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# Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions

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## Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions

Ira P. Robbins\*

*Per curiam*—literally translated from Latin to “by the court”—is defined by Black’s Law Dictionary as “[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion.” Accordingly, the author of a *per curiam* opinion is meant to be institutional rather than individual, attributable to the court as an entity rather than to a single judge. The United States Supreme Court issues a significant number of *per curiam* dispositions each Term. In the first six years of Chief Justice John Roberts’s tenure, almost nine percent of the Court’s full opinions were *per curiams*. The prevalence of issuing unattributed opinions raises questions of its impact on judicial accountability and the development of the law.

This Article argues that the *per curiam* is a misused practice that is at odds with the individualized nature of the American common law system, frustrating efforts to hold individual judges accountable and inhibiting the development of the law. Thus, the use of the *per curiam* in courts of last resort, including *de facto* courts of last resort, should be limited to a narrow class of opinions in which the use of formulaic, boilerplate language has already extinguished any sense of individuality. Opinions containing language that is more expansive must be attributed in order to serve as a check on judges’ fidelity to the law and to enable the public and the legal profession to formulate an accurate understanding of the law.

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I.	INTRODUCTION.....	1198
II.	BACKGROUND .....	1200
	A. <i>Traditional Usage of the Per Curiam Opinion</i> .....	1200
	B. <i>Modern Shifts in Usage</i> .....	1202
III.	JUDICIAL ACCOUNTABILITY .....	1207
	A. <i>Accountability and the Signed Opinion</i> .....	1210
	B. <i>The Per Curiam Frustrates Accountability</i> .....	1212
	C. <i>Elected Judges, Too, Should Avoid Per Curiam</i> <i>Opinions</i> .....	1221
IV.	DEVELOPMENT OF THE LAW .....	1224
	A. <i>Judicial Personalities</i> .....	1225
	B. <i>Individuality and the Language of Judicial</i> <i>Decisions</i> .....	1228
	C. <i>Judges as Lawmakers</i> .....	1235
V.	EXCEPTIONS .....	1238
VI.	CONCLUSION .....	1241

## I. INTRODUCTION

In 1986, the United States Supreme Court heard *Bazemore v. Friday* to resolve allegations of racial discrimination.<sup>1</sup> The Court issued its ruling per curiam. Given the multiple voiced opinions, however, that label was meaningless.<sup>2</sup> The Court's holding relied on two concurring opinions, one authored by Justice Brennan and joined by the whole Court,<sup>3</sup> and the second authored by Justice White and joined by four other Justices.<sup>4</sup> Perhaps the Court was attempting to hide behind the per curiam label, or perhaps the Court wanted to show a united front on an issue of such magnitude. Because the separate authors of the concurring and dissenting opinions were identified, however, as they always are, and because the Court placed such heavy emphasis on the majority's reasoning, the Court failed to accomplish either goal. Regardless of the anticipated effect of the decision, *Bazemore* demonstrates how far the per curiam opinion has strayed

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1. 478 U.S. 385 (1986) (per curiam).

2. *Id.*; see *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (involving an opinion "by the court" in which there were five separate concurrences and four separate dissents); JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 214-15 (2011) (referring to the "one-paragraph unsigned opinion" in *Furman* and stating that *Furman's* "brief per curiam statement was followed by 231 pages of opinions, one opinion for each of the nine members of the Court").

3. *Bazemore*, 478 U.S. at 388 (Brennan, J., concurring in part).

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

from its original usage as a fast and easy way to dispose of simple, procedural matters that were to have no effect on the status of the law.

Per curiam—literally translated from Latin to “by the court”<sup>5</sup>—is defined by *Black’s Law Dictionary* as “[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion.”<sup>6</sup> Accordingly, the author of a per curiam opinion is meant to be institutional rather than individual, attributable to the court as an entity rather than to a single judge. Since its original use, the per curiam has been used to expand desegregation from public schools to other public venues,<sup>7</sup> to supply the constitutional standard for the regulation of speech,<sup>8</sup> to strike down portions of a campaign finance law,<sup>9</sup> to make the Court a de facto censorship board for things it deemed obscene,<sup>10</sup> and even to decide the outcome of a presidential election.<sup>11</sup> Today, the per curiam is a misused practice that is at odds with the individualized nature of the American common law system, frustrating efforts to hold individual judges accountable and inhibiting the development of the law. Thus, this Article argues that the use of the per curiam in courts of last resort, including de facto courts of last resort such as the federal courts of appeals, should be limited to a very narrow class of opinions in which the use of formulaic, boilerplate language has already extinguished any sense of individuality. The per curiam is inappropriate, however, when the opinion begins to expound on the particular facts or law at issue.

Part II of the Article examines the history of the per curiam opinion, including its early usage in nineteenth-century Supreme Court cases, its application to more substantive cases and decisions with separate opinions, and its current trends. Part III argues that, because appellate judges are held accountable primarily through their individual role in judicial decision making, all of their opinions must be attributed. Part IV explores the individual role of appellate judges in making and explaining the law, arguing that individuality pervades

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5. R. Perry Sentell, Jr., *The Peculiarity of Per Curiam: In the Georgia Supreme Court*, 52 MERCER L. REV. 1, 2 (2000).

6. BLACK’S LAW DICTIONARY 1201 (9th ed. 2009).

7. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

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

9. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

10. *See Miller v. California*, 413 U.S. 15, 22 n.3 (1973) (writing that the per curiam-based procedure for resolving obscenity cases, used thirty-one times to summarily reverse convictions from 1967 to 1973, “has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us”).

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

the substance and language of judicial opinions. Consequently, the author of those decisions must be identified for the public and the legal profession to have an accurate understanding of the law and to frame legal arguments effectively. Part V identifies the narrow set of exceptions in which the per curiam is appropriate.

## II. BACKGROUND

### A. *Traditional Usage of the Per Curiam Opinion*

Traditionally, the per curiam was used to signal that a case was uncontroversial, obvious, and did not require a substantial opinion.<sup>12</sup> The early usage of the per curiam label, which first appeared in a published Supreme Court decision in 1862, was consistent with the unity among the Justices that its name connotes.<sup>13</sup> Over the next few decades, the Court generally used the per curiam to dispose briefly of standard proceedings, such as grants or denials of certiorari, dismissals for lack of jurisdiction, and various motion decisions.<sup>14</sup> By the turn of the century, the Court also routinely issued per curiams for brief affirmances and reversals of lower court decisions.<sup>15</sup> These early opinions often comprised only a sentence or two, rarely more than a paragraph, and never displayed disagreement among the Justices.<sup>16</sup>

Beginning in 1909 with Justice Oliver Wendell Holmes, whose strongly worded separate opinions earned him the moniker “the Great Dissenter,” per curiam opinions began to feature dissents.<sup>17</sup> The per

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12. Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29, 36 (1992).

13. 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, 521-22 (2000) (noting that *Mesa v. United States*, 67 U.S. (2 Black) 721 (1862) (per curiam), was the first published per curiam opinion). The per curiam, however, was used before *Mesa* in several unreported cases. 131 U.S. app. at xi, xvii (1888). Only one of these opinions was ever published. *West v. Brashear*, 131 U.S. app. at lxvi (1839) (per curiam), was not printed until it appeared in an 1889 collection of previously unpublished opinions that was compiled for the Court's centennial. Ray, *supra*, at 521-22.

14. Ray, *supra* note 13, at 522.

15. *Id.* The Supreme Court first cited to precedent in a per curiam reversal in *Sherman v. Robertson*, 136 U.S. 570 (1889) (per curiam). Ray, *supra* note 13, at 522.

16. See Ray, *supra* note 13, at 522-23 (reasoning that without discussion there could be no conflict of opinion).

17. See Arthur J. Jacobson, *The Ghostwriters*, in *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000*, at 189, 196-97 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002) (observing that Justices William H. Moody and Edward D. White joined Justice Holmes and “established that per curiam and dissent . . . could coexist in the same decision”); Ray, *supra* note 13, at 524-25 (citing *Chi., Burlington, & Quincy Ry. Co. v. Williams*, 214 U.S. 492 (1909) (per curiam), in which Justice Holmes dissented from a three-page per curiam that set forth the certified questions of law from the lower court).

curiam label—which “falters at its inception” because the opinion “by the court” is necessarily written by some individual justice<sup>18</sup>—also began to falter at its conclusion, no longer denoting a resolute bloc of complete institutional support. The practice of writing separately from per curiam opinions was not fully embraced, however, until President Franklin D. Roosevelt’s nominees began to fill the bench, bringing a strong sense of judicial individuality and a reluctance to suppress their views for chimerical judicial solidarity.<sup>19</sup> Indeed, whereas “[t]he Court in the nineteenth and early twentieth centuries . . . deliberately submerged the idea of a personal voice in the fiction of a collective voice,” Roosevelt’s Court “never hesitated to disturb consensus opinions with statements of individual views.”<sup>20</sup> By mid-century, Justices dissenting from or concurring with a supposedly unanimous and straightforward per curiam opinion had become a well-established practice.<sup>21</sup>

Along with this shift from unanimity to discord, the per curiam has also seen shifts in usage since its original employment in more routine, procedural matters. By the 1930s, the Court had begun using the per curiam to decide substantive cases accompanied by oral argument and to develop more thorough opinions.<sup>22</sup> The per curiam not only allowed the Court to quickly adjudicate these more substantive cases but also to signify to the public that the issues in them were easily resolved and required little explanation.<sup>23</sup> While it continues to expand the use of the per curiam to more substantive

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18. Sentell, *supra* note 5, at 2.

19. Ray, *supra* note 13, at 532.

20. *Id.* at 518, 527. As Ray succinctly writes, in the late 1930s “[p]er curiam opinions increasingly came with dissents attached, creating an oxymoronic form, one that simultaneously insisted on both institutional consensus and individual disagreement.” *Id.* at 520.

21. *E.g.*, Simpson v. Union Oil Co., 396 U.S. 13, 15 (1969) (per curiam) (Black, J., concurring in part and dissenting in part); Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam) (Black, Harlan, & Stewart, JJ., concurring); Eichel v. N.Y. Cent. R.R. Co., 375 U.S. 253, 256 (1963) (per curiam) (Harlan, J., concurring in part and dissenting in part); Mackey v. Mendoza-Martinez, 362 U.S. 384, 388 (1960) (per curiam) (Clark, J., dissenting, joined by Harlan & Whittaker, JJ.); Bowles v. United States, 319 U.S. 33, 36 (1943) (per curiam) (Jackson, J., dissenting, joined by Reed, J.); McCart v. Indianapolis Water Co., 302 U.S. 419, 423 (1938) (per curiam) (Black, J., dissenting).

22. See Ray, *supra* note 13, at 523 (identifying four cases from the 1934 Supreme Court Term in which per curiams were issued after oral argument, and commenting that “[t]he decisions are unexceptional in themselves, but they represent the adaptation of the per curiam to a new use, the resolution of significant issues in a condensed format”).

23. *Id.*

cases, the Court still employs the per curiam in cases that are routine and uncontroversial to a majority of the Justices.<sup>24</sup>

### *B. Modern Shifts in Usage*

Beginning in the mid-twentieth century, the Supreme Court expanded the role of the per curiam, fashioning it as a strategic device to resolve time-sensitive cases quickly, as a protective shield from controversial issues, and as a way to make new law by indirection.<sup>25</sup> Through the per curiam, the Court at times also aimed to convey a message of consensus while engaging in more complicated and substantive decision making.<sup>26</sup>

The Supreme Court has used the per curiam to adjudicate cases needing urgent resolution, such as those involving military and national security interests. In *Ex parte Quirin*,<sup>27</sup> for example, the Court issued a brief per curiam opinion as a means to deliver a prompt decision during wartime to sustain the legitimacy of the military trial of eight German saboteurs.<sup>28</sup> The Court released a more detailed opinion a few months later, but six of the eight saboteurs had been sentenced to death and were executed a few days after the release of the first opinion.<sup>29</sup> Similarly, in *New York Times Co. v. United States*

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24. Wasby et al., *supra* note 12, at 36-37. Cardozo suggested that there were three categories of cases: (1) those that are "predestined" and can be resolved in only one way; (2) those that involve no dispute about the law itself, but rather its application to the specific facts of a case; and (3) those that will impact the development of the law. RUGGERO J. ALDISERT, *OPINION WRITING* 19-20 (2d ed. 2009). According to United States Court of Appeals for the Third Circuit Judge Aldisert, a per curiam opinion exists "somewhere between an unpublished or memorandum opinion and a full-blown signed published opinion. [It is used] when the rule of law and its application to relatively simple facts are clear, or when the law has been made clear by an appellate decision subsequent to the trial court's judgment." *Id.* at 21. Aldisert advises:

A signed or per curiam opinion should be published in all cases that contribute to the progressive development of the law. However, you must distinguish between those cases requiring interpretation and those simply requiring application of existing interpretation to new facts. The latter may not contribute to the progress of the law. If it does not, it should be disposed of by memorandum opinion or judgment order.

*Id.* at 27.

25. See generally Laura Krugman Ray, *The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court*, 27 J. SUP. CT. HIST. 176, 177 (2002) (discussing the evolution of the per curiam opinion).

26. Ray, *supra* note 13, at 536.

27. 317 U.S. 1 (1942) (per curiam).

28. See Ray, *supra* note 13, at 537 (indicating that the Court issued a brief per curiam one day after hearing oral argument at a Special Term).

29. See *id.* (stating that Chief Justice Stone worked on the full opinion in solitude while summering in New Hampshire).

(*Pentagon Papers*),<sup>30</sup> the Court faced the need to act quickly in deciding the appropriateness of enjoining the *New York Times* and the *Washington Post* from publishing portions of the top-secret Pentagon Papers that potentially posed serious harm to national security.<sup>31</sup> In reaching a swift resolution, the Court separated the result in the case from its reasoning and issued a three paragraph per curiam that “said almost nothing of substance.”<sup>32</sup> The only paragraph dealing with the merits referred to three trivial precedents and two lower court rulings, followed by the Court succinctly noting its agreement.<sup>33</sup> The per curiam in *Pentagon Papers* was followed by six divergent concurring opinions.<sup>34</sup> This demonstrated the Court’s determination to reach a decision under urgent circumstances, even in the absence of agreement regarding the reasoning behind it.<sup>35</sup>

At times the per curiam has been a convenient tool for the Supreme Court in deciding controversial cases, because “[w]ith no Justice signing the opinion, there was no individual to be blamed for evading the tough questions.”<sup>36</sup> In *Toolson v. New York Yankees, Inc.*,<sup>37</sup> the Court used the per curiam to avoid reexamining the underlying rationale for baseball’s federal antitrust exemption.<sup>38</sup> By relying on precedent established in *Federal Baseball Club v. National League of Professional Baseball Clubs*,<sup>39</sup> which exempted baseball from federal

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30. 403 U.S. 713 (1971) (per curiam).

31. See Ray, *supra* note 13, at 551 (explaining that the Justices were highly divided on whether to grant certiorari, with the controlling vote belonging to Justice Stewart, who proposed to keep the injunction in place but to hear the cases immediately the next day); see also DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* 301 (1996) (noting that the Justices did not have ample time before the summer recess to produce a majority opinion they could support).

32. Ray, *supra* note 13, at 552.

33. *Pentagon Papers*, 403 U.S. at 714.

34. *Id.* (Black, J., concurring); *id.* at 720 (Douglas, J., concurring); *id.* at 724 (Brennan, J., concurring); *id.* at 727 (Stewart, J., concurring); *id.* at 730 (White, J., concurring); *id.* at 740 (Marshall, J., concurring).

35. See Ray, *supra* note 13, at 552-54 (discussing that each of the six concurring opinions had a “particular slant” on the issue). But see Jacobson, *supra* note 17, at 202 (contrasting the *Pentagon Papers* per curiam opinion with *Cooper v. Aaron*, 358 U.S. 1 (1958), in which all of the Justices signed their names, and stating that the six Justices who joined the per curiam could have done the same).

36. Ray, *supra* note 13, at 538; see Michelle Friedland et al., *Opinions of the Court by . . . Anonymous*, S.F. ATTORNEY (BAR ASS’N S.F.), Summer 2008, at 38, 39 (explaining that per curiams in controversial cases can “depersonalize the decision” and strengthen the institutional voice).

37. 346 U.S. 356 (1953) (per curiam).

38. Ray, *supra* note 13, at 538.

39. 259 U.S. 200, 208-09 (1922) (holding that baseball did not constitute commerce and therefore was exempt from federal antitrust laws).



antitrust laws, and by deferring to Congress to change the status of baseball, the Court avoided confronting the issue and the need to formulate a developed opinion.<sup>40</sup>

The cases following the landmark decision in *Brown v. Board of Education*<sup>41</sup> are another instance in which the Supreme Court utilized the per curiam in controversial cases, extending its desegregation ruling incrementally beyond education to other fields, such as public beaches,<sup>42</sup> golf courses,<sup>43</sup> and bus systems.<sup>44</sup> These per curiams failed to discuss the rationale of the cases, or even the subject matter.<sup>45</sup> The Court's decision in *New Orleans City Park Improvement Ass'n v. Detiege*, for example, ended segregation in public housing without referring to any precedent, merely stating, "The judgment is affirmed."<sup>46</sup> The Court constructed "a bridge of per curiams" to extend desegregation, implying that each subsequent case inevitably followed from its predecessor to reach a certain conclusion.<sup>47</sup> By omitting legal reasoning from the per curiam decisions, the Court prevented a renewed attack on *Brown*'s precedent and furthered desegregation throughout the South.<sup>48</sup>

More recently, the Supreme Court in *Bush v. Gore*<sup>49</sup> issued a per curiam to defuse charges of political bias in deciding the winner of the 2000 presidential election.<sup>50</sup> Despite the appearance of unity provided by the per curiam label, there was publically acknowledged discord among the Justices as evidenced by the accompanying five signed opinions.<sup>51</sup> Critics charged that the use of the per curiam in this case

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40. Ray, *supra* note 13, at 538.

41. 347 U.S. 483 (1954).

42. *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (per curiam) (affirming the United States Court of Appeals for the Fourth Circuit's decision to desegregate public beaches).

43. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (affirming the United States Court of Appeals for the Fifth Circuit's decision to desegregate golf courses).

44. *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (affirming district court ruling that Alabama statutes requiring bus segregation were unconstitutional); see Wasby et al., *supra* note 12, at 37 (recognizing that per curiam opinions were also used to extend Fourteenth Amendment rights in finding segregated courtroom seating unconstitutional).

45. Ray, *supra* note 13, at 539.

46. 358 U.S. 54 (1958) (per curiam).

47. Ray, *supra* note 13, at 540.

48. *Id.*

49. 531 U.S. 98 (2000) (per curiam).

50. See Ray, *supra* note 13, at 569, 575 (concluding that the use of the per curiam indicated that the opinion was depersonalized, putting the Supreme Court above politics).

51. See *id.* at 570-71 (observing that the opinion included one concurrence and four dissents, with only Justices O'Connor and Kennedy not signing their names to any part of the separate opinions).

was improper because it “failed to package the majority opinion as a restrained solution, based on a substantial consensus.”<sup>52</sup>

The Supreme Court has also used the per curiam to create new law. In *Brandenburg v. Ohio*,<sup>53</sup> for example, the Court overturned the defendant’s conviction for statements, made at a Ku Klux Klan meeting, that violated an Ohio statute prohibiting the advocacy of violence.<sup>54</sup> Chief Justice Warren assigned the task of completing the *Brandenburg* opinion to Justice Brennan after its original author, Justice Fortas, resigned from the Court.<sup>55</sup> Although Justice Brennan made seemingly inconsequential changes to the earlier draft, his new language significantly impacted First Amendment doctrine.<sup>56</sup> The per curiam enabled Justice Brennan to do so anonymously.

Additionally, the Supreme Court has continuously used the per curiam for certain brief dispositions, such as summary dispositions on the merits.<sup>57</sup> These decisions are often particularly opaque to the extent that they do not give any explanation or reasoning, but instead simply state the result.<sup>58</sup> The Supreme Court also issues per curiam decisions

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52. See *id.* at 575 (depicting the Court’s use of the per curiam as “more aggressive and less successful” compared to its use in remanding for clarification in *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam)); see also Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 173 & n.2 (2001) (noting that prominent scholars, including Alan M. Dershowitz and Vincent Bugliosi, questioned the Court’s motives).

53. 395 U.S. 444 (1969) (per curiam).

54. Bernard Schwartz, *Justice Brennan and the Brandenburg Decision—A Lawgiver in Action*, 79 JUDICATURE 24, 27 (1995).

55. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 318 (2010).

56. Ray, *supra* note 13, at 542-43; see *infra* notes 228-239 and accompanying text (describing Justice Brennan’s redraft of Justice Fortas’s original opinion in *Brandenburg* and its significant impact on First Amendment free speech doctrine).

57. See, e.g., EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 349 (9th ed. 2007) (indicating that the most controversial of these dispositions occurs where the Court grants certiorari, addresses the merits and facts of the case, and then either reverses or affirms the lower court’s judgment without allowing the parties to file briefs or present oral arguments).

58. See Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path Around a Brick Wall*, 32 STETSON L. REV. 367, 367-68 (2003) (detailing the use of “per curiam affirmances” in the Florida Supreme Court, in which the court simply affirms the lower court decision without explanation); Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 722 (1956) (explaining the confusion that Supreme Court memorandum per curiam opinions create regarding their precedential value and the status of the law). For further discussion of the per curiam affirmation, see generally Domenic L. Massari III, *Establishing New Criteria for Conflict Certiorari in Per Curiam District Court Decisions: A First Step Toward a Definition of Power*, 29 U. FLA. L. REV. 335 (1977); Tobias Weiss, *What Price Per Curiam?*, 1995 TRIAL LAW GUIDE 23. Justice Stevens has commented that summary reversals show “‘how ineffectively the Court is supervising its discretionary docket,’ i.e., by deciding cases ‘not of sufficient importance to warrant full briefing and

when it grants certiorari, vacates the lower court's decision, and remands the case; this is known as a GVR (grant, vacate, remand) order. The Court issues hundreds of GVRs every year, either in the form of orders or opinions.<sup>59</sup> Most GVRs are orders and thus are not per curiam;<sup>60</sup> however, a GVR is issued as a per curiam when the Court's language expands beyond the formulaic language of these orders.<sup>61</sup> A permutation of this practice occurs when the Court has previously granted certiorari and heard arguments but then decides to vacate and remand.<sup>62</sup> The Supreme Court similarly uses the per curiam to chastise indigent litigants for filing frivolous claims and to deny future *in forma pauperis* petitions.<sup>63</sup> As with GVRs, the majority of these prospective denials are issued as orders with boilerplate language.<sup>64</sup> When the Court discusses the specific facts of the case or refers to a separate opinion, however, these dispositions are issued as per curiam opinions.<sup>65</sup> Finally, the Court may issue a per curiam opinion when it dismisses certiorari as improvidently granted (DIGs), generally issuing an average of three such opinions per Term.<sup>66</sup> The

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argument' and 'not worthy of an opinion signed by a Member of this Court.'" GRESSMAN ET AL., *supra* note 57, at 353 (quoting Bd. of Educ. v. McCluskey, 458 U.S. 966, 971-72 (1982) (per curiam) (Stevens, J., dissenting)). Further, Justice Stevens noted that per curiam opinions issued without briefing and oral argument contribute to "the ever-increasing impersonalization and bureaucratization of the federal judicial system" and threaten "the quality of our work." *McCluskey*, 458 U.S. at 972 (Stevens, J., dissenting).

59. See Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711, 715, 717 (2009) (indicating that, in the 2006 Term, the Court issued 250 GVRs and in the 2007 Term it issued 200 GVRs).

60. See *id.* at 717 (recognizing that the majority of the 2006 and 2007 GVRs were boilerplate orders).

61. *Id.* This practice is often controversial. See, e.g., *Youngblood v. West Virginia*, 547 U.S. 867, 870-71 (2006) (per curiam) (Scalia, J., dissenting) (chastising the Court for an inappropriate use of the GVR and listing the situations in which he believes GVRs are appropriate).

62. E.g., *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (per curiam); *Dep't of State v. Legal Assistance for Vietnamese Asylum Seekers, Inc.*, 519 U.S. 1 (1996) (per curiam).

63. See, e.g., IRA P. ROBBINS, *HABEAS CORPUS CHECKLISTS* 867-72 (2010) (noting the Supreme Court's strong language regarding frivolous *in forma pauperis* litigation and identifying key per curiam opinions issued in these matters).

64. E.g., *Shahin v. Strosser*, 131 S. Ct. 1808 (2011).

65. E.g., *In re Whitaker*, 513 U.S. 1 (1994) (per curiam); *In re Anderson*, 511 U.S. 364 (1994) (per curiam).

66. GRESSMAN ET AL., *supra* note 57, at 358; Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1424.

Court resorts to this practice when it reconsiders its basis for granting review and determines that none existed.<sup>67</sup>

In sum, the Supreme Court issues a significant number of per curiam dispositions each Term. In the first six years of Chief Justice Roberts's tenure, almost nine percent of the Court's full opinions were per curiams.<sup>68</sup> In the last six years of the Rehnquist Court, per curiam decisions accounted for just over eight percent of the Court's opinions.<sup>69</sup> The prevalence of issuing unattributed opinions in cases involving more than formulaic, boilerplate language raises questions about its impact on judicial accountability and the development of the law.

### III. JUDICIAL ACCOUNTABILITY

In the American legal system, disclosure of a court's reasoning in published opinions is both how the judiciary asserts its authority and the means through which it is monitored and controlled.<sup>70</sup> William Cranch, the second reporter for the Supreme Court, wrote in the

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67. See GRESSMAN ET AL., *supra* note 57, at 358-62 (listing specific reasons that the Court has provided for issuing a DIG).

68. See *Stat Pack for October Term 2010*, SCOTUSBLOG, 42 (June 28, 2011), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB\\_OT10\\_stat\\_pack\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf) (5 of 80 opinions with enough reasoning to be considered "full opinions" were per curiam in the 2009 Term); *The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 411 (2010) (14 of 87); *The Supreme Court, 2008 Term—The Statistics*, 123 HARV. L. REV. 382, 382 (2009) (4 of 78); *The Supreme Court, 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 516 (2008) (3 of 70); *The Supreme Court, 2006 Term—The Statistics*, 121 HARV. L. REV. 436, 436 (2007) (6 of 73); *The Supreme Court, 2005 Term—The Statistics*, 120 HARV. L. REV. 372, 372 (2006) (12 of 81); *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 420 (2005) (4 of 79).

69. See *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 497 (2004) (7 of 83); *The Supreme Court, 2002 Term—The Statistics*, 117 HARV. L. REV. 480, 480 (2003) (7 of 78); *The Supreme Court, 2001 Term—The Statistics*, 116 HARV. L. REV. 453, 453 (2002) (6 of 81); *The Supreme Court, 2000 Term—The Statistics*, 115 HARV. L. REV. 539, 539 (2001) (9 of 86); *The Supreme Court, 1999 Term—The Statistics*, 114 HARV. L. REV. 390, 390 (2000) (4 of 77); *The Supreme Court, 1998 Term—The Statistics*, 113 HARV. L. REV. 400, 400 (1999) (6 of 81).

70. See MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 312 (2004) ("American judicial accountability and control are . . . produced . . . by requiring the public disclosure of judicial discourse and reasoning"); SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 24 (2003) (asserting that the power of the Supreme Court to make binding law via judicial decisions is possible only through the publication and distribution of those decisions); see also Edward Lazarus, *The Supreme Court's Excessive Secrecy: Why It Isn't Merited*, FINDLAW (Sept. 30, 2004), <http://writ.news.findlaw.com/lazarus/20040930.html> ("Unless we achieve some window into the Court's internal decisionmaking, we have no way of evaluating whether the Court is, in fact, living up to [its] constitutional trust.").

preface to his first volume, "Every case decided is a check upon the judge."<sup>71</sup> According to Justice Brennan, this is so because the courts "have a duty to explain [in their decisions] *why* and *how* a given rule has come to be."<sup>72</sup> The coherence and clarity of these explanations allow the public, the media, and the legal profession to determine the judiciary's consistency and fidelity to the law.<sup>73</sup> In this way, judicial decisions shoulder much of the burden for legitimating the judiciary.<sup>74</sup>

While legislation is the result of a prescribed process, when laws originate in the judiciary they have the potential to be more opaque because the process by which they are created is not directly accessible.<sup>75</sup> The merit of the transparency of the procedure is just as vital as the integrity of the resulting law itself.<sup>76</sup> A thorough judicial opinion can ensure this transparency by bringing the public into the process.<sup>77</sup> When an opinion is unsigned, however, it loses some of its apparent transparency, because the public is unable to associate the anonymous author with the reasoning contained in the opinion.

The process through which the Supreme Court reports its decisions to the public has evolved over time.<sup>78</sup> While some of its earliest decisions were issued *seriatim*, a majority of the opinions delivered before John Marshall's ascent to Chief Justice were per

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71. 5 U.S. (1 Cranch) iii (1804).

72. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986). Justice Brennan went on to assert that this duty serves as a check on the judiciary analogous to the electoral process in the political branches. *Id.*

73. See 5 U.S. (1 Cranch) at iii-iv (maintaining that, when a judge explains his opinions publicly, he "can not [sic] decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public"); Brennan, *supra* note 72, at 435 (contending that, because courts must derive legal principles rather than declaring law, explanations of the courts' reasoning "restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority").

74. LASSER, *supra* note 70, at 300-01; see KENNETH JOST, *THE SUPREME COURT A TO Z* 345 (3d ed. 2003) ("The Supreme Court [J]ustices believe that their opinions and orders must speak for themselves.").

75. This opacity undermines respect for the legal system itself. Cf. Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?*, 36 SUFFOLK U. L. REV. 1, 30 (2002) (advocating for transparency in the context of the unpublished internal rules of the Supreme Court).

76. Brennan, *supra* note 72, at 435. Further, accountable and transparent judges are the true marks of a democratic government. LASSER, *supra* note 70, at 338.

77. See Brennan, *supra* note 72, at 435 (explaining that courts have a duty to provide the public with the rationale for their judicial rulings).

78. See, e.g., James Markham, Note, *Against Individually Signed Opinions*, 56 DUKE L.J. 923, 928-31 (2006) (recounting the history of the individually attributed opinion in the Supreme Court from the Marshall Court's practice of delivering only one opinion in the Chief Justice's name to the rise of separate opinions, the entrenchment of the individually signed opinion, and the current tendency of Justices to write separately for seemingly personal reasons).

curiam opinions—opinions from the body as a whole rather than an individual Justice, although the Court did not use this term.<sup>79</sup> Upon becoming Chief Justice, Marshall promoted his belief that portraying the Court as an undivided body would enhance its prestige; thus, decisions were generally delivered by individual Justices speaking for the entire Court, and usually by Chief Justice Marshall himself.<sup>80</sup> This method drew sharp criticism from Thomas Jefferson and his Republican colleagues, who thought that it limited the accountability of the individual Justices by “shield[ing] compleatly [sic]” their “personal reputation.”<sup>81</sup> Jefferson believed that, in order to maintain adequate control over the judiciary, all opinions should be issued *seriatim*, with each Justice required to articulate his views on the particular issue before the Court.<sup>82</sup> Only this method, Jefferson argued, would provide the public with an adequate check on judges who otherwise could be derelict or capricious in their duties.<sup>83</sup> Despite

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79. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 145-46 & n.45 (1999). Twenty-four percent of these early opinions were issued *seriatim*. *Id.* at 140.

80. See Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41, 45 (1994-1995) (“Marshall was concerned with impressing upon the country the Supreme Court’s unity on issues, not its divisions in individual philosophy. He sought to place emphasis on the serious nature of the Court’s decisions, not on how scintillating or sparkling the language and writing style of its individual members might be.”); see also Kelsh, *supra* note 79, at 141 (observing that, although this practice was used at least three times by Chief Justice Oliver Ellsworth, Marshall made it common practice).

81. Kelsh, *supra* note 79, at 145-46. Jefferson believed that one Justice speaking for the entire Court

“saves [judges] the trouble of developing their opinion methodically and even of making up an opinion at all. . . . It would certainly be right to abandon this practice in order to give to our citizens one and all, that confidence in their judges which must be so desirable to the judges themselves, and so important to the cement of the union.”

*Id.* (quoting Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), quoted in DONALD G. MORGAN, *JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND PHILOSOPHY OF A JEFFERSONIAN JUDGE* 169 (1954)).

82. See Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 194 (1959) (noting that Jefferson believed each Justice should announce his individual views in each case so that Congress can hold each one accountable); see also BLACK’S LAW DICTIONARY, *supra* note 6, at 1202 (defining *seriatim* opinions as “[a] series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking for the court as a whole”).

83. See Brennan, *supra* note 72, at 433 (citing Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), quoted in ZoBell, *supra* note 82, at 194) (addressing Jefferson’s criticism that unanimous opinions may close the “marketplace of ideas” and actually consist of “a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning”).

Jefferson's reservations, the Marshall Court laid the foundation for the current system of a single Justice delivering the opinion of the Court, with the other Justices free to write separately to express disagreement with the majority or to offer alternate theories, which essentially eradicated the use of *seriatim* opinions.<sup>84</sup>

#### A. *Accountability and the Signed Opinion*

Today, individually attributed opinions and publicly recorded votes are the primary instruments for holding appellate judges and justices accountable, because they are the sole chronicle of their work.<sup>85</sup> The signed opinion provides the public with a window into the inner workings of the courts that fosters judicial accountability through an environment of individual responsibility.<sup>86</sup> Many prominent jurists agree with this characterization. For example, as then-Circuit Judge Ruth Bader Ginsburg remarked, "Disclosure of votes and opinion writers may nourish a judge's ego, his or her sense of individuality; but if our system affords the judge personal satisfaction, it also serves to hold the individual judge accountable."<sup>87</sup> Thomas Jefferson likely would have agreed, because the per curiam "shield[s] the [Justices] compleatly [sic]."<sup>88</sup> He argued that "[t]he practice is certainly

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84. See generally Kelsh, *supra* note 79 (examining the Supreme Court's historical methods for delivering its opinions).

85. See, e.g., Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 241-42.

[O]ur system of appellate justice still lodges responsibility for decisions in the individual judges who compose the tribunal rather than in the court as a bloodless abstraction. Certainly, where appellate judges are subject to periodic reelection or reappointment, the data for appraising an incumbent's worth come from his recorded votes and opinions. As for judges who hold lifetime tenure, the publication of dissents and separate opinions is a safeguard against arbitrary or slipshod decision making by fellow judges.

*Id.*

86. See Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 61-62 (2006) (writing that identification of authors creates the necessary link between that person and his claims, imparting both credit and responsibility).

87. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139 (1990). Judge Ginsburg went on to state, "Public accountability through the disclosure of votes and opinion authors puts the judge's conscience and reputation on the line." *Id.* at 140 (citing Kelman, *supra* note 85, at 241); see LASSER, *supra* note 70, at 312-13 (citing Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 528-30 (1986)) (suggesting that judges' reputations may be affected by their attributed opinions).

88. Kelsh, *supra* note 79, at 145-46 (citing Letter from Thomas Jefferson to William Johnson, *supra* note 81, quoted in MORGAN, *supra* note 81, at 169).

convenient for the lazy, the modest, & the incompetent.”<sup>89</sup> Similarly, Justice Antonin Scalia has commented that public acknowledgement of authorship and votes ensures that, due to the risk of embarrassment or reproach, judges do not drift in their elucidation and application of legal theories without strong justification.<sup>90</sup> Justice Scalia also encouraged composing separate opinions as a means of ensuring methodical decision making and consistent application of the law.<sup>91</sup> Accordingly, the individualized method of delivering appellate decisions promotes sound, well-reasoned opinions and provides the transparency that is fundamental to the credibility of the courts and to the accountability of their individual members.<sup>92</sup>

This accountability is critical for Article III judges, whose lifetime tenure means not having to worry about losing their judicial positions over a controversial decision. No matter how much the public may disagree with a judge’s decision, if the judge has not committed an offense serious enough to warrant impeachment, his or her tenure is assured.<sup>93</sup> Nevertheless, when judges sign opinions, they publicly take responsibility for the opinions’ contents and consequences.<sup>94</sup> This work product and its attendant reputational effect are the only means, other than impeachment, to hold unelected judges accountable.<sup>95</sup> Judges are likely to care about reputation in part

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89. *Id.*

90. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42 (“Even if they do not personally write the majority or the dissent, their name will be subscribed to the one view or the other. They cannot, without risk of public embarrassment, meander back and forth—today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite.”).

91. *Id.*

92. See LASSER, *supra* note 70, at 302 (“[T]he American system is the only one that presents individually signed judicial decisions, discloses the votes of the sitting judicial panels, and/or offers the publication of concurring and dissenting opinions. It . . . offers direct access to the arguments and reasoning of the individual judges sitting in judgment on particular disputes.”); Fisk, *supra* note 86, at 73 (noting that transparency motivates people to conform their conduct to accepted norms in order to avoid blame, as well as to receive credit).

93. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”); see, e.g., Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 211 (1993) (“[H]istory provides clear evidence that impeachment was to be the sole political mechanism for disciplining federal judges.”).

94. See Ginsburg, *supra* note 87, at 140. For example, Justice Blackmun was still targeted by people unhappy with the outcome of *Roe v. Wade* sixteen years after he wrote the opinion. *Id.*

95. Scalia, *supra* note 90, at 34 (citing Donald G. Morgan, *The Origin of Supreme Court Dissent*, 10 WM. & MARY Q. 353, 354-55 (1953) (citing THOMAS JEFFERSON, WORKS 249 (P.L. Ford ed., 1905) (relating Jefferson’s concern that impeachment and individual reputation are the only checks on judges))); see Kelman, *supra* note 85, at 242 (“[R]ecorded



because of potential promotion<sup>96</sup> and in part because of a general reputational incentive.<sup>97</sup> This means of accountability depends on judges signing opinions; those opinions that are issued per curiam cannot have an impact on the author's public image because the author remains anonymous.

Accountability is especially critical for the Supreme Court, which has the ultimate voice in interpreting the Constitution.<sup>98</sup> Not only do Supreme Court decisions have implications for the parties involved, but they also dictate the way lower courts approach similar situations in the future. Likewise, decisions in state appellate courts and federal courts of appeals should be attributed, as these courts are also often de facto courts of last resort for a litigant.<sup>99</sup> Because these decisions significantly influence the outcome of litigation and clarity of the law, attribution is pivotal to ensure accountability throughout the judicial decision-making process.

### *B. The Per Curiam Frustrates Accountability*

Per curiam opinions, by their very nature, obscure the author of an opinion and therefore frustrate the method of achieving

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... opinions ... safeguard against arbitrary or slipshod decision[s] ... by [tenured] judges.”). Judicial attribution creates a situation that is similar to both scholarly attribution and trademark. See Fisk, *supra* note 86, at 61-62 (discussing the connection between the quality of work and reputational effects); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269-70 (1987) (describing how trademarks encourage investments in quality).

96. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 631-32 (2000) (suggesting that, while Supreme Court Justices may not be concerned with promotion, appellate judges may have Supreme Court ambitions).

97. *Id.* at 629-30.

98. U.S. CONST. art. III, § 2, cl. 1 (“The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (establishing the principle of judicial review).

99. See Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2029 (1999) (“Although the Supreme Court’s decisions garner most of the attention from the media and the academy, most of the legal developments within the federal judiciary . . . occur not at the Supreme Court but within the courts of appeals.”); Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APP. PRAC. & PROCESS 105, 106-07 (2010) (noting that not only do state courts of last resort interpret state law, but also that they “fill the constitutional gaps” in federal law (quoting William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986))). For a discussion of the additional accountability implications for elected judges, see *infra* Part III.C.

accountability through attribution.<sup>100</sup> When courts use an anonymous veil, they lose the benefits of the signed opinion—the environment of transparency, individual responsibility, and well-reasoned explanation—that keep the judiciary credible and accountable.<sup>101</sup> Further, because attribution is the norm, decisions issued per curiam may harm the courts' credibility if the public believes it is a tactic used for strategic or political reasons or to maintain secrecy.<sup>102</sup> Any impression that courts are shirking their responsibilities or masking their true motives may weaken their legitimacy as apolitical and independent decision makers.<sup>103</sup>

Two prominent opinions from the Supreme Court—*Bush v. Gore* and *Buckley v. Valeo*—illustrate these potential pitfalls in the per curiam's usage.<sup>104</sup> Coming at the end of the legal and political wrangling surrounding the Florida vote recount after the 2000 presidential election, the *Bush v. Gore* decision is perhaps the best known per curiam opinion in the history of the Court. The decision determined the winner of the election and therefore made the Court

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100. See Marin K. Levy et al., *The Costs of Judging Judges by the Numbers*, 28 YALE L. & POL'Y REV. 313, 317 (2010) ("Because, as their designation suggests, per curiam opinions are the opinions 'by the court,' they are not signed by the principal drafter . . . . In short, there is no way to know which judge should receive credit for the effort of writing these opinions."); see also TEXAS WATCH, IN THE SHADOWS: A LOOK INTO THE TEXAS SUPREME COURT'S OVERUSE OF ANONYMOUS OPINIONS 2 (May 2008), available at <http://www.abajournal.com/files/PerCuriamReportFinal.pdf> (decrying the Texas Supreme Court's excessive use of the per curiam as avoiding accountability and the incentive to reach proper legal conclusions).

101. See Ginsburg, *supra* note 87, at 140 ("There is security in anonymity . . . . But the judge who works under an anonymity cloak 'has nothing like the prominence of the common law judge.' Judges nameless to the public who write stylized judgments do not command the moral force judges in the United States sometimes demonstrate." (quoting F.H. LAWSON ET AL., AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 9 (3d ed. 1967))); Tobias Weiss, Commentary, *Judicial Independence: Another Viewpoint*, FED. LAW., Aug. 1999, at 39, 39 (denouncing the use of "ukase" per curiams as reducing accountability and tarnishing the courts' image).

102. See Robbins, *supra* note 75, at 30 (writing that internal Supreme Court rules should be published, because "clarity and directness are essential for development of the law, for understanding of the judicial process, and for respect for the legal system itself").

103. See JOST, *supra* note 74, at 345 ("[T]he public also tends to view the Court with a kind of reverence—trusting the Court to be above politics and relying on it to protect individual freedom and to prevent abuses by Congress, the president, or the states."); Brennan, *supra* note 72, at 434 (agreeing with Chief Justice Charles Evans Hughes that the independent character of the Justices is what sustains the Court's public confidence (citing CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS, AN INTERPRETATION 67-68 (1928))).

104. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

susceptible to accusations of partisanship and politicization.<sup>105</sup> Although public opinion polls did not reflect a drop in confidence in the Court after the decision,<sup>106</sup> many commentators have argued that it tarnished the Court's image.<sup>107</sup> Judge Richard Posner believed that "[t]he majority decision . . . damaged the Court's prestige, at least in the short run."<sup>108</sup> The damage occurred because the Court never before had resolved a presidential election and, in the glare of the intense media attention and public scrutiny that accompanied the momentous occasion, its members chose anonymity in an attempt to convey unanimity. This collectivity, however, bore a thin façade.<sup>109</sup> The four scathing dissents,<sup>110</sup> and even the concurring opinion by Chief Justice Rehnquist,<sup>111</sup> revealed that the reasoning of the majority decision was hardly shared by an undivided Court.<sup>112</sup> Instead, the Court was divided ideologically, with the conservatives garnering five votes and ruling in favor of the conservative presidential candidate, placing the Court firmly in the middle of the political morass, rather than above it.<sup>113</sup>

Whereas *Bush v. Gore* reveals the danger posed to the credibility of the courts by using the per curiam to disguise what could be perceived as dishonest motivations, *Buckley v. Valeo* is illustrative of a second problem. When no single Justice is individually responsible for an opinion, its reasoning may be disjointed and incoherent.<sup>114</sup> *Buckley*

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105. LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 169 (2006).

106. JOST, *supra* note 74, at 349.

107. *See id.* at xi (observing that, although the *Bush v. Gore* decision "struck many experts as emblematic of an assertiveness bordering on arrogance," two years later the Court's decisions seemed to correspond closely with public sentiment).

108. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 175 (2001).

109. *See Ray, supra* note 13, at 576 ("In *Bush v. Gore*, with the Court unable to [achieve authentic unanimity], it settled instead on the per curiam as an alternate method of conveying the institutional unity that the Court clearly lacked.").

110. *See Bush v. Gore*, 531 U.S. 98, 128-29 (2000) (per curiam) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."). The other dissents were penned by Justice Souter, *id.* at 129, Justice Ginsburg, *id.* at 135, and Justice Breyer, *id.* at 144.

111. *Id.* at 111 (Rehnquist, C.J., concurring).

112. *See Ray, supra* note 13, at 576 (acknowledging that, despite the per curiam label, followers of the Court understood that the per curiam did not necessarily indicate genuine unanimity).

113. JOST, *supra* note 74, at xi.

114. *See Allison R. Hayward, The Per Curiam Opinion of Steel: Buckley v. Valeo as Superprecedent? Clues from Wisconsin and Vermont*, 2005-2006 CATO SUP. CT. REV. 195,

is a landmark 138-page campaign finance per curiam that upheld the Federal Election Campaign Act limits on campaign contributions but struck down limits on campaign expenditures.<sup>115</sup> Although the Justices worked diligently on the opinion for months, sending drafts to each other and collaborating on some language, the gluing together of different parts from different authors into one lengthy and fragmented decision “demonstrate[d] the perils of drafting by committee.”<sup>116</sup> Further, the per curiam opinion in *Buckley* may not have accurately reflected the diversity of views on the Court regarding campaign finance.<sup>117</sup> That the opinion was both incoherent and incomplete raises the concern that Judge Posner described: “The less that lawyers and especially other judges regard judicial opinions as authentic expressions of what the judges think, the less they will rely on judicial opinions for guidance and authority.”<sup>118</sup>

A related concern, although not raised directly by *Buckley* itself, is that the per curiam’s anonymous nature reduces personal responsibility and leads to opinions of lower quality.<sup>119</sup> Then-Circuit Judge Ruth Bader Ginsburg remarked, “Judges generally do not labor over unpublished judgments and memoranda, or even published per curiam opinions, with the same intensity they devote to signed opinions.”<sup>120</sup> Other judges have also acknowledged spending less time crafting or editing per curiam decisions,<sup>121</sup> undoubtedly because they would not be held solely responsible for either the prose or the ramifications of the opinion.

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206 (suggesting that the assignment of various portions of the *Buckley* opinion to different Justices’ chambers may have generated the opinion’s “incoherence”).

115. Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 241 (2003).

116. *Id.* at 251 (noting that the Justices in *Buckley* “accommodated one another” as an attempt to appear united).

117. *Id.* at 250.

118. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 148 (1999).

119. See JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 325 (5th ed. 2007) (“Per curiam opinions written for . . . convenience-of-the-court reasons . . . usually reduce the expenditure of judge-time, but they also have a tendency to reduce personal responsibility. This may result in a mediocre or below-average work product.”).

120. Ginsburg, *supra* note 87, at 139. Judge Ginsburg continued, “As a bright commentator observed in a related context: ‘When anonymity of pronouncement is combined with security in office, it is all too easy for the politically insulated officials to lapse into arrogant *ipse dixit*.’” *Id.* (quoting Kelman, *supra* note 85, at 242).

121. *E.g.*, Donald L. Burnett, Jr., *Law Clerking: ‘My Favorite Year,’* ADVOC. (IDAHO ST. B.), Mar.-Apr. 2010, at 26, 28.

Although one judge has called this concern “[r]ubbish,”<sup>122</sup> the admissions of other members of the bench suggest its validity.<sup>123</sup> Judge Posner agrees that the signed opinion elicits the greatest effort from judges and “mak[es] the threat of searing professional criticism an effective check on irresponsible judicial actions.”<sup>124</sup> Nevertheless, many judges assign drafting of signed opinions to their clerks.<sup>125</sup> While a judge whose name appears on an opinion will suffer the consequences of having his clerks do the majority of the opinion writing without substantial oversight, a judge who is responsible for an opinion that is issued per curiam does not have the same degree of reputational concern. The per curiam, with its veil of anonymity, diminishes the consequences for judges who fail to do enough of their own work.<sup>126</sup>

Despite these problems with the per curiam, some argue that circumstances occasionally require a unanimous opinion that is distanced from any individual author.<sup>127</sup> This argument generally is premised on a fear that when a court appears divided, it loses legitimacy.<sup>128</sup> But the authority of a court in a democracy originates in a grant from the people.<sup>129</sup> Because a majority is sufficient for a grant of power from the people to the government, the support of only a majority of a court should be sufficient for an opinion to prevail.<sup>130</sup> Simultaneously, when each judge reduces his or her thinking to writing, this ensures active dialogue and participation, and thus the

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122. Nygaard, *supra* note 80, at 49 (“The responsibility for the content of each opinion rests with the court. . . . [T]he per curiam would inspire greater institutional responsibility. Judges would read opinions with greater care and perform more editorial surgery, because opinions could no longer be explained as that of ‘SO-AND-SO, Circuit Judge.’”).

123. *E.g.*, Ginsburg, *supra* note 87, at 139-40; Scalia, *supra* note 90, at 42.

124. POSNER, *supra* note 118, at 349.

125. Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 (“[T]he available evidence suggests [that Justices] rely on their clerks to produce first drafts, which the [J]ustices then edit.”).

126. *See* Ginsburg, *supra* note 87, at 139 (“[U]nsigned work products, more often than signed opinions, are fully composed by hands other than a judge’s own—by staff attorneys or law clerks—and let out with scant editing by the supervising panel.”).

127. *See, e.g.*, Jacobson, *supra* note 17, at 194 (arguing that controversies concerning the judiciary’s role should be issued per curiam in order to distance them from any individual judge); *cf.* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960) (“[T]he effort is to make this opinion an opinion of the court . . . . This, like the process of consultation and vote, goes some distance to smooth the unevenness of individual temper and training into a moving average more predictable than the decisions of diverse single judges.”).

128. *See infra* notes 145-166 and accompanying text (discussing the arguments in favor of the per curiam).

129. Scalia, *supra* note 90, at 35.

130. *Id.*

vitality of the judiciary.<sup>131</sup> According to Justice Brennan, explaining one's views in a dissent "is not self-indulgence—it is very hard work that we cannot shirk."<sup>132</sup> Discouraging the use of dissents potentially leads to the exclusion of important arguments from the written record. These arguments, when preserved, may become the foundation of future decisions.<sup>133</sup>

Disagreement among judges should be expected—and even welcomed—when strong and independent minds meet on the bench. When judges are not in accord, their disagreements and jurisprudential convictions should not be stifled by faux unanimity.<sup>134</sup> Although dissonance on the courts "destroy[s] the illusion of absolute certainty and of judicial infallibility," according to former New York Court of Appeals Judge Stanley Fuld, "the reputation and prestige of a court—the influence and weight that it commands—depend on something stronger and more substantial than an illusion."<sup>135</sup>

Early in his tenure, Chief Justice John Roberts expressed his desire to achieve greater genuine unanimity on the Supreme Court.<sup>136</sup> The Roberts Court has had mixed results in meeting this goal, however, with the percentage of its opinions delivered unanimously fluctuating from a low of thirty percent of all opinions in 2007, to a high of forty-eight percent in 2010.<sup>137</sup> This quest for genuine unanimity, however, has resulted in the "artificial unanimity" that Judge Fuld warned against.<sup>138</sup> In the 2010 Term, there was at least one concurring opinion in fifty-three percent of these unanimous decisions, revealing disagreement in a Court trying to appear undivided.<sup>139</sup> Perhaps more troubling, unanimous Supreme Court

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131. Brennan, *supra* note 72, at 438; see Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 758-59 (1995) (noting the importance of published opinions in legitimating judicial decisions).

132. Brennan, *supra* note 72, at 438.

133. For a discussion of the practice of spotting ancillary statements from past decisions, see *infra* Part IV.B (examining how judges may plant "time bombs" in their opinions to resurrect in later cases).

134. See Brennan, *supra* note 72, at 434 ("[U]nanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time [the case is announced].") (quoting HUGHES, *supra* note 103, at 67)).

135. Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 928 (1962).

136. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 331 (2007); Liptak, *supra* note 125.

137. *Stat Pack for October Term 2010*, *supra* note 68, at 3.

138. Fuld, *supra* note 135, at 927.

139. See *End-of-Term Statistical Analysis—October Term 2010*, SCOTUSBLOG, 2 (July 1, 2011), [http://www.scotusblog.com/wp-content/uploads/2011/07/SB\\_Summary\\_Memo\\_](http://www.scotusblog.com/wp-content/uploads/2011/07/SB_Summary_Memo_)

decisions tend to contain the vaguest rulings, providing the least guidance to lower courts.<sup>140</sup> A study that analyzed the language of Supreme Court opinions using linguistic software maintained that five-to-four decisions were the clearest, while unanimous opinions were the most obscure.<sup>141</sup> It follows, then, that disagreement on the bench encourages judges to refine their thinking, creating careful opinions that strengthen the credibility of the judiciary.<sup>142</sup> Further, although signed and separate opinions fall short of Jefferson's ideal of *seriatim* opinions,<sup>143</sup> this "disagreement among judges is as true to the character of democracy, and as vital, as freedom of speech itself."<sup>144</sup> It is integral to maintaining the accountability and credibility of the judiciary.

Commentators have argued that per curiam opinions also may be desirable in situations in which it is essential for the Court to speak with one voice.<sup>145</sup> Though historic constitutional questions of far-reaching significance and public discord are rare, commentators point to these "constitutional moments when the Court's need for unanimity may take precedence over an individual Justice's disagreement."<sup>146</sup> One prominent example is the post-*Brown v. Board of Education*<sup>147</sup> desegregation cases, in which the Supreme Court

buil[t] a bridge of per curiams, each one presented as following inevitably from its predecessor, until the final conclusion was, as the Court insisted, irrefutable. The strategic advantages of this approach are obvious. It would hardly have assisted the painful struggle to implement *Brown* throughout the South if each new case provided a new occasion to revisit old discredited arguments and reopen old wounds. By eliminating legal discussion and allowing the per curiam form to carry its message of unstoppable progress, the Court

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OT10.pdf; Liptak, *supra* note 125 (indicating that, in the 2009 Term, there was at least one concurring opinion in seventy-seven percent of the decisions).

140. Liptak, *supra* note 125.

141. *Id.* (citing Ryan J. Owens & Justin Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of Supreme Court Opinions* (June 16, 2010) (manuscript at 22), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1695775](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695775)).

142. See Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 408 (1999) (writing that decisions with separate opinions reflect that "these decisions are the product of independent and reflective thought and that they emanate from judges who, though they try to persuade one another about how a case should be resolved, do not simply acquiesce in the majority's point of view to serve the interests of 'monolithic solidarity'").

143. See *supra* note 82 and accompanying text.

144. Fuld, *supra* note 135, at 926.

145. See GEORGE, *supra* note 119, at 325; Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 212-13 (2003).

146. Ray, *supra* note 145, at 212.

147. 347 U.S. 483 (1954).

communicated its constitutional position more effectively and less provocatively than a sequence of fully developed opinions could have done.<sup>148</sup>

According to the commentators, the cases compel a unanimous opinion in order to emphasize the Court's authority and the rightness of its decision.<sup>149</sup> While unanimity may best highlight the magnitude of such decisions, the Court could achieve this end by having each Justice individually sign, as it did in *Cooper v. Aaron*.<sup>150</sup> Following the *Brown* cases, the Court grew impatient waiting for the states to comply with its desegregation order, and by issuing the unanimous opinion signed by all nine Justices, it forcefully conveyed this message to the states and to the public.<sup>151</sup>

Although the per curiam arguably was helpful in enabling the Court to issue abbreviated opinions without substantial discussion of its reasoning, it could have issued signed opinions that contained just as little substance. But the argument that these abbreviated opinions advanced the Court's objectives also lacks merit, as some commentators question whether the post-*Brown* train of per curiams was as effective as the preceding quotation describes.<sup>152</sup> A significant portion of the *Brown* opinion was dedicated to addressing the negative effects of racial segregation in the specific setting of public education.<sup>153</sup> The subsequent per curiams, however, neglected to address adequately how the education-centric rationale in *Brown* applied to other public facilities, such as golf courses<sup>154</sup> and beaches.<sup>155</sup> Indeed, well-known and respected legal scholars criticized the Court for failing to explain

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148. Ray, *supra* note 13, at 540.

149. Jacobson, *supra* note 17, at 189, 203 ("Despite the disintegration in our age of the norm of unanimity, a per curiam designation, in one of its modes, is at least a rhetorical call for unanimity where a decision implicates the interests of the Court as an institution in a major issue affecting the frame of governance."); Ray, *supra* note 145, at 221-22.

150. 358 U.S. 1 (1958) (holding, in the desegregation context, that the states were bound by the Supreme Court's decisions, and could not choose to ignore them); see *supra* note 35 and accompanying text (setting forth Jacobson's argument that the *Pentagon Papers* opinion should have been signed).

151. See Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 63 n.27 (1965) (noting that the importance of some cases is best acknowledged by all of the members of the Court signing on to the opinion).

152. See, e.g., EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 33 (1999) (recognizing that *Brown*'s special emphasis on education made it difficult for the Court to explain why segregated golf courses and beaches were unconstitutional).

153. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-95 (1954).

154. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam).

155. *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (per curiam).



the constitutional reasoning behind desegregation in *Brown's* "per curiam progeny," even when those scholars approved of the Court's holding.<sup>156</sup>

Some advocates of the per curiam go even further, arguing that the per curiam is desirable in all opinions issued by appellate courts, not just in important constitutional decisions by the Supreme Court.<sup>157</sup> They point out that the signed opinion is not constitutionally mandated and that the per curiam is not contradictory to any particularly venerated Anglo-American judicial tradition, suggesting that the courts' identity should be derived by the institution and not by the individuals who comprise it.<sup>158</sup> Judge Richard Lowell Nygaard of the United States Court of Appeals for the Third Circuit writes that the signed opinion leads to an inherent contradiction between a judge's ego and the courts' institutional role.<sup>159</sup> The result is "a deterioration in the institutional diligence on some courts of appeals, leaving the judge who is assigned the opinion to write approximately as he or she pleases as long as the result represents the conference position."<sup>160</sup> He therefore advocates for the use of the per curiam as a means to inspire greater institutional responsibility for the content of each opinion, rejecting the arguments that the individually signed opinion produces better reasoned decisions and increases personal responsibility.<sup>161</sup>

By concentrating public scrutiny on the institution rather than on individuals, the argument goes, courts' independence and accountability would be heightened, not diminished.<sup>162</sup> Advocates of the neutral

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156. See GERSTMANN, *supra* note 152, at 33 (listing prominent scholars who attempted to recast *Brown* as a "political-process decision").

157. See Nygaard, *supra* note 80, at 43 (suggesting that judicial opinions should not be signed because "[o]pinions are the product of a consensus"); Markham, *supra* note 78, at 925 (arguing that signed opinions create a situation where "opinions are written less for the litigants than for an external audience of like-minded devotees").

158. Nygaard, *supra* note 80, at 43 ("[T]he per curiam opinion does not run counter to or violate any revered tradition. It is a part of the American heritage from English law."); Markham, *supra* note 78, at 926 ("Nothing in the Constitution or any other source of American law mandates the current practice of identifying the author of each opinion published in a given case, including majority opinions, concurrences, and dissents.").

159. Nygaard, *supra* note 80, at 41.

160. *Id.* at 45.

161. *Id.* at 41.

162. See Markham, *supra* note 78, at 926.

Having a Justice's name attached to an opinion brings a measure of accountability and control to an otherwise secretive institution, but this accountability carries with it a cost in the Court's ability to appear independent and above the political fray, and detracts from the notion of the Court as something greater than the nine individuals who comprise it.

*Id.*

per curiam argue that it was effective, for instance, in the politically charged circumstances of *Bush v. Palm Beach County Canvassing Board*.<sup>163</sup> There, the unsigned opinion came not from individual Justices with their own political views, but from the Court itself, “an institution situating itself above politics.”<sup>164</sup> Similarly, the three Justices who signed *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>165</sup> moved toward anonymity in an attempt to strengthen the Court’s institutional voice while addressing the sensitive issue of abortion.<sup>166</sup>

This argument aligns with Judge Learned Hand’s view that the institution of the courts is more important than the “individual ‘proclivities’ of the judges.”<sup>167</sup> Unanimity, however, “is not in itself a judicial virtue.”<sup>168</sup> Judicial accountability is best promoted when disagreement is embraced and potentially far-reaching individual opinions are not stifled for the sake of false unanimity. Similarly, anonymity is not meritorious. Instead, when opinions are attributed, they allow the public to serve as a check on the judiciary and create an incentive for diligent effort in lawmaking, which in turn reinforces the courts’ role as a reputable and apolitical institution.

### C. *Elected Judges, Too, Should Avoid Per Curiam Opinions*

In thirty-nine states, judges must either run for election or at least be subject to periodic retention votes.<sup>169</sup> The public relies on recorded votes and opinions in evaluating judges who are subject to reelection or reappointment. Thus, when a court comprised of elected judges issues a per curiam opinion, it reduces the information available to voters on which to make their decisions.

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163. 531 U.S. 70 (2000) (per curiam) (vacating and remanding the Florida Supreme Court decision allowing the recount of votes because that decision lacked an adequate explanation); see Ray, *supra* note 13, at 569.

164. Ray, *supra* note 13, at 569.

165. 505 U.S. 833 (1992) (implementing the “undue burden” standard in assessing state regulation of abortion).

166. Markham, *supra* note 78, at 937. In that case, however, the existence of three signatures, while to some extent obscuring the authorship of the opinion, at least indicates to the public the affirmative support of the Justices who attached their names to the opinion.

167. Nygaard, *supra* note 80, at 49 (citing LEARNED HAND, THE BILL OF RIGHTS 71 (1958)).

168. Brennan, *supra* note 72, at 432.

169. JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE, at app. 3 (2010), available at <http://www.brennancenter.org/page/-/IAS-NPJE-Decade-ONLINE.pdf>.

While the accountability argument differs somewhat in the context of elected rather than appointed judges, the result is the same—judges must be accountable through attribution. Any judge who must make a politically charged decision may face undesirable consequences, and elected judges face the further potential consequence of losing their jobs. Elected judges are subject to the pressures of any elected official—they must raise money for campaigns and convince their constituents to vote for them.<sup>170</sup> When a court is forced to make a decision on a politically sensitive matter, judicial elections may mean that the judges on the court become targets of campaigns against their reelection or retention.<sup>171</sup>

Recently, three justices of the Iowa Supreme Court were targeted by such a campaign as a result of their decision in *Varnum v. Brien*, in which the court struck down a law defining marriage in Iowa as between a man and a woman.<sup>172</sup> Political groups spent more than \$500,000 during the campaign,<sup>173</sup> even though the vote was only on whether to retain the justices, and not part of a head-to-head competition. The threat of elected judges becoming targets of campaigns against their reelection seems to be increasing with the elevated spending on judicial election campaigns over the past decade.<sup>174</sup>

One might argue that opinions in controversial cases, such as *Varnum*, should be issued per curiam in order to avoid retaliation through election campaigns by those opposed to a judge's decision or

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170. For an overview of the argument that judicial elections violate litigants' due process rights by distorting the judicial decision-making process, see MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 248-50 (3d ed. 2004).

171. See Ginsburg, *supra* note 87, at 140 (citing the successful campaign in 1986 against retaining California Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin as evidence that judicial elections often reflect popular opinion rather than judicial performance).

172. 763 N.W.2d 862, 872 (Iowa 2009).

173. Andy Kopsa, *National Anti-Gay Groups Unite To Target Iowa Judges*, IOWA INDEP. (Oct. 21 2010), <http://iowaindependent.com/45701/national-anti-gay-groups-unite-to-target-iowa-judges>. In general, the 2010 retention votes "marked the rapid politicization of judicial races that had been specifically designed to be free of intrigue," with spending on such votes reaching three million dollars as compared with the two million dollars spent in the last decade. A.G. Sulzberger, *In Iowa, Voters Oust Judges over Marriage Issue*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/03/us/politics/03judges.html?scp=2&sq=iowa%20judges&st=cse>. On the removal of the three Iowa judges, see also Annette J. Scieszinski & Neal Ellis, *The Gamble of Judging: The 2010 Iowa Supreme Court Retention Election*, JUDGES' J., Fall 2011, at 8; Patricia Timmons-Goodson, *An Interview with Justice Michael J. Streit (Ret.)*, JUDGES' J., Fall 2011, at 9.

174. For a description of the increased intensity of judicial elections in the past decade, see SAMPLE ET AL., *supra* note 169.

pattern of decisions. But there are three fundamental flaws in this argument. First, the decision in *Varnum* was unanimous. It would not have mattered had the justices shielded the identity of the opinion's author with a per curiam because they had already indicated to the public that there was complete agreement among the members of the court. Even if the justices had not been unanimous in a per curiam opinion, the breakdown of their votes would still have been determinable, and thus the per curiam would not have prevented political retaliation. Second, that the other three justices lost the retention vote, despite not having authored the *Varnum* opinion, suggests that apparent agreement with an unpopular ruling is sufficient to make a judge a political target. Third, arguing for the use of per curiam in cases announcing politically charged decisions in order to avoid retaliation conflicts with the fundamental design of the judicial election process. The reason to elect judges is to allow the public to voice its approval or disapproval of judges' decisions. On the one hand, one who favors judicial elections should be offended by the idea of issuing controversial opinions as per curiam; in so doing, the court is circumventing the judicial election process by attempting to protect the author of the opinion from the electorate. On the other hand, one who opposes judicial elections based on a belief that judicial opinions are meant to be apolitical does not resolve the matter by suggesting that controversial decisions should be issued per curiam. As the aftermath of *Varnum* illustrates, such a tactic will not always be sufficient to avoid political reprisal for judges.

The use of unattributed decisions is an ineffective solution to the problem of the politicization of judicial decision making.<sup>175</sup> In one sense, the use of unattributed decisions as a solution is too narrow an approach because situations like those surrounding *Varnum* will still occur. At the same time, this approach is overly broad; it brings with it all of the negative effects of the per curiam that are discussed above in this Part. Thus, the argument that elected judges should issue per curiam opinions in controversial cases to avoid reprisal is not persuasive.

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175. It seems strange to suggest that changing the system of attribution, rather than the judicial-election system itself, is the solution to the problems that come with such elections. Prominent jurists and scholars, including Justice O'Connor and Dean Erwin Chemerinsky, have advocated for reforms to the judicial-election system. James Podgers, *O'Connor on Judicial Elections: "They're Awful. I Hate Them,"* A.B.A. J. (May 9, 2009, 8:09 AM), [http://www.abajournal.com/news/article/oconnor\\_chemerinsky\\_sound\\_warnings\\_at\\_aba\\_conference\\_about\\_the\\_dangers\\_of\\_s/](http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s/).

## IV. DEVELOPMENT OF THE LAW

Along with providing for individual accountability, the signed opinion reflects the role of judges and justices as individual lawmakers. In courts that reach their decisions by majority vote and express those decisions through the words of a single author, the individualized nature of the judge cannot be understated. The oft-used judges-as-umpires analogy may play well during Senate confirmation hearings; however, it ignores the truth that judges and justices draw from their own philosophy, worldview, and experiences to determine where the law stands or what the Constitution means.<sup>176</sup> This leads to judges developing their own unique patterns of decision making, just as no two umpires have identical strike zones. As then-Judge Benjamin Cardozo wrote in his seminal work, *The Nature of the Judicial Process*, “Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”<sup>177</sup> Conscious and subconscious forces shape each individual judge, and therefore shape the law as expressed in judicial opinions.

Like a signed opinion, the per curiam is not written “by the court,” as its name suggests, but is necessarily written by some individual judge with a unique philosophy. Each judge also

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176. See Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1 (recounting the use of the umpire analogy by senators and nominees). When Chief Justice Roberts was a nominee, he declared at his confirmation hearings that “[j]udges are like umpires . . . . Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.” *Id.* (internal quotation marks omitted). Chief Justice Roberts also acknowledged, however, that “we all bring our life experiences to the bench.” *Id.* (internal quotation marks omitted). As Weber wrote, “[T]he umpire metaphor misleadingly jumble[s] together the ideas of belief, bias and activism, as though all personal viewpoints are somehow tainted for being personal. Judges with personal beliefs make objective decisions all the time . . . .” *Id.*; see also CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 74 (2007) (“The Constitution’s abstract language makes it impossible for judges to behave like umpires, and every justice has an ideologically identifiable voting pattern.”).

177. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921); see William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3, 10 (1988) (“Sensitivity to one’s intuitive and passionate responses, and awareness of the range of human experience, is . . . not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.”); Fuld, *supra* note 135, at 926 (asserting that it is unreasonable to expect judges with different backgrounds to approach legal issues in the same manner).

contributes a unique style.<sup>178</sup> Knowledge of these philosophies and styles enables both lower courts and attorneys to develop the law and tailor their arguments effectively. The per curiam label, however, serves to mask its author's identity and, in doing so, it obscures the author's jurisprudence, the significance of the decision, and the decision's potential to affect future cases.<sup>179</sup> In this way, the per curiam stunts an appropriate development of the law.

### A. *Judicial Personalities*

Individual personalities pervade courts and necessarily influence judicial decisions.<sup>180</sup> Consequently, there is an inherent paradox between a purportedly voiceless per curiam opinion and the reality that individual personalities shape the development of the law. Furthermore, judicial impersonality is not necessarily desirable.<sup>181</sup> Judges' recognition of their differences and the importance of expressing their unique perspectives while engaging in vigorous debate balances conflicting personalities and philosophies on the

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178. See Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1408 (2005) (“[A] court may issue an opinion *per curiam*, without further attribution, even though it is the work of one or more judges on the panel and may bear the stylistic hallmarks of its author or authors such that more accurate attribution could be achieved.”).

179. See JOST, *supra* note 74, at 505-06 (“The written opinions often affect national policy on major social and economic issues. They are read with close attention by judges, attorneys, lobbyists, news reporters, and policymakers.”); Richard B. Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286, 286 (2000) (“The written judicial opinion is critical to legal systems like that of the United States in which decisions of judges and their justifications constitute law that will control the result when comparable controversies appear again in court.”).

180. See CARDOZO, *supra* note 177, at 169 (articulating that the myth of pure judicial impersonality is an “ideal . . . beyond the reach of human faculties to attain”); *cf.* Brennan, *supra* note 72, at 432 (“The Court is something of a paradox—it is at once the whole and its constituent parts. The very words ‘the Court’ mean simultaneously the entity and its members.”).

181. Brennan, *supra* note 177, at 10. But see Amy Goldstein et al., *Sotomayor Emphasizes Objectivity, Explains ‘Wise Latina’ Remark*, WASH. POST (July 15, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071400992.html> (noting that Justice Sotomayor faced heavy criticism during her Supreme Court nomination hearings for her previous remarks regarding the influence of life experiences on judicial decision making). Although Justice Sotomayor distanced herself from the controversial “wise Latina” comment, she has recognized the existence and potential influence of a judge’s life experiences on judicial decisions, but has urged judges to “seek to transcend their identities” by working together to find common ground. See Charlie Savage, *A Judge’s View of Judging Is on the Record*, N.Y. TIMES, May 15, 2009, at A21 (referring to then-Judge Sotomayor’s foreword in the 2007 book, *The International Judge*).

bench.<sup>182</sup> Attributed and separate opinions highlight the individual role of judges on a court and “make[] it clear that . . . decisions are the product of independent and thoughtful minds, who try to persuade one another but do not simply ‘go along’ for some supposed ‘good of the institution.’”<sup>183</sup>

An individual’s upbringing, experiences, and prejudices shape one’s personality. This personality in turn naturally influences one’s worldview, political inclinations, and jurisprudence.<sup>184</sup> This influence is manifested in judicial opinions. A clear example of the impact of personality and experience on a judicial opinion is Justice Stevens’s dissent in *Texas v. Johnson*, in which he argued that flag burning should not be constitutionally protected under the First Amendment.<sup>185</sup> This dissent was “the most out-of-character vote of his judicial career,”<sup>186</sup> but is understandable considering his military service in World War II and his son’s service in Vietnam.<sup>187</sup> Justice Stevens himself acknowledged that his time in the Navy affected his feelings about flag burning, noting, “I don’t think anybody can go through a war and not have it have a profound effect on him.”<sup>188</sup> Clerks and secretaries who were present recalled the intense emotion that gripped Justice Stevens—his red face, raw voice, and teary eyes—as he read

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182. See CARDOZO, *supra* note 177, at 177 (“The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.”).

183. Scalia, *supra* note 90, at 35. Justice Scalia also has acknowledged that personally signed opinions put the Court at the forefront of legal development. *Id.* at 39.

184. Jeffrey Rosen discusses the role of various Justices’ childhoods, personalities, and experiences in their jurisprudence throughout the history of the Court. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2007). Rosen describes, for example, the influence that service in the Union Army during the Civil War had on Justices John Harlan and Oliver Wendell Holmes. *Id.* at 80, 83-86. Justice Harlan transformed from a Southern slaveholder to vocal advocate of racial and economic equality after witnessing the battlefield bravery and sacrifices of black troops. *Id.* Justice Holmes, by contrast, was disgusted by the bloody carnage of a conflict enflamed by unbending ideologies; although he was the son of a Massachusetts abolitionist, he became a “radical skeptic of abolitionism and of all constitutional ideals.” *Id.*

185. 491 U.S. 397, 436-39 (1989) (Stevens, J., dissenting).

186. TOOBIN, *supra* note 136, at 234.

187. BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 14 (2010) (quoting one of Justice Stevens’s law clerks, who called the dissent “biographical” and “very much based on his experience”).

188. Jeffrey Cole & Elaine E. Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, LITIG., Spring 2006, at 8, 8-9. Justice Stevens went on to say that he still believed he was “dead right” in his dissent. *Id.* at 9.

his dissent from the bench.<sup>189</sup> To Justice Stevens, the American flag is sacred and deserves protection from “unnecessary desecration.”<sup>190</sup> It is symbolic of ideals worth fighting for, ones “of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.”<sup>191</sup> Justice Stevens personally fought for those ideals, and he undoubtedly had friends who died while doing the same. Thus, he could not decide the issue differently.

In the same case, Justices Kennedy and Scalia acknowledged their personal beliefs, yet still were able to create an air of neutrality. They concurred with the majority in *Texas v. Johnson* and found a prohibition on flag burning unconstitutional “despite their deeply held reverence for traditional values.”<sup>192</sup> As Justice Kennedy wrote: “The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.”<sup>193</sup> By noting their beliefs while claiming to subordinate them to the demands of the Constitution, Justices Kennedy and Scalia suggested that impersonality is not necessary to achieve an unbiased decision.<sup>194</sup>

In reaching a decision, judges may be able to remain unbiased while reflecting on their own beliefs and worldview. Pressure to eschew personality for the appearance of impartiality and institutional cohesiveness is misguided.<sup>195</sup> Per curiam opinions, in which the institution itself is the attributed author, are a manifestation of this pressure; they give credit to an author who appears to have no

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189. BARNHART & SCHLICKMAN, *supra* note 187, at 18.

190. *Johnson*, 491 U.S. at 439 (Stevens, J., dissenting).

191. *Id.* at 437.

192. WRIGHTSMAN, *supra* note 105, at 22.

193. *Johnson*, 491 U.S. at 420-21 (Kennedy, J., concurring).

194. *Cf.* Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 233-34 (2002) (referencing Justice Cardozo’s belief by stating that “there is no way to extinguish the personal identity of a judge and leave behind only a dispassionate professional decisionmaker”).

195. Chief Justice Roberts has said that he wants the legacy of his Court to be one in which individual Justices “subordinate their own interests and agendas in the interest of building judicial consensus and institutional legitimacy,” and even pointed to the ritual and dress of the Court as evidence of its impartiality. ROSEN, *supra* note 184, at 234, 239-40. At the same time, it appears that the Justices’ political views are becoming increasingly open to the public. *See* Dahlia Lithwick, *Their Own Private Hell: Will the Supreme Court’s Evolving View of Privacy Undermine the First Amendment?*, SLATE (Mar. 8, 2011, 6:09 PM), <http://www.slate.com/id/2287234> (noting recent examples of Justices giving speeches at political events and joking that, “[i]f the gotcha videos and the accusations and counteraccusations continue to fly, by the time the court finally gets the case about the constitutionality of President Obama’s health care law, the only people who will be allowed to hear it will be two law clerks and the guy who works in the mailroom”).



personality. In reality, individual personalities pervade the substance and language of a per curiam just as they do in signed opinions without sacrificing impartiality. As a result, per curiams are unnecessary to avoid bias in judicial decision making.

*B. Individuality and the Language of Judicial Decisions*

Judicial opinions are personalized not only in the legal positions they adopt, but also in the style and content of the language used to express those positions. Whether the opinion is written by multiple judges or is an unattributed per curiam, the opinion reflects an individual style without revealing its author.<sup>196</sup> Justices Brennan and Cardozo both believed that "impersonality is not possible and that judges inevitably infuse their work with elements of their own distinctive natures."<sup>197</sup> For this reason, the opinions of certain judges are instantly recognizable, with a style that conveys to the public a sense of the judge and his judicial philosophy.<sup>198</sup> While individual style and voice can be distinguishable, the majority of the legal community and the public would not be able to match the language of an opinion to a particular author, making it more essential that opinions be attributed.

Scholars have explored how the writing styles of various Justices serve as windows into their temperaments and jurisprudence.<sup>199</sup> Justice Black, for example, made his opinions accessible by writing in a conversational manner, with the objective of enabling the public to understand its constitutional protections, which he considered to be only those expressly authorized by constitutional language.<sup>200</sup> Justice

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196. See *supra* notes 114-118 and accompanying text (explaining that *Buckley* demonstrates the difficulties of writing by committee due to the distinct styles of its various authors).

197. Ray, *supra* note 194, at 194 (citing Brennan, *supra* note 177, at 3).

198. POSNER, *supra* note 118, at 145; see Ray, *supra* note 145, at 217 ("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."). Judge Posner also believes, however, that

[t]he strongly marked individuality that traditionally characterized English and American judges and that makes the opinions of a Holmes, a Cardozo, or a Learned Hand instantly recognizable as their author's personal work is becoming a thing of the past. The result is not just a loss of flavor but a loss of information.

POSNER, *supra* note 118, at 145.

199. See generally Ray, *supra* note 194, at 193-94 (chronicling the relationship between various Justices' writing and experiences).

200. *Id.* at 198-201.

Frankfurter's decisions, by contrast, were written in the formal and abstract language of an intellectual. He had been a Harvard Law School professor before he came to the Court; his themes of judicial restraint and deference to democratic will were addressed to a particular and select class of society.<sup>201</sup> On today's Court, Justice Scalia's voice is readily recognizable through his matter-of-fact style of writing, which often conveys his impatience by challenging the foolishness of his colleagues.<sup>202</sup> His voice is "a carefully constructed artifice, the persona that conveys emotional reactions as well as legal arguments."<sup>203</sup> These are examples not only of unique styles of judicial writing; they are also illustrations of unique methods of judicial decision making, which the Justices convey to the public through their opinions. By reading a decision written by Justice Black, an advocate would know to avoid the lofty ideological arguments and flowery language that appealed to Justice Frankfurter. A more accessible argument, appealing to a seemingly commonsense or straightforward reading of the Constitution, was more likely to sway Justice Black, just as it is more likely to convince Justice Scalia today.

Judges also express their individual views and personality by using particular words in the articulation of legal standards. These words, of course, have immense implications for the law, as lower courts, lawyers, and the public attempt to determine what exactly the law "is" based on a higher court's language.<sup>204</sup> As one commentator has noted, "[W]hen a court explains its decision in a judicial opinion, literally every word has a potential future effect on someone's welfare."<sup>205</sup> Given their effect on the law and the outcome of future cases, words in judicial opinions should be—and often are—chosen with an eye carefully attuned to potential implications. The desirability of these implications, and thus the use of a particular word or phrase, depends on the author's personal view of where the law stands and the direction in which it ought to move.<sup>206</sup>

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201. *Id.* at 201-04.

202. *Id.* at 226-27.

203. *Id.* at 227.

204. See Cappalli, *supra* note 179, at 287 ("Rules are constructed of words, and words are imperfect expressions of thought. This is particularly true of the abstract words used in law. . . . From the moment of publication the judicial opinion, and every word within, becomes an instrument for good or evil in the hands of lawyers and judges:").

205. *Id.*

206. These personal views on the law are necessarily determined and shaped by the judges' individual personality. See *supra* Part IV.A.

At times, Justices will openly advocate for a favored word or phrase to be adopted as the legal standard. Justice Sandra Day O'Connor, for example, developed a reputation for her unique views on abortion.<sup>207</sup> In her first important abortion-related case, *Akron v. Akron Center for Reproductive Health, Inc.*, Justice O'Connor dissented from the majority opinion and promoted an "undue burden" test as the appropriate inquiry into whether the challenged regulation infringed upon a woman's constitutional rights.<sup>208</sup> Nine years later, the abortion question was again before the Court in *Casey*.<sup>209</sup> Conservatives on the bench had four votes to overturn *Roe v. Wade*<sup>210</sup> and to allow states wide latitude in regulating abortion.<sup>211</sup> Justice O'Connor, however, had reservations and wanted to uphold the "essence" of *Roe* while allowing most of the challenged restrictive provisions to stand.<sup>212</sup> She ultimately joined with Justices Souter and Kennedy to draft the majority opinion, stating, "In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."<sup>213</sup> Justice O'Connor's singular take on abortion, represented by the phrase "undue burden," had triumphed and "[a] stray observation from a separate opinion . . . had become the law of the land on the most contentious constitutional issue of her time."<sup>214</sup>

In other instances, judges and justices are more discreet about the use of words and phrases they intend or hope will affect the law in a desired manner. Justice Brennan, in particular, was known for inserting apparently nonprovocative language into the text or footnote of an opinion, only to draw on that language to advance his position in a later case.<sup>215</sup> He did so strategically, knowing how far his colleagues were willing to go and "crafting legal arguments to which they could, however hesitantly, sign on."<sup>216</sup> Although these decisions may not have

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207. TOOBIN, *supra* note 136, at 50.

208. 462 U.S. 416, 463-64 (1983) (O'Connor, J., dissenting) ("The 'undue burden' required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard.").

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

210. 410 U.S. 113 (1973).

211. TOOBIN, *supra* note 136, at 47.

212. *See id.* at 52 (recounting that Justice O'Connor was especially bothered by a provision that required married women seeking abortions to inform their husbands, seeing it "as paternalism at best and sexism at worst").

213. *Casey*, 505 U.S. at 876.

214. TOOBIN, *supra* note 136, at 58.

215. STERN & WERMIEL, *supra* note 55, at 343.

216. Ruth Marcus, *The Court's Liberal Champion*, WASH. POST, Oct. 6, 2010, at A19.

fully conformed to Justice Brennan's personal point of view, he was willing to compromise—to draft the opinion in a manner that would allow him to advance his entire vision later and to wait patiently for the appropriate case in which to do so.<sup>217</sup> Justice Brennan's practice has not gone unnoticed: his biographers wrote that his “colleagues learned to watch for the seemingly innocuous casual statement or footnote—seeds that would be exploited to their logical extreme in a later case.”<sup>218</sup>

One such seed may have been planted in the well-known and oft-cited contraception case, *Eisenstadt v. Baird*.<sup>219</sup> Due to the diversity of the views on the Court following oral arguments and conference, Justice Brennan initially agreed to compose a brief per curiam opinion and dispose of the case quickly.<sup>220</sup> The draft that he circulated, however, was a sixteen-page signed opinion addressing the merits of the case.<sup>221</sup> Justice Brennan presented this draft to his colleagues on the morning of December 13, 1971, the very day that *Roe* was first argued before the Court.<sup>222</sup> He included in the draft a phrase that would become famous: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>223</sup> This language, which was not suggested by any argument, brief, or amici curiae, “linked contraception and abortion as part of the overall phenomenon of human reproduction.”<sup>224</sup> In doing so, Justice Brennan may have been attempting to influence the outcome of the abortion decisions.<sup>225</sup> This possibility is reinforced by the fact that, when Justice William Douglas approached Justice Brennan regarding the latter's views on Justice Douglas's proposed opinion for *Doe v. Bolton*<sup>226</sup>—the companion case to *Roe*—Justice Brennan noted that “*Eisenstadt* in its

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217. *Id.*

218. STERN & WERMIEL, *supra* note 55, at 343. “O'Connor had taken to heart Powell's warnings that Brennan planted ‘time bombs’ in his opinions. She had learned to watch for those seemingly offhand, throwaway phrases that he exploited in later cases.” *Id.* at 493.

219. 405 U.S. 438 (1972).

220. Roy Lucas, *New Historical Insights on the Curious Case of Baird v. Eisenstadt*, 9 ROGER WILLIAMS U. L. REV. 9, 13, 42 (2003).

221. *Id.* at 43.

222. *Id.*

223. *Eisenstadt*, 405 U.S. at 453; Lucas, *supra* note 220, at 43.

224. Lucas, *supra* note 220, at 43.

225. See STERN & WERMIEL, *supra* note 55, at 370 (stating that rather than issue a narrow opinion, Justice Brennan used *Eisenstadt* as a way to expand the right of privacy); Lucas, *supra* note 220, at 14.

226. 410 U.S. 179 (1973).

discussion of *Griswold* is helpful in addressing the abortion question.<sup>227</sup>

Justice Brennan may well have planted a second seed in a case involving a constitutional issue no less important than privacy rights and reproduction: freedom of speech under the First Amendment. *Brandenburg v. Ohio*<sup>228</sup> allowed the Court to reconsider its free speech jurisprudence outside of the politically charged Cold War context, in which it had widely deferred to government regulation.<sup>229</sup> At conference, the Justices unanimously agreed to overturn *Brandenburg*'s conviction for making racist, anti-Semitic, and antigovernment statements at a Ku Klux Klan rally.<sup>230</sup> Chief Justice Warren assigned the opinion to Justice Abe Fortas, who had a burgeoning reputation in First Amendment cases.<sup>231</sup> After circulating his draft opinion, however, Justice Fortas was forced to leave the Court for financial improprieties.<sup>232</sup> Justice Brennan assumed the task of completing the opinion, which was issued as a per curiam after Justice Fortas's departure.<sup>233</sup>

Although Justice Brennan agreed generally with Justice Fortas's position,<sup>234</sup> his redrafted opinion subtly but significantly changed *Brandenburg*'s standard for the constitutional regulation of speech.<sup>235</sup> Justice Fortas's draft "would have virtually returned the law to the clear and present danger test" and the view that "speech might not 'be

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227. STERN & WERMIEL, *supra* note 55, at 370 (emphasis added).

228. 395 U.S. 444 (1969) (per curiam).

229. See Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 975-76 (2010) (explaining that the Court took fifty years to "officially embrace either the spirit or the full measure of protections" in Justice Oliver Wendell Holmes' "clear and present danger" test, and that from the 1930s to the McCarthy era the Court allowed the government to regulate political speech, especially for alleged communists).

230. See *Brandenburg*, 395 U.S. at 445-46 (recounting that *Brandenburg* had been filmed making derogatory statements about Jews and blacks at a Ku Klux Klan rally and also spoke about taking "revengeance" against the U.S. government if it "continue[d] to suppress the white, Caucasian race"). *Brandenburg* was convicted under an Ohio statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444-45 (alterations in original) (internal quotation marks omitted).

231. Schwartz, *supra* note 54, at 27.

232. Gey, *supra* note 229, at 977; Schwartz, *supra* note 54, at 28.

233. Schwartz, *supra* note 54, at 28.

234. See *id.* ("After he had read the Fortas draft, Brennan wrote, on April 15, 1969, 'Of course I am with you in this. It's a splendid opinion.'"). In his memo to Justice Fortas regarding the draft opinion, Justice Brennan also suggested various alterations in the language, which Justice Fortas partially incorporated into his draft. *Id.*

235. *Id.*

punished except upon a showing of clear and present danger of imminent, substantial, criminal, or violent consequences.”<sup>236</sup> Justice Brennan’s ultimate opinion, however, removed positive references to the clear and present danger test and substituted for Justice Fortas’s requirement of “inciting . . . imminent lawless action” the phrase “likely to incite or produce such [lawless] action.”<sup>237</sup> These two alterations created a *Brandenburg* standard that is much more protective of potentially subversive speech.<sup>238</sup> Professor Bernard Schwartz summarized Justice Brennan’s role in *Brandenburg* and its effect on the law as follows:

By changing a few words in the Fortas draft, Brennan completely altered the cast of the *Brandenburg* opinion. So far as is known, none of the other justices had any comment on Brennan’s changes; perhaps they did not even realize what he had done in the seemingly slight alterations he made. What is clear is that the whole Court joined [in] the *Brandenburg* per curiam . . . .<sup>239</sup>

Justice Brennan was the most prolific—or at least the best known—composer and exploiter of seemingly innocuous language. But he was not alone among Supreme Court Justices. Commentators today, for example, are looking to an aside by Justice Ginsburg in *Christian Legal Society Chapter v. Martinez*<sup>240</sup> for clues about how the Court will rule in future cases involving gay marriage.<sup>241</sup> In her majority opinion, Justice Ginsburg wrote that the Court’s decisions “have declined to distinguish between status and conduct” in the context of laws affecting gays and lesbians.<sup>242</sup> This brief phrase is potentially significant because “courts are more apt to protect groups

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236. *Id.* at 27-28.

237. *Id.* at 28 (“The crucial element in Brennan’s redraft was, as Judge Posner points out, ‘the addition of the words “likely to incite,” because “likely to” implies that “incite” has the force of “bring about” rather than [merely] “try to stir up.”’” (alteration in original) (quoting Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 515 (1994) (reviewing GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994))).

238. *Id.*

239. *Id.* at 29.

240. 130 S. Ct. 2971 (2010) (holding that a law school policy requiring officially recognized student groups to comply with a nondiscrimination policy did not violate the organization’s rights to free speech, expressive association, and exercise of religion).

241. Adam Liptak, *Looking for Time Bombs and Tea Leaves on Gay Marriage*, N.Y. TIMES, July 20, 2010, at A11.

242. *Christian Legal Soc’y*, 130 S. Ct. at 2990.

whose characteristics are immutable.”<sup>243</sup> The word “status” suggests that sexual orientation is one such characteristic.<sup>244</sup>

It is not only the Supreme Court’s more liberal members who have inserted discreet kernels of language that can be used to promote their idiosyncratic views of the law. Indeed, on the current Court “the seed planters are the conservative justices, and it remains to be seen whether they will be able to reap anywhere near as bountiful a harvest as did Brennan.”<sup>245</sup> Court watchers continue to guess where these seeds have been planted and when or if they will bloom in future opinions.<sup>246</sup>

Finally, the individuality that pervades judicial decisions persists despite the well-known increase in the practice of having law clerks draft opinions.<sup>247</sup> Today, all of the Justices appear to have their clerks write the first drafts of their opinions.<sup>248</sup> Chief Justice Rehnquist acknowledged that the Supreme Court Justices’ chambers were “a collection of nine autonomous opinion-writing bureaus.”<sup>249</sup> Critics argue that this function of law clerks may diminish the insight and sense of individual style that the judicial opinion offers.<sup>250</sup> Opinions written by law clerks, who are beginning their careers and as a result write cautiously and in a more formulaic manner, are less likely to be direct in their meaning.<sup>251</sup> Yet, while opinions written by law clerks are

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243. Liptak, *supra* note 241.

244. *See id.* (“The court is talking about gay people, not homosexuals, and about people who have a social identity rather than a class of people who engage in particular sex acts.” (quoting Professor Suzanne B. Goldberg)).

245. Marcus, *supra* note 216.

246. *See, e.g.,* Dahlia Lithwick, *Gaming the System: At the Supreme Court, Could Legal Precedent Be Less Important than Popular Opinion?*, SLATE (Feb. 2, 2011, 5:32 PM), <http://www.slate.com/id/2283415> (examining the Commerce Clause jurisprudence of Justices Scalia and Thomas to predict how they will rule on the constitutionality of the individual healthcare mandate in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S. Code)).

247. Adam Liptak, *A Sign of Court’s Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 7, 2010, at A1.

248. *Id.*

249. *Id.*

250. *See* POSNER, *supra* note 118, at 150 (“The sense of style that is inseparable from the idea of a great judge in our tradition is unlikely to develop in a judge that does not do his own writing. People are not born great writers; they become great writers by hard work—as writers, not editors. And the struggle to compose a coherent opinion provides a more searching test of the soundness of one’s ideas than performing an editorial function does.”).

251. *See id.* at 145-46 (“The standard opinion style that has emerged [from the use of law clerks] follows the style of the student-written sections of the law reviews—which is hardly surprising when one considers who the law clerks are. The style tends to be colorless and plethoric, and also heavily given to euphemism. . . . Instead of using language to

generally of lower quality, the judge or justice will usually be motivated by reputational concerns to edit and redraft these opinions carefully if the opinion is attributed individually.<sup>252</sup> With a *per curiam* opinion, however, judges do not have the same concerns and thus will not be as thorough in editing opinions written by law clerks.<sup>253</sup> At least for signed opinions, “even stylistic discipline and platoons of law clerks cannot extinguish the spark of personality from the work of Justices who draw on emotion and experience, as well as intellect, in shaping their judicial responses.”<sup>254</sup>

Judges’ individual style is reflected through tone and language choice, both of which have implications for lower courts and practitioners. Judges’ unique personality and style are essential components in the advancement and expansion of the law. Use of the *per curiam* attempts to force judges to relinquish their individuality, thereby stunting the development of the law.

### C. *Judges as Lawmakers*

Under the common law system in the United States, courts have many functions. They develop the law through written opinions that are binding authority for future cases; they offer guidance for fellow judges, as well as for lawyers and litigants; they inform the public about the status of legal issues; and they provide a framework for lawyers, academics, and other legal practitioners analyzing those issues.<sup>255</sup> Judicial decisions thus create a public record that explains the law.<sup>256</sup> The handiwork of a particular judge in a particular case—the

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highlight the things being discussed, the standard style draws a veil over reality, making it harder to see exactly what the judge is doing.”).

252. For a discussion of the reputational implications of attribution, see *supra* notes 85-97 and accompanying text.

253. See Burnett, *supra* note 121, at 28 (recognizing that, as an Idaho appellate court judge, the author “was fully involved in crafting the substance of the *per curiam* opinions, but [his] stylistic editing was lighter than [his] treatment of signed opinions”).

254. Ray, *supra* note 194, at 195.

255. See generally A. WHITNEY GRISWOLD, *The Basis of a Rule of Law*, in LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL: AND OTHER ESSAYS 160, 161 (1959) (“Laws are made by men, interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself. This is true even of the common law. With its slow, seemingly automatic accumulation of precedent, it may look to laymen like a coral reef. The legal philosopher knows it to be a finely wrought cathedral.”).

256. See Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 5-6 (2009) (asserting that the availability of written opinions strengthens the courts’ legitimacy to develop case law); Cappalli, *supra* note 179, at 286 (noting the importance of the written judicial opinion in the U.S. legal system).



decision itself, as well as the words and tone used to convey it—is a window into that judge’s jurisprudence, serving as an important interpretative tool for judges, attorneys, and the general public.<sup>257</sup> Written opinions are carefully scrutinized to extract information about a judge’s legal philosophy—information that is used to gain an understanding about where the law stands on a specific issue, to provide guidance regarding the direction in which the law is likely to move, and to help frame arguments based on these determinations.<sup>258</sup> Knowledge of an opinion’s author provides a “useful shortcut” for attorneys, allowing them to sort through an array of decisions and examine particular opinions for hints regarding a judge’s jurisprudential or philosophical leanings on specific issues.<sup>259</sup>

This shortcut has been particularly important with the recent turnover in the Supreme Court context. What was once known as the O’Connor Court has become the Kennedy Court, illustrating the importance and influence of Justices Sandra Day O’Connor and Anthony Kennedy as the ideological center, and therefore the “swing vote” of the Court in close cases.<sup>260</sup> During her last five years on the Court, Justice O’Connor voted with the majority in approximately three-fourths of the Court’s five-to-four decisions.<sup>261</sup> Because

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257. See Aldisert et al., *supra* note 256, at 2-3 (stating that readers and users of judicial opinions turn to the written opinion to quickly obtain information regarding the relevant issues, legal precedent, and resulting rule of law).

258. See JOST, *supra* note 74, at 505-06 (observing that other careful readers of judicial opinions include lobbyists, policy makers, and journalists).

259. See Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1092 (2005) (“The dictates of formal precedent aside, opinions by judicial superstars like Hand, Friendly, and Cardozo will probably receive close scrutiny.”).

260. See Charles Lane, *Kennedy Reigns Supreme on Court*, WASH. POST, July 2, 2006, at A6 (“It was the O’Connor court. Now it may be the Kennedy court.”); see also Ramesh Ponnuru, *Sandra’s Day: Why the Rehnquist Court Has Been the O’Connor Court, and How To Replace Her (Should It Come to That)*, NAT’L REV. (June 30, 2003), <http://old.nationalreview.com/flashback/ponnuru200507011211.asp>; Editorial, *The O’Connor Court*, WASH. POST (July 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070101835.html>; Lyle Denniston, *The ‘Kennedy Court,’ Only More So*, SCOTUSBLOG (Apr. 9, 2010, 6:49 PM), <http://www.scotusblog.com/2010/04/the-kennedy-court-only-more-so/>. But see Linda Greenhouse, *Is the ‘Kennedy Court’ Over?*, N.Y. TIMES (July 15, 2010), <http://opinionator.blogs.nytimes.com/2010/07/15/rethinking-the-kennedy-court/> (concluding that the era of the “Kennedy Court” is over because Justice Kennedy is much more likely to align with the Court’s conservative members, and thus he no longer has the same influence as an in-play swing vote).

261. See *End of Term Statistics and Analysis—October Term 2005*, SCOTUSBLOG, 2 (June 29, 2006), <http://www.scotusblog.com/archives/EndofTermAnalysis.pdf> (determining that Justice O’Connor was in the majority in both of the two five-to-four decisions in which she participated); *End of Term Statistics and Analysis—October Term 2004*, SCOTUSBLOG, 1 (June 30, 2005), <http://www.scotusblog.com/archives/FinalOT04StatsMemo.pdf> (14 of 24

persuading Justice O'Connor often was the difference between winning and losing, attorneys tailored their arguments to appeal to her judicial philosophy.<sup>262</sup> As a result, the Court's jurisprudence reflected her "sensibilities and preferences" more than those of any other Justice,<sup>263</sup> and her voice became the law in many areas.<sup>264</sup>

Since Justice O'Connor's retirement, Justice Kennedy has been in the majority in eighty-two percent of the Court's five-to-four decisions.<sup>265</sup> Today, the "court's major rulings, on presidential power, environmental law and other issues, reflect[] his moderately conservative, but often fiercely independent, view of the law."<sup>266</sup> Attorneys must now appeal to Justice Kennedy's "distinct approach to constitutional interpretation," which fluctuates all over the

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decisions); *Statistics for the Supreme Court's October Term 2003*, SCOTUSBLOG, 2 (July 13, 2004), <http://www.scotusblog.com/wp-content/uploads/2007/11/ot03stats.pdf> (16 of 21 decisions); *Statistics for the Supreme Court's October Term 2002*, SCOTUSBLOG, 2, <http://www.scotusblog.com/wp-content/uploads/2007/OT02.pdf> (last visited May 13, 2012) (13 of 15 decisions); *Statistics for the Supreme Court's October Term 2001*, SCOTUSBLOG, 2, <http://www.scotusblog.com/wp-content/uploads/2007/OT01.pdf> (last visited May 13, 2012) (15 of 21 decisions); *Statistics for the Supreme Court's October Term 2000*, SCOTUSBLOG, 2, <http://www.scotusblog.com/wp-content/uploads/2007/OT00.pdf> (last visited May 13, 2012) (20 of 26 decisions).

262. See *The O'Connor Court*, *supra* note 260 (noting that Justice O'Connor was "allergic" to the broad principles that appealed to her more ideological colleagues and generally decided cases on their particular facts, leaving her with room to maneuver in a later case); Ponnuru, *supra* note 260 ("Justice O'Connor gets her way more often than the [C]hief [J]ustice does. As the 'swing vote' on the Court, O'Connor is in the majority more often than any of her colleagues. Legal briefs in important cases are written to appeal, above all, to her.").

263. *The O'Connor Court*, *supra* note 260.

264. See Joan Biskupic, *O'Connor Era Ends at Court, Continues in Law*, USA TODAY (Jan. 29, 2006), [http://www.usatoday.com/news/washington/2006-01-29-oconnor-analysis\\_x.htm](http://www.usatoday.com/news/washington/2006-01-29-oconnor-analysis_x.htm) (examining Justice O'Connor's career and analyzing the legal standards she set in such divisive and important areas as abortion, religious displays in public places, and affirmative action); *supra* notes 207-214 and accompanying text (exploring the role of Justice O'Connor in crafting the "undue burden" standard for abortion cases).

265. *End-of-Term Statistical Analysis—October Term 2010*, *supra* note 139, at 3; *Stat Pack for October Term 2010*, *supra* note 68, at 11. The *End-of-Term Statistical Analysis—October Term 2010* notes that, since the beginning of the Roberts Court, Justice Kennedy's majority votes in five-to-four cases have surpassed those of all other Justices. *End-of-Term Statistical Analysis—October Term 2010*, *supra* note 139, at 3. Kennedy was in the majority in 14 of 16 cases in 2010, 11 of 16 cases in 2009, 19 of 23 cases in 2008, 8 of 12 cases in 2007, and 24 of 24 cases in 2006. *End-of-Term Statistical Analysis—October Term 2010*, *supra* note 139, at 3; *Stat Pack for October Term 2010*, *supra* note 68, at 11. Furthermore, 68 of these 75 decisive votes came in cases in which the Court was divided ideologically between "right" (Chief Justice Roberts and Justices Scalia, Thomas, and Alito) and "left" (Justices Stevens, Souter, Breyer, and Ginsburg). *End-of-Term Statistical Analysis—October Term 2010*, *supra* note 139, at 3; *Stat Pack for October Term 2010*, *supra* note 68, at 11.

266. Editorial, *The Fragile Kennedy Court*, N.Y. TIMES (July 7, 2006), <http://www.nytimes.com/2006/07/07/opinion/07fri1.html>.

sociopolitical map, ranging from progressive views of the First Amendment and personal liberties, while maintaining a more conservative approach to abortion and other social values stemming from his Catholicism.<sup>267</sup> Justice Kennedy's previous explanations regarding relevant areas of the law are significant to understanding how the Court will rule on a particular issue.<sup>268</sup> Simply stated, litigants will want to know whether and how Justice Kennedy has written on their issue. The per curiam label, however, raises the possibility that his unattributed explanations will go unnoticed.

Use of the per curiam strips an opinion of an important tool that judges, attorneys, and the public rely on in analyzing and comprehending court decisions. Much like a pitcher with an anonymous umpire, judges and attorneys are unable to tailor their arguments effectively when pitching to a court or judge whose pattern of decision making has been obscured by the per curiam. Attributed opinions reflect how each member of the Court has "contributed a view, a way of writing, a way of thinking, [and] a way of approaching [various] topic[s],"<sup>269</sup> helping to establish an individual Justice's unique strike zone. The author of an opinion must reveal his identity for readers to understand properly the unique judicial philosophy, individual motivation, and personality behind the opinion's language.<sup>270</sup>

## V. EXCEPTIONS

The per curiam opinion raises troubling issues regarding judicial accountability and poses a threat to the development of the law by masking the opinion's author and his or her respective jurisprudence. There are instances, however, in which the use of a per curiam may be appropriate without implicating these concerns. These opinions generally employ formulaic, boilerplate language that is silent on the unique facts of the case or application of the law to those facts. Further, these decisions are truly unanimous; the result is so obvious that no Justice feels the need to write separately. The Supreme Court does not follow clear guidelines in issuing its dispositions, so it is

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267. FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 170-71 (2009).

268. TOOBIN, *supra* note 136, at 327; Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1.

269. THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 160 (Brian Lamb et al. eds., 2010) (quoting Justice Sotomayor).

270. See Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 134-35 (2009) (stating that individually composed opinions make it easier for a reader to identify the intent that motivated a particular decision).

difficult to carve out exceptions based on the type of disposition involved. Nevertheless, there are certain situations in which the Court generally uses formulaic language for a unanimous opinion; in these situations the per curiam may be appropriate.

One such situation is when the Court dismisses certiorari as improvidently granted. In its most basic form, a DIG simply reads, “The writ of certiorari is dismissed as improvidently granted.”<sup>271</sup> Similarly, the Court might issue a formulaic per curiam when it decides to vacate and remand after oral argument. In these situations, the per curiam reads that “[t]he judgment is vacated, and the case is remanded to [the lower court] for further consideration in light of” a case, statute, or factual development that the Court believes warrants reconsideration.<sup>272</sup> Attribution of these opinions would have little value, because the boilerplate language does not directly address the particular factual and legal issues in the case. As soon as a court’s language moves beyond the simple boilerplate, however, it begins to provide opportunities to hold judges accountable and to provide insight regarding where the law stands on an issue, the direction in which the law is likely to move, and how to frame legal arguments. When moving beyond boilerplate language, therefore, the per curiam is no longer appropriate and the decision should be attributed.<sup>273</sup> Any

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271. See, e.g., *Tolentino v. New York*, 131 S. Ct. 1387, 1388 (2011) (per curiam); *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (per curiam); *Philip Morris USA Inc. v. Williams*, 556 U.S. 178, 179 (2009) (per curiam); *Bell v. Kelly*, 555 U.S. 55, 56 (2008) (per curiam); *Toledo-Flores v. United States*, 549 U.S. 69 (2006) (per curiam).

272. See, e.g., *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (per curiam) (“The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010).”); *Dep’t of State v. Legal Assistance for Vietnamese Asylum Seekers, Inc.*, 519 U.S. 1 (1996) (per curiam) (“The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of [section] 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . .”); *Kimberlin v. Quinlan*, 515 U.S. 321, 322 (1995) (per curiam) (“The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Johnson v. Jones*, [515 U.S. 304 (1995)].”); *Perry v. Louisiana*, 498 U.S. 38 (1990) (per curiam) (“The judgment is vacated and the case is remanded to the 19th Judicial District Court of Louisiana for further consideration in light of *Washington v. Harper*, 494 U.S. 210 (1990).”).

273. See, e.g., *Roper v. Weaver*, 550 U.S. 598 (2007) (per curiam) (three-page opinion dismissing certiorari as improvidently granted); *Medellín v. Dretke*, 544 U.S. 660 (2005) (per curiam) (six-page opinion dismissing certiorari as improvidently granted); *Mitchell v. Donovan*, 398 U.S. 427 (1970) (per curiam) (four-page opinion vacating and remanding for lack of jurisdiction). The per curiam might seem appropriate for a GVR because of its generally formulaic language; when a GVR contains only boilerplate language, however, the Court issues it as an order, and therefore not as an opinion, per curiam or otherwise. See, e.g., *City of Reno v. Conn.*, 131 S. Ct. 1812 (2011) (“Petition for writ of certiorari granted.

language that explains a court's reasoning for a disposition, whether factual or legal, implicates the accountability and development of the law, concerns described above.

Similar concerns arise when separate opinions follow a per curiam decision. In these instances, the existence of separate opinions reveals that the matter is not routine and well-settled, but rather that some important aspect of the case is subject to conflicting interpretations. When the separate opinion is a concurrence, this suggests that the court could have reached the result in a different manner. A dissent, on the other hand, calls into question both the court's reasoning and the result.<sup>274</sup> In both of these situations, the result

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Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Connick v. Thompson*, 131 S. Ct. 1350 (2011).” (citation omitted)); *Baker v. Buss*, 131 S. Ct. 1715 (2011) (“[P]etition for a writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Wall v. Kholi*, 131 S. Ct. 1278 (2011).” (citation omitted)); *Allshouse v. Pennsylvania*, 131 S. Ct. 1597, 1598 (2011) (“Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Pennsylvania, Western District, for further consideration in light of *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).” (citation omitted)); *Am. Home Prods. Corp. v. Ferrari*, 131 S. Ct. 1567 (2011) (“Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Georgia for further consideration in light of *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011).” (citation omitted)). The Supreme Court issues hundreds of these GVR orders each Term. Bruhl, *supra* note 59, at 715. A GVR is issued as a per curiam only when the Court's language expands beyond the formulaic language of these orders. *E.g.*, *Bell v. Cone*, 543 U.S. 447 (2005) (per curiam). The situation is similar when the Court bars a petitioner from all future *in forma pauperis* petitions. When formulaic, these dispositions are issued as orders; when issued as per curiam opinions, these opinions tend to elaborate beyond the appropriate scope of the per curiam. Compare *Simon v. Bickell*, 131 S. Ct. 1796 (2011) (issuing a boilerplate order denying motion for *in forma pauperis* and petition for writ of certiorari and stating that, because petitioner has “repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee . . . is paid”), *Brown v. Small*, 131 S. Ct. 1686 (2011) (same), and *Cluck v. Vail*, 131 S. Ct. 1689 (2011) (same), with *Attwood v. Singletary*, 516 U.S. 297 (1996) (per curiam) (taking a page and a half to describe petitioner's abuse of the *in forma pauperis* petition process and bar prospective filings), and *Martin v. D.C. Ct. of App.*, 506 U.S. 1 (1992) (per curiam) (explaining for two pages why all *in forma pauperis* petitions from petitioner are prospectively denied). Further, I do not believe that per curiam summary dispositions that move beyond boilerplate language ought to be permitted, whether or not they are unanimous. For examples of cases decided in the 2011 Supreme Court Term, see *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (unanimous eight-page opinion); *Perry v. Perez*, 132 S. Ct. 934 (2012) (eleven-page opinion followed by two-page concurrence); *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam) (unanimous ten-page opinion); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (per curiam) (unanimous five-page opinion); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam) (eight-page opinion followed by nine-page dissent).

274. See Jacobson, *supra* note 17, at 197 (“Dissent here plays an unusual, dual role: it registers the minority's disagreement with the underlying decision but also its objection to the majority's implicit invocation of a norm of unanimity.”).

is not automatic and the reasoning is not formulaic.<sup>275</sup> Therefore, the main opinion should be signed by its author. The per curiam opinion is thus appropriate only in a narrow class of situations in which courts use only formulaic, boilerplate language to dispose of the matter before it and when there are no separate opinions attached to it.

## VI. CONCLUSION

The per curiam label first appeared on a simple, procedural United States Supreme Court decision in the nineteenth century. Since that time, the per curiam has evolved to apply to more substantive decisions. Because judges are held accountable individually through the signed opinion, which ensures diligent effort, consistency, and fidelity to the law, the expanded use of the per curiam frustrates this accountability. Furthermore, in deciding and writing judicial opinions, judges leave their individual mark on the law through their personality and style. Today, the law and its direction are controlled by the nuances of language, and most Supreme Court decisions are accompanied by opinions in which the Justices offer their unique views on the issues at hand. Individuality is apparent even in per curiam opinions, supposedly “by the court,” which makes attribution critical for the development of the law. Anonymity in judicial decisions should be reserved only for a narrow set of opinions in which formulaic, boilerplate language leaves no legitimate room for individual expression.

Just as pitchers calibrate their pitches to the particular strike zone of the home plate umpire, lawyers tailor their arguments to the individual views of the judges hearing their case.<sup>276</sup> Although umpires wear masks, their identity is known the instant they make a call.

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275. For example, Chief Justice Roberts wrote a six-page dissent (in which he was joined by Justices Scalia, Kennedy, and Sotomayor) from the Court’s formulaic DIG in *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010) (per curiam). For an example from the 2011 Supreme Court Term, see *Cavazos*, 132 S. Ct. 2 (per curiam), which contained an eight-page summary reversal, followed by Justice Ginsburg’s nine-page dissent (joined by Justices Breyer and Sotomayor). See also *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (six-page summary reversal followed by three-page dissent).

276. Stephen Himes, *John Roberts and the Supreme Strike Zone*, FLAK MAG. (Oct. 30, 2007), <http://www.flakmag.com/opinion/roberts.html>. The author states:

Because the exact location of the strike zone depends on the umpire, pitchers calibrate their game plans to who’s behind the plate. . . . Lawyers do the same thing: If Solicitor General Paul Clement is facing a probable 5-4 school integration case, he’s going to pound the Anthony Kennedy strike zone over the inside-right corner—but not off the edge, in the Scalia/Thomas wheelhouse.

*Id.*

Judges, on the other hand, wear a shroud of anonymity when they use the per curiam; nobody knows who called strike three.