority opinion.⁹⁰ Similarly, another commentator has suggested that repeated dissents on the same issue represent a Justice’s “elevating his individual jurisprudence (and perhaps individual legacy?)” over “coherence in the Court’s doctrine.”⁹¹ It follows that limiting the ability to write separately might diminish concern for individual reputation and reinvigorate the notion of a unified rather than atomistic Court.

More practically, prohibiting attribution and separate opinions would drastically reduce the opportunity for Justices to play to their bases. They would not be able to use concurrences or dissents to signal their intentions for the next case, snipe at their colleagues, or otherwise fly their liberal or conservative colors. They could, of course, continue to do so off the bench,

86. See FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* 68 (2000).

87. See MICHAEL A. ZILIS, *THE LIMITS OF LEGITIMACY: DISSIDENT OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS* 25 (2015) (noting that media coverage is more negative when the Court is divided); SALAMONE, *supra* note 7, at 66–116, 148–49 (stating that media coverage of divided decisions is more likely to use ideological or political language).

88. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 349–51 (1991).

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

90. *Id.* at 153; see also *id.* at 157–58 (examples from the Taney Court); *id.* at 166–70 (examples from 1864–1940).

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

but remarks in unofficial outlets are less notable and carry less weight. Off-the-bench arguments are also more remote in time and space from the Court's opinion, reducing their efficacy and thus perhaps their frequency.

Reducing the Justices' opportunity to write for their fans is essentially a way to try to break down what David Fontana and Aziz Huq have called "cross-institutional [social] networks" in order to generate or reinforce institutional loyalties.⁹² The ideologically polarized fan bases that confer celebrity status on the Justices have at least partially displaced earlier judicial social networks, including lawyers, law professors, journalists covering the Court, and colleagues on the Supreme Court and other courts. Those earlier networks were more likely to value judicial craftsmanship and impartiality over partisan decision-making.⁹³ Fred Schauer has suggested that beginning about 1980, "law school culture and legal scholarship" slowly began to value substantive results over legal craftsmanship.⁹⁴ I suggest that (much later than 1980), the Justices themselves began to change insofar as they no longer sought to impress the traditional, and non-partisan, constituencies. Either way, disrupting the social networks that encourage bad judicial behavior is one possible way to change that behavior.

Requiring a single per curiam opinion is also likely to reduce the number of cases without a majority opinion at all. A Justice who agrees with the result but not the reasoning would have less individual incentive to demur from joining the putative Court opinion, and more institutional incentive to join. Conversely, the Justice writing the opinion for the Court will have an incentive to write it in such a way as to attract at least four others. For both the writing Justice and the putatively concurring Justice, the alternatives are much more unattractive than they are currently. My proposal would also alter the incentives of a writing Justice who already has at least five votes for the result, because he or she would have to be more attentive to other Justices' suggestions lest they defect from the *opinion* even if they are willing to go along with the *result*. And those other Justices would also be more insistent that their own views be included in the Court's per curiam opinion, because they would not have a good alternative method of expression.

My proposal would likely also reduce the overall number of cases without a majority opinion. Under the current regime, a case without a majority

92. Fontana & Huq, *supra* note 54, at 59–60. They go on to suggest that the Court's current social network "of commentators, think tanks, scholars, and lawyers, largely located inside the Beltway" in fact fosters institutional loyalty. *Id.* at 63–64. This overlooks the entire problem that I identify in this Article: For many of the Justices, their social network is not that group, or at least not all of it—their social network is their fan base. Daryl Levinson makes a similar mistake when he suggests that judges are unlikely to engage in "empire-building" because whatever a judge does it "will win [her] prestige among some segments of the bar, legal academy, and public, but cost her prestige among others." Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 963 (2005). For today's celebrity-seeking Justices, only particular segments matter.

93. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629–30, 630 n.65 (2000).

94. *Id.*

opinion is confusing to law students (and lower courts!⁹⁵) but otherwise it looks pretty much like the ordinary output of the Court. A one-sentence per curiam stating only the result and that the Court could not reach agreement, however, is an obvious outlier; too many of them might be embarrassing to the Court and the Justices. And even if we ended up with the same number of no-majority opinions as we have now, it might be easier on lower courts: Rather than having to divine the meaning of a fractured decision, they would act as they always do in the absence of a Supreme Court ruling, making and following circuit precedent until and unless the Supreme Court issues a ruling.

Finally, we might expect more compromise and collaboration among the Justices. When a deliberative body must produce a unified written product, each member has an incentive to persuade rather than command the other members.⁹⁶ As Richard Re has pointed out in suggesting that a case without a majority opinion should not be considered precedential for any purpose, requiring a majority ruling “offers an attractive way to encourage the Justices to form beneficial precedents through compromise.”⁹⁷ Log-rolling (in the relatively narrow sense of going along even if one is not completely satisfied with the opinion, expecting the favor to be returned), careful editing of opinions, and even jointly-authored opinions are more likely if no Justice has the option of going it alone. Anonymity might also “facilitate internal deliberative practices by making members amenable to compromise and mutual persuasion.”⁹⁸

2. Single Opinions and Judicial Minimalism

On a more abstract level, my proposal addresses—and eases—the tension between minimalist opinions and opinions that provide guidance to lower courts and other law-constrained officials (and thus increase certainty in the

95. The Court currently directs lower courts to rely on the “narrowest” opinion if there is no majority opinion. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). The *Marks* rule is easy to state but devilishly difficult to apply. See generally Williams, *supra* note 4 (describing the current chaos surrounding plurality opinions); Re, *supra* note 58 (criticizing *Marks*). Examples abound. In considering one recent no-majority case on the *Erie* doctrine, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), some lower courts follow the plurality opinion. See, e.g., *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 83 (2d Cir. 2013). Others follow a concurring opinion by a single Justice. See, e.g., *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1217 (10th Cir. 2011). One court has concluded that *none* of the opinions is controlling. *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1336–37 (D.C. Cir. 2015); see also Re, *supra* note 58, at 1944–45 (describing lower court treatment of *Freeman v. United States*, 564 U.S. 522 (2011), in which “the Court’s least popular view became law” of most circuits under the *Marks* rule).

96. I consider later, *infra* notes 231–33 and accompanying text, whether my approach could backfire on a polarized Court, with the majority simply running roughshod over the minority in the absence of dissenting opinions calling the majority to account.

97. Re, *supra* note 58, at 1972.

98. Ferejohn & Pasquino, *supra* note 40, at 1695.

law).⁹⁹ Minimalist opinions are narrow rather than broad, deciding only the issue before the Court. They are also shallow rather than deep, reflecting “incompletely theorized agreements” among Justices who cannot reach consensus on the deeper philosophical and jurisprudential questions lurking under the surface of the particular dispute.¹⁰⁰ But minimalist opinions provide less guidance to lower courts, a major function of Supreme Court opinions.¹⁰¹ Indeed, one scholar lists the obligation of “establishing law that gives reasonably clear guidance for the future” as one of only seven uncontroversial rules of recognition that define legitimate Supreme Court practice.¹⁰²

It is superficially easy to conclude that prohibiting concurrences (and, to a lesser extent, dissents) might yield more minimalist opinions for the Court, as Justices seek to write opinions that persuade a majority of the Court to sign on to the opinion and not just to endorse the result. This might then provide less guidance, and less certainty. As Fred Schauer puts it, “[t]o adopt the course of minimalism . . . is to adopt the course of nonguidance.”¹⁰³ Cass Sunstein, who first championed minimalism, has more recently backed away from it, in part because minimalism reduces certainty.¹⁰⁴ He therefore finds the increase in multiple opinions largely untroubling because it provides more benefits than costs.¹⁰⁵ He recognizes, however, “that for those who favor minimalism, there is a plausible instrumental argument in favor of a norm of consensus.”¹⁰⁶

But the link between prohibiting multiple opinions and generating minimalist opinions is not as tight as it might seem. First, as Schauer has pointed out, the current Supreme Court frequently fails to give guidance despite the multiplicity of opinions.¹⁰⁷ A Justice’s currently credible threat to withhold his or her endorsement of the majority opinion is likely to lead to “muddled explanations and fragmented majorities,” neither of which gives much guidance to lower courts.¹⁰⁸ And although the lack of guidance under

99. For discussions of this tension, see, for example, Sunstein, *supra* note 81, at 812–14; and Schauer, *supra* note 4, at 207–08.

100. See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

101. See, e.g., Schauer, *supra* note 4, at 206–10; Schauer, *supra* note 2, at 1469–71; Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the Judicial Power*, 80 B.U. L. REV. 967, 997 (2000); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807–09 (1982).

102. FALLON, *supra* note 9, at 99–100.

103. Schauer, *supra* note 4, at 228.

104. Sunstein, *supra* note 81, at 814. One also suspects that his list of the cases that would have been decided more narrowly under a minimalist approach—all of which are liberal—might have influenced his change of heart.

105. *Id.* at 815, 816.

106. *Id.* at 814.

107. Schauer, *supra* note 4, at 231.

108. Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 371 (2008).

the current regime does not rule out the possibility that single opinions would give even less guidance, two aspects of my proposal reduce the tendency toward minimalism. The fact that no one will know how many Justices' views are represented by the majority opinion means that the Court can still issue wide and deep opinions as long as five Justices agree. By banning both multiple opinions *and* vote counts, my proposal also removes a current disincentive cutting against maximalist opinions: The broader the opinion, the more likely there are to be dissents and concurrences and the broader the target for those dissenting and concurring Justices. Thus the proposal pulls in both directions. Additionally, my insistence on anonymity and the concomitant inability to play to one's base might allow (or force) Justices to focus more on providing guidance to the lower courts and less on speaking to "[t]hose who have the ability to make or break judicial reputations," including law professors and journalists.¹⁰⁹

In short, anonymity, silence about the Justices' votes, and a ban on multiple opinions work together to provide incentives for the Justices to reach consensus on an opinion that is just maximalist enough to provide guidance.

And if the proposal works as expected, the Justices should eventually view themselves as intended—more as part of an institution and less as individual actors. As this view of their role sharpens and hardens, they will seek to protect the Court as an institution. One danger to the institution is the possibility that lower courts will exploit ambiguity or gaps in Supreme Court opinions to undermine the Court's holdings in various ways.¹¹⁰ The Justices will therefore have an incentive to reach broader or deeper agreement that can be reflected in the per curiam opinion: Maximalist and more thoroughly reasoned opinions provide at least a partial safeguard against lower-court perfidy.¹¹¹ Thus even if my proposal produces overly minimalist opinions to start, the institutional changes that it sets in motion should eventually lead to an optimal balance between minimalist and maximalist opinions.

The choice between minimalism and guidance is closely related to another dichotomy that my proposal bridges. A number of scholars have compared the American judicial practices with those of civil-law countries, especially France.¹¹² In the latter, most courts produce a single opinion that

109. Schauer, *supra* note 4, at 234; *see also* Brian T. Fitzpatrick & Paulson K. Varghese, *Scalia in the Casebooks*, 84 U. CHI. L. REV. 2231, 2232–33 (2017) (measuring Justices' influence by how often their opinions appear in casebooks).

110. *See* CORLEY, *supra* note 85, at 73, and sources cited therein; *see also* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO L.J. 1, 48–49 (2010) (“By sending confusing messages, the Justices run the risk of losing control over the direction of the law altogether.”).

111. *Cf.* Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 628 (2020) (“Understanding the reasons behind a decision helps government officials execute it in a manner consistent with the decision-maker’s goals.”).

112. *See generally* MITCHEL DE S.-O.-L’E LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2004) (comparing U.S. law with the Court of Cassation in France); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015) (examining judges’ reasons in the United States and Europe). I give a simplified and generalized description of the French judicial

describes the facts, restates the statutory law, and reaches a one-sentence conclusion; there is little or no reasoning. The opinion need not contain much guidance, because it has no precedential effect—neither the issuing court nor lower courts are bound by the decision beyond the narrow effect on the parties themselves.¹¹³ As one scholar has suggested, the difference between the French and American regimes lies in how much transparency is expected of courts (which, in France, is very little).¹¹⁴ And the reason for the difference, he suggests, is that in the United States, judicial legitimacy is grounded in the judges’ “(public) argumentation,” while in France it is grounded “in the expertise and quality of its judicial institutions.”¹¹⁵ My proposal incorporates the best of both worlds by allowing—indeed expecting—careful reasoning in support of the result but still requiring the institution of the Court to speak with one voice. Mandating a single opinion makes the reasons for the result transparent even if the process by which that decision is reached is somewhat less transparent.¹¹⁶ My proposal thus maintains enough transparency to allow the public to judge the legitimacy of judicial decisions while lessening the current deleterious impact of multiple opinions.

3. Partial Measures Won’t Work

Notice that all parts of my proposed law are necessary to accomplish these goals. Adopting only anonymity without limiting separate opinions is likely to fail for several reasons.¹¹⁷ First, public perception of the Court as polarized and political will remain unchanged. Even without names attached, different opinions coming from the same case will contain reasoning that marks them as the “conservative” or “liberal” argument. More important, anonymity alone does nothing to reduce the Justices’ ability or incentive to play to their bases. It would be all too easy for a Justice to hide hints to his or her identity within the opinion, and all too tempting for the media and law professors to play a

regime, which contains both some exceptions to the lack of binding precedent and a separate system of academic commentary on decisions (“notes d’arrêts”) that plays a role similar to that of American judicial opinions. See EVA STEINER, *FRENCH LEGAL METHOD* 82–91, 179–85 (2002).

113. This rejection of both binding precedent and *stare decisis* applies to the decisions of all lower courts and two of the highest courts, the Court of Cassation and the Conseil d’État, but not to the decisions of the Conseil Constitutionnel. STEINER, *supra* note 112, at 79–80.

114. LASSER, *supra* note 112, at 300.

115. *Id.* at vii. Other scholars have made similar points, suggesting that individual reputation matters more in “recognition” judiciaries like the United States (which tend to be common law) than in “career” judiciaries like France and Japan (which tend to be civil law). See GAROUPA & GINSBURG, *supra* note 27, at 18–19, 29–30, 44–48.

116. I discuss in Section III.B.1 questions about whether separate opinions, reflecting a more transparent deliberative process, are necessary to legitimize the Court’s decisions.

117. A handful of commentators have suggested that opinions should be issued anonymously, including concurring and dissenting opinions. Lerner & Lund, *supra* note 30, at 1260; Peter Bozzo, Note, *The Jurisprudence of “As Though”: Democratic Dialogue and the Signed Supreme Court Opinion*, 26 YALE J.L. & HUMANS 269, 300 (2014) (not actually endorsing unsigned opinions but urging Justices to write “as if they were issuing unsigned opinions”); James Markham, Note, *Against Individually Signed Opinions*, 56 DUKE L.J. 923, 927 (2006).

game of “guess who.”¹¹⁸ Indeed, anonymity might *increase* the incentive to write politicized opinions: Lacking a straightforward method of identifying themselves for reputational purposes, the Justices would have to work harder to make themselves identifiable to their target audiences. Finally, permitting concurrences and dissents means that Justices still have no incentive to join the majority opinion, and thus there would be no reduction in the number of cases lacking a majority opinion at all.

Similarly, merely disclosing vote counts (even in the absence of additional opinions) would dilute the power of the institution, lead to negative publicity, and generate more guessing games. John Marshall knew this, and his early opinions for the Court usually gave no clue as to how many Justices joined.¹¹⁹ And prohibiting multiple opinions (with or without disclosing the vote count) but identifying the author of the opinion for the Court still allows that author to play to his or her base. Stifling the other Justices might diminish the problem somewhat, but it might also cause internal strife as Justices jockey to be the author of the Court’s opinion in high-profile cases.¹²⁰ If the Court’s opinion is unattributed, authorship is less important.

Skeptics might argue—citing Marshall as an example—that even if something like my proposal would be good for the Court, we do not need *Congress* to legislate it. The Court once valued consensus (and obscurity rather than notoriety), and it could do so again. Ideological diversity on the Court is not a barrier; the earlier norm of consensus manifested itself in public unanimity despite private disagreement, as potentially dissenting Justices engaged in silent acquiescence.¹²¹ Even as late as the early twentieth century, Chief Justice Taft endorsed the norm of silent acquiescence: “I don’t approve of dissentings generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent”¹²²

118. And the game would be made easier by developments in artificial intelligence (“AI”). In France, where (as noted earlier) the court produces a single signed opinion, researchers began using AI to try to identify judges through their linguistic patterns. They were successful enough that France criminalized the activity. See *France Bans Judge Analytics, 5 Years in Prison for Rule Breakers*, ARTIFICIAL LAW. (June 4, 2019), <https://www.artificiallawyer.com/2019/06/04/france-bans-judge-analytics-5-years-in-prison-for-rule-breakers> [<https://perma.cc/9PKC-XS29>].

119. See 3–4 G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815–35, at 187–88 (1988).

120. The current norm (although not formally required) is to equalize the number of majority opinions assigned to each Justice.

121. See Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 364 (2001); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1331–38, 1340–44 (2001); see also Sunstein, *supra* note 81, at 786–87 (discussing Chief Justice Marshall’s desire of public unanimity and dislike of dissents).

122. David M. O’Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 91, 93 (Cornell W. Clayton & Howard Gillman eds., 1999).

But changing the Court from within has been tried, and it has failed. After the sharp rise in separate opinions during the Chief Justiceship of Harlan Fiske Stone,¹²³ President Truman chose Fred Vinson to replace Stone in large part to try to return to the prior norm of consensus.¹²⁴ It failed, and the Vinson Court “was perhaps the most severely fractured Court in history,”¹²⁵ earning the sobriquet “nine scorpions in a bottle.”¹²⁶ Six decades later, Chief Justice John Roberts espoused the same goal of re-establishing a norm of consensus. In an interview at the end of his first year as Chief, Roberts said

he would make it his priority, as Marshall did, to discourage his colleagues from issuing separate opinions. “I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.”¹²⁷

I leave as an exercise for the reader whether he has succeeded in the decade and a half since that interview. The problem is that the norm of separate opinion-writing, once rare, has become entrenched.¹²⁸ Only Congress can successfully limit the Court to a single unattributed opinion.

Finally, my proposal has one last advantage over at least some of the other solutions. Because it is a statutory change rather than a constitutional amendment, it can be undone relatively easily. We might view it as an experiment that can be unplugged if it goes bad.

The question remains whether Congress *may* prohibit separate or signed opinions, and whether it would, on balance, be a good idea. In Part IV, I turn to objections to my proposal, including both potential constitutional challenges and more pragmatic objections.

123. It is almost uniformly agreed that the Stone Court—and in particular the 1941 Term—marked the sudden transformation from a Court with few concurrences or dissents to a (still extant) Court where individual opinions are the norm. *See, e.g.*, PAMELA C. CORLEY, AMY STEIGERWALT & ARTEMUS WARD, *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* 14–22 (2013); EPSTEIN & KNIGHT, *supra* note 7, at 24; Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 *J. POLITICS* 361, 361–63 (1988); Sunstein, *supra* note 81, at 773–83. A few studies have suggested that the trend began earlier, during the Chief Justiceship of Charles Evans Hughes, although the rate increased dramatically under Stone. *See* Bennett et al., *supra* note 85, at 863 and sources cited therein; O’Brien, *supra* note 122, at 100–01.

124. Walker et al., *supra* note 123, at 385.

125. KLUGER, *supra* note 79, at 584; *see* 12 WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953*, at 424–25 (2006); MICHAL R. BELKNAP, *THE VINSON COURT: JUSTICES, RULINGS, AND LEGACY* 40 (2004); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 *CORNELL L.Q.* 186, 204 (1959).

126. ROBERT J. STEAMER, *CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT* 19 (1986).

127. Rosen, *supra* note 82.

128. *See* CORLEY ET AL., *supra* note 123, at 11; Sunstein, *supra* note 81, at 772 (stressing “path-dependence”); *see also* Ferejohn & Pasquino, *supra* note 40, at 1701 (suggesting that it would be “hopeless” to expect the Court to exercise self-restraint).

IV. POTENTIAL OBJECTIONS

A. CONSTITUTIONAL OBJECTIONS

I can imagine three possible constitutional objections to my proposal. First, unsigned opinions—or single opinions for the Court—might be thought to violate the constitutional rights of litigants. That cannot be the case, however, as the Court frequently issues per curiam opinions (both with and without reasoned explanations) on the merits. Moreover, the Court itself never provides an explanation or discloses the votes for denials of certiorari, although individual Justices occasionally write separately. Similarly, opinions of the Court have issued since John Marshall’s time as Chief Justice. Litigants do not even have a right to a reasoned opinion;¹²⁹ they cannot possibly have a right to an attributed opinion or to dissents and concurrences.

The second possible objection is that prohibiting dissents and concurrences violates the First Amendment rights of Justices who wish to write such opinions. Justices Douglas and Brennan hinted as much.¹³⁰ But at least as the law stands, this challenge is only slightly more difficult to dispense with. As government employees, the Justices have limited First Amendment rights. Established precedent confirms the constitutional validity of my proposal. The Court in *Garcetti v. Caballos*¹³¹ drew a distinction between speaking as a citizen and speaking as a government employee; only the former is protected by the First Amendment.¹³² Unless the employee speaks as a citizen on matters of public concern, “the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.”¹³³ The Court thus held “that when public employees make statements pursuant to their official duties” their speech can be punished or restricted.¹³⁴ When Justices publish opinions, they are acting pursuant to their official duties, which therefore leaves Congress free to specify what they may or may not say (within the bounds of separation of powers principles, to which I turn next).¹³⁵

129. See *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“[S]ince this Court reviews judgments, not opinions, we must determine whether the Court of Appeals’ legal error resulted in an erroneous judgment . . .”). Reasoned opinions serve other purposes, including “providing higher courts with a mechanism to facilitate their review of lower courts’ decisions.” Cohen, *supra* note 112, at 532. As noted earlier, reasoned opinions also provide guidance to lower courts and other government actors. See *supra* text accompanying notes 101–02. Reason-giving by unelected judges also substitutes for democratic accountability. See *infra* text accompanying note 180. On reason-giving generally, see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

130. See William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC’Y 104, 105 (1948) (“Disagreement among judges is as true to the character of democracy as freedom of speech itself.”); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986) (describing dissents as contributions to “the marketplace of competing ideas”).

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

132. *Id.* at 421–22.

133. *Id.* at 418.

134. *Id.* at 421.

135. Alternatively, limiting the Justices’ ability to speak through separate opinions can be justified under the doctrine of *Pickering v. Board of Education*. That case and its progeny established

The most plausible constitutional objections are that Congress mandating per curiam majority opinions and prohibiting concurrences or dissents violates separation of powers principles. Constitutional objections could come in two forms: either it is beyond Congress' enumerated powers, or it invades the province of the judiciary. The Necessary and Proper Clause is undoubtedly sufficient to respond to the first objection. As many others have noted, that clause gives Congress the authority to adopt laws that implement not only its own powers, but the powers of the other two branches.¹³⁶ As Gary Lawson puts it, it is "beyond cavil" that the Necessary and Proper Clause provides authority "for congressional legislation with respect to the operations of the judicial department."¹³⁷ And that authority is extremely broad: It is within "the sole power of Congress to determine, and to make provision for, incidental (but not indispensable) powers that in *its* view may promote greater efficiency in the executive or judicial departments."¹³⁸

The second objection boils down to the question whether decisions about how to attribute opinions—and which opinions to permit—are an inherent aspect of the "judicial power" and thus vested by Article III in the judiciary alone. In other words, we must determine whether Article III limits congressional power when it comes to opinion-writing practices. As far as I can ascertain, this question has never been seriously addressed.¹³⁹ But one

that when a public employee speaks on matters of public concern, the government can nonetheless restrict the speech if the government's interest as an employer outweighs the rights of the employee. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). The arguments in this Article suggest that the government's interest is high, and the fact that for more than 150 years the Justices largely restrained themselves from writing separately suggests that the speech interests are low. In addition, the infringement on speech is only partial: Justices are free to speak anywhere, and in any manner, they choose *except* through officially published opinions. Finally, consider *Rust v. Sullivan*: "Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral." *Rust v. Sullivan*, 500 U.S. 173, 198 (1991). The same could be said of individuals who are voluntarily employed in the judicial branch.

136. See, e.g., Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 300–02 (2006); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2130 (2004); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 532–35 (2000). See generally Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001) (discussing the ways in which "Congress . . . regulates the manner in which federal courts exercise their jurisdiction").

137. Lawson, *supra* note 136, at 198.

138. William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause"*, 36 OHIO ST. L.J. 788, 807 (1975).

139. Three pieces of scholarship have previously suggested that anonymous Supreme Court's opinions might be beneficial. Two relied on voluntary action by the Court and thus raised no constitutional issues. See generally Bozzo, *supra* note 117 (suggesting the Court shift to unsigned opinions); Markham, *supra* note 117 (same). The third disposes of the question in one sentence in a footnote: "Given the many well-accepted ways in which Congress constrains judicial power, such as dictating rules of judicial procedure and evidence, we think it would be very difficult to construct a persuasive argument that any of our proposals are unconstitutional." Lerner & Lund, *supra* note 30, at 1282 n.132. I am not so sanguine, and at least think the question deserves

scholar has 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 It is thus worth considering the question in some depth.

The contours of the judicial power are notoriously uncertain. The Supreme Court has identified three types of limitations on judicial power that are forbidden by Article III. First, Congress may not dictate what result a court should reach in a particular case.¹⁴¹ Second, “Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.”¹⁴² Finally, Article III “gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts,” and thus Congress cannot retroactively compel federal courts to reopen final judgments.¹⁴³ But what Congress can do outside of these forbidden actions is unclear, to say the least.

The uncertainty regarding congressional authority has given rise to voluminous scholarly debates. Most familiar is the extensive discussion of the extent to which Congress can strip jurisdiction from the federal courts in general or the Supreme Court in particular.¹⁴⁴ That discussion is not directly

attention. In addition, no one has suggested prohibiting separate opinions, and thus no one has addressed the constitutionality of that part of my proposal.

140. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1591 n.154 (2000).

141. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–48 (1871). It is widely accepted that *Klein* stands for at least the proposition that Congress cannot control the Court’s constitutional rulings. See, e.g., Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 56 (2010); James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 815–23 (1998). How much further *Klein* extends is the subject of some debate. Gary Lawson notes that “[e]veryone” agrees “that Congress cannot enact a statute instructing a federal court to decide a specific case in a specific way.” Lawson, *supra* note 136, at 201. Apparently, “everyone” does not include a majority of current Justices. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325–26 (2016); *Patchak v. Zinke*, 138 S. Ct. 897, 908–09 (2018).

142. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)).

143. *Id.* at 218–19.

144. A representative sampling of the literature reads like a Who’s Who of federal courts scholars. See, e.g., Fitzpatrick, *supra* note 65; Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010); William A. Fletcher, *Congressional Power Over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III*, 59 DUKE L.J. 929 (2010); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193 (2007); Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515 (2005); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Lawrence

relevant to my proposal. No one contends that fully defining the scope of its own jurisdiction is inherent in a court's exercise of the judicial power and thus beyond the reach of Congress; the text of the Constitution—to say nothing of the history since its adoption—makes clear that Congress has a large role to play in defining jurisdiction. In particular, while there is dispute about whether Congress may *deprive* the courts of jurisdiction, there is universal agreement that Congress can *confer* jurisdiction.¹⁴⁵ The constitutionality of jurisdiction-stripping thus depends more on historical, theoretical, and semantic arguments about such things as the meaning of the Exceptions Clause, the breadth of the allocation of “the” judicial power, and theories about the role of the courts in policing the political branches. Those issues are not easily translatable to questions about the contours of inherent judicial power in the context of regulating opinion-writing. Similarly, an ongoing debate about the constitutionality of congressional control over recusal decisions by Supreme Court Justices raises narrow questions that shed little light on the scope of Congress' power generally.¹⁴⁶

Some scholars, however, have addressed broader questions of congressional power over the judiciary. Several have suggested that Congress can regulate the courts' use of principles of *stare decisis* in constitutional cases,¹⁴⁷ and at least one has contended the Congress could dictate rules of statutory interpretation.¹⁴⁸ These proposals would allow Congress to control judicial methodology—the tools that courts use when deciding cases. Telling the Court what methodology it may or must use comes perilously close to telling it how cases should come out, surely an essential component of judicial power.¹⁴⁹ As Gary Lawson puts it, “Congress cannot tell courts how to reason

Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

145. This is not to say that the Constitution places no limits to Congress' power to confer jurisdiction on the federal courts. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

146. Compare Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 656–61 (1987) (arguing that Congress can regulate Supreme Court recusals), and Suzanne Levy, Comment, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal*, 16 U. PA. J. CONST. L. 1161, 1187–93 (2014) (same), with Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1184–85 (arguing that Congress cannot regulate Supreme Court recusals).

147. *See, e.g.*, Paulsen, *supra* note 140, at 1540; Harrison, *supra* note 136, at 504. *But see* Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1175–76 (2008); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 571–72 (2001); Lawson, *supra* note 136, at 194; *cf.* James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 YALE L.J.F. 27, 31 (2017) (suggesting that Congress can regulate the use of *stare decisis* in statutory cases even if not in constitutional cases).

148. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2085 (2002).

149. For an argument that methodological rules *are* a type of law, implying that Congress cannot dictate methodology in contexts in which it cannot dictate substantive outcomes (in other

any more than it can tell courts how to decide.”¹⁵⁰ Thomas Healy illustrates the problem with congressional limitations on judicial methodology by drawing an analogy to a hypothetical statute “prohibiting the courts from relying upon original understanding in interpreting the Constitution.”¹⁵¹ My proposal, which restricts only the Court’s communication methods and not how it decides or reasons, is even more likely to be constitutional than these proposals.

But these proposals are controversial, to say the least. A more robust defense of my proposal requires a broader discussion of the scope of the judicial power and its essential attributes that are protected from congressional interference. In a classic article on the topic, Leo Levin and Anthony Amsterdam suggested “that judges may not be inhibited from . . . the effective resolution of justiciable controversies.”¹⁵² Michael Paulsen describes “the essence of Article III power” as “decisional autonomy on the merits of questions of law presented in cases properly within the courts’ jurisdiction.”¹⁵³ David Engdahl defines judicial power as “what a tribunal may do regarding matters within its jurisdiction.”¹⁵⁴ Nicholas Rosenkranz talks about the “necessary incidents of the judicial power.”¹⁵⁵ Others limn the scope of the judicial power by emphasizing what is *not* included within it. John Harrison excludes “legislation that is based on systemic considerations that are divorced from particular doctrinal results.”¹⁵⁶ Stephen Burbank notes that prospective procedural rulemaking is not an inherent judicial power, distinguishing it from “the power . . . to make law when deciding cases”¹⁵⁷ and the “powers that are necessary for [courts] . . . to function as courts exercising judicial power

words, in constitutional cases), see Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1915–17 (2011). Scholars who argue in favor of congressional power over methodology have several responses. One is that principles of stare decisis are either common-law rules or rules based on policy, and thus can be overridden by statute. Paulsen, *supra* note 140, at 1543–51; Harrison, *supra* note 136, at 528–29. Rosenkranz makes the same argument regarding tools of statutory interpretation. Rosenkranz, *supra* note 148, at 2107–08. A more oblique response is that regulating stare decisis is simply legislating what factors the Court may consider in making its decision, and that such relatively uncontroversial congressional enactments as the Rules of Decision Act and the Rules of Evidence similarly limit what courts can consider in deciding cases. Paulsen, *supra* note 140, at 1582–87. Both responses are undermined if stare decisis itself (or methods of statutory interpretation) has constitutional stature, as Richard Fallon suggests. See Fallon, *supra* note 147, at 577–78; see also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988) (“[T]he principle of stare decisis inheres in the ‘judicial power’ of [A]rticle III.”).

150. Lawson, *supra* note 136, at 214.

151. Healy, *supra* note 147, at 1202.

152. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958).

153. Paulsen, *supra* note 140, at 1596.

154. David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 83.

155. Rosenkranz, *supra* note 148, at 2102.

156. Harrison, *supra* note 136, at 505.

157. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1685 (2004).

under Article III.”¹⁵⁸ Martin Redish identifies five types of judicial independence from Congress, four of which are essential attributes of judicial power. For the purposes of this Article, the most important inclusions are those having to do with interpreting and applying the law in individual cases with finality, and the only exclusion is what he calls “lawmaking” independence: “the ability . . . to create . . . controlling subconstitutional substantive legal principles . . . in the course of [adjudicating individual cases].”¹⁵⁹

What all these generalities have in common is that they are part of the process of judicial decision-making. And more specific examples confirm that it is the process of effectual decision-making that must be protected from congressional interference. Scholars attempting to give content to the inherent and exclusive powers of the judiciary have focused not only on the reasoning and the outcome of a case, but on the “manner” of decision-making,¹⁶⁰ the giving of reasons for the decision,¹⁶¹ and the ability of courts to justify their decisions as legitimate.¹⁶² This view that Article III prohibits only congressional interference with the decision-making process is also consistent with the Court’s limited existing jurisprudence on the issue: Congress cannot tell the courts how to decide cases, nor can it deprive them of the power to make *final* judgments by either subjecting those judgments to non-judicial review or by requiring courts to reopen them.¹⁶³

My proposal is outside the decision-making function. Regulating the manner by which the Court can *communicate* its decision does not intrude on

158. *Id.* at 1688.

159. MARTIN H. REDISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX 53 (2017); *see also id.* at 52–76 (describing the relevant ideas). Redish’s primary example of subconstitutional substantive legal principles governing the courts are rules of procedure. *See id.* at 73–75. A similar description of the necessity of decisional independence and finality (along with some additional matters) is found in Liebman & Ryan, *supra* note 141, at 704.

160. Liebman & Ryan, *supra* note 141, at 754.

161. Bhagwat, *supra* note 101, at 973. Bhagwat suggests that giving reasons is what distinguishes the judicial power from legislative power, and thus that it is part of the essence of judging. Stephen Burbank, on the other hand, has suggested that a statute *requiring* a written opinion (that is, requiring the giving of reasons) “would present an interesting test” of the limits of Congress’ power over the courts. Burbank, *supra* note 157, at 1688 n.37. Two nineteenth century courts actually invalidated state laws requiring written opinions in every case, on the ground that the court’s “constitutional duty is discharged by the rendition of decisions.” *Houston v. Williams*, 13 Cal. 24, 25 (1859); *accord* *Vaughan v. Harp*, 49 Ark. 160, 4 S.W. 751, 753 (1887). *Houston* was overruled by state constitutional amendment in 1879. *See* *People v. Kelly*, 146 P.3d 547, 550–54 (Cal. 2006). *Vaughan*, on the other hand, was cited positively as late as 1973. *See* *Upton v. State*, 502 S.W.2d 454, 456 (Ark. 1973). In 1821, the Louisiana legislature required *separate* opinions by each supreme court judge in each case; judges complied by writing “I concur in the opinion for the reasons adduced.” *See* Joe W. Sanders, *The Role of Dissenting Opinions in Louisiana*, 23 LA. L. REV. 673, 677–78 (1963). “The law was . . . repealed the following year.” *See id.* at 678. Ironically, Louisiana later “*prohibited* the publication of dissenting opinions” in its 1898 Constitution. Although the official case reporter complied, the Southern Reporter—West’s private publication—continued to publish dissents. (The ban was eliminated in 1921.) *See id.* at 678 (emphasis added).

162. Healy, *supra* note 147, at 1199.

163. *See supra* notes 141–43 and accompanying text.

its ability to *make* the decision however, and by whatever methodology or reasoning, it chooses. Thus, even if regulation of judicial methodology is off limits for Congress, my proposal is easily distinguishable on the ground that it affects only matters that arise after the Court has already made (and justified) its decision. It may have indirect effects on how Justices decide (for example, as I argued earlier, it might foster compromise and cooperation among the Justices) but it does not directly regulate the decision-making process. My proposal is also distinguishable on pragmatic grounds. As Richard Fallon notes, prohibiting the Court from relying on *stare decisis* “would threaten chaos,”¹⁶⁴ while prohibiting concurrences and dissents would reduce the chaos currently generated by a multiplicity of conflicting opinions.

A skeptic might respond that by limiting the number and range of opinions that can be produced, my proposal interferes with the ability of the Court to legitimate and justify its decisions, thus diminishing its judicial power.¹⁶⁵ But there is a crucial distinction between the power of the Court as an institution and the power of individual Justices. My proposal may diminish the ability of individual Justices to explain and legitimate their viewpoints, but it does not intrude on the power of the institution as a whole.¹⁶⁶ And it is the institution of the Court, not the individual Justices, that is entrusted with judicial power.

Alternatively, we might define the essence of judicial power—especially the decision-making process—as cabined in time. Congress can determine what goes into the decision-making process by specifying which cases the Court may or must hear.¹⁶⁷ It can also regulate what comes out of the decision-making process in various ways, including by specifying what types of judgments—such as affirmance, modification, vacation, and so on—the Supreme Court may issue,¹⁶⁸ and by requiring the court reporter to “prepare the decisions of the Court for publication.”¹⁶⁹ In between, Congress has no authority. Thus, as a matter of separation of powers Congress could not prohibit the Justices from *writing* concurrences or dissents and circulating them internally, but it can prohibit the court reporter from publishing them in the official volumes.¹⁷⁰ Similarly, prohibiting the publication of authorial

164. Fallon, *supra* note 147, at 593–94.

165. See Healy, *supra* note 147, at 1199 (“[T]he power to decide cases would not mean much if courts could not explain why those decisions were legitimate and entitled to respect.”); Engdahl, *supra* note 154, at 102–04 (Necessary and Proper Clause only authorizes laws that “help effectuate,” not laws that “diminish, curtail, or interfere” with the powers of the other branches).

166. See *supra* notes 79–88 and accompanying text. Sometimes what appears to be a limit actually enhances, rather than undermines, the power of the entity being limited. Tara Grove has made an analogous argument with regard to the Exceptions Clause: Congress has used its power to facilitate rather than diminish the Court’s judicial role. Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 978 (2013).

167. See 28 U.S.C. §§ 1251–1260 (2018).

168. *Id.* § 2106.

169. *Id.* § 673(c); see also *id.* § 676 (directing the printing and binding of decisions).

170. It would probably also violate the First Amendment for Congress to prohibit the Justices from publishing or otherwise disseminating their views—including commentary on decided cases

attribution or vote counts could be accomplished by directing the court reporter to remove any such information before publication. However, if both of those things are constitutional, then it seems a silly formality to require that Congress direct its instructions to the court reporter rather than to the Court itself.

Finally, one part of the *Erie* doctrine (muddled as it is¹⁷¹) might actually be of assistance by analogy. *Erie*, of course, tells federal courts to apply state substantive law and federal procedural law. The methods of determining which is which are famously byzantine and unpredictable. The flip side of *Erie* (sometimes called “reverse-*Erie*”), however, is much more manageable because it is a straightforward balancing test: State courts deciding federal questions must apply federal substantive law, but they may apply state procedural law as long as doing so does not unduly interfere with the implementation of a substantive federal right.¹⁷²

That balancing test can be adapted to present purposes. Congressional regulation of the Supreme Court would be permitted as long as it does not unduly interfere with the Court’s ability to make, explain, or justify its substantive decisions. Indeed, the classic exposition of the appropriate locus of procedural rulemaking power places it first in the courts, but notes that it is imperative “that at some point there be available legislative authority to override the court where its actions reflect a policy fundamentally opposed to what the legislators might consider to be in the significant best interests of the people.”¹⁷³ The authors go on to explain that “[t]he need for legislative review in the cases here considered arises from the fact that these procedures are so intimately related with substantive considerations that inherent in them is the potential of frustrating substantive policies.”¹⁷⁴ Although in the rulemaking context it is the legislative authority to prescribe substantive policy that must be shielded, the same test can be used to describe the boundaries of exclusive judicial authority. Limiting the type of opinions and prohibiting attribution to individual Justices does not run afoul of this test.

Finally, there is a procedural problem with arguing that adopting my proposal violates the Constitution: Even if one is persuaded of a violation, it is not clear that it could be litigated. First, who would have standing? In most (perhaps all) instances in which a particular branch’s action is challenged as a violation of separation of powers, there is a person or entity who suffers the

in the form of “dissents” or “concurrences”—elsewhere. For reasons I discuss *infra* in Section IV.B.3, I do not believe that allowing such dissemination significantly reduces the effectiveness of my proposal.

171. See Suzanna Sherry, *A Pox on Both Your Houses: Why the Court Can’t Fix the Erie Doctrine*, 10 J.L., ECON. & POL’Y 173, 174–77 (2013); Suzanna Sherry, *Normalizing Erie*, 69 VAND. L. REV. 1161, 1163 (2016).

172. *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952); *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Johnson v. Fankell*, 520 U.S. 911, 916, 919 (1997); see also Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 20 (2006) (“Determining the applicable law in state court involves the reverse-*Erie* doctrine.”).

173. Levin & Amsterdam, *supra* note 152, at 16.

174. *Id.* at 18.

consequences.¹⁷⁵ As noted earlier, however, no litigant has a right to separate opinions, attributed opinions, or a vote count. The only persons who suffer the concrete and tangible injury necessary for standing are Justices who want their separate opinions (or their names) published in the United States Reports. Assuming that one or more Justices might actually bring suit then raises the second procedural question: Who could conclusively decide the constitutional question? Not the Supreme Court, obviously. Presumably district courts and courts of appeals (or state courts) could hear the case, but what if those courts disagreed with one another?

In summary, however we define the scope of the judicial power, a federal statute prohibiting signed or separate opinions does not invade it. But concluding that a measure is constitutional does not demonstrate its wisdom or effectiveness. The next Section therefore addresses nonconstitutional objections to my proposal.

B. OTHER OBJECTIONS

Beyond constitutional barriers, opponents might make several objections to my proposal. First, there is an argument that limiting separate opinions or prohibiting attribution would result in more harm than good. Second, skeptics might complain that as a practical matter it is unlikely to work as I suggest. I address these objections in turn.

1. Separate Opinions Serve Important Purposes

A number of scholars have defended concurrences and dissents as necessary to legitimize judicial review by unelected judges in our democracy. That argument comes in three similar but distinct flavors: democratic legitimacy, public acceptance, and transparency. We might profitably divide the arguments according to Richard Fallon's taxonomy of types of legitimacy.¹⁷⁶ Sociological legitimacy is concerned with whether the public perceives the Court as legitimate and its authority as binding, and is therefore focused primarily on public acceptance. Moral legitimacy, on the other hand, raises normative questions about whether the Court *should* be able to bind others and thus is, at least in the present context, interchangeable with democratic legitimacy.¹⁷⁷

175. Youngstown Sheet & Tube's property was seized. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 583 (1952). Men were held prisoner at Guantanamo. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 557 (2006); *Boumediene v. Bush*, 553 U.S. 723, 723 (2008). Jagdish Chadha's deportation suspension was nullified. *INS v. Chadha*, 462 U.S. 919, 928 (1983). Ted Olson was subpoenaed. *Morrison v. Olson*, 487 U.S. 654, 665 (1988). New York State lost federal funds. *Clinton v. City of New York*, 524 U.S. 417, 417 (1998). Noel Canning challenged an NLRB order against it. *NLRB v. Noel Canning*, 573 U.S. 513, 513 (2014). And Menachem Zivotofsky's passport incorrectly listed his place of birth. *Zivotofsky v. Kerry*, 576 U.S. 1, 1 (2015).

176. FALLON, *supra* note 9, at 22.

177. Fallon's third category, legal legitimacy, is more narrow, focusing on whether the Court's decisions are fairly within the parameters of judicial decisionmaking. Few people seem to

Some scholars who defend the need for separate opinions are most worried about moral (or democratic) legitimacy. For example, Ferejohn and Pasquino write that “[t]he [Court’s] public expression of diverse legal views about controversial issues has a direct value in a constitutional *democracy*.”¹⁷⁸ Another scholar argues that “[m]ultiple judicial opinions that grapple with legal issues are the judicial analogue to a deliberative democratic . . . process, which . . . project an image of accountable judging and participation by interested audiences.”¹⁷⁹

I can make two responses specific to these arguments from moral or democratic legitimacy. First, 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. Indeed, scholars have argued that reasoned opinions are essential because they function as a substitute for democratic accountability,¹⁸⁰ or, more broadly, because adjudicative legitimacy rests on the giving of legal reasons.¹⁸¹ On this view, the per curiam opinion would provide the same legitimacy. Second, and relatedly, my proposal does not substantially limit the diversity of legal views, it just relocates them from the pages of the United States Reports or the Supreme Court’s website to less official publications. Justices—and law professors—would continue to express criticism of doctrines and cases in law reviews and other fora. Admittedly, this is not as effective a means of communication, but it serves the purpose. And stripped of the automatic publication (and guaranteed audience), Justices might be forced to express themselves more thoughtfully.

Other scholars are more concerned with sociological legitimacy. They argue that dissents foster public acceptance of decisions among those who disagree with the results, by demonstrating that their views were at least considered.¹⁸² If dissenting voices are completely excluded, they suggest, the Court as an institution (and the opinions it does issue) will be diminished in the eyes of the public.¹⁸³ Whether this is true is an empirical question beyond the scope of this Article. Would losers feel better or worse about the outcome if the Court spoke with one voice? On the one hand, they might feel

have many doubts about the legal legitimacy of most of the Court’s output, although they may question individual decisions here and there.

178. Ferejohn & Pasquino, *supra* note 40, at 1673; *see also id.* at 1699 (“The open display of competing viewpoints invites the attentive and affected public to discuss, argue, petition for new laws, and otherwise work to shape these controversial policies.”).

179. *See* WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 126 (2007).

180. *See, e.g.*, Bhagwat, *supra* note 101, at 973–74; Ferejohn & Pasquino, *supra* note 40, at 1697; Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 686 (1995); Michael C. Dorf, *Dicta and Article III*, 142 *U. PA. L. REV.* 1997, 2029 (1994); *see also* Schauer, *supra* note 129, at 636–37 (identifying reason-giving as the “antithesis” of authority).

181. *See, e.g.*, Schwartzman, *supra* note 59, at 1012.

182. *See* SALAMONE, *supra* note 7, at 61–62, 150; CORLEY ET AL., *supra* note 123, at 11.

183. There is also implicit in these arguments a concern that Justices hiding behind the anonymity of a single opinion will be less accountable to the public. I deal with that possibility in the next Section, when I discuss the potential virtues of signed opinions.

completely alienated and ignored. On the other hand, dissenting opinions—especially intemperate or politically polarizing ones—might stoke their fury against the majority. The few existing empirical studies have reached conflicting conclusions.¹⁸⁴ It is a risk I am willing to take.

Kevin Stack has focused on both moral and sociological legitimacy, arguing that separate opinions provide an otherwise unavailable window into the decision-making process itself given the Supreme Court's practice of secret deliberation in conference.¹⁸⁵ They provide necessary transparency: The existence of separate opinions is the only evidence we have that the Justices are deliberating and engaging with each other on the merits. That deliberation and engagement, Stack suggests, is a fundamental feature of moral (or political) legitimacy in a democracy, as well as a means of ensuring public buy-in or sociological legitimacy. In other words, the Supreme Court should not be a black box.

My response is twofold. First, as a practical matter, Supreme Court opinions (both majority and separate opinions) have been exhibiting less and less actual engagement as the Justices become both more polarized and more brand-conscious. The "deliberation" reflected by multiple opinions often seems more like ships passing in the night—and firing their cannons (or canons) at each other—than like true conversation. More important, however, is that this is essentially a demand for procedural transparency on top of the substantive transparency that a written opinion for the Court already provides. But asking the Court to be procedurally transparent is asking it to behave like the political branches, which only exacerbates the problem of the perception of the Justices as politicians in black robes rather than as at least somewhat disinterested legal craftsmen, and may help make that politicization of judicial decision-making a reality.

Indeed, if procedural transparency is a requirement for legitimacy, why stop at separate opinions—why not put cameras not only in the courtroom but in the Supreme Court's conference room so that we can watch their deliberations the same way we watch congressional hearings? Taking transparency that far is absurd, but the thought experiment shows that transparency is an equivocal value, especially for the judiciary. Judicial decision-making is a qualitatively different activity than legislating, and it is not clear that being able to *see* evidence of the Court's deliberations—in the sense of an argumentative exchange among the Justices—is important in the same way it is for other public actors. In light of the damage done by multiple opinions in the current culture of celebrity, and the different and potentially lesser value of transparency in the context of judicial decision-making, the substantive transparency of a reasoned opinion that we know represents the view of a majority of Justices might be the best compromise.

184. See *supra* notes 83–84, 87 and accompanying text. Although it is well established that people want their voices to be heard by those with authority to make decisions, see generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006), it is unclear whether the presence or absence of dissenting opinions makes a difference to their perception of being listened to.

185. Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 *YALE L.J.* 2235–36 (1996).

Cass Sunstein offers a second defense of dissent, both on the Supreme Court and in general. Dissent, he argues, is valuable as a force against the human tendency toward conformity.¹⁸⁶ And “widespread conformity deprives the public of information that it needs to have.”¹⁸⁷ There is no doubt that he is correct as a general matter: One well-rehearsed justification for (and consequence of) the Free Speech Clause of the First Amendment is to encourage dissent so as to allow the marketplace of ideas to flourish in the hope that the best ideas will prevail. But it is not so obvious that public dissents by Supreme Court Justices are necessary, or even helpful, to these goals. While it is perhaps true that nothing puts an issue on the national agenda like a Supreme Court Justice’s opinion, the marketplace of political and constitutional ideas does not seem to be in need of such a boost to flourish. In addition to the expression of dissenting ideas in law reviews, the media, and elsewhere, other aspects of our legal structure encourage pushback against conformity. From the existence of 50 different state legislatures to the adversary system, our legal structures give dissenters an incentive and an opportunity to swim against the tide. Consider, for example, the Southern resistance to *Brown* and the continued widespread ignoring of the constitutional prohibition on school prayer,¹⁸⁸ or the plethora of lawsuits filed against President Trump’s various executive actions. Dissent is alive and well.

A third major reason offered in support of separate opinions is that they influence the course of development of the law, sometimes eventually becoming law themselves.¹⁸⁹ Famous examples include Justice Harlan’s dissent in *Plessy v. Ferguson*,¹⁹⁰ the separate opinions of Justices Holmes and Brandeis in early twentieth century free speech cases,¹⁹¹ Justice Holmes’ dissent in *Lochner*,¹⁹² Justice Stone’s dissent in *Gobitis*,¹⁹³ and Justice Jackson’s

186. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 1–13, 23–38 (2003).

187. *Id.* at 6.

188. The resistance to *Brown* should need no citation. For school prayer, see, for example, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 262–67 (2009).

189. See CORLEY ET AL., *supra* note 123, at 10–11; Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4–5 (2010); Ferejohn & Pasquino, *supra* note 40, at 1701; Sunstein, *supra* note 81, at 802–03.

190. *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting); see *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–96 (1954) (distinguishing and implicitly disapproving, but not formally overruling, *Plessy*).

191. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 372–75 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

192. *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting), *abrogated by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *overruling recognized by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992).

193. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 601–07 (1940) (Stone, J., dissenting), *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

dissent in *Korematsu*¹⁹⁴ and his concurrence in the *Steel Seizure Cases*.¹⁹⁵ But it turns out that these cases are the exception rather than the rule: Supreme Court dissents are rarely cited by either courts of appeals or Supreme Court majorities,¹⁹⁶ and they rarely turn into majority opinions.¹⁹⁷ Moreover (leaving aside the *Steel Seizure Cases*) the majority opinions in these cases reflected principles that were, sooner or later, rejected by the American public, and thus would likely have been overruled or discredited even in the absence of dissenting opinions. *Plessy* has never been formally overruled and was not even discredited by the Court until almost 60 years after it was issued. Likewise, it took almost three quarters of a century for the Court to overrule *Korematsu*. When the overruling (or discrediting) takes decades, a “historical dissent may provide nothing more than some quotable support for a decision that would have been the same in any event.”¹⁹⁸ Dissents (and concurrences) do not appear to steer the law very much or very often. As one scholar noted more than 30 years ago, a dissent “may be a correct prophesy yet not a source of the change.”¹⁹⁹

A more sophisticated variant on the argument that dissents influence the development of judge-made law is made in a recent article jointly authored by law professor Barry Friedman, political scientist Andrew Martin, and two former students of Friedman’s.²⁰⁰ They suggest that dissents and concurrences—in particular what they label “pivotal” concurrences—send important signals about the state of the law. “Pivotal” concurrences are those written by Justices who join the majority opinion, and whose votes are necessary to make that opinion a majority rather than a plurality opinion, but which in some way “undercut” the majority’s reasoning.²⁰¹ Like dissents, pivotal concurrences “spell the path toward legal change, letting litigants know precisely what issues to push.”²⁰² Indeed, both dissents and pivotal concurrences “invite” change;

194. *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting), overruled by *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

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

196. Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 126–27 (2011).

197. Bennett et al., *supra* note 85, at 837.

198. Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 255.

199. *Id.* A more limited form of the argument that dissents affect the course of the law is that in statutory cases, dissents signal Congress to make changes in the law. See Eskridge, *supra* note 88, at 388–89. My focus here is on constitutional cases.

200. Bennett et al., *supra* note 85.

201. *Id.* at 847–48.

202. *Id.* at 870. Allison Orr Larsen suggests—and ultimately rejects—a similar argument that “perpetual dissents” signal the possibility of change. Larsen, *supra* note 91, at 467–68; see also CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928) (describing dissent as “an appeal to the intelligence of a future day”); CHARLES P. CURTIS, JR., *LIONS UNDER THE THRONE* 75 (1947) (“The minority have a curious concurrent jurisdiction over the future [because] a dissent is a formal appeal for a rehearing . . . sometime in the future . . .”); M. Todd Henderson, *From Serialism to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283,

the difference is that dissents invite it at some future time and pivotal concurrences invite it more immediately.²⁰³ And, these scholars continue, dissents and pivotal concurrences also “smooth the process of change” by “keep[ing] changes in the law from appearing as an incomprehensible bolt from the blue.”²⁰⁴

My fundamental disagreement with Friedman and his colleagues is about whether inviting (and smoothing) change in this way is good for the Court or the country, at least in the current polarized climate. What they characterize as sending signals, I would characterize as playing to the base. Litigants may be reading those signals, but if so, they are reading the tea leaves of the individual Justices rather than following the path of the law. The example of the recent increase in state anti-abortion legislation is a case in point: The legislators enacting these laws despite their clear unconstitutionality are reading the dissents in earlier cases, looking at recent appointments, and counting to five.²⁰⁵ As for smoothing the process of change, it seems to me that Justices should be encouraged to make changes incrementally rather than all at once, and not as a result of changes in personnel. Thus, any change that appears to be “a bolt from the blue” in the absence of prior concurrences or dissents should not be made in the first place, making such concurrences and dissents unnecessary. What Friedman and his colleagues are essentially suggesting is that pivotal concurrences reduce the likelihood that frequent overruling (especially of recent cases) will diminish public confidence in the Court as a legal—rather than political—institution.²⁰⁶ Maybe so, but reducing the political cost of overruling increases its likelihood, which in turn negatively affects doctrinal stability.

Moreover, any argument that dissents influence the subsequent course of the law is complicated by a recent study detailing what makes dissents more or less influential. It turns out that the more emotional or distinctive language (read: polemic) in a dissent, the more likely it is to be cited in later majority opinions.²⁰⁷ 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.

At bottom, all of the reasons discussed so far concern the costs and benefits of suppression of disagreement in a world in which the law is not a

340 (“[D]issent allows lower courts, lawyers, and politicians to measure the weight of the opinion and to plan a political or legal counterattack.”).

203. Bennett et al., *supra* note 85, at 868–70.

204. *Id.* at 869–70.

205. See Renae Reints, *These Are the States that Passed ‘Heartbeat Bills,’* FORTUNE (May 31, 2019, 4:00 AM), <https://fortune.com/2019/05/31/states-that-passed-heartbeat-bill> [<https://perma.cc/C6FR-Q82M>].

206. On the relationship between overrulings and public perception, see, for example, Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1110–11 (1995).

207. Rachael K. Hinkle & Michael J. Nelson, *How to Lose Cases and Influence People*, 8 STAT., POL. & POL’Y 195, 195 (2017).

“brooding omnipresence in the sky.”²⁰⁸ The publication of dissenting or concurring opinions is a tangible reminder that the law *is* uncertain and the Supreme Court *does* make law. As Robert Post has recognized, the twentieth century explosion of separate opinions was in part a reflection of “a shift in the Court’s jurisprudential understanding of the nature of law, from a grid of fixed and certain principles designed for the settlement of disputes, to the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes.”²⁰⁹ Legal realism, in short, makes “consensus more difficult” and places a higher premium on “justifying the judges’ decisions, individual and collective.”²¹⁰

I can see the point. I have advocated transparency and criticized Justice Scalia’s statement that he “never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these [formalist] legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it.”²¹¹ I can hardly claim, therefore, that forcing a pretense of unanimity where none exists is unproblematic.

But we have come a long way since Holmes and the Realists, and even since Post wrote in 2001. The pendulum of academic and public opinion has swung so far toward the realist view that there is scarcely any room for an argument that law, even as made by the Supreme Court, is about more than raw political or ideological preferences. Dissents and concurrences, especially on a Court as polarized as the current Court, feed the view that precedent, principle, and legal reasoning exert no influence; it is all about Republicans and Democrats.²¹² And that perception is exacerbated by the cult of the celebrity. Suppressing dissents and concurrences is a necessary corrective. Perhaps when the pendulum swings back, we will need full transparency again. My proposal could be a temporary measure—until the Court starts acting like a judicial institution rather than like nine independent law firms competing for clients and reputation. In the meantime, forcing critiques that illustrate the uncertainty and flexibility of law into the law reviews and elsewhere (and I have no doubt that they will make their way into the media,

208. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

209. Post, *supra* note 121, at 1274.

210. O’Brien, *supra* note 122, at 101.

211. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RESV. L. REV. 581, 589 (1989). For author’s criticism, see Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 973 (2011).

212. Perhaps my views are an idiosyncratic *cri de coeur*; after all, I have spent a good part of my career defending the ideas that judging is a craft, not a purely political exercise, and that law is an independent source of constraint on judges. See, e.g., FARBER & SHERRY, *supra* note 66, at 31; Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 461–65 (2009); Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 U. CIN. L. REV. 1053, 1053–54 (2007); Sherry, *Politics*, *supra* note 66, at 973–79; Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 796–98 (2003); Suzanna Sherry, *Introduction: Is the Supreme Court Failing at Its Job, or Are We Failing at Ours?*, 69 VAND. L. REV. 909, 915–17 (2016); Suzanna Sherry, *Liberty’s Safety Net*, 16 GREEN BAG 2D 467, 468 (2013); Suzanna Sherry, *What’s Law Got to Do With It?*, 2 PERSPS. ON POL. 769, 773–74 (2004).

the internet, and wherever else the public gets its information about the Supreme Court) is the lesser of two evils.²¹³

Two final objections can be made to my proposal. Some commentators suggest that concurrences and dissents can improve the majority opinion by forcing the Justice authoring the majority to respond and therefore to produce the best possible opinion.²¹⁴ A dissent “rides herd on the majority” and keeps it accountable.²¹⁵ That conclusion is speculative at best, and reading Supreme Court opinions gives the impression that majorities (or pluralities) these days care little for what separate opinions say (even as they purport to respond). Moreover, if my proposal eventually serves to increase internal deliberation, that deliberation will substitute for—and be an improvement on—written cavils in dissenting opinions. Moreover, as noted before, criticism of Supreme Court opinions will not disappear, but will simply be relocated.

Finally, some might take issue with my original characterization of an atomized Supreme Court as dysfunctional. Writing in 1994, Mark Tushnet suggested that the inclusion of memorable phrases in opinions was a way for the Justices to establish trust. He labeled such phrases “outcroppings of individualism” and “eruptions of individual idiosyncrasy in the otherwise bureaucratic operations of the Supreme Court.”²¹⁶ These idiosyncratic phrases, he argued, show elite opinion leaders (who ultimately influence the public) that “a real person occupies a seat on the Court” and thus that the Court should be trusted.²¹⁷ Although Tushnet ultimately questioned whether we should trust the elite opinion leaders themselves,²¹⁸ the idea of the Court as a group of individuals rather than as a unified institution did not seem to trouble him. In 1994, however, the Court and its Justices still toiled in relative obscurity. Before the internet, before ideologically stratified media, before the American Constitution Society (and in the infancy of the Federalist Society), the Justices were not and could not be celebrities with separate fan bases. Ultimately, though, if Tushnet—or anyone else—would prefer an atomized Court in today’s political climate, then this Article will not persuade him otherwise.

213. This is especially true if those who see a looming crisis of legitimacy are right and if Todd Henderson’s account of changing norms on unanimity and dissensus as power plays designed to enhance the authority of the Court is accurate. Henderson, *supra* note 202, at 287. If both of those assertions are true, the Supreme Court is about to be in need of a new power play. *But see id.* at 343–44 (suggesting that imposing a norm of unanimity now would *decrease* the power of the Court, and arguing that that is why Chief Justice Roberts favors it).

214. *See, e.g.*, Ginsburg, *supra* note 189, at 3; Brennan, *supra* note 130, at 430; CORLEY ET AL., *supra* note 123, at 11; Sunstein, *supra* note 81, at 804.

215. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26–28 (1960). For evidence that this occurred prior to the late 1990s, see generally MALTZMAN ET AL., *supra* note 86. But the proliferation of separate opinions since then might suggest that it happens less often on today’s Court.

216. Mark Tushnet, *Style and the Supreme Court’s Educational Role in Government*, 11 CONST. COMMENT. 215, 225, 222 (1994).

217. *Id.* at 225.

218. *Id.*

2. Signed Opinions Serve Important Purposes

Commentators have made three related arguments in favor of signed opinions. Signed opinions hold judges and Justices accountable by “put[ting] the judge’s conscience and reputation on the line.”²¹⁹ They preserve judicial legitimacy in a system in which judges articulate substantive values: “Because judges are not merely bureaucrats but value articulators, their personal preferences—their identities—matter.”²²⁰ And signed opinions both ensure and certify that the judge has engaged in an appropriate dialogue in the decision-making process.²²¹ These three arguments together suggest that unsigned opinions amount to, as Owen Fiss puts it (following Hannah Arendt), “Rule by Nobody.”²²² Without signed opinions, we end up with the Court as a faceless bureaucracy.

But it cannot be a matter of general principle that all judicial opinions must be signed. The Court issues unsigned orders all the time, often uncontroversially. It uses *per curiam* opinions in both important and trivial cases, remands cases for reconsideration without attribution and with little explanation, and denies (or grants) *certiorari* without either attribution or explanation.

The question thus comes down to whether the benefits of signed opinions in most Supreme Court cases outweigh the costs. The trade-off here is essentially whether we care more about the accountability, reputation, and legitimacy of the Court as a whole or of each individual Justice. Signed opinions enhance the reputation of the individual Justices, but, as I have suggested, at the cost of the reputation and legitimacy of the Court as an institution. Signed opinions also encourage Justices to dig in their heels and not give an inch: “Judges cannot afford to be modest when their reputations are at stake. They cannot afford to acknowledge that their opponent has a point when doing so will expose them to personal attack. . . . The signed opinion, . . . becomes a means of eschewing humility.”²²³

Some might argue that the accountability of the Court depends on our ability to hold each Justice accountable. Collective accountability, in other words, is built on individual accountability. Public scrutiny of signed opinions puts pressure on the individual signatories to be consistent and principled. Remove that scrutiny, the argument goes, and you create a collective action problem: Each Justice will be confident that some other Justice will be blamed for a *per curiam* opinion that flouts consistency or principle and thus will join it whenever it is expedient or politically comfortable to do so. Requiring Justices to sign their names is a way to make them assert “*I am doing this*

219. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990).

220. Bozzo, *supra* note 117, at 284; *see also id.* at 292 (“Because values matter in [Supreme Court] opinions, identities matter, too.”).

221. *See* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983). As Fiss himself notes, however, this certification is something of a sham given the bureaucratization of the judiciary. *Id.* at 1443.

222. *Id.* at 1452.

223. Bozzo, *supra* note 117, at 298.

because *I* believe the law requires it.” Cary Coglianese makes a similar argument that individual agency heads should be required to sign off on actions taken by their agencies, to avoid presidential “overreach”: presidential control over matters committed to agency discretion.²²⁴

But an unprincipled *per curiam* (and especially a series of them) exposes the Court to public opprobrium, tainting *all* the Justices and reducing the likelihood that lower courts and other government officials will obey the Court’s mandates. Critical as I am about the influence of celebrity on judicial behavior, I am not so cynical as to believe that personal reputation is the only thing that keeps Justices principled. In addition, the cult of celebrity has so diluted the force of individual accountability that a signature is edging further from affirming “I am doing this because I believe the law requires it” and closer to affirming “I am doing this so you can see how loyal I am to my fans.”

Moreover, under current conditions, the accountability of signed opinions has the potential to backfire. Studies have shown that when individuals are accountable to a known (as opposed to an unknown) audience, they “adopt positions likely to gain the favor of those to whom they are accountable.”²²⁵ To the extent that many Justices are aiming their opinions at particular, known, audiences rather than writing for the public at large, they will tailor them to those audiences—as we saw in the examples of opinions concurring in certiorari denials. Only when writing for an audience whose views are unknown (or varied) do decision-makers “think in more self-critical, integratively complex ways in which they consider multiple perspectives.”²²⁶ And at least one study suggests that the known-audience effect reaches back to the decision-making process itself: Knowing the views of the audience results in “a change in perspective or evaluat[ion] . . . and not merely . . . a reporting shift designed to please the audience.”²²⁷ Trying to hold celebrity-seeking Justices individually accountable through signed opinions might influence their actual decisions as well as their justifications, biasing them towards the views of their polarized fan bases.

3. It Won’t Work

The final objection to my proposal is more practical: It will not accomplish its goals. I can imagine two different objections, polar opposites. The first is that it 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, signaling, and pandering that currently takes place in separate opinions will be displaced into oral argument instead. The second is

224. Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 52 (2017).

225. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCH. BULL. 255, 256 (1999).

226. *Id.* at 257. Presumably, an actor accountable to an audience whose views she knows to be mixed—such as a judge writing for the public at large—would behave the same way.

227. John Pennington & Barry R. Schlenker, *Accountability for Consequential Decisions: Justifying Ethical Judgments to Audiences*, 25 PERSONALITY & SOC. PSYCH. BULL. 1067, 1075 (1999).

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.

My blanket response is that even if these potential problems have traction, they do not doom my proposal. If Congress bans separate opinions and negative consequences follow, there is a simple solution. Because this is a statutory fix rather than a constitutional one, Congress can repeal the law.

Beyond that, I can offer only tentative responses to these practical objections. That Justices might publish their separate opinions elsewhere is a feature, not a bug. 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 carry less weight than an official dissent or concurrence, but it will carry *some* weight. Moreover, its influence (and that of the majority opinion as well) 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: Half the country, upon learning that Justices Ginsburg, Breyer, Kagan, and Sotomayor dissent, will be immediately suspicious and disinclined to take the majority opinion seriously; the other half will react the same way upon learning that Justices Thomas, Alito, Gorsuch, and Kavanaugh dissent. 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.

As for the same phenomena simply reappearing in oral argument, there are several reasons why that is unlikely.²²⁸ First, oral arguments are face-to-face interactions. People are much more likely to curb their worst impulses in face-to-face interactions than when they are writing in solitude—people say things on the internet and even in email that they would never say in person.²²⁹ Second, oral arguments garner much less attention than the release of Supreme Court opinions. Like publication of dissents in other forums, then, any bad behavior at oral argument will have fewer spillover effects on the press, the public, or the Justices.

Leaks are more problematic. My proposal may well give rise to a temptation for Justices to play to their fans and burnish their political credentials by announcing to the world both their own vote and, where the vote was close, the actual vote count.²³⁰ Or some Justices might inform legal

228. One study recently found that Justices already use oral argument to advocate their positions (at least more than they used to). Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1161 (2019). Even if true, it is not likely to worsen under my proposal for reasons I give in the text.

229. See, e.g., John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321 (2004) and sources cited therein.

230. Colleagues have informally suggested that the Code of Conduct for United States Judges, available at https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/6CEX-LNG4>], might prevent

databases of the author and the vote count, or even provide the databases with separate “opinions” that could be included in the database. The best we could hope for is that the Justices’ concern for the Court as an institution—whether now, or after enhancement by the operation of the proposal itself—might lead them to restrain themselves. Playing to the base might also 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.

Finally, there is the possibility that by fostering a norm of consensus, my proposal would lead not to accommodation and compromise but rather to overbearing and unaccountable majorities exploiting the lack of separate opinions to impose controversial broad and deep rulings.²³¹ That is indeed a risk, but again, concern for the Court as an institution might temper the majority. Broad, deep rulings on highly-contested issues—especially if there is a persistent minority and winners and losers turn out to track political divides—could generate a backlash against the Court and make those rulings harder to enforce.²³² Justice Ginsburg, for example, has suggested that the breadth of *Roe v. Wade* is one major source of the political reaction against it.²³³ Others disagree,²³⁴ but the suggestion raises the possibility of it happening with other cases. One hopes the Court would be cautious enough to try to avoid such a backlash. Once again, moreover, one purpose of my proposal is to change the Justices’ focus from their own reputations to that of the Court as an institution; to the extent that it succeeds, there is less concern that unfettered majorities in the future would endanger the Court by riding roughshod over silent dissenters.

Even if my proposal does lead to compromise rather than a mere muzzling of dissenters, there is a possibility that the public would see it differently. The argument is that under the current regime, a case with a single opinion sends a strong signal of the correctness of the decision;²³⁵ Americans who disagree with it cannot rely on ad hominem or political explanations for the Court’s decision. Under my proposal, by contrast, there would be no way for the Court to send such a signal, and people might assume that every case was in fact a five to four political decision. While this is a

leaks. However, that Code does not currently apply to Supreme Court Justices, and even if it did, it is not clear that discussing already-decided cases violates it.

231. See Sunstein, *supra* note 81, at 814 (making the same point about minimalism and consensus norms).

232. See JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 43 (2009).

233. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985).

234. See MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* xii–xvii (2015); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2028 (2011).

235. See Michael D. Gilbert & Mauricio A. Guim, *Active Virtues*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 19), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366512.

possible cost of my proposal, it is not a significant one. In controversial cases that capture the attention of the public, I do not think the Court has issued a unanimous opinion in more than 60 years—not since *Brown*. (And the unanimity in *Brown* nevertheless failed to convince those opposed to the decision to obey it.)²³⁶ We are not losing much if we lose a signal that gets used only once or twice a century.

V. CONCLUSION

The Supreme Court is dysfunctional in many ways. But one of its dysfunctions exacerbates the others. When Justices put their own reputation and legacy above the reputation and credibility of the Court as an institution, there are ripple effects from the confirmation process to the decision-making process to public perception of the Court. If we can temper Justices' ability or incentive to play to their polarized fan base, we might be able to reduce some of the dysfunction. This Article suggests that the best way to do so would be for Congress to prohibit separate opinions and require that the single opinion for the Court be an anonymous *per curiam* that does not reveal how many Justices join it. Enacting such legislation could enhance the reputation of the Court as a legal rather than political institution, reduce polarization (and incivility) on the Court, eliminate plurality opinions that create uncertainty and unpredictability, and turn the Justices back into mere mortal judges who keep our constitutional democracy humming along despite whatever goes on in the more political branches.

In the end, of course, my proposal guarantees nothing and poses real risks. We can hope that it would work as advertised and provide an overall benefit despite some costs, but we cannot be sure. Would it promote internal judicial deliberation or merely silence dissent and allow five Justices to impose their unfettered will? Would it produce more certainty and stability, or less? Would it improve or degrade public opinion of the Court? Would it depoliticize or further politicize the Court and the appointments process?

236. Unanimous opinions (especially those without any caveats or concurrences) usually come in cases that the general public neither knows nor cares about. For example, during the 2019 Term, the Court was unanimous (without concurrences) in eight cases: *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365 (2019) (whether fee-shifting is statutorily permitted in suits against the Patent and Trademark Office); *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) (whether particular bankruptcy court rulings are final orders); *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (the meaning of an obscure ERISA provision); *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020) (how to allocate IRS refunds when affiliated corporations file a consolidated tax return); *Davis v. United States*, 140 S. Ct. 1060 (2020) (*per curiam*) (the incorrectness of a lone circuit's "outlier practice" in refusing to review certain arguments for plain error); *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020) (the availability of punitive damages against state-sponsored terrorism); *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589 (2020) (whether defense preclusion applies when the earlier case involved a different claim). The closest the 2019 Term's unanimous cases came to controversy was in holding that participants in the "Bridgegate" scandal could not be convicted of wire fraud (or federal-program fraud) because they did not aim to obtain money or property, as required by the language of the statutes themselves. *Kelly v. United States*, 140 S. Ct. 1565, 1568–69 (2020). The case might have drawn public attention because it involved Bridgegate; certainly, the statutory interpretation question was easy and uncontroversial.

Would institutional accountability diminish in the absence of individual accountability? In particular, even if the proposal would work in the abstract to keep a functional Court from becoming dysfunctional, would it work in our current position, with the institutions, norms, and Justices we already have? We cannot know the answers, although I have tried to make arguments that the results would be favorable.

More broadly, enacting such a law might at least serve as a wake-up call, signaling to the Justices that they need to realign their priorities. At the very least, perhaps this Article, in exposing the transformation of some Supreme Court Justices into publicity-seeking media personalities like the Kardashians, might seep into public and judicial consciousness and serve some shaming function.

But the ultimate question is whether the situation is so dire—whether the cult of celebrity and its related dysfunctions are so harmful to the Supreme Court and its role in our constitutional democracy—that it is worth taking a risk. I think it is.