2003

Judging the Justices: A Supreme Court Performance Review

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JUDGING THE JUSTICES: A SUPREME COURT PERFORMANCE REVIEW

Laura Krugman Ray[*]

My topic is the performance of the Supreme Court as the primary source of constitutional doctrine in our legal system. Ever since the Marshall Court decided *Marbury v. Madison*[1] two hundred years ago, it has been the role of the Supreme Court to interpret the Constitution and apply it to federal and state statutes to see if they pass muster.[2] *Marbury* gave the Court the authority to strike down any government action it found to be in violation of the Constitution,[3] a broad and solemn power and one that has generated countless debates over the substance of the Court's decisions. I am going to resist the temptation to talk about that substance. Instead, I want to consider the Court's decision-making craft. I want to ask an institutional question: How well is the Rehnquist Court, or, more precisely, how well are the Justices who sit on that Court, performing the difficult and delicate job of making constitutional law?

How should we go about evaluating the Justices' performance? If we were to give the Justices an annual report card, what subjects would we want to grade? Some old favorites would appear. Math—can they add to five, the magic number that Justice Brennan used to say could do anything at the Court?[4] English—do they write clearly and concisely, so that we don't have to struggle to understand what they say? And what about what used to be called deportment? Do they work well with others, are they courteous and respectful, do they participate effectively in group activities? And, finally, should the Justices be graded, as many law students are, on a curve? That is, should we measure the Rehnquist Court against an absolute standard of judicial excellence, or should we take into account the quality of earlier Courts or the particular challenges of the present day?

Let's start the grading process by considering what we, as consumers of the law, would like to see from our Supreme Court when it decides an issue of constitutional law. Ideally, we would like an opinion that presents clearly defined legal principles endorsed by all nine Justices—a unanimous opinion

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1. 5 U.S. (1 Cranch) 137 (1803).
2. *Marbury*, 5 U.S. (1 Cranch) at 177.
3. *Id.* at 180.
4. BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 6 (1996).

setting out a rule of law that is easy for lower courts to apply, for lawyers to explain to their clients, and for affected lay people to understand. We would like an opinion that is focused and concise, as brief as the merits of the case permit, without long digressions or elaborate footnotes. We would hope for an opinion written in a lively and accessible style that we might actually enjoy reading. And we would appreciate a tone of civility, without sarcastic attacks or emotional outpourings. Is it fair to expect all this from the Rehnquist Court? Has any Supreme Court ever delivered such an exemplary work product?

It is clear at the outset that the Rehnquist Court Justices would not earn high marks for unanimity. They have acquired a reputation for just the opposite—sharply divided decisions, with abundant, separate opinions by Justices on both sides. When Linda Greenhouse, who reports on the Court for the New York Times, reviewed a recent term, the headline read, "The High Court and the Triumph of Discord."[5] In its 2001 term, the Court was actually unanimous in a third of its eighty-one cases, which doesn't sound like a bad batting average; but of course those cases didn't draw much attention.[6] Instead, Court watchers focused on the sixty percent of its cases that came with dissents attached.[7] Together, the Justices authored a total of sixty-five dissenting opinions that term, not to mention their forty-four concurrences.[8] In other words, the Justices produced more separate opinions than opinions for the Court. So if we are looking for a unified bench, the Rehnquist Court won't qualify.

Of course, neither would the Burger or the Warren or the Roosevelt Courts. The fact is that no Supreme Court in the past sixty-five years—at least since the New Deal constitutional revolution of 1937—has produced a steady stream of unanimous opinions on major issues.[9] And I think that the abundance of dissenting opinions since 1937 is by no means something to deplore—it may even be something to celebrate. In John Marshall's day, when the Supreme Court was not yet established as an equal branch of government, the Chief Justice insisted that the Court speak with a single voice—which to Marshall meant his own voice—when it issued opinions.[10] In 1805, Justice Johnson dared to write a separate opinion and found himself the target of endless criticism from his colleagues.[11] Unanimity was a useful strategy for the Marshall Court as it

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5. Linda Greenhouse, *Ideas & Trends: Divided They Stand; The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001, § 4, at 1.

6. These numbers are based on the Harvard Law Review's annual statistical summary of the Supreme Court's Term. *The Supreme Court 2001, Term—The Statistics*, 116 HARV. L. REV. 453, 457 (2002).

7. *Id.*

8. *Id.* at 453.

9. *See generally* C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947 (1948) (analyzing and charting increasing decrease in consistent agreement between Supreme Court Justices).

10. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 195 (1959).

11. *Id.*

worked to develop its unprecedented role in the new republic, but it is by no means an essential strategy for a Supreme Court whose power is firmly grounded.

And the power of the contemporary Supreme Court is uncontested. These days, there are critics who think that the Court may even be exercising too much power when it strikes down some of Congress' handiwork.[12] Unlike the Marshall Court and the Courts of the nineteenth century, which had no right to turn away any cases that fell within their jurisdiction, the contemporary Court chooses the cases it wants to hear—since 1988 it has had almost complete discretion to shape its own docket.[13] Many of the cases the Court selects deal with difficult constitutional issues. Last term, for example, the Court was asked to decide whether the University of Michigan violated the Equal Protection Clause by using race as a positive factor in undergraduate and law school admissions,[14] whether the state of Texas violated due process or equal protection by criminalizing homosexual sodomy,[15] and whether cross burning is protected by the First Amendment.[16]

Is it reasonable to expect nine individuals of vastly different backgrounds and experience, appointed by five different Presidents over a period of twenty-two years, to reach precisely the same conclusion in such challenging cases? And is it reasonable to expect the Justices who find themselves in the minority to swallow hard and join the majority for the sake of a unified result? Should we, in fact, want to discourage diverse opinions on questions of great constitutional import? In the nineteenth century, disagreement within the Court was widely regarded as unseemly, like family squabbles that should be kept hidden from the neighbors. In the twentieth century, many Justices rejected that notion. They felt that it was part of their job to speak their minds on important issues, in the process perhaps laying the groundwork for future change. They pointed to the first Justice Harlan, the solitary dissenter in *Plessy v. Ferguson*,[17] who rejected the majority's separate but equal doctrine and argued instead that the

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12. For a recent collection of essays critical of the Rehnquist Court's determined pursuit of its agenda, see generally THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002). One contributor has described the Court as aggressively activist:

> No longer restricting itself to crabbed interpretations of civil rights statutes, it is inventing whole new doctrines under the Commerce Clause, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment that severely constrict the other branches of the federal government in their capacity to act on behalf of minorities and the poor.

William L. Taylor, *Racial Equality: The World According to Rehnquist*, *in* THE REHNQUIST COURT, *supra* at 41-42.

13. *See generally* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988) (noting that 1988 statute eliminated substantially all of Supreme Court's mandatory jurisdiction and made petitioning for writ of certiorari primary path to Supreme Court review of federal and state decisions).

14. Gratz v. Bollinger, 123 S.Ct. 2411, 2417 (2003); Grutter v. Bollinger, 123 S.Ct. 2325, 2332-33 (2003).

15. Lawrence v. Texas, 123 S.Ct. 2472, 2476 (2003).

16. Virginia v. Black, 123 S.Ct. 1536, 1539 (2003).

17. 163 U.S. 537 (1896).

Constitution was color-blind.[18] It took over half a century for the Supreme Court in *Brown v. Board of Education*[19]—a unanimous decision—to reject the *Plessy* majority and transform Harlan's dissent into one of the Court's proudest moments.[20]

Justice Brennan, a great defender of dissent—and himself the author of over four hundred dissenting opinions—called the act of dissent part of a Justice's "larger constitutional duty to the community."[21] A Justice should not dissent lightly, Brennan warned us, but when he or she thinks that the Court's majority has misread the Constitution, it is a judicial obligation to point out the flaws in the majority's reasoning.[22] Sometimes the dissenter, like Justice Harlan, is speaking over the heads of the present Court to a future generation; sometimes, as with Justice Holmes' *Lochner v. New York*[23] dissent, the majority comes around in a few years to the dissenter's view.[24] And, of course, sometimes the dissenter remains a solitary voice in the wilderness. But the dissenter has a legitimate role to play in reminding us that the answers to difficult constitutional questions are not always simple, and that reasonable minds can differ, even on the Supreme Court.

Of course, there are some constitutional moments when the Court's need for unanimity may take precedence over an individual Justice's disagreement. Probably the most famous of these moments came in *Brown*, when the Court was preparing to declare segregated schools a violation of the Equal Protection Clause.[25] Chief Justice Warren had a strong majority for that holding—eight votes, including two of the Court's three southerners.[26] But because he knew what powerful resistance the decision would face, he wanted more than that; he wanted a unanimous decision.[27]

The ninth vote belonged to Justice Stanley Reed of Kentucky, who did not share his colleagues' belief that the separate but equal doctrine was unconstitutional.[28] Warren tried to persuade Reed through a series of discussions, but Reed stood firm.[29] Finally, Warren laid out the problem for the

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18. *Plessy*, 163 U.S. at 552, 559 (Harlan, J., dissenting).

19. 347 U.S. 483 (1954).

20. *Brown*, 347 U.S. at 495.

21. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986). For a consideration of Justice Brennan as a dissenter, see generally Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988).

22. Brennan, *supra* note 21, at 437-38.

23. 198 U.S. 45 (1905).

24. *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting). *Lochner's* rejection of state statutes regulating hours of work was reversed twelve years later in Bunting v. Oregon, 243 U.S. 426, 435 (1917).

25. *Brown*, 347 U.S. at 483.

26. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 89 (1983).

27. *Id.* at 89, 94.

28. *Id.* at 89.

29. *Id.* at 94.

lone dissenter; he told Reed, "[Y]ou're all by yourself in this now. You've got to decide whether it's really the best thing for the country."[30] And Justice Reed decided to cast his vote with his eight colleagues, not because he shared their position, but because he was persuaded that the harm an eight-to-one vote would cause the country was more important than his own reservations.[31] Reed never regretted his vote.[32] He made an extraordinary choice—to put the Court's institutional role as interpreter of the Constitution ahead of his own beliefs—because he viewed *Brown*, as he said years later, as perhaps "the most important decision in the history of the Court...."[33]

Looking back almost half a century later, we can appreciate Justice Reed's difficult decision not to dissent in *Brown* and the value of allowing the Court to speak with the full power of a unanimous opinion. But *Brown* was an exceptional case with sweeping consequences. Would we really want the Justices to suppress their real views on a regular basis, leaving behind in the conference room their authentic differences of opinion? Wouldn't we lose the benefit of thoughtful analysis that might well persuade Justices of a future Court, as Justice Harlan's *Plessy* dissent did? If we believe, as I think we should, that the truth emerges from the clash of opposing views, then why should we criticize the Justices for airing their disagreements?

There is, however, another less constructive way in which the Justices express their individual views. A Justice who accepts the majority's result but doesn't like its legal argument may—and these days often does—write a concurring opinion. These concurrences sometimes, like dissents, offer different approaches to a constitutional question. But sometimes they do a good deal less than that—they emphasize a particular point in the majority's opinion, or they suggest that the opinion should or shouldn't apply to similar situations.[34] In other words, they fine-tune the majority opinion without offering us anything much of new substance. Justice Ginsburg has suggested that, in the interests of collegiality, appellate judges should think twice before writing separately,[35] and concurrences are a good example of an opportunity for self-restraint. In the 2001 term, the Rehnquist Court Justices wrote a total of forty-four concurrences.[36] Chief Justice Rehnquist, it should be noted, wrote none—since becoming Chief Justice, he has sharply reduced his separate opinions; Justice

30. *Id.*

31. SCHWARTZ, *supra* note 26, at 94.

32. *Id.* at 106.

33. *Id.*

34. See generally Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court,* 23 U.C. DAVIS L. REV. 777 (1990) for an examination of the concurrence's role in the Court's jurisprudence.

35. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134, 150 (1990). For an analysis of the role played by the concept of collegiality in Justice Ginsburg's performance on the Court, see Laura Krugman Ray, *Justice Ginsburg and the Middle Way,* 68 BROOK. L. REV. 629, 631-34 (2003).

36. *The Supreme Court, 2001 Term—The Statistics*, *supra* note 6, at 453.

Scalia came in first with nine.[37] I don't believe that the Court's jurisprudence would have suffered very much if some of those forty-four concurrences had never been published.

We know that sometimes the author of a majority opinion can stop a concurrence in its tracks by including language that a colleague would otherwise put in a separate opinion. Chief Justice Hughes was always willing to gain a vote by adding a colleague's paragraph to his opinion—whether it fit or not—and, as Hughes said, "let the law reviews figure out what it meant."[38] A less extreme version of this spirit of accommodation is part of what Justice Ginsburg means by collegiality. The author of a majority opinion needs to count to five, but needn't stop there. If the Justices can reach agreement on language that bridges minor differences, readers might be spared some of those frustrating cases in which Justice X joins parts IA, IIC, and IIIB of Justice Y's opinion, and no one can figure out the Court's line-up without a scorecard. More importantly, we might also be spared those cases in which the Justices are so splintered in their responses that no single Justice is able to count all the way to five—with the result that the Court produces no majority opinion, only a cluster of plurality opinions, and the lower courts are left without any clear guidance.

So the Rehnquist Court Justices deserve neither an A nor a D for math. When they dissent or concur out of a strong conviction that the majority is simply wrong in its reading of the Constitution—as in the recent spate of five-four Eleventh Amendment cases[39]—the Justices are serving not only themselves but also the institution of the Court. They are part of an honorable tradition of principled disagreement, and we should not blame them for refusing to sign on with the majority. When, however, the Justices produce a welter of separate opinions, each one diverging only slightly from the one that came before, we may legitimately ask if they couldn't find a way to reach some consensus among themselves and draft some language that would accommodate viewpoints that aren't really so far apart. We may not want the kind of opinion Justice Hughes claimed to accept, one that would baffle the law reviews. But we should be able to accept cautiously worded opinions as a reasonable price to pay for consensus among the Justices, and we are not wrong to hope that the Justices might work a bit harder to find that common ground.

If the Rehnquist Court Justices deserve only middling grades in math, they score even lower in English, where a fair evaluation would include the message "needs improvement." I wonder if anyone these days actually looks forward to reading a typical Supreme Court opinion. As lawyers, law students, and law teachers, we are likely to be concerned about an important constitutional issue

37. *Id.*

38. WILLIAM H. REHNQUIST, THE SUPREME COURT 264 (rev. ed. 2002).

39. *See, e.g.*, Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 376, 388-89 (2001) (Breyer, J., dissenting) (noting that majority's interpretation of Fourteenth Amendment is mistaken); Alden v. Maine, 527 U.S. 706, 760 (1999) (Souter, J., dissenting) (noting there is no evidence supporting majority's reading of Tenth Amendment); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 100, 184 (1996) (Souter, J., dissenting) (noting that majority's decision is "fundamentally mistaken" and "wholly unwarranted").

and eager to find out how the Justices line up and what they say. But do we really feel the same shiver of anticipation as when we pick up the work of a masterful legal writer like Holmes or Cardozo or Jackson? More likely, our hearts sink a bit at the length of the opinion before us. We expect to wind our way through long explanations of basic principles, through subsections piled on subsections, through detailed footnotes, all of this written in a flat and graceless style. A typical Holmes opinion was four or five pages long with no footnotes; the average Rehnquist Court opinion from a recent volume of the U.S. Reports is four times longer with eight footnotes.[40] Has constitutional law become so much more complicated in the past century or has something happened to Supreme Court prose?

The answer to the first question is a qualified yes. The scope of constitutional law protections for individual rights is certainly broader today than it was in Holmes' day—just consider the expansion of the Equal Protection Clause and the development of substantive due process doctrine.[41] That certainly accounts in part for the added complexity and length of some opinions. But it isn't the full story. In the past fifty years or so, the process of Supreme Court opinion writing has undergone a sea change. Justice Brandeis famously said that the Supreme Court Justices were "almost the only people in Washington who do their own work," by which he meant that they actually wrote their own opinions.[42] The Justices had law clerks—one each until the 1950s—but those clerks generally did research and checked cites; they didn't write opinions. [43] In 1938, Justice Stone allowed his law clerk to draft a footnote to one of his opinions, *United States v. Carolene Products Co.*[44] Footnote four turned out to be the source of modern equal protection doctrine and the most important footnote in Supreme Court history, and the law clerk—Louis Lusky, who later became a Columbia law school professor—disclosed his authorship some fourteen years later.[45] But footnote four was also a rare exception to the generally narrow and anonymous role of law clerks from their first arrival at the Court in 1882.[46] Clerks helped their Justices in a variety of ways—Holmes' clerks read aloud to him in his later years, and McReynolds' clerks carried opinion drafts to the printer[47]—but clerks didn't take on the duties of their

40. Average of opinions in Volume 533 of U.S. Reports calculated by the author.

41. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986 (1990) (describing expansive range of subject matter considered by Supreme Court's substantive due process rulings).

42. SCHWARTZ, *supra* note 4, at 22-23.

43. *Id.* at 49; MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 146 (1994).

44. 304 U.S. 144, 152 (1938).

45. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 513 (1956).

46. SCHWARTZ, *supra* note 4, at 49.

47. For references to Holmes' clerks reading aloud to him, see SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 371 (1989); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 462 (1993). For an account of McReynolds' clerk bringing an opinion to the printer, see THE FORGOTTEN MEMOIR OF JOHN KNOX:

Justices.

That picture started to change after World War II. Congress gradually increased the number of law clerks per Justice from one to two, then to three, and eventually to the four that almost all Justices hire today.[48] And as the number of clerks grew, the Justices began to function less like individual craftsmen and more like senior partners of small law firms. The Justices divided their tasks among the clerks in their chambers and then reviewed the work product.[49] And in most chambers those tasks came to include the first drafts of opinions.[50] Chief Justice Rehnquist has described his approach to opinion writing.[51] He assigns each opinion to a law clerk, explains how the Justices voted at conference, and asks for a first draft in about two weeks.[52] Rehnquist then reviews the draft and makes revisions with what he calls " a view to shortening it, simplifying it, and clarifying it."[53] The final word, of course, belongs to the Chief Justice, but the job of shaping the argument and finding language for it belongs in the first instance to the law clerk.

Does it matter that recent law school graduates are drafting constitutional law opinions? After all, their Justices are vigilant in supervising the entire opinion writing process, and the clerks can't slip unauthorized notions into their drafts without prompt detection. Even so, I think it matters in a number of ways. First, though clerks aren't creating doctrine, they are framing it. As lawyers, we know that a legal argument can be shaped in many different ways and that the first to shape it has a strong advantage. The editing process begins with the clerk's formulation, and I suspect that it is the rare draft that is scrapped entirely. So the clerk's approach is the starting point for all future discussions. That is a powerful role for smart but inexperienced lawyers to play in the making of the Court's most important decisions—a constitutional law decision, once made, can be changed only by the Court itself in defiance of stare decisis or by a constitutional amendment.

The fact that law clerks are the primary authors of constitutional opinions matters in another way as well—it has a strong effect on the style of the finished product, and not necessarily for the better. A law clerk mastering a legal issue for the first time is likely to feel the need to explain, in sometimes painful detail, everything he or she has learned about that issue. An experienced Justice, on the other hand, may well feel less need to reinvent the wheel each time the issue arises. Supreme Court law clerks almost invariably come to their jobs with law review experience, and they bring with them the law review's insistence on

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A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON 141 (Dennis J. Hutchinson & David J. Garrow eds., 2002).

48. GLENDON, *supra* note 43, at 146.

49. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 157, 159-61 (4th ed. 1996).

50. GLENDON, *supra* note 43, at 146.

51. REHNQUIST, *supra* note 38, at 260-63.

52. *Id.* at 260-61.

53. *Id.* at 262.

documenting every detail of an argument. Such thoroughness is admirable, but not always appropriate, particularly when it creates an explosion of footnotes that add little of value to Court opinions.

Law clerks also bring with them the law review style of writing, which is formal, dry, and impersonal. And it is here that I think we suffer most from law clerk opinions. In the golden age when Justices wrote for themselves, many of them developed distinctive voices that the reader could recognize immediately. And those recognizable voices created strong judicial personalities that also told us something about the Justice's jurisprudence.[54] When Justice Black, for example, wrote his opinions in simple, clear language, he was speaking not just to lawyers but to everyone.[55] He wanted his message—that the Constitution broadly protects the rights of all people—to reach a wide audience.[56] Black called "writing in language that people cannot understand . . . one of the judicial sins of our times," and so his opinions often sound more like friendly conversation than formal legal prose.[57] In contrast, Justice Frankfurter believed that the Court had a limited role to play in second-guessing Congress and the state legislatures on the constitutionality of their statutes.[58] His opinions expressed the idea of judicial restraint through his use of very formal language.[59] Frankfurter enjoyed using high diction—words like "excogitate"[60] and "embroilment"[61]—in his opinions, speaking over the heads of lay people to a specialized audience of lawyers and judges about his theory of judging.[62] No reader is likely to have much trouble distinguishing an opinion by Black from one by Frankfurter.

If we try the same test with two Rehnquist Court Justices, the results are likely to be quite different. Can even the most devoted reader of the U.S. Reports claim to distinguish the voice of Justice O'Connor from that of Justice Kennedy? Or the voice of Justice Souter from that of Justice Breyer? The single, dramatic exception is, of course, Justice Scalia, whose opinions no one would ever mistake for the work of any other Justice. And the reason for this is equally clear: We know that Scalia actually writes his own opinions.[63] (Justice Stevens also writes many of his own opinions, though his style is less

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54. See generally Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002), for an analysis of the concept of judicial personality.

55. *See id.* at 198 (describing Justice Black's straightforward style of opinion writing).

56. *Id.*

57. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 325 (1994).

58. Ray, *supra* note 54, at 201-04.

59. *Id.* at 204.

60. Terminiello v. Chicago, 337 U.S. 1, 12 (1949) (Frankfurter, J., dissenting).

61. Colegrove v. Green, 328 U.S. 549, 554 (1946).

62. Ray, *supra* note 54, at 204.

63. *See* GLENDON, *supra* note 43, at 146 (commenting on drafting responsibilities delegated to Supreme Court law clerks); EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 271 (1998) (criticizing clerks' drafting of Supreme Court opinions).

distinctive.)[64] The voice we hear in a Scalia opinion, particularly a Scalia dissent, is immediately recognizable. It is the voice of a supremely confident jurist who is indignant that his colleagues somehow can't manage to see things his way, which is of course the only right way. The language of a typical Scalia opinion is strong, vivid, and colloquial, as if the Justice were in the same room, speaking right in our ears. We may not agree with his positions, we may even have reservations about his methodology, but we are never left in doubt about who is speaking and what he thinks.

And that sense of sharply defined judicial personalities speaking directly through their opinions is what is largely missing from the work of the Rehnquist Court. When Chief Justice Warren was preparing the Court's opinion in *Brown*, he knew precisely how the opinion should be written. It had to be, in his words, "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."[65] No one has ever considered Warren one of the Court's great writers, and in fact most of his opinions were drafted by his clerks. But we know that he worked on *Brown* himself because he understood that its style was as important as its holding.[66] After all, the strong message the Court sent to the country needed to reach not just its lawyers, but also its people.

The Rehnquist Court Justices have lost sight of that idea. With the exception of Justice Scalia and Justice Stevens, they delegate too much of the Court's opinion writing to their smart, diligent, well-trained clerks, supposedly for the sake of efficiency. But the curious fact is that, despite working with their many law clerks, the Rehnquist Court Justices have cut almost in half the number of opinions issued each term, from 152 in 1986 to about 80 in recent terms.[67] So quantity has declined, and so has quality. The clerks, supervised by their Justices, produce opinions that are like generic brands—solid, reliable, but undistinguished and indistinguishable from one another. It is unfair to expect law clerks to write opinions that speak directly in the voices of their Justices. But, especially in light of the Court's shrinking docket, I don't think it is unfair to expect the Justices to hark back to Justice Brandeis' Washington, D.C., and do more of their own work—the work of communicating their jurisprudential visions in their own words to the people who read their opinions.

So most of the Justices fall far short of high grades in English as well as in math. Can we at least say, as generations of teachers have told the parents of children with weak grades, that the Justices are a pleasure to have on the bench—that they are cooperative, courteous, and civil, model citizens of the judicial community? Unfortunately, the record doesn't quite support that claim. The discord within the Rehnquist Court appears not only in divided votes and separate opinions, but also in the nature of its judicial discourse. There are certainly respectful ways for colleagues to disagree with one another, but those

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64. LAZARUS, *supra* note 63, at 271.

65. SCHWARTZ, *supra* note 26, at 97.

66. *Id.* at 96-97.

67. *The Supreme Court, 1986 Term—The Statistics*, 101 Harv. L. Rev. 362 (1987); *The Supreme Court, 2001 Term—Statistics*, *supra* note 6.

aren't always the ways that the Rehnquist Court Justices have chosen. Their record, in short, is mixed.

The Supreme Court has always valued collegiality among its members. For over a hundred years it has been a tradition for the Justices to begin each conference by shaking hands with one another—a total of thirty-six handshakes. The gesture demonstrates that, however heated the conference discussion may become, it is still a conversation among colleagues who respect each other. There have nonetheless been low points in the relations among the Justices, the lowest perhaps Justice McReynolds' refusal to sit for the Court's annual photograph because seniority guidelines would have placed him next to Louis Brandeis, a Jewish Justice.[68] And there have been high points as well, like the delicacy with which his colleagues approached Justice Holmes to tell him that, at the age of ninety, he was simply no longer able to do the job.[69] Despite serious friction between some members—the strained relations between Black and Frankfurter were legendary[70]—the Justices have almost always recognized their responsibility to the institution of the Court and protected its harmonious operation.

If we begin our assessment of the Rehnquist Court Justices, as teachers tend to do, with the positives rather than the negatives, we can say that it has produced one of the most remarkable examples of collegial cooperation in the Court's history, though even that episode has a darker side. In 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[71] brought to the Court the explosive question of whether *Roe v. Wade,*[72] which recognized the right to abortion, should be overturned.[73] At conference, Justice Kennedy suggested that he was ready to cast the crucial fifth vote to strike down *Roe*, and *Roe's* opponents went home assuming that victory was theirs.[74] Chief Justice Rehnquist even began work on the majority opinion.[75] But, unbeknownst to their colleagues, Justices O'Connor and Souter persuaded Justice Kennedy to join them in drafting a single, co-authored opinion that would preserve what they considered the core holding of *Roe*.[76] They worked in total secrecy, finally surprising the other Justices when they circulated their joint draft.[77]

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68. *See* FORGOTTEN MEMOIR, *supra* note 47, at xix (describing Justice James McReynolds' anti-Semitic and racist views).

69. *See* WHITE, *supra* note 47, at 466-67 (highlighting sensitivity of Supreme Court's approach when convincing Justice Holmes to retire).

70. *See generally* JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989) (describing personal and professional disagreements of Justices Black and Frankfurter).

71. 505 U.S. 833 (1992).

72. 410 U.S. 113 (1973).

73. *Casey*, 505 U.S. at 844.

74. See Jeffrey Rosen, *The Agonizer*, THE NEW YORKER, Nov. 11, 1996, at 82, 87 and LAZARUS, *supra* note 64, at 466-83 for accounts of the behind-the-scenes decision-making process in *Casey*.

75. LAZARUS, *supra* note 63, at 473.

76. *Id.* at 469-72.

77. *Id.* at 471-74.

From the point of view of *Roe's* opponents, of course, this was a huge disappointment. But from an institutional point of view, it was a successful act of collaboration. The three Justices divided up the drafting of *Casey*, each one taking responsibility for a section and then announcing it from the bench, but all three signed the full opinion. There are only a handful of opinions signed by more than one Justice in the history of the Court. The most famous is *Cooper v. Aaron*,[78] where all nine Justices signed an opinion to assert the Court's full authority to order school desegregation in the face of local defiance.[79] In *Casey,* Justices O'Connor, Kennedy, and Souter used their joint opinion to try to defuse one of the Court's most controversial issues. They could have simply combined their votes to support the opinion of a single Justice, but that Justice would certainly have become the personal lightning rod for powerful reactions from both the supporters and opponents of *Roe.* Instead, by joining forces, they spoke with the added authority of their three unified voices and deflected attention from the identity of a single author to the legal arguments of a trio of authors. Of course, in doing so they also deceived their colleagues. We're told that Justice Scalia was so upset when he found out that he walked over to Justice Kennedy's house to dress him down.[80] So this episode illustrates both the ability of some Rehnquist Court Justices to work together in a challenging situation and their willingness to work behind closed doors, fooling their colleagues in the process, to reach their larger goal.

Although Justice Scalia gets the Court's highest grade in English, he unfortunately also gets its lowest grade in deportment. The same confidence in the correctness of his views that makes Scalia's opinions so forceful also leads him to tell his colleagues with brutal frankness how misguided they are for disagreeing with him. In a series of dissents, he has called the majority's arguments, among other things, "nothing short of ludicrous,"[81] "entirely irrational,"[82] and "nothing short of preposterous."[83] He has said that a position taken by Justice O'Connor "cannot be taken seriously,"[84] and she is one of his usual allies on the Court. In his scathing dissent to the joint opinion in *Casey,* Scalia announced that it was "beyond human nature" not to "respond to a few of the [Court's] more outrageous arguments," and he proceeded to attack his colleagues with ferocity.[85] Many Court observers have lamented Scalia's lack of civility and the new tone of harsh attack that he has brought to its opinions.[86]

If we leave the printed page for the courtroom, where the Court presents its

78. 358 U.S. 1 (1958).

79. *Cooper*, 358 U.S. at 19-20.

80. Rosen, *supra* note 74, at 87.

81. Lee v. Weisman, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

82. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting).

83. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

84. Webster v. Reprod. Health Serv., 492 U.S. 490, 532 (1989) (Scalia, J., concurring).

85. *Casey*, 505 U.S. at 981 (5-4 decision) (Scalia, J., concurring and dissenting).

86. *See, e.g.*, Erwin Chemerinsky, *The Rhetoric of Constitutional Law,* 100 MICH. L. REV. 2008, 2021-22 (2002) (discussing how rhetoric of opinions offers insight to Supreme Court).

public face to the world, we again find Scalia misbehaving. He insists on dominating oral argument, interrupting his colleagues to pepper the advocates with a barrage of questions and hypotheticals, so that the other Justices have to struggle to make themselves heard. In one oral argument, Scalia alone asked twenty-three of the thirty-five questions put to one advocate.[87] He seems to have trouble sharing, and it is fair to say that he doesn't always work well with others. At the other extreme of courtroom behavior is Justice Thomas, who never asks a question or speaks at all during oral argument.[88] His silence is so well established that he made national headlines when he denounced cross burning during a recent Court session.[89] He too earns a low grade for participation in group activities.

The most dramatic test of the Rehnquist Court's performance came when the Justices resolved the 2000 presidential election in the case of *Bush v. Gore*.[90] The country's attention was focused on the Court in an unprecedented manner; there were even television reporters filming the Justices as they drove out of the Court's parking garage on the evening of December 12. [91] The resolution of the case had been eagerly awaited, but the unfortunate reporters who received the first copies of *Bush v. Gore* that night were clearly stymied—live, on camera—by the result. Instead of a clear-cut opinion either permitting the Florida recount to continue or halting it, they were confronted with a welter of opinions—one concurrence, four dissents, and, most baffling, a lead opinion authored by that unknown jurist, per curiam.[92] This was no moment for a legal novice to tell the American public what the Court had decided. But even when the legal experts settled in to analyze the various opinions, there were no easy summaries or crisp capsule accounts forthcoming. *Bush v. Gore* emerged as a complicated case with some genuine surprises, and it generated a small industry of books and articles in the months that followed.

Should the Court be downgraded for not producing a single, unanimous opinion? We have seen how hard Chief Justice Warren labored to make *Brown* unanimous. Twenty years later, the members of the Burger Court also labored hard to produce a unanimous opinion in *United States v. Nixon*,[93] the case that ordered President Nixon to release his Watergate tapes and led directly to his resignation.[94] At these rare constitutional moments, when the Court renders a decision of far-reaching significance for a divided country, a unanimous opinion

87. *See* Linda Greenhouse, *Court Appears Ready to Reverse a Sodomy Law*, N.Y. TIMES, Mar. 27, 2003, at A19 (reporting on oral argument before Supreme Court in *Lawrence v. Texas*).

88. *See* Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1 (reporting on oral argument of Virginia cross-burning case before Supreme Court).

89. *Id.*

90. 531 U.S. 98 (2000) (per curiam).

91. Tony Mauro, *Is* Bush v. Gore *Finished for the Supreme Court? Don't Bet on It*, THE LEGAL INTELLIGENCER, Dec. 18, 2000, at 4.

92. *Bush*, 531 U.S. at 100.

93. 418 U.S. 683 (1974).

94. *Nixon*, 418 U.S. at 714.

provides a level of authority and reassurance that no split result can match. Of course, Justices with principled disagreements cannot, and should not, always follow the path of Justice Reed in *Brown* and suppress their own views. But I think that when the country faces such historic decisions, we have a right to expect a better performance than the Rehnquist Court offered in *Bush v. Gore.*

The most surprising aspect of *Bush v. Gore* was the use of the per curiam opinion.[95] As a rule, an opinion per curiam, or "by the court," signals an issue of not much significance that the entire Court agrees can be quickly and easily resolved.[96] It would be hard to come up with a label less suited to *Bush v. Gore.* Here, seven Justices, including two dissenters, believed that there was an equal protection problem with the Florida recount but disagreed over the remedy.[97] Three Justices, including the Chief Justice, believed that the more serious problem was an Article II violation caused by the Florida Supreme Court's interpretation of state election law.[98] With the Chief Justice in the majority, we would naturally expect him to do what Chief Justices have traditionally done in cases of great importance: assign the opinion to himself. Yet here Chief Justice Rehnquist chose instead to write a concurring opinion, joined by Justices Scalia and Thomas.[99] The four dissenters—Justices Stevens, Souter, Ginsburg, and Breyer—each wrote a separate opinion.[100] And that means that the per curiam was almost certainly written by one or both of the two Justices, O'Connor and Kennedy, who didn't sign or join any other opinion.[101]

There has been a great deal of speculation about the per curiam, with its very limited equal protection holding – good for that case only – that not enough time remained to conduct a constitutionally valid recount. Did the Rehnquist/Scalia/Thomas bloc join that opinion half-heartedly, when it failed to win over the two additional votes it needed for its own majority? Was this a pragmatic solution to a Court so badly splintered that there was no other way to produce a majority opinion, and we might otherwise have been left with a non-binding plurality opinion? Was the use of the per curiam label a way of suggesting greater consensus than the views of the members of the majority really justified? Was the opinion written in such haste, under such pressure, that more than one Justice worked on it and no one wanted to claim the credit—or the blame? Finally, and most disturbingly, was this an opinion driven by political rather than jurisprudential concerns?

We don't know the answers to these questions, and we're not likely to know

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95. See Laura Krugman Ray, *The Road to* Bush v. Gore: *The History of the Supreme Court's Use of the Per Curiam Opinion,* 79 NEB. L. REV. 517, 568-75 (2000) for a discussion of *Bush v. Gore* as a per curiam opinion.

96. *See id.* at 569 (arguing that use of per curiam form in *Bush v. Palm County Canvassing Board* reflected consensus and neutrality of opinion).

97. *Id.* at 572-73.

98. *Id.* at 572.

99. *Id.* at 571-72.

100. Ray, *supra* note 95, at 571.

101. *See id.* (suggesting that Justices O'Connor's and Kennedy's views were expressed solely in per curiam opinion).

them for many years, not until the Court files of a participating Justice become available to legal scholars. But we do know that in *Bush v. Gore* the Rehnquist Court Justices failed to rise to the occasion. At a time of national turmoil, when the Court, by agreeing to hear the case, seemed to promise that it could provide a satisfactory outcome, it provided instead a puzzling and unsettling result that sparked even more controversy. I regret to say that the Justices would be lucky to receive a passing grade for their effort.

Finally, how should we evaluate the overall performance of the Rehnquist Court Justices? Should we apply absolute standards of excellence or should we grade on a curve, taking into account the nature of the issues the Court has faced? Every Supreme Court is to some extent a captive of history—its reputation is shaped by the major cases it decides. The Court of the 1930s faced the government's efforts to bring the country back from a severe depression; the Warren Court faced the harsh consequences of racial segregation; the Burger Court faced a President's challenge to the rule of law.[102] The Rehnquist Court, which chooses its own docket, is less a captive of history than any of its predecessors. But it will inevitably be remembered, and judged, for its choosing and handling of *Bush v. Gore.*

Nothing can erase that extraordinary case from volume 531 of the U.S. Reports, but it is possible for the Court to reexamine the ways in which it prepares and delivers its constitutional law opinions, including practices that it has inherited from earlier Courts. As the nine Justices of the Rehnquist Court begin their tenth term together on the first Monday of this October, they might do well to consider how to improve their performance in future cases: to work harder for consensus, to rein in the ghostwriters in their chambers, and to foster collegiality in their opinions and in the courtroom. We would all be pleased to find that, at the end of their next term, the Justices had raised their grades and brought home to all of us a better report card.

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102. *See, e.g.*, *Nixon*, 418 U.S. at 713 (concluding that Nixon's executive privilege claim failed because it was based on general interest in confidentiality); *Brown*, 347 U.S. at 495 (holding that race-based school segregation violated Equal Protection Clause); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding constitutionality of New Deal era National Labor Relations Act).