2000

The Road to *Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion

Laura K. Ray

*Widener Law, lkray@widener.edu*

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

**Recommended Citation**


Available at: https://digitalcommons.unl.edu/nlr/vol79/iss3/2

This Article is brought to you for free and open access by the Law College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Laura Krugman Ray*

The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion

TABLE OF CONTENTS

I. Introduction ........................................... 518
II. The History of the Per Curiam Opinion as a Form of Judicial Expression ........................................... 521
   A. The Background: An Instrument of Consensus ...... 521
   B. The Transformation: The Decline of Consensus .... 524
III. The Per Curiam and the Idea of Individualism .......... 530
   A. The Emergence of the Separate Voice .............. 530
   B. The Pursuit of Consensus ............................ 533
IV. The Per Curiam as a Strategic Device ................... 536
   A. Achieving Efficiency ............................... 537
   B. Working by Indirection .............................. 538
   C. Creating New Law .................................. 541
   D. Using Procedure as a Screen ...................... 548
   E. Disciplining Courts and Litigants .................. 549
V. The Per Curiam and Individual Expression .............. 550
   C. Collaboration and the Broader Vision: Buckley v. Valeo ............................................ 557
VI. The Per Curiam and the Rehnquist Court ............... 561
   A. The Prologue: A Limited Role ...................... 561
   B. Bush v. Gore: The Return to Center Stage ........ 568
VII. Conclusion ............................................ 575

© Copyright held by the NEBRASKA LAW REVIEW.

* Professor of Law, Widener University School of Law. A.B., Bryn Mawr College; Ph.D., J.D., Yale University. I am grateful to Alan E. Garfield and Philip E. Ray for their helpful readings of earlier drafts of this article.

1. 121 S. Ct. 525 (2000).

517
I. INTRODUCTION

Justice Stephen Breyer recently caused a minor stir when he used the pronoun "I" in a Supreme Court majority opinion. After surprised Court observers called the usage to Breyer's attention, he disclosed that it was "inadvertent" and would be corrected. Why should the choice of pronoun generate even a minor stir and prompt a judicial retreat? Breyer had departed from a long-standing convention that dictates that a Justice writing for the Court may speak in the first person plural — "we" — but not in the first person singular. Even though a single Justice signs the opinion by name, the text insists throughout on its shared provenance as the voice not just of its author but of all those who have voted to join it.

This traditional balance of the institutional and the personal has shifted in this century from the Court's earlier insistence on presenting what Learned Hand termed "monolithic solidarity" to the world. That insistence began with Chief Justice Marshall's determination that the Court should no longer resolve its cases *seriatim*, with each Justice writing separately, but instead in a single, unified opinion. The resulting culture of the Court, one that discouraged both dissenting and concurring opinions as assaults on this unified front, persisted from Marshall's day into the 1930s. The Court in the nineteenth and early twentieth centuries thus deliberately submerged the idea of a personal voice in the fiction of a collective voice, one that spoke for the institution rather than for the Justice who served as its designated scribe.

The monolith began to splinter in the early decades of the twentieth century and today is barely recognizable. With the dramatic up-

3. *Id.* at 7.
6. The Court first produced more than twenty-five dissenting opinions in the 1937 Term; five years later, in the 1942 Term, the number had climbed to sixty-three. *See* ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 137-40 (1978).

surge in the number of separate opinions, both dissents and concurrences, written by the Justices since the late 1930s, there has been no lack of opinions speaking directly, sometimes even emotionally, about their authors' individual positions. As the reaction to Justice Breyer's misstep indicates, however, those inside and outside the Court still value the ideal of a majority opinion that avoids any overt signs that it reflects the personal views of its individual author, even while Court scholars continue to assess the Justices' jurisprudence based largely on their signed opinions. The consequence for the Court of this tension between institutional and individual authorship is a more complicated and more finely calibrated jurisprudence, one in which Justices dutifully refrain from using "I" in their own majority opinions but feel free to pick and choose among the parts of a colleague's opinion, joining only those which they wholeheartedly endorse and writing separately to detail their points of divergence.

This shifting balance between the impersonal and the individual is evident as well in the history of what was traditionally the most impersonal variety of opinion, the per curiam, which suppressed not only the identity of its author but the idea of attributed authorship itself. In its earliest appearances, the per curiam was true to its name, authored anonymously and presented "by the Court" rather than by a designated Justice to express a result that enjoyed full institutional support. The subtext of a per curiam was clear: this case is so easily resolvable, so lacking in complexity or disagreement among the Jus-

7. See C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947, at 24 (1948). According to Pritchett's figures, in the 1935 Term only 16 percent of the Court's opinions were non-unanimous; by the 1938 Term the figure was 34 percent, and by 1943 it had climbed to 58 percent. See id. at 25.

8. See Black's Law Dictionary 1156 (7th ed. 1999). Very little has been written about the per curiam. The most valuable piece is Stephen L. Wasby et al., The Per Curiam Opinion: Its Nature and Functions, 76 Judicature 29, 32 (1992), which focuses on the Court's use of the per curiam from the 1969 to the 1981 Terms and provides interesting statistics. For the argument that the issuance by appellate courts of brief, non-explanatory per curiams is abusive and "not compatible with a democratic system of government," see Tobias Weiss, What Price Per Curiam?, 39 Trial Law. Guide 23, 30 (1995). For the counterargument, that signed opinions from intermediate appellate courts should be barred as "an unfortunate blending of judicial ego into the institutional mixture," see Richard Lowell Nygaard, The Maligned Per Curiam: A Fresh Look at an Old Colleague, 5 Scribes J. Legal Writing 41, 41 (1994-95). For an ironic essay which argues that "Judge Per Curiam... has been drafted for too many hard cases," see Henry S. Manley, Nonpareil Among Judges, 34 Cornell L.Q. 51, 51-52 (1948). One handbook for judges lists five reasons for writing a per curiam, including the occasion when the panel assigned a case "feels that the issue raised is one demanding that the court speak with a single voice." Joyce J. George, Judicial Opinion Writing Handbook 220 (3d ed. 1993). Another handbook author finds the per curiam "both proper and desirable" for limited situations, including those when "the difficulty of reaching agreement on a particular draft opinion... may make
The per curiam was not, however, insulated from the shift in the Court's opinion-writing process from impersonality to individual expression. Rather, the per curiam has functioned as a microcosm of that shift, reflecting in its evolution the increasing tendency of the Justices to assert their personal views even in the most impersonal context.

Thus, in the late 1930s, as concurrences and dissents proliferated, the role of the per curiam also changed. Per curiam opinions increasingly came with dissents attached, creating an oxymoronic form, one that simultaneously insisted on both institutional consensus and individual disagreement. In the 1950s and 1960s the Court also found that the impersonal nature of the per curiam made it the ideal instrument for a variety of strategic purposes, from the efficient resolution of urgent cases to the evasion of controversial issues and the making of new law by indirection. By the 1970s the Court had adapted the per curiam to a purpose diametrically opposed to its original use, producing per curiam opinions accompanied by as many as nine separate opinions, each asserting a strong and independent position. In its most elaborate incarnations, the per curiam finally became its own antithesis, the vehicle for three of the Court's most challenging and most splintered constitutional cases of this century.

Then, in eight days in December 2000, the Supreme Court added a dramatic new chapter to the history of the per curiam opinion. As George W. Bush and Albert Gore, Jr. jostled for legal advantage in resolving the disputed presidential election results in Florida, the country speculated about the role the Supreme Court was likely to play and the way each Justice might vote. Twice the Court granted certiorari petitions from Governor Bush to review decisions of the Florida Supreme Court permitting vote recounts to go forward, and twice, after accelerated briefing and oral argument schedules, the Court issued prompt per curiam opinions. On December 4th, the first of these opinions, *Bush v. Palm Beach County Canvassing Board*, vacated the Florida court opinion and remanded for clarification, a muted task well-suited to the modest role usually assigned the per curiam. The second opinion, however, *Bush v. Gore*, was far less modest. It effectively concluded the election in favor of Governor Bush by identifying an equal protection violation in the recount process and precluding any further recount on the grounds that it was too late to...
complete a constitutionally acceptable process before a December 12th
deadline set by federal law.

The Court had never before resolved a presidential election, and it
had rarely if ever performed its opinion-writing role in the glare of
such avid and sustained attention from the media and the nation.
Yet, when the opinion emerged, in another departure from the Court's
usual methodical practice, shortly before 10:00 p.m. on December
12th, it too proved to be a per curiam with no indication of authorship.
The Court's unsigned opinion was accompanied by one concurrence
and four dissents, so there was little difficulty in understanding the
positions taken explicitly by seven of the Justices and deducing the
positions of their two silent colleagues. Yet, at this extraordinary mo-
ment in American history, when the Court assumed an unprecedented
role as arbiter of the presidential election, it chose to speak collectively
in the most self-effacing judicial form available to it. Why did the
Court issue its historic opinion as a per curiam? The answer to that
question lies at the end of a long and largely unexamined road, the
Court's evolving use of the per curiam opinion as a flexible and strate-
gic instrument of Supreme Court jurisprudence over the past one hun-
dred and forty years.

Viewed against the backdrop of the Court's increasingly individu-
alized opinion writing, the evolution of the per curiam encapsulates
the larger history of the Court's refinement of its decisionmaking role.
An examination of the ways in which the Court has adapted the per
curiam to its changing needs will also chart the uneven course of the
Court's continuing struggle to balance its institutional role as an
agent of consensus against the demands of its Justices for individual
expression.

II. THE HISTORY OF THE PER CURIAM OPINION AS
A FORM OF JUDICIAL EXPRESSION

A. The Background: An Instrument of Consensus

The Supreme Court's first officially designated per curiam opinion
to be published appeared in 1862, when the Court in Mesa v. United
States11 proclaimed, "Let this appeal be dismissed" for failure to file a
transcript within the congressionally prescribed time.12 The opinion

11. 67 U.S. 721 (1862).
12. Id. at 722. In its earliest years and later under Chief Justice Marshall, the Court
issued opinions without indicating authorship. See John P. Kelsh, The Opinion
Delivery Practices of the United States Supreme Court 1790-1945, 77 WASH. U.
L.Q. 137, 145 (1999). These opinions were not, however, designated "per curiam"
and are not included in the opinion tables (specifically, Table 9) compiled by
Blaustein and Mersky in their statistical study of the Court. See Blaustein &
Mersky, supra note 6, at 137-38. According to one group of scholars who have
studied the per curiam, "[t]he Court's changes and occasional inconsistency in the
was a bare forty-two words and, beyond its initial command, contained only one other sentence. It resolved a motion, apparently without oral argument, and occupied less than a page in U.S. Reports. It was, in short, an efficient method of disposing of a routine matter with a minimal amount of judicial exertion. *Mesa* was not, however, the Court's first use of the heading. That honor belongs to *West v. Brashear,* a motion decision restoring a case to the docket, that somehow was overlooked when it was issued in 1839. Fifty years later, *West* was published in the appendix to Volume 131 as one of the "Omitted Cases Now Reported In Full."14

In the years that followed *Mesa,* the Court found additional uses for per curiam opinions in resolving such routine matters as dismissals for lack of jurisdiction, grants or denials of certiorari petitions, and a range of motion decisions. Some twenty-five years after *Mesa,* the Court began to include on occasion a brief explanation of the basis for its result. In 1889, in *Sherman v. Robertson,* the Court for the first time cited to precedent as the ground for reversal in a per curiam opinion, a practice that soon became entrenched and continues to the present.16 By the early years of the twentieth century, the Court routinely used the per curiam to dismiss cases and to affirm or reverse decisions below.17 All of these opinions were quite brief, and they often were not even a complete sentence.18 On rare occasions, a decision might contain more than a single paragraph, although not a sustained argument. Thus, the per curiam opinion for *United States* use of the per curiam label means that examining these rulings is somewhat like shooting at a moving target." Wasby et al., supra note 8, at 32. In the interest of achieving what consistency is possible, I have included in my study only those opinions labeled "per curiam."

13. 131 U.S. app. at lxvi (1839).
14. *West* is the earliest of the omitted cases included by J.C. Bancroft Davis, Reporter to the Court, in the "Appendix to the Reports of the Decisions" included in Volume 131. The decision is also reprinted in Volume 76 of the Lawyers' Edition under an explanatory note indicating that "[i]n the preparation of cases for publication in the Lawyers' Edition of the Supreme Court Reports, several hundred early cases were discovered and included therein which had never before been published. A very few cases, however, were not included in their proper place, and they are accordingly grouped in this appendix in order that the Lawyers' Edition shall contain every case decided." 76 L. Ed. 1341 (1889).
15. 136 U.S. 570 (1889).
16. The Court noted briefly that the case was "Reversed with costs, on the authority of the decision of this court in the case of Hartranft v. Oliver, (No. 190 of October term 1887), 125 U.S. 525." Id. at 571.
v. Marvin\textsuperscript{19} covers three pages, but most of the text consists of a quotation from the findings of fact and conclusion of law of the court below.\textsuperscript{20} In a half page, the Court does, uncharacteristically, summarize the positions submitted in writing by counsel, but the Court's own resolution consists of two sentences: the first cites to the cases in which "[t]he various applicable statutory provisions will be found," and the second accepts the lower court's use of precedent and affirms its judgment.\textsuperscript{21} The opinion, though lacking in sustained argument, nonetheless signals a shift from cursory case resolution toward the more fully developed opinions of argued cases.

That shift was significantly advanced when, in the 1934 Term, the Court began using the per curiam to resolve cases on the merits. Volume 295 of U.S. Reports contains four cases, all argued to the Court, which are either affirmed or reversed by per curiam issued within two weeks of oral argument. Two of these opinions, one slightly less than two pages and the other a half page, directly address the substantive issues raised by the decisions below.\textsuperscript{22} In \textit{Stanley v. Public Utilities Commission},\textsuperscript{23} the Court discussed the discretion appropriate to a state legislature in regulating carriers for hire and found no transgression.\textsuperscript{24} The second opinion, \textit{Texas & New Orleans R.R. Co. v. United States},\textsuperscript{25} addressed the merits more succinctly and found orders of the Interstate Commerce Commission adequately supported by the Commission's findings.\textsuperscript{26} The 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. It is worth noting that both cases concern aspects of the Court's New Deal agenda – determining the reach of regulatory power in legislatures and administrative agencies. The per curiam allowed the Court at once to signal that these cases warranted some exposition but were nonetheless so easily decided that they did not require the more elaborate presentation of a signed opinion.

The shifting role of the per curiam is reflected as well in the changing placement of the opinions. The early per curiam appeared in the

\begin{itemize}
  \item \textsuperscript{19} 212 U.S. 275 (1909).
  \item \textsuperscript{20} See id. at 275-77.
  \item \textsuperscript{21} Id. at 277.
  \item \textsuperscript{22} In one case, \textit{Fox v. Gulf Refining Co.}, 295 U.S. 75 (1935), the Court remanded the case to the district court with instructions to consider an unresolved issue "composed as above stated" in the per curiam. Id. at 76. In the other, \textit{Hollins v. Oklahoma}, 295 U.S. 394 (1935), the Court again remanded a Fourteenth Amendment claim based on exclusion of blacks from a criminal jury, this time with directions to apply the principles set forth in two earlier Court decisions. Id. at 395.
  \item \textsuperscript{23} 295 U.S. 76 (1935).
  \item \textsuperscript{24} See id. at 77.
  \item \textsuperscript{25} 295 U.S. 395 (1935).
  \item \textsuperscript{26} See id. at 396.
\end{itemize}
rear section of U.S. Reports, together with other briefly noted resolutions of motions, under the heading "Decisions announced without Opinions." As the per curiams became more numerous, they were given a section of their own for the first time in the October 1902 Term, designated simply "Opinions Per Curiam." Almost twenty years later, per curiams began to appear as well in the main section of the volume, although it took another decade before that became a regular practice. In United States v. Malcolm, for example, the Court set forth in its entirety a certification from the court below before succinctly answering the questions; the opinion appeared immediately before the separate section used for the briefer per curiams. Per curiams coexisted in both the main section of the volume and their own separately labeled section at the rear until the 1957 Term, when the heading was dropped, although per curiams continued to appear, grouped together, at the rear of volumes for several years thereafter.

B. The Transformation: The Decline of Consensus

Changes in the length and placement of per curiams, though notable stages in their evolution, pale in significance beside the dramatic shift from an opinion, however brief, literally supported by the entire Court to an opinion that carries on its face the disagreement of some Justices. For much of its history, the per curiam was unaccompanied by any indications of such divergence. The first dissent from a per curiam was authored, appropriately, by the Great Dissenter himself, Oliver Wendell Holmes, in the 1909 case of Chicago, Burlington and Quincy Railway Co. v. Williams, before the Court on a certificate from the Eighth Circuit Court of Appeals. In its per curiam, the Court spent three pages setting forth the questions of law certified by the


29. In Ex Parte Tracy, for example, the Court in slightly more than a page denied a motion to file a habeas corpus petition while explaining that, since other relief was available to the petitioner, there was no need for habeas. See Ex Parte Tracy, 249 U.S. 551, 551-52 (1919).

30. 282 U.S. 792 (1931).

31. See id. at 794; see also Public Serv. Comm'n v. Batesville Tel. Co., 284 U.S. 6 (1931)(dismissing an appeal and explaining that the case did not fall within the authorizing statute and therefore a petition for certiorari was necessary).

32. Compare Decisions Per Curiam and Orders June 10 through July 11, 1957, 354 U.S. 901 (1957), with the per curiam opinions grouped together, though without an introductory heading, at 345 U.S. 600-08. On the placement of per curiam opinions, see Wasby et al., supra note 8, at 32.

lower court before concluding that the certificate before it was "essentially the same as that disposed of" when the case had earlier been heard by the Court and that the present matter should be dismissed based on the earlier resolution. In his one paragraph dissent, joined by Justices White and Moody, Holmes initially noted his reluctance to dissent "when it does not seem that an important principle is involved or that there is some public advantage to be gained from a statement of the other side." He had therefore joined the Court's determination when the case was first before it that the questions certified were not within the statute giving the Court jurisdiction to resolve them. Since the present certificate in his view contained questions of pure law, the Court had jurisdiction and should respond. Holmes thus at the same time assumed the modest stance of a reluctant dissenter and, sub silentio, changed the per curiam from a decision of absolute consensus to one of asserted disagreement.

Holmes's groundbreaking gesture of writing separately in a per curiam case was, surprisingly, not followed for more than two decades, and even then it was in a significantly less emphatic manner. The Court had dismissed the writ of certiorari in Broad River Power Co. v. South Carolina for lack of jurisdiction in a unanimous opinion authored by Justice Stone. On rehearing, the Court announced in its per curiam that it had reached the same result but that "the members of the Court differ in the reasons which lead to that decision." Two separate statements followed, each supported by four Justices, with one Justice not participating. Instead of opinions written in the first person, each statement was formulated in the third person. Thus, "Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler concur in this disposition of the case, upon the rehearing, for the following reasons," while "The Chief Justice, Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone adhere to the views expressed" in the Court's prior opinion. In Broad River Power, the impersonality of the per curiam becomes instead a thin mask for the clearly articulated disagreement of equal blocs of Justices.

Although a few intervening cases carried terse third party statements of disagreement, the first full-fledged dissenting opinion attached to a per curiam appeared early in 1938, only three months

34. Id. at 495 (Holmes, J., dissenting).
35. See id. at 496.
36. 281 U.S. 537 (1930).
38. Id. at 192-93.
39. See, e.g., Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32, 33 (1936)("Mr. Justice Brandeis and Mr. Justice Cardozo dissent."); Cate v. Beasley, 299 U.S. 30, 32 (1936)("Mr. Justice Reynolds is of opinion that the challenged judgment should be reversed.").
after its author, Justice Black, joined the Court. In *McCart v. Indianapolis Water Co.*, the Court's per curiam opinion, authored by Chief Justice Hughes, spent barely four pages affirming an appeals court decision that ordered further district court review of water rates set by the Public Service Commission of Indiana. In a solitary dissent of almost eighteen pages, Justice Black strongly attacked the Court's result on several grounds, most prominently the limited role assigned the federal courts in reviewing regulation of rates for intrastate utilities. "I believe," he concluded, "the State of Indiana has the right to regulate the price of water in Indianapolis free from interference by federal courts." Black's dissent also, unsurprisingly, carried populist overtones in its concern for the people of Indianapolis who, in his view, "[were] already compelled to pay an unjustifiable price for their water on account of previous judicial over-valuation of this property." The boldness of the lengthy dissent to the Chief Justice's per curiam provoked concern on the Court, prompting Justice Stone to send Hughes a mysterious message: "I see in Justice Black's dissent the handiwork of someone other than the nominal author." Black's subsequent record as author of concurrences and dissents indicates that Stone had misjudged his colleague.

As a new arrival from the Senate, where he passionately supported the New Deal agenda, Black showed none of the tendency of Justices in their first term on the Court to proceed cautiously and accept the guidance of their senior colleagues. A figure of great energy and ambition, Black launched his judicial career by writing a lengthy and detailed refutation of an opinion the other seven participating Justices thought required little elaboration or argument. Black brought to

40. See *McCart v. Indianapolis Water Co.*, 302 U.S. 419 (1938). The case was argued on December 15, 1937, and decided on January 3, 1938. Justice Black was appointed by President Roosevelt on August 12, 1937, confirmed by the Senate on August 17, and sworn in as Associate Justice on August 19. He took his seat on the Court for the first time on October 4, 1937. See *Justices of the Supreme Court During the Time of these Reports*, 302 U.S. III n.3 (1937).

41. 302 U.S. 419 (1938).

42. See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 273 (2d ed. 1997).

43. See *McCart*, 302 U.S. at 422-23. On remand, the district court was directed to conduct a new hearing to determine whether the rates set by the Commission were, in light of an accurate valuation of the water company's property, confiscatory. See id.

44. See id. at 423-24 (Black, J., dissenting).

45. Id. at 441.

46. Id.

47. NEWMAN, supra note 42, at 273-74. According to Newman, Stone's reference "is unknown, but soon rumors started popping up in Washington that Ben Cohen and Tom Corcoran were writing Black's opinions .... Anyone who knew Black even slightly would have guffawed at the suggestion." Id. at 274.

48. Justice Cardozo did not participate in the decision of the case. See *McCart*, 302 U.S. at 423.
the Court a powerful sense of judicial individuality and a reluctance to submerge his own views. In the first paragraph of his opinion, he notes that “[t]he importance of the questions here involved leads me to set out some of my reasons for” dissenting.49 Black's willingness to stake out his own territory in effect completed the transformation of the per curiam from its original role as an instrument of consensus to its new role as another judicial battleground for the ideological battles to follow within the Roosevelt Court and its successors.

Justice Black was the first Roosevelt appointee to the Court, and he was followed to the bench in quick succession by Stanley Reed in 1938, Felix Frankfurter and William O. Douglas in 1939, Frank Murphy in 1940, James F. Byrnes and Robert H. Jackson in 1941, and Wiley Rutledge in 1943.50 Although most of Roosevelt's choices were strong-willed and highly individualistic, Black and Douglas were the two Justices who consistently appended dissents or, less frequently, concurrences, to per curiam opinions. In his thirty-four years on the Court, Black authored twenty dissents and three concurrences, while Reed, for example, added only one dissent in nineteen years, and Frankfurter added seven dissents and seven concurrences in twenty-three years. Even Black's substantial numbers pale when compared to Douglas's performance. In his thirty-six year tenure on the Court, the longest of any Justice, Douglas wrote seventy-one dissents from per curiams, twenty-one concurrences, and five opinions simply labeled “separate.” Together, Black and Douglas led the Court toward a model of decisionmaking that never hesitated to disturb consensus opinions with statements of individual views.

As the practice of adding separate opinions to per curiams became established, the Justices in the 1940s added other refinements to their use of the per curiam. Not all separate opinions were conventionally labeled. In one 1943 case, for example, three Justices joined in a brief third party statement disagreeing with the Court but not using the word "dissent," while Justice Jackson wrote a separate concurrence referring to the three as "the dissenting Justices."51 Other variations included a separate opinion labeled neither dissent nor concurrence;52

49. Id.
50. See The Oxford Companion to the Supreme Court of the United States 969 (Kermit L. Hall ed., 1992). In 1941 Roosevelt elevated Harlan F. Stone, a Calvin Coolidge appointee, from Associate Justice to Chief Justice. See id.
52. See New York ex rel. Whitman v. Wilson, 318 U.S. 688, 691 (1943). The opinion was written by Justice Frankfurter and joined by Justices Roberts and Reed. See id. at 692. Another example of this type of opinion is Justice Douglas's separate opinion in NAACP v. Williams, 359 U.S. 550 (1959). Douglas opens by saying that "[w]ith some doubts I bow to the conclusion" of the per curiam concerning the finality of the judgment below and after a brief discussion concludes that "I acquiesce in the denial of certiorari at this stage of the proceedings." Id. at 550-51.
jointly authored separate opinions; a per curiam announced by Justice Douglas, who had also authored a signed opinion for a related case; and the growing tendency of Justices to join one another's separate opinions. This tendency to join finally led in the 1960s to a per curiam opinion issued by the most closely divided Court possible: in *Niukkanen v. McAlexander* the Court issued a per curiam, but it nevertheless divided five to four, with three Justices joining a dissent by Douglas.

At the same time a complementary tendency of some Justices to fine-tune their separate views in per curiam cases emerged. By 1963, the practice of appending opinions that both concurred and dissented had begun. In a case that year, Justice Harlan filed an opinion concurring in part and dissenting in part; he believed that certiorari should not have been granted, accepted the Court's result, but disagreed with its rationale. The Justices also began to note partial agreement with per curiams. Thus, in 1964 Justice Douglas filed an opinion concurring in part with the Court's per curiam, and more
recently Justice Souter indicated, without opinion, that he joined only Part I of the Court's opinion.\textsuperscript{60} In the 1970s separate opinions began to proliferate. A 1977 per curiam, for example, carried with it a concurrence by Justice Blackmun and separate dissents by Justices Brennan, Stewart, and Stevens.\textsuperscript{61} With the joinder of various opinions by the five other Justices, all nine members of the Court registered views beyond the scope of the per curiam.

The grouping and regrouping of the Justices in a complicated 1986 case, \textit{Bazemore v. Friday},\textsuperscript{62} demonstrated how flexible and capable of incorporating diverse positions the per curiam had become. All nine Justices joined Justice Brennan's lengthy partial concurrence which, \textit{inter alia}, overturned the lower court's rejection of the statistical evidence submitted by plaintiffs claiming racial discrimination by the North Carolina Extension Service.\textsuperscript{63} Four Justices then joined Justice White's concurrence finding that the Extension Service had met its constitutional and statutory duty to eliminate discrimination,\textsuperscript{64} while the remaining three joined Justice Brennan's second separate opinion, a partial dissent finding a broader unmet duty to desegregate.\textsuperscript{65} The per curiam opinion endorsed the results of both concurrences, explaining in each instance that it so held "for the reasons stated in" the Brennan and White opinions.\textsuperscript{66} White could have written a signed opinion for the Court incorporating both concurrences, and Brennan could have written a single opinion concurring and dissenting in part. Instead, the Court allowed Brennan's unanimous concurrence to follow a per curiam, hinting at a subtle but unexplained distinction between what the Court itself held and what all of its members believed.

This elusive distinction recalls what may be the most delicate refinement of a Justice's separate response to a per curiam. In \textit{O'Keeffe}...
v. Smith, Hinchmon, & Grylls Associates, Inc.,

Justice Douglas appended an opinion "dubitante" to a per curiam upholding a ruling by the Deputy Commissioner of the Bureau of Employees' Compensation. Douglas noted that, unlike the Court, he would not be "inclined to reverse a Court of Appeals that disagreed with a Deputy Commissioner over findings as exotic as we have here." It is not surprising that Douglas, the most supremely individualistic Justice of this century, is the author of one of the handful of opinions dubitante recorded in U.S. Reports, but it is significant that the anomaly appears in a per curiam case, signaling that even a Justice who doubts his own tentative position is more inclined to express it in writing than to join a supposedly clear-cut opinion.

III. THE PER CURIAM AND THE IDEA OF INDIVIDUALISM

A. The Emergence of the Separate Voice

It is no coincidence that the per curiam, originally an instrument of pure consensus, first became a judicial vehicle for individual expression during the Roosevelt Court. In its earliest years the Supreme Court had functioned as a highly individualistic body, with the Jus-

68. See id. at 371 (Douglas, J., dubitante). Justice Harlan dissented from the Court's opinion, joined by Justices Clark and White. See id. at 365 (Harlan, J., dissenting). An opinion dubitante is one "indicating the judge doubted a legal point but was unwilling to state that it was wrong." BLACK'S LAW DICTIONARY 515 (7th ed. 1999).
69. O'Keeffe, 380 U.S. at 372.
70. In addition to O'Keeffe, only two other opinions have been formally presented as dubitante. In Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), Douglas filed another opinion dubitante, noting that he was "not as certain as Mr. Justice White" concerning an issue in the case and therefore preferred to reserve certain questions. Id. at 403 (Douglas, J., dubitante)(emphasis omitted). The only other such opinion—and the earliest—was written by Justice Frankfurter. See Radio Corp. of America v. United States, 341 U.S. 412, 421 (1951). Frankfurter opened his opinion with the following expression of doubt: "Since I am not alone in entertaining doubts about this case they had better be stated." Id. The only other Justice to use the term to classify an opinion, though in a more indirect manner, was a third Roosevelt Court appointee, Wiley Rutledge. A 1949 case contained the notation that "Mr. Justice Rutledge acquiesces in the Court's opinion and judgment, dubitante on the question of equal protection of the laws." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 111 (1949)(emphasis omitted). Two years earlier he had opened a concurring opinion by stating, "I join in the judgment dubitante." New York ex rel. Halvey v. Halvey, 330 U.S. 610, 619 (1947)(Rutledge, J., concurring). For two uses of the term in the text of separate opinions, see Chambers v. Mississippi, 410 U.S. 284, 308 (1973)(White, J., concurring). White noted that he was "inclined, although dubitante, to conclude with the Court that we have jurisdiction." Id. at 307-08. Douglas's third use of the term occurred in 1961. See International Ass'n of Machinists v. Street, 367 U.S. 740, 779 (1961)(Douglas, J., concurring). He "concluded dubitante to agree" to the judgment suggested by Justice Brennan. Id.
tices writing their opinions *seriatim* and leaving the determination of the Court's holding, as in the English system, to the readers of the Justices' multiple opinions. With the arrival of John Marshall as Chief Justice, that potent individualism was reined in by a leader who insisted on speaking for a unified Court, even at the cost of vigorously suppressing the disagreement of colleagues.\(^7\) Marshall's disciplined leadership solidified and increased the Court's power, but it also shaped a Court that continued to value its collective institutional power above the independent voices of its members and thus, into the start of the twentieth century, discouraged dissent. Even Holmes, who achieved a popular reputation as a ready dissenter, expressed his distaste for the practice and in fact contributed only seventy-two dissenting opinions over a Court career of almost thirty years.\(^2\)

This traditional model for the Court—eight Associate Justices accepting the guidance of a respected Chief Justice and working toward consensus—continued into the twentieth century under the tenure of Charles Evans Hughes, regarded by many who served under him as an exemplary leader. Hughes was celebrated for running the Justices' conferences with a strong hand by shaping the discussion of cases with his introductory remarks and limiting the time for discussion of independent views.\(^3\) The result was a lean, efficient process that

---

71. When Justice William Johnson brought to the Supreme Court the custom of dissent prevailing at his Virginia court, his colleagues reproached him. As Johnson reported in an 1822 letter to Thomas Jefferson:

> [D]uring the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate court had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all. I therefore bent to the current, and persevered until I got them to adopt the course they now pursue, which is to appoint someone to deliver the opinion of the majority, but leave it to the discretion of the rest of the judges to record their opinions or not ad libitum.


73. According to Justice Douglas, a member of the Hughes Court for two years, Hughes "was most efficient. The Conference started at noon, and no matter how long the Conference List, we were usually through by four-thirty or five. The discussions were short; Hughes's statements were always succinct." WILLIAM O. DOUGLAS, THE COURT YEARS 222 (1980). For an account of Hughes's method of conducting the Court's conference, see 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 672-73 (1951). According to Pusey, "[e]xcept at the beginning of a new term, when several conferences were necessary to dispose of the petitions for certiorari accumulated during the summer, Hughes always insisted on finishing all the business before the conference at a single session." *Id.* at 673. For another
Hughes could describe to Congress, in the heat of the court packing battle, as keeping the Court abreast of its docket despite the advanced age of many of its members.\textsuperscript{74} Hughes's leadership was not, however, universally appreciated. As an Associate Justice, Harlan Stone, a former academic who enjoyed extended debate, chafed at the restrictions imposed under the Hughes regime. When Roosevelt elevated Stone to succeed Hughes in 1941, the new Chief Justice implemented his own preferred approach, allowing extended debate at conferences that dragged on over several days, often to the despair of his otherwise sympathetic colleagues.\textsuperscript{75} The Stone Court, unlike the Hughes Court, put individual voice before institutional efficiency.

In this respect the administrative aspect of the Court reflected the substantive divergences that marked the Court in the 1930s, especially the deep rifts between conservatives and liberals that were resolved, though not ended, by the constitutional revolution of 1937. That story has been told many times, most masterfully by William Leuchtenberg, and it chronicles the bitter divisions on the Court between the conservative Four Horsemen and their opponents, the Justices who endorsed an expanded vision of federal legislative power.\textsuperscript{76} The Roosevelt Justices, many of whom came from government positions or academia, brought to the bench their strong personalities, personal ambitions, and reluctance to compromise.\textsuperscript{77} They clashed with such stalwarts of the prior generation as Justice McReynolds, whose abrasive personality and conservative views made him a difficult colleague, but they also clashed with one another. Even as Roosevelt populated the Court with nine appointees, the anticipated return to consensus remained elusive. As the 1930s gave way to the 1940s, the Roosevelt Court itself divided between separate alliances—Black and Douglas, Frankfurter and Jackson—that precluded the tempering of individual views in the service of institutional harmony.\textsuperscript{78}

\textsuperscript{74} See \textit{William E. Leuchtenburg, The Supreme Court Reborn} 140-41 (1995).

\textsuperscript{75} Douglas described Stone as "first, last and always, a professor who wanted to search out every point and unravel every skein." \textit{Douglas, supra} note 73, at 222. With Stone as Chief Justice, "our Conference was never finished by four-thirty or five. We moved the starting time back, first to eleven and then to ten o'clock, but we still could not finish by six on Saturday. . . . He believed in free speech for everybody, including himself." \textit{Id.} at 223.

\textsuperscript{76} \textit{See generally Leuchtenburg, supra} note 74.

\textsuperscript{77} \textit{See} \textit{O'Brien, supra} note 72, at 100.

\textsuperscript{78} On the divisions and alliances within the Roosevelt Court, see \textit{Pritchett, supra} note 7, at 240-63.
B. The Pursuit of Consensus

The convergence of these three strains—the jurisprudential, the administrative, and the temperamental—combined to reconstitute the Court as a confederation of individualists. In the absence of a strong and respected Chief Justice, which was the state of affairs during the brief tenure of Fred Vinson, there was little chance of achieving consensus on a controversial issue like school desegregation. When *Brown v. Board of Education* came before the Vinson Court, the tentative vote revealed such a serious division that the best option for the Justices hoping to strike down school segregation as unconstitutional was a maneuver to have the case put over for reargument. After Vinson's unexpected death led to Earl Warren's appointment as Chief Justice, the Court acquired a strong and politically savvy leader who commanded the respect and even the affection of the Justices. Even so, Warren's determination to achieve a unanimous decision in *Brown* required a prolonged and delicate campaign executed with the consummate skill of an experienced politician rather than the *ex cathedra* style of leadership that had worked for Marshall and, in a modified form, for Hughes as well.

The wooing of Stanley Reed as the ninth vote essential for unanimity was the culmination of that campaign, and it reveals the blending of the institutional and the personal in shaping Court consensus by the middle of the twentieth century. Since Warren understood that Reed, a Kentuckian, did not believe that the doctrine of separate but equal was unconstitutional, Warren's approach to his colleague was more personal than jurisprudential. He arranged a series of lunches, most attended by Justices Burton and Minton, the least threatening among a bench of imposing and largely intransigent Justices, at which Warren tried to persuade Reed to accept the position of his colleagues. When Reed remained unconvinced, Warren couched his final appeal in the language of institutional need. As recounted by Bernard Schwartz, Warren presented Reed with the stark choice between undermining the Court's authority on an explosive issue or holding to his own position: "Stan, you're all by yourself in this now. You've got to decide whether it's really the best thing for the coun-

79. Bernard Schwartz believes that "Fred M. Vinson may have been the least effective Court head in the Supreme Court's history." *Bernard Schwartz, A History of the Supreme Court* 253 (1993). He lacked both the intellectual power and the administrative ability to lead a Court of highly intelligent and assertive Justices toward consensus and, under his leadership, "the Vinson Court was the most fragmented in the Court's history." *Id.* at 254.


81. *See Schwartz, Super Chief, supra* note 80, at 90. Schwartz sees the luncheon strategy as evidence of "Warren's instinct for effective leadership." *Id.*
Reed voted with the Court, but he did so out of institutional responsibility and regard for Warren, not personal conviction. The episode is a moving one—Reed reportedly had tears in his eyes as Warren read the unanimous opinion from the bench—not least because it harks back to a type of institutional decisionmaking not often seen in the years since. Warren as Chief Justice was less interested in the authenticity of Reed's commitment to the Court's position than he was in the consequences of a desegregation decision carrying a single dissent by a southerner. Like John Marshall before him, Warren understood the potential harm to both the country and the Court that a splintered decision could provoke, and he succeeded in conveying that message to the Court's last holdout. Reed's own willingness to follow Warren by sacrificing one form of integrity for another, personal conviction for institutional solidarity, stands as one of the last triumphs of the earlier model that placed consensus above individualism.

The next great effort to achieve judicial unanimity in a potentially explosive case came twenty years later, when President Nixon challenged the Court's authority to order him to release the Watergate tapes, and it illustrates the progress of the Court's shift from consensus to individualism. The first striking difference between Brown and United States v. Nixon is that the successful effort was led not by the Chief Justice but by blocs of Associate Justices working against him to secure a solid and persuasive opinion. Although the Justices agreed among themselves that the decision had to be unanimous, they had rejected Brennan's original suggestion that it be signed by all eight Justices rather than by a single author. Once Chief Justice Burger assigned the case to himself, his colleagues could only counter what they considered to be his confused and inadequate drafts with their own versions, circulated among themselves and presented to him as their preferred text. Burger ultimately acquiesced, accepting most of their contributions and claiming others as his own, but he emerged as

82. Id. at 94 (footnote omitted). Schwartz's source for the conversation was Reed's law clerk, who witnessed it. Id. Kluger identifies the clerk as George Mickum and quotes him as saying of Reed, "Because he was a Southerner, even a lone dissent by him would give a lot of people a lot of grist for making trouble. For the good of the country, he put aside his own basis for dissent." KLUGER, supra note 80, at 698.

83. See SCHWARTZ, SUPER CHIEF, supra note 80, at 105.

84. For a detailed account of the behind-the-scenes maneuvers that resulted in the Court's unanimous opinion, see BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 287-347 (1979). For a brief account of the shaping of the Court's opinion, see BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 145-48 (1996) [hereinafter SCHWARTZ, DECISION].

85. WOODWARD & ARMSTRONG, supra note 84, at 296, 309-10.
the pawn of the Associate Justices, not their leader, the obstacle to consensus rather than its architect.86

The second striking difference is the nature of the opinion produced. Although the opinion in Brown has occasioned a great deal of comment and some criticism for its approach to the constitutional issue posed by segregation, no one has questioned the coherence of Warren's vision. Warren instructed his law clerk that the opinion was to be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory," and the final product clearly matches that description.87 It is, in short, the work of a single mind with a clear strategic goal.88 The Court's opinion in United States v. Nixon, on the other hand, has been aptly described by one Justice as the work of a committee.89 Its doctrine is incompletely explained, its various sections seem at times to have been (as they were) written by different hands, and it is internally inconsistent in its varying emphases on presidential privilege and judicial authority. The cost of achieving consensus, even in the face of the Watergate crisis, was clearly steep, and the effort of bringing together Justices who differed significantly in the degree of respect they were willing to accord presidential power appears in the sometimes strained and never fluent text. By 1974, consensus was no longer a shared goal; rather, it was an occasional political necessity that the Justices struggled among themselves to forge from the diversity of their individual positions.

In the quarter century since United States v. Nixon, this shift from consensus toward judicial individualism has progressed. Court decisions today are frequently heavily splintered, with Justices choosing among the sections of their colleagues' opinions, agreeing with some, rejecting others, and offering their own takes on the issues at hand. A concurrence may well begin "I write separately only to express" and follow with the author's insistence on an individual or even idiosyn cratic position, often one that has been articulated in earlier cases and rejected by other Justices.90 The most significant counter-example to this trend is Chief Justice Rehnquist who, since his elevation in 1986,
has reduced his output of separate opinions dramatically.91 As Chief Justice he places a higher premium on consensus than he did in his earlier years as a renegade conservative on an inhospitably liberal Court or as the leader of a nascent conservative majority.

IV. THE PER CURIAM AS A STRATEGIC DEVICE

The transformation of the Court's ruling principle from consensus to individualism also transformed the per curiam from an impersonal judicial instrument to its opposite, a judicial instrument useful precisely because it permitted the widest possible display of divergent opinions. If the early per curiams left the reader unable to identify the anonymous author who enjoyed the wholehearted support of the other eight Justices, by the 1970s, the Burger Court years, the per curiam at times left the reader puzzled by the gap between label and content. On several occasions the Court turned to the per curiam to resolve high-profile cases which raised difficult and controversial issues on which the Justices held widely divergent positions. In some instances the per curiam offered the Court a convenient way to defer or accelerate the resolution of a case, but in others it seemed to raise more questions than it answered. Why, if the Justices could agree on only a bare paragraph, were they calling attention to their discord by presenting it as a unified result accompanied by hefty separate opinions? And why could no member of the Court be found to extract some measure of consensus from the welter of differing views? Was the per curiam the last resort for a Court that, unable to reach genuine agreement, was determined to lay claim to the label as a substitute for the reality?

Within this larger history of the per curiam's transformation is a smaller history that illustrates the Court's expanding interest in the potential of the per curiam as an adaptable judicial tool. The Roosevelt Court, faced with challenging issues to decide and internal conflicts to navigate, found the per curiam useful in meeting a number of strategic goals. Since the per curiam traditionally carried a message of clear-cut resolution and consensus, the Court increasingly found that packaging a case in per curiam form allowed it to communicate that comfortable message while engaging in more complicated acts of decisionmaking. As the Roosevelt Court of the 1940s gave way to the Warren and Burger Courts, the per curiam played a steadily

91. According to the Harvard Law Review statistics that appear in each November issue, Rehnquist, as an Associate Justice from 1972 to 1986, averaged 16.3 dissents and 4.7 concurrences per term. As Chief Justice since 1986, he has averaged 5.4 dissents and 1.4 concurrences per term. Even allowing for the Court's shift to the right in recent years, which places Rehnquist less often in the minority than in his early years, the decline is still significant.
more prominent role in the strategic presentation of cases of considerably more than routine interest.

A. Achieving Efficiency

The Court began experimenting with the per curiam as a strategic device in the 1940s, adapting it in *Ex Parte Quirin*[^92] to the unusual demands imposed by the war. When eight German saboteurs were captured in the United States and scheduled for trial by a military commission, they sought to file habeas corpus petitions challenging the constitutionality of a military trial. Responding to what Chief Justice Stone characterized as "the urgency of the case,"[^93] the Supreme Court granted certiorari before judgment, heard oral argument at a special term on July 29th and 30th, and only one day later, on July 31st, released a brief per curiam upholding the validity of a military trial. The petitioners' sentences, including six executions, were carried out only a few days after the issuance of the per curiam. Stone, who as usual was summering in New Hampshire, worked on the full opinion in solitude, buoyed by his colleagues' unusual will to unanimity in this dramatic case and at the same time constrained by the demands of satisfying such divergent Justices.[^94] The prompt per curiam allowed the Court to resolve a serious issue with expedition in the tense wartime atmosphere while still having the leisure to craft an important precedent acceptable to all members of the Court. In a similar post-war situation, when the Court was faced in 1948 with the question of its jurisdiction to review the judgments of the Allied Powers' military tribunal in Japan, the per curiam again provided a way for the Court to rule immediately.[^95] The case was resolved by a per curiam issued on December 20, 1948, three days after the conclusion of oral argument, but Douglas's concurring opinion did not appear until June 27, 1949, over six months later.[^96] A delay occasioned by one member of the Court did not prevent the resolution of a case with significant international implications.

[^92]: 317 U.S. 1 (1942).
[^94]: See id. at 659.
[^96]: See id. While the per curiam was only three paragraphs, Douglas's concurrence was sixteen pages long. See id. at 199-215 (Douglas, J., concurring). The case also indicates that Justice Rutledge "reserves decision and the announcement of his vote until a later time." Id. at 198. In fact, as a footnote clarifies, Rutledge died on September 10, 1949, "without having announced his vote on this case." Id.
B. Working by Indirection

In the 1950s the Court discovered a new use for the per curiam as an impersonal vehicle for resolving controversial cases without confronting controversial issues. By presenting an opinion in the per curiam mode, the Court sent a signal that any substantive discussion was irrelevant, that the result was compelled not by the merits of highly contested issues but rather by external factors that precluded the Court from even addressing the merits. With no Justice signing the opinion, there was no individual to be blamed for evading the tough questions. The choice had been made by a faceless entity, a kind of legal bureaucrat, and the opinion that conveyed that choice seemed somehow less to be blamed for timidity than acknowledged for doing its job.

The strategic use of the per curiam for purposes of evasion is illustrated by the Court's 1953 decision to uphold an increasingly shaky thirty year-old precedent. In Toolson v. New York Yankees, Inc., the Court was asked to revisit the question of baseball's exemption from federal antitrust law, an exemption which had been established by a 1922 Oliver Wendell Holmes decision, Federal Baseball Club v. National League of Professional Baseball Clubs. With two Justices dissenting, the Toolson Court, after full argument, decided that any change in the status of baseball should be left to Congress and reaffirmed Federal Baseball "[w]ithout re-examination of the underlying issues." Like earlier per curiams that simply made reference to binding precedents, Toolson's reliance on stare decisis and deference to Congress obviated the need for a developed opinion, at least in the view of seven Justices.

But the one paragraph opinion provided something more than a gesture of institutional respect for Holmes and Congress or, as the dissent charged, a refusal to acknowledge fundamental changes in the conduct of baseball that had fatally undermined the precedent. Since Federal Baseball had ruled that baseball was not commerce, it precluded Congress from regulating the sport under its Commerce Clause power. As Bernard Schwartz has documented, Chief Justice Warren objected that Justice Black's original draft per curiam did

98. See 259 U.S. 200 (1922). Holmes found that "[t]he business [of] giving exhibitions of base ball ... although made for money would not be called trade or commerce in the commonly accepted use of those words." Id. at 208-09.
99. Toolson, 346 U.S. at 357. Justice Burton filed a dissenting opinion, joined by Justice Reed. See id. at 357 (Burton, J., dissenting).
100. Justice Burton called it "a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act." Id. at 358.
101. See Schwartz, Super Chief, supra note 80, at 162.
not make clear that Congress had the power to regulate baseball under federal antitrust law should it choose to do so.\(^{102}\) He proposed additional language making that point, and Black agreed to incorporate it.\(^{103}\) Thus, \textit{Toolson} ends by reaffirming \textit{Federal Baseball} "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws," leaving the door open for Congress to resolve the issue by statute.\(^{104}\) In \textit{Toolson}, then, the per curiam that appears to do no more than reaffirm a precedent in fact modifies that precedent, making new law at the very moment that it apparently disclaims any intention of addressing the merits.

The Court refined the use of the per curiam as a strategic instrument of indirection in a series of cases seeking to expand desegregation of public facilities in the wake of \textit{Brown v. Board of Education.}\(^{105}\) These cases were resolved by per curiam opinions of the most basic variety. Not only did these opinions omit any discussion of the issue, but they also declined even to identify the subject matter of the case. In \textit{Mayor of Baltimore City v. Dawson},\(^{106}\) for example, the Court noted only that "[t]he motion to affirm is granted and the judgment is affirmed," thus effectively desegregating public beaches.\(^{107}\) On the same day, in \textit{Holmes v. City of Atlanta},\(^{108}\) the Court desegregated public golf courses, vacating the decisions below and remanding "with directions to enter a decree for petitioners in conformity" with Dawson.\(^{109}\) A year later the Court in \textit{Gayle v. Browder}\(^{110}\) desegregated the bus system in Montgomery, Alabama, by affirming the court below and citing \textit{Brown}, \textit{Mayor}, and \textit{Holmes}.

All three opinions appeared in the rear section of U.S. Reports designated "Decisions Per Curiam," surrounded by summary decisions dismissing cases for lack of a substantial federal question. The message was unmistakable: attempts to preserve segregated public facilities were, as a matter of law, so groundless and so lacking in merit that they could be disposed of with a stroke, recorded among the cases with the slightest claim on the Court's attention. Two years later, when the Court struck down segregation in public housing, the per curiam lacked even any cite to precedent; it consisted of just four

\(^{102}\) \textit{See id. at 162-63.}\(^{103}\) \textit{See id.}\(^{104}\) \textit{Toolson}, 346 U.S. at 357.\(^{105}\) For a more general study of indirection as an opinion writing strategy, see Laura Krugman Ray, \textit{The Figure in the Judicial Carpet: Images of Family and State in Supreme Court Opinions}, 37 J. LEGAL EDUC. 331 (1987).\(^{106}\) 350 U.S. 877 (1955).\(^{107}\) \textit{Id.} at 877.\(^{108}\) 350 U.S. 879 (1955).\(^{109}\) \textit{Id.} at 879.\(^{110}\) 352 U.S. 903 (1956).
words: "The judgment is affirmed." The most elaborate of these per curiasms, Johnson v. Virginia, came in 1963, when the Court in two pages reversed the contempt conviction of a black man who had refused to sit in the blacks only section of traffic court. After describing the facts of the case, the opinion disposed of the case with two sentences:

Such a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities. . . . State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws.

In this sequence of cases the Court engaged in jurisprudence by elision. Between Brown, which was carefully limited to public education, and Johnson, which baldly asserted that the extension of Brown to all public facilities "[was] no longer open to question," there is quite simply no discussion by the Court of the implications of Brown for any sphere outside education. Bernard Schwartz quotes the clerk instructed by Warren to draft the Montgomery bus opinion by citing three precedents as saying, "I thought at the time that it was a pretty casual way for the Court to advance a major proposition of constitutional law and still do." Perhaps "subtle" would be a better adjective than "casual." What the Court did instead of providing a detailed legal rationale was to build a bridge of per curiasms, 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 communicated its constitutional position more effectively and less provocatively than a sequence of fully developed opinions could have done.

On at least one occasion the Court used the per curiam to conceal its intention of ducking a particularly sensitive racial issue. The Court confronted the appeal in Naim v. Naim, which challenged the constitutionality of Virginia's anti-miscegenation law, at confer-

113. Id. at 62.
114. Id.
115. SCHWARTZ, SUPER CHIEF, supra note 80, at 126.
116. Schwartz finds such criticisms irrelevant and asks, "Was there a need for explanations once the Brown opinion - with the broad sweep of its language striking down separation of the races - had been written?" Id. In my view, whatever need for explanation remained was met by the implicit message conveyed by the use of intervening per curiam opinions.
ence in November 1955, little more than five months after the issuance of Brown II, the opinion mandating enforcement of the school desegregation decision. At conference Justice Frankfurter insisted that it would be a mistake to hear the case because a divided decision on the miscegenation law would interfere with the difficult enforcement process under Brown. Frankfurter argued "that to throw a decision of this Court . . . into the vortex of the present disquietude would . . . seriously, I believe very seriously, embarrass the carrying-out of the Court's decree of last May." Over dissenting votes from Warren and Black, who believed that the Court should meet its responsibility and address the issue, the Court voted to issue a per curiam opinion based on the inadequacy of the record below. With Frankfurter's assistance, Justice Clark drafted a deliberately vague opinion citing "[t]he inadequacy of the record" and "the failure of the parties to bring here all questions relevant to the disposition of the case" as the reasons for the Court's decision remanding the case to the lower court. Although both Warren and Black considered appending dissents, eventually both decided to refrain, allowing the Court to use the per curiam as a perfect instrument of evasion.

C. Creating New Law

By the late 1960s the Court had moved beyond evasion, using the per curiam not only to avoid important substantive issues but also at times forthrightly to resolve them. The most remarkable of the per curiam cases in which the Court made significant new law is Brandenburg v. Ohio, unmistakably a major First Amendment precedent. Reviewing Ohio's criminal syndicalism statute, the Court replaced its longstanding clear and present danger test for speech advocating illegal action with a new, more liberal standard by striking down the statute for its failure to distinguish between speech that directly incites "imminent lawless action" and speech that merely advocates it. The opinion also overruled Whitney v. California, a forty-year-old, though "thoroughly discredited," precedent, and it is surprising to find such a decisive step taken in a per curiam.

119. Schwatz, Super Chief, supra note 80, at 159.
120. See id. at 160-61.
121. Id. at 160.
122. See id. at 160-61.
124. Id. at 447.
125. 274 U.S. 357 (1927).
The explanation for *Brandenburg* is as remarkable as its use of the per curiam form. After oral argument on February 27, 1969, the Court voted unanimously to overturn the defendant's conviction for statements made at a Ku Klux Klan rally in violation of the Ohio statute. The case was assigned to Justice Fortas, who had his signed draft in circulation by April 11th. Although by mid-April Fortas also had the necessary votes, he agreed to a request from Justice Harlan that he delay releasing *Brandenburg* until two related cases were also ready because “it would be well to bring down the three cases at the same time.” That delay was fatal to Fortas's authorship of *Brandenburg*. On May 14th he responded to pressure from Congress and the White House over allegations of irregular financial dealings and resigned from the Court. The case was then reassigned to Brennan and reappeared as a per curiam.

The *Brandenburg* draft that Brennan inherited from Fortas was a polished opinion of slightly more than seven pages, and Brennan left much of the draft intact. He corrected a few technical errors, moved part of one paragraph from the text to a footnote, made some minor stylistic adjustments, and eliminated two pages of text, most of it an historical account of the enactment and enforcement of criminal syndicalism statutes. Brennan also deleted Fortas's final paragraph, which found “no need here to decide whether under a properly drawn statute the State could punish any aspect of the conduct disclosed by this record.” The per curiam opinion is thus both shorter and more narrowly focused than the Fortas draft.

In addition to making these routine changes, however, Brennan also took one highly significant step. In the language of the Fortas draft, the First Amendment would permit prosecution for speech that advocates force or illegal action when that speech is “directed to inciting or producing imminent lawless action and is attended by present...”

---


128. Id. at 28 (quoting a letter from Justice Harlan to Justice Fortas).

129. For an account of the events leading up to the Fortas resignation, including his acceptance of the controversial stipend from Louis Wolfson, a financier of dubious reputation, see Bruce Alan Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 545-77 (1988) and Laura Kalman, *Abe Fortas: A Biography* 359-78 (1990).


131. Fortas Draft, supra note 130, at 8.
danger that such action may in fact be provoked." Fortas rejected a request by Black that all references to the clear and present danger test be eliminated, though Black was nonetheless willing to concur in the draft. When Brennan took over the opinion he altered Fortas's controlling language, removing the echo of the earlier test. In his version,

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

The opinion was released on June 9, 1969, less than a month after Fortas's resignation from the Court on May 14th.

Brennan's seemingly slight verbal adjustment of Fortas's language in fact altered First Amendment doctrine dramatically. Where Fortas's version of the traditional clear and present danger test still allowed the government to restrict speech when there was any "present danger" of imminent lawless action, Brennan's reformulation imposed tighter restraints on government: only when the speech at issue was "likely to incite or produce such action" could the speaker be silenced. Gerald Gunther has described Brandenburg as creating "a new standard of speech protection." More sweepingly, Morton Horwitz has described it as "[t]he culmination of Justice Brennan's free-speech jurisprudence," an opinion that "finally shook off the repressive effects of McCarthyism, vindicated the Holmes-Brandeis free speech dissent, and arguably even went beyond Justices Holmes and Brandeis in the protection it provided speech."

132. Id. at 5; Schwartz, Justice Brennan, supra note 127, at 27.
133. See Murphy, supra note 129, at 543.
135. See id. at 444. The case was argued on February 27th.
136. See Kalman, supra note 129, at 373.
137. Schwartz notes of Brennan's revision, "It is true that his redraft changed only a small portion of what Justice Fortas had written, but the changes completely altered the nature of the Brandenburg opinion, converting it from one that confirmed the clear and present danger test to one that virtually did away with the test as the governing standard in First Amendment cases." Schwartz, Justice Brennan, supra note 127, at 28.
Brandenburg is thus a landmark case released in per curiam form only because of its unusual history. Most of the brief text was written by Fortas and left intact by Brennan, so in one sense it was a collaborative work by two members of the Court—one departed, one very much present—rather than an authentic "Brennan" opinion. In a larger sense, however, the opinion stretches the increasingly elastic boundaries of the per curiam in two additional ways. First, by failing to identify the true author of a new and influential standard, Brandenburg obscures the doctrinal development of First Amendment jurisprudence. Second, by signaling that the case is an unexceptional resolution of a routine legal issue, the per curiam obscures as well the significance of its content. Fortas had circulated Brandenburg as a signed opinion, and it seems clear that had he remained on the Court, or had Brennan been originally assigned the case, Brandenburg would not have emerged as a per curiam. The twist of fate that allowed Brennan to alter First Amendment law in a way that Fortas had rejected also allowed the per curiam to assume new prominence as a source of important new law.

Following Brandenburg, the decade of the 1970s was the high-water mark of the per curiam as a vehicle for the resolution of important cases with new doctrinal content. A new element also entered the mix at this point—the Court's increasing willingness to resolve cases in per curiam form without the full trappings of the conventional review process. Over the sustained complaints of Justices Marshall, Stevens, and Blackmun, the Court acquired the habit of granting certiorari and reversing decisions below without either full briefing or oral argument.\textsuperscript{141} Pennsylvania v. Mimms\textsuperscript{142} illustrates this phenomenon. The case presented a new Fourth Amendment issue, whether a police officer who had stopped a car for a routine motor vehicle infraction, here an expired license plate, could order the driver to step out of the car and, having then observed a bulge in the driver's jacket, frisk the driver and arrest him for offenses based on the weapon found in

\textsuperscript{141} See Robert L. Stern et al., Supreme Court Practice 250-54 (7th ed. 1993). For other cases in which dissenters complained about the Court's summary use of the per curiam, see, e.g., Hutto v. Davis, 454 U.S. 370, 387 (1982)(Brennan, J., dissenting)(deploring the use of summary disposition based on certiorari petitions "to change or extend the law in significant respects"); California v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 95 (1981)(Stevens, J., dissenting)(terming it "distressing to find that the Court considers novel questions of this character so easy as not even to merit argument"); Ortwein v. Schwab, 410 U.S. 656, 662 (1973)(Douglas, J., dissenting)(accusing the Court of deciding \textit{sub silentio} "a question this Court studiously has avoided"). For a discussion of the Court's use of the per curiam for summary dispositions, see Wasby et al., supra note 8, at 37-38.

\textsuperscript{142} 434 U.S. 106 (1977).
the search. In its opinion of barely five pages, the Court carefully separated the issue into two parts. The first, which it characterized as "the narrow question" of the reasonableness of the order to vacate the car, was resolved by balancing the police officer's safety interest against what the Court termed the "de minimis" intrusion on the driver's liberty interest and finding that the officer's interest prevailed. The second, the propriety of the search itself, was found to be clearly governed by precedent. "We have," the Court noted, "as little doubt on this point as on the first." This note of certitude connects the resolution of the two questions, one new law and one based on precedent, and deems them equally suited to the per curiam form.

Both dissenters, Marshall and Stevens, took exception to the manner of the Court's decision as well as to its content. In a solitary opinion, Marshall objected to the resolution of "such an important issue" based only on the parties' certiorari filings and argued "that the Court does institutional as well as doctrinal damage by the course it pursues today." Stevens's dissent, joined by Brennan and Marshall, was even more pointed. He found it "disturbing" that "this important innovation is announced almost casually" and deplored what he termed "the summary disposition of a novel constitutional question" by a method that creates "an unacceptable risk of error." By forgoing its standard practice of full briefing and oral argument, the Court, in the dissenters' view, assumes a degree of expertise it lacks and fails to give the parties their deserved opportunity to present the merits of their case. Worse still to Stevens is the Court's refusal to acknowledge the significant step it is taking, its pretense that only narrow and obvious questions of law are being resolved.

143. The driver was convicted of carrying a concealed deadly weapon and unlawfully carrying a firearm without a license. See id. at 107.
144. Id. at 109.
145. Id. at 111.
146. Id. The controlling precedent was Terry v. Ohio, 392 U.S. 1 (1968).
148. Id. at 116 (Stevens, J., dissenting).
149. Id. at 124.
150. For another case in which the dissent accuses the Court of deciding an important constitutional issue sub silentio, see Ortwein v. Schwab, 410 U.S. 656 (1973). In Ortwein, the Court ruled that Oregon's twenty-five dollar appellate court filing fee did not violate the Due Process or Equal Protection Clauses as applied to the appellants' efforts to appeal reductions of their welfare benefits. The Court relied on its ruling in United States v. Kras, 409 U.S. 434 (1973), where it had upheld bankruptcy filing fees against a similar constitutional challenge. Dissenting in Ortwein, Justice Marshall attacked both the substantive result and the summary nature of the Court's disposition of the constitutional issue:

The extent to which the State may commit to administrative agencies the unreviewable authority to restrict pre-existing rights is one of the great questions of constitutional law about which courts and commentators have debated for generations. . . . Because I am not ready to decide
Stevens's allusion to the casual quality of the Court's opinion points to the strategic value of the per curiam in the announcement of new law. The label itself, of course, immediately classifies the case as routine and unexceptional. It also calls attention to a degree of consensus that the decision may not justify, especially when there are multiple or strongly worded separate opinions attached. More subtly, the fact that the majority opinion does not carry an author's signature or the names of those who join suggests that the named dissenters or concurrers are a splinter group, renegades from an harmonious Court rather than one bloc rejecting the position of another. The per curiam label gives the opinion an unearned aura of inevitability that may strengthen the majority's position against the counterarguments raised by the dissent. Unlike a signed opinion, which personalizes internal disagreement, a per curiam throws the institutional weight of the Court against the individually named Justices who oppose it.

The Court took advantage of the per curiam's aura of inevitability in cases where it asserted that the application of settled doctrine clearly mandated a particular result. In *Stone v. Graham*, for example, the Court summarily ruled that a Kentucky statute requiring the posting of the Ten Commandments in classrooms clearly had no secular purpose and thus violated the test of *Lemon v. Kurtzman*. Four Justices disagreed with the Court's sense of inevitability. Chief Justice Burger and Justices Blackmun and Stewart all believed that the case warranted full briefing and argument. The fourth dissenter, Justice Rehnquist, called the Court's action "a cavalier summary reversal" and contributed a substantive opinion of his own. In spite of its summary resolution and its four dissenters, *Stone* set an important precedent and is frequently cited, a per curiam that carries significant weight despite its lack of a fully articulated rationale for its result.

that question summarily, *sub silentio*, and without the benefit of full briefing and oral argument, I must dissent from the Court's decision. 410 U.S. at 666 (Marshall, J., dissenting). The other three dissenters, Stewart, Douglas, and Brennan, all raised similar objections to the summary disposition, but both Stewart and Brennan found, in Brennan's words, "no reason to set this case for argument in light of the majority's firmly held view that *Kras* is controlling." *Id.* at 664 (Brennan, J., dissenting).

152. 403 U.S. 602 (1971).
153. See *Stone*, 449 U.S. at 43.
154. *Id.* at 47 (Rehnquist, J., dissenting).
155. For other frequently cited cases in which the Court resolved constitutional issues without plenary review, see, e.g., *Ortwein v. Schwab*, 410 U.S. 656 (1973) (holding that appellate court filing fee does not violate due process or equal protection); *Papish v. Board of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973) (holding application of "conventions of decency" on state university campus a violation of First Amendment rights). Four Justices dissented in *Ortwein*; Stewart filed a statement, and Douglas, Brennan, and Marshall filed dissenting opinions. *See*
The Court appeared to make a similar use of the per curiam in *Massachusetts Board of Retirement v. Murgia*, where it determined after argument that a Massachusetts statute mandating retirement for all police officers at the age of fifty met the reasonableness standard of equal protection analysis. As Mark Tushnet has demonstrated, however, *Murgia* reflects a more complicated resolution of a highly divisive case and a more complicated use of the per curiam. The opinion in *Murgia* was originally assigned to Justice Brennan, whose first draft reformulated the Court's rational review standard and immediately provoked strong opposition from Justice Rehnquist. As the Justices exchanged correspondence and opinions making clear their substantial differences, Justice Powell entered the fray with an opinion based on a new theory. Brennan adopted Powell's opinion in an attempt to win support from other Justices, but when that attempt failed he turned the case over to Powell, who then revised his draft in order "to attain as much unanimity as possible." Rehnquist continued to resist Powell's approach, however, and Powell once again revised to produce an opinion, in his words, "about as blandly written as one can write." The bland per curiam skirted the crucial issue of the appropriate rational review standard,

---

Ortwein, 410 U.S. at 661 (Douglas, J., dissenting); *id.* at 664 (Brennan, J., dissenting); *id.* at 665 (Marshall, J., dissenting). In *Papish*, three Justices dissented. Chief Justice Burger wrote a dissent and together with Justice Blackmun joined Justice Rehnquist's dissent. See *Papish*, 410 U.S. at 671, 673.


159. See *id.* at 1856-57.

160. Brennan supported a more flexible standard that would give the Court more leeway in striking down state statutes, while Rehnquist believed that the standard "ought to virtually foreclose judicial invalidation except in the rare, rare case where the legislature has all but run amok and acted in a patently arbitrary manner." *Id.* (quoting Letter from Justice William H. Rehnquist to Justice William J. Brennan 1 (Jan. 30, 1976), in *Thurgood Marshall Papers*, Library of Congress, box 165, file 8). Powell's new approach was based on a theory that the class of older adults affected by the statute had sufficient political power to protect its interests in the legislature. See *id.* at 1858.


162. *Id.* at 1860 (quoting Memorandum from Justice Lewis F. Powell, Sr. to the Conference (June 15, 1976), in *Thurgood Marshall Papers*, Library of Congress, box 165, file 8). Rehnquist had asked Powell to include "a quotation of Rehnquist's preferred standard," but Powell "apparently was uncomfortable with writing an opinion that, in both his and Rehnquist's eyes, was internally inconsistent." Tushnet, *supra* note 158, at 1860.
describing it simply as "relatively relaxed,"163 and won the votes of all the participating Justices except for Marshall, the lone dissenter.164

Murgia, a frequently cited precedent, achieved consensus only by declining to engage the crucial issue that divided the Court. It made law, if only of the blandest nature, leaving the Justices, again in Powell's words to his colleagues, "free to fight again another day."165

D. Using Procedure as a Screen

During this same period the Court employed the per curiam to resolve or, as the dissenters might argue, manipulate a procedural issue in order to avoid confronting a difficult substantive issue. Perhaps the most noted of such cases was DeFunis v. Odegaard,166 where, over impatient dissents from Justices Douglas and Brennan,167 the Court found an affirmative action case brought by a law student then in his last semester to be moot. Brennan, writing for four Justices, accused the Court of "straining to rid itself of this dispute" in order to defer its first engagement with affirmative action issues in the school context.168 The majority's selection of the per curiam form once again signaled that this was a routine instance of an issue that had been overtaken by circumstances and rendered unsuitable for resolution on the merits, in sharp contrast to the dissenters' insistence on the significance of the issue and its claim to the Court's full attention.

In a second case, Snepp v. United States,169 the dissent suggested that the Court's per curiam was using a novel procedural route to reach its desired substantive result. The case involved the obligation of a Central Intelligence Agency employee to secure prepublication clearance for his book, and Justice Stevens in dissent objected that the Court's sub silentio granting of the government's conditional cross-petition for certiorari was "as unprecedented as its disposition of the merits" by the imposition of a constructive trust on Snepp's earnings from the book.170 Whatever the majority's intent, the use of the per

163. Murgia, 427 U.S. at 314.
164. See id. at 317 (Marshall, J., dissenting). Justice Stevens did not participate. See id.
166. 416 U.S. 312 (1974).
167. See id. at 320 (Douglas, J., dissenting); id. at 348 (Brennan, J., dissenting). Douglas's lengthy dissent addressed the merits of the case. Brennan's brief dissent, joined by Douglas, White, and Marshall, argued that the case was not moot and that the Court's evasion of the substantive issue "clearly disserves the public interest." Id. at 350.
168. Id. at 349 (Brennan, J., dissenting).
170. Id. at 524 (Stevens, J., dissenting); see STERN ET AL., supra note 141, at 253-54.
curiam suggested that nothing new or unusual was involved in resolving the case.

On occasion dissenters have directly accused the Court of issuing procedural rulings in per curiam opinions as a smokescreen for significant but unstated substantive messages. When the Court in *Patterson v. McLean Credit Union*\(^\text{171}\) ordered reargument on the question of whether a recent civil rights precedent, *Runyon v. McCrary*,\(^\text{172}\) should be reconsidered, the dissenters detected hostility to the holding of *Runyon* and reacted strongly. Writing again in dissent, Justice Stevens rebuked the Court for its procedural and substantive overreaching:

> If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation—and for the future of this Court as an institution—will be even more serious than any temporary encouragement of previously rejected forms of racial discrimination. The Court has inflicted a serious—and unwise—wound upon itself today.\(^\text{173}\)

The text of the Court's opinion is highly unusual in its direct rejoinder to the dissenters' charges; it is almost entirely devoted to a defense of the reargument order, buttressed by long lists of precedents for both requesting reargument and overruling precedent.\(^\text{174}\) The usually bland per curiam became, in this case, a battleground for a heavily divided Court, with four Justices attacking the motives and the strategy of their five prevailing colleagues in seeking to revisit *Runyon* under cover of an unsigned per curiam order.

**E. Disciplining Courts and Litigants**

In the same period, the Court also used the per curiam as a disciplinary tool to chastise both litigants and lower courts. The per curiam for *In re Sindram*\(^\text{175}\) denied the petitioner's motion to proceed *in forma pauperis* on the basis of his excessive filings and ordered the Court clerk to accept Sindram's future petitions for extraordinary writs only if accompanied by the requisite fee.\(^\text{176}\) The three dissenters faulted the Court for both procedural and substantive errors: "the total absence of any authority for the penalty"\(^\text{177}\) and the "unseemly...

---

174. *See id.* at 618.
176. *See id.* at 180.
message of hostility to indigent litigants." As in Patterson, the dissenters detected a hidden agenda behind the bland surface of a per curiam that claimed neutral and evenhanded intentions.

Even the per curiam's early function as an efficient means of invoking precedent was sharpened by the 1980s into a pointed means of scolding lower courts. Thus, in Hutto v. Davis, the Court noted that a court of appeals that had disregarded precedent "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress." In such cases, the per curiam became a useful tool for the Court, acting in its administrative role as supervisor of its own internal workings and of the entire federal court system, to issue stern rebukes with the impersonal authority of an unsigned opinion. Perhaps the clearest example of the per curiam employed to recall a straying lower federal court to its duty occurred in Alexander v. Holmes County Board of Education, where the Court characterized the issue before it, a desegregation order for Mississippi schools, as "one of paramount importance." It then proceeded to reverse the court of appeals, which had granted extensions of time for compliance by school districts. The Court's opinion contained a five-part order giving the court of appeals explicit directions for handling the case on remand, and there was no dissent. In Alexander the Court used the per curiam as it had earlier used unanimity in Brown and the signature of all nine Justices in Cooper v. Aaron, to summon its full institutional power. Here, at least, the per curiam retained much of its early vigor as an expression of a unified and determined Court.

V. THE PER CURIAM AND INDIVIDUAL EXPRESSION

These various strategic uses of the per curiam suggest its great flexibility as a decisionmaking instrument and the Court's ingenuity in adapting that instrument to new occasions. In the 1970s, faced with three cases of extraordinary importance, the Court took advantage of the malleable per curiam to address particularly difficult constitutional issues: the propriety under the First Amendment of restraining publication of the Pentagon Papers in New York Times Co.

178. Id. at 182 (Marshall, J., dissenting).
180. Id. at 374-75; see also Florida v. Meyers, 466 U.S. 380, 382 (1984)(noting that "[t]he District Court of Appeal either misunderstood or ignored our prior rulings").
182. Id. at 20.
183. See id.
184. See id. at 20-21.
v. United States, the constitutionality of the death penalty in Furman v. Georgia, and the constitutionality of campaign finance legislation in Buckley v. Valeo. The Court's technique ranges from the barest of per curiam opinions to the densest, from detailed separate opinions to more broadly conceived commentaries. In all three cases, however, the per curiam allows the Court to accommodate the opposing values of institutional consensus and individual expression.

A. The Minimalist Opinion and Efficiency: New York Times Co. v. United States

New York Times Co. v. United States came to the Court under conditions of great urgency and high drama. The United States, claiming imminent harm to its security interests and personnel, was seeking to enjoin the New York Times and the Washington Post from publishing portions of the forty-seven volume top secret study of American policy in Vietnam known as the Pentagon Papers. The lower courts hearing the cases had both issued temporary restraining orders, and on Friday, June 25, 1971, the Justices (minus Justice Douglas, already at his vacation home in Goose Prairie, Washington, but in telephone communication with the Court) met to decide whether to hear the cases. Four Justices—Black, Douglas, Brennan, and Marshall—wanted to deny certiorari and dissolve the restraining orders at once. Four other Justices—the Chief Justice, joined by Harlan, White, and Blackmun—wanted to hear the cases but to delay argument. The controlling vote belonged to Justice Stewart, who wanted to keep the stay in place but hear the cases the following morning. With certiorari granted, the records for both cases were provided to the Court that day, although the materials from the New York Times case did not arrive until eight o'clock in the evening. The two-hour oral argument began fifteen hours later, at eleven o'clock Saturday morning, and the Court met once again in conference that afternoon, issuing its decision just four days later.

186. 403 U.S. 713 (1971).
188. 424 U.S. 1 (1976).
189. For a thorough account of the events surrounding the case, see Sanford J. Ungar, The Papers & the Papers (1972). The Brethren describes the handling of the case by the Justices. Woodward & Armstrong, supra note 84, at 139-150.
190. See Woodward & Armstrong, supra note 84, at 141.
191. Sources differ on the details of the Burger bloc's position. According to Bernard Schwartz, these Justices "wanted the cases set for argument the following week." Bernard Schwartz, The Ascent of Pragmatism 160 (1990). Woodward and Armstrong assert that the Burger bloc "wanted to hear argument in October and continue the injunction until then." Woodward & Armstrong, supra note 84, at 141.
192. See Schwartz, Ascent of Pragmatism, supra note 191, at 160.
193. See id.
Court was able to complete this remarkably rapid resolution by the simple expedient of severing the result in the case from its rationale. As Chief Justice Burger later remarked in discussing the case, "'[t]he simplest thing to do in getting it out in a hurry is each justice states what is on his mind.'" The lean per curiam allowed the Court to resolve the case swiftly, dissolving the prior restraints placed on the newspapers, without taking the time that would surely have been necessary to fashion a majority opinion satisfactory to five members of the highly divided Court.

The Court's brief three paragraph per curiam, written by Justice Brennan on Saturday morning before oral argument and eventually supported by six Justices, said almost nothing of substance. The first paragraph described the issue, and the third entered the Court's mandate. In the only paragraph to invoke the merits, the Court quoted from two unexceptionable precedents, one holding that a request for a prior restraint "'comes to this Court bearing a heavy presumption against its constitutional validity'" and the second asserting that the government "'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" After briefly referring to three lower court rulings that the government had failed to meet its burden, the Court tersely noted, "'We agree.'" There was no other statement of law and no application of the law to the facts of the case; the Court's agreement was distilled to those two words endorsing the unexplained holdings of lower courts. The per curiam thus became a form of minimalist jurisprudence, a device allowing the Court to achieve its result with the most limited basis for consensus.

The six concurring opinions written by Justices Black, Douglas, Brennan, Stewart, White, and Marshall illustrate vividly why the Court's per curiam was crafted in this way. Some of the Justices paired off—Black and Douglas joined each other's opinions, as did Stewart and White; the other two wrote alone. And each Justice had a particular slant on the case. Black, predictably, believed that the First Amendment prohibited any restraint on the press that, by dis-

194. UNGAR, supra note 189, at 242. Despite his own dissenting opinion, Burger announced the Court's decision from the bench on June 30th. See id.
195. See SCHWARTZ, ASCENT OF PRAGMATISM, supra note 191, at 160. According to Schwartz, "'As soon as Brennan arrived at the Court the next morning (Saturday, June 26), he drafted a brief per curiam affirming the lower court in the Post case and reversing it in the Times case.'" Id.
197. Id. (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).
198. Id.
199. For a study of the Rehnquist Court's minimalist approach, see CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).
closing government conduct, "fulfill[ed] its essential role in our democracy."\(^{200}\) His opinion included a paraphrase of a southern drinking song to emphasize the role of the press in preventing government from sending the people "off to distant lands to die of foreign fevers and foreign shot and shell."\(^{201}\) Douglas, Black's usual companion in First Amendment cases, joined that opinion but wrote separately to include a discussion of inapplicable statutory authority and the absence of inherent government power to restrain the press.\(^{202}\) Brennan wrote separately to caution that this case should not be read "to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government"\(^{203}\) and to insist that only the most exigent circumstances would justify such restraint.\(^{204}\) Stewart took a dramatically different approach in his concurrence, emphasizing the executive branch's constitutional duty "as a matter of sovereign prerogative and not as a matter of law as the courts know law" to protect confidentiality in international matters.\(^{205}\) He nonetheless joined the Court's judgment because he found that disclosure of the Pentagon Papers would not "surely result in direct, immediate, and irreparable damage to our Nation or its people."\(^{206}\) For White, on the other hand, it was clear that disclosure of some of the documents would result in harm to the nation.\(^{207}\) He nonetheless joined his five colleagues because the government had not met its burden "in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these."\(^{208}\) Finally, Marshall, like White, addressed the statutory aspect of the case, although Marshall characterized the issue differently, as "whether this Court or the Congress has the power to make law" concerning press restraints.\(^{209}\) Since Congress had failed to legislate, the Court lacked the power to "enact[,] law, especially a law that Congress has refused to pass," in order to prevent publication.\(^{210}\)

The breadth of disagreement in these concurrences is astonishing.\(^{211}\) The Justices disagreed about the likelihood of harm from publication of the Pentagon Papers, about the role of the Court in

---

201. Id. at 717.
202. See *id.* at 720-22 (Douglas, J., concurring).
203. Id. at 724-25 (Brennan, J., concurring).
204. See *id.* at 726-27.
205. 403 U.S. at 729-30 (Stewart, J., concurring).
206. Id. at 730.
207. See *id.* at 731 (White, J., concurring).
208. Id.
209. Id. at 741 (Marshall, J., concurring).
210. Id. at 747.
211. Although White joined the majority after learning, during conference, that yet another newspaper had obtained access to the Pentagon Papers, the three other
enforcing the First Amendment, about the branch of government with authority to protect the confidentiality of sensitive material. The Court’s per curiam provided the only basis for consensus with its spare statement of agreement that the government had failed to meet its burden of persuasion on the question of prior restraint. *New York Times* is unlike *Youngstown Sheet & Tube Co. v. Sawyer*, another critical constitutional case reviewed by the Court in circumstances of haste and public scrutiny, where the four Justices in the majority could accept a brief doctrinal opinion by Justice Black before going off on their own to add their separate concurrences which refined and, in some instances, contradicted Black. With so little common ground, the majority Justices in *New York Times* found in the per curiam a convenient form to contain the message of their diverse concurrences: we stand together as a Court and emphatically reject the government’s claim for prior restraint of the press on these facts; although our individual positions vary significantly, and we encourage you to read them, the urgent nature of this case makes the result more important than the theory that supports it.

In a curious way, the minimalist per curiam necessitated by the broad disagreement within the Court tempted the Chief Justice, himself one of the three dissenters, to read the opinion from the bench and to tell the ABA convention the following week that *New York Times v. United States* was “actually unanimous.”213 A common theme of the three dissenters is what Burger terms the Court’s “unseemly haste” in resolving the case without adequate time for briefing or preparation, suggesting a procedural rather than substantive divergence.214 Burger’s opinion notes as well that “[t]he prompt setting of these cases reflects our universal abhorrence of prior restraint,” a sentence that may have allowed him to make his comment about unanimity with a straight face.215 The other dissenters, however, both indicated less concern over the First Amendment rights of the press. Harlan’s opinion circumscribed the judicial role to a threshold determination of whether the disclosure at issue was within the executive branch’s authority over foreign relations; if so, “the judiciary may not properly . . . redetermine for itself the probable impact of disclosure on the national security.”216 Blackmun, too, expressed no distaste for prior restraints, observing that the “First Amendment, after all, is only one part of an entire Constitution” and that “there are situations where restraint is

---

212. 343 U.S. 579 (1952).
215. *Id.* at 748-49.
216. *Id.* at 757 (Harlan, J., dissenting).
in order and is constitutional. 217 Although it seems clear that Burger was overreaching in describing the Court's position as unanimous, the minimalist per curiam provided a pretext for claiming wider consensus than the diverse separate opinions—concurring as well as dissenting—would seem to warrant.


The per curiam performed a similar function in a case which lacked the extraordinary time pressure of New York Times but which carried an urgency and solemnity of its own. In Furman v. Georgia, 218 decided almost precisely a year after New York Times, 219 the Court reviewed several death sentences under the Georgia and Texas death penalty statutes and found them to be unconstitutional. 220 The one paragraph per curiam relays the Court's holding in a single lean sentence: "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 221 The per curiam is followed by five separate concurrences authored by Justices Douglas, Brennan, Stewart, White, and Marshall, all veterans of the New York Times majority. The authors of the four dissenting opinions included the two new Justices, Powell and Rehnquist, who replaced Justices Black and Harlan early in 1972. 222 With New York Times as a model, the majority Justices were freed by the per curiam to write concurrences which at times approach highly personalized essays.

The Furman concurrences reflect the central beliefs of each concurring author. For Douglas, the Georgia statutes are "pregnant with discrimination" 223 against the poor, the politically powerless, and the members of disfavored minorities. 224 In a characteristic reference, he cites to a Hindu law which increased the punishment "as social status diminished" and laments that "[w]e have, I fear, taken in practice the same position." 225 Just as Douglas returns to his enduring theme of protection for the disadvantaged outsider, Brennan relies on a central

---

217. Id. at 761 (Blackmun, J., dissenting).
218. 408 U.S. 238 (1972).
219. New York Times was decided on June 30, 1971. Furman was decided on June 29, 1972, five months after oral argument.
221. Furman, 408 U.S. at 239-40.
222. See id. at 240. Chief Justice Burger and Justice Blackmun authored the other two dissenting opinions. See Id.
223. Id. at 257 (Douglas, J., concurring).
224. See id. at 255.
225. Id.
tenet of his jurisprudence, the essential dignity of each human being. Since "[t]he State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings," the death penalty is an unconstitutional "denial of the executed person's humanity." For Stewart, the central failing of the death sentences at issue is their arbitrariness. Tracking the language of the Eighth Amendment, he finds that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." The approach is typical of Stewart, tying a practical observation to the textual language of the relevant constitutional provision. White's concurrence characteristically relies on what he terms "common sense and experience." Since legislatures have delegated the sentencing function to juries, which in the valid exercise of their discretion frequently choose a less harsh punishment than death, "capital punishment within the confines of the statutes now before us has for all practical purposes run its course." Marshall's concurrence is a lengthy examination of the asserted functions of the death penalty, complete with three appendices of data. His systematic refutation of each function is less striking than the framework that contains it. He opens by noting that "[c]andor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death" and closes by noting that in striking down the death penalty the Court pays homage to the basic decency and humanity of "our system of government." The various arguments and data Marshall presents are subsumed by the simple frame, reminiscent of Brennan's opinion, which locates the death penalty in a larger moral context.

The five concurrences in Furman illustrate the liberating effect of the per curiam for the Justices who supported it: the concurrences are vivid, distinctive, and occasionally idiosyncratic. Writing on an issue that extends beyond the usual parameters of the legal system, the Justices invoke without apology ethics, experience, and emotion in articulating their responses. This mood of personal liberation extends to the dissenters as well, especially to Justice Blackmun who, early in his career on the Court, joins his fellow dissenters but adds what he terms "the following, somewhat personal comments," which are indeed personal. He opens by observing that such cases "provide for me an excruciating agony of the spirit," a remarkably intimate confession.

---

226. 408 U.S. at 270 (Brennan, J., concurring).
227. Id. at 290.
228. Id. at 309 (Stewart, J., concurring).
229. Id. at 312 (White, J., concurring).
230. Id. at 313.
231. 408 U.S. at 316 (Marshall, J., concurring).
232. Id. at 371.
233. Id. at 405 (Blackmun, J., dissenting).
234. Id.
and ends by expressing his ambivalence over his place in the dissent:
“Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement.” The three other dissenters criticize precisely this quality of openness in the concurring opinions. Chief Justice Burger insists that “[o]ur constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty.” Justice Powell cautions, “those of us who sit on this Court at a particular time should act with restraint before assuming, contrary to a century of precedent, that we now know the answer for all time to come.” More waspishly, Justice Rehnquist calls the decision “not an act of judgment, but rather an act of will.” Each of these responses, like the opinions of the concurring Justices, seems perfectly characteristic of its author. Reading the full range of nine opinions, it is hard not to believe that the neutrality of the per curiam has encouraged its opposite, a set of remarkably open and personal responses to the constitutional challenge posed by the death penalty.

C. Collaboration and the Broader Vision: Buckley v. Valeo

The third case in this trilogy, Buckley v. Valeo, holds the distinction of being without question—and without any serious competition—the longest per curiam ever written, an astonishing 138 pages, followed by a ninety page appendix. Buckley was decided three and a half years after Furman by a Court that differed only by Douglas's departure and his replacement by Stevens, who did not participate in the case. Although in personnel the Court remained almost identical, its approach differed dramatically from that used in New York Times and Furman—a minimalist per curiam followed by each Justice's distinctive and painstakingly complete opinion. In Buckley, the Court authorized what Bernard Schwartz has aptly called an “opinion by committee,” a joint enterprise that produced a per curiam con-

235. Id. at 414.
236. Id. at 375 (Burger, C.J., dissenting).
237. 408 U.S. at 431 (Powell, J., dissenting).
238. Id. at 468 (Rehnquist, J., dissenting).
239. 424 U.S. 1 (1976).
240. Buckley was argued on November 10, 1975 and decided on January 30, 1976. Douglas had resigned from the Court two days after oral argument. Justice Stevens, appointed by President Ford on November 28th, took the oath of office on December 17th, too late to participate in Buckley.
241. SCHWARTZ, DECISION, supra note 84, at 142. Schwartz borrowed the term from an unidentified Justice who, in conversation with him, had described United States v. Nixon as “opinion by committee.” BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 276 (1988). Schwartz elsewhere quotes from a memorandum to the Conference by then Justice Rehnquist describing the Buckley process as “the farming out to several different members of the Court of differ-
taining an elaborately detailed analysis of the campaign finance statute at issue. The separate opinions that followed—only five, totaling what seems in context a paltry fifty-nine pages—make no attempt to revisit the per curiam's detailed analysis and provide instead distinctive perspectives on the general problem of regulating political campaigns in a democratic system.

Buckley's challenge to the 1974 amendments to the Federal Election Campaign Act not only raised a number of difficult First Amendment issues concerning campaign finance, including public funding for presidential candidates, but also raised a practical issue of timing. The case was argued before the Court on November 10, 1975, and the first release of funds for the 1976 presidential election was scheduled for January 2, 1976. Although many opinions can be drafted, circulated, and approved in less than two months without difficulty, the complexities of this case and the disagreements among the Justices that surfaced at conference indicated that Buckley was not likely to be among them. To expedite the process, Justice Stewart proposed a novel solution, the creation of a committee of Justices charged with producing a per curiam opinion. The designated committee members, Justices Stewart, Brennan, and Powell, parcelled out sections of the opinion to their colleagues, and the resulting collaborative effort was then reviewed by a second committee, this time of law clerks, with instructions, according to Justice Powell, "to harmonize stylistic and verbiage differences between the several Parts subject, of course, to review by each of us." The per curiam form was thus adapted to a new use: an anonymous screen for a jointly authored opinion that could be prepared in time to meet an external deadline.

Both committees performed their tasks capably. The opinion is an exhaustive treatment of the constitutionality of the 1974 FECA amendments, written in a homogenized and impersonal judicial style that defeats any attempt to determine the authors of the various sec-


243. See Schwartz, Decision, supra note 84, at 143.

244. See id.

245. See id. According to Woodward and Armstrong, Justice White was originally a member of the committee but withdrew after he disagreed with the other members over statutory caps on campaign expenditures and was replaced by Justice Brennan. See Woodward & Armstrong, supra note 84, at 396.

246. Schwartz, Decision, supra note 84, at 143 (quoting a January 19, 1976 letter from Justice Powell).
If the length of the per curiam discouraged the Justices from revisiting the issues in detail, its impersonality encouraged four of them to append their own personalized approaches to the broader issue of federal regulation of campaign finance. All five separate opinions concur in part and dissent in part; one, Justice Blackmun's, is a scant three paragraphs noting the sections he joins and those he rejects. For the other separate authors, their opinions are the occasion to stake out more distinctive positions.

Chief Justice Burger's opinion takes aim less at the Court's opinion than at Congress and what he calls "an impermissible intrusion by the Government into the traditionally private political process." The opinion, unlike the section of the per curiam apparently written by Burger, is filled with colorful language. Thus, "Congress has used a shotgun to kill wrens as well as hawks," the intermingling of government and politics is potentially "incestuous," and the Court's "effort to blend First Amendment principles and practical politics has produced a strange offspring." In his view Congress' entire campaign finance enterprise is misguided, and so are the Court's efforts to distinguish valid from invalid regulations. The opinion ends with a pithy, if inelegant, restatement of its theme: "Freedom is hazardous, but some restraints are worse." The language, unusually vivid for Burger, reflects his strong sense that the Court has gone fundamentally astray in its endorsement of even part of Congress' overreaching.

Although the dominant theme of Justice White's opinion contrasts sharply with Burger's hands-off approach, White matches Burger in the scope and intensity of his disapproval. White writes as the pragmatist, surprised and irritated that the Court is "strangely enough claiming more insight as to what may improperly influence candidates" than those "seasoned professionals," the members of Congress and the President, who passed and signed the statute. White of

---

247. The anonymity of the committee's opinion has apparently been pierced by insider information. According to Woodward and Armstrong, Stewart wrote the sections on campaign contributions and expenditures, Powell wrote the sections on disclosure and reporting requirements, Brennan wrote the section on public financing of presidential elections, Rehnquist wrote the section on the Federal Election Commission, and Burger wrote the preamble and the statement of facts. See Woodward & Armstrong, supra note 84, at 396; see also Schwartz, Ascent of Pragmatism, supra note 191, at 89, 144.

248. See Buckley, 424 U.S. at 290 (Blackmun, J., concurring in part and dissenting in part).

249. Id. at 235 (Burger, C.J., concurring in part and dissenting in part).

250. See supra note 247.

251. Buckley, 424 U.S. at 239 (Burger, C.J., concurring in part and dissenting in part).

252. Id. at 249.

253. Id. at 253.

254. Id. at 257.

255. Id. at 261 (White, J., concurring in part and dissenting in part).
course was actively involved in President Kennedy's election campaign,\textsuperscript{256} and he allies himself with the political pros in Congress against what he sees as the Court's meaningless distinctions between constitutional limits on contributions and unconstitutional limits on expenditures.\textsuperscript{257} In his pragmatic view, Congress has identified "an acceptable purpose and the means chosen [are] a commonsense way to achieve it."\textsuperscript{258} Like Burger, White expresses his irritation in vivid language, including his "regret" that the Court by its decision has consigned candidates to the fundraising "treadmill."\textsuperscript{259} Unlike Burger, however, White sees intrusion by the Court rather than overreaching by Congress. Their divergent views attack the per curiam from opposite sides, questioning its premises more strongly than its specific holdings. These dissonant opinions frame the per curiam like a pair of bookends, facing in opposite directions and suggesting how capacious the Court's opinion must be if these two Justices can both manage to concur in part.

The two remaining separate opinions, by Justices Marshall and Rehnquist, both focus on the same issue—a level playing field for federal elections—but with an eye to protecting predictably different constituencies. For Marshall, the point of disagreement is the Court's rejection of the statutory provision limiting the use by candidates of their personal funds. In his view the interest at stake in regulating expenditures of personal wealth is "the interest in promoting the reality and appearance of equal access to the political arena"\textsuperscript{260} for rich and poor alike. For Rehnquist it is not economic but political outsiders who are being treated unfairly by the Court. He takes exception to the Court's approval of Congress' financing scheme for presidential elections that distinguishes the two major party candidates from minor party or independent candidates in a way that "has enshrined the Republican and Democratic Parties in a permanently preferred position."\textsuperscript{261} Like a second pair of bookends, these two concurrences frame the per curiam with their claims of discrimination in favor of financial and political power.

The \textit{Buckley} per curiam stands alone as an extraordinary response to an unusual situation. Its collaborative nature and its monumental size permit the prompt coverage of numerous issues in great detail, an

\begin{itemize}
\item \textsuperscript{256} For an account of White's role in the Kennedy campaign, see DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 241-59 (1998).
\item \textsuperscript{257} See \textit{Buckley}, 424 U.S. at 261 (White, J., concurring in part and dissenting in part).
\item \textsuperscript{258} \textit{Id.} at 266.
\item \textsuperscript{259} \textit{Id.} at 265. In another colorful phrase, White also rejects the view "that political races are reserved for those who have the facility—and the stomach—for doing whatever it takes" in order to win. \textit{Id.}
\item \textsuperscript{260} \textit{Id.} at 287 (Marshall, J., concurring in part and dissenting in part).
\item \textsuperscript{261} \textit{Id.} at 293 (Rehnquist, J., concurring in part and dissenting in part).
\end{itemize}
admiringly practical solution to the Court's predicament. But those same virtues—the impersonal quality of the opinion and its sheer mass—allow the whole to be swamped by its parts, the big picture to be clouded by the many smaller images. The response of the separate authors to the massive per curiam is to produce concurrences that focus directly on that big picture. Burger, White, Marshall, and Rehnquist have all distilled their reservations about the per curiam to complementary pairs of opinions that express with great directness their perspectives on the broad issue of government regulation of the political process, an issue that was in danger of being overshadowed by the sheer mass of the Court's opinion.

VI. THE PER CURIAM AND THE REHNQUIST COURT

A. The Prologue: A Limited Role

*New York Times, Furman*, and *Buckley*, the great trilogy of the 1970s, represent the high-water mark of the per curiam, its grandest and most substantial use by the Court. Although the number of per curiams produced by the Burger Court remained high, no subsequent case adapted the form to such spectacular effect. Over its life the Burger Court averaged fifteen per curiams per term, with a high of twenty-six in 1981 and an uncharacteristic low of six in 1977. As the Rehnquist Court followed the Burger Court in 1986, the number of per curiams declined significantly. In its first term the Rehnquist Court issued only seven per curiams, barely half of the Burger Court's total of thirteen for the previous term, at a time when the Court's docket had not yet begun to shrink. To date, the Rehnquist Court

---

262. According to the *Harvard Law Review's* annual statistics, the Burger Court published a high of 26 per curiams in the 1981 Term and a low of 6 in the 1977 Term, averaging 15 for the period from the 1969 through the 1985 Terms, or 10 percent of the Court's total opinion output.

263. These figures are based on the *Harvard Law Review's* annual statistical summary of Court opinions, which does not include all the per curiams issued each term. According to an explanatory note, the *Review* classifies some of these as full opinions depending on the length of the opinion and the extent to which it elaborates upon the issues involved. Although admittedly less precise, this method indicates more accurately which cases received more cursory attention by the Court, and hence seems a more useful barometer for measuring a significant aspect of the Court's activity.

264. In the 1985 Term, the Burger Court issued 159 opinions, including thirteen per curiams; the following Term, the Rehnquist Court issued 152 opinions, including seven per curiams. By 1995, the Court's opinion output had dropped to seventy-
has averaged six per curiam s each term, less than half of the Burger Court's average. Even taking into account smaller opinion output, the current Court has clearly been less inclined than its predecessor to find in the per curiam a useful and flexible judicial instrument.

The per curiam s issued by the Court in the recent presidential election cases represent a significant departure from its earlier practice. The surprising nature of those opinions can be fully appreciated when viewed against the backdrop of the Rehnquist Court's otherwise restrained use of the form. The declining number of per curiam s, though revealing, tells only part of the story. The Rehnquist Court's approach is measured as well by the situations in which it chooses to employ the per curiam. Many of these situations are concerned with the efficient operation of the Court rather than with substantive issues. By far the largest bloc of per curiam s follows in the wake of In re Sindram, where the Court denied an indigent defendant the right to proceed in forma pauperis because of his prior frivolous and excessive filings. Justice Stevens, a dissenter though not an author in Sindram, has made this issue his own, writing strong dissents to several per curiam s denying indigents the right to file and, for all subsequent cases, noting his dissent with a brief reference to his earlier, more elaborate opinions. Although Stevens's principal argument—that such punitive responses are less efficient than simple denials of the

nine, a shade less than half of the Burger Court total of a decade earlier, and the Rehnquist Court produced only four per curiam s, its smallest number, in that term. For a consideration of possible reasons for the Court's docket decline, see Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, S up. Ct. Rev. 403 (1996).


266. When the Court amended its Rule 39 to authorize denials of motions to proceed in forma pauperis, Stevens in dissent argued that the Court's new initiative was misguided for administrative as well as substantive reasons:

It is usually much easier to decide that a petition should be denied than to decide whether or not it is frivolous. Moreover, the cost of administering the amended Rule will probably exceed any tangible administrative saving. Transcending the clerical interest that supports the Rule is the symbolic interest in preserving equal access to the Court for both the rich and the poor. I believe the Court makes a serious mistake when it discounts the importance of that interest. In re Amendment to Rule 39, 500 U.S. 13, 15 (1991)(Stevens, J., dissenting). Blackmun joined Stevens's opinion, and Marshall filed his own dissent. See id. at 14. For an earlier per curiam dissent by Justice Brennan making similar points, see In re McDonald, 489 U.S. 180, 185 (1989)(Brennan, J., dissenting). Brennan argued that "[t]o rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer." Id. at 188. In 1993, Stevens announced that "[i]n the future, however, I shall not encumber the record by noting my dissent from similar orders denying leave to proceed in forma pauperis, absent exceptional circumstances." Day v. Day, 510 U.S. 1, 3 (1993)(Stevens, J., dissenting). For examples of recent opinions in which Stevens offered his shorthand dissent, see
filings involved—has not attracted any support from his current colleagues, the members of the Rehnquist Court in a number of other situations routinely agree to dispose of cases with non-substantive difficulties through the per curiam. Thus, the Court has used the per curiam to dismiss cases in which certiorari was improvidently granted and to resolve cases for reasons that include mootness, lack of ripeness, the absence of a Court quorum, and a vote resulting in an evenly divided Court.

Beyond these areas of agreement, the debate within the Court over the propriety of summary dispositions continues even after the departure of their most vocal critic, Justice Marshall. Although many per curiams granting certiorari and reversing the decision below without briefing or argument are unanimous, some Justices continue to object on occasion that the procedure, though efficient, can be inappropriate or unfair. Where Justices Marshall and Stevens concentrated on the element of unfairness to litigants deprived of the opportunity to present their positions to the Court, later Justices have raised other concerns. Justice Scalia, in a rare dissent from a per curiam, noted that summary dispositions should be used only when the law is settled and, in the case at hand, argued that its extraordinary facts warranted a denial of certiorari instead. Justice Ginsburg has used her dissent to criticize the Court for its arrogance in vacating a circuit court stay of execution without first seeking clarification of the order. "Appreciation of our own fallibility," she wrote for three other Justices, "and respect for the judgment of an appellate tribunal closer to the scene than we are, as I see it, demand as much." Despite these reservations, the Court continues to rely on per curiam summary dispositions as an efficient docket management device.

The use of one such summary procedure has resulted in the Rehnquist Court's most extensive per curiam decision. In Lawrence v. Chater, the Court discussed at length the criteria for its use of what it calls a GVR order, a practice by which it at once grants certiorari, vacates the decision below, and remands to the lower court for reconsideration. The per curiam opinion, an unusual twelve pages in


267. See, e.g., Vermont v. Cox, 484 U.S. 173 (1987); Cerbone v. Conway, 479 U.S. 84 (1986). Both cases had been argued to the Court.


269. See Anderson v. Green, 513 U.S. 557 (1995). This case was argued to the Court.


length, responded in detail to an even longer dissent by Justice Scalia which argued for restriction of the practice to narrowly defined situations. After asserting its power to issue GVR orders, the majority listed the advantages of the procedure, citing first among them conservation of the Court's scarce resources for plenary review, and adopted a flexible standard based on a review of the "equities and legal uncertainties" of each case. The Scalia dissent insisted that the Court lacks the "power to make such a tutelary remand, as to a schoolboy made to do his homework again" and that GVR orders show a lack of respect for lower courts. The dissent produced some characteristically colorful Scalia rhetoric, especially the observation that the Court's increasing use of the device "should make even the most Pollyannish reformer believe in camel's noses, wedges, and slippery slopes.” In two brief opinions, Justice Stevens concurred and Chief Justice Rehnquist, noting his substantial agreement with the Scalia opinion, concurred in Lawrence and dissented from the GVR order in a related case.

Lawrence is an apt illustration of the differing applications of the per curiam by the Burger and Rehnquist Courts. The most elaborate Burger Court per curiams are three landmark cases, each making important new law and each eliciting strong and distinctive separate opinions from Justices with divergent views on substantive issues. The counterpart on the Rehnquist Court is, in contrast, an opinion dealing with the Court's internal procedures for handling the heavy flow of certiorari petitions in an efficient and equitable manner. Lawrence also elicits separate opinions, including a substantial response from Scalia, and deals with an important aspect of the Court's role in the appellate process. The remaining gap between a resonant landmark like Buckley or Furman and a procedural discussion like Lawrence, however, clearly reflects the current Court's return to a sense of the per curiam as a low-profile instrument of judicial effi-

275. See id. at 177 (Scalia, J., dissenting). The Scalia dissent runs for fifteen pages and is joined by Justice Thomas. Scalia announced that he would vote for GVR orders only in cases marked by one of three factors: an "intervening factor" with "a legal bearing" on the case; uncertainty over the Court's jurisdiction; or confession of error in the judgment below by the winning party. Id. at 191-92.

276. See id. at 166-67. The other advantages listed by the Court were help to the court below "by flagging a particular issue," obtaining "the benefit of the lower court's insight before we rule on the merits," and reducing the incidence of "unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues.” Id. at 167.

277. Id. at 175.

278. Id. at 185-86 (Scalia, J., dissenting).

279. Id. at 190.

280. See id. at 175 (Stevens, J., concurring).

281. See id. at 176 (Rehnquist, C.J., concurring in Lawrence and dissenting in Stutson v. United States, 516 U.S. 193 (1996)).
ciency rather than a vehicle for innovative constitutional jurisprudence.

When the Rehnquist Court does use the per curiam to resolve cases on the merits, it tends to do so in a traditional manner. Many of these substantive per curiams are summary dispositions which avoid full review and simply invoke precedent, indicating that the court below has misread or misapplied a Supreme Court precedent.\(^\text{282}\) Like the earliest per curiams that contained only a cite to precedent, these cases waste little time on an issue that the Court finds has already been definitively resolved. On occasion, the Court will streamline the resolution of a fully argued case by directing attention to another case decided the same day, usually remanding for consideration in light of the fully articulated decision.\(^\text{283}\) Or, as it did in a capital murder case pending on direct review when *Batson v. Kentucky*\(^\text{284}\) established a new standard for peremptory challenges, the Court will remand for application of that standard.\(^\text{286}\) No new law is made by any of these approaches, and efficiency is gained.

Unlike its predecessor, the Rehnquist Court does not use the per curiam to announce new law. In a handful of situations, the Court has addressed constitutional issues, but even these cases are presented as routine applications of settled constitutional principles. When the Court determined that an Arkansas statute providing benefit offsets against a federal statute "authorize[d] the precise conduct that Congress sought to prohibit," it found a violation of the Supremacy Clause and, without hearing argument, granted certiorari and remanded.\(^\text{286}\) Only Justice Marshall objected to the summary disposition.\(^\text{287}\) Even a decision striking down a privacy provision of a Puerto Rican criminal procedure rule as unconstitutional was handled as a summary disposi-


\(^{284}\) 476 U.S. 79 (1986).

\(^{285}\) See *Trevino v. Texas*, 503 U.S. 562 (1992). In a single paragraph, the Court granted the petitioner's motion for leave to proceed *in forma pauperis*, granted certiorari, and remanded "for further proceedings not inconsistent with this opinion." *Id.* at 568.

\(^{286}\) *Rose v. Arkansas State Police*, 479 U.S. 1, 4-5 (1986). For another Supremacy Clause case, this time one argued to the Court, see *Bennett v. Arkansas*, 485 U.S. 395 (1988), where the Court found an Arkansas statute authorizing attachment of Social Security benefits to be in conflict with federal law and reversed the Arkansas Supreme Court. See *id.* at 398.

\(^{287}\) See *Rose*, 479 U.S. at 5.
tion, this time without objection from any Justice. Only very rarely has any member of the Court complained that a case provided a cursory treatment of an important issue. When the Court ruled that the Eighth Circuit had erred in evaluating a Batson claim, Justice Stevens thought it "unwise . . . to announce a law-changing decision without first ordering full briefing and argument on the merits of the case," but only Justice Breyer joined in the protest. Breyer himself has protested summary disposition of an unusual criminal case where the defendant's counsel, who was not a member of the Supreme Court bar, failed to file a brief in opposition to the state's certiorari petition. Justice Kennedy, who very seldom adds a separate opinion to a per curiam, was moved to dissent from another summary disposition holding that Secret Service agents guarding the president were entitled to qualified immunity from a suit brought by a suspect. In a variation of the arguments usually advanced by Stevens, Kennedy insisted that the importance of the issue warranted full briefing and argument.

These cases illustrate another aspect of the Rehnquist Court's use of the per curiam – the general absence of strongly worded separate opinions taking exception to the Court's handling of its cases. On a Court whose members have not been shy about asserting their individual views with vigor and occasionally with venom, this absence suggests a broad-based consensus on a limited role for the per curiam. Even when a per curiam is accompanied by multiple concurrences and dissents, those opinions tend to be brief and muted in their rhetoric. Perhaps most significantly, Justice Scalia, usually the most strident author of separate opinions, has been remarkably restrained in his per curiam efforts. In one concurrence he noted, almost apolo-

289. Purkett v. Elm, 514 U.S. 765, 770 (1995)(Stevens, J., dissenting). Stevens also accused the Court of "resolv[ing] a novel procedural question without even recognizing its importance to the unusual facts of this case." Id. at 771.
290. See id.
291. Breyer, joined by Stevens, dissented from the summary disposition, asserting that "we should not summarily reverse in a criminal case, irrespective of the merits, where the respondent is represented by a counsel unable to file a response, without first inviting an attorney to file a brief as amicus curiae in response to the petition for certiorari." Maryland v. Dyson, 527 U.S. 465, 468 (1999)(Breyer, J, dissenting).
293. See id. Kennedy also relied on the fact that two other Justices, Scalia and Stevens, "disagree[d] with the statement in the per curiam opinion that the Court of Appeals misstated the law" as a second basis for full review. Id. at 235.
294. See, e.g., United States v. Watts, 519 U.S. 148 (1997), with concurring opinions by Scalia and Breyer, id. at 158, and dissenting opinions by Stevens and Kennedy, id. at 159. See also City of Monroe v. United States, 522 U.S. 34 (1997). Scalia concurred in the judgment, id. at 39; Souter, joined by Breyer, dissented, id. at 40; Breyer, joined by Souter, dissented, id. at 45.
getically, “I write as I have written only because the Court has rejected the traditional view of habeas corpus relief as discretionary.”

In a more characteristic rhetorical performance, Scalia in another concurrence found that the Court’s position “soars beyond the unimaginable, into the wildly delirious.” That language stands out as an isolated instance, an exception to the general rule of low key responses to the Court’s per curiam.

The tone for the Rehnquist Court’s use of the per curiam has in part been set by its Chief, who has seldom contributed separate opinions. On the few occasions when he has been tempted to write for himself, Rehnquist tends to focus on institutional issues rather than the substantive dissatisfactions of a single Justice. Early in his tenure as Chief Justice, he observed in dissent that a decision vacating the circuit court’s unpublished per curiam order “without any suggestion of error or intervening change in the law is an unwise use” of the resources of both courts. In another dissent, he noted that he was not in favor of automatic vacation “when the [Solicitor General] confesses error,” a practice by which the federal government relinquishes a victory which it believes is unearned. More recently, Rehnquist dissented from a per curiam in which he found the Court’s remand “muddled and cryptic” and insisted that the lower court was entitled to “clearer guidance.” These occasional dissents responding to the Court’s institutional practices rather than its substantive law suggest Rehnquist’s preference for assigning the per curiam a limited role that advances the efficiency of the Court’s decisionmaking process but does not engage unresolved or controversial issues.

296. Dobbs v. Zant, 506 U.S. 357, 363 (1993)(Scalia, J., concurring). He also referred to “this Court’s ‘death is different’ time warp.” Id.
297. Rehnquist has made clear his concern with the efficient operation of the Court. In writing about his conduct of the conference, he has aligned himself with the Hughes rather than the Stone model. See Rehnquist, supra note 73, at 293. In Rehnquist’s view, “the true purpose of the conference discussion of argued cases is not to persuade one’s colleagues through impassioned advocacy to alter their views, but instead by hearing each justice express his own views to determine therefrom the view of the majority of the Court.” Id. at 295.
300. See LINCOLN CAPLAN, THE TENTH JUSTICE 9 (1988). According to Caplan, Rehnquist, who has long disliked the practice, “browbeat[s] the SG when he steps up to confess” and believes that the Justices should not accept these confessions of error “but should instead make their own rulings on the case.” Id. at 10.
Against this backdrop of limited use, the Rehnquist Court's decision to issue its opinions in both *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore* in per curiam form reflects the extraordinary demands placed on the Court by those cases. Just as the Burger Court on three occasions of constitutional challenge found the per curiam adaptable to its needs, so the Rehnquist Court, faced with its own unprecedented constitutional challenge, turned to the per curiam to deliver its momentous constitutional response.

B. *Bush v. Gore*: The Return to Center Stage

When the Rehnquist Court granted certiorari to review the Florida Supreme Court's first presidential election decision, it faced a challenging judicial prospect. As *Bush v. Gore* later confirmed, the Court was strongly divided on the issue of the Florida Supreme Court's authority to extend the state's certification deadline and include recounted votes in the final tally. The Court was also painfully aware that Bush supporters had vigorously denounced the Florida court's opinion as a partisan effort to salvage the Gore candidacy by a bench composed almost entirely of Democratic appointees. At the threshold, then, the Supreme Court faced institutional concerns prompted by its own internal divisions and by the specter of harsh criticism if its opinion appeared to reflect the political preferences of its Justices. The Court had before it the model of *United States v. Nixon*, where a unanimous opinion, forged with great difficulty and authored by the Chief Justice, a Nixon appointee, had avoided such partisan implications in another high-profile controversy surrounding the presidency and had won the Court high praise for judicial statesmanship. A unanimous opinion in *Bush v. Palm Beach County Canvassing Board* would clearly be of great value in shielding the Court from accusations of partisanship and confirming its position as a neutral decisionmaker.

The Court also had less personal reasons to seek unanimity. The Court's opinion would inevitably send two distinct messages, one to the nation and one to the Florida court. In speaking to the nation, the Court's challenge was to defuse if possible the tension surrounding the disputed election by issuing an opinion that would neither inflame the losing side nor foster bitterness in the nation at large over federal judicial intervention. In speaking to the Florida court, the Supreme Court addressed at once a lower court subject to its review on issues on federal law and a state court entitled to its respect under principles of federalism. Both messages could most effectively be sent by a unified Court that concealed any internal differences and spoke in a single voice.

The further and subtler question, however, was whose voice it would be. The opinion could have been signed by Chief Justice Rehnquist in the Court's tradition of allowing the Chief Justice to author its
most significant cases, as Earl Warren did in Brown. The Court could also have opted to issue an opinion signed by all nine Justices, as it did in Cooper v. Aaron and as Justice Brennan had proposed it do in United States v. Nixon. There would have been, however, drawbacks to both options. An opinion signed by the Chief Justice would inevitably be personalized, carrying the imprint of an author whose political background had necessitated his own recusal in the Nixon case. The adoption of the Cooper v. Aaron approach, an extraordinary device used by the Court to assert the force of its constitutional powers to enforce desegregation under Brown, could sharpen concerns about the extent of its role in resolving an election controversy.

Under these circumstances, the per curiam was a much more appropriate choice. The unsigned opinion was effectively depersonalized, coming not from individual Justices with political baggage but from the Court itself, an institution situating itself above politics. The Court also benefited from the per curiam's traditional reputation as an instrument of consensus. Its label suggested that the Justices had achieved significant agreement and were equally committed to the result they had collectively reached. Finally, and most importantly, the per curiam form reflected the modesty and neutrality of the opinion's substance.

The Court's brief per curiam opinion spent more than half of its four pages setting forth the history of the case. The remaining pages contained four block quotations totaling almost fifty lines, leaving the Court barely a page for its own language. The Court quoted Article II of the Constitution, the federal statute creating the safe harbor deadline of December 12th and two Supreme Court precedents: McPherson v. Blacker, cited for the plenary power of the state legislature, and Minnesota v. National Tea Co., cited for the Supreme Court's authority to ask for clarification of ambiguous state court rulings which might impede constitutional review of state action. The cumulative mass of these quotations suggested indirectly that the Court was relying heavily on external authority and that its decision was constrained by that authority rather than generated by the will of its Justices. The penultimate sentences of the opinion were even more modest in their presentation: “Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority

303. See id. at 474.
304. See id.
305. 146 U.S. 1 (1892).
306. See id.
308. See Bush, 121 S. Ct. at 475.
under Art. II, §1, cl.2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5."309 The Court speaks in the first person plural to acknowledge its shared need for clarification. The syntax is simple and direct, with the second sentence a precise echo of the first. Finally, the message itself is non-accusatory and bland, without any hint that the Florida court has engaged in any judicial overreaching. The conclusion, vacating the Florida decision and remanding for “further proceedings not inconsistent with this opinion,” is presented in context as the only rational response to the Court’s genuine uncertainty over the intentions of the Florida court.310

In *Bush v. Palm Beach County Canvassing Board*, the Court found in the per curiam the appropriate instrument to convey its calming message. All nine Justices, the Court told the nation, are united in our effort to resolve this matter in a reasoned and principled manner, subject to law and precedent. We recognize that important federal issues may be implicated by the Florida opinion, and, as prudent decisionmakers, we must be certain that we understand precisely what the Florida court intended before we venture further. The per curiam allowed the Court to assert in the same opinion its constitutional authority and its deference to principles of federalism. The opinion itself resolved nothing, but it managed to claim for the Court a respectable place outside the political thicket.

The Court faced a much greater challenge when it agreed to review the Florida Supreme Court’s second decision ordering an immediate statewide recount.311 The Court not only granted the Bush campaign’s application for stay but also treated the application as a petition for certiorari, and the Court’s preliminary order, issued on December 9th, eliminated at a stroke any claim to the unanimity asserted by the earlier per curiam. Justice Stevens’s dissent to the granting of the stay accused the majority of violating established principles of judicial restraint and predicted that the stay would “inevitably cast a cloud on the legitimacy of the election.”312 More dramatically, it was joined by Justices Souter, Ginsburg, and Breyer and countered by a concurrence from Justice Scalia, who noted, “a majority of the Court, while not deciding the issues presented, believe that the petitioner has a substantial probability of success.”313 Even before the Court began drafting its final opinion in *Bush v. Gore*, it had informed an expectant nation that its members were already at least preliminarily aligned five to four in support of the Bush position.

---

309. *Id.*
310. *Id.*
312. *Id.* at 513 (Stevens, J., dissenting).
313. *Id.* at 512 (Scalia, J., concurring).
The posture of modest reserve fostered by the earlier per curiam was effectively replaced by an adversarial alignment of Justices.

In light of this publicly proclaimed division, it is all the more remarkable that, when the final opinion did emerge on December 12th, it was once again in the form of a per curiam. The Court’s unsigned opinion was accompanied by five signed opinions: a concurrence by Chief Justice Rehnquist, joined by Justices Scalia and Thomas; a dissent by Justice Stevens, joined by Justices Ginsburg and Breyer; a dissent by Justice Souter, joined by Justice Breyer and, in part, by Justices Stevens and Ginsburg; a dissent by Justice Ginsburg, joined by Justice Stevens and Ginsburg; and a dissent by Justice Breyer, joined in part by Justices Stevens, Ginsburg, and Souter. This bare lineup of Justices announced clearly the extent of the Court’s internal disagreement, not only between majority and dissent but within each bloc as well. Only Justices O’Connor and Kennedy did not sign their names to any part of any separate opinion, suggesting that their views were expressed by the per curiam alone.

Why, then, did the Court issue a per curiam instead of a majority opinion signed by the Chief Justice or by one of the Justices who fully supported its content? The opinion itself and the circumstances of its issuance provide some clues. First, of course, is the question of timing. The Court relied in part on what it viewed as the Florida Supreme Court’s recognition of the state legislature’s intention to meet the December 12th safe harbor deadline, finding it “obvious” that no constitutionally acceptable recount could be completed before that date. It would have been potentially embarrassing for the Court, under those circumstances, to fail itself to release its opinion before that deadline passed. The opinion barely beat the deadline, appearing just two hours before midnight, but it did carry the date of December 12th. It is possible that the limited time available between oral argument at 11:00 a.m. on December 11th and the end of the safe harbor deadline at midnight on December 12th necessitated an opinion that was, like Buckley v. Valeo, written in different chambers and cobbled together. Even if Bush v. Gore was not an opinion by committee, the per curiam has other efficiency advantages. It permits members of a Court majority to reach a rough agreement on basic positions, expressed in the per curiam, and then write separate opinions detailing their more refined views. The per curiam also spares any Justice from signing an opinion.

315. See id. at 539 (Stevens, J., dissenting).
316. See id. at 542 (Souter, J., dissenting).
317. See id. at 546 (Ginsburg, J., dissenting).
318. See id. at 550 (Breyer, J., dissenting).
319. See id. at 532.
that may, because of severe time constraints, be less coherent, less elegant, or less responsive to the dissents than its author might wish. It is notable that in *Bush v. Gore*, Chief Justice Rehnquist, a member of the majority who possessed the assignment power, chose instead to author a concurrence adding what he termed "additional grounds" for reversal of the Florida decision.\textsuperscript{320} When an opinion is, like this one, destined to be read and studied widely for many years to come, pride of authorship may work in reverse to counsel the anonymity of the per curiam.

Beyond such circumstantial factors, however, the content of the opinion also suggests that the Court hoped to benefit from the aura of consensus that the per curiam label carries. By its diction, the per curiam claimed that its position was irrefutable. Not only was it "obvious" that no constitutional recount could be completed in time—it was also "evident" that any recount meeting the deadline would be unconstitutional.\textsuperscript{321} More strikingly, the per curiam claimed the support of Justices who had not joined it. The opinion noted that "[s]even Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy" and that "[t]he only disagreement is as to the remedy."\textsuperscript{322} The use of "only" to minimize the significance of that disagreement is somewhat disingenuous, since in this case the recount remedy was the crucial element before the Court.

The per curiam's claim to broad support within the Court is refuted by the strong positions and language of the separate opinions. Chief Justice Rehnquist's concurrence found "that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II."\textsuperscript{323} Going beyond the equal protection argument of the per curiam, Rehnquist criticized the Florida court for basing its analysis on an "entirely irrelevant"\textsuperscript{324} statutory provision and for crafting a remedy that ignored legislative intentions.\textsuperscript{325} Thus, three of the five members of the Court's majority made clear their view that the per curiam opinion was too limited in its scope.

The two dissenting Justices who allegedly supported the per curiam made their divergence even clearer. Although Justice Souter agreed that disparate ballot counting standards created an equal protection problem, he rejected the December 12th deadline in favor of December 18th and found "no justification for denying the State the

\textsuperscript{320} See id. at 533 (Rehnquist, C.J., concurring).
\textsuperscript{321} Id.
\textsuperscript{322} Id.
\textsuperscript{323} Id. at 535 (Rehnquist, C.J., concurring).
\textsuperscript{324} Id. at 538.
\textsuperscript{325} See id.
opportunity to try to count all disputed ballots now." Justice Breyer, who also found an equal protection problem, was even more vehement in rejecting the majority's position. He opened his opinion by calling the Court "wrong" to have granted certiorari initially and to have issued a stay and saw "no justification for the majority's remedy." Arguing that presidential elections are political matters that require judicial restraint, Breyer found the Court's willingness to involve itself in the matter an improvident and dangerous step. He noted, "the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself," a confidence which he termed "a public treasure." Even more fundamentally, "we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation." The Souter and Breyer dissents reveal how far apart their authors were from the sense of the per curiam and how thin the claim to their support for its central position really was.

The other two dissenting opinions provide additional evidence of the fundamental division within the Court. Justice Stevens's dissent rejected both the equal protection claim and, more importantly, what it termed the "unstated lack of confidence in the impartiality and capacity of the state judges" who would implement the recount. Stevens's opinion concluded with a harsh assessment of the institutional consequences of the Court's position, noting that "the identity of the loser" of the election is "perfectly clear": "It is the Nation's confidence in the judge as an impartial guardian of the rule of law." In her dissent Justice Ginsburg criticized the Court for failing to defer to the Florida Supreme Court's construction of state law, what she termed an "ordinary principle" reflecting "the core of federalism." She too ended her opinion with a harsh rejection of the Court's holding that no constitutionally acceptable recount was possible as "an untested prophecy [that] should not decide the Presidency of the United States." She omitted the usual adverb "respectfully," used by her three colleagues, and ended with a terse "I dissent." Read together, the dissents and the concurrence seriously weaken any claim to consensus founded on the majority's use of the per curiam.

The Court is also at some pains to limit the reach of its holding, and for that purpose the per curiam label, suggesting that no signifi-

\[326. \text{id. at 546 (Souter, J., dissenting).} \n327. \text{See id. at 550 (Breyer, J., dissenting).} \n328. \text{id. at 551.} \n329. \text{id. at 557.} \n330. \text{id.} \n331. \text{id. at 542 (Stevens, J., dissenting).} \n332. \text{id.} \n333. \text{id. at 549 (Ginsburg, J., dissenting).} \n334. \text{id. at 550.} \n335. \text{id.} \]
This is a new equal protection principle, one with potentially far-reaching implications, and the opinion seems anxious to rein in the principle it has just formulated. After locating the new right “in the special instance of a statewide recount under the authority of a single judicial officer,” the opinion expressly disclaimed any intent to craft a generally applicable principle: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” The new right, then, is carefully circumscribed, and its announcement in a per curiam opinion attempts to reinforce the Court’s position that the right, though sufficiently fundamental to halt the recount, is not sufficiently comprehensive to deserve the status of a signed opinion.

In the most striking paragraph of the opinion, the Court asserted a limitation of a different sort, a limitation on its own judicial role:

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

This curious passage, like the equal protection right created and then confined, seems both to assert and reject judicial power. The first sentence embraces judicial restraint and disavows a judicial role in selecting the president. The second sentence then rejects that restraint because the Court, against its will, has been dragged into the case by the litigants. The Court is presented as a passive entity, accepting the “unsought responsibility” that “the judicial system has been forced to confront,” with no mention of the Court’s affirmative role in staying the recount and granting certiorari or of the position taken by one party—the Gore campaign—against Court intervention. The invocation of “contending parties” carries a faint echo of Planned Parenthood v. Casey, where the jointly authored opinion by Justices O’Connor, Kennedy, and Souter noted the Court’s special commitment to stare decisis when “the contending sides of a national controversy . . . end their national division by accepting a common mandate rooted in the Constitution.” In that opinion the authors described a judicial obli-

---

336. Id. at 530.
337. Id. at 532.
338. Id.
339. Id. at 533.
341. Id. at 867.
gation that could conflict with and override the individual preferences of the Justices. Here too the Court's opinion claims that the Justices of the majority are reluctant decisionmakers, forced to resolve this case but unwilling to extend their unsought authority beyond the minimum required to perform that task.

The per curiam form thus promises to meet several of the Court's needs in this extraordinary case. By suggesting that the opinion comes from the Court rather than from an identified Justice, the per curiam assumes institutional authority and attempts, with limited success, to underplay the serious division reflected by the vote and the separate opinions. The per curiam also suggests an opinion of modest intentions, useful to a Court that insists at the same time on identifying a new constitutional right and limiting its application. Most dramatically, the per curiam seems intended to support the Court's assertion that, far from engaging in judicial activism in resolving the presidential election, it is in fact only reluctantly entering the fray to fulfill its constitutional role.

For the past sixty years the Court has found the per curiam a flexible instrument readily adaptable to new situations, but the demands of *Bush v. Gore* prove too great. Although the Court attempted to link together its two opinions by referring to *Bush v. Palm Beach County Canvassing Board* as *Bush I*, the differences between the per curiam remanding for clarification and the per curiam resolving a presidential election remain sharp and strong. In the earlier case the Court used the per curiam effectively to respond to a heated controversy with a modest and tentative opinion, what Cass Sunstein has characterized as "a triumph for good sense and even for the rule of law." In *Bush v. Gore*, however, the Court was both more aggressive and less successful. Its use of the per curiam form failed to package the majority opinion as a restrained solution, based on a substantial consensus, to a national problem that the Supreme Court was reluctantly compelled to solve.

VII. CONCLUSION

In almost a century and a half of Supreme Court appearances, the per curiam opinion has played a great variety of roles. In its earliest form, the per curiam label signaled an opinion with no substance used to dispose of a routine case in the most efficient manner. Starting with the Roosevelt Court, the per curiam gradually evolved into a flexible judicial instrument capable of serving a range of strategic purposes. The Burger Court found in the per curiam a method of

---

342. See *Bush v. Gore*, 121 S. Ct. at 527.
resolving difficult cases under challenging circumstances, bringing it remarkable prominence. The fortunes of the per curiam waned in the Rehnquist Court, which seemed interested in using it principally for the swift resolution of cases which required little if any analysis and inspired little debate among the Justices. With *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore*, however, the per curiam made an unexpected return to center stage as the vehicle for resolution of a momentous episode in American legal history.

This surprising resurgence of the per curiam does not, however, mean that the Rehnquist Court is likely to employ it for cases of major import in the future. The per curiam has functioned most effectively when it allowed the Court to strike a balance between the institutional need for consensus and the individual need for personal expression. In the decades since the members of the Roosevelt Court discarded the norm of broadly consensual decisionmaking in favor of a more individualized process, freeing each Justice to speak directly and even idiosyncratically, the Court, despite some criticism, has rarely looked back. Faced with cases like *Brown* and *United States v. Nixon*, the Court has mustered the unanimity necessary to meet the occasion. In *Bush v. Gore*, with the Court unable to do so, it settled instead on the per curiam as an alternate method of conveying the institutional unity that the Court clearly lacked. The effort failed precisely because the Rehnquist Court itself has become identified with a jurisprudence of individual expression in which agreement is no longer highly valued. Accustomed to reading the separate opinions of Justices in strong conflict, students of the Court were not likely to be lulled by the per curiam label into the belief that this opinion represented an authentic consensus.

In the current jurisprudential universe of five to four divisions and multiple separate opinions, the Justices are unconstrained in expressing their views and have little use for a form of opinion that communicates consensus. The per curiam opinion written “by the Court” has a vaguely old-fashioned sound, an echo of an era when the institution subsumed the Justices who served it. The current Court acts as nine individual Justices, and today an authentic opinion by the Court is one that speaks not in a single anonymous voice but in a dissonant chorus.