

CIRCUMSTANCE AND STRATEGY: JOINTLY AUTHORED SUPREME COURT OPINIONS

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I. INTRODUCTION

The common wisdom is that Supreme Court opinions come in four varieties: majority, concurring, dissenting, and per curiam. This tidy taxonomy omits, however, a rare but fascinating variant. In a period of little more than 60 years the Court produced a handful of joint opinions, those written not by a single Justice or an anonymous Court but by a collaborative effort of named authors. These opinions have been signed by as few as two or as many as nine Justices. They have come in the form of a brief statement or an opinion of extraordinary length. Some have occurred in landmark cases, and most are routinely cited as the product of joint authorship.¹ But to date there has been no effort to examine these cases as a group with an eye to determining why in some instances Justices have chosen not to write individually and invite the

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¹ The Westlaw introduction to *Mitchell v. Oregon*, for example, describes an opinion as authored by Justice Brennan: “Mr. Justice Brennan filed opinion dissenting from same judgment and concurring in other judgments, in which Mr. Justice White and Mr. Justice Marshall joined.” In contrast, the text of U.S. Reports, reproduced by Westlaw, presents that opinion as a joint product: “Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall dissent from the judgments insofar as they declare § 302 unconstitutional as applied to state and local elections, and concur in the judgments in all other respects, for the following reasons.” *Oregon v. Mitchell*, 400 U.S. 112, 229 (1970) (emphasis omitted).

endorsement of their colleagues, but instead to become members of a coalition that shares both the work and the credit for its joint opinion.

This Article examines seven joint opinions written between 1942 and 2003. These opinions deal with many of the most controversial issues to come before the Court, including the rights of religious minorities, desegregation, affirmative action, abortion, the death penalty, voting rights, and campaign finance. In each case, matters of circumstance and strategy led some Justices to find innovative ways of advancing their positions, even at the cost of surrendering individual judicial identity. Viewed together, these opinions reveal the joint opinion as an infrequently used but potentially powerful judicial instrument capable of shaping doctrine in ways that have altered and even transformed the law.

II. THE JOINT OPINIONS

A. *Jones v. City of Opelika: Identity and Authorship*

The one-paragraph statement by Justices Black, Douglas, and Murphy in *Jones v. City of Opelika*² is not the first product of joint authorship, but it is arguably the first to make a dramatically strategic use of the form. The complicated story of *Jones* begins in 1940 with the Court's resolution of its first major flag salute case, *Minersville School District v. Gobitis*,³ where the Court rejected the claim of Jehovah's Witness school children that the school district's compulsory practice violated their First Amendment free exercise rights because their religion prohibited them from worshipping graven images.⁴ Chief Justice Charles Evans Hughes assigned the opinion to Justice Felix Frankfurter,⁵ an Austrian immigrant and fierce patriot who credited his assimilation into American life to his public school teacher for her practice of giving "gentle uppercuts" to any of his classmates who spoke German with him and thus interfered with his mastery of English.⁶ Although both Frankfurter and Justice Owen Roberts had urged the Chief Justice to write the opinion himself, Hughes demurred, "saying that he had made [the assignment] because of Frankfurter's moving statement at conference on the role of the public school in instilling love of country in our pluralist society."⁷

² *Jones v. City of Opelika*, 316 U.S. 584 (1942).

³ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940). The Court had earlier addressed flag salute claims three times, though only in brief per curiam opinions finding no substantial federal question. Irving Dilliard, *The Flag-Salute Cases*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 226 (John A. Garraty ed., 1964). Frankfurter cited those opinions, observing that the lower court decisions conflicted with them. *Gobitis*, 310 U.S. at 592 n.2.

⁴ For a detailed account of the case and its context, see DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* (1962).

⁵ *Gobitis*, 310 U.S. at 591.

⁶ FELIX FRANKFURTER, *FELIX FRANKFURTER REMINISCES* 4–5 (1960); *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 133, 364 (Kermit L. Hall, James W. Ely, Jr. & Joel B. Grossman eds., 2d ed. 2005).

⁷ Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 41 (1967). At conference, Hughes, who told his brethren that "I come up to this case like a skittish horse to a brass band," nonetheless articulated a position very much like Frankfurter's eventual opinion: "As I see it, the state can insist on inculcation of loyalty. It would be extraordi-

Writing for an eight-to-one majority to uphold the requirement, Frankfurter found the government's interest in inculcating a sense of national unity in school children sufficient to defeat their free exercise claim.⁸ A celebrated civil libertarian as a Harvard Law School professor and activist, Frankfurter, then in his second term on the Court, might have been expected to offer a strong dissent rather than to speak for the majority. He clearly saw both sides of the case, identifying the issue as the need "to reconcile two rights," the government's interest in developing national security through national unity and the free exercise rights of religious minorities.⁹ There were, however, two factors that determined the outcome for Frankfurter: his view of national unity as "an interest inferior to none in the hierarchy of legal values" and the need for judicial deference to legislative authority.¹⁰ Frankfurter's discomfort with the role he assumed in *Gobitis* emerges in a letter he wrote to Justice Harlan Stone, the sole dissenter,¹¹ seven days before the case came down. After somewhat grandly defending his opinion at length as "a lodestar for due regard between legislative and judicial powers,"¹² he ended with a request more appropriately directed to a member of the majority: "In any event, I hope you will be good enough to give me the benefit of what you think should be omitted or added to the opinion."¹³

Although Frankfurter was widely expected to read his opinion from the bench, he did not¹⁴—perhaps another indication of discomfort with his role in the case. That left the stage to Stone, who read his dissent aloud with emotional force.¹⁵ For Stone, the balance between legislative power and minority rights on the facts of this case clearly favored the *Gobitis* children. "History teaches us," Stone found, "that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and public good, and few which have not been directed, as they are now, at politically helpless minorities."¹⁶ Moreover, "[t]he very terms of the Bill of Rights" prevented the legislature from finding that an interest in national unity could outweigh religious liberty.¹⁷ Stone, the author of the celebrated *Carolene Products* footnote calling for "a searching judicial inquiry . . . where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities," found the notion that the courts had no role to play "no more than

nary if in this country the state could not provide for respect for the flag of our land." THE SUPREME COURT IN CONFERENCE (1940–1985) 430 (Del Dickson ed., 2001).

⁸ *Gobitis*, 310 U.S. at 597–600.

⁹ *Id.* at 594–95.

¹⁰ *Id.* at 595, 600.

¹¹ *See id.* at 601.

¹² ALPHEUS THOMAS MASON, SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 220 app. (1955).

¹³ *Id.*

¹⁴ MELVIN I. UROFSKY, THE SUPREME COURT JUSTICES 431 (1994).

¹⁵ Dilliard, *supra* note 3, at 233.

¹⁶ *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting).

¹⁷ *Id.* at 605.

the surrender of the constitutional protection of small minorities to the popular will.”¹⁸

The aftermath of the decision, coming as Germany’s military forces were sweeping across Europe and British troops were being evacuated from Dunkirk, was a sustained nationwide outbreak of violence directed at Jehovah’s Witnesses, sometimes with the participation of law enforcement officers, that included beatings, shootings, a tar and feathering, and even a castration,¹⁹ together with a strongly hostile response to *Gobitis* from the press and the law reviews.²⁰ Although President Roosevelt, hosting the Frankfurters at Hyde Park, expressed his support for the majority opinion, Eleanor Roosevelt found its treatment of school children disturbing.²¹

For their part, the liberal Justices who joined the Frankfurter opinion—Frank Murphy, Hugo Black, and William O. Douglas—almost immediately experienced buyer’s remorse, and scholars have worked to untangle the various explanations offered to justify their uncharacteristic votes. According to Sidney Fine, Murphy’s biographer, the Justice’s remorse was particularly keen.²² Although he never circulated it, Murphy was the only one of the liberal Justices to try his hand at a dissent.²³ His draft argued that “in the realm of attitude and opinion, . . . the individual is permitted wide freedom” and found an intrusion on that freedom since the school board’s regulation demanded “an attitude of mind and a public avowal thereof.”²⁴ Murphy also made explicit the link between *Gobitis* and the international situation:

Especially at this time when the freedom of the individual conscience is being placed in jeopardy [*sic*] by world shaking events, it is of vital importance that freedom of conscience and opinion be protected against ill considered regulations that have no practical efficacy and bear no necessary or substantial relation to the maintainance [*sic*] of order and safety of our institutions.²⁵

¹⁸ *Id.* at 606.

¹⁹ MANWARING, *supra* note 4, at 164–67. For another account of these attacks, including an assault on an attorney prepared to represent Witnesses, see Dilliard, *supra* note 3, at 235. For a comprehensive account of the background to *Gobitis* and *West Virginia v. Barnette*, see Vincent Blasi & Seana V. Shiffirin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 433 (Michael C. Dorf, ed., 2004).

²⁰ According to Dilliard, “More than 170 leading newspapers condemned the decision while only a few supported it.” Dilliard, *supra* note 3, at 235. Further, the “almost uniformly adverse judgment of the law reviews and journals” was negative. *Id.* at 236.

²¹ JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 113 (1989) [hereinafter SIMON, *THE ANTAGONISTS*].

²² SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS 185* (1984) [hereinafter FINE, *FRANK MURPHY*].

²³ *Id.* The handwritten draft found that “the acts of the individual are subject to the will of the group” except, as here, “in the realm of attitude and opinion.” Furthermore, any such regulation, if necessitated by circumstances, would be “beyond the sphere allocated to [the school board] by law, that of education.” Frank Murphy Papers, Bentley Historical Library, University of Michigan.

²⁴ FINE, *FRANK MURPHY*, *supra* note 22, at 185.

²⁵ *Id.*

Fine speculates that Hughes, a commanding figure on the Court, may have discouraged Murphy from pursuing his dissent.²⁶ A highly dramatic version of that explanation, offered several years later in a journalist's book about the Court, has Murphy "rush[ing] in to see" Hughes about changing his vote as the Justices were preparing to take the bench to announce the *Gobitis* decision: "Murphy pleaded with the bearded chief, but was dissuaded. The curtains parted for high noon."²⁷ Although that scenario seems highly unlikely, Murphy apparently remained unhappy about his position, "tortured by that vote when he cast it"²⁸ and regretful thereafter.

For Black and Douglas, the change of mind came a bit later but with similar conviction. Melvin Urofsky notes that "Black did not like the law, but he saw nothing in the Constitution to invalidate the measure."²⁹ Roger Newman, Black's biographer, calls his subject's explanation—that "the rush of work at the term's close prevented the justices' looking at [Stone's] dissent until after the opinion came down"—simply "lame."³⁰ Black's own version, provided in a 1967 interview, supports Newman's conclusion on a different basis by suggesting that the liberals read the dissent but failed to act.³¹ Black claimed that as soon as the liberals saw the dissent "we knew we were wrong, but we didn't have time to change our opinions. We met around the swimming pool at Murphy's hotel and decided to do so as soon as we could."³² That account is supported by Stone's law clerk, Allison Dunham, whose version of the episode indicates that Stone originally intended simply to note his dissent without drafting an opinion. According to Dunham, "Partly out of urging on my part and partly because he felt rather strongly, he finally decided to write his dissent"³³

²⁶ According to Fine, "What seems to have occurred is that an indecisive freshman justice who had served on the Court only a few months discussed his proposed dissent with the chief justice, who persuaded him to go along with the Court." *Id.* at 186. Douglas supports this speculation in his autobiography when he observes that "[i]t is always difficult, and especially so for a newcomer, to withdraw his agreement to one opinion at the last minute and cast his vote for the opposed view." WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975*, at 45 (1980).

²⁷ WESLEY McCUNE, *THE NINE YOUNG MEN* 214 (1947).

²⁸ FINE, *supra* note 22, at 187. In a letter to Frankfurter, Murphy called the case "a Gethsemane for me. . . . But after all the Constitution presupposes a government that will nourish and protect itself." *Id.*

²⁹ MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953*, at 109 (1997).

³⁰ ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 284 (1994). According to Newman, the Stone dissent circulated on the day before the conference vote, which did not entirely foreclose a change of position. *Id.*

³¹ *Id.*

³² *Id.* Newman mentions two other factors not raised by Black and Douglas: "[T]he forcefulness of Hughes's statement at conference and that no justice wished to change his position to vote against Hughes." *Id.* at 285. Douglas himself also makes clear that Stone's dissent was circulated the day before the conference "at which Frankfurter's opinion was cleared for Monday release." Although this would seem to have provided an opportunity for the liberals to switch their preliminary positions, Douglas offers two reasons why a switch was unlikely. He notes that "though Stone vaguely adumbrated his position, he did not, for once, campaign for it." Furthermore, "by this time the vote for Frankfurter's position had solidified." DOUGLAS, *supra* note 26, at 45.

³³ ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 527-28 (1956) (internal quotation marks omitted).

but as a result of the delay some Justices had already accepted Frankfurter's opinion by the time Stone's dissent circulated.³⁴

Confusing matters further is Frankfurter's account, arguably apocryphal,³⁵ of his exchange with Douglas at the start of the next term: "Douglas said, 'Hugo would now not go with you in the Flag Salute case.' I said 'Why, has he reread the Constitution during the summer?' Douglas replied, 'No, but he has read the [news]papers.'" ³⁶ This apparent allusion to press reports of the violence against the Jehovah's Witnesses and to broad editorial criticism of the *Gobitis* decision presents Black as changing his position over the summer in light of external events and thus conflicts with Black's own 1967 account placing the change of mind before the recess. In a 1961 taped conversation, Douglas made clear that he, Black, and Murphy believed they had "made a mistake" in joining the Frankfurter opinion, though without specifying the timing: "We thought we had been taken in and we mentioned this several times. . . . We wished we hadn't . . . gone along. We wished we had had a reargument."³⁷ So, as Douglas biographer Bruce Murphy concludes, "[T]he three of them began to plot to arrange for one."³⁸

Whatever the actual chronology of lost opportunity and regret, by the time the next Jehovah's Witness free exercise claim came before the Court two years later, the three liberals were fully prepared to act on their determination to correct their error. At issue in *Jones v. Opelika* was the conviction of a Jehovah's Witness arrested for attempting to distribute religious pamphlets in violation of a city ordinance requiring a license tax for the sale of books.³⁹ The Court, this time by the narrower vote of five to four in an opinion by Justice Stanley Reed, rejected Jones's free exercise claim and upheld the ordinance as within the city's authority, observing that "[t]he ordinary requirements of civilized life compel this adjustment of interests" even in the face of a First Amendment claim.⁴⁰ There were two dissents, one by Stone,⁴¹ this time joined by Black, Douglas, and Murphy, and the other by Murphy,⁴² joined by Stone,

³⁴ *Id.* at 528.

³⁵ According to Newman, Frankfurter "invented and wrote down supposed conversations—with Douglas about Black and the First Flag Salute case, claiming that Hugo changed his mind because he had been 'reading the newspapers'" and elsewhere "in his files [Frankfurter] attributed other, similar remarks to Black and Douglas." NEWMAN, *supra* note 30, at 298.

³⁶ JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 209 (1975).

³⁷ BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 188 (2003) (internal quotation marks omitted). In a diary entry, Douglas gave an additional reason for his original position on *Gobitis*: "I talked it over with Brandeis. He was very clear that F.F. was right — he had no doubts. That influenced me." The Court Diary of William O. Douglas (June 1, 1940) (Philip E. Urofsky ed.), in JOURNAL OF SUPREME COURT HISTORY 80, 94 (1995).

³⁸ MURPHY, *supra* note 37, at 188.

³⁹ The *Jones* case, from Opelika, Alabama, was joined with two similar cases, *Bowden v. City of Fort Smith, Ark.* and *Jobin v. State of Arizona*. *Jones v. City of Opelika*, 316 U.S. 584, 584 (1942).

⁴⁰ *Id.* at 595.

⁴¹ *Id.* at 600–11.

⁴² *Id.* at 611–23.

Black, and Douglas. Invoking the “preferred position”⁴³ conferred by the Constitution on freedom of speech and religion, Stone found that the license requirement’s “potency as a prior restraint on publication . . . falls short only of outright censorship or suppression.”⁴⁴ Murphy referred directly to “the unpopularity of Jehovah’s Witnesses and the difficulties put in their path because of their religious beliefs,”⁴⁵ concluding that, in cases of claimed invasion of First Amendment rights, it was “far better that [the Court] err in being overprotective of these precious rights.”⁴⁶

Thus, Black and Douglas had two joinder opportunities (and Murphy one) to express their opposition to the majority’s result, in addition to the option that only Murphy exercised, writing a separate opinion of one’s own. What is remarkable in *Jones* is that all three considered these outlets inadequate to meet their needs in voicing their rejection of the Court’s restriction on free exercise rights. Instead, they took the extraordinary step of appending a single paragraph to the decision, signed jointly by Black, Douglas, and Murphy, with no indication of the actual author and no mention of a formal dissent. The paragraph begins by characterizing the Court’s position as one “which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group” and as “but another step in the direction” of *Gobitis*.⁴⁷ It then takes a surprising turn, presenting a forthright retraction of the trio’s position in that earlier case: “Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided.”⁴⁸

Although the use of the passive voice (“it was also wrongly decided”⁴⁹) seems to evade direct responsibility for that outcome, in fact even if the majority had lost three supporters it would still have mustered the necessary five votes to prevail. The liberals’ subtler message appears in the first part of that crucial sentence. The repetition of the first person plural pronoun—“our opinion,”⁵⁰ followed by three uses of “we”⁵¹—emphasizes the collaborative nature of the statement, just as the decision not to identify a single author further submerges the individuality of the trio. Their names appear in order of seniority, coincidentally also alphabetical order,⁵² with no hint of leader and followers. For purposes of their statement, the three are as close to perfect equals as the protocols of the Court allow.

Why, then, did the three liberals choose this method of announcing their change of heart? What, in other words, did it convey that the conventional

⁴³ *Id.* at 608.

⁴⁴ *Id.* at 611. Stone did not indicate at conference that he planned to dissent, something the other Justices learned only when he did not initial the circulating copy of Frankfurter’s majority opinion. 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 729 (1951). The source cited is Pusey’s interview with Hughes.

⁴⁵ *Opelika*, 316 U.S. at 621–22.

⁴⁶ *Id.* at 623.

⁴⁷ *Id.*

⁴⁸ *Id.* at 623–24 (emphasis added).

⁴⁹ *Id.* at 624.

⁵⁰ *Id.* at 623.

⁵¹ *Id.* at 623–24.

⁵² *Id.* at 623.

joinder practices could not? First, the statement spoke directly to a constituency that reads Court opinions but seldom finds in them an implicit call to arms: the bar. The message sent was not simply that the liberals now regret their position in *Gobitis* and instead believe that “[t]he First Amendment does not put the right freely to exercise religion in a subordinate position.”⁵³ More emphatically, the message was that they are eager to reverse what they now view as an error; they have not merely evolved since that decision—they confess that they were, frankly, wrong when they joined Frankfurter’s opinion. As a consequence, they are now inviting an opportunity to undo that error, to find a suitable vehicle for its reversal. With Stone, the original dissenter,⁵⁴ there were four certain votes to reverse, which meant that there were also four votes to grant certiorari. The trio was signaling attorneys that it was now on the lookout for the right case to revisit the error of *Gobitis* and that it needed only one more vote to correct it.

Far from being the lost cause that its eight-one alignment indicates, *Gobitis*, the trio suggested, was ripe for review and reversal. The joint statement thus served as more than its authors’ confession of error. It served as well to undermine the authority of *Gobitis*, to present it as a precedent hanging by a thread. Three of its majority votes had already abandoned it. If only one more Justice could be persuaded to follow suit, *Gobitis* could be replaced with the views represented in the Stone and Murphy dissents.

The statement was directed not only to the bar but also to the bench, both to members of the Supreme Court who voted with Frankfurter and to members of the lower courts facing flag salute issues. The difficult first step—the embarrassing recantation taken in the most public way—now made it easier for any wavering member of the original majority to follow suit. One new member of the Court, Wiley Rutledge, had already joined in the reversal of *Jones*. The other new member, Robert Jackson, had voted with the majority in the second *Jones* decision, but he did not sit on *Gobitis* and thus had less investment in its outcome. The joint statement was thus an attempted seduction, as well as an invitation, to join in the act of undoing the error of a flawed and now undermined precedent. For lower court judges, the message was oblique but potentially appealing: the ordinary principles of fidelity to Supreme Court precedent may no longer apply in this situation.

The joint statement also served another purpose. There was a clear expectation, particularly in his own mind, that Frankfurter, a distinguished scholar and experienced supporter of liberal causes, would be the leader of the Court’s liberal wing.⁵⁵ That expectation may well have played a role in winning the support of the trio for his *Gobitis* opinion; if Frankfurter saw no free exercise problem, then presumably the Court was striking the correct balance between state authority and First Amendment rights. Once the three liberals defected and renounced their prior allegiance to Frankfurter’s position, they in effect

⁵³ *Id.* at 624.

⁵⁴ *Id.* at 601.

⁵⁵ Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 76 (1988); see also THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 133, 364.

ended their role as his admiring disciples. That defection led to the realignment of the Roosevelt Court, with Frankfurter and Black becoming, in James Simon's term, permanent jurisprudential "antagonists" for the remaining twenty years they served together.⁵⁶ In his memoir, Douglas summarized "[t]he great divide between us and the Frankfurter school, which grew wider and wider with the passing years."⁵⁷ Where "the Frankfurter school was for 'balancing' constitutional rights against the claims of social order, Douglas and Black "thought that all of the 'balancing' had been done by those who wrote the Constitution and the Bill of Rights."⁵⁸ Although Black and Frankfurter maintained a version of their personal friendship, it was the alliance of Black and Douglas that dominated the liberal wing of the Court for the next generation.⁵⁹

The Court's new direction became evident not long after *Jones v. Opelika* came down on June 8, 1942.⁶⁰ As it happened, the trio had no need to persuade a member of the original majority to change his vote. Less than four months after the *Jones* decision, one of its supporters, James Byrnes, resigned to assume the post of director of economic stabilization in the Roosevelt administration.⁶¹ The president then named Rutledge, a notably liberal member of the District of Columbia circuit court, to Byrnes's seat.⁶² On February 14, 1943, the day of Rutledge's Senate confirmation, the Court granted reargument in *Jones*.⁶³ Matters then proceeded briskly. The case was reargued on March 10 and 11, together with other cases raising the same issue, and on May 3 the Court, in an opinion by Douglas, reversed its earlier holding, finding First Amendment violations in the burden placed on the Jehovah's Witnesses' distribution of religious literature by the licensing schemes at issue.⁶⁴ The remaining

⁵⁶ JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 214–15 (1980). Simon used the term as the title of his book on the relationship of Black and Frankfurter. See SIMON, *THE ANTAGONISTS*, *supra* note 21. Frankfurter retired from the Court in 1962. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra* note 6, at 1133.

⁵⁷ DOUGLAS, *supra* note 26, at 48.

⁵⁸ *Id.*

⁵⁹ Several scholars have noted the durability of the Black-Frankfurter relationship in spite of their strong jurisprudential differences. According to Black's biographer, their conflicts on the Court "never really threatened their friendship, for too great was their mutual respect and regard." NEWMAN, *supra* note 30, at 288. In his joint study of the two Justices, James Simon describes the complex nature of their relationship:

Frankfurter's personal bitterness toward Black during their tumultuous times together on the Court spilled out in page after page of his diaries and correspondence. But even as he wrote vituperatively about Black's motives and conduct, Frankfurter functioned on a second, higher level. He invited Black to private luncheons for visiting dignitaries and showed kindly attention to Josephine Black and the three Black children.

SIMON, *THE ANTAGONISTS*, *supra* note 21, at 260. Simon reports that when Black learned of Frankfurter's death from a newspaper headline he exclaimed "'Ohhh, Felix is dead!' And then he wept." *Id.*

⁶⁰ *Jones v. City of Opelika*, 316 U.S. 584, 584 (1942).

⁶¹ Byrnes resigned on Oct. 3, 1942. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra* note 6, at 1133.

⁶² *Id.* at 877, 1133.

⁶³ *THE SUPREME COURT IN CONFERENCE (1940–1985)*, *supra* note 7, at 433.

⁶⁴ *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943).

three members of the original majority—Roberts, Reed, and Frankfurter—were now the dissenters, joined by another recent appointee, Jackson, who was named to the Court when Chief Justice Hughes retired and Stone took the center seat.⁶⁵

Since *Jones* dealt with a licensing tax rather than a flag salute requirement, one final step remained to dispose of *Gobitis* and its specific holding. The Court took that step in *West Virginia State Board of Education v. Barnette*,⁶⁶ where Jehovah's Witnesses challenged the Board's resolution, adopted in the wake of *Gobitis*, that required all students (and teachers) to salute the flag.⁶⁷ The three judge district court that heard the case clearly received the message sent by the joint statement in *Jones*.⁶⁸ Judge John Parker, the Fourth Circuit judge sitting with the district court who wrote for the panel, described the liberating effect of the recantation, which he termed a "special dissenting opinion":

The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika*. . . . [W]e feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.⁶⁹

When the district court judgment came directly to the Supreme Court, Jackson joined the majority that had reversed *Jones*. Writing one of his most eloquent and often quoted opinions, he found that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."⁷⁰

Two pairs of Justices added their own positions. A brief note at the end of the majority opinion said simply that "Mr. Justice Roberts and Mr. Justice Reed adhere to the views expressed by the Court in *Minersville School District v.*

⁶⁵ Jackson was appointed to Harlan Stone's seat in June 1941 when Stone became Chief Justice following Chief Justice Hughes's death. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 1133. Jackson was on most issues a conservative ally of Frankfurter and had voted with the majority in the original *Jones v. Opelika* decision. 316 U.S. 584 (1942). In *Murdock*, Reed wrote a dissent that was joined by Roberts, Frankfurter, and Jackson. *Opelika*, 319 U.S. at 134. Frankfurter filed a separate dissent joined by Jackson. *Id.* at 140.

⁶⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁶⁷ *Id.* at 625–26.

⁶⁸ *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (1942).

⁶⁹ *Id.* at 253 (emphasis added). The Washington Supreme Court, facing its own Jehovah's Witness flag salute case, endorsed Parker's position. Noting that his district court opinion "did not feel obligated to follow the opinion of the supreme court in the *Gobitis* [sic] case," Justice Beals observed that "[u]nder all the circumstances, that opinion can scarcely be deemed to have become authoritative." *Bolling v. Superior Court for Clallam Cnty.*, 133 P.2d 803, 809 (Wash. 1943) (emphasis added).

⁷⁰ *Barnette*, 319 U.S. at 638.

Gobitis.⁷¹ At the opposite pole, Black and Douglas wrote jointly, this time without Murphy, to revisit their previously announced turnaround, noting that “since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.”⁷² After “[l]ong reflection,” they had decided that although *Jones*’s general principle was correct—that state regulation in the public interest was not always barred by the Constitution—the application of that principle “in the particular case was wrong.”⁷³ They now found that “[n]either our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation.”⁷⁴ Still apparently concerned by the appearance of inconsistency, they wanted to make clear in their concurrence that what had taken place was an adjustment rather than an abandonment of their prior position. And they once again chose to speak with one voice—using “we” rather than “I”—to defend themselves from the charge of unprincipled decision making.⁷⁵

This time, perhaps remembering his own abandoned *Gobitis* dissent, Murphy did not add his name to their explanation. Unlike *Jones*, where he was part of the joint statement as well as the author of his own dissent,⁷⁶ in his *Barnette* concurrence Murphy spoke only in his own voice and did not expressly acknowledge any obligation to explain himself. He simply noted that “[r]eflection”—the same word Black and Douglas used—had “convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom [of conscience] to its farthest reaches.”⁷⁷ There was also a subtext to his separate opinion, the suggestion that his earlier joinder with his colleagues was not necessarily the start of a permanent jurisprudential alliance. And that suggestion proved to be an accurate prediction. Although in his remaining six years on the Court Murphy frequently voted with Black, Douglas, and Rutledge to form a reliable liberal bloc, it was Black and Douglas who shared a distinctive First Amendment perspective that linked their names together for a judicial generation.

One final voice remained to be heard on the flag salute question: that of Frankfurter. This time he spoke alone in one of the most personal statements ever heard from any member of the Court. Frankfurter opened his lengthy dissent with a deliberate invocation of his identity as a Jew and an immigrant:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in

⁷¹ *Id.* at 642–43.

⁷² *Id.* at 643.

⁷³ *Id.*

⁷⁴ *Id.* at 644.

⁷⁵ *Id.* at 643–44.

⁷⁶ *Jones v. City of Opelika*, 316 U.S. 584, 611, 623 (1942).

⁷⁷ *Id.* at 645.

writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.⁷⁸

In contrast to the joint opinion of Black and Douglas that found dual identity in shared jurisprudential positions, Frankfurter's solo dissent prefaced his reaffirmation of *Gobitis* with autobiographical specifics while insisting that such factors were irrelevant to the judicial role. His fellow dissenters, Roberts and Reed, who had also repeated their adherence to *Gobitis* in their brief joint statement, did not join; as Robert Burt has noted, Frankfurter's opening paragraph in effect "made it impossible for any other justice to join."⁷⁹ Two Justices had urged Frankfurter to remove parts of the passage; Roberts said that he considered the first two sentences "more and more a mistake,"⁸⁰ while Murphy found them "too personal."⁸¹ For Frankfurter, however, that was precisely the point he wanted to make. In his diary entry for the day the opinion was issued, he insisted that "I do not see what is 'personal' about referring to the fact that although a Jew, and therefore naturally eager for the protection of minorities, on the Court it is not my business to yield to such considerations, etc."⁸² The passage, paradoxical in its argument that Frankfurter's precise identity is in fact a guarantor of his judicial neutrality,⁸³ has an additional resonance in the context of the joint statements and opinions of *Jones* and *Barnette*. For Frankfurter, the failed leader of the Court's liberal bloc, the alliance of Murphy, Black, and Douglas was an unappealing assertion of common ground. Having lost control of both the flag salute resolution and the liberal Justices, Frankfurter had no interest in tailoring his dissent to the concerns of his past or current allies. Instead, he offered the perfect counterpoint to the notion of joint authorship: an opinion that rejects individual judicial identity while at the same moment wielding it as a means of collegial exclusion.

B. *Cooper v. Aaron: The Collaborative Opinion*

In contrast to the shifting alignments of *Jones* and *Barnette*, the purest example of Supreme Court joint authorship is the opinion in *Cooper v. Aaron*, signed by all nine Justices to assert the Court's role as the definitive interpreter of the Constitution.⁸⁴ Those signatures were not merely symbolic. As Bernard Schwartz's authoritative account of the Court's decision-making process details, *Cooper* is also a remarkable example of collaborative and sometimes

⁷⁸ *Id.* at 646–47 (Frankfurter, J., dissenting).

⁷⁹ ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 49 (1988).

⁸⁰ LASH, *supra* note 36, at 253.

⁸¹ *Id.* at 254.

⁸² *Id.* In a letter to Murphy, Frankfurter reported being "literally flooded" in the wake of *Gobitis* with letters insisting that his religion imposed on him a duty to defend the rights of minorities. "Long reflection" on that experience "has left me without any doubt that I must disregard my sensitiveness and say in plain language what much needs to be said and expresses my deepest conviction." FINE, *supra* note 22, at 383 (internal quotation marks omitted).

⁸³ For an analysis of the paradoxical quality of Frankfurter's passage, see Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 218–21 (2002).

⁸⁴ *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

combative composition.⁸⁵ At one point or another, seven Justices either drafted or proposed changes to portions of the opinion.⁸⁶ Four drafted separate opinions or statements that never appeared in print,⁸⁷ while another—who did not play an active part in the process—was alone in opposing joint authorship.⁸⁸ And, in a peculiar irony, the Justice who first proposed the strategy of a joint opinion became the only Justice to undermine it by appending his own separate opinion.

In *Cooper*, the Court faced a bold challenge to the enforcement of *Brown v. Board of Education*⁸⁹ in the Little Rock, Arkansas school system. Although the school board had begun a gradual desegregation process, the state's governor, Orval Faubus, dispatched National Guard troops to deny entry to the small group of black students admitted to a white high school.⁹⁰ After President Eisenhower responded by sending federal troops to allow the process to resume, the board asked the federal district court to postpone the desegregation process for two and a half years.⁹¹ The district court agreed to the delay, the Eighth Circuit reversed, and the Supreme Court found itself faced with what it characterized as “a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution.”⁹² The Court had little difficulty in resolving the legal issue. In a September 11 conference that followed oral argument and lasted only thirty minutes, the Justices were unanimous in their decision to affirm the Eighth Circuit.⁹³ The procedural resolution was a bit more complicated. In light of “the imminent commencement of the new school year”⁹⁴ in four days, the Court decided to issue its order the following day, and Justices Frankfurter and Harlan were assigned to draft it.⁹⁵ Since an opinion would clearly take more time to prepare, Justice Brennan, who had been asked earlier by Warren to write a memo for the Court on the case,⁹⁶ was

⁸⁵ BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT - A JUDICIAL BIOGRAPHY* 292–303 (1983) [hereinafter SCHWARTZ, *SUPER CHIEF*].

⁸⁶ *Id.*

⁸⁷ *Id.* at 293–95.

⁸⁸ Douglas was the only Justice to vote against joint authorship. According to Schwartz, Douglas said “that the Court had always issued opinions in the name of one Justice, and that should be done here also. Anyway, the suggestion carried, eight to one.” *Id.* at 300. In his memoirs, Douglas, who was never reluctant to describe his role in major events, mentions the case only in passing. DOUGLAS, *supra* note 26, at 115 (1980). The second Justice who does not appear in accounts of the case was Charles Whittaker. *See, e.g.*, SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 292–303.

⁸⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹⁰ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 290.

⁹¹ *Id.*

⁹² *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

⁹³ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 293, 295.

⁹⁴ *Cooper*, 358 U.S. at 1 (per curiam issued September 12, 1958). The Court’s full opinion was issued on September 29 and quoted the per curiam in its entirety in a footnote. *Id.* at 5.

⁹⁵ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 293.

⁹⁶ SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 143 (2010). In a 1989 interview, Brennan recounted a plane ride from California to Washington with Warren:

As they sat next to each other on the plane, Brennan recalled turning to Warren and saying, ‘Well, Chief, do you want me to try to turn something out? I’ll be glad to do it.’ By the time they

officially assigned the task of drafting an opinion for publication by the start of the Court's 1958 Term on October 6.⁹⁷

Brennan was prompt in carrying out his assignment. By September 17 he had a draft to circulate to the Court, and at a conference two days later the flow of suggestions from his colleagues began.⁹⁸ The most momentous of these came from Justice Frankfurter, who proposed that the Court take the unprecedented step of issuing an opinion signed by all nine Justices.⁹⁹ The original plan had been to issue the opinion as a *per curiam*, with no author's name attached.¹⁰⁰ As Warren recalled, it was Frankfurter who proposed the multiple signature strategy at the Court's September 19 conference as a way of indicating that all the members of the Court, including those who had joined after 1954, fully supported *Brown's* mandate:

We were all of one mind in that case . . . but Mr. Justice Frankfurter called our attention to the fact that there had been a number of changes in the membership of the Court since *Brown v. Board of Education*. He suggested that in order to show we were all in favor of that decision, we should also say so in the Little Rock case, not in a *per curiam* or in an opinion signed by only one Justice, but by an opinion signed by the entire Court. I do not recall this ever having been done before. However, in light of the intense controversy over the issue and the great notoriety given Governor Faubus' obstructive conduct in the case, we thought well of the suggestion, and it was done.¹⁰¹

According to Schwartz, it was actually Harlan who had initiated the idea in his own draft opinion, which read, "The opinion of the Court, in which (naming each Justice) join, was announced by The Chief Justice."¹⁰² Frankfurter then adopted it, revising his copy of the Harlan draft to read, "The combined views of (naming each Justice) constituting the opinion of the Court, was announced by the Chief Justice."¹⁰³ Whoever deserves the credit, the Court approved the proposal in an eight to one vote, with only Douglas opposed.¹⁰⁴

The Justices also had numerous suggestions about the substance of Brennan's draft. The core of the opinion, as Brennan told the conference, "proposed to restate elementary constitutional propositions drawing upon authority of Marshall, Taney and Hughes" to establish the Court's constitutional authority over all government officials.¹⁰⁵ That section survived with only minor stylistic changes. The Justices did, however, criticize other sections. Warren found the

arrived in Washington, where news photographers waited to snap their pictures inside the terminal, Warren had asked Brennan to prepare a memo as the basis for the Court's consideration of the case.

Id.

⁹⁷ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 293, 295.

⁹⁸ *Id.* at 295, 297.

⁹⁹ *Id.* at 299.

¹⁰⁰ LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 161 (2000). For an analysis of the ways the Court has used the *per curiam* opinion for both routine cases and cases of greater import, see Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 *NEB. L. REV.* 517 (2000).

¹⁰¹ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 298 (1977).

¹⁰² SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 300 (internal quotation marks omitted).

¹⁰³ *Id.* (internal quotation marks omitted).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 295–96 (internal quotation marks omitted).

account of the case's history "rather dry," and Brennan agreed to revise it.¹⁰⁶ Black thought that "a sentence should be added to the effect that the obligation applies to every school system maintained from the public purse," and Brennan complied.¹⁰⁷ Frankfurter and Burton took issue with Brennan's assertion of the state's duty to desegregate in what Frankfurter called "such rigid terms," and Brennan removed that portion of the opinion.¹⁰⁸ Black and Frankfurter thought that "this is the kind of opinion which should close with two or three sentences highlighting for the public the true nature of the issues at stake," and Brennan added new language to meet the request.¹⁰⁹ The additions included the opinion's penultimate sentence, which stated firmly that "[t]he principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."¹¹⁰ The opinion's final sentence, which appeared in a later revision, was a brief and eloquent coda: "Our constitutional ideal of equal justice under law is thus made a living truth."¹¹¹

The most extensive challenge to Brennan's draft came from Harlan in the form of a 25-page draft opinion of his own that was, however, circulated only to Frankfurter and Tom Clark, his fellow conservatives on the Court.¹¹² Harlan's biographer is uncertain of the motivation for the draft, noting only that Harlan may have believed that his own "somewhat more moderate" approach might be more successful in attracting a unanimous Court than Brennan's text.¹¹³ Subsequently, just before the Court's September 24 conference, Harlan circulated his "Suggested Substitute" for the final section of the current draft to the entire Court.¹¹⁴ Brennan, who had accommodated the earlier concerns of Warren, Black, Frankfurter, and Harold Burton, resisted Harlan's suggestions.¹¹⁵ Harlan wanted to delete the language that prohibited states from evading *Brown* "whether accomplished ingeniously or ingenuously"; Brennan said, "Personally, I feel that is a vital statement very essential to the point we are making."¹¹⁶ Harlan also wanted to remove Brennan's use of *Marbury* and his treatment of the Court's role as constitutional interpreter; Brennan told the con-

¹⁰⁶ *Id.* at 297 (internal quotation marks omitted).

¹⁰⁷ *Id.* at 297 (internal quotation marks omitted). Brennan's new sentence read: "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Id.*

¹⁰⁸ *Id.* In agreeing to the change, Brennan "'recognize[d] a contradiction in the thought that the rights of the children are personal and the notion that their recognition may be delayed for some children so long as the start is made to enforce them for other children.'" *Id.*

¹⁰⁹ *Id.* at 298.

¹¹⁰ *Cooper v. Aaron*, 358 U.S. 1, 19–20 (1958). The earlier version varied only slightly. For example, it referred to "the freedoms guaranteed by the Constitution" rather than "by our fundamental charter." SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 298.

¹¹¹ *Cooper*, 358 U.S. at 20.

¹¹² SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 298.

¹¹³ TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* 168 (1992).

¹¹⁴ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 298.

¹¹⁵ *Id.* at 298–99.

¹¹⁶ *Id.*

ference “[t]hat too I think is a very essential part of what I believe our opinion should contain.”¹¹⁷ Although the conference joined Brennan in rejecting those suggestions, it did accept—over Brennan’s objection—a further Harlan suggestion that the opinion refer specifically to the Court’s changes in personnel since *Brown*.¹¹⁸ Harlan’s draft included the following passage: “Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in the original decision as to the inescapability of that decision.”¹¹⁹ Brennan regarded that addition as “a grave mistake”:

It lends support to the notion that the Constitution has only the meaning that can command a majority of the Court as that majority may change with shifting membership. Whatever truth there may be in that idea, I think it would be fatal in this fight to provide ammunition from the mouth of this Court in support of it.¹²⁰

Harlan’s language, only slightly modified, was nonetheless inserted into the opinion’s final paragraph, with the emphatic addition that the *Brown* “decision is now unanimously reaffirmed.”¹²¹

Willingly or not, Brennan had now incorporated the suggestions of five colleagues. What might have been the most serious challenge and the most difficult to deal with—a complete dissent drafted by Clark—never progressed from the Justice’s handwritten draft to a circulated opinion.¹²² The draft made clear that Clark did not intend the dissent “to be construed in any respect whatsoever as a change of position from that taken in *Brown* etc.”¹²³ His objection was procedural, the view that the Court’s accelerated timetable for the case—what he termed “forced action”—was a violation of the Court’s rules.¹²⁴ “Of all tribunals,” he wrote, “this is one that should stick strictly to the rules.”¹²⁵ According to Schwartz, other members of the Court had no knowledge of the dissent at the time of the decision;¹²⁶ it was apparently an expression of a concern that Clark ultimately decided not to pursue, presumably in the interest of preserving unanimity in such a controversial case. Clark had been a member of the *Brown* Court when Warren persuaded Reed to withhold his dissent, telling the solitary holdout “[y]ou’ve got to decide whether it’s really the best thing for the country.”¹²⁷ It may be that the *Brown* episode played a part in Clark’s decision to keep his reservations to himself. He did, however, have a small role in the preparation of the final draft.¹²⁸ Black, who felt that Brennan’s opening

¹¹⁷ *Id.* at 299.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

¹²² SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 294.

¹²³ *Id.* (emphasis added).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 93–94. Reed later wrote to Frankfurter that, although “there were many considerations that pointed to a dissent,” those considerations “did not add up to a balance against the Court’s opinion[;] . . . the factors looking toward a fair treatment for Negroes are more important than the weight of history.” *Id.* at 96 (internal quotation marks omitted).

¹²⁸ *Id.* at 301.

paragraph, like his original conclusion, lacked the force such an important case required, offered his own introduction as a substitute.¹²⁹ Clark then proposed some stylistic revisions, which were accepted by the conference and became part of the final version approved and handed down at the Court's special term on September 29.¹³⁰

The joint opinion, drafted by Brennan with contributions from five Justices and the signatures of all nine members of the Court, might have been expected to be the final word in the case. Once again, however, as in *Barnette*, Frankfurter insisted on having his own say. Before the final vote on Brennan's opinion, Frankfurter had let his colleagues know that he intended to add his own solitary concurrence.¹³¹ Burton's diary entry suggests the conference's response and the deal that was struck:

Justice Frankfurter agrees to join [the Court's opinion] but he intends to file also a separate opinion. The Conference could not dissuade him from writing separately but he agreed not to file his separate opinion until a week or so after the Court opinion is filed.¹³²

Burton's language is a pale reflection of the powerful emotions provoked by Frankfurter's insistence on adding his concurrence. In his memoir, Warren, generally reserved in his language, said that Frankfurter's decision "caused quite a sensation on the Court."¹³³ Brennan was even more dramatic. "There was havoc around here, just hell to pay. The Chief, Black and I were furious," he said, adding, with reference to Frankfurter, "We almost cut his throat."¹³⁴ Warren apparently asked Black to intercede with Frankfurter, but he remained firm and circulated the concurrence on October 3.¹³⁵

At the Court's October 6 conference, Brennan and Black—like Warren, still upset by Frankfurter's behavior—presented the following joint statement that they intended to issue in response:

Mr. Justice Black and Mr. Justice Brennan believe that the joint opinion of all the Justices handed down on September 29, 1958 adequately expresses the view of the Court, and they stand by that opinion as delivered. They desire that it be fully understood that the concurring opinion filed this day by Mr. Justice Frankfurter must not be accepted as any dilution or interpretation of the views expressed in the Court's joint opinion.¹³⁶

When the other Justices, including Warren, were unable to dissuade Black and Brennan, Harlan saved the day by circulating his own pointed rejoinder in the form of yet another opinion, this one mildly parodic:

Mr. Justice Harlan concurring in part, expressing a *dubitante* in part, and dissenting in part.

¹²⁹ *Id.* at 300.

¹³⁰ *Id.* at 301.

¹³¹ *Id.* at 302.

¹³² *Id.* Warren's memoir suggests that Frankfurter notified his colleagues of his intention to file a concurrence only after the decision had come down, but Burton's diary entries seem the more accurate source on this point. WARREN, *supra* note 101, at 298–99.

¹³³ WARREN, *supra* note 101, at 298–99.

¹³⁴ NEWMAN, *supra* note 30, at 475.

¹³⁵ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 302.

¹³⁶ *Id.* at 303.

I concur in the Court's opinion, filed September 29, 1958, in which I have already concurred. I doubt the wisdom of my Brother Frankfurter filing his separate opinion, but since I am unable to find any material difference between that opinion and the Court's opinion—and am confirmed in my reading of the former by my Brother Frankfurter's express reaffirmation of the latter—I am content to leave his course of action to his own good judgment. I dissent from the action of my Brethren in filing their separate opinion, believing that it is always a mistake to make a mountain out of a molehill. *Requiescat in pace.*¹³⁷

Although Frankfurter's concurrence was filed later that day, Black and Brennan, presumably persuaded or chastened by Harlan's words, changed their minds and did not file their statement.

As this complicated story reveals, eight Justices believed that the Court's opinion should be signed by all nine Justices. And at least six Justices thought that, even when Frankfurter breached their unanimity by filing his concurrence, Black and Brennan were misguided in responding.¹³⁸ What did these Justices believe that their unprecedented strategy would accomplish that an opinion like *Brown*—a unanimous opinion written by the Chief Justice—would not? Why did they resist the addition of a concurrence that essentially restated the arguments of the joint opinion? And why did Frankfurter, a powerful supporter of unanimity in *Brown*, insist on breaking ranks?

Clearly, Warren and the other Justices understood the hostility that would greet their assertion of the Court's constitutional authority to enforce *Brown* over the fierce resistance of Arkansas' governor, its legislature, and many of its citizens. Six of the Justices (Warren, Black, Frankfurter, Douglas, Burton, and Clark) had lived through the experience of *Brown*, both the careful building of a unanimous Court and the attacks, including calls for impeachment that focused on Warren as its author and the Court's leader.¹³⁹ The three new members of the Court—Harlan, Brennan, and Charles Whittaker—were all recent appointments by President Eisenhower,¹⁴⁰ who had sent federal troops to secure the black students' access and who thus appeared more committed to desegregation than he had in the wake of *Brown*, when he remained largely silent.¹⁴¹ Frankfurter's idea of a jointly signed opinion thus accurately reflected the sense of unity, both within the Court and between the judicial and executive branches, on the enforcement issue.

A unanimous opinion once again authored by Warren would have been a less assertive statement of that unity and would once again have offered the Chief Justice as the primary target for reprisals. On the other hand, a joint opinion would make explicit precisely where the three newest Justices stood on the question of *Brown*'s validity and at the same time send the strong message that the members of the Court stood together as equals rather than leader and followers on the enforcement question.

¹³⁷ *Id.* (emphasis omitted).

¹³⁸ *Id.*

¹³⁹ Robert L. Brown, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 1, 2–3 (2005).

¹⁴⁰ THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 102, 422–23, 1088.

¹⁴¹ See ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* 127 (1995).

It is also worth remembering that Warren, who could have exercised his assignment power to treat *Cooper* as a high profile case to be authored by the Chief Justice with the support of his eight colleagues, chose not to do so from the start. He began by asking Brennan to draft the opinion and then accepted without hesitation Frankfurter's proposal.¹⁴² In a final gesture of Court solidarity, Warren prefaced his announcement of the decision from the bench by noting that the opinion had been jointly authored by all nine Justices.¹⁴³ As Anthony Lewis reported in the *New York Times*, Warren "looked at each of the justices in turn as he read their names," an acknowledgment of *Cooper*'s remarkable genesis.¹⁴⁴

Cooper also crystallized an issue that *Brown* had not: the institutional authority of the Court itself. Although *Brown* had been attacked as a political decision and a misreading of the equal protection clause,¹⁴⁵ it had not invited a challenge to the Court's role as articulated in *Marbury v. Madison*; in fact, neither *Brown I* nor *Brown II* ever mentioned *Marbury* as a source of the Court's power.¹⁴⁶ In *Brown* the Court was demonstrating its role as constitutional interpreter; in *Cooper* it was proclaiming that role. *Cooper*'s opening sentence sounded the theme of federal power embodied by the Court: "As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government."¹⁴⁷ And the Court made clear that those questions were at least as important as the principle, settled by *Brown*, that the equal protection rights of school children "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"¹⁴⁸ As the opinion indicates, the Court could have stopped at that point, having said "enough to dispose of the case."¹⁴⁹ Nonetheless, the opinion continues, "[W]e should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case."¹⁵⁰

The answer the Court gives is carefully grounded in cases that are not only "settled doctrine"¹⁵¹ but also unanimous, the word that becomes a resonant refrain in the opinion. Brennan had rejected Harlan's suggestion that the draft's citation to *Marbury* be omitted,¹⁵² and the final version makes clear why he considered that cite essential. In two paragraphs, the final version invokes the

¹⁴² STERN & WERMIEL, *supra* note 96, at 143; SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 299.

¹⁴³ Anthony Lewis, *Supreme Court Forbids Evasion or Force to Balk Integration*, N.Y. TIMES, Sept. 30, 1958, at 1. The sub-headline for the story read "9 Write Opinion." *Id.*

¹⁴⁴ *Id.* Only Douglas was absent. *Id.*

¹⁴⁵ THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 1068–69.

¹⁴⁶ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964).

¹⁴⁷ *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

¹⁴⁸ *Id.* at 17.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Id.*

¹⁵² See footnotes 117–18 and accompanying text.

opinions of three of the Court's Chief Justices—Marshall, Taney, and Hughes—in cases in which they strongly asserted the primacy of the Constitution, as interpreted by the Court, over state governments.¹⁵³ And each case, the opinion points out, was unanimous.¹⁵⁴ Thus, in the classic passage, Marshall, “speaking for a unanimous Court, . . . declared in the notable case of *Marbury v. Madison* . . . that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’”¹⁵⁵ Half a century later in *Ableman v. Booth*, “Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement [of an oath by state officials to support the Constitution] reflected the framers’ ‘anxiety to preserve [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State.’”¹⁵⁶ In a second reference to Marshall and his opinion in *United States v. Peters*, he “spoke for a unanimous Court in saying that,” if state legislatures may “annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.”¹⁵⁷ And, finally, the same principle applies to a state’s governor: “If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court [in *Sterling v. Constantin*], ‘it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land.’”¹⁵⁸ The refrain continues in the opinion’s final paragraph, where we are told that “[t]he basic decision in *Brown* was unanimously reached by this Court”¹⁵⁹ and that the three Justices who have joined the Court since *Brown* “are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed.”¹⁶⁰

This insistence on the role historically played by unanimity links together the two principles on which *Cooper* rests: the supremacy of the Constitution over the states and the Court’s authority to enforce that supremacy. The opinion finds support in the fact that the Court itself has repeatedly endorsed those principles without dissent. Joint authorship was supposed to intensify that unanimity, to embody in the list of signatures a Court speaking as a unified institution about its own institutional role. Frankfurter’s decision to write his own concurrence was thus a blow not only to that intended signal but also to the tradition of undiluted support in *Marbury*, *Ableman*, *Peters*, *Sterling*, and

¹⁵³ *Cooper*, 358 U.S. at 18–19.

¹⁵⁴ *Id.* As Dennis Hutchinson notes, it was the fourth draft of the opinion, circulated to the conference on September 25, that “for the first time expressly pointed out the unanimity of those prior decisions supporting its analysis.” Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 81 (1979).

¹⁵⁵ *Cooper*, 358 U.S. at 18.

¹⁵⁶ *Id.* (quoting *Ableman v. Booth*, 21 How. 506, 524 (1859)).

¹⁵⁷ *Id.* (quoting *United States v. Peters*, 5 Cranch 115, 136 (1809)).

¹⁵⁸ *Id.* at 19 (quoting *Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* There is one additional reference to a unanimous Court decision when the opinion cites precedent for the position that constitutional rights may not be “sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.” *Id.* at 16. The reference begins: “As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation.” *Id.*

Brown itself, all decisions with no concurrences added. Why, then, did Frankfurter, who had fought for unanimity in *Brown*, insist on writing for himself as well as joining the Court's opinion? His answer, in a letter to a friend, reflected the same assertion of individual identity that had emerged in his *Barnette* dissent:

Why did I write and publish the concurring opinion? I should think anybody reading the two opinions would find the answer. My opinion, by its content and its atmosphere, was directed to a particular audience, to wit: the lawyers and the law professors of the South, and that is an audience which I was in a peculiarly qualified position to address in view of my rather extensive association, by virtue of my twenty-five years at the Harvard Law School, with a good many Southern lawyers and law professors.¹⁶¹

Frankfurter saw himself, not the Court itself, as the conduit through which those lawyers would come to recognize the “transcending issue, namely, respect for law as determined so impressively by a unanimous Court in construing the Constitution of the United States”¹⁶² and therefore to accept desegregation, even though his own concurrence undermined that unanimity. There was general agreement among the Justices that Frankfurter's concurrence did not depart from the substance of the joint opinion, and in fact Frankfurter himself made that point strongly in his opening sentence: “While unreservedly participating with my brethren in our joint opinion,” he wrote, “I deem it appropriate also to deal individually with the great issue here at stake.”¹⁶³ He seems to have believed that the same message conveyed in his voice would have the effect of winning the support of the progressive members of the southern legal establishment, especially those who had attended Harvard and studied with him.

This curious ambivalence in Frankfurter—both proposing the joint authorship strategy and undermining it in the face of solid resistance from his fellow Justices—seems to stem from his dual identity as Justice and professor, the same dual identity that allowed him to lecture those Justices in conference as if they were his students rather than his equals.¹⁶⁴ Frankfurter both proposed and supported the jointly signed opinion, which had the effect of diminishing the role of any single Justice. But he ignored the objections of his colleagues, including the written protest of Black and Brennan, who expressly stated that the concurrence could dilute or distort “the views expressed in the Court's joint opinion.”¹⁶⁵ This split between theory and practice appears as well in the text of Frankfurter's opinion. Quoting language from a 1930 decision insisting that a state “must . . . yield to an authority that is paramount to the State,” he attributes “[t]his language of command” to his most revered predecessor, Oliver Wendell Holmes, “speaking for the Court that comprised Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Brandeis, Mr. Justice Suther-

¹⁶¹ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 303.

¹⁶² Hutchinson, *supra* note 154, at 84.

¹⁶³ *Cooper*, 358 U.S. at 20 (Frankfurter, J., concurring).

¹⁶⁴ MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 47–48 (1991). That technique tended to backfire. “‘When I came into this conference,’ Douglas said after one of Frankfurter's disquisitions, ‘I agreed in the conclusion that Felix has just announced. But he's talked me out of it.’” *Id.* at 48.

¹⁶⁵ SCHWARTZ, *SUPER CHIEF*, *supra* note 85, at 303.

land, Mr. Justice Butler and Mr. Justice Stone.”¹⁶⁶ That list of names, echoing the list from *Cooper*, suggests the collective nature of the decision, joined by the Court’s most conservative and most liberal members, while at the same time distinguishing Holmes as the author. Later in the concurrence, Frankfurter emphasizes the enhanced authority of the Supreme Court’s constitutional holdings when they are “the unanimous conclusion of a long-matured deliberative process”¹⁶⁷ with no apparent awareness that his celebration of unanimity and shared deliberation was in sharp contrast to his own separate opinion filed a week after the Court’s decision.¹⁶⁸ For Frankfurter, the submergence of individual identity in joint authorship was appropriate for the other Justices, including Warren as Chief Justice and Brennan as principal drafter, but an unacceptable limit on his own extra-judicial roles as teacher, mentor, and advisor to the legal community.

There is one other aspect of the joint opinion that proved to be both a help and a hindrance to the drafting process. The story of *Cooper* suggests that, whatever reservations members of the Court may usually feel about requesting major changes to a colleague’s draft, they are more comfortable making those requests when the opinion is going to be issued under joint authorship. Harlan, in a letter to Brennan about his “Suggested Substitute” for the last six pages of the Brennan draft, explained the difference: “If this were an opinion under your sole authorship, I would not think of pursuing this course. In that situation, I would have joined the draft.”¹⁶⁹ A similar spirit seems to have animated the other Justices as well. As Dennis Hutchinson observes, Brennan found himself “a supervising editor, accommodating the various views and suggestions of his colleagues,” rather than an independent author of an opinion that those colleagues were free to join or reject.¹⁷⁰ Since each Justice’s name was to be attached to the opinion, each might well have felt entitled to greater control over the text and thus felt less deferential to the ordinary prerogatives of the Court’s designated author.

Whatever the implications of *Cooper*’s joint authorship model, the Court has never again employed it. An effort by Brennan to persuade the Court to revisit the form in *United States v. Nixon*,¹⁷¹ the Watergate tapes case, was rejected by Chief Justice Burger.¹⁷² According to the authors of *The Brethren*, Brennan made the suggestion in separate conversations with his colleagues, arguing that the case called for a “definitive” opinion and that the Little Rock model would be the most effective strategy for producing one.¹⁷³ Although

¹⁶⁶ *Cooper*, 358 U.S. at 22–23 (quoting *Wisconsin v. Illinois*, 281 U.S. 179, 197 (1930)).

¹⁶⁷ *Id.* at 24.

¹⁶⁸ WARREN, *supra* note 101, at 298–99. According to Warren, after Frankfurter’s concurrence was filed “some of the Justices stated that they would never permit a Court opinion in the future to be made public until it was certain that the views of all were announced simultaneously.” *Id.* at 299.

¹⁶⁹ YARBROUGH, *supra* note 113, at 170.

¹⁷⁰ Hutchinson, *supra* note 154, at 79.

¹⁷¹ *United States v. Nixon*, 418 U.S. 683 (1974).

¹⁷² BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 145 (1996) [hereinafter SCHWARTZ, *DECISION*].

¹⁷³ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 373 (1979).

Brennan thought that he had achieved consensus for his plan, he was surprised at the response when he attempted to formalize it at conference: “Instead there was an uneasy silence, not a word of support from anyone.”¹⁷⁴ Chief Justice Burger never endorsed the idea and eventually insisted on putting his name alone on the Court’s unanimous opinion because, he said, “The responsibility is on my shoulders.”¹⁷⁵ As Woodward and Armstrong’s account makes clear, the other Justices, largely dissatisfied with Burger’s draft for such a controversial case, instead resorted to more indirect and even devious tactics to substitute their own versions for much of his opinion, which was extensively revised and reshaped by their contributions.¹⁷⁶ *Cooper v. Aaron* thus stands alone, unique in the Court’s history, as the only decision in which all but one of the Justices chose to go beyond the traditional expression of unanimity to forge a new form of collaborative decision making.

C. *Oregon v. Mitchell: Amplification*

In *Oregon v. Mitchell*, the Court faced a challenge to the Voting Rights Act Amendments of 1970.¹⁷⁷ The challenged provisions prohibited the use of literacy tests in national and state elections for a period of five years, barred the use of state residency requirements to disqualify voters from participating in presidential elections, and lowered the voting age for both national and state elections from 21 to 18.¹⁷⁸ Since the cases were brought under the Court’s original jurisdiction, there were no lower court decisions to review. The Court was, instead, writing on a clean slate, and that slate turned out to be a complicated one.

On two of the three issues, the Court reached a substantial consensus. All nine Justices agreed that Congress had the power to bar the use of literacy tests, and all but Justice Harlan accepted the ban on state residency requirements.¹⁷⁹ The third issue, however, polarized the Court. On the question of Congress’ power to change the voting age in national elections, five Justices said yes and four said no, while on the question of Congress’ power to change the voting age in state elections, the numbers were reversed, with five saying no and four saying yes.¹⁸⁰ The single Justice in the majority on both issues was Black, who joined two different coalitions of four to control the result.¹⁸¹ Each of those

¹⁷⁴ *Id.* at 374. At conference Burger indicated that “[h]e would take the opinion.” *Id.* Although he also said “that he would consider the assignment decision further and give his final decision tomorrow, . . . Brennan knew the course was set.” *Id.*

¹⁷⁵ SCHWARTZ, *DECISION*, *supra* note 172, at 145.

¹⁷⁶ WOODWARD & ARMSTRONG, *supra* note 173, at 310–44; *see also* SCHWARTZ, *DECISION*, *supra* note 172, at 145–48.

¹⁷⁷ *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ According to Justice Blackmun, Black’s powerful position was the result of a deliberate strategy. Howard Ball, who interviewed Blackmun in 1986, reported the Justice’s account of the Conference vote:

Black passed on the vote until he saw the junior justice, Blackmun, cast his vote on the issue. At that point, with the Court deadlocked four to four on the case, Black cast the deciding vote and

coalitions was further subdivided. On one side, Harlan wrote for himself,¹⁸² while Potter Stewart's opinion was joined by Warren Burger and Harry Blackmun.¹⁸³ On the other side, Douglas wrote for himself,¹⁸⁴ while Brennan, Byron White, and Thurgood Marshall co-authored a joint opinion.¹⁸⁵ Nonetheless, all of the Justices—with the sole exception of Black—took the same position on both federal and state elections. Gerald Dunne has described *Oregon v. Mitchell* as “an extraordinary decision . . . unparalleled in almost a century and a half,” not because the vote of a single Justice controlled the outcome, but because of Black's position.¹⁸⁶ “What was almost without precedent,” Dunne found, “was his casting that vote on opposite sides of two propositions that every one of his colleagues saw as organically inseparable.”¹⁸⁷

In *Oregon*, what would have been a symmetrical alignment of the opposing Justices and their opinions was unbalanced by a single factor, the joint authorship of the Brennan bloc's opinion. In light of Brennan's subsequent championing of joint opinions for *United States v. Nixon* in 1974 and *Buckley v. Valeo* in 1976,¹⁸⁸ it seems likely that he was the prime mover in the decision to cast the *Oregon* opinion in that mold. White was, by temperament, disinclined to build coalitions. In a 1996 interview, three years after his retirement, his response to a question about alliances within the Court was that “I think this notion of blocs and extra-persuasive justices is just not accurate.”¹⁸⁹ And there is little if any evidence that Marshall, whose only close tie within the Court was

was able to write the opinion for the Court. Blackmun said that Black ‘thoroughly enjoyed [the manipulation].’

HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 271 n.2 (1996). Black's lead opinion, designated as one “announcing the judgments of the Court in an opinion expressing his own view of the cases,” laid out the Court's alignment:

For the reasons set out in Part I of this opinion, I believe Congress can fix the age of voters in national elections, such as congressional, senatorial, vice-presidential and presidential elections, but cannot set the voting age in state and local elections. For reasons expressed in separate opinions, my Brothers Douglas, Brennan, White, and Marshall join me in concluding that Congress can enfranchise 18-year-old citizens in national elections, but dissent from the judgment that Congress cannot extend the franchise to 18-year-old citizens in state and local elections. For reasons expressed in separate opinions, my Brothers the Chief Justice, Harlan, Stewart, and Blackmun join me in concluding that Congress cannot interfere with the age for voters set by the States for state and local elections. They, however, dissent from the judgment that Congress can control voter qualifications in federal elections.

Mitchell, 400 U.S. at 117–18.

¹⁸² *Id.* at 152–229.

¹⁸³ *Id.* at 281–96.

¹⁸⁴ *Id.* at 135–52.

¹⁸⁵ *Id.* at 229–81.

¹⁸⁶ GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 427 (1977).

¹⁸⁷ *Id.*

¹⁸⁸ *United States v. Nixon*, 418 U.S. 683 (1974); *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁸⁹ DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 468 (1998) (edited transcript of June 30, 1996 interview with Clifford May, published in the Rocky Mountain News). Hutchinson, White's biographer and his former law clerk, endorses the formulation of Lance Liebman, another former White law clerk, that White was “‘walking a path of his own that happens to intersect now with one group, now with the other.’” *Id.* at 380. Neither Hutchinson's nor Liebman's perspective suggests that White would have actively engaged in the formation of blocs of like-minded Justices.

with Brennan, was the leader rather than the supporter of Brennan's frequent efforts to win support for their shared liberal positions.¹⁹⁰ However the *Oregon* coalition was forged, the intended effect presumably was, as Brennan later said of *Regents of the University of California v. Bakke*, to "amplify" the message of the joint opinion¹⁹¹: that the enforcement clauses of the Fourteenth and Fifteenth Amendments provided Congress with the authority to lower the voting age even though the disputed statute did not deal with racial discrimination.¹⁹²

The concern to underscore that point may have seemed pressing in light of the individual opinions that dominated the case. Three Justices wrote for themselves—Black, Douglas, and Harlan.¹⁹³ Of those opinions, Douglas's must have seemed the least troublesome. Douglas was a loner, known for his steady stream of separate opinions, both concurring and dissenting, rejecting the bases for his colleagues' positions in favor of his own, sometimes quirky, rationales.¹⁹⁴ In *Oregon*, Douglas dismissed any historical arguments based on the intention of the framers of the Fourteenth Amendment as beside the point. In his view, "[t]he right to vote is a civil right deeply embedded in the Constitution" and therefore protected by the Fourteenth Amendment.¹⁹⁵ "Hence," he concluded, "the history of the Fourteenth Amendment tendered by my Brother Harlan is irrelevant to the present problem."¹⁹⁶ Since Douglas, though pursuing his own line of argument, came out in the same place as the Brennan bloc, his opinion was not a problem for it to confront and overcome.

The Black and Harlan opinions were a different matter. Black agreed with the Brennan bloc "that Congress has ultimate supervisory power over congressional elections," but he rejected a similar argument for state elections.¹⁹⁷ "My Brother Harlan," he wrote, "has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."¹⁹⁸ And Stewart's opposing opinion for his bloc relied on Black, calling him "surely correct when he writes, 'It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from

¹⁹⁰ MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* 330 (1992). According to Brennan's biographers, although Brennan himself resented portrayals of him as a successful judicial politician,

the justice himself understated his role as a political operator. . . . And, as legal historian Mark Tushnet has observed, Brennan was a successful politician in a deeper sense: 'Like all good political leaders, Brennan structured the process of decision and gave his colleagues reasons for doing what he understood to be the right thing.'

Stern & Wermiel, *supra* note 96, at 464.

¹⁹¹ Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 *YALE L. & POL'Y REV.* 341, 357 (2000).

¹⁹² *Oregon v. Mitchell*, 400 U.S. 112, 231 (1970) (Brennan, White, Marshall, Js., concurring in part and dissenting in part).

¹⁹³ *Id.* at 117, 135, 152.

¹⁹⁴ Howard Ball, *Loyalty, Treason, and the State: An Examination of Justice William O. Douglas's Style, Substance, and Anguish*, in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 7, 25 (Stephen L. Wasby ed., 1990).

¹⁹⁵ *Mitchell*, 400 U.S. at 138.

¹⁹⁶ *Id.* at 140.

¹⁹⁷ *Id.* at 124.

¹⁹⁸ *Id.* at 124–25 (internal quotation marks omitted).

President to local constable or village alderman.’”¹⁹⁹ The chain of reliance led from Stewart to Black to Harlan, and it was Harlan’s opinion that the Brennan bloc was at greatest pains to refute.

If Douglas was regarded as a sometimes idiosyncratic voice, Harlan was his opposite: a highly respected Justice who stood for the principles of judicial restraint and deference to Congress. Now Harlan was departing from that deferential stance, in what he himself called “an opinion of more than ordinary length,” to insist that Congress was acting beyond the bounds of its constitutional power.²⁰⁰ The first part of his opinion, some 45 pages, laid out the history of the passage of the Fourteenth Amendment that in his view demonstrated “virtually unanimous agreement, clearly and repeatedly expressed, that §1 of the Amendment did not reach discriminatory voter qualifications.”²⁰¹ Citing to Douglas’s opinion, Harlan added that “I must confess to complete astonishment at the position of some of my Brethren that the history of the Fourteenth Amendment has become irrelevant.”²⁰² Based on that history, he found that “I need do no more by way of justifying my reliance on these materials than sketch the familiar outlines of our constitutional system.”²⁰³ The resulting analysis led Harlan to conclude that on questions involving “the delicate adjustment of the federal system,” judicial deference was inappropriate because “[t]he role of final arbiter belongs to this Court.”²⁰⁴ The gauntlet was thrown down. Harlan was, in effect, challenging the Justices on the other side to present a counter history that would support congressional authority under the Fourteenth Amendment to set qualifications for state elections.

The Brennan bloc’s joint opinion took on that challenge, devoting 27 of its 52 pages to answering Harlan. It accused him of oversimplifying “an era of constitutional confusion, confusion that the Amendment did little to resolve.”²⁰⁵ The joint opinion provided its own reading of the passage of the Fourteenth Amendment in a turbulent time. “But clarity and precision are not to be expected,” it argued, “in an age when men are confronting new problems for which old concepts do not provide ready solutions.”²⁰⁶ Instead, there was “every reason to believe that different men reconciled in different and often imprecise ways the Fourteenth Amendment’s broad guarantee of equal rights and the statements of some of its framers that it did not give Congress power to legislate upon the suffrage.”²⁰⁷ For the authors of the joint opinion, that uncertainty and imprecision meant in practical terms that the framers had delegated the task of interpreting the amendment to future generations. They expressed that position in language evocative of Brennan’s theory of a living constitution:

We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in

¹⁹⁹ *Id.* at 293–94 (Stewart, J., concurring in part and dissenting in part).

²⁰⁰ *Id.* at 154 (Harlan, J., concurring in part and dissenting in part).

²⁰¹ *Id.* at 200.

²⁰² *Id.* at 201.

²⁰³ *Id.*

²⁰⁴ *Id.* at 209.

²⁰⁵ *Id.* at 252 (Brennan, White, Marshall, Js., concurring in part and dissenting in part).

²⁰⁶ *Id.* at 269.

²⁰⁷ *Id.*

accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record and cease to interpret the Amendment as this Court has always interpreted it.²⁰⁸

The joint opinion thus redefines the role imposed by history on the Court. Instead of serving as Harlan's irrefutable foundation, history is now an unreliable guide; where Harlan finds the Court confined to the framers' intentions, the joint opinion finds the Court liberated to adapt the amendment to the needs of the present. Thus, the Court need only apply a rational basis standard and find limiting the vote to those 21 and older "unnecessary to promote any legitimate interests of the State in assuring intelligent and responsible voting."²⁰⁹

The task of refuting, or at least undermining, Harlan's historical argument was central to the Brennan bloc's Fourteenth Amendment position. Given the weight of Harlan's reputation, his research, and his willingness to depart from his customary deference to the legislative branch, the Brennan bloc needed something of substantial heft to put on its side of the scales. In 1970, joint authorship of a major opinion was a novel strategic approach, one last seen 12 years before in *Cooper v. Aaron*. The decision by Brennan, White, and Marshall to use that approach here suggests their sense that a chorus of three voices might have more impact than the conventional single author opinion joined by supporters, the form used by Stewart, Burger, and Blackmun. The joint opinion sent a message that its reading of the Fourteenth Amendment was not merely a novel theory by a single Justice accepted, perhaps reluctantly, by two other Justices. It was, instead, a theory fully endorsed by all three signers that merited the same careful consideration that Harlan's opinion would surely command.

D. *Gregg v. Georgia: Speaking from the Center*

In 1972 the Supreme Court in *Furman v. Georgia*²¹⁰ struck down two state death penalty statutes in a one-sentence per curiam opinion saying simply that "[t]he Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."²¹¹ Each of the nine Justices wrote a separate opinion, five concurring and four dissenting, leaving considerable uncertainty in their wake. In the four years following *Furman*, 35 states amended their death penalty statutes in the hope of complying with the new, unarticulated standard, and in 1976 the Court agreed to hear five cases challenging a selection of those new statutes.²¹² The five carefully chosen cases were a representative sample of the varieties of post-*Furman* statutes, which generally followed one of two models.²¹³ Georgia, Texas, and Florida responded to concerns about unguided jury discretion and arbitrary imposition by the formu-

²⁰⁸ *Id.* at 278.

²⁰⁹ *Id.*

²¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

²¹¹ *Id.* at 239–40.

²¹² *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

²¹³ WOODWARD & ARMSTRONG, *supra* note 173, at 431–32.

lation of aggravating and mitigating factors for juries to consider;²¹⁴ North Carolina and Louisiana responded to those same concerns by eliminating jury discretion entirely and making the death penalty mandatory for crimes committed under specified circumstances.²¹⁵ These five cases, referred to collectively under the name of *Gregg v. Georgia*, the lead case, came before a Court identical to the *Furman* Court with one significant exception. In December 1975 John Paul Stevens replaced Douglas, one of *Furman*'s concurring Justices, who had retired a month earlier after a prolonged period of illness and limited capacity.²¹⁶ The death penalty cases had been held over until Douglas's replacement was confirmed, and the newly seated Justice Stevens found himself a pivotal figure in the resolution of *Gregg*.²¹⁷

At the Court's April 2 conference following the two day oral argument, Brennan made clear his firm opposition to capital punishment and Marshall agreed, but the conference vote was seven to two against striking down all five statutes.²¹⁸ Four Justices—Burger, White, Blackmun, and William Rehnquist—took the opposite position, voting to uphold most or all of the statutes.²¹⁹ The three remaining Justices—Stewart, Lewis Powell, and Stevens—agreed that the death penalty was constitutional under some circumstances but did not vote in lockstep with the Burger bloc.²²⁰ According to John Jeffries, Powell's biographer, "the votes were divided and confused. There were firm majorities to uphold two statutes, less certain support for two more, and no clear majority one way or the other on the law from North Carolina."²²¹ Faced with this murky outcome, Burger assigned all five cases to White, who, like Burger, had voted to uphold all five statutes.²²² Stewart and Powell then took stock of their situation. With Powell now clear that he would vote to strike

²¹⁴ *Gregg*, 428 U.S. at 163–65; *Jurek v. Texas*, 428 U.S. 262, 269–72 (1976); *Proffitt v. Florida*, 428 U.S. 242, 248–50 (1976).

²¹⁵ *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 338 (1976).

²¹⁶ THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 272–73, 976.

²¹⁷ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 422 (1994).

²¹⁸ WOODWARD & ARMSTRONG, *supra* note 173, at 434; STERN & WERMIEL, *supra* note 96, at 426.

²¹⁹ STERN & WERMIEL, *supra* note 96, at 427.

²²⁰ *See id.*

²²¹ JEFFRIES, *supra* note 217, at 423. Woodward and Armstrong give a precise account of the votes for each state statute:

Georgia: 7 to 2 to uphold. Only Brennan and Marshall dissented.

Florida: 7 to 2 to uphold. Again only Brennan and Marshall dissented.

Texas: 5 to 3 to uphold. Stevens joined Brennan and Marshall in dissenting while Stewart passed.

Louisiana: 5 to 4 to uphold. Stevens and Stewart joined Brennan and Marshall in dissent.

North Carolina: 4 to 3 to 2 to strike. Brennan, Marshall, Stewart and Stevens were in the majority while Blackmun and Powell passed.

WOODWARD & ARMSTRONG, *supra* note 173, at 528.

²²² JEFFRIES, *supra* note 217, at 423. According to Woodward and Armstrong, Burger, concerned about keeping White's support firm, thought that "the assignment would probably hold him." WOODWARD & ARMSTRONG, *supra* note 173, at 435. Burger also thought that White was likely to write the kind of technical opinion that would secure the votes of Blackmun and Powell to uphold the North Carolina statute. *Id.*

down the North Carolina statute, White no longer had a majority for all five cases.²²³

So Stewart and Powell joined forces. They did not want to fritter their votes away by concurring or dissenting in White's opinions, and they realized that in at least one case (the one from North Carolina), White would not have a majority. If they wrote separately, theirs would be the decisive opinion in all five cases, charting (so they hoped) a coherent middle course between the two extremes. But they needed another vote. With White, Burger, Blackmun, and Rehnquist, they could make a majority to uphold any law, but to strike down a statute they needed more help than Brennan and Marshall. They needed John Paul Stevens.²²⁴

And they acted promptly to secure his support, inviting Stevens to lunch and discussing the situation with him. The three Justices found themselves largely in agreement on the cases and decided to move forward, informing Burger of the new state of affairs; when Burger declined to withdraw White's assignment, Stewart acted on his own.²²⁵ He informed White that the situation had changed since Burger assigned the cases to him; with the new coalition in place, White had effectively lost his complete majority support. At a May 5 conference, Burger, aware of how matters stood, asked Brennan as senior Justice of a potential new bloc of five to reassign the North Carolina case, but Brennan, aware that the majority would contain no unqualified opponents of capital punishment except himself and Marshall, said no. Stewart then proposed that he, Powell, and Stevens essentially share the assignment, jointly preparing the opinions for all five cases; the other Justices agreed.²²⁶

The three members of the centrist bloc in *Gregg* distributed the work among themselves. Powell, drawing on his own *Furman* dissent, was to refute Brennan and Marshall's absolute position on death penalty statutes; Stewart was to distinguish between the statutes that were constitutional and those that were not; and Stevens was to present the facts.²²⁷ Each of the headnotes for the five cases listed the three authors by seniority in the identical form: "Judgment of the Court, and opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens."²²⁸ Each headnote also indicated the name of the Justice announcing the opinion: Stewart in *Gregg* and *Woodson*; Powell in *Proffitt*; and Stevens in *Jurek* and *Roberts*.²²⁹ The public role did not necessarily correspond with the substance of each Justice's contribution; Powell, for example, crafted the central argument in *Gregg*, although Stewart announced the opinion.²³⁰ Although that blurring of direct responsibility may have misled readers of the opinions, the dominant message sent by *Gregg* was nonetheless clear: that in this controversial case dealing with a polarizing issue, the resolution

²²³ WOODWARD & ARMSTRONG, *supra* note 173, at 436.

²²⁴ JEFFRIES, *supra* note 217, at 425–26.

²²⁵ WOODWARD & ARMSTRONG, *supra* note 173, at 436.

²²⁶ JEFFRIES, *supra* note 217, at 426–27.

²²⁷ *Id.* at 427.

²²⁸ See *Gregg v. Georgia*, 428 U.S. 153, 158 (1976) (emphasis omitted); *Jurek v. Texas*, 428 U.S. 262, 264 (1976); *Proffitt v. Florida*, 428 U.S. 242, 244 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 282 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 327 (1976).

²²⁹ *Gregg*, 428 U.S. at 158; *Jurek*, 428 U.S. at 264; *Proffitt*, 428 U.S. at 244; *Woodson*, 428 U.S. at 282; *Roberts*, 428 U.S. at 327.

²³⁰ JEFFRIES, *supra* note 217, at 427.

came not from a single Justice but from a unified bloc of Justices with separate identities who had worked together to forge a consensus.

That message of consensus was reflected in the careful distinctions that the three Justices drew among the five statutes. In *Gregg*, they wrote that “the punishment of death does not invariably violate the Constitution,”²³¹ pointing to the passage of new death penalty statutes by 35 states in the four years since *Furman* had suggested that American society no longer supported the practice. Three of the statutes under review—those of Georgia, Texas, and Florida—were found to contain sufficient safeguards to ensure that they would not permit arbitrary imposition of disproportionate sentences.²³² Two of the statutes—those of North Carolina and Louisiana—were found unconstitutional because of their failure both to address *Furman*’s call for guided juror discretion²³³ and to “focus on the circumstances of the particular offense and the character and propensities of the offender.”²³⁴ This range of response suggested that the three authors brought to the table a shared willingness to examine each statute on its own merits, to perform a retail rather than a wholesale analysis, and to follow that analysis wherever it led.

By July 2, when the five cases were ready to be announced, they contained a total of 20 separate opinions and statements concurring in and dissenting from the judgments.²³⁵ Every member of the Court had spoken at least twice, White and Blackmun five times each. In the absence of a single controlling majority opinion, Burger proposed that he as Chief Justice should be the first to present his opinion, but the others insisted that the joint authors should hold that position.²³⁶ And that seems appropriate. In the busy final two months of the term remaining after the May 5 conference, Stewart, Powell, and Stevens had worked together to resolve the five death penalty cases. Amid the welter of individual voices, their joint opinions that controlled the cases provided not just efficiency but a reassuring note of collaboration and consistency as well.

The three centrist Justices had set out with a modest agenda, the resolution of particular cases rather than a broad ideological statement. Stewart and Powell, veterans of *Furman*, were concerned about its potential to produce what they considered two equally undesirable effects: the abolition of the death penalty or, ironically, a sharp increase in the number of executions under new state

²³¹ *Gregg*, 428 U.S. at 169.

²³² *Id.* at 207; *Jurek*, 428 U.S. at 276–77; *Proffitt*, 428 U.S. at 259–60.

²³³ *Woodson*, 428 U.S. at 302.

²³⁴ *Roberts*, 428 U.S. at 333.

²³⁵ Brennan and Marshall each filed a dissent applicable to *Gregg*, *Proffitt*, and *Jurek*. In *Gregg*, White filed an opinion concurring in the judgment, Burger and Rehnquist a joint statement concurring in the judgment, and Blackmun a statement concurring in the judgment. *Gregg*, 428 U.S. at 207, 226, 227. In *Proffitt*, White filed an opinion concurring in the judgment and Blackmun a statement concurring in the judgment. *Proffitt*, 428 U.S. at 260, 261. In *Jurek*, Burger filed a statement concurring in the judgment, White an opinion concurring in the judgment, and Blackmun a statement concurring in the judgment. *Jurek*, 428 U.S. at 277, 279. In *Woodson*, Brennan and Marshall each filed a statement concurring in the judgment and White, Blackmun, and Rehnquist each filed a dissenting opinion. *Woodson*, 428 U.S. at 305–08. In *Roberts*, Brennan and Marshall filed statements concurring in the judgment Burger filed a dissenting statement, White a dissenting opinion, and Blackmun a dissenting statement. *Roberts*, 428 U.S. at 336–37, 363.

²³⁶ WOODWARD & ARMSTRONG, *supra* note 173, at 440–41.

statutes providing mandatory death sentences.²³⁷ Stevens, the new voice, may in fact have been the most ideological of the three. At conference he revealed his expectation “that Thurgood’s and Bill Brennan’s views will eventually become law, but not yet,”²³⁸ a perspective that foreshadowed his announcement, 32 years later, of his own opposition to the death penalty.²³⁹ And Stevens also thought that “[t]o have created a monster like North Carolina, which increases the incidence of the penalty, is abhorrent.”²⁴⁰ Yet he too, in his first term on the Court,²⁴¹ found in the joint opinion an approach to the problem that moved the Court toward a pragmatic center while avoiding any semblance of individual ideological fervor. Among the Court’s abundance of individual voices, the five joint death penalty opinions served, as intended, to convey a balanced and impersonal response to a powerfully divisive issue.

E. Regents of the University of California v. Bakke: Amplification Revisited

Looking back at his 16 terms on the Court, Justice Powell called *Regents of the University of California v. Bakke*²⁴² his most important opinion.²⁴³ But it was another Justice, William Brennan, who played the most important role, that of master strategist, in resolving the case. Although Brennan’s name appeared only as one of four authors of a joint opinion,²⁴⁴ it is fair to say that his fingerprints may be detected on Powell’s opinion as well. And Brennan’s decision to label the quite different opinion that he largely wrote himself as a collaborative product reflects his use of the joint opinion form to express a hard won unity of purpose with his sometimes fractious partners. In *Bakke*, Brennan repeatedly mended with tact the strained seams that threatened to pull apart his bloc and thus to prevent the Court from upholding the principle of affirmative action.

²³⁷ JEFFRIES, *supra* note 217, at 426.

²³⁸ THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 7, at 621.

²³⁹ Concurring in a 2008 death penalty case, Stevens made clear his position:

I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment in violation of the Eighth Amendment.’ *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment). The internal quotation is from White’s concurring opinion in *Furman*. 408 U.S. 238, 312 (1972) (White, J., concurring). In a December 17, 2010, interview that the retired Justice O’Connor conducted of the retired Justice Stevens, he identified *Jurek v. Texas*, the Texas death penalty case, as the only case he “would decide differently today”:

My first year on the court we decided five death-penalty cases, and we held unconstitutional the mandatory death sentences in two states and upheld the nonmandatory statutes in two other states. And I think upon reflection, we should have held the Texas statute—which was challenged in the fifth case—to fit under the mandatory category and be unconstitutional. In my judgment we made a mistake on that case.

Sandra Day O’Connor Interviews John Paul Stevens, NEWSWEEK, Jan. 3, 2011, at 38.

²⁴⁰ DAVID M. OSHINSKY, CAPITAL PUNISHMENT ON TRIAL: *Furman v. Georgia* and the Death Penalty in Modern America 70 (2010).

²⁴¹ THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 976.

²⁴² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²⁴³ JEFFRIES, *supra* note 217, at 456.

²⁴⁴ See *Bakke*, 438 U.S. at 272.

Brennan's *Bakke* strategy was not immediately successful. A committed supporter of affirmative action in higher education, Brennan recognized that the challenged plan at the Medical School of the University of California at Davis—reserving 16 of 100 seats for members of specified racial and ethnic minorities—was not the most sympathetic test case. The California Supreme Court had decided in favor of Allan Bakke, a 33-year-old white applicant who had been rejected twice by Davis although his grades and test scores were markedly higher than those of applicants accepted for the 16 reserved seats.²⁴⁵ Brennan's effort to block certiorari fell short when he garnered only the votes of Marshall, another strong proponent of affirmative action, Blackmun, and Chief Justice Burger.²⁴⁶ With the case now on the Court's docket, Brennan turned his attention to the substantive debate that followed. Despite Brennan's reputation for one-on-one persuasion of his colleagues, Bernard Schwartz's detailed history of the case makes clear that the debate was largely carried out on paper in a stream of memoranda that flowed from the chambers of seven Justices.²⁴⁷ According to Howard Ball's tally, in the period from October 1977 to January 1978 seven Justices sent twelve Memoranda to the Conference; only Blackmun, who was absent from the Court for prostate cancer surgery during that time, and Stewart did not write.²⁴⁸

Those memos clarified the views of some, though not all, of the Justices. On the right, both Burger and Rehnquist were blunt in their rejection of the Davis plan as a violation of Bakke's equal protection rights. Burger's October 21 memo, circulated a week after the Court's first conference on the case, insisted on strict scrutiny as the standard of review for equal protection claims made by white litigants.²⁴⁹ "No member of this Court, so far as I can recall," he observed, "has ever had any question but that racial classifications are suspect under all circumstances."²⁵⁰ Although Burger left the door open to possibly permissible alternative programs, he was clear that in his view "this rigidly cast admissions program is impermissible on this record because it does precisely what has long been condemned by this Court—it excludes applicants on the basis of race."²⁵¹ Rehnquist's memo, following on November 11, agreed that

²⁴⁵ JEFFRIES, *supra* note 217, at 455–56.

²⁴⁶ According to Linda Greenhouse, at the time of the certiorari vote, Brennan and Marshall "cast strategic votes against hearing the case. Burger and Blackmun voted to deny for a different reason: they were content with the lower court's ruling" against the Davis program. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 129 (2005) [hereinafter GREENHOUSE, *BECOMING JUSTICE BLACKMUN*].

²⁴⁷ BERNARD SCHWARTZ, *BEHIND Bakke: Affirmative Action and the Supreme Court* 43 (1988) [Schwartz, *Behind Bakke*]. Schwartz notes the change in procedure from the personal interactions of the Warren Court to the paper exchanges of the Burger Court, due in part to such technological devices as the Xerox copier that arrived at the Court under Burger's administration. SCHWARTZ, *DECISION*, *supra* note 172, at 7.

²⁴⁸ HOWARD BALL, *THE Bakke Case: Race, Education, and Affirmative Action* 113 (2000) [hereinafter BALL, *BAKKE CASE*]. Ball's breakdown of memos authored is Burger one, Brennan two, White two, Marshall one, Powell four, and Stevens one. *Id.* at 114.

²⁴⁹ Warren E. Burger, Memorandum of Oct. 21 (1977), *reprinted in* SCHWARTZ, *BEHIND Bakke*, *supra* note 247, at app. A, 168.

²⁵⁰ Warren E. Burger, Memorandum of Oct. 21 (1977), *reprinted in* SCHWARTZ, *BEHIND Bakke*, *supra* note 247, at app. A, 168.

²⁵¹ *Id.* at 171.

strict scrutiny was the applicable standard.²⁵² Rehnquist also agreed that the program was a clear equal protection violation: “I take it as a postulate that difference in treatment of individuals based on their race or ethnic origin is at the bull’s eye of the target at which the Fourteenth Amendment’s Equal Protection Clause was aimed.”²⁵³ Although Stewart did not circulate a memo, he made clear at the Court’s December 9 conference that in his view the Equal Protection Clause “forbids discrimination based on a person’s race alone That’s precisely what the Davis program does and injurious action based on race is unconstitutional.”²⁵⁴ He was clearly aligned with Burger and Rehnquist. Stevens, who had not yet written about his views, also clarified his position at the conference.²⁵⁵ He, too, criticized the Davis program, though on different grounds.²⁵⁶ He thought that the Court should “duck the constitutional holding” and base its response instead on Title VI, the federal statute prohibiting discrimination on the basis of race by any entity receiving federal funds.²⁵⁷ “I would hold,” he declared, “that Title VI is violated by the two-track quota system” at Davis.²⁵⁸ That meant four votes to strike down the program.

Views of the Justices on the left also emerged. On November 23 Brennan circulated his own pre-conference memo addressing both the Title VI and constitutional issues.²⁵⁹ He dealt with the statutory issue in little more than a page, finding that “Title VI essentially incorporates Fourteenth Amendment standards and treats affirmative action as does the Amendment.”²⁶⁰ Focusing therefore largely on the crucial equal protection issue, Brennan insisted that “not every remedial use of race is constitutionally forbidden” and that “to state an abstract principle of color-blindness is itself to be blind to history.”²⁶¹ Suggesting a broad agreement that had certainly not yet emerged on the Court, Brennan said that “I think I’m right that all nine of us agree that Davis in this case did *not* use race with ill will toward Bakke or anyone.”²⁶² With that prologue, he then reached the heart of his position:

The constitutional principle I think to be supported by our cases can be summarized as follows: government may not on account of race, insult or demean a human being by stereotyping his or her capacities, integrity, or worth as an individual. In other

²⁵² William H. Rehnquist, Memorandum of Nov. 10–11 (1977), *reprinted in* SCHWARTZ, BEHIND *Bakke supra* note 247, at app. B, 177.

²⁵³ *Id.*

²⁵⁴ SCHWARTZ, BEHIND *Bakke, supra* note 247, at 94–95.

²⁵⁵ *Id.* at 97.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ William J. Brennan, Jr., Memorandum of Nov. 23 (1977), *reprinted in* SCHWARTZ, BEHIND *Bakke, supra* note 247, at app. D, 244.

²⁶⁰ William J. Brennan, Jr., Memorandum of Nov. 23 (1977), *reprinted in* SCHWARTZ, BEHIND *Bakke, supra* note 247, at app. D, 243.

²⁶¹ SCHWARTZ, BEHIND *Bakke, supra* note 247, at 228.

²⁶² *Id.* at 231. Later in the memo Brennan again insisted on unanimity on the question of the Davis plan: “But I feel, and I doubt any of my colleagues disagree, that Davis’ admissions policies as applied to Bakke are *not*” what he termed “invidious by design.” *Id.* at 235 (emphasis added).

words, the Fourteenth Amendment does not tolerate government action that causes any to suffer from the prejudice or contempt of others on account of his race.²⁶³

Brennan made one other point of significance for what was to follow. He suggested what Schwartz terms “a modified version of the rational-basis test”²⁶⁴ as the appropriate standard of review: “[W]hether the affirmative action policy actually adopted is a reasonable and considered one in light of the alternatives available and the opportunities it leaves open for whites.”²⁶⁵ Under that standard, the Davis program was, in his view, clearly constitutional. At the December 9 substantive conference both White and Marshall announced their support for the Davis program, with Marshall insisting that “this is not a quota to keep someone out—it’s a quota to get someone in.”²⁶⁶

Brennan now had three certain votes for his position. With Blackmun absent, Powell became the crucial Justice and the focus of Brennan’s attention. Powell had circulated a draft opinion on November 22, making two major points.²⁶⁷ First, he insisted that strict scrutiny was the appropriate standard and found no compelling state interest in retaining the Davis program.²⁶⁸ “Preferring members of any one group for no reason other than race or ethnic origin,” he wrote, “is discrimination for its own sake. This the Constitution forbids.”²⁶⁹ But Powell also devoted a section of his memo to an appreciative account of Harvard University’s admissions policy, which awarded a plus to applicants for a number of qualities, including race, that fostered a diverse student body and which in his view was “clearly . . . a constitutionally permissible goal for an institution of higher education.”²⁷⁰ When Powell announced his conference vote to affirm the California Supreme Court decision, Brennan challenged him on the grounds of inconsistency. Since the California decision rejected any racial preference, Powell’s endorsement of the Harvard plan contradicted that decision.²⁷¹ In fact, Brennan proposed, Powell should be voting to affirm in part and reverse in part, thus leaving the door open for the use of race as one factor among many in admissions programs.²⁷² Powell agreed, stating “that the judgment must be reversed insofar as it enjoins Davis from taking race into account.”²⁷³ And Brennan, as Schwartz notes, “immediately saw the significance of Powell’s agreement [and] . . . stressed its importance to his law clerks”: Powell was in effect accepting affirmative action plans on principle

²⁶³ *Id.* at 233.

²⁶⁴ *Id.* at 91.

²⁶⁵ William J. Brennan, Jr., Memorandum of Nov. 23 (1977), reprinted in SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at app. D, 240.

²⁶⁶ THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 7, at 739.

²⁶⁷ Lewis F. Powell, Jr., Memorandum of Nov. 22 (1977), reprinted in SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at app. C, 195.

²⁶⁸ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 214–16.

²⁶⁹ Lewis F. Powell, Jr., Memorandum of Nov. 22 (1977), reprinted in SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at app. C, 214.

²⁷⁰ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 217.

²⁷¹ *Id.* at 96.

²⁷² *Id.*

²⁷³ *Id.* Ten days later, in a memo to the conference, Powell returned to this position, noting that “in the unlikely but welcome event that a consensus develops for allowing the competitive consideration of race as an element, I think we should affirm as to the Davis program, but reverse in part as to the scope of the injunction.” *Id.* at 104–05.

while rejecting the particular plan in place at Davis.²⁷⁴ Brennan had now elicited at least a partial fourth vote, but the ninth Justice remained to be heard from.

The period that the Justices had dubbed “waiting for Harry” could have ended promptly in January 1978 when Blackmun returned to the Court and resumed his duties.²⁷⁵ But as his divided colleagues continued their vigil, Blackmun said nothing about the *Bakke* case, becoming irritable when it was mentioned and responding to an inquiry from the Chief Justice by saying simply that he hadn’t yet decided on his position.²⁷⁶ The wait finally came to an end on May 1, when Blackmun circulated a memo to the conference.²⁷⁷ He had been, he said, “constantly stewing about the *Bakke* case”²⁷⁸ while attending to other cases, but he was now ready to make clear his support for the Davis plan. Although he hoped that within a decade such approaches would be unnecessary, he argued that “[t]his is not an ideal world” and thus “the only possible and realistic means of achieving the societal goal” of a nation without race consciousness was one that took race into account.²⁷⁹ Therefore he found the Davis plan “within constitutional bounds, though perhaps barely so.”²⁸⁰ With a touch of disingenuousness, Blackmun noted that he had “not had the benefit of the Conference discussion of early December, so I do not know precisely how my vote affects the ultimate tally.”²⁸¹

If that was so, he was the only member of the Court left in ignorance. By joining the Brennan-Marshall-White bloc, Blackmun created an unusual configuration that resembled the alignment in *Oregon v. Mitchell*. Four Justices now clearly found constitutional an affirmative action plan that openly relied on race as a relevant admissions factor. Four other Justices, the Burger-Rehnquist-Stewart-Stevens bloc, just as clearly found the plan’s reliance on race invalid; although three members would have ruled on constitutional grounds, Stevens’s insistence on a statutory rationale prevailed. And in the middle was Powell, whose draft opinion found the Davis plan unconstitutional but accepted the use of race as one of many factors, as in the Harvard plan. Each bloc rejected Powell’s opinion in part; each bloc accepted Powell’s opinion in part.

Burger and Brennan as the leaders of their blocs pondered the assignment challenge posed by the Court’s unusual alignment. In the memo on the case that he wrote for his files, Brennan described his strategy for securing an appropriate assignment:

Since I had known the CJ to use the [opinion] assignment power in an unorthodox manner in other important cases, I was prepared to resist any such effort in this case. Immediately, I approached the CJ and, relying on *Mitchell v. Oregon*, pointed out

²⁷⁴ *Id.* at 97.

²⁷⁵ *Id.* at 120.

²⁷⁶ *Id.* at 122–23.

²⁷⁷ Harry A. Blackmun, Memorandum of May 1 (1978), reprinted in SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at app. E, 245.

²⁷⁸ *Id.* at 247.

²⁷⁹ *Id.* at 248, 251.

²⁸⁰ *Id.* at 257.

²⁸¹ *Id.* at 259.

that the only assignment which could be made would be a joint one from me and the Chief to LFP—the only one of us not in partial dissent.²⁸²

Brennan, Burger, and Powell then met to discuss the situation, and Powell agreed to take on the case.²⁸³

On May 2, the day following Blackmun's circulation, Burger sent a memo to the conference implementing Brennan's proposal:

Given the posture of this case, Bill Brennan and I conferred with a view to considering what may fairly be called a 'joint' assignment. There being four definitive decisions tending one way, four another, Lewis' position can be joined in part by some or all of each 'four group.' Accordingly the case is assigned to Lewis who assures a first circulation one week from today.²⁸⁴

That settled the assignment of the case, but it still left the assignment of a separate opinion open to Brennan, the senior Associate Justice in his bloc. Already dealing with four opinions for the Court in his chambers, Brennan asked White to write that opinion but White declined, pointing to his other obligations and his strong reliance on Title VI rather than on the constitutional basis.²⁸⁵ Brennan then determined that he would have to write the opinion himself. Apparently, he already had in mind proposing to his coalition "the idea of a jointly signed opinion with BRW, TM, and HAB, a course which I hoped would amplify the message that a majority had held that most affirmative action programs are permissible under both Title VI and the Constitution."²⁸⁶ And with tensions existing among the bloc's members, Brennan recalled that he "became convinced that only I might be in a position to obtain the votes of the remaining three."²⁸⁷

When Brennan circulated his first draft on June 8, he included the message that "[m]y hope, of course, is that we can end up with a joint opinion," but that outcome was by no means certain.²⁸⁸ Brennan had hoped that Powell would join some sections of his opinion, but Powell objected to language rejecting the use of strict scrutiny, language that Marshall had readily joined.²⁸⁹ For his part, White submitted 14 suggestions for revision, including his own insistence on the strict scrutiny standard.²⁹⁰ Though whipsawed by conflicting demands, Brennan immediately set to work mollifying his critics.²⁹¹ To keep both White and Marshall on board, Brennan formulated a new standard of review for affirmative action programs, replacing the compelling state interest required by strict scrutiny with an "important and articulated purpose" while at the same time concluding that "our review under the Fourteenth Amendment should be *strict* and *searching* nonetheless" to reject any statute "*that stigmatizes any*

²⁸² Brennan memorandum, *reprinted in* Epstein & Knight, *supra* note 191, at 355.

²⁸³ *Id.* at 356.

²⁸⁴ *Id.* at 356 n.65.

²⁸⁵ BALL, BAKKE CASE, *supra* note 248, at 126–27.

²⁸⁶ Epstein & Knight, *supra* note 191, at 357.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 360 n.86.

²⁸⁹ BALL, BAKKE CASE, *supra* note 248, at 131.

²⁹⁰ *Id.* at 130–31.

²⁹¹ *Id.* at 131.

group or that singles out those least represented in the political process to bear the brunt of a benign program.”²⁹²

White also questioned the heart of Brennan’s opinion: his definition of *Bakke*’s “central meaning” as government’s right to “take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.”²⁹³ Brennan described his strategy to persuade White to accept the formulation:

This assertion—which I had intentionally placed in a very prominent position at the end of the first paragraph of my opinion—was intended to give some guidance and assurance to those who wanted to keep affirmative action alive. Accordingly, I was dismayed to find that BRW thought it inaccurate. I immediately called LFP, who assured me that he had no trouble with the form of the assertion—a position he later retracted somewhat. . . . I quickly relayed LFP’s position to BRW, and this seemed to mollify him.²⁹⁴

The peace was only momentary. After the skirmishes with Powell over the “central meaning” passage were resolved,²⁹⁵ Brennan faced additional objections to his June 23 draft from both White and Blackmun:

On Saturday, all hell broke loose. First BRW called me at home to say he could not live with the changes relating to the standard of review. He was absolutely insistent that we say “strict scrutiny” and further, that our analysis remain superficially traditional.

I went to the office to discuss this with BRW. On arriving there, my clerks told me that HAB had called. I called HAB and he, too, indicated that he was pulling out of the opinion. HAB was simply very mad that we had made a lot of changes. He stated that he had not read any of them, but that he was just in no position to even consider *Bakke* any further.²⁹⁶

With the opinion scheduled to come down on June 28, Brennan scrambled to satisfy both White on substance and Blackmun on procedure.²⁹⁷ As to White, Brennan managed to find an acceptable compromise on the disputed language. And after Brennan engaged Blackmun’s clerk as an emissary with the latest draft of the opinion, Blackmun called on the evening of June 24 to say “that he was back with us if I would promise to make no more changes. I promised.”²⁹⁸

²⁹² *Id.* (italics in original text). The discussion that follows is based in part on Ball’s discussion. *Id.* at 130–34.

²⁹³ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 139.

²⁹⁴ Epstein & Knight, *supra* note 191, at 365–66. In a letter to Brennan sent on June 23, Powell did express reservations about Brennan’s “central meaning” formulation, though he did not request any further changes: “If your statement is read literally, I doubt that it does reflect accurately the judgment of the Court. . . . I have not objected to your characterization of what the Court holds as I have thought you could put whatever ‘gloss’ on the several opinions as you think proper.” *Id.* at 367–68 n.107. Although Powell had made no request for modifications, Brennan responded by adding the following language: “[A]t least where appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.” JEFFRIES, *supra* note 217, at 492 n.* (internal quotation marks omitted).

²⁹⁵ See SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 140; STERN & WERMIEL, *supra* note 96, at 454.

²⁹⁶ Epstein & Knight, *supra* note 191, at 368.

²⁹⁷ BALL, BAKKE CASE, *supra* note 248, at 134.

²⁹⁸ *Id.* at 134.

The skirmishes behind the scenes that came close to derailing Brennan's joint opinion illustrate both the strong tensions provoked by the affirmative action issue and his celebrated deftness in forging compromises and alliances despite those tensions. The skirmishes also suggest the reasons that Brennan, the principal drafter of the opinion as well as the tactician who preserved its unity against considerable odds, chose to issue that opinion under the joint names of his bloc. Had Brennan's name alone appeared as author of the opinion while Stevens's name appeared on the rival bloc's opinion, the Court's response to *Bakke* would have achieved a perfect symmetry: two blocs of four Justices, with three members of each bloc joining an opinion that endorsed part of Powell's opinion. Brennan had hoped to upend that symmetry by persuading Powell to join parts of his bloc's opinion, but ultimately Powell decided not to take that step.²⁹⁹ From Brennan's perspective, the fate of the Davis plan was far less important than the fate of affirmative action itself.³⁰⁰ If Davis lost but the door remained open to some varieties of affirmative action, Brennan could count that as a substantial victory, one that would have far-reaching implications for future doctrine.³⁰¹ The challenge, then, was how to package the Court's unusual alignment so as to undermine its symmetry and suggest a solid victory for the supporters of affirmative action.

By presenting his opinion as jointly authored, Brennan approached his goal in several ways. As he had expressly stated earlier in the process, he thought that a joint opinion would "amplify" the message of the opinion³⁰²: the survival of affirmative action as constitutional. Coming from Brennan as author—or Marshall as a signatory—that message was hardly surprising. Coming also from White, no across-the-board liberal,³⁰³ and from Blackmun, only recently emerged from Burger's shadow,³⁰⁴ the message had a stronger impact. In a June 13 memo to Brennan, White had urged him "to keep the decibel level as low as possible. We won't accomplish much by beating a white majority over past ills or by describing what has gone by as a system of apartheid."³⁰⁵ Brennan complied as a matter of substance and tone, but he found another medium for his message. In the years since his role as principal drafter in *Cooper v. Aaron*, Brennan had become an advocate for the joint opinion, using it in *Oregon v. Mitchell* and urging it unsuccessfully on his colleagues in *United States v. Nixon* and *Buckley v. Valeo*.³⁰⁶ Now he once again used it in *Bakke* to disturb the Court's seeming balance and transform a tie into a victory.

²⁹⁹ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 88; *see also* STERN & WERMIEL, *supra* note 96, at 448.

³⁰⁰ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 41–42; *see also* STERN & WERMIEL, *supra* note 96, at 445.

³⁰¹ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 44 ("This program is not of course governmentally mandated but was voluntary instituted by Davis. A decision here need not go beyond such a program; 'to hold that voluntary minority admissions programs are consistent with the Equal Protection's clause would not establish the validity of mandated programs.'").

³⁰² Epstein & Knight, *supra* note 191, at 357.

³⁰³ STERN & WERMIEL, *supra* note 96, 447.

³⁰⁴ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 121.

³⁰⁵ *Id.* at 139.

³⁰⁶ STERN & WERMIEL, *supra* note 96, at 466.

Although Brennan managed to keep all three of his partisans on board as co-authors, there was, inevitably, a price to pay for the compromises and the low decibel level. Each of the three felt the need to add his own “separate opinion”—the label used in U.S. Reports,³⁰⁷ presumably because there was no opinion of the Court to concur in or dissent from—making clear the points of divergence. For White, this was a matter of substantive law. He devoted his entire opinion to the argument that Title VI did not provide a private right of action. “Because each of my colleagues either has a different view or assumes a private cause of action,” he wrote, “the merits of the Title VI issue must be addressed,”³⁰⁸ and White took on that task. For Marshall and Blackmun, however, the separate opinion was a vehicle not for substantive argument but for highly personal elaborations of the joint opinion.

Marshall’s opinion opens with a rejection of the Court’s holding that the Davis program violates the Constitution:

For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.³⁰⁹

Marshall then proceeds to describe both that history and its legacy in vivid and unsparing terms. “Three hundred and fifty years ago,” he recounts, “the Negro was dragged to this country in chains to be sold into slavery,” a system that “brutalized and dehumanized both master and slave.”³¹⁰ Marshall describes the early Slave Codes, the subsequent Black Codes, the disenfranchisement strategies employed by the South, and the Supreme Court decisions, like *Plessy v. Ferguson*, that undermined the Fourteenth Amendment to entrench segregation for generations.³¹¹ He cites “the tragic but inevitable consequence of centuries of unequal treatment” in life expectancy, income, and employment.³¹² “The dream of America as the great melting pot,” he observes tartly, “has not been realized for the Negro; because of his skin color he never even made it into the pot.”³¹³ And he ends with a direct attack on the five Justices who have voted to strike down the Davis program as responsible for yet another setback in the tortuous path from slavery to full participation in American life. “I fear,” Marshall concludes, “that we have come full circle” to retreat from the benchmarks of *Brown* and the Civil Rights Act: “Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.”³¹⁴

³⁰⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978). See the first page of the opinion where the separate opinions are listed. See also STERN & WERMIEL, *supra* note 96, at 452 (“Brennan reluctantly concluded that his foursome would have to write separately while concurring with Powell as much as possible.”).

³⁰⁸ *Id.* at 387 (White, J., separate opinion).

³⁰⁹ *Id.* (Marshall, J., separate opinion).

³¹⁰ *Id.* at 387–88.

³¹¹ *Id.* at 387–94 (Marshall, J., separate opinion).

³¹² *Id.* at 395.

³¹³ *Id.* at 400–01.

³¹⁴ *Id.* at 402.

Blackmun's separate opinion opens on a less combative note, saying quietly that "I add only some general observations that hold particular significance for me."³¹⁵ Those observations include cites to cases in which the Court had taken race into account in upholding desegregation and employment plans; his view of the "thin and indistinct" line³¹⁶ that separates the Davis and Harvard admissions programs; and the existence of various government preferences favoring, among others, veterans, Indians, athletes, and the children of alumni. What these "additional components on the edges of the central question"³¹⁷ signified for Blackmun was the overlooked fact that the use of preference was already present, though unacknowledged, in our legal system:

It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.³¹⁸

Blackmun's tone becomes sterner as he insists that those on the Court who ignore this reality and insist on a racially neutral affirmative action plan are "demand[ing] the impossible."³¹⁹ In his often quoted language, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."³²⁰ Though Marshall's rhetoric is considerably tougher and his accusation of complicity fiercer, his separate opinion and Blackmun's are not so far apart in substance. Both are willing to point the finger at their colleagues on the other side as unwilling to acknowledge the realities of history and law that should inform the Court's equal protection jurisprudence.

These separate opinions, particularly those of Marshall and Blackmun, underscore the constraints that Brennan as draftsman accepted in his jointly signed opinion. His focus remained squarely on the core issue, the question of whether race-conscious affirmative action plans violate equal protection. And he answered that question in the first sentence of his opinion, which announced the Court's holding in broad terms: "The Court today . . . affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all."³²¹ His second sentence, a gracious acknowledgment of the "mature consideration which each of our Brethren has brought" to the issue and the resulting assortment of opinions, "no single one speaking for the Court," seems to be accepting and even appreciating the resultant lack of consensus.³²² The third and final sentence, however, pivots to insist that, despite these various perspectives, consensus has nonetheless emerged:

³¹⁵ *Id.* (Blackmun, J., separate opinion).

³¹⁶ *Id.* at 406.

³¹⁷ *Id.*

³¹⁸ *Id.* at 407.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 324 (Brennan, White, Marshall, and Blackmun, Js., concurring in the judgment in part and dissenting in part).

³²² *Id.* at 324–25.

But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.³²³

This passage, the end product of Brennan's negotiations with White and Powell, was the outcome that Brennan sought. He paid a price for it, accepting the modifications needed to satisfy his allies so that he could claim victory. Unlike his three co-authors, Brennan had no wish to speak as well for himself, to articulate his original position before it was diluted by the need for compromise. White, Marshall, and Blackmun all sought to balance the claims of solidarity with the rival claims of individuality. For Brennan, the crucial goal was five votes to sustain the basic principle, asserted in the most forceful way possible—under the joint authorship of four Justices. Beyond that he had nothing further that he wished to say.

When the *Bakke* decision came down on June 28, 1978, it was Powell who made the initial announcement in open court.³²⁴ In his memo to his colleagues a day earlier, he had expressed his discomfort with that role, calling himself “a ‘chief’ with no ‘Indians’” who “should be in the rear rank, not up front!”³²⁵ He was followed by Brennan, who might have presented himself as a chief but chose instead to speak as one member of a proud coalition, informing those present that “[o]nly five members of the Court address the constitutional question of uniquely paramount importance that this case presents—what race-conscious programs are permissible under the Equal Protection Clause.”³²⁶ Nonetheless, Brennan insisted, “the fact that only five of the nine Justices address the constitutional issue must not obscure the signal importance of today's decision.”³²⁷ And he read aloud the opinion's “central meaning” passage, the product of a compromise that reached beyond his own bloc of four to win the crucial fifth vote.³²⁸ That joint opinion serves as an embodiment of its principal author's remarkable ability to transform a plurality of four into a majority of five.

F. *Planned Parenthood of Southeastern Pennsylvania v. Casey: Division of Labor.*

Joint authorship assumed a new guise in *Planned Parenthood v. Casey*, the Court's 1992 abortion case that reaffirmed the central holding of *Roe v. Wade*.³²⁹ This time three Justices—Sandra Day O'Connor, Anthony Kennedy, and David Souter—signed their names to the majority opinion.³³⁰ Instead of a

³²³ *Id.* at 325.

³²⁴ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 142.

³²⁵ BALL, BAKKE CASE, *supra* note 248, at 135.

³²⁶ SCHWARTZ, BEHIND *Bakke*, *supra* note 247, at 146.

³²⁷ *Id.*

³²⁸ *Id.* Stevens took exception to Brennan's assertion of *Bakke*'s “central meaning.” According to Stevens, “[I]t is hardly necessary to state that only a majority can speak for the Court or determine what is the ‘central meaning’ of any judgment of the Court.” BALL, BAKKE CASE, *supra* note 248, at 137.

³²⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992).

³³⁰ *Id.* at 843.

seamless collaboration, however, the three authors chose to announce their individual contributions in the most public way: from the bench. That extraordinary procedure reflects the strategic concerns that prompted these Justices, subsequently dubbed the troika, to transform the joint opinion from a device that conceals individuality to one that both reveals and celebrates it.

When *Casey*'s challenge to Pennsylvania's abortion statute first reached the Court in the fall of 1991, opponents of *Roe* had reason to hope that at last the five votes needed for reversal were at hand. Three years earlier, in *Webster v. Reproductive Health Services*, O'Connor had disappointed and provoked Justice Scalia by finding no need to reach that ultimate issue, noting calmly that "[w]hen the constitutional validity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*."³³¹ Her position, Scalia observed in a widely noted barb, "cannot be taken seriously."³³² But two strong supporters of *Roe*, Brennan and Marshall, had recently retired, and their replacements—Souter and Clarence Thomas—were viewed as two potential votes to overturn.³³³ And Kathryn Kolbert, the ACLU attorney representing the petitioner Planned Parenthood, was eager to have the Court decide the case before the fall presidential election.³³⁴ Her petition for certiorari, filed on November 7, 1991, precisely two weeks after Thomas officially took his seat, presented only a single question designed to draw a definitive response from the Court, one she anticipated would be in the affirmative: "Has the Supreme Court overruled *Roe v. Wade*, holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?"³³⁵ That response, as Jeffrey Toobin has noted in his detailed account of the case's progress, would inject the abortion issue into the election debate.³³⁶

The strategic maneuvers surrounding *Casey* were not, however, limited to counsel. Chief Justice Rehnquist apparently pursued a counter strategy, to delay the decision of the case until after the election by withholding Kolbert's certiorari petition from the agenda for the Justices' conference by a practice known as "relisting."³³⁷ When a protesting memo from Justice Blackmun, the author of *Roe*, failed to move Rehnquist, Justice Stevens devised his own strategic ploy, which Toobin describes:

To break the log jam on *Casey*, Stevens threatened to write a dissenting opinion on Rehnquist's decision to relist the case. . . . As far as anyone could tell, no justice had ever written an opinion dissenting from a relisting. That was the point. Stevens knew that to write one now—and to accuse Rehnquist of stalling because of abortion politics in a presidential election—would create a sensation.³³⁸

³³¹ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 526 (1989) (O'Connor, J., concurring in part and in the judgment).

³³² *Id.* at 532 (Scalia, J., concurring in part and in the judgment).

³³³ JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 25, 58 (2008).

³³⁴ *Id.* at 49.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 49–50.

³³⁸ *Id.* at 50.

Rehnquist backed down, and the certiorari petition was presented to the conference.³³⁹ Justice Souter then made his own strategic move, circulating a memo that proposed three questions to replace Kolbert's single-question approach.³⁴⁰ Souter's version asked whether "undue burden" was the appropriate standard; whether that standard had been properly applied by the court of appeals; and what role stare decisis should play in the abortion context.³⁴¹ As Linda Greenhouse recounts, "The following day, Justice Stevens proposed an even more understated formulation, one that did not commit the Court to choosing a standard of review."³⁴² Stevens's streamlined version retained Souter's stare decisis question and, after listing the provisions of the Pennsylvania statute, asked whether the Court of Appeals had erred in finding them constitutional.³⁴³ Seven Justices then voted to grant Stevens's revised version of the certiorari petition,³⁴⁴ and *Casey* was argued to the Court on April 22.³⁴⁵

Accounts of the Court's post-argument conference are somewhat sketchy and suggest that the discussion was what Jeffrey Rosen calls "typically terse,"³⁴⁶ with little substantive discussion. According to Edward Lazarus, Rehnquist, as Chief Justice speaking first, wanted to uphold all the provisions of the Pennsylvania statute but not to overturn *Roe* expressly. Justices White, Scalia, Kennedy, and Thomas expressed their general agreement; Blackmun chose not to speak; Stevens wanted to overturn two provisions, one requiring spousal notification and the other mandating a 24-hour waiting period; O'Connor had concerns about the spousal notification provision, which Souter also found unconstitutional.³⁴⁷ Jan Crawford Greenburg adds that Souter also supported O'Connor's undue burden standard.³⁴⁸ Toobin's account differs slightly. He finds that seven Justices—all but Blackmun and Stevens—favored upholding most of the Pennsylvania statute; those two Justices found most of the statute unconstitutional.³⁴⁹ And there were four Justices—Rehnquist, White, Scalia, and Thomas—prepared to overturn *Roe* but lacking the fifth vote.³⁵⁰ Both Lazarus and Toobin agree that Rehnquist assigned the opinion to himself.³⁵¹

³³⁹ *Id.*

³⁴⁰ Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 777–78 (2010) [hereinafter Greenhouse, *Strategist*].

³⁴¹ *Id.* His third question read "What weight is due to considerations of stare decisis in evaluating the constitutional right to abortion?" *Id.* at 778.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ GREENHOUSE, BECOMING JUSTICE BLACKMUN, *supra* note 246, at 202.

³⁴⁵ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833 (1992).

³⁴⁶ Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82, 87.

³⁴⁷ EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 466–67 (1999).

³⁴⁸ JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 154 (2007).

³⁴⁹ TOOBIN, *supra* note 333, at 56.

³⁵⁰ *Id.* James Simon notes that Kennedy appeared open to the possibility of supporting a majority opinion that would officially reject *Roe*'s analysis. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 157 (1995) [hereinafter SIMON, CENTER HOLDS].

³⁵¹ TOOBIN, *supra* note 333, at 61; LAZARUS, *supra* note 347, at 468.

What happened next is a remarkable tale of strategic collaboration, with Souter as the initiator. Shortly after the *Casey* conference, he went to O'Connor's chambers—a departure from the Justices' usual practice of communicating by memo.³⁵² Souter's mission was to interest O'Connor in developing an alternative approach to *Casey*, one that would retain *Roe*'s central holding while also finding most of the provisions of the Pennsylvania statute constitutional.³⁵³ O'Connor was receptive to the idea, but, in light of the conference vote, only Blackmun and Stevens were reliable allies.³⁵⁴ The elusive fifth vote belonged to Kennedy who, when approached by Souter and O'Connor about their initiative, turned out to be receptive as well.³⁵⁵ What followed was a collaboration that resembled a conspiracy. The three Justices decided to insulate themselves from any efforts at persuasion or dissuasion by their colleagues by proceeding in secrecy.³⁵⁶ They agreed that only one clerk in each chambers would work on the opinion, leaving the others in uncharacteristic ignorance.³⁵⁷ Also left in ignorance was Rehnquist, working on what he reasonably believed to be a majority opinion supported by Kennedy that would uphold the Pennsylvania statute under a rational basis standard.³⁵⁸

The three members of the troika divided the opinion writing responsibilities. Kennedy drafted the opening section of the opinion setting out the history of the case, the portion reaffirming *Roe*'s central holding through what he termed "the explication of individual liberty,"³⁵⁹ and the brief concluding section.³⁶⁰ Souter, who had introduced the stare decisis issue into the certiorari petition, drafted the section analyzing the impact of the doctrine on *Roe*.³⁶¹ And O'Connor drafted the section of the opinion applying her undue burden standard to the Pennsylvania statute and upholding all provisions except the requirement of spousal notification.³⁶² The three authors exchanged their drafts for editorial comments but made no major changes in one another's work; the completed opinion was, in a remarkably pure sense, a joint opinion, its separate components written independently and combined at the point of circulation. That point arrived on June 3, just a week after Rehnquist circulated what he still had no reason to doubt would be the Court's opinion.³⁶³ In the interim between the two opinions, Kennedy wrote a note to Blackmun asking to meet with him to convey what he said "should come as welcome news."³⁶⁴ After his conversation with Kennedy, Blackmun wrote a succinct note to himself that summed up the situation: "*Roe* sound."³⁶⁵

³⁵² See TOOBIN, *supra* note 333, at 57.

³⁵³ *Id.* at 58.

³⁵⁴ *Id.* at 62.

³⁵⁵ *Id.* at 63.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *See id.*

³⁵⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992).

³⁶⁰ *See Rosen*, *supra* note 346, at 87–88.

³⁶¹ SIMON, CENTER HOLDS, *supra* note 350, at 164.

³⁶² *Id.*

³⁶³ TOOBIN, *supra* note 333, at 63, 65.

³⁶⁴ *Id.* at 64.

³⁶⁵ *Id.* at 65 (emphasis added).

When the 61 page draft joint opinion was circulated, Stevens immediately resumed his role of strategist. In Linda Greenhouse's apt description, "[H]e sprang into action, running interference between Justice Blackmun and the other three Justices" to forestall the dissent that Blackmun was already preparing and to produce, as far as possible, an opinion for the Court.³⁶⁶ On the same day that he read their first draft, Stevens sent a letter, addressed to all three authors with copies to the conference, congratulating O'Connor, Kennedy, and Souter on what he termed "a fine piece of work."³⁶⁷ And he specifically endorsed their unorthodox collaboration. "I think I understand why you decided to write jointly," he told them, "and I agree that your decision is a wise one."³⁶⁸ Apparently recognizing the potentially exclusive nature of the joint opinion, he then tactfully inquired about the possibility of joining it in part. "I do not know whether you are interested in a partial join by a non-author," he began, "but you may nevertheless be interested in knowing that I believe I could join substantial parts of it."³⁶⁹ He ended with a compliment, telling the three authors that "[y]ou have written an excellent opinion in which none of the 61 pages is wasted."³⁷⁰

Fifteen days later, he wrote to them again, this time copying only Blackmun and noting that "[y]ou have indicated that you would welcome suggestions that will enable Harry and me to join as much of your opinion as possible."³⁷¹ Stevens then proceeded to make a concrete proposal for a reorganization of the opinion:

Although I am conscious of the reasons why you have included criticism of the trimester approach early in the opinion, I would like to suggest that the entire opinion would be immeasurably strengthened by placing that discussion in a later section, thereby making it possible for Harry and me to join Parts I and II, and (if you will consider a couple of relatively minor suggestions) Part III as well. In my view, an opinion that begins as an opinion of the Court and continues to speak for a Court for 25 pages would be far more powerful than one that starts out as a plurality opinion and shifts back and forth between a Court opinion and a plurality opinion.³⁷²

Kennedy replied the same day that his "initial inclination is that what you propose is quite feasible and I will recommend to Sandra and David that we accomplish your change in the next draft to see how it looks."³⁷³ Only a day later Kennedy had sent his revised draft to Stevens, who in turn promptly responded that "[y]our second draft is much stronger. Many thanks for your

³⁶⁶ Greenhouse, *Strategist*, *supra* note 340, at 778.

³⁶⁷ Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 3, 1992) (on file with the Library of Congress, Harry A. Blackmun Collection, Manuscript Division, at box 601, folder 6).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 18, 1992) (on file with the Library of Congress, Harry A. Blackmun Collection, Manuscript Division, at box 601, folder 6).

³⁷² *Id.*

³⁷³ Letter from Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court (June 18, 1992) (on file with the Library of Congress, Harry A. Blackmun Collection, Manuscript Division, at box 601, folder 6).

reaction to my suggestions.”³⁷⁴ The outcome of this correspondence was an opinion that does, as Stevens proposed, speak for the Court for its first 26 pages, including the crucial sections upholding the core of *Roe*. Only then do Stevens and Blackmun withdraw their support, leaving the troika on its own to substitute the undue burden standard for *Roe*’s strict scrutiny and to uphold all but one of the Pennsylvania regulations.³⁷⁵

The opinion produced by the troika, restructured in light of Stevens’s suggestions, differs dramatically from the earlier collaborative opinions. In *Casey* there was no attempt made to fashion a unified opinion that spoke for all its contributors. Instead, the opinion speaks in three distinct voices, and the seams between the sections are allowed to show. In case anyone missed the composite nature of the joint effort, each of its authors presented his or her own section in open court when the decision was announced. This redefinition of the joint opinion, reflected in both its genesis—the three Justices offering only editorial comments on one another’s work—and its public affirmation, is reflected as well in the theme of the opinion. That theme is the insistence that even irreconcilable differences on sensitive issues such as abortion can be harmonized by people of good will through recognition of fundamental constitutional principles.

The willingness to speak in a recognizable voice emerges in the first sentence of the opinion: “Liberty finds no refuge in a jurisprudence of doubt.”³⁷⁶ That voice clearly belongs to Kennedy, not the most senior or first-named member of the troika, but the one most given to speaking in broad abstractions.³⁷⁷ In this instance the meaning is not difficult to grasp. The keynote of the opinion is the need for clarity in the Court’s abortion jurisprudence, and the opening assertion sets the tone for what follows in Part II, Kennedy’s detailed account of the development of the Court’s substantive due process jurisprudence. “The controlling word in the cases before us,” Kennedy asserts, “is ‘liberty,’”³⁷⁸ and the controlling precedents are *Griswold v. Connecticut*,³⁷⁹ *Eisenstadt v. Baird*,³⁸⁰ and *Carey v. Population Services International*³⁸¹—

³⁷⁴ Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 19, 1992) (on file with the Library of Congress, Harry A. Blackmun Collection, Manuscript Division, at box 601, folder 6). Stevens indicated that he was now able to join Parts I, II, and III of the opinion but that he still had “qualms about Part IV” and suggested combining Parts IV and V so that he “could write separately agreeing with you that the post-viability rule announced in *Roe* remains the law.” *Id.* Apparently that request was not granted. In a separate letter dated the following day, Stevens joined Parts I, II, III, and VI in their entirety and three sections of Part V but did not join Part IV. Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 22, 1992) (on file with the Library of Congress, Harry A. Blackmun Collection, Manuscript Division, at box 601, folder 6).

³⁷⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 922 (1992) (noting which parts Stevens and Blackmun concurred with).

³⁷⁶ *Id.* at 844.

³⁷⁷ Toobin has described this as “a weakness for high-flown, sometimes rather meaningless rhetoric,” and finds Kennedy “at his airy best (or worst) in *Casey*.” TOOBIN, *supra* note 333, at 66.

³⁷⁸ *Casey*, 505 U.S. at 846.

³⁷⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁸⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

³⁸¹ *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977).

each cited at least five times in the span of five pages.³⁸² Those cites support Kennedy's formulation of the specific interest at stake in *Casey*, the "realm of personal liberty which the government may not enter."³⁸³ When Kennedy elaborates on that realm, he adds a string of further abstractions that culminate in the famous passage that describes the liberty interest at issue:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.³⁸⁴

That passage, ridiculed by Scalia in his dissent as "a collection of adjectives that simply decorate a value judgment and conceal a political choice,"³⁸⁵ could not have come from the chambers of any other member of the *Casey* Court.

There is a second strand in Kennedy's section of the opinion that could—and in fact did—come from other chambers: the pervasive theme of reconciliation in spite of diverse positions. Kennedy acknowledges the deep gulf that separates people both on and off the Court on the question of abortion: "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."³⁸⁶ In an unusually personal formulation, he then discloses that "[s]ome of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision."³⁸⁷ As Justices they must disregard their individual perspectives because "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."³⁸⁸ That obligation resurfaces in the final sentence of Part II, where Kennedy expressly acknowledges both "the weight of the arguments" made by the state of Pennsylvania for overruling *Roe* and "the reservations any of us may have in reaffirming" its central holding, reservations "outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."³⁸⁹ Individual identity, though ultimately subsumed in judicial identity, nonetheless provides a brief common bond with those who will be disappointed or even angered by the case's outcome. Such reactions are not only predictable but fully understandable as well, since "reasonable people will have differences of opinion about these matters,"³⁹⁰ just as the three co-authors apparently do.

When Kennedy reappears, after both his colleagues have been heard, to end the opinion, he does so in a brief coda that invokes the Constitution as a covenant that "define[s] the freedom guaranteed by the Constitution's own

³⁸² *Griswold* is cited four times with *Eisenstadt* and *Carey* and once with *Eisenstadt*. *Casey*, 505 U.S. at 848, 849, 852, 853. *Eisenstadt* and *Carey* are cited together once. *Id.* at 851.

³⁸³ *Id.* at 847.

³⁸⁴ *Id.* at 851.

³⁸⁵ *Id.* at 983 (Scalia, J., dissenting).

³⁸⁶ *Id.* at 850 (plurality opinion).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 853.

³⁹⁰ *Id.*

promise, the promise of liberty.”³⁹¹ Among his concluding abstractions, the final word—liberty—is also the opinion’s first word, a rhetorical flourish that again carries its author’s clear signature. That circle, he suggests, can comfortably contain the disparate views of those, both authors and readers of the opinion, who can find common ground within the Constitution.

The voice that opens Part III of the joint opinion offers its own abstract formulation, but one both more focused and less grandiose than Kennedy’s prelude: “The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.”³⁹² What comes next is a careful analytic account of the Court’s *stare decisis* doctrine that identifies the “prudential and pragmatic considerations” that inform its application: workability of the precedent, reliance upon it, and changes in the law or the facts since its creation.³⁹³ When those considerations, systematically applied to *Roe*, produce no basis for its reversal, Souter admits that “[i]n a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached.”³⁹⁴ His basis for not stopping echoes Kennedy’s concern, the strongly diverse views on the subject of abortion. Souter looks first inside the Court to assess the support for *Roe*. He counts heads, finding that its original majority of seven Justices has been affirmed by majorities of six and of five in two subsequent cases.³⁹⁵ He also notes that in *Webster*,³⁹⁶ decided the year before he joined the Court, “two of the present authors questioned the trimester framework in a way consistent with our judgment today,” although a majority in that case “either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*.”³⁹⁷ Despite these signs of differing internal attitudes toward *Roe*, he concludes that “there clearly has been no erosion of its central determination.”³⁹⁸ Under traditional *stare decisis* principles, then, he finds that “the stronger argument is for affirming *Roe*’s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.”³⁹⁹ Where Kennedy subordinated the individual views of the Justices to a broadly conceived liberty interest, Souter subordinates those views to the more precisely defined requirements of *stare decisis* analysis.

The disagreements of greater concern to Souter are those existing outside the Court. And while he recognizes the reluctance of some Justices to accept *Roe* as a factor favoring its reversal, he finds the general population’s stronger hostility toward *Roe* as a factor in favor of upholding the precedent. Souter argues that in those rare cases like *Roe* or *Brown* where the Court must resolve a bitterly disputed issue, it “calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”⁴⁰⁰ For the Court subsequently to overrule its precedent would

³⁹¹ *Id.* at 901.

³⁹² *Id.* at 854.

³⁹³ *Id.* at 854–55.

³⁹⁴ *Id.* at 861.

³⁹⁵ *Id.* at 857–58.

³⁹⁶ *See Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

³⁹⁷ *Casey*, 505 U.S. at 858.

³⁹⁸ *Id.* at 857.

³⁹⁹ *Id.* at 861.

⁴⁰⁰ *Id.* at 866–67.

risk the appearance of “a surrender to political pressure” that could “subvert the Court’s legitimacy”⁴⁰¹ as an institution guided by constitutional principles rather than external or personal forces. Souter thus expands Kennedy’s treatment of internal disagreements over *Roe* to include as well the broader public controversy simmering outside the Court. The arguments are distinct: Kennedy relies on the Justices’ personal obligation to accept the Court’s definition of constitutional values while Souter relies on the Justices’ institutional obligation to honor the Court’s commitment to its own precedents. The point, however, is the same: that the Court can bridge both internal and external divides through the principled exercise of its constitutional authority.

The voice that takes control in Part IV, that of Justice O’Connor, is immediately less abstract and more concrete than the voices of her co-authors. Writing not for the Court but only for the troika, she opens with a sentence that nonetheless insists on the opinion’s continuity while giving specific (though qualified) content to the right at issue: “From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy.”⁴⁰² Sharpening the contrast between her approach and Kennedy’s, she paraphrases his opening sentence to establish a distinctly more practical tone. In the O’Connor version, “Liberty must not be extinguished for want of a line that is clear,”⁴⁰³ and only two sentences later she provides that clarity: “We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.”⁴⁰⁴ As she explains, that standard is justified by pragmatic concerns, since “there is no line other than viability which is more workable.”⁴⁰⁵ In her hands, the opinion now shifts from the jurisprudential and historical tenor of the earlier sections to the practical task of providing guidance to lower courts, the medical community, and the women whose lives will be directly affected by the Court’s resolution.

O’Connor also, however, contributes her own variation on the theme sounded by Kennedy and Souter, the Court’s capacity to contain and even reconcile conflicting positions on the contentious abortion issue. She notes that the Court has “twice reaffirmed” *Roe* “in the face of great opposition” and must now overrule portions of those two earlier cases.⁴⁰⁶ Nonetheless, she insists that “the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*.”⁴⁰⁷ And she dismisses as irrelevant the question of “whether each of us, had we been Members” of the *Roe* Court, would have agreed with its majority.⁴⁰⁸ The issue now before the Court almost 20 years later “is not the soundness of *Roe*’s resolution of the issue, but the

⁴⁰¹ *Id.* at 867.

⁴⁰² *Id.* at 869.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 870.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* Those cases are *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) and *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 419–20 (1983). Justices Burger, White, O’Connor, and Rehnquist dissented in *Thornburgh*, while Justices O’Connor, White, and Rehnquist dissented in *Akron*.

⁴⁰⁷ *Casey*, 505 U.S. at 870.

⁴⁰⁸ *Id.* at 871.

precedential force that must be accorded to its holding.”⁴⁰⁹ In other words, O’Connor reinforces Souter’s position that the institutional claims of stare decisis trump the personal convictions of individual Justices.

The rejection of *Roe*’s trimester scheme in favor of viability as the marker for government regulation of abortion brings to light some surprising past alliances, and O’Connor does not shrink from citing them in support of the Court’s new position. Both she and Chief Justice Rehnquist agreed in *Webster* that the trimester scheme was not “part of the essential holding of *Roe*.”⁴¹⁰ And Rehnquist in *Webster* and O’Connor in *Akron v. Akron Center for Reproductive Health* each found pre-viability limits on government efforts to persuade women to reject abortion “incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.”⁴¹¹ Yet they are now on opposite sides in *Casey*. After citing her points of agreement with the now dissenting Rehnquist, O’Connor next notes the tensions within the troika. “Members of the Court, including two of us,” she observes, have used the term undue burden “in ways that could be considered inconsistent.”⁴¹² The cites that follow make clear that here the disagreement is between O’Connor and Kennedy.⁴¹³

Yet in the paragraph introducing her summary of the troika’s positions, O’Connor is also at pains to acknowledge the inevitability of such disagreements and their acceptability in cases like *Casey*:

Even when jurists reason from shared premises, some disagreement is inevitable. Compare *Hodgson*, 497 U.S., at 482–497, 110 S.Ct., at 2961–2969 (KENNEDY, J., concurring in judgment in part and dissenting in part), with *id.*, at 458–460, 110 S.Ct., at 2949–2950 (O’CONNOR, J., concurring in part and concurring in judgment in part). That is to be expected in the application of any legal standard which must accommodate life’s complexity.⁴¹⁴

There is no technical need to include the *Hodgson* cite to support a general point that has been made and documented earlier in the opinion. O’Connor seems determined to demonstrate that particular differences among Justices who agree on broader grounds are the natural outcome of issues like abortion that touch the most personal aspects of both life and the law. In the context of *Casey*, that applies both to the past differences among members of the troika and to the current differences that preclude Justices Stevens and Blackmun from endorsing the parts of the joint opinion that replace strict scrutiny review with the undue burden standard and that uphold all the statutory provisions at issue except the requirement of spousal notification. The paragraph, coming as it does before O’Connor’s summary, works both to lower unrealistic expectations of complete consensus and to underscore the achievement of the troika in winning the votes that it has. The form of joint opinion that the three members

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 873 (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (Rehnquist, C.J.); *id.* at 529 (O’Connor, J., concurring in part and concurring in the judgment). O’Connor notes that in *Webster* she had “describ[ed] the trimester framework as ‘problematic.’” *Id.* at 873.

⁴¹¹ *Id.* at 876.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 878.

of the troika have chosen, then, is an appropriate expression of the support for their position: not perfect agreement, not evasive compromise, not hostile disagreement. The three Justices have found common ground with one another and, in part, with two of their colleagues while openly recognizing that, on the matter of abortion, such imperfect agreement must and will suffice to resolve the case before them.

The acceptance of less than total agreement as a successful outcome is echoed to different degrees in the opinions of the troika's two partial supporters. In his opinion concurring in part and dissenting in part, Stevens opens by casting a positive light on his mixed response.⁴¹⁵ "The portions of the Court's opinion that I have joined are more important than those with which I disagree," he insists, so "I shall therefore first comment on significant areas of agreement, and then explain the limited character of my disagreement."⁴¹⁶ He finds the Court "unquestionably correct" in its reliance on *stare decisis* "in a case of this kind, notwithstanding an individual Justice's concerns about the merits."⁴¹⁷ If less than an apology for his inability to support the joint opinion wholeheartedly, these remarks are intended to blunt the impact of his partial disagreement. Stevens further blunts that impact by providing a footnote identifying the fifteen Justices who have addressed the merits of *Roe* since its issuance: "Of those," he notes, "11 have voted as the majority does today."⁴¹⁸ And he proceeds to name them all, a list that includes both strong liberals like Justices Douglas and Brennan as well as more conservative figures like Chief Justice Burger and Justice Powell.⁴¹⁹ More tellingly, he also identifies without naming those taking the opposite position: "Only four—all of whom happen to be on the Court today."⁴²⁰ The implication is that these four have violated the jurisprudential code of conduct by abandoning respect for well-established precedent to indulge their personal preferences.

Justice Blackmun, the author of *Roe* and the second member of the Court to endorse the joint opinion in part, is less supportive than Stevens of the troika. Where Stevens both concurred and dissented in part, Blackmun's opinion bears the more qualified label "concurring in part, concurring in the judgment in part, and dissenting in part."⁴²¹ And Blackmun focuses more on criticism of the dissenters than on praise of the troika. In the opening section of his opinion he twice literally puts that criticism ahead of his praise. On the subject of the spousal notification regulation, he finds that "the joint opinion and I disagree on the appropriate standard of review," only then adding that "I do agree, however, that the reasons advanced by the joint opinion suffice to invalidate the spousal notification requirement under a strict scrutiny standard."⁴²² Even more severely, he notes that "while I believe that the joint opinion errs in failing to invalidate the other regulations, I am pleased that the joint opinion has not ruled

⁴¹⁵ See *id.* at 911 (Stevens, J., concurring in part and dissenting in part.).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 912.

⁴¹⁸ *Id.* at 912 n.1.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* at 922.

⁴²² *Id.* at 925 n.1.

out the possibility that these regulations may be shown to impose an unconstitutional burden."⁴²³ Blackmun's primary concern, understandably enough, is the preservation of *Roe*, including its "analytical framework," which he finds "no less warranted than when it was approved by seven Members of this Court."⁴²⁴

Even Blackmun's direct praise for the troika serves primarily to contrast with his powerful condemnation of the Chief Justice's dissent, which Blackmun reads as a long overdue admission by Rehnquist and his supporters that they seek to overturn *Roe*.⁴²⁵ "If there is much reason to applaud the advances made by the joint opinion today," he asserts, "there is far more to fear from THE CHIEF JUSTICE's opinion."⁴²⁶ That fear is expressed most vividly in the famous closing section of the opinion, a passage that rivals Frankfurter's *Barnette* dissent in its intensely personal tone:

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and Justice SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.⁴²⁷

If the joint opinion aims to provide a vehicle to accommodate varying views on a critical issue, Blackmun's injection of his own identity and its implications for the future of *Roe* undermines that vehicle much as Frankfurter's concurrence in *Cooper* undermined its hard fought unanimity on an issue of comparable import. For Blackmun, the joint opinion is only a holding action, not a resolution of the issue. Where Stevens seeks to underplay his divergence from the troika's position, Blackmun remains unwilling fully to endorse anything less than a binding affirmation of *Roe*. It is hardly surprising that Stevens's final strategic effort—to discourage Blackmun from including his final paragraph—was unsuccessful.⁴²⁸

⁴²³ *Id.* at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Blackmun concludes that "[o]ur precedents and the joint opinion's principles require us to subject all non-*de-minimis* abortion regulations to strict scrutiny." *Id.* Once again, the joint opinion is mentioned second.

⁴²⁴ *Id.* at 930.

⁴²⁵ *Id.* at 940. Blackmun's language is powerfully critical and suggests that a past subterfuge has finally been discarded:

At long last, THE CHIEF JUSTICE and those who have joined him admit it. . . . There, on the first page, for all to see, is what was expected: 'We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.'

Id.

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 943.

⁴²⁸ GREENHOUSE, BECOMING JUSTICE BLACKMUN, *supra* note 246, at 206. According to Greenhouse, that paragraph was drafted by one of Blackmun's clerks, Stephanie Dangel, who told her Justice that he "faced the choice of whether to make a direct link between the upcoming election and the future of abortion. It is 'the one substantive decision you will have to make,' she said." *Id.* Blackmun chose to follow Dangel's advice to include the personal concluding passage over Stevens's advice to remove it. *Id.* Greenhouse also pro-

The two remaining opinions, authored by Rehnquist and Scalia, are both by designation less than pure dissents, although their texts suggest otherwise. Each is labeled “concurring in the judgment in part and dissenting in part,”⁴²⁹ and each is signed by four Justices: Rehnquist, White, Scalia, and Thomas. The result is a Court as closely divided as possible, with greater agreement among the dissenters than among the members of the majority. Rehnquist takes note of the diverse views among the current members of the Court, observing that “the reexamination undertaken today leaves the Court no less divided than beforehand” and calling its undue burden standard “an unjustified constitutional compromise.”⁴³⁰ That division, Rehnquist insists, and the resulting uncertainty surrounding the law are themselves grounds for revisiting and overturning *Roe*. “This state of confusion and disagreement,” he writes, “warrants reexamination of the ‘fundamental right’ accorded to a woman’s decision to abort a fetus in *Roe*, with its concomitant requirement” of strict scrutiny,⁴³¹ a reexamination that should result in the rejection of *Roe*.⁴³² Where the troika sees disagreement as a potential basis for accommodation of diverse positions, Rehnquist sees it as a reason for discarding precedent completely. From his vantage point, *stare decisis* doctrine is inapplicable to such an embattled precedent, and he offers a sardonic image of the troika’s approach as little more than a sham. The revision of *Roe*, especially the elimination of the trimester scheme, leaves standing only a deceptive façade with no substance behind it, “a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent.”⁴³³

If Rehnquist is sardonic in his attack on the troika, Scalia is savage. The very form of his opinion embodies his scathing rejection of the joint opinion as wrong in every important way: ungrounded in text or historical tradition,⁴³⁴ a distortion of both *Roe* and *stare decisis* doctrine,⁴³⁵ unclear, unworkable, and rooted in value judgments rather than law.⁴³⁶ The vehicle for this attack is a dialogue of sorts, with bold face passages from the joint opinion followed by refutations, what Scalia calls a compelled response “to a few of the more outrageous arguments in today’s opinion, which it is beyond human nature to leave

vides the only record of Stevens’s effort, the reply from Blackmun, which reads in its entirety:

Dear John:

I appreciate your call Friday afternoon about Part IV of my second draft. After lengthy discussions here, we have decided to leave that paragraph in. This does not mean that I do not appreciate your call.

Sincerely, Harry

Greenhouse, *Strategist*, *supra* note 340, at 782.

⁴²⁹ *Casey*, 505 U.S. at 944, 979.

⁴³⁰ *Id.* at 945 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁴³¹ *Id.* at 950.

⁴³² *Id.* at 953.

⁴³³ *Id.* at 966. Earlier in the opinion, Rehnquist offers a different image to make the same criticism of the troika’s *stare decisis* argument: “*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.” *Id.* at 954.

⁴³⁴ *Id.* at 980 n.1.

⁴³⁵ *Id.* at 982–84, 993–94.

⁴³⁶ *Id.* at 985–87.

unanswered.”⁴³⁷ This highly unusual point-counterpoint structure suggests that there is no middle ground or basis for accommodation, only two irreconcilable positions: one right and the other not only misguided but deliberately misleading, a “verbal shell game” meriting neither acceptance nor respect.⁴³⁸ And Scalia also finds not consensus but inconsistency in the majority bloc:

Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence (the joint opinion’s ‘undue burden’ standard)—and that principle is inconsistent with *Roe* To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions.⁴³⁹

For Scalia, the accommodation of previously differing views is abandonment of principle rather than principled consensus.

The joint opinion in *Casey* serves as both a pragmatic device and an embodiment of its own argument. In practical terms, sharing authorship of an opinion on one of the most controversial and combustible issues facing the Court was a strategy for demonstrating a strong base for preserving the central holding of *Roe* and persuading other Justices to join. It carried a second potential benefit, similar to *Cooper*’s benefit of issuing an opinion signed by all nine Justices rather than placing the burden on a single named Justice: three authors would share the hostile responses the opinion was sure to elicit.⁴⁴⁰ Beyond such

⁴³⁷ *Id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part).

⁴³⁸ *Id.* at 987.

⁴³⁹ *Id.* at 997. Scalia is referring to Kennedy and O’Connor; he details what he views as their unprincipled inconsistency in an earlier footnote citing their opinions in earlier abortion cases. *Id.* at 986 n.4. It is not surprising that the two dissenters reportedly had different personal responses to news of the joint opinion. In Rosen’s account, “[T]he Chief Justice, according to clerks, told Kennedy that the decision was his to make, and he had to do what he thought was right,” while “Scalia, by contrast, was so upset that he walked over to Kennedy’s nearby house in McLean to upbraid him.” Rosen, *supra* note 346, at 87. Other accounts vary slightly. Toobin agrees that Scalia went to Kennedy’s home “to try to talk him out of his position” and adds that one of Scalia’s clerks also tried to persuade Souter to change his position. TOOBIN, *supra* note 333, at 67. According to James Simon, “Chief Justice Rehnquist attempted to talk Kennedy out of his support for the joint opinion, and Justice Scalia, less diplomatically than the chief, expressed his outrage to Kennedy.” SIMON, CENTER HOLDS, *supra* note 350, at 165. In Lazarus’s account, “The Chief invited Kennedy for one of his periodic walks around the Court building in the hope of wooing him back into the anti-*Roe* fold,” while “Scalia reportedly visited Kennedy at home to plead with him to change his mind again.” LAZARUS, *supra* note 347, at 478. Lazarus reports that “[a]s liberals gathered secondhand, Scalia initially appealed to his and Kennedy’s shared anti-abortion Catholic beliefs and, failing in that, warned Kennedy that he was destined to become another Blackmun—a sentimentalist scorned by both conservatives and serious legal thinkers generally.” *Id.* Dennis Hutchinson reports that Scalia also responded extra-judicially to Kennedy’s switch: “Justice Scalia’s staff canceled a group outing with the Kennedy staff to see the Orioles play at Camden Yards when Scalia suddenly refused to go.” HUTCHINSON, *supra* note 189, at 429.

⁴⁴⁰ Edward Lazarus makes this point:

Reportedly, at least some members of the troika did fear opening themselves up to the incessant protests that had dogged Blackmun since he authored *Roe*. Some have speculated, reasonably I believe, that the idea of jointly authoring *Casey* stemmed in part from a desire to avoid having a single author-Justice suffer the consequences that were sure to follow reaffirming the right to abortion.

LAZARUS, *supra* note 347, at 478 n.*.

practical considerations, the joint opinion sent a subtler jurisprudential message as well. Its theme was the possibility of bringing together people of differing personal views on the question of abortion—including the Justices who had previously disagreed on *Roe* or who might still hold personal reservations about it—under the Court’s unifying authority to establish constitutional principles. By banding together as equal but distinct members of the troika—each openly claiming authorship of a portion of the opinion while acknowledging internal disagreements and personal reservations—the three authors crafted a model of such accommodation under shared constitutional values. As the separate opinions demonstrate, that model was not fully embraced even by its supporters or respected by its adversaries. But it remains a brave and innovative approach to the challenge of achieving consensus for one of the most polarizing issues ever to come before the Court through a willingness to submerge individual judicial identity in the Court’s institutional identity as the final interpreter of constitutional liberty.

G. *McConnell v. Federal Election Commission: Division of Labor Revisited*

The Court’s most recent joint opinion, *McConnell v. Federal Election Commission*, presents an unprecedented configuration of Justices⁴⁴¹ in a case resolving numerous constitutional challenges to the Bipartisan Campaign Reform Act of 2002 (“BCRA”).⁴⁴² *McConnell* is known as one of the longest decisions the Court has ever produced.⁴⁴³ Its complete text occupies 250 pages and consists of the opinion of the Court followed by five separate opinions concurring in part, dissenting in part, or both, with two of those opinions written by members of the majority.⁴⁴⁴ Even more striking, for present purposes, is the authorship of the Court opinion, which makes *McConnell* a joint opinion in two different senses. The opinion contains three distinct parts, each one signed individually: the first part by Justices Stevens and O’Connor, the second part by Chief Justice Rehnquist, and the third part by Justice Stephen Breyer.⁴⁴⁵ Where the co-authors of *Casey* disclosed their division of labor by means of

⁴⁴¹ *McConnell v. F.E.C.*, 540 U.S. 93, 110 (2003).

⁴⁴² *Id.* at 114.

⁴⁴³ See, e.g., Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 244 n.8 (2004).

⁴⁴⁴ The complete majority opinion covers 132 pages. *McConnell*, 540 U.S. at 114–246. The separate opinions cover an additional 118 pages. *Id.* at 247–365. For the separate opinions, see *id.* at 247 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II); *id.* at 264 (Thomas, J., concurring with respect to BCRA Titles III and IV, except for BCRA §§ 311 and 318, concurring in the result with respect to BCRA §318, concurring in the judgment in part and dissenting in part with respect to BCRA Title II, and dissenting with respect to BCRA Titles I, V, and § 311); *id.* at 286 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II); *id.* at 350 (Rehnquist, C.J., dissenting with respect to BCRA Titles I and V); *id.* at 363 (Stevens, J., dissenting with respect to § 305).

⁴⁴⁵ *Id.* at 114 (“Justice Stevens and Justice O’Connor delivered the opinion of the Court with respect to BCRA Titles I and II.”); *id.* at 224 (“Chief Justice Rehnquist delivered the opinion of the Court with respect to BCRA Titles III and IV.”); *id.* at 233 (“Justice Breyer delivered the opinion of the Court with respect to BCRA Title V.”).

their presentations in open court, the co-authors of *McConnell* went a step further, making their disclosure in the text itself.

It is fair to say that, again unlike *Casey*, the division of labor in *McConnell* was scarcely equal. Stevens and O'Connor answered the challenges to the key portions of BCRA, Titles I and II, upholding both the statute's ban on the use of soft money for federal election purposes and its regulation of electioneering communications in an opinion of 110 pages.⁴⁴⁶ Rehnquist then addressed challenges to several provisions of BCRA's Titles III and IV, finding some non-justiciable, upholding a disclosure of identity requirement for candidate-authorized communications, and rejecting a ban on political contributions by minors in an opinion of nine pages.⁴⁴⁷ Finally, Breyer upheld a Title V provision imposing record-keeping requirements on broadcasters in an opinion of 13 pages.⁴⁴⁸

These three opinions were not only of vastly different lengths; they also attracted different supporters. The Stevens and O'Connor opinion was joined in its entirety by Justices Souter, Ginsburg, and Breyer,⁴⁴⁹ while Stevens, O'Connor, Souter, and Ginsburg in turn joined Breyer's opinion.⁴⁵⁰ The Rehnquist opinion, however, drew a broader and more varied response. It was joined in its entirety by O'Connor, Scalia, Kennedy, and Souter; in all but one part by Stevens, Ginsburg, and Breyer; and in specified provisions by Thomas.⁴⁵¹ Most dramatically, although Rehnquist had majority support for his section and thus wrote for the Court, he did not join either of the other sections of the Court opinion.⁴⁵² In one further peculiarity, two Justices writing for the Court—Rehnquist and Stevens—also contributed their own dissenting opinions.⁴⁵³

The Justices' alignment on the issues clearly presented a challenge of its own for the assignment of the opinion. But even before the case had reached that point, *McConnell* had led the Court to modify its usual procedures. Congress, anticipating constitutional challenges and concerned to have them resolved promptly, included a provision in BCRA authorizing an accelerated review process before a panel of three federal judges whose decision went directly to the Supreme Court.⁴⁵⁴ That decision, five months in the making,⁴⁵⁵ was scarcely conducive to a smooth and efficient review process. Gerard J. Clark and Steven B. Lichtman have vividly described the lower court judges' opinions: "In an orgy of acrimony and dissension, they produced a monstrous 1638 page ruling so spectacularly incomprehensible it required a four-page

⁴⁴⁶ *Id.* at 114–224.

⁴⁴⁷ *Id.* at 224–33.

⁴⁴⁸ *Id.* at 233–47.

⁴⁴⁹ *Id.* at 113 n.*.

⁴⁵⁰ *Id.* at 233 n.*.

⁴⁵¹ *Id.* at 224 n.*.

⁴⁵² *Id.* at 350–51.

⁴⁵³ *Id.* at 350, 363.

⁴⁵⁴ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 81, 114 (providing that "[a] final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States").

⁴⁵⁵ Richard Briffault, *What Did They Do and What Does It Mean? The Three-Judge Court's Decision in McConnell v. FEC and the Implications for the Supreme Court*, 6 U. PA. J. CONST. L. 58, 63–64 (2003).

spreadsheet to summarize each judge's findings on each issue."⁴⁵⁶ Two of the judges jointly authored a per curiam opinion, and in addition each member of the panel wrote separately.⁴⁵⁷ As Linda Greenhouse noted, that lower court decision was unlikely to carry much weight with the Supreme Court because it "failed to accomplish the one task that might have sent a decision on to the Supreme Court with a certain momentum: to produce a unified and coherent set of factual findings and legal conclusions."⁴⁵⁸ Aware of the massive task that awaited them, the Justices issued an expedited briefing schedule and returned early from their summer recess to hear oral argument—an extraordinary four hours—at a special session (the first since the Watergate tapes case in 1974)⁴⁵⁹ on September 8, 2003, a month before the customary first Monday in October.⁴⁶⁰ By the time of assignment, the Justices must have been open to any innovative procedure that would facilitate *McConnell*'s resolution.

The Title III and IV issues presented little difficulty. Rehnquist, as Chief Justice always the senior member of any voting bloc, wielded the assignment power and used it to assign that portion of the decision to himself.⁴⁶¹ For the remainder, including the crucial issues of soft money and electioneering communications, Stevens was the senior Justice and could have followed suit, taking for himself those portions of what was clearly a high profile decision. Yet Stevens chose not to do so. He assigned the Title V issue to Breyer, who as an academic had specialized in issues of government regulation.⁴⁶² And, perhaps aware of the lower court's approach to its per curiam, he jointly assigned the Title I and II issues to O'Connor and himself.⁴⁶³

This was by no means the first time that Stevens, as Senior Associate Justice, had declined to appropriate a plum assignment for himself. The term before, he had assigned *Grutter v. Bollinger*, the University of Michigan affirmative action case, to O'Connor, who wrote for the Court to uphold the law school's program,⁴⁶⁴ and *Lawrence v. Texas*, the homosexual sodomy case, to Kennedy, who wrote for the Court to strike down the Texas statute criminalizing private sexual conduct.⁴⁶⁵ In both instances, as Toobin has observed, "Stevens's decision took wisdom and selflessness."⁴⁶⁶ The wisdom lay in

⁴⁵⁶ Gerard J. Clark & Steven B. Lichtman, *The Finger in the Dike: Campaign Finance Regulation After McConnell*, 39 SUFFOLK U. L. REV. 629, 640 (2006).

⁴⁵⁷ *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). Richard Briffault identifies the co-authors of the per curiam as District Court Judges Kollar-Kotelly and Leon. Briffault, *supra* note 455, at 60.

⁴⁵⁸ Linda Greenhouse, *1,638 Pages, but Little Weight in Supreme Court*, N.Y. TIMES, May 3, 2003, at A14.

⁴⁵⁹ *United States v. Nixon*, 418 U.S. 683 (1974); see Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 34, 35 (2004).

⁴⁶⁰ *McConnell v. FEC*, 540 U.S. 93, 133 (2003).

⁴⁶¹ See William P. McLauchlan, *Opinions, Assignment and Writing of*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 705.

⁴⁶² George Dargo, *Breyer, Stephen G.*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 6, at 106.

⁴⁶³ *McConnell*, 540 U.S. at 93.

⁴⁶⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁴⁶⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁶⁶ TOOBIN, *supra* note 333, at 260. Earlier, Toobin calls *Lawrence* "wisely assigned." *Id.* at 220.

assigning each opinion to the potentially least firm member of a five Justice coalition in order to avoid losing a less than certain majority.⁴⁶⁷ And the selflessness lay in a realistic assessment of Stevens's own situation. As Toobin puts it, Stevens "had just turned eighty-three. How many more big opinions could he expect to come his way?"⁴⁶⁸ Yet only the next term another big opinion had arrived, and Stevens chose to share the assignment with O'Connor, the only member of the Court who had run for public office, presumably had some direct experience with campaign finance issues, and had joined several Court majorities supporting statutory regulation.⁴⁶⁹ There was also, of course, a practical motive for sharing the assignment, since the opinion would need to cover a great deal of ground and still emerge promptly, well in advance of the 2004 election campaign.⁴⁷⁰ Stevens's strategy may also have been informed not only by the Court's earlier uses of joint opinions in cases like *Gregg* and *Bakke* but also by its handling of an earlier campaign finance landmark, *Buckley v. Valeo*, which was issued as an elaborate per curiam opinion.⁴⁷¹ Although Stevens joined the Court five weeks too late to participate in that case, he nonetheless would have witnessed the Court's use of what one Justice called an "opinion by committee" written jointly by an uncredited consortium.⁴⁷² And Stevens may also have been aware that he had before him the joint per curiam opinion written by two members of the lower court panel.⁴⁷³

Whatever Stevens's models for his assignment, the outcome was successful. The joint opinion is largely technical, reviewing the history of the campaign finance legislation and the Court's precedents, analyzing the challenged provisions, drawing on the factual record documenting campaign finance abuses engaged in by both major political parties, and repeatedly invoking Congress' "need to prevent circumvention of the entire scheme" to preserve almost all of the challenged provisions.⁴⁷⁴ The style is generally workmanlike and consistent throughout, with no obvious signs of any shift in authorial voice.⁴⁷⁵ There are, however, a few distinctive points which may hint at the different sensibilities at work in the opinion. There is an opening quote from the early

⁴⁶⁷ See *id.* at 260.

⁴⁶⁸ *Id.*

⁴⁶⁹ O'Connor was appointed to a vacancy in the Arizona state senate in 1969 and thereafter won election for two subsequent terms. In 1975 she was elected to a judgeship on the Maricopa County Superior Court. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited March 16, 2012). O'Connor had voted with the majority in several recent campaign finance decisions. See, e.g., *FEC v. Beaumont*, 539 U.S. 146 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Mo. Gov't*, 528 U.S. 377 (2000).

⁴⁷⁰ See, e.g., Clark and Lichtman, speculating that Stevens acted as he did "[l]ikely because of the length of the opinion, the complexity of the issues, and the press of time." Clark & Lichtman, *supra* note 355, at 641.

⁴⁷¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴⁷² Ray, *supra* note 100, at 557-58.

⁴⁷³ The opinion was signed by District Court Judges Colleen Kollar-Kotelly and Richard J. Leon. *McConnell v. FEC*, 251 F. Supp. 2d. 176 (D.D.C. 2003).

⁴⁷⁴ *McConnell v. FEC*, 540 U.S. 93, 172 (2003).

⁴⁷⁵ Heather Gerken takes a harsher view, calling the opinion "mechanical and unreflective." Heather Gerken, *Lost in the Political Thicket*, LEGAL AFF., Nov.-Dec. 2004, at 22, 24.

twentieth century lawyer and statesman Elihu Root calling for legislation banning political contributions by corporations in order to block use of those funds “to elect legislators who would ‘vote for their protection and the advancement of their interests as against those of the public.’”⁴⁷⁶ There is recognition that “Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation.”⁴⁷⁷ And finally there is the most quoted passage, the concluding observation that this opinion will not put the campaign finance issue to rest because “[m]oney, like water, will always find an outlet.”⁴⁷⁸ If the Root quote seems likelier to come from the more academic Stevens and the acknowledgment of “real-world differences” to come from the more pragmatic O’Connor, the final passage in its framing of the inevitable in simple but potent form seems to summarize the shared perspective of the co-authors, both supporting Congress’ effort to deal with campaign finance abuses that evaded the reach of its earlier statutory scheme. Quite simply, in both content and style, the joints in this joint opinion do not show. And the opinion proved as well to be an efficient means of resolving a daunting case. *McConnell* was handed down on December 10, 2003, scarcely three months after oral argument, an impressive turnaround time for one of the Court’s longest decisions.⁴⁷⁹

McConnell is unique in offering two varieties of the joint opinion within a single opinion for the Court. The Court’s alignment gave majorities to two different blocs, each with its own senior Justice wielding assignment power. As a result, the Court’s opinion was jointly authored in the sense that Rehnquist signed a portion of the opinion that spoke only for his own supporters. But the Court’s opinion was jointly authored in a second sense as well, since Stevens chose to assign his portion to both O’Connor and himself. As the only case to offer this duality, *McConnell* presents the most complete version of the joint opinion, illustrating both the external and internal varieties of shared authorship.

III. CONCLUSION

The Supreme Court’s joint opinions, though diverse in subject matter and authorial identity, have in common the capacity to send subtle messages that underscore their jurisprudential content. Those messages range from an invitation to challenge a recent precedent to what Brennan called amplification to a demonstration that Justices can retain their individual perspectives while combining to reach centrist resolutions of divisive issues. Some of these opinions are seamless on the surface, although their histories disclose the complicated interactions and negotiations needed to produce them. Others deliberately allow their seams to show, accepting internal differences. All, however, are candid

⁴⁷⁶ *McConnell*, 540 U.S. at 115 (quoting *United States v. Auto. Workers*, 352 U.S. 567, 571 (1957)).

⁴⁷⁷ *Id.* at 188.

⁴⁷⁸ *Id.* at 224.

⁴⁷⁹ *Id.* at 133.

expressions of the workings of a collegial Court, an institution in which strong convictions and fragile alignments can on occasion find their best expression in the flexible form of a jointly authored opinion.