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## Concurring in Part & Concurring in the Confusion

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# CONCURRING IN PART & CONCURRING IN THE CONFUSION

Sonja R. West\*

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*I regret that I cannot concur but shall not dissent.*

—Justice Sanford<sup>1</sup>

When a federal appellate court decided last year that two reporters must either reveal their confidential sources to a grand jury or face jail time, the court did not hesitate in relying on the majority opinion in the Supreme Court's sole comment on the reporter's privilege—*Branzburg v. Hayes*.<sup>2</sup> "The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter," Judge Sentelle wrote for the three-judge panel of the Circuit Court of Appeals for the District of Columbia.<sup>3</sup>

By this declaration, the court dismissed with a wave of its judicial hand the arguments made by the reporters and media amici that the court should follow the more lenient concurring opinion of the fifth justice in *Branzburg*, Justice Powell, rather than the restrictive opinion of the Court authored by Justice White. The reporters had contended that while Justice White's opinion rejected any constitutional privilege in this situation, Justice Powell's concurrence advocated a case-by-case balancing approach and thus left an opening for a constitutionally based privilege. Because it provided the crucial fifth vote in the case and was the "least common denominator" between the views of the majority and the dissenters, Justice Powell's opinion should control, the reporters had submitted.<sup>4</sup>

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1. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1342–43 (2001) (providing Sanford's quote).

2. 408 U.S. 665 (1972).

3. *In re Grand Jury Subpoena*, Miller, 397 F.3d 964, 970 (D.C. Cir. 2005).

4. *Id.* at 971.

The reporters' argument was certainly not a new one; numerous courts and commentators had interpreted *Branzburg* in the same manner. The Third, Fourth, Fifth, and Ninth Circuit Courts of Appeals all have pronounced Justice White's opinion to be a mere "plurality."<sup>5</sup> And Justice Stewart, the chief dissenter in *Branzburg*, later declared that the case was decided by "a vote of four and a half to four and a half."<sup>6</sup> Some courts and commentators, moreover, have concluded that *Branzburg* was a five to four victory *for the press*, with Justice Powell's concurrence plus the four dissenters actually *creating* a qualified reporter's privilege—the exact holding Justice White's opinion rejected.<sup>7</sup> As Professor Rodney Smolla surmised, "[t]he important point of the story [was] that a short concurring opinion by a Justice who actually joined the opinion of the Court in *Branzburg* in effect superseded the majority opinion and became the prevailing law of the land."<sup>8</sup>

The D.C. Circuit, however, would have none of it. Writing with an air of perplexity in response to the reporters' argument, the panel easily dismissed Justice Powell's concurrence as mere surplusage:

Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants. . . . In any event, *whatever Justice Powell specifically intended, he joined the majority.*<sup>9</sup>

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5. See *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983, 990 n.2 (3d Cir. 1985) (referring to *Branzburg* opinion as a "plurality"); *United States v. Model Magazine Distribs., Inc. (In re Grand Jury 87-3 Subpoena Duces Tecum)*, 955 F.2d 229, 234 (4th Cir. 1992) (same); *United States v. Smith*, 135 F.3d 963, 968–69 (5th Cir. 1998) (same); *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) (stating that Justice White "wrote for four justices" and referring to opinion as a "plurality").

6. Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 635 (1975).

7. See, e.g., *Ashcroft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (finding that *Branzburg* recognized some form of a qualified First Amendment reporter's privilege); *Shoen v. Shoen*, 5 F.3d 1289, 1292 & n.5 (9th Cir. 1993) (interpreting *Branzburg* "as establishing such a qualified privilege for journalists"); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (interpreting *Branzburg* as recognizing "a qualified privilege"); *In re Grand Jury Proceedings, Ridenhour*, 520 So. 2d 372, 374–75 (La. 1988) (finding that "[t]he vast majority of courts . . . have proceeded to adopt the dissent's qualified privilege"); 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5426, at 745–47 (1980) ("So complete was the denigration of White's opinion that five years after it was written, a federal court could say that the existence of the First Amendment 'privilege is no longer in doubt.'") (footnote omitted). Judge Posner also has pondered the confusion:

Since the [four] dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion . . . maybe his opinion should be taken to state the view of the majority of the Justices—though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion.

*McKevitt v. Pallasch*, 339 F.3d 530, 531–32 (7th Cir. 2003).

8. Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1115–16 (2002).

9. *In re Grand Jury Subpoena, Miller*, 397 F.3d 964, 971–72 (D.C. Cir. 2005) (emphasis added); see also *In re Grand Jury Proceedings, Scarce*, 5 F.3d 397, 400 (9th Cir. 1993) (noting that Justice White's opinion "is not a plurality opinion"); *Storer Commc'ns, Inc. v. Giovan (In re Grand*

Scanning the D.C. Circuit's decision on my way to teach *Branzburg* to my Media Law Seminar, I was surprised by the panel's surety that White's opinion should be treated as a true majority. What exactly made the D.C. Circuit so confident of Justice Powell's acquiescence in Justice White's reasoning, particularly when Powell's separate writing seemed to contradict it? If White's opinion were treated as a plurality, then Powell's concurrence would be the law. So why such faith that the White opinion governs?

### I. THE CONCURRING CONFUSION

It appears that the answer, remarkably, must lie with a solitary but crucial word in Justice Powell's concurrence. It is the fourth word of the opinion, the one that follows the comma after the Justice's name: "Mr. Justice Powell, *concurring*."<sup>10</sup> If the comma had been followed by one of the other phrases in the justices' handbag, such as "concurring in part," "concurring in the judgment," "concurring in the result," or some combination thereof, then the panel would have viewed *Branzburg* quite differently. Had Justice Powell concurred *in part*, for example, then the D.C. Circuit would have admitted that at least some of Justice White's analysis did not have the support of five votes. Presumably, it would have turned to Justice Powell's concurrence for further insight.

The Supreme Court itself, moreover, has told us what to do in such a situation, explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"<sup>11</sup> This "narrowest grounds" analysis is the exact approach the reporters were advocating to the D.C. Circuit. But, unfortunately for the reporters, Justice Powell did not select the phrase "concurring in part" to follow the comma after his name, and he did not pick "concurring in the judgment" either; instead he used the simple word "concurring." And therefore, as far as the D.C. Circuit was concerned, everything he wrote after that word added nothing more than "emphasis"—even when it is obvious to many that Justice Powell did not wholly accept Justice White's approach.<sup>12</sup>

This counterintuitive outcome leads me to question whether these laconic "after the comma" phrases deserve such power—the power to override even the more detailed analysis that follows in the body of the opinion.

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Jury Proceedings), 810 F.2d 580, 585 (6th Cir. 1987) (concluding that Justice White wrote for the majority and that Justice Powell's concurring opinion "neither limits nor expands upon its holding").

10. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (emphasis added).

11. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Stewart, J., plurality opinion)).

12. In all fairness to Judge Sentelle and the D.C. Circuit, the court did go on to state that even if Justice Powell's opinion allowed for the possibility of a reporter's privilege in some situations, it did not allow for this privilege in the case of a reporter subpoenaed before a grand jury, which was the situation in the case before it. This decision is likely not a controversial reading of *Branzburg*. For my purposes, however, I am simply interested in the logic the court used to dismiss Justice Powell's concurrence at the forefront of its analysis.

Should it be that by not concurring “in part,” Justice Powell thereby relegated all the other words in his opinion to nothing more than judicial residue? I believe the answer to this question is no.

When it is self-evident that the rationale of the primary opinion does not hold the support of five justices, it should not be treated as a majority, no matter how many justices allegedly concurred. Three primary reasons support this conclusion. First, logic dictates that courts should not look the other way and blindly follow a false majority. Second, the justices do not use these “after the comma” phrases in a uniform or consistent enough manner to merit such authority. Finally, the Supreme Court’s history of *seriatim* opinion writing supports the conclusion that the justices’ separate writings are meant to be dissected and interpreted on an individual basis. In sum, I disagree with the D.C. Circuit’s view that we must damn to legal oblivion “whatever Justice Powell specifically intended” simply because he made the choice to “concur” in the majority opinion. Instead, these “after the comma” phrases should be seen as mere guidelines to the justices’ positions but should not be determinative when they conflict with the text of the opinion. Concurring in name should not trump dissenting in substance.

## II. THE CONFUSION CONTINUES

As the *Branzburg* case demonstrates, courts and commentators are confused about the proper interpretation and use of pseudo-concurrences. Another apt example from the area of media law is found in the 2001 Supreme Court case of *Bartnicki v. Vopper*.<sup>13</sup> In that case, six members of the Court held that the First Amendment protected the media defendant’s broadcast of cellular telephone conversations that had been illegally intercepted and taped by a third party. Justice Stevens authored the opinion of the Court, and Justices O’Connor and Breyer provided the fifth and sixth votes necessary to form a majority. Under the D.C. Circuit’s analysis, the story should end here—the Court had spoken. Yet Justice Breyer filed a separate concurring opinion in which Justice O’Connor joined. The concurring opinion begins promisingly enough, as Justice Breyer declares, “I join the Court’s opinion.”<sup>14</sup> It is in the second sentence where things become fuzzy: “I agree with its narrow holding limited to the special circumstances present here. . . . I write separately to explain why, in my view, the Court’s holding does not imply a significantly broader constitutional immunity for the media.”<sup>15</sup>

If accepted as controlling, the text of the Breyer concurrence in *Bartnicki* would severely limit the holdings of the “majority” Stevens opinion. As Professor Smolla observed, “[t]he pivotal concurring opinion of Justice Breyer was in many respects more in philosophical tune with Chief Justice

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13. 532 U.S. 514 (2001).

14. *Id.* at 535 (Breyer, J., concurring).

15. *Id.* at 535–36.

Rehnquist's dissent than with the opinion of Justice Stevens."<sup>16</sup> Therefore, Professor Smolla concluded that "Justice Stevens's opinion is more aptly described as a four-Justice plurality decision, a decision that is quite sharply and dramatically constrained by the limiting language in the Breyer and O'Connor concurrence."<sup>17</sup>

Not surprisingly, there is disagreement about how to interpret Breyer's "concurring" opinion. One student commentator, for example, adamantly disagreed with Professor Smolla's analysis, insisting "*Bartnicki* was not a plurality decision." In support, he pointed to three elements: the *concurring* label, Justice Breyer's opening sentence, and the line-up of justices joining the majority listed in the syllabus.<sup>18</sup> And still other observers are left simply confused. Another student commentator noted that "[i]t is unknown whether [future courts] will apply the test applied by the majority in *Bartnicki* or . . . [the] standard promulgated by Justice Breyer in his concurring opinion."<sup>19</sup> Unfortunately, the Court itself gives us little insight as to which approach is correct.

### III. ANALYZING THE CONFUSION

In an attempt to discern the proper weight of "after the comma" phrases, let us begin with the—hopefully not controversial—statement that the principal job of the Supreme Court is to decide cases by making judgments. Coming in a strong second is the duty to issue opinions, which "are simply explanations of those judgments or those votes on judgments."<sup>20</sup> While there is general confidence in the number of justices who support a result, problems arise when trying to determine the number who back a particular rationale. Many court-watchers might be surprised to notice that opinions of the Court do not include a "joined by" lineup like those found at the beginning of a concurring or dissenting opinion. Rather, public silence by a justice is considered agreement.<sup>21</sup> The flip side is also true—disagreement requires action, and the official practice is that if a justice differs from the

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16. 2 RODNEY A. SMOLLA, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 25:45.50 (2004).

17. Smolla, *supra* note 8, at 1114; see also James M. Hilmert, *The Supreme Court Takes on the First Amendment Privacy Conflict and Stumbles: Bartnicki v. Vopper, the Wiretapping Act, and the Notion of Unlawfully Obtained Information*, 77 IND. L.J. 639, 651–55 (2002) (referring to the Stevens opinion as a "plurality" and declaring that the limited Breyer concurrence "prevails as the law of the case").

18. Daniel P. Paradis, Comment, *Bartnicki v. Vopper: Cell Phones and Throwing Stones*, 37 NEW ENG. L. REV. 1117, 1147 n.243 (2003).

19. Jennifer Nichole Hunt, Note, *Bartnicki v. Vopper: Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence?*, 30 PEPP. L. REV. 367, 395 (2003).

20. Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 661 (2002). *But see* Linda Greenhouse, *Between Certainty & Doubt: States of Mind on the Supreme Court Today*, 6 GREEN BAG 2D 241 (2003) (discussing the doctrinal debate between judicial "minimalists," who decide cases, and judicial "maximalists," who lay down legal rules).

21. Although the current practice is for justices to send non-public "join" letters to the author of an opinion of the Court, the justices make no public statement of agreement.

reasoning of the primary opinion, he or she must file or openly join a separate opinion. The reader is left to sort out the fragments.

This system works relatively well with dissenting opinions. A dissent tends to be a clear signal that this is one justice who is not on board with whatever scheme his or her brethren are concocting. Things become murky, however, when a justice concurs at least to some degree with the opinion of the Court and chooses to write separately. In a system in which silence equals agreement, a justice's mere act of writing separately signals to the reader that closer inspection is needed to fully understand the justice's position. Assuming that a separate writing indicates some amount of divergence from the majority opinion, whether greatly in substance or minimally in emphasis, the reader must then search for further clues to determine the extent of the justice's departure. Obviously a first step is the phrase following the comma after the justice's name: "concurring," "concurring in part," "concurring in the judgment," "concurring in the result," or some medley of the above. But is that the only meaningful indicator?

The student commentator I mentioned above also relied on the syllabus as evidence that Justices Breyer and O'Connor were fully concurring in the majority opinion in *Bartnicki*. Yet the practice of cataloging in the syllabus which justices have fully joined the opinion of the Court began only recently in the 1970s. In *Bartnicki* there was such a list, but in more cases—such as in *Branzburg*—even the Reporter of Decisions had no comment. Of course, each Supreme Court decision reminds the audience that the syllabus "constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader."<sup>22</sup> The point of this disclaimer is that the reader should discern the position of the justice based on the text of the opinion, not on the summaries. The question remains, therefore, whether the "after the comma" phrases should play a heightened precedential role or, like the syllabus, they should be seen as mere guidelines offered for the convenience of the reader that should not override the official analysis that follows.

One important difference between the syllabus and the "after the comma" phrases is that the phrases are added by the justice's chambers as part of the drafting process and not by the Reporter of Decisions. A very informal conversation<sup>23</sup> with former Supreme Court law clerks revealed that in most chambers the phrase is selected by the justice preparing the first draft or, as often, by the hapless law clerk to whom the task was assigned.<sup>24</sup>

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22. See, e.g., *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1754 n.\* (2001) (citing *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906)).

23. The informal conversation involved my emailing or talking in person with a handful of clerks with whom I am acquainted from a variety of terms and chambers.

24. See B. Rudolph Delson, Note, *Typography in the U.S. Reports and Supreme Court Voting Protocols*, 76 N.Y.U. L. REV. 1203, 1209 n.34 (2001) ("Even if clerks were not composing opinions in their entirety, they might have been instrumental in determining how opinions were formatted."); see also *Conroy v. Aniskoff*, 507 U.S. 511, 527 (1993) (Scalia, J., concurring in the judgment) ("I confess that I have not personally investigated the entire legislative history—or even that portion of

While some clerks recalled an occasional discussion about the proper terminology, many did not. Could it be that the fate of the reporter's privilege could have taken a different turn had a law clerk thought to say, "Justice Powell, do you think you should add *in part* after the word *concurring*?"

While blaming the clerks and writing off "after the comma" phrases as slapdash add-ons might be a simple way to resolve this question in some cases, it is ultimately unsatisfactory. Contrary to Oliver Wendell Holmes's declaration that judges "are apt to be naif, simple-minded men,"<sup>25</sup> it seems more plausible that Justice Powell purposefully chose to put *concurring* after the comma in lieu of another phrase. Commentators of political science research on judicial decisionmaking and strategy have observed that "there is clearly a norm in favor of reaching a majority opinion."<sup>26</sup> In *Turner Broadcasting System, Inc. v. FCC*, for example, Justice Stevens in his opinion "concurring in part and concurring in the judgment" stated plainly that he was voting the opposite of his inclinations because "no disposition of this appeal would command the support of a majority of the Court."<sup>27</sup> Some justices view plurality opinions as a failure on the part of the Court to fulfill its duty to decide cases.<sup>28</sup> As Professor Thomas Baker observed, the justices have "not infrequently sublimated their judicial egos, suppressed their individual voices, [and] voted against themselves . . . in particular cases, out of respect for the Court as an institution."<sup>29</sup>

The desire for the Court to have a majority opinion, at least in name if not in reasoning, would likely have resonated with no one more so than Justice Powell, nicknamed "the majority maker."<sup>30</sup> If unity were Justice

it which relates to the four statutes listed above. The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task.").

25. OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295 (1920).

26. Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 549 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) and citing Saul Brenner & Robert H. Dorff, *The Attitudinal Model and Fluidity Voting on the United States Supreme Court: A Theoretical Perspective*, 4 J. THEORETICAL POL. 195, 198–200 (1992) (reporting that justices shift from the minority to the majority in order to create a greater Court consensus)).

27. 512 U.S. 622, 669, 674 (1994) (Stevens, J., concurring in part and concurring in the judgment).

28. See, e.g., *Nichols v. United States*, 511 U.S. 738, 746 (1994) (suggesting that when the Court is "splintered," there is "a reason for reexamining that decision"); BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 58 (1979) (stating that Chief Justice Burger believed that "concurrents detracted from the main opinion and were, in some cases, almost an insult to the author assigned for the majority"); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 52–53 (1993) (declaring it the "norm for judges to sacrifice details of their convictions in the service of producing an outcome and opinion attributable to the court").

29. Thomas E. Baker, *Why We Call the Supreme Court "Supreme,"* 4 GREEN BAG 2D 129, 136 (2001).

30. *Former Supreme Court Justice Powell Dead At 90*, CNN.COM, Aug. 25, 1998, <http://www.cnn.com/ALLPOLITICS/1998/08/25/obit.powell/>; see also Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1855–86 (1995) (book review) (stating that Justice Powell's "perception of himself as a centrist led him to believe that the law must be what he thought it was" and describing his opinions as a "mosaic of accommodation,



Powell's main motivation in choosing to concur outright, however, it is uncertain whether he did so knowing the risk that it would devalue his separate writing or believing his choice would *increase* the importance of his concurrence by positioning it to shape future interpretations of the opinion of the Court. Either way, it is unpersuasive to argue that this type of gamesmanship and tactical maneuvering should override the actual legal analysis of a justice when it is made available to us via a separate opinion.

All of these questions must be examined, moreover, in the context of the uses of these phrases over time from case to case, justice to justice, and Court to Court. Even a cursory review of Supreme Court jurisprudence shows that there is little consistency. For example, both Justice Powell and Justice Breyer have shown they can and will concur "in part" or "in the judgment" in other cases in which their disagreement with the majority seems no more pronounced than in *Branzburg* and *Bartnicki*.<sup>31</sup> It is further not clear whether urging the justices to be more thoughtful with their "after the comma" phrasing would lead to any greater clarity. How much is the law aided by knowing that Justice Blackmun was "concurring in part, concurring in the judgment in part, and dissenting in part" in his separate opinion in *Planned Parenthood v. Casey*?<sup>32</sup> What could this type of über-detailed description mean other than simply, "Read the opinion to see what I think"?

#### IV. THE COURT'S HISTORY CLEARS THE CONFUSION

This examination of these "after the comma" phrases thus far has revealed that they are used in an inconsistent, unclear, and often contradictory manner. This leaves little to instill confidence that these phrases should take prominence over the text of the separate writing when there is a conflict. Some might argue, therefore, that the inquiry should end here with the conclusion that judicial precedent includes at its core nothing more than judgments, and to the extent opinion-writing goes beyond the judgment, it is, in actuality, simply dicta. I do not believe it is necessary to be quite so dismissive of the explanations of judgments found in Court opinions. Rather, I believe the answer lies with a look at the history of opinion-writing by the Court.

Originally, the Supreme Court issued opinions through anonymously written per curiam opinions or by the justices writing seriatim (separately)

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highly differentiated and strongly variegated but of a generally conservative hue" (quoting JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 403 (1994)).

31. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 127 (2001) (Breyer, J., concurring in part) ("I agree with the Court's conclusion and join its opinion to the extent that they are consistent with the following three observations."); *Milliken v. Bradley*, 433 U.S. 267, 291 (1977) (Powell, J., concurring in the judgment) ("I write to emphasize [this case's] uniqueness, and the consequent limited precedential effect of much of the Court's opinion.").

32. 505 U.S. 833, 922 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) see also, e.g., *Pennsylvania v. Muniz*, 496 U.S. 582, 606 (1990) (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

in every case.<sup>33</sup> It was Chief Justice Marshall who first began the tradition of having one justice author an opinion of the Court.<sup>34</sup> The practice was not universally embraced. Denouncing this new approach to opinion writing, Thomas Jefferson declared it “convenient for the lazy, the modest, & the incompetent.”<sup>35</sup> Jefferson, instead, called for a return to the seriatim style of opinion delivery, arguing that only separate writings give “our citizens one and all, that confidence in their judges which must be so desirable to the judges themselves, and so important to the cement of the union.”<sup>36</sup>

The first concurrence to an opinion of the Court was in the Marshall-era case of *Sims v. Irvine*.<sup>37</sup> Even though Chief Justice Ellsworth had delivered the opinion of the Court, Justice Iredell wrote separately, explaining, “[t]hough I concur with the other judges of the court in affirming the judgment of the circuit court, yet as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly.”<sup>38</sup> Some members of the Court later concluded that separate opinions were essential to the workings of the Court and it was their duty to explain their individual reasoning “on all subjects of general interest; particularly constitutional questions.”<sup>39</sup>

While Chief Justice Marshall’s tradition of opinions of the Court authored by individual justices remains, the current practice of separate writings clearly emanates from our seriatim past. English courts still follow this approach, in which “[e]ach judge delivers an opinion separately, sometimes extempore, so that one can determine the views of the court only by adding up these individual statements.”<sup>40</sup> The value and desirability of separate writings endure because they tend to be more intellectually honest and give the public confidence in the exact analysis of the individual justices.<sup>41</sup> Separate writings by the justices also serve “an important and legitimate role in distinguishing between strong and weak precedents.”<sup>42</sup> In other words, tradition demanded separate, individual analysis of each case by our jurists. So in cases in which the newer “opinion of the Court” system clearly fails,

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33. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 140 (1999).

34. *Id.* at 143.

35. *Id.* at 145.

36. *Id.* at 146.

37. 3 U.S. (3 Dall.) 424 (1799); Kelsch, *supra* note 33, at 142.

38. 3 U.S. (3 Dall.) at 457.

39. Letter from William Johnson to Thomas Jefferson (Apr. 11, 1823), *quoted in* Kelsh, *supra* note 33, at 149.

40. John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 489 (2001).

41. It is even said, moreover, that Congress today maintains the power to require the justices to file seriatim opinions in all cases. Ralph A. Rossum, *Congress, The Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 426 n.200 (1983).

42. Kelsch, *supra* note 33, at 171.

as in *Branzburg*, it makes sense to revert to a justice-by-justice approach in determining what the law is.

To be clear, I do not argue that lower courts cannot rely on an opinion of the Court in which five or more justices wholly concur. Similarly, there is no question that whether a justice concurs or dissents is a reliable indicator of his or her vote on the outcome of the particular case before the Court. It is only in the cases in which a necessary member of the “majority” writes an opinion that in substance diverges from the reasoning of the Court that I contend we must view it as what it truly is—a return to our seriatim roots. We should, in these instances, engage in the more difficult and time-consuming practice of opinion-by-opinion analysis and face the vague, unpredictable consequences that flow from it. This, I believe, is the messy beauty of the law. And in this conclusion I hope others will concur—well, at least in part anyway.