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Concurring and Dissenting without Opinion

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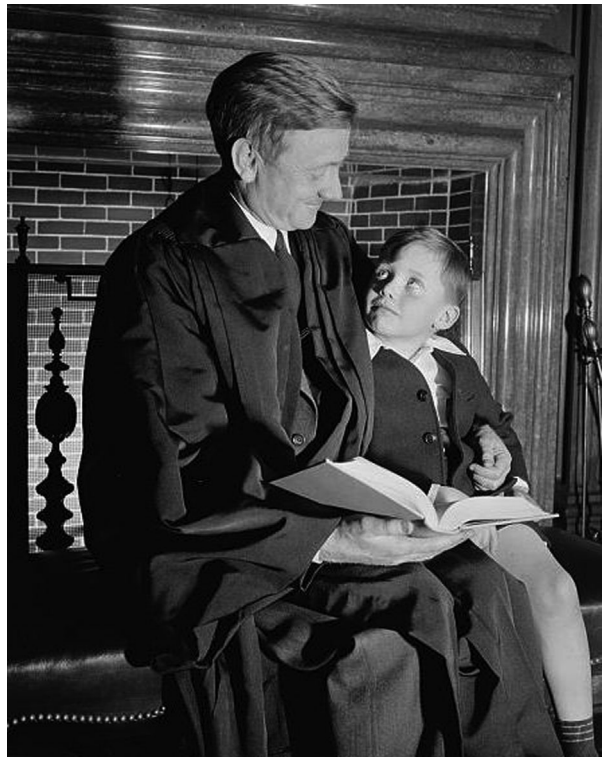
I. Introduction

In *Buck v. Bell*, the Supreme Court held by an 8-1 vote that a state's compulsory sterilization law for the intellectually disabled did not violate the Fourteenth Amendment's due process or equal protection clauses.[1] Writing for the Court, Justice Oliver Wendell Holmes, Jr. infamously concluded, "Three generations of imbeciles are enough."[2] Justice Pierce Butler dissented but did not write an opinion to explain his position. Rather, the opinion in *Buck* simply concludes: "Mr. Justice Butler dissents."[3] The popular account pins Butler's position on his affiliation with the Roman Catholic Church,[4] but as one scholar notes, "claiming a religious motive for Butler's dissent is mere speculation. He left no opinion, and no other evidence has surfaced."[5] Butler's decision not to write separates *Buck* from other anti-canon candidates such as *Dred Scott v. Sandford*,[6] *Plessy v. Ferguson*,[7] and *Korematsu v. United States*[8]—all of which contained celebrated dissenting opinions that subsequently helped guide the development of law.[9]

The practice of noting disagreement without explanation is puzzling in part because the value of disagreement on a collegial court comes from among other factors the beneficial effects of generating written explanations. As Justice Ruth Bader Ginsburg once wrote, separate opinions "may provoke clarifications, refinements, [and] modifications in the court's opinions."[10] Justice Antonin Scalia echoed this point, emphasizing that a "dissent or concurrence puts [an] opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points."[11] In the longer term, Chief Justice Charles Evans Hughes famously remarked, "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have betrayed."[12]



During his time on the Court, Justice William O. Douglas's decision-making in tax cases showed an increasing tendency to merely note dissent or explain his position in perfunctory fashion. Some scholars have speculated that this behavior could be explained by his disdain for the IRS and tax code. Douglas is pictured here with his son, Bill Jr., at the time of his appointment to the Court in 1939.

Aside from improving the quality of judicial decision-making and potentially influencing the path of law, separate opinions may help foster public confidence in the judiciary and promote institutional legitimacy. Justice Antonin Scalia once suggested, for example, that separate opinions help demonstrate that legal conclusions are the "product of independent and thoughtful minds."[13] And as Chief Justice Harlan Fiske Stone once explained, separate opinions provide "some assurance to counsel and to the public that decision has not been perfunctory, which is one of the most important objects of opinion writing."[14] More sharply, Justice William J. Brennan referred to the "obligation" of explaining legal conclusions as "serv[ing] a function within the judicial process similar to that served by the electoral process with regard to the political branches of government."[15] For these reasons, concurrences and dissents without opinion have been described as "serv[ing] no useful purpose in the development of . . . jurisprudence, since [they provide] no indication of wherein the disagreement lies."[16]

Others, however, have indicated that the practice of noting disagreement may have salutary effects. Judge Richard Posner, who refers to noting as a "nonreasoned" opinion, "used to think that the only possible explanation for the nonreasoned separate opinion besides sheer laziness was the pressure that caseload growth was exerting on the time of federal judges," but "c[a]me to realize that there are other, more edifying explanations for this form of opinion: the maintenance of collegiality and the promotion of legal certainty."[17] While acknowledging that reason giving promotes core democratic values,

Mathilde Cohen emphasizes some of the costs associated with the practice, including entrenching public disagreement and eroding legitimacy, hampering collegiality, curbing the cognitive costs associated with motivated reasoning, and managing caseload pressures.[18] Of course, the costs and benefits of noting disagreement may vary across levels of the judicial hierarchy and by other institutional circumstances such as panel size.

Few scholars have thoroughly examined the practice of noting disagreement on any court. The first systematic study chronicled Justice William O. Douglas's decision-making in tax cases, highlighting an increasing tendency during his time on the Court to merely note dissent in these cases, explain his position in perfunctory fashion, or refuse to acknowledge well-settled jurisprudential principles in the field.[19] The authors of that study speculated that his behavior in tax cases could be explained by his disdain for the IRS and tax code.[20] With respect to noting dissent in particular, a practice that is difficult to explain by definition, the authors concluded that Justice Douglas "fail[ed his] . . . duties to the Court, to the parties before him, and to all who look for understanding to Supreme Court opinions, whether majority, concurring or dissenting."[21]

A more recent study attempts to understand why Justices sometimes silently concur in a majority opinion without explaining the nature of their disagreement.[22] To solve the inherent difficulty of understanding why Justices sometimes merely note their disagreement, this study utilizes private memoranda exchanged between Justices on the Burger Court to uncover the motivations behind noting concurrence. Not surprisingly, these archival records suggest that Justices sometimes settle for noting their disagreement due to time pressures and the perception that certain cases are not sufficiently important to warrant reasoned explanation for disagreeing with the majority position. However, there is also evidence that decisions to note are driven by a desire to maintain voting consistency across cases or withhold support for disfavored precedents discussed in majority opinions. Justices also sometimes resort to noting due to uncertainty or ambivalence about proper dispositions or as a result of bargaining failures over opinion language and scope.

To what extent have Supreme Court Justices noted their disagreement by concurring or dissenting without opinion? Little is known about the use of this opinion delivery practice over time. In this article, we recover the lost history of noting disagreement by manually reviewing every Supreme Court decision from 1791 through O.T. 2014 to compile instances of Justices concurring or dissenting without opinion. The resulting data offers new insight into an important but largely forgotten opinion delivery practice. We find that noting disagreement has been a common practice throughout much of the Court's existence, though of course it is relatively uncommon in contemporary times.[23] Furthermore, contrary to the somewhat popular association of the practice with Justice Douglas, we demonstrate that a majority of the Court's Justices noted their disagreement at one time or another, with two surpassing Douglas in use and others coming close. In addition to presenting original data concerning the practice of noting disagreement, we offer a detailed historical narrative exploring the types of cases in which this practice can be found over time, shifting norms concerning the provision of written opinions, and the influence of institutional changes on proclivities to concur or dissent silently.

This project contributes to several important literatures. As an initial matter, it contributes to the literature on opinion delivery practices by supplying the first comprehensive history of Justices noting disagreement, and demonstrating that the use of this form has been common throughout much of the Court's history.[24] Furthermore, it

contributes to the literature on changing norms concerning separate opinion writing over time.[25] In particular, this project emphasizes the regular use of an intermediate practice between silently acquiescing to majority positions, which characterized disagreement during the Court's earlier years, to the proliferation of written concurrences and dissents in the modern era.[26] Our empirical approach also contributes to a growing body of quantitative historical research using comprehensive data collection efforts to gain leverage over important questions concerning American legal history.[27]

This article proceeds as follows. In Part II, we begin by laying out a conception of noting disagreement that distinguishes it from what we call "perfunctory opinions," which provide at least some explanation to accompany a concurring or dissenting position. Next, we explain how we compiled comprehensive data on Justices noting disagreement over time. We then explore several attributes of the data, including overall trends in use and Justice-level breakdowns. In Part III, we use case law to develop a rich historical narrative explaining the practice's origins in the Supreme Court, the types of cases in which Justices noted disagreement over time, shifting norms concerning the practice, and the impact of institutional changes in areas such as jurisdiction and opinion assignment on tendencies to note concurrence or dissent without explanation. Part IV concludes.

II. Quantifying Concurrences and Dissents without Opinion

A. Defining Noted Disagreement

As an initial matter, it is important to be conceptually clear about what constitutes noting disagreement. The core of our classification rule emphasizes instances where Justices indicate their concurrence or dissent without explaining the nature of their disagreement.[28] Since our classification rule emphasizes a complete lack of explanation, we exclude two intermediate practices between noting and writing separately that are conceptually distinct and would otherwise inflate our numbers if counted. First, we exclude what might be called "perfunctory" concurrences and dissents, where Justices provide a cursory explanation of their position or at least an indication of where one might look for an explanation.[29] Perfunctory opinions indicate, for example, that a concurring or dissenting position rests on reasons explained in the lower court's opinion or in a different but related Supreme Court case.[30] Second, we exclude noted concurrences and dissents in cases where it is clear from an opinion that an explanation for a minority position is provided in a separate case.[31] Relatedly, we also exclude noted concurrences and dissents in cases that point to a different case with a complete explanation of the majority position where the noters in the second case also noted in the first.[32] In addition to providing a conservative estimate of the phenomenon of interest, these classification rules are consistent with the existing literature on separate opinion writing on the Supreme Court by counting each concurring or dissenting event only once.

Before discussing our search strategy, it is important to review one possible source of existing information on noted concurrences and dissents. Albert P. Blaustein and Roy M. Mersky's book **The First One Hundred Justices** includes term-aggregated data on the number of "concurrences and dissents without opinion" during the Court's first 100 years.[33] Understandably, given the wording, some have cited these data when referencing the number of noted concurrences or dissents during particular eras.[34] However, although Blaustein and Mersky included noted concurrences and dissents in this category, these instances were combined with the far more common practice of "join[ing] in [a] concurring [or dissenting]

opinion written by another justice."[35] Since the authors present only aggregate data, it is impossible to separate instances of Justices noting disagreement from joining separate opinions in their tabulations involving concurring and dissenting "without opinion."

Compiling our own data on noted concurrences and dissents proved to be a time-intensive and tedious task. First, we compiled a list of every Supreme Court decision from 1791 through O.T. 2014. For cases decided from 1791 through 2005, we utilized the list generated by Fowler et al. in their study of the impact of Supreme Court precedents over time.[36] This list excludes in-chambers opinions, per curiam decisions in cases that were not orally argued, and other orders. Next, we updated this list through O.T. 2014 using the Supreme Court Database.[37] These steps yielded a total of 27,394 Supreme Court decisions made throughout its history. To locate instances of Justices concurring or dissenting without opinion, we manually reviewed each opinion.

B. The Cases

Our search yielded a total of 553 cases (two percent) in which at least one Justice noted concurrence, and 1,225 cases (four percent) in which at least one Justice noted dissent. The average number of cases per year with at least one noted concurrence during this period was about three, with a range from zero to twenty; the average number of cases per year with at least one noted dissent during this period was six, with a range from zero to thirty-seven.[38] The average percentage of cases with at least one noted concurrence during this period was two percent, with a range from zero to thirteen percent; the average number of cases with at least one noted dissent during this period was four percent, with a range from zero to twenty-six percent.[39]

Figure 1 displays trends in noted concurrences and dissents over time. The first panel plots the number of cases each year with noted concurrences (dashed line) and dissents (solid line) throughout the Supreme

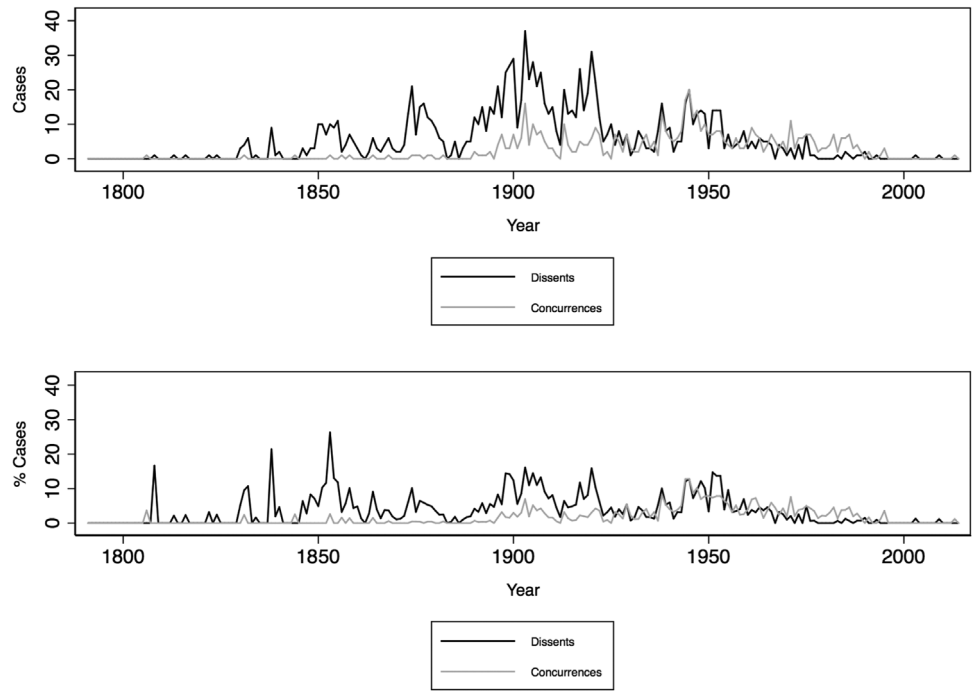


Figure 1. Noted Disagreement over Time.

Court's history. The second panel adjusts for varying caseloads over time by plotting the percentage of cases each year with noted concurrences (dashed line) and dissents (solid line). Looking at the caseload-adjusted second panel, it is clear that the peak period for noted dissents came during Chief Justice Roger B. Taney's tenure, with subsequent high points during the Fuller, White, and Vinson eras before quickly dissipating, beginning with Warren. For noted concurrences, the peak period came during Chief Justice Stone's tenure. While the use of noted dissents outpaced the use of noted concurrences for most of the Court's history, the Burger Court marked the point at which noted concurrences became more common. By the mid-1990s, the practice of noting disagreement had all but been eliminated.

The aggregate case statistics only partially convey the prevalence of noted disagreement throughout the Court's history. Overall, the 1,778 cases that yielded a noted concurrence or dissent during this period produced 2,661 votes without explanation—676 concurring votes and 1,985 dissenting votes. The number of votes to note is higher than the number of cases because it was not uncommon for more than one Justice to note in a single case.[40] Interestingly, in cases with noted dissent it was more common for two Justices to note than one. Overall, seventy-seven percent of cases with noted concurrence included one Justice noting while only thirty-eight percent of cases with noted dissent included one Justice noting.

The number of votes to note exceeding the number of cases with notes indicates that this practice was not merely reserved for instances where a Justice held a singular viewpoint—a common explanation for decisions to silently acquiesce.[41] Relatedly, it was not uncommon for Justices to note their disagreement in cases where at least one Justice wrote a separate opinion concurring or dissenting. Overall, about twenty-three percent of the cases that included noted disagreement had at least one separate opinion. This suggests that Justices differed considerably over whether it was worth the effort to write separately in particular cases.

C. The Justices

We now examine which Justices commonly noted their disagreement. Perhaps because of Wolfman et al.'s study of Justice Douglas dissenting without opinion in tax cases, the practice is sometimes associated with him in particular. Justice Ginsburg, for example, once cited the Wolfman et al. study "[f]or consideration of the unusual practice of Justice Douglas, who sometimes dissented without stating his reasons in federal tax cases."[42] As is no doubt clear from the data we have already presented, however, the practice of noting disagreement persisted throughout much of the Court's history. Indeed, we uncovered noted concurrences or dissents by eighty-eight of the Court's 112 Justices (seventy-nine percent) serving during the sample period. Although length of service may be one predictor of frequency, those who noted the most are a diverse group that varies considerably in terms of disposition and reputation.

Figure 2 displays dot plots of the top-twenty Justices in terms of the number of noted concurrences and dissents (though in the case of concurrences there are twenty-one listed Justices because of a tie between Owen J. Roberts and Thurgood Marshall at number twenty). Overall, while the perception that Justice Douglas frequently noted disagreement is borne out by the data (though his concurrences and dissents without opinion were not reserved solely for tax cases), he comes in with only the third most instances of noted disagreement behind Justices John Marshall Harlan I and Hugo L. Black. Between the latter two, Justice Black easily issued the most noted concurrences in the Court's history while Harlan I edged out Joseph McKenna for the most noted dissents.

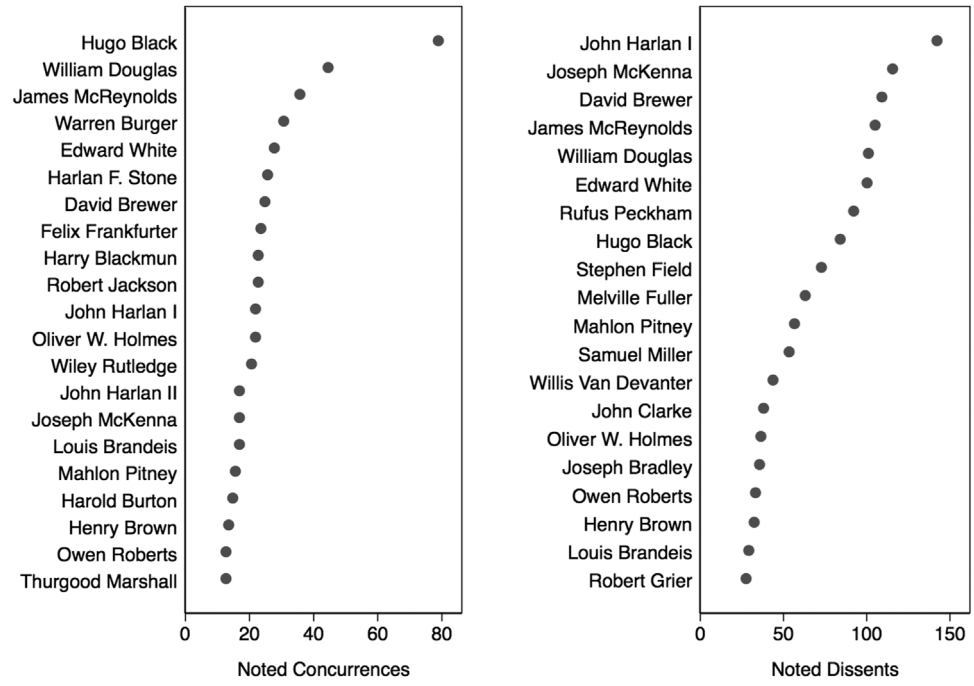


Figure 2. The Justices.

Justices who were in the top-twenty for noting concurrences but not noting dissents include Harry Blackmun, Warren Burger, Felix Frankfurter, John Marshall Harlan II, Thurgood Marshall, and Wiley Rutledge. Justices who were in the top-twenty for noting dissents but not noting concurrences include Joseph Bradley, John H. Clarke, Stephen Field, Melville W. Fuller, Robert Grier, Samuel F. Miller, Rufus Peckham, and Willis Van Devanter. While several Justices appear on both top-twenty lists, there is a clear sorting by period for many Justices who appear on one but not the other, with later-serving Justices compiling numerous noted concurrences and earlier-serving Justices being more likely to compile noted dissents. Overall, the lists are notable for their diversity both in terms of era and reputation.[43] While noting disagreement has sometimes been associated with "sheer laziness,"[44] several of the Court's most well-respected Justices appear on these lists. Moreover, it is notable that both of the Court's "great dissenters" (Justices Oliver Wendell Holmes, Jr., and John Marshall Harlan I) were among the most frequent to note dissent.

III. A Historical Narrative

A. Beginnings, 1806-1839

The first issuance of a noted concurrence or dissent seems to have occurred in *Randolph v. Ware*, decided in 1806.[45] The case arose after a Virginia tobacco planter's uninsured shipment of "50 hogsheads of tobacco"[46] was lost at sea on its way to a British merchant. The planter sought to recover from the merchant, arguing the merchant had a duty to insure and that its agent had promised to insure the shipment. Chief Justice Marshall recused himself, having decided the case below, and as sometimes occurred in his absence the remaining Justices delivered the opinion seriatim.[47] Writing separately, Justices William Johnson, Bushrod Washington, and

William Paterson agreed that the merchant was not liable because the norm had been for the merchant to provide insurance only upon direct request, adding that the agent's promise may have bound him to the planter but did not bind the merchant. The following note appears after the opinions: "Cushing, J. concurred."[48] Although Cushing's reasons for not writing are unclear, speculation suggests that he may have still been ill after missing the previous term in its entirety.[49] Cushing may have also battled "mental decrepitude"[50] during these later years of service, though Justice Johnson's well-known posthumous quip to Thomas Jefferson that "Cushing was incompetent" has been disputed.[51]

During the next twenty-three years, there were noted dissents in five cases and zero noted concurrences. In 1824, with Chief Justice Marshall and Justices Washington and Duvall not sitting, Justice Joseph Story noted dissent in a case concerning the appropriate grace period for a promissory note.[52] After Story's noted dissent, more than five years passed before the next. In 1829, Justice Washington died and in 1830 President Andrew Jackson appointed Henry Baldwin to the Bench. During the next decade, Justice Baldwin was almost single-handedly responsible for continuing the practice of noting disagreement. From 1830 through 1839, Justice Baldwin noted dissent twenty-four times and noted concurrence once. Although Justice Thompson joined Baldwin in noting dissent in one case,[53] Baldwin was otherwise the only Justice to note disagreement during this period. Baldwin's mental competence has been widely questioned,[54] with Judge Frank Easterbrook once referring to him as one "who alternated between periods of sullen quietude, sometimes delivering oral opinions but refusing to allow the Reporter to publish them, and bilious but absurd writings."[55] Indeed, several opinions during this time bear the unusual printer's note that "the opinion of Mr. Justice Baldwin was not delivered to the reporter."[56] In addition to suffering mental ailments, Baldwin may have been less inclined than other Justices to abide by the norm of acquiescence that dominated decision-making on the Marshall Court.[57]

B. Institutionalization and Fluctuation, 1840-1941

The institutional practice of noting disagreement seemed to become entrenched as a way for Justices to dispose of cases about midway through Chief Justice Taney's tenure. By that time, Baldwin had died and the Marshall era's norm of consensus had eroded to a considerable degree. Although opinion delivery practices changed little during Taney's early years, during the middle period Justices felt increasingly comfortable publicly disagreeing with majority positions. With Marshall gone, there is evidence "that Taney-era Justices began to conceive of their role more as an individual effort and less as part of a cohesive unit."[58] Recognizing the increase in dissents and concurrences without opinion during this period, one commentator notes that the practice was "useful only as a way of separating the individual Justice from the Court."[59] More specifically, the practice may have been considered a useful intermediate way to distance one's self from the majority position while building and maintaining a consistent voting record.[60] In addition, the mid-to late nineteenth century coincided with the westward expansion of circuit riding and a burgeoning mandatory docket.[61]

An examination of the cases in which Justices noted disagreement during this period reveals that the practice was reserved primarily for relatively mundane disputes that did not involve constitutional issues.[62] In 1849, for example, Justices James Moore Wayne and Peter Vivian Daniel noted dissent in a case concerning disputed title to "a tract of land of about six hundred acres, and forty-four slaves."[63] Similarly, Justice Nathan

Clifford noted dissent in a case concerning disputed title to "certain parcels of land included in the northeast fractional quarter of section twenty-one, in township seven north, of range twenty-two east, in the district of lands subject to sale at Green Bay, and are situated in the city of Milwaukee."[64] In 1852, Justice Robert Cooper Grier noted dissent in a case determining, among other things, whether a testator's contract for land rent with a provision for transfer with later payment was an implied revocation of a devise to the testator's wife in his will.[65] And Justices Catron and Grier noted dissent in a case involving a contract dispute about whether commission should be paid by a land seller to his broker after the broker arranged sale of a parcel for $5,000 to a buyer that the seller ultimately refused to execute.[66]

Although noting in relatively mundane cases had been the norm since the practice's inception, *Bradwell v. Illinois* is one prominent case decided during this early period that included a noted dissent.[67] In *Bradwell*, the Court held that a state law prohibiting women from practicing law was constitutionally valid under the Fourteenth Amendment's privileges or immunities clause. In addition to the disposition, the case is remembered in part because of Justice Bradley's concurring opinion, joined by Justices Noah Swayne and Stephen J. Field, reasoning, "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother."[68] Chief Justice Salmon P. Chase was the lone dissenter, but merely had the following stated: "The CHIEF JUSTICE dissented from the judgment of the court, and from all the opinions."[69] Although one might surmise that Chief Justice Chase considered the case to be controlled by the dissenting opinion he joined not long before in *Slaughter-House Cases*,[70] the conjecture seems somewhat unsatisfactory as a complete explanation for not writing given that it was Field's dissent he had joined and that Justices Bradley and Swayne had also dissented in *Slaughter-House Cases* but joined the majority disposition in *Bradwell* through Field's concurrence. Chase's posture may have also been the result of illness, as he was suffering from numerous maladies at the time and would die later that year.[71] In any event, the case's salience and unusual coda to Chase's notation that he dissented "from all the opinions" makes this instance particularly noteworthy.

The second wave of noted disagreements during this period began around 1890 and persisted into the 1920s. Although the introduction of discretionary jurisdiction and gradual elimination of circuit riding duties eased workload pressures somewhat around the turn of the century, the Justices soon found themselves being consumed by a growing discretionary docket in the early years of the twentieth century.[72] And while new Justices occupied the Court, little seemed to change in the types of cases that were generating noted concurrences and dissents during this time. Justices George Shiras, Rufus W. Peckham, and Edward D. White noted dissent in a case concerning whether the *Benito Estenger*, a ship owned by a Spanish subject and captured near Cuba during the Spanish-American war, could be condemned as lawful enemy prize.[73] In a case described as being "in narrow compass" by Justice McKenna writing for the Court, Justice David J. Brewer noted dissent from a holding that adverse possession of land under state law prevailed over a claim of right owing to issuance of a land patent from the federal government.[74] Chief Justice White and Justices McKenna and James C. McReynolds noted dissent in an opinion affirming an order compelling a railroad "to stop two interstate trains, one numbered 17 and southbound, the other numbered 18 and northbound, at the City of Meridian, for a time sufficient to receive and let off passengers."[75] And Justice McReynolds noted dissent in a case determining that the Commissioner of Patents could not exclude

the phrase "Moistair Hearing System" as descriptive from a trademark described as: "A design like a seal, comprising the head of an Indian chief surmounting a scroll bearing his name, 'Doe-Wah-Jack,' and surrounded by a circle, outside of which appear the words 'Round Oak' and 'Moistair Heating System' in a circle, and the whole being surrounded by a wreath of oak leaves."[76]

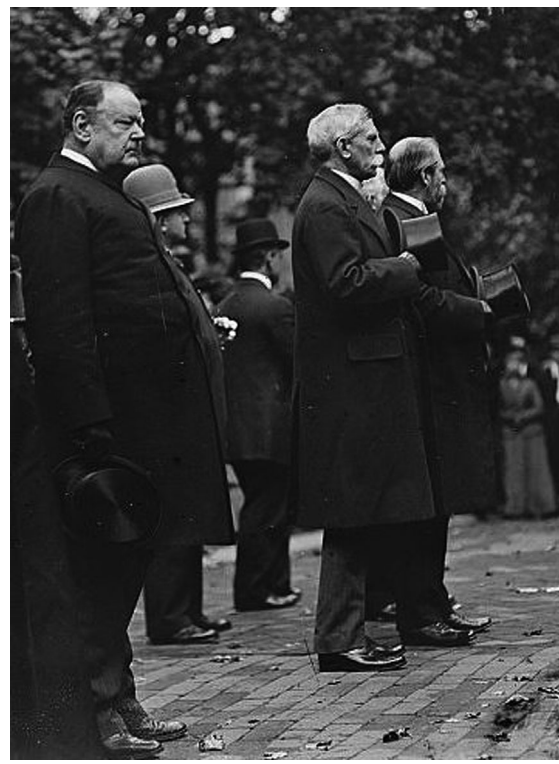
During this second wave of noted disagreement, there is evidence of institutional dialogue taking place in print concerning the proper circumstances under which Justices should settle for merely concurring or dissenting without opinion as opposed to writing separately. Not surprisingly, case importance was the primary point of emphasis. Of course, invoking issue importance was common when writing separately during this period.[77] In one constitutional case, for example, Justice William H. Moody prefaced a dissent by writing that, while "difference of opinion may well be left without expression" under some circumstances, "where the judgment is a judicial condemnation of an act of a coordinate branch of our government, it is so grave a step that no member of the court can escape his own responsibility, or be justified in suppressing his own views, if unhappily they have not found expression in those of his associates."[78] When these defenses of separate opinion writing are made in contradistinction to noted disagreement within the same case, however, it suggests an ongoing institutional dialogue about the appropriateness of disagreeing with the majority position while refusing to offer any explanation with respect to the nature of that disagreement. And it is no surprise that this type of dialogue often took place in constitutional cases, which are regularly thought to be a proxy for case importance.[79]

In *The Robert W. Parsons*, the Court reviewed a state court judgment construing the phrase "maritime contract" in a state statute to exclude work done on a dry dock to a canal boat used to ship merchandise intrastate between ports.[80] In light of the state court's construction, recovery on the resulting lien could be sought in state court instead of federal court. The Court reversed this judgment, holding that it was a maritime contract. As a result, the state statute was invalidated to the extent that it suggested otherwise by construction and any recovery related to it would have to be sought in federal court. As a case about the scope of state as opposed to federal court jurisdiction and reach of the federal commerce power, the state court indicated that the issue was "one which has provoked much discussion, and one concerning which the state and federal courts have apparently entertained and expressed somewhat diverse views."[81] While Justice Harlan noted dissent, Justice Brewer, joined by Chief Justice Fuller and Justice Peckham, began his dissent by stating, "I am unable to concur in the opinion and judgment in this case, and deem the matter of sufficient importance to justify an expression of my reasons therefor."[82]

A similar sentiment is found in *Muhlker v. New York & Harlem Railroad Co.*, where the Court reversed a lower court judgment dismissing an action to enjoin use of an elevated railroad structure on the street adjoining the plaintiff's residence.[83] Writing for himself and three others, Justice McKenna suggested that the resulting diminution in the quality of light, air, and access to the residence violated the contracts clause and constituted a taking without just compensation. The opinion had important implications for the tradeoff between private property rights and state power to promote economic growth. One contemporary commentator testified to the case's importance, referring to it as "a substantial aid to stability of contractual obligations and to justice."[84] In addition to McKenna's opinion, Justice Brown noted concurrence and Justice Holmes wrote for himself and three others in dissent. Perhaps because the judgment was left in a 4-1-4 posture, with its attendant uncertainty,[85]

Justice Holmes began his dissent by suggesting that, because the case "seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it."[86] While such a preface was not uncommon during this period, Holmes's distinction between the expression of dissent and giving reasons for it may have been directed toward Brown, who could have otherwise written the controlling "narrowest grounds" opinion.[87]

While there were more examples of noted disagreement occurring in constitutional cases during this era, many such cases were of the mundane variety. This is undoubtedly a result of the fact that many of the constitutional cases decided by the Court during this period reached the agenda through appeal or writ of error. In the illustrative *Omaechevarria v. Idaho*, Justices Willis Van Devanter and McReynolds noted dissent to the Court upholding a state statute that prohibited grazing sheep on public lands previously occupied by cattle.[88] Among other challenges, a convicted sheep herder argued that the statute abridged the "Privileges of citizens of the United States, in so far as it prohibits the use of the public lands by sheep owners; and equal protection of the laws, in that it gives to cattle owners a preference over sheep owners."[89] The Court concluded that the law was not "unreasonable or arbitrary" because "experience shows that sheep do not require protection against encroachment by cattle, and that cattle rangers are not likely to encroach upon ranges previously occupied by sheep herders."[90] Given the nature of the underlying dispute, it is unlikely that any



During the Chief-Justiceship of Edward D. White (1910-1925), noted dissents were high. It is not surprising that Justices Oliver Wendell Holmes, Jr. (between White and Charles Evans Hughes at John Marshall Harlan's funeral in 1911), who dissented frequently, thus is also among the Justices to note dissent most often. Noted disagreement decreased as a result of eliminating much of the Court's mandatory jurisdiction in 1925.

written dissent countering these propositions would have contributed much to the broader jurisprudential principles.

The end of this second wave is marked by important institutional changes that may have dampened the frequency of noting disagreement. As an initial matter, the Judiciary Act of 1925 eliminated much of the Court's mandatory jurisdiction. The detrimental effect of a largely mandatory docket on the Court's performance during this era is well known.[91] It is possible that the occurrence of noted disagreement decreased as a result of eliminating much of the Court's mandatory jurisdiction in 1925, either because the Justices had more time to write separate opinions or because the pool of cases changed such that these notations were increasingly unnecessary. Although the Justices had been permitted funds to hire a stenographer for more than thirty years, Congress first authorized the hiring of a law clerk for each Justice in 1919.[92] The introduction of law clerks may have decreased the opportunity cost associated with filing a written dissent. During this time, the Justices also started the "informal and occasional" practice of circulating opinion drafts.[93] Noting disagreement may have been more appealing when majority opinions were simply presented to the Conference without going through the bargaining and accommodation process that structures opinion formation today.

A relative period of stasis marked the interregnum between passage of the 1925 Judges' Bill and the constitutional revolution of 1937. There appear to have been two primary reasons for initiation of the third wave of regular noted disagreements beginning with cases decided in 1938. First, Justice Black, who as mentioned earlier would become the Justice who noted most frequently, joined the Court in 1938. For cases decided in 1938 alone, Black registered ten noted concurrences or dissents.[94] Although Black was President Roosevelt's first appointment to the Court, and was seated during a time of intense political conflict, most of these notes were filed in otherwise unanimous and mundane cases. In *Calmar Steamship v. Taylor*, for example, Justice Black noted dissent to an otherwise unanimous opinion holding that a ship owner does not have an indefinite obligation to provide post-voyage medical care for treatment of an employee's incurable disease that manifested itself while aboard the ship during the scope of employment but was not caused by the owner's negligence.[95]

Increased productivity of noted concurrences and dissents by Justice McReynolds is the second major factor contributing to the initiation of the third wave of noted disagreement. Known for his combative personality and laziness,[96] McReynolds regularly noted disagreement throughout his career. Beginning with cases decided in 1938, however, there was a noticeable uptick. As was the norm, many of the cases in which McReynolds noted disagreement during this period were of the mundane variety. In *Guarantee Trust v. IRS*, for example, the Court held that an executor for a deceased member of a corporate partnership owed taxable income for the year of his death on corporate profits obtained prior to the firm's fiscal year ending on July 31 and between August 1 and the date of death, rather than just owing on the former.[97] Justices McReynolds and Roberts noted dissent.

Although most instances of noted disagreement during this period were in comparatively unimportant cases, there were exceptions. Justice Butler noted dissent in *Palko v. Connecticut*, where Justice Benjamin Cardozo wrote for the Court in holding that the Fourteenth Amendment's due process clause incorporated the Fifth Amendment's double jeopardy clause because the latter was "implicit in the concept of ordered liberty."[98] And when Justice Frankfurter wrote the Court's opinion in *Minersville School District v. Gobitis* holding that a

public school's policy of requiring students and teachers to recite the Pledge of Allegiance did not run afoul of the First Amendment,[99] Justice McReynolds noted concurrence.[100]

C. The Modern Era, 1941-present

While pinpointing a precise beginning to the modern era of noting disagreement is somewhat arbitrary, two junctures are worth special recognition. The first is the explosion of separate opinion writing that took place during the middle of the twentieth century. Scholars have proffered an array of explanations for the increase in separate opinions, including alterations to the Court's jurisdiction, evolving institutional norms, personnel changes, and leadership styles. One popular theory is that Chief Justice Stone was "an ineffective leader"[101] who precipitated the increase in separate opinion writing with the way he managed Conference and eschewed manufactured consensus. Indeed, a Bayesian change point analysis of separate opinion-writing found 1941—the year Stone became Chief Justice—to mark an important structural break in the production of dissents.[102]

We need not take a position in the broader debate over what caused the explosion of separate opinion writing to identify 1941 as a plausible beginning to the period that would mark the eventual demise of noting disagreement. As a general matter, it is reasonable to expect the increase in separate opinion writing to be associated with a decrease in the extent to which Justices settled for noting concurrence or dissent. It is important to emphasize, however, that the demise of concurring and dissenting without opinion was gradual. Indeed, while aggregate trends indicate that instances of noted disagreement declined around the time that the 1925 Judges' Bill eliminated much of the Court's mandatory jurisdiction, there was a subsequent spike in use of this practice after Stone's ascension to Chief Justice marked a stark increase in the number of written concurrences and dissents being produced. In 1945, for example, the number of cases with noted concurrences or dissents was second only to the 1903 peak. The simultaneous regular use of noted and written concurrences and dissents can be explained by thinking of these tools as variations of disagreement. Just as a variety of factors are thought to have led to the explosion of separate opinion writing, these same factors may have led Justices to note disagreement rather than silently acquiesce in cases not considered important enough to warrant a separate written opinion.

With the burdens of a primarily mandatory docket lifted, the cases fostering noted disagreement during this period tend to resemble the types of cases decided by the modern Court. Nonetheless, the norm of reserving mere notations of disagreement for narrow decisions persisted. In *United States v. Townsley*, for example, the Court held that government workers in the Panama Canal Zone who were paid a fixed monthly rate were nonetheless entitled to overtime pay when working in excess of forty hours per week under the Independent Offices Appropriation Act.[103] Although no separate opinion was written regarding this narrow issue of statutory construction, Justice Frank Murphy noted concurrence while Chief Justice Stone and Justices Robert H. Jackson and Wiley Rutledge noted dissent. A similarly narrow issue of statutory construction prompted a noted dissent from Justice Black in *McKenzie v. Irving Trust*, where the Court held that a debtor's payment mailed to a creditor more than four months before bankruptcy, but received and processed less than four months before bankruptcy, could not be recovered by the debtor's trustee under the Bankruptcy Act, which effectively negated transfers made within a four-month window to avoid favoring certain creditors.[104]

Justices also continued noting dissent in constitutional cases during the early years of the modern era, though none were important

or far reaching enough to become a part of the canon. This is not to suggest that the underlying issues were unimportant, however, only that the particular cases were often not noteworthy precedents meant to be central in guiding lower court decision-making. The Court's decision in *Adkins v. Texas* is illustrative.[105] In *Adkins*, the Court rejected a black criminal defendant's claim that the state's concerted effort to limit the number of black grand jurors to one violated the Fourteenth Amendment's equal protection clause. Justice Murphy wrote an impassioned dissent arguing that the decision "tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences in race, color or creed."[106] In addition, Justice Rutledge noted concurrence while Chief Justice Stone and Justice Black noted dissent. Notwithstanding the obvious general importance of the underlying issue, the Court's relatively narrow decision in *Adkins* distinguished it from more canonical cases in the area such as *Strauder v. West Virginia*,[107] *Norris v. Alabama*,[108] and *Batson v. Kentucky*.[109]

This period also generated more active criticism of Justices who were content to

Hugo L. Black (pictured above with his wife, Josephine) is the Justice who noted most frequently. For cases decided in 1938 alone, the year he joined the Court, Black registered ten noted concurrences or dissents. Although Black was seated during a time of intense political conflict, most of these notes were filed in otherwise unanimous and mundane cases.

merely note disagreement, particularly by Justice Frankfurter. In *Niemotko v. Maryland*, the Court overturned the convictions of members of a Jehovah's Witness group for disorderly conduct after holding Bible talks in a public park despite a request for permission being denied by the city.[110] Although the judgment was unanimous, Justice Black noted concurrence in the result. While Justice Frankfurter also concurred in the result, he wrote what one commentator referred to as a "classic" opinion on the importance of balancing interests in free speech cases.[111] At the start of the opinion, Frankfurter included a thinly veiled criticism of Black (and possibly others who may have silently acquiesced in the majority opinion): "When the way a result is reached may be important to results hereafter to be reached, law is best respected by individual expression of opinion."[112]

In *Larson v. Domestic and Foreign Commerce Corp.*, the Court held that sovereign immunity barred the award of an injunction prohibiting the head of the War Assets Administration from selling or delivering surplus coal to a second purchaser allegedly in violation of a contract entered into by the federal agency with the plaintiff.[113] Justice Douglas issued a one-paragraph concurrence explaining that he agreed with the Court's position on sovereign immunity when the question involved sale of government property.[114] Justice Rutledge noted concurrence and Justice Jackson noted dissent. In a written dissent, Justice Frankfurter, joined by Justice Burton, emphasized the potential harms of narrow "[c]ase-by-case adjudication" in which "judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict."[115] Before going on to discuss the issue presented, Frankfurter indicated his disapproval of the Justices noting disagreement when he wrote: "The case before us presents one of those problems for the rational solution of which it becomes necessary, as a matter of judicial self-respect, to take soundings in order to know where we are and whither we are going."[116]

The start of the Burger Court marks the second significant junction of special note for defining the modern era of noting disagreement. After a noticeable drop in the use of this practice during the Warren Court, two institutional changes made during the Burger Court era have been specifically tied to the decline of noting disagreement. First, the norm of having the senior Justice in the minority coalition assign the dissenting opinion was institutionalized during the Burger Court.[117] Prior to this innovation, there were sporadic attempts at coordination among members of a minority coalition but no accepted norm that a particular Justice would or should bear the burden of ensuring that a minority position be explained in writing.[118] By reducing coordination costs, this institutional change has been said to be associated with "[t]he abrupt end of the practice of notation (dissenting without opinion) at the beginning of the Burger Court."[119]

A second potentially important institutional change that took place during the Burger Court that may have dampened willingness to note disagreement was the introduction of a syllabus to each opinion in 1971. The syllabus now affixed to Supreme Court opinions clearly states each Justice's vote and the portions of any particular opinion a Justice joins. Prior to the introduction of the syllabus, voting coalitions were sometimes ambiguous. Corley et al. have suggested that "[t]he addition of a syllabus . . . made each justice publicly responsible for his or her votes."[120] As a result, this institutional change might have "led to the death of acquiescence and notation"[121] to the extent that prominent focus was placed on each Justice's behavior in any given case.

Although previously published evidence suggests that the practice of noting

disagreement survived through the Burger Court, instances of noted concurrence became more common than instances of noted dissent.[122] As with prior practice, however, instances of noting tended to occur in relatively unimportant cases. In *Oil Workers v. Mobil Oil Corp.*, for example, the Court held that federal law allowing states to prohibit agency shops did not permit them to "void an agency-shop agreement covering unlicensed seamen who, while hired in Texas and having a number of other contacts with the State, spend the vast majority of their working hours on the high seas."[123] Although three other Justices wrote separate opinions, Chief Justice Burger merely had it noted that he concurred in the judgment.

While noted disagreement had always been uncommon in consequential constitutional cases, the Burger Court included what may have been the last notations in important and publicly visible opinions. Chief Justice Burger noted dissent in *Carey v. Population Services International*, where the Court invalidated various provisions of a state law dealing with the regulation and distribution of contraception.[124] There were also instances of noted disagreement in several First Amendment cases. For example, Justice Harry Blackmun noted concurrence in *New York v. Ferber*, where the Court upheld a state law prohibiting the promotion of sexual performances by children under sixteen. Justice Blackmun also noted concurrence in *Bethel School District v. Fraser*, where the Court held that a high school student's allegedly lewd speech at an assembly of the student body was not protected speech.

Instances of noted disagreement became exceedingly rare beginning with the Rehnquist Court, and are almost unheard of on the contemporary Court in cases disposed of after oral argument. Indeed, in the last decade of our sample period we uncovered only one instance of a noted concurrence or dissent in an orally agued case, and that was an unusual case. In *Los Angeles County Flood Control District v. Natural Resources Defense Council*, the Court reversed the Ninth Circuit and held that water flowing from one part of a navigable river into a concrete channel, then back into the river, does not constitute "discharge of a pollutant" under the Clean Water Act.[125] What made the case unusual was that the petitioner, respondent, and U.S. as amicus all agreed with the Court's answer to the question presented; they disagreed, however, on what that result meant for the parties to the case—a question that by itself would likely not have warranted review.[126] In this unusual posture, Justice Samuel Alito noted concurrence.[127]

In addition to the importance of previously discussed changes to institutional norms during the Burger Court, several factors may have helped contribute to the demise of noting disagreement in the modern era. Gradual membership turnover is one important factor. Although Justices Black and Douglas were the only two of the top-twenty noting Justices in the Court's history to serve as late as the Burger Court, gradual turnover means that varying degrees of exposure to the practice persisted as a plausible outcome at least in relatively unimportant cases well past the point that changes to formal institutional norms might have otherwise eradicated it. Even after Justices Black and Douglas were replaced, for example, most of the remaining Justices would have seen the practice utilized and may have noted disagreement themselves on occasion. Over time, however, this became less true and the practice may have increasingly been considered inappropriate.

A sentiment expressed by Justice Brennan toward the end of his career helps capture what was likely to have been a slow-emerging consensus in favor of explaining the nature of one's disagreement rather than noting. Not long after joining the Court in 1956, Brennan joined Chief Justice Warren and Justices Black and Douglas in noting dissent in *Thomas v. Arizona*, where the Court

upheld the conviction of a defendant who alleged that a confession introduced at trial had been unconstitutionally coerced by fear of lynching.[128] More than twenty-five years later, Brennan wrote a "defense of dissents" that carved out room for silent acquiescence in light of "trivial disagreements" but argued that "members of the Court [otherwise] have a responsibility" to articulate the reasons for disagreement.[129] He concluded with a statement that questioned the continuing institutional validity of noting disagreement: "This is why, when I dissent, I always say why I am doing so. Simply to say, 'I dissent,' I will not do. I elevate this responsibility to an obligation because in our legal system judges have no power to declare law."[130] This sentiment expresses the now common sense, as Justice Scalia once put it, that "legal opinions are important for the reasons they give, not the results they announce."[131] To the extent that these positions are now widely accepted, it may be that noting disagreement is no longer considered a legitimate practice for Supreme Court Justices.

More practically, caseload changes may help explain the demise of noted disagreements. In O.T. 2014, the Supreme Court delivered formal opinions in seventy-four cases.[132] In contrast, the Court averaged about 177 opinions per term during the 1940s.[133] With a high caseload, noting disagreement may be considered a valuable compromise position between silently acquiescing and writing separately. As Justice Ginsburg once explained, "In collegial courts, one gets no writing credit for dissenting or concurring opinions; however consuming the preparation of a separate opinion may be, the judge must still carry a full load of opinions for the court."[134] To keep up with other writing assignments, merely noting disagreement might sometimes seem to be the preferable course. But this argument loses much of its luster when comparatively few opinions are being written in any event. When the number of total cases is low, Justices can devote more time to separate opinions.

IV. Conclusion

The practice of noting disagreement has largely been considered an unusual relic of Supreme Court practice long ago discarded or an idiosyncratic behavior perpetuated by a relatively small number of Justices. By manually reviewing every Supreme Court opinion from 1791-2014 and systematically coding instances of Justices concurring or dissenting without opinion, we have recovered the lost history of this institutional practice. Contrary to the conventional wisdom, we have shown that Justices began noting disagreement in the early nineteenth century and continued doing so regularly into the last quarter of the twentieth century. Moreover, we demonstrate that this practice was widespread among Justices.

Although precise explanations for particular instances of noted disagreement are difficult to identify by definition, case narratives support the conventional understanding that the practice was primarily reserved for unimportant issues. Ultimately, the gradual demise of Justices merely noting their disagreement may have been precipitated by formal institutional changes in areas such as jurisdiction and opinion assignment along with a decreasing caseload and shifting norms about the importance of being transparent with respect to reasoning. While noted disagreement appears to have all but vanished from the modern Court, at least for orally argued cases, it was an important and pervasive practice that served an intermediate function between silently acquiescing to majority positions, as was common in the Court's early years, and emergence of a strong norm in favor of writing separately that emerged during the middle of the twentieth century. As such, it is an important institutional tool that offers a

window into the complexities of Supreme Court practice and institutional change.

ENDNOTES

[1] 274 U.S. 200 (1927).

[2] *Id*. at 207.

[3] 274 U.S. at 208 (Butler, J., dissenting).

[4] *See, e.g.*, Victoria Nourse, Buck v. Bell: *A Constitutional Tragedy from a Lost World*, 39 Pepp. L. Rev. 101, 113 (2011) (detailing that "many speculate [Butler's noted dissent in *Buck*] was influenced by his Catholicism and Catholics' distaste for sterilization as bodily mutilation).

[5] Paul A. Lombardo, Three Generations, No Imbeciles: Eugenics, The Supreme Court, And Buck v. Bell 172 (2008).

[6] 60 U.S. 393 (1857).

[7] 163 U.S. 537 (1896).

[8] 323 U.S. 214 (1944).

[9] For a discussion of the anticanon in constitutional law, *see* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379 (2011).

[10] Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 143 (1990).

[11] Antonin Scalia, *The Dissenting Opinion*, 19 J. Sup. Ct. Hist. 33, 41 (1999).

[12] Charles Evans Hughes, The Supreme Court of the United States 68 (1928).

[13] Scalia, *The Dissenting Opinion*, at 35.

[14] Harlan F. Stone, *Dissenting Opinions Are Not without Value*, 26 J. Am. Judicature Soc'y 78 (1942).

[15] William J. Brennan, jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 435 (1985).

[16] *Survey of the Work of the Colorado Supreme Court, 1936-1942*, 14 Rocky Mtn. L. Rev. 213, 214 (1942).

[17] Richard A. Posner, The Federal Courts: Challenge and Reform 174-175 (1999).

[18] Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 Wash. & Lee L. Rev. 483, 514-25 (2015).

[19] Bernard Wolfman et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. Penn. L. Rev. 235 (1973) [hereinafter Wolfman et al., *Behavior*]. This article was later published as a book. Bernard Wolfman et al., Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases (1975).

[20] *See* Wolfman et al., *Behavior*, at 315-325.

[21] *Id.* at 328.

[22] Greg Goelzhauser, *Silent Concurrences*, 31 Const. Comment. 351 (2016)

[23] But *see* William Baude, *Foreword: The Supreme Court's Shadow Docket,* 9 N.Y. J. of Law & Liberty 1 (discussing several instances of contemporary Justices noting dissent in orders and summary opinions from the Court's "shadow docket").

[24] For discussion of opinion delivery practices at various points during the Court's history, *see* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945,* 77 Wash U. L.Q. 137 (1999); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 Minn. L. Rev. 1267 (2001).

[25] *See, e.g.*, Pamela Corley et al., The Puzzle of Unanimity: Consensus on the United States Supreme Court (2013); Gregory A. Caldeira & Christopher J. W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 Am. J. Pol. Sci. 874 (1998); Marcus E. Hendershot et al., *Dissensual Decision Making: Revisiting the Demise of Consensual Norms within the U.S. Supreme Court*, 66 Pol. Res. Q. 467 (2012); Mark S. Hurwitz & Drew Noble Lanier, *I Respectfully Dissent: Consensus, Agendas, and Policymaking on the U.S. Supreme Court, 1888-1999,* 21 Rev. of Pol'y Res. 429 (2004); Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. Pol. 361 (1988).

[26] For discussion of silent acquiescence, *see* Greg Goelzhauser, *Silent Acquiescence on the Supreme Court*, 36 Just. Sys. J. 3 (2015) [hereinafter Goelzhauser, *Silent*]; Greg Goelzhauser, *Graveyard Dissents on the Burger Court*, 42 J. Sup. Ct. Hist. 188 (2015) [hereinafter Goelzhauser, *Graveyard*]. *See also* Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 Am. J. Pol. Sci. 362 (2001) (analyzing voting fluidity, much of which may have been acquiescence, on the Waite Court); Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 143-152 (discussing reluctance to dissent on the Marshall Court); Post, *The Supreme Court Opinion as Institutional Practice*, at 1344 (describing a "norm of acquiescence" on the Taft Court).

[27] *See, e.g.*, Eric C. Nystrom & David S. Tanenhaus, *The Future of Digital Legal History: No Magic, No Silver Bullets*, 56 Am. J. Legal Hist. 150 (2016).

[28] Noted concurrences are special concurrences by definition.

[29] In his class of "nonreasoned" opinions, Judge Posner includes noting disagreement as a "limiting case" but also includes opinions that consist of a "short paragraph that announces a conclusion but merely hints at the reasoning process behind it" and those "that adopt by reference the reasoning of the lower court." Posner, The Federal Courts, at 174. Our approach is more restrictive in part because of the subjectivity inherent in designing any ex ante classification rule that distinguishes between perfunctory and sufficiently well-reasoned separate opinions. Moreover, we are specifically interested in

the phenomenon of Justices offering no explanation for their disagreement with the majority position.

[30] *See, e.g., Katchen v. Landy*, 382 U.S. 323, 340 (1966) (Black and Douglas, J., dissenting) ("Mr. Justice Black and Mr. Justice Douglas dissent for the reasons stated in the dissenting opinion of Judge Phillips in the Court of Appeals."); *Ylst v. Nunnemaker*, 501 U.S. 797, 807 (1991) (Blackmun, J., dissenting) ("For the reasons stated in the dissent in *Coleman v. Thomson*, *ante*, p. 758, I also dissent in this case.")

[31] To clarify our coding rule, consider two hypothetical opinions: in case A at time 1, every Justice's vote and reasoning is accounted for through writing or joining a reasoned opinion; in a related case B at time 2, the majority opinion writer from case A points the reader to case A for a detailed explanation of the reasoning behind the disposition while a Justice who wrote in dissent in case A merely notes dissent in case B. Although it requires nominal additional effort, a reader of case B can readily find the reason(s) for the disagreement noted in case B. In *Lemke v. Homer Farmers Elevator Co.*, 258 U.S. 65, 66 (1922), for example, the Court's opinion notes that the question at issue "was considered and passed upon in No. 456, just decided" and "the reasons therein stated for the conclusion reached are controlling here, and need not be repeated." Although Justices Holmes, Brandeis, and Clarke merely note dissent in *Homer Farmers Elevator*, the companion case mentioned by the majority opinion includes a reasoned dissent by Justice Brandeis, joined by Holmes and Clarke, in addition to a full majority opinion. *Lemke v. Famers Grain Co.*, 258 U.S. 50, 61-65 (1922).

[32] Consider the same hypothetical cases introduced in footnote 31 except that the noter in case B also noted in case A. These notes are not independent. As a result, including notes from case B would overstate the occurrence of noted disagreement. In *United States v. Ferger (No. 2)*, 250 U.S. 207, 207-208 (1919), for example, the Court's opinion reports that the "case is disposed of by the ruling just announced in No. 776 . . . for the reasons stated" therein. While Justice Mahlon Pitney noted dissent in *Ferger*, he also noted dissent in the companion case referenced by the majority opinion. *United States v. Ferger*, 250 U.S. 199, 206 (1919) ("Mr. Justice Pitney dissents."). As a result, the reason for Justice Pitney's disagreement on the underlying substantive issue is unclear from either opinion.

[33] Albert P. Blaustein & Roy M. Mersky, The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States 90 (1978).

[34] *See, e.g.*, Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 158.

[35] *Id.*

[36] James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court,* 15 Pol. Analysis 324, 327 (2007).

[37] Harold J. Spaeth et al., 2014 Supreme Court Database, Version 2014 Release 01, http://supremecourtdatabase.org. After we completed this project, the Legacy Database of the Supreme Court Database was released, which includes each case decided by the Supreme Court throughout its history along with information regarding votes and opinion writing that may simplify the process of uncovering instances of noted disagreement. Harold J. Spaeth et al., 2016 Supreme Court Legacy Database, Version 2016 Release 01, http://supremecourtdatabase.org. Using the Legacy Database to uncover instances of noted disagreement may result in different findings due to different classification rules about what constitutes a case.

[38] Listed numbers are rounded to the nearest whole number. The standard deviation of the number of noted concurrences per year is four; the standard deviation of the number of noted dissents per year is seven.

[39] The standard deviation of the percentage of cases with a noted concurrence in a year was two percent; the standard deviation of the percentage of cases with a noted dissent in a year is five percent.

[40] The average yearly number of votes noting concurrence is three, with a standard deviation of four and a range from zero to twenty-six. The average yearly number of votes noting dissent is nine, with a standard deviation of thirteen and a range from zero to sixty-eight.

[41] *See, e.g.*, Goelzhauser, *Graveyard*, at 196-98 (discussing instances during the Burger Court when Justices referenced their solitary position as a reason to silently acquiesce); Donald Granberg & Brandon Bartels, *On Being a Lone Dissenter*, 35 J. Applied Social Pysch. 1849 (2005) (demonstrating empirically that unanimous opinions from 1953-2001 were overrepresented and solo-dissenter opinions underrepresented based on a rectangular distribution).

[42] Ginsburg, *Remarks on Writing Separately*, at 145 n. 68.

[43] Different Justices likely appear on these lists for different reasons. With respect to dissents, for example, it is well known that Justice Van Devanter struggled with producing written opinions, regularly having majority opinions reassigned. *See, e.g.*, Barry Cushman, *The Hughes Court Docket Books: The Early Terms, 1929-1933,* 40 J. Sup. Ct. Hist. 103 (2014). As Judge Posner once recognized, however, "Holmes and Cardozo regularly resorted to this manner of dissent even though they could have found the time to write a full-scale dissent."[43] Posner, The Federal Courts, at 175. These Justices are thought to have noted disagreement in relatively unimportant cases. *See,*

e.g., Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 Pepp. L. Rev. 919, 929 (2012) ("Brandeis often dissented without opinion, because he did not believe the matter to be worth the great effort he poured into his written dissents."). *See also* Melvin I. Urofsky, Louis D. Brandeis: A Life 579-81 (2009). For a related discussion of dissents that Brandeis wrote but ultimately chose not to publish, *see* Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis (1957).

[44] Posner, The Federal Courts: Challenge and Reform, at 175.

[45] 7 U.S. 503 (1806).

[46] *Id*. at 510.

[47] *See* Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 144.

[48] 7 U.S. at 513.

[49] Charles C. Turner et al., *Beginning to Write Separately: The Origins and Development of Concurring Judicial Opinions*, 35 J. Sup. Ct. Hist. 93, 97 (2010).

[50] David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chi. L. Rev. 995, 1001 (2000).

[51] *See* Scott Douglas Gerber, *Deconstructing William Cushing*, In Seriatim: The Supreme Court Before John Marshall 99-100 (Scott Douglas Gerber ed., 1998).

[52] *Renner v. Bank of Columbia*, 22 U.S. 581 (1924).

[53] *The Patapsco Insurance Co. v. Coulter*, 28 U.S. 222 (1830).

[54] *See* Garrow, *Mental Decrepitude on the U.S. Supreme Court*, at 1002-1003.

[55] Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. Chi. L. Rev. 481, 487 (1983).

[56] *See, e.g.*, Kelly V. Jackson, 31 U.S. 622, 633 (1832); *Crane v. The Lessee of Henry Gage Morris*, 31 U.S. 598, 621 (1832). The most famous instance of this mark occurred in *Worcester v. Georgia*, 31 U.S. 515, 596 (1832). ("The opinion of Mr. Justice Baldwin was not delivered to the reporter.") In *Worchester*, however, there is a summary of Justice Baldwin's position. *Id.* As a result, it is not a pure example of noting dissent. For more information on Baldwin's dissent in *Worcester*, including a reprinting of the missing opinion, *see* Lyndsay G. Robertson, *Justice Henry Baldwin's "Lost Opinion" in* Worcester v. Georgia, 24 J. Sup. Ct. Hist. 50 (1999).

[57] *See* G. Edward White, The Marshall Court and Cultural Change, 1815-1835 (1991).

[58] Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 159.

[59] *Id*.

[60] *Id*. at 166-170.

[61] *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003); *see also* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 Minn. L. Rev. 1710, 1721-1722 (2007).

[62] *See also* Melvin I. Urofsky, Dissent and the Supreme Court: Its Role In The Court's History and the Nation's Constitutional Dialogue (2014) 58, 64 (discussing notations of disagreement in the context of relatively unimportant constitutional cases).

[63] *Erwin v. Lowry*, 48 U.S 172 (1849).

[64] *Parker v. Kane*, 63 U.S. 1, 11 (1859).

[65] *Bosley v. Wyatt*, 55 U.S. 390 (1852).

[66] *Kock v. Emmerling*, 63 U.S. 69 (1859).

[67] 83 U.S. 130 (1873).

[68] *Id*. at 141 (Bradley, J., concurring).

[69] *Id.* at 142 (Field, C.J., dissenting).

[70] 83 U.S. 36 (1873). Justice Samuel Freeman Miller's opinion in *Bradwell* called the principles articulated in *Slaughter-House Cases* "conclusive for the present case." *Bradwell*, 83 U.S. at 139.

[71] *See* John Niven, Salmon P. Chase: A Biography, 444-48 (1995).

[72] *See* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U. L. Rev. 1 (1986).

[73] *The Benito Estenger*, 176 U.S. 568 (1900).

[74] *Toltec Ranch Co. v. Cook*, 191 U.S. 532 (1903).

[75] *Gulf, Colorado & Santa Fe Railway Co. v. Texas*, 246 U.S. 58, 59 (1918).

[76] *Estate of P.D. Beckwith v. Commissioner of Patents*, 252 U.S. 538, 539 (1920) (quoting the application for trademark registration).

[77] *See* Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 162-63.

[78] *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463, 504-505 (1908) (Moody, J., dissenting).

[79] *See, e.g.*, Urofsky, Dissent and the Supreme Court, at 62.

[80] *Perry v. Haines*, 191 U.S. 17 (1903).

[81] *In re Haines*, 52 A.D. 550, 551-52 (1900).

[82] 191 U.S. at 38 (Brewer, J., dissenting).

[83] 197 U.S. 544 (1905).

[84] Wilbur Larremore, *Stare Decisis and Contractual Rights*, 22 Harv. L. Rev. 182, 185 (1909).

[85] On the confusion that can be generated by these plurality opinions, particularly prior to the enunciation of the narrowest grounds doctrine, *see* Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 Am. Pol. Res. 30 (2009); Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 Const. Comment. 321 (2000); Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980).

[86] 197 U.S. at 571 (Holmes, J., dissenting).

[87] Of course, it would be more than seventy years before the Supreme Court clarified that the holding in a case governed by multiple opinions is delivered by the

opinion concurring on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977).

[88] 246 U.S. 343 (1918).

[89] *Id*. at 344.

[90] *Id*. at 347.

[91] On the consequences of mandatory jurisdiction for the Court's docket and performance during this era, *see* POST, *The Supreme Court Opinion as Institutional Practice*; EDWARD A. HARTNETT, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); STEPHEN C. HALPERN & KENNETH N. VINES, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 WESTERN POL. Q. 471 (1977).

[92] TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK, 83-84 (2006).

[93] G. EDWARD WHITE, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1505 (2006).

[94] *See, e.g*., *U.S. v. Klamath and Moadoc Tribes of Indians*, 304 U.S. 119, 126 (1938) (Black, J., concurring without opinion); *Lone Star Gas v. Texas*, 304 U.S. 224, 242 (1938) (Black, J., dissenting without opinion); *Denver Stockyard v. U.S.*, 304 U.S. 470, 485 (1938) (Black, J., concurring without opinion).

[95] 303 U.S. 525 (1938).

[96] *See* ALBERT LAWRENCE, *Biased Justice: James C. McReynolds of the Supreme Court of the United State*s, 30 J. SUP. CT. HIST. 244 (2005).

[97] 303 U.S. 493 (1938).

[98] 302 U.S. 319, 325 (1937).

[99] 310 U.S. 586 (1940).

[100] *Id*. at 600 (McReynolds, J., concurring without opinion). Although it is not clear why McReynolds concurred without opinion, his dislike of Frankfurter is well chronicled. *See, e.g*., LAWRENCE, *Biased Justice*, at 251-52.

[101] WALKER ET AL., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, at 379.

[102] ARTHUR SPRILING, *Bayesian Approaches for Limited Dependent Variable Change Point Problems*, 15 POL. ANALYSIS 387 (2007). But *see* BARRY CUSHMAN, *The Hughes Court Docket Books: The Late Terms, 1937-1940*, 55 AM. J. LEGAL HIST. 361 (discussing signals of increased dissensus prior to Stone's ascension); HENDERSHOT ET AL., *Dissensual Decision Making* (demonstrating the presence of multiple change points before and after 1941 when examining separate opinion writing at the Justice level rather than Court level).

[103] 323 U.S. 557 (1945).

[104] 323 U.S. 365 (1945).

[105] 325 U.S. 398 (1945).

[106] 325 U.S. 398, 410 (Murphy, J., dissenting).

[107] 100 U.S. 303 (1880). In *Strauder*, Justice Field filed a one-sentence perfunctory dissent pointing interested readers to another opinion released on the same day for explanation. 111 U.S. at 312 (Field, J., dissenting).

[108] 294 U.S. 587 (1935).

[109] 476 U.S. 79 (1986).

[110] 340 U.S. 268 (1951).

[111] R. GEORGE WRIGHT, *Does Free Speech Jurisprudence Rest on a Mistake: Implications of the Commensurability Debate*, 23 LOY. L.A. L. REV. 763, 764 (1990). On the broader dispute involving Black and Frankfurter over balancing interests in free speech cases, *see* LAURENT B. FRANTZ, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[112] 340 U.S. at 273 (1951) (Frankfurter, J., concurring). Frankfurter's concurring opinion begins: "The issues in these cases concern living law in some of its most delicate aspects. To smother differences of emphasis and nuance will not help its wise development." The cases Frankfurter refers to, argued on the same day as *Niemotko* and also involving free speech claims, include *Kunz v. New York*, 340 U.S. 290 (1951) and *Feiner v. New York*, 340 U.S. 315 (1951). Chief Justice Vinson wrote for the majority in each case—in favor of the free speech claimant in *Niemotko* and *Feiner*, and against the free speech claimant in *Kunz*. Black filed a written dissent in *Feiner*, but noted concurrence in *Kunz* in addition to *Niemotko*. Douglas also filed a written dissent in *Feiner* (joined by Minton), but silently joined the majority in *Niemotko* and *Kunz*. Jackson filed a written dissent in *Kunz*, but silently joined the majority in *Niemotko* and *Feiner*. Justice Frankfurter's concurrence in *Niemotko* covered all three cases separately. Given the circumstances, it is possible that the respective dissenters silently acquiesced while joining the majority in the other cases. Indeed, Chief Justice Vinson's brief and narrow majority opinions in each case may have been designed to allow Justices with differing views on first principles to join. If something like this occurred, Justice Frankfurter's criticism in *Niemotko* may have been directed at others in addition to Black.

[113] 337 U.S. 682 (1949).

[114] 337 U.S. at 705 (Jackson, J., concurring).

[115] 337 U.S. at 705-706 (Frankfurter, J., dissenting). Notwithstanding the opinions from Justices Jackson and Frankfurter suggesting that *Larson* was disposed of on narrow grounds, some commentators have suggested that *Larson*'s reasoning was broad. *See, e.g*., VICKI C. JACKSON, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 557 (2003) (suggesting that "[a] closely divided Court upheld the plea of sovereign immunity, in very broad reasoning.").

[116] *Id*. at 706.
[117] Corley et al., The Puzzle of Unanimity, at 87.
[118] *See* Beverly Blair Cook, *Justice Brennan and the Institutionalization of Dissent Assignment*, 79 Judicature 17, 19-20 (2005).
[119] *Id*. at 20.
[120] Corley et al., The Puzzle of Unanimity, at 87.
[121] *Id*. at 86.
[122] Goelzhauser, *Silent*.
[123] 426 U.S. 407, 410 (1976).
[124] 431 U.S. 638 (1977).
[125] 133 S. Ct. 710 (2013).
[126] *See* Kevin Russell, *Argument Preview: A Clean Water Act Question No One Cares to Debate*, SCOTUSBlog, December 3, 2012, http://www.scotusblog.com/2012/12/argument-preview-a-clean-water-act-question-no-one-cares-to-debate/.
[127] It is possible that Justice Alito disagreed with the Court's decision to hear oral arguments and dispose of the case on the merits despite agreement between the parties. One alternative, for example, would have been to summarily reverse the Ninth Circuit. *See* Kevin Russell, *Opinion Analysis: The Court Unanimously Agrees with Everyone Else*, SCOTUSBlog, January 10, 2013, http://www.scotusblog.com/2013/01/opinion-analysis-the-court-unanimously-agrees-with-everyone-else/ (questioning "why the Court bothered setting the case for briefing and argument, rather than just summarily reversing, given that all the parties have agreed on the answer to the question presented from the beginning."). Although not included in our sample period, Justice Alito later noted concurrence in a case finding that Nevada could not award greater damages to a citizen suing another state than it would allow a citizen to obtain against Nevada under the full faith and credit clause. *Franchise Tax Board of California v. Hyatt*, 132 S. Ct. 1277 (2016).
[128] 356 U.S. 390 (1958).
[129] Brennan, *In Defense of Dissents*, at 435.
[130] *Id*.
[131] Scalia, *The Dissenting Opinion*, at 33 (1994).
[132] *The Supreme Court's 2014 Term—The Statistics*, 129 Harv. L. Rev. 381, 389.
[133] Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 Wm. & Mary L. Rev. 1219, 1228 (2012).
[134] Ginsburg, *Remarks on Writing Separately*, at 142.