

ARTICLES

The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court

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INTRODUCTION

The concurrence is a neglected element of appellate jurisprudence. While the majority opinion sets forth the law and the dissent takes a stand in opposition, the concurrence hedges by accepting the result but quibbling about the analysis. Over the past century commentators on the dissent have created a substantial literature, ranging from early denunciations to recent celebrations.¹ Commentators, however, have had little to say about the concurrence, which, if mentioned at all, generally is merged with the dissent as a minor excrescence on the majority

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¹ Early critics denounced the authors of dissents as self-serving, self-indulgent, and harmful to the authority of the Court. See Bowen, *Dissenting Opinions*, 17 GREEN BAG 690 (1905); *The Evils of Dissenting Opinions*, 57 ALB. L.J. 74 (1898) (speech by Henry Wollman). Defenders of dissents argued that they pave the way for change in the law while correcting majority errors and overreaching. See, e.g., Roberts, *Dissenting Opinions*, 39 AM. L. REV. 23 (1905); Bloch, *The Value of Dissent*, 3 LAW SOC'Y J. 7 (1930-31); see A. BARTH, *PROPHETS WITH HONOR* (1974) (reviewing dissents he considered both courageous and prophetic); ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186 (1959) (chronicling conflicting attitudes towards dissents); Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMPLE L. REV. 307, 308-14 (1988) (emphasizing views of Supreme Court justices).

opinion.²

Despite its low profile in the scholarly literature, in the past half century the concurrence has become a frequent appendage of United States Supreme Court opinions.³ The Burger Court in its seventeen

² See, e.g., B. SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 354-62 (1957). In 1952 the topic for the American Bar Association's Ross Prize essay competition was "The Functions of Concurring and Dissenting Opinions in Courts of Last Resort." See Moorhead, *The 1952 Ross Prize Essay: Concurring and Dissenting Opinions*, 38 A.B.A. J. 821 (1952). One entrant announced that for most purposes "it is unnecessary to treat dissenting and concurring opinions separately." Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394, 396 (1952). One commentator did distinguish between the dissent and concurrence on grounds that the former is "essential to an independent judiciary" while the latter generally should be subsumed in the collegial decisionmaking process unless its author has something different to offer. B. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* 225 (1977).

In a speech published as this Article was going to press, Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit argued for greater restraint in the production of dissents and concurrences to protect "the values so prized in the civil law tradition: clarity and certainty in judicial pronouncements." Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 150 (1990).

³ See B. SCHWARTZ, *supra* note 2, at 357 (remarking on a "proliferation of concurring opinions" since 1937); see also McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals*, 31 CAN. B. REV. 595, 613 (1953) (stating that the post-1937 Supreme Court has been a Court of multiple concurrences). McWhinney offered a number of possible explanations for the substantial increase in separate opinions after 1937 including, *inter alia*, the new prominence of constitutional issues on the Court's docket in the wake of the Judiciary Act of 1925; the replacement of Hughes, a strong chief justice, by Stone, a more tolerant leader; personal discord among justices; and their lack of technical legal knowledge. *Id.* at 614-19. Justice Rehnquist in 1973 attributed the increase in concurrences to the dominance of constitutional issues on the Court's docket. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361, 363 (1973) (stating "[i]t may well be that the nature of constitutional adjudication invites, at least, if it does not require, more separate opinions than does adjudication of issues of law in other areas"); see also Danelski, *The Influence of the Chief Justice in the Decisional Process*, in *COURTS, JUDGES AND POLITICS* 695, 702 (W. Murphy & C. Pritchett 3d ed. 1979) (studying Chief Justice Stone's Court leadership).

Louis Lusky rejected the weak leadership by Chief Justice Stone during his tenure from 1941 until 1946 as a cause for the increased use of concurrences. Instead, Lusky claimed the increase was caused by Felix Frankfurter's enthusiastic use of the concurrence and the "Court's steadily accelerating movement toward formulation of new constitutional rules not fairly derivable by interpretation from the text of the Constitution or its formally ratified amendments." Lusky, *Fragmentation of the Supreme Court: An Inquiry into Causes*, 10 HOFSTRA L. REV. 1137, 1143 (1982) [hereafter *Fragmentation of the Supreme Court*]. Lusky argued that Frankfurter was reluctant to surrender the intellectual independence he had enjoyed as a law professor to the cause of unanim-

year tenure averaged seventy-six concurrences each Term, fluctuating from a low of fifty-one in 1974 to a high of ninety-five in 1981.⁴ The Rehnquist Court in its first years has shown little numerical divergence from its predecessor. The Court produced seventy-six concurrences in 1986, precisely the Burger Court average and also precisely one-half the number of majority opinions. In 1987 it produced sixty-four concurrences and in 1988 eighty-eight.⁵ Although the numbers remain steady, the concurring opinions from the first Terms of the Rehnquist Court suggest a tendency to adapt the concurrence to a purpose not often used in the past.

The concurrences of the Rehnquist Court, particularly those of Justice Scalia, often sweep more broadly than many of their antecedents. Unlike the one paragraph concurrence offering a terse qualification of the majority opinion, these concurrences address at some length larger questions of the Court's jurisprudence. Such minority opinions expand

ity on the Court. *Id.* at 1144. For an extended discussion of Lusky's second theory, the Court's new mode of constitutional interpretation, see L. LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975). Another author advanced a similar theory to explain the increase in plurality opinions that began with the Warren Court. See Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1140-42 (1981) [hereafter *Harvard Note*].

During his 23 years on the Court, from 1939 to 1962, Frankfurter wrote 164 concurring opinions. One observer of the Court called him "regularly the 'concurringest' of the Justices." J. FRANK, *MARBLE PALACE THE SUPREME COURT IN AMERICAN LIFE* 124 (1958). In an early concurrence he praised the pre-Marshall Court's use of individual opinions and insisted that "the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring). Lusky called this language a "fateful pronouncement." LUSKY, *Fragmentation of the Supreme Court*, *supra*, at 1144; see also Field, *Frankfurter, J., Concurring*, 71 HARV. L. REV. 77 (1957) (responding to *Fikes v. Alabama*, 352 U.S. 191, 199 (1957)) (Frankfurter, J., concurring) (commenting in verse on Frankfurter's use of *Plimsoll* line as metaphor for limits of due process).

⁴ The Harvard Law Review's annual tabulation of Supreme Court opinions is the source of these figures and similar figures throughout this Article. For purposes of this Article, opinions concurring in part and dissenting in part are not considered to be concurrences, since they do not accept the Court's judgment in its entirety.

⁵ The Harvard Law Review summary apparently does not consider a concurring statement by Justice Brennan as a concurrence. See *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1851 (1989).

The Court also produced 154 dissenting opinions in the 1986 Term, 97 in the 1987 Term, and 116 in the 1988 Term. *Leading Cases*, 101 HARV. L. REV. 119, 362 (1987-1988); 102 HARV. L. REV. 143, 350 (1988-1989); 103 HARV. L. REV. 137, 394 (1989).

the conventional dialogue of majority and dissent to a choral conversation. They also move the Court further from the consensus insisted on by Chief Justice Marshall⁶ and closer to a form of decisionmaking that prolongs debate by incorporating divergent views.⁷ This Article will analyze the uses to which members of the Rehnquist Court have put the concurrence and consider the effect of such practices on the Court's decisionmaking process.

I. THE THEORY OF THE CONCURRENCE

The modern judicial concurrence is a curious hybrid. A direct descendent of the *seriatim* opinion, it is now suspect because, unlike its ancestor, it lacks direct decisional force. Yet the concurrence may have a substantial effect on the outcome of a case. Such an opinion may prevent the court from reaching a majority opinion or, less dramatically, transform a unanimous holding into a fragmented majority. The concurrence as a practical matter may have a greater effect on subsequent cases than on the majority opinion that it accompanies, especially if the concurrence is one proposing an independent legal basis for the majority's result. Further, such an opinion may offer the clearest possible expression of an individual justice's views, unhampered by the accommodation of a colleague's position.⁸

By its nature a concurrence is a companion of sorts to the majority opinion. Etymologically, to concur means to run with, to accompany, from the Latin *con*, meaning "together," and *currere*, meaning "to run."⁹ The purest form of concurrence, a minority opinion that simply emphasizes the court's holding, in effect runs with the majority, accepting both its rationale and its result. Other varieties of the concurrence, however, are less faithful companions. One of the most frequent uses of the concurrence is to limit the reach of the majority opinion.

⁶ See A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 15-16 (1919); ZoBell, *supra* note 1, at 193.

⁷ See Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 394-95 (arguing that "direct, prolonged conflict" over family law matters assists "in forging communal bonds").

⁸ Justice Frankfurter remarked that "[w]hen you have to have at least five people to agree on something, they can't have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammelled by what anybody else may do or not do if he put that out." H. PHILIPS, *FELIX FRANKFURTER REMINISCES* 298 (1960).

⁹ 3 *THE OXFORD ENGLISH DICTIONARY* 675-76 (2d ed. 1989). Interestingly, the earliest, and now obsolete, meaning of "concur" was to run together violently or in a hostile manner, to clash. *Id.*

These limiting concurrences generally accept the court's position but part company with the majority by resisting the implications of its opinion. The concurrence also is at times used to enlarge a holding by suggesting its application beyond the bounds of the majority opinion. Finally, the concurrence often is used to propose an alternate legal theory in support of the court's result.

Thus, of all the major varieties of the concurrence, only the first — the emphatic concurrence — actually accompanies the majority opinion. As a rule, the limiting concurrence is more accurately characterized as centripetal in nature, drawing the court's holding back toward the factual center of the case in an effort to confine its effect. In contrast, the expansive concurrence is centrifugal, pulling the holding away from its original context toward other related situations. Even the doctrinal concurrence is only a half-hearted companion, accepting the majority's outcome but attacking its supporting argument. It may be either centripetal or centrifugal, depending upon the nature and consequences of the alternate theory proposed.

This diversity in the functions of the concurrence apparently has discouraged commentators on the appellate process from extended analysis of its role. In contrast to the dissent, which is readily characterized as a prophetic address to the future¹⁰ or an expression of individual conscience,¹¹ the concurrence generally is assessed in more pragmatic terms. One commentator found the most important function of the concurrence to be an indicator of how a particular judge views a given issue and therefore of how a court may be expected to vote in the future.¹² Another author regarded the concurrence as a spur to competition and to a healthy rivalry among the members of a court that will improve the quality of all opinions.¹³ A third writer wryly defined three

¹⁰ In his famous description, Chief Justice Hughes called the dissent "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928); see also A. BARTH, *supra* note 1, at 10 (labeling dissenters as prophetic).

¹¹ Several Supreme Court justices have taken this position. See, e.g., Brennan, *In Defense of Dissents*, 37 *HASTINGS L.J.* 427, 437 (1986); Douglas, *The Dissent: A Safeguard of Democracy*, 32 *J. AM. JUDICATURE SOC'Y* 104, 106 (1948); C. HUGHES, *supra* note 10, at 67-68.

¹² Moorhead, *supra* note 2, at 823.

¹³ Stephens, *supra* note 2, at 410. Stephens argued that concurrences and dissents provide "a part of the light of day" in the judicial process by dispelling "the cherished illusion of legal certainty and judicial infallibility." *Id.* at 398-99. As in the rest of his essay, Stephens did not distinguish concurring from dissenting opinions in this regard.

Ruth Bader Ginsburg of the United States Court of Appeals for the District of Co-

categories of concurrences: the excusable, the justifiable, and the reprehensible.¹⁴

B.E. Witkin, author of a handbook for appellate judges, took the most pragmatic approach to concurrences.¹⁵ Witkin isolated three principal uses: to expand a holding or to supplement its reasoning;¹⁶ to limit or qualify a holding;¹⁷ or to offer a different theory in support of the majority's conclusion.¹⁸ He also acknowledged a fourth category, which he called "the reluctant concurrence," in which the authoring judge admits to being bound by either a prior decision of the court or the need to produce a majority opinion on an important issue.¹⁹ This functional view of the concurrence suggests an essentially centripetal process in which the author is responding to the substance of the majority opinion and is looking inward toward the occasion of its publication.

An alternative and hostile view of the concurrence credits it with a more serious effect on appellate decisionmaking. Bernard Schwartz, a strong proponent of this view, has argued that the license to concur or dissent should be reserved for great or hard cases because its indiscriminate use detracts from a court's proper role as lawgiver.²⁰ The concurring opinion in an ordinary case has as its only function "to leave an impression of dissonance within the tribunal."²¹ Schwartz cited Justice Holmes as his source for the test he proposed: "Unless an expression of separate views will make a significant contribution to the development of the law, the would-be concurren or dissenter would be better to

lumbia Circuit has made a similar point about the role of concurrences in improving the quality of a court's opinions: "The prospect of a dissent or separate concurring statement pointing out an opinion's inaccuracies or inadequacies heightens the author's incentive to 'get it right,' or, at least, to keep it tight." Ginsburg, *The Obligation To Reason Why*, 37 U. FLA. L. REV. 205, 216 (1985).

¹⁴ Gewin, *Opinions — Dissents, Special Concurrences, Policy, Techniques*, 63 F.R.D. 594, 595 (1973).

¹⁵ B. WITKIN, *supra* note 2, at 217.

¹⁶ *Id.* at 219.

¹⁷ *Id.* at 222.

¹⁸ *Id.* at 221.

¹⁹ *Id.* at 223-24. Witkin is skeptical of the utility of such concurrences since "[h]igh courts are constantly seeking to maintain respect for stare decisis by positive declarations that trial judges and intermediate appellate courts must follow controlling authority." *Id.* at 224. One of the most distinguished practitioners of the reluctant concurrence was the second Justice Harlan, who followed an initial dissent on an issue with subsequent concurrences deferring to *stare decisis*. See Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 274-83 (1985).

²⁰ B. SCHWARTZ, *supra* note 2, at 359.

²¹ *Id.* at 361.

guard his silence."²²

Schwartz's sense of the minority opinion as a disruptive element suggests that the concurrence may function as a catalyst for more positive changes as well. The concurrence, with more authority than a dissent, may propose future avenues for development of the law laid down by the majority. It also may work to reserve an issue for resolution in a different case and context. As a practical matter, the concurrence more often seeks to confine than to expand the majority view, but in both guises it can look beyond the majority opinion.

This dual nature of the concurrence — as technical adjustment to the majority opinion and as independent formulation of alternate doctrine — makes it both an agent of *stare decisis* and an agent for change. When the concurrence seeks to limit the applicability of the majority view or to deny a majority a proposed change in the law, the effect is resistance to further development. When, however, the concurrence offers its own legal theory, especially one connected to a larger doctrinal position, the opinion counsels immediate alteration of new law. In practical terms, a concurrence may transform a potential majority to a plurality, creating confusion and instability in the law. Alternatively, it may preserve a majority by reluctantly accepting the binding force of prior law. The concurrence may endorse only the majority's result or both its result and its rationale. But by writing separately, a concurring author always offers an internal commentary on the court's judgment, throwing partial illumination on the otherwise obscure process that creates majorities. Finally, a concurring author also dilutes the force of a majority opinion and, consequently, its authority. The record of the Rehnquist Court illustrates the versatility of the concurrence as an instrument of judicial discourse. While some justices write concurrences that carry centripetal force, addressing the particularities of the majority view, others write concurrences that carry centrifugal force, pulling away from the Court's opinion toward larger juridical concerns. An examination of the concurrences written in its first three Terms suggests that the concurrence may become a tool of some significance for the members of the Rehnquist Court and for those who hope to understand its performance.

²² *Id.*; J. FRANK, *supra* note 3, at 125 (echoing Schwartz's view). Schwartz sees Holmes as a reluctant dissenter whose reputation as the "great dissenter" is based less on the number of his dissents than on their quality. B. SCHWARTZ, *supra* note 2, at 359-60.

II. VARIETIES OF THE CONCURRENCE

A. *The Limiting Concurrence*

One of the most traditional uses of the concurrence is to limit the majority opinion to the particular circumstances of the case under review.²³ The concurring justice generally will subscribe to the majority's position only with the caveat that its opinion not be read as applying to other factual contexts or other law. The impulse behind such qualifying opinions basically is one of contraction. While looking beyond the immediate case, the concurrer acts to rein in the doctrinal force of the majority.

Several members of the Rehnquist Court recently have fashioned such traditional concurrences. Justice Brennan began one such opinion in the classic manner: "I write separately only to note that today's holding is a narrow one."²⁴ Although he joined in the unanimous majority opinion finding preemption, he advised that "our decision should not be interpreted as adopting a broad rule that *any* defense premised on congressional intent to preempt state law is sufficient to establish removal jurisdiction."²⁵ On occasion the concurrer makes explicit the terms of his or her vote. Thus, Justice Blackmun joined a majority opinion imposing the thirty dollar per day expert witness fee of section 1821 "on the understanding that it does not reach the question whether, under 42 U.S.C. Section 1988, a district court may award fees for an expert witness."²⁶

These limiting concurrences also may serve to reaffirm prior decisions. For example, Justice O'Connor concurred in the Court's judgment, but only partially in its opinion, when she believed that the Court's discussion of the Federal Election Campaign Act could "be read as moving away from the teaching of *Buckley v. Valeo*."²⁷ Such

²³ B. WITKIN, *supra* note 2, at 218; *see also* Moorhead, *supra* note 2, at 823 (stating a concurring opinion can warn that majority's opinion cannot go too far).

²⁴ Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67 (1987) (Brennan, J., concurring).

²⁵ *Id.*

²⁶ Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) (Blackmun, J., concurring). For other concurrences in which justices impose conditions on their agreement, *see, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring); Dellmuth v. Muth, 109 S. Ct. 2397, 2403 (1989) (Scalia, J., concurring).

²⁷ Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 265 (1986) (O'Connor, J., concurring in part and in the judgment); *see also* Tyler Pipe Indus. v. Washington Dep't of Revenue, 483 U.S. 232, 253 (1987) (O'Connor, J., concurring) (joining Court's opinion with understanding that it did not extend "inter-

loyalty to prior opinions is not reserved for majority holdings. Justice Blackmun joined the Court's opinion holding an ordinance to be unconstitutionally broad, but he wrote separately to "disassociate" himself from "any possible suggestion" that two cases from which he had dissented were authority for the majority view.²⁸ Such concern about the implications of an opinion is not uncommon, though it rarely is expressed so delicately. In an employment discrimination case, Justice Stevens joined the Court's judgment but concurred to caution that it was "unwise to announce a 'fresh' interpretation of our prior cases" before the district court issued its findings on remand.²⁹

All of these concurrences are circumscribed in function and in length. However worded, they are expressions of ambivalence, an occasion for a justice both to join the majority and to voice reservations about its opinion. The strategies may vary from a caveat to a gloss on the majority's text, but the brevity of these concurrences — most often only one paragraph — signals their limited and limiting role in the Court's judicial discourse. Looking inward to the case under review, they are typical of concurrences with centripetal effect.

A more ambitious subset of the limiting concurrence is the opinion that takes the majority to task for addressing an issue not properly before it. For some members of the Rehnquist Court, this situation simply calls for withholding support from a portion of the majority opinion. Justice Stevens, for example, on three occasions in the 1986 Term accused the majority of going farther than necessary.³⁰ Other justices have chided the Court for resolving issues not raised in the parties'

nal consistency" test from earlier case); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 495 (1987) (White, J., concurring) (concurring with understanding that opinion did not disturb prior statutory construction).

²⁸ *City of Houston v. Hill*, 482 U.S. 451, 472 (1987) (Blackmun, J., concurring).

²⁹ *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 2797 (1988) (Stevens, J., concurring in the judgment). For a case containing three limiting concurrences, see *South Carolina v. Baker*, 485 U.S. 505, 527 (1988) (Stevens, J.); *id.* at 528 (Scalia, J.); *id.* (Rehnquist, C.J.).

³⁰ See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 555 (1987) (Stevens, J., concurring in part and in the judgment); *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 121 (1987) (Stevens, J., concurring in part and in the judgment); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 409 (1987) (Stevens, J., concurring in part and in the judgment).

For examples of other justices making the same accusation, see *Asarco Inc. v. Kadish*, 109 S. Ct. 2037, 2054 (1989) (Brennan, J., concurring in part and in the judgment); *Graham v. Connor*, 109 S. Ct. 1865, 1873 (1989) (Blackmun, J., concurring in part and in the judgment); *Perry v. Leeke*, 109 S. Ct. 594, 602 (1989) (Kennedy, J., concurring in part).

briefs³¹ and for rejecting in dictum the reasoning of a prior inapplicable case.³² Such concurrences are in part sorting exercises that distinguish the essential from the inessential elements of the majority opinion. Their tendency, once again, is toward contraction: the Court's opinion should say no more than is needed to resolve the case under review, and the concurers as a rule practice what they preach.

In his first year on the Court, Justice Scalia authored several opinions that stand in dramatic contrast to these traditional limiting concurrences.³³ Six of his concurring opinions strongly rebuked the Court for addressing issues inessential to the resolution of the case under review, but they also did something more. They set forth a theoretical basis for Scalia's objections in the form of general observations on the decision-making process. Read together, these opinions offer the materials for a theory of appellate jurisprudence. These are centrifugal concurrences, opinions that reach out from the particular case to the broadest issues of the judicial process.

Four of Scalia's early concurrences arise in cases of statutory interpretation, which traditionally present more technical and less theoretical issues than cases of constitutional import. Yet in each case Scalia exceeded the conventional response of the concurer — that the Court went farther than necessary. In the first of these cases, *California Federal Savings and Loan Association v. Guerra*,³⁴ the Court ruled that Title VII did not preempt a California statute requiring employers to provide leave and reinstatement to pregnant employees. The Court reasoned that the state provision was not inconsistent with the purposes of the federal statute and did not require the performance of any act unlawful under Title VII. Justice Scalia concurred in the Court's judg-

³¹ See, e.g., *Western Air Lines v. Board of Equalization*, 480 U.S. 123, 135 (1987) (White, J., concurring) (stating Court acted inappropriately by calling for further briefing and *sua sponte* raising ir.-lieu tax issue); *Colorado v. Connelly*, 479 U.S. 157, 171 (1986) (Blackmun, J., concurring in part and in the judgment) (stating burden of proof issue not raised or briefed by parties).

³² *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987) (Powell, J., concurring in the judgment).

³³ Before his appointment to the Court, Justice Scalia served on the United States Court of Appeals for the District of Columbia Circuit from 1982 to 1986. For a review of his work on that court, see Meaux, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and State*, 62 TUL. L. REV. 225 (1987). Scalia was a less prolific concurer on the court of appeals: during his four years, he wrote a total of 15 concurrences. King, *Justice Antonin Scalia: The First Term on the Supreme Court — 1986-87*, 20 RUTGERS L.J. 1, 4 n.10 (1988). King gives an account of Scalia's Supreme Court opinions for the 1986 Term. *Id.*

³⁴ 479 U.S. 272 (1987).

ment but insisted that the Court decided "more than is necessary" because only the narrow preemption provision of the Pregnancy Disability Act (PDA) applied.³⁵ The Court erred, he argued, in applying the broader preemption provision of the Civil Rights Act. To that point, the opinion said no more than is usual in similar concurrences.

Justice Scalia then, however, broadened his criticism to include a sarcastic swipe at the majority's approach: "By parity of analysis, we can decide any issue, so long as the facts before us either do or do not present it."³⁶ In choosing the latter course, the Court prematurely interpreted the PDA and issued an advisory opinion, an exercise useful to California's legislature and employers but nonetheless improper. "It has never been suggested, however," he concluded, "that the constitutional prohibition upon our rendering of advisory opinions is a doctrine of convenience."³⁷ What might have been a reproach to the Court for applying the wrong statutory section becomes instead a full-blown constitutional attack. Scalia made no mention in his opinion of the interpretational issue that engaged the majority,³⁸ Justice Stevens in concurrence,³⁹ and Justice White in dissent:⁴⁰ whether Title VII prohibits any preferential treatment of pregnancy. Instead, the constitutional assault effectively cut off his discussion of the substantive issue. Thus, Justice Scalia used the occasion of his first Supreme Court concurrence to issue a doctrinal statement of some generality.

Justice Scalia's views on statutory interpretation emerge with greater specificity in three additional concurrences written during his first term. In *INS v. Cardoza-Fonseca*,⁴¹ the majority construed language in the Immigration and Nationality Act to impose a less demanding standard of proof on those seeking asylum than the Board of Immigration Appeals (BIA) had applied. The Court's opinion included a section on legislative history⁴² and declined to defer to the BIA in a matter of statutory construction.⁴³ Scalia again concurred in the Court's judgment⁴⁴ but took strong exception to its use of legislative history in support of its holding. He characterized the Court's approach as reliance

³⁵ *Id.* at 295-96 (Scalia, J., concurring in the judgment).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 284-88.

³⁹ *Id.* at 292-95 (Stevens, J., concurring in part and in the judgment).

⁴⁰ *Id.* at 297-304 (White, J., dissenting).

⁴¹ 480 U.S. 421 (1987).

⁴² *Id.* at 432-36.

⁴³ *Id.* at 446-48.

⁴⁴ *Id.* at 452 (Scalia, J., concurring in the judgment).

on the well established doctrine of variance. This doctrine maintains that when a statute's language is clearly contrary to the congressional intent revealed in legislative history the Court "is required" to question the presumption that the language of the statute expresses that intent.⁴⁵ Scalia argued that this doctrine is "an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect — at least in the absence of a patent absurdity."⁴⁶ His discussion ended with a pronouncement of epigrammatic force: "Judges interpret laws rather than reconstruct legislators' intentions."⁴⁷

The second prong of the concurrence took an even harder line. Scalia agreed with the Court that the BIA interpreted the crucial language in a manner inconsistent with its plain meaning. However, he also criticized the Court's "superfluous discussion" of the proper deference due an agency's interpretation of a statute⁴⁸ and accused the Court of undermining a major precedent by authorizing courts to supplant agency interpretations of statutes.⁴⁹ Another rhetorical formulation, this time alliterative as well, concluded the discussion: "But this approach would make deference a doctrine of desperation. . . . This is not an interpretation but an evisceration of *Chevron*."⁵⁰

⁴⁵ *Id.* at 452.

⁴⁶ *Id.*

⁴⁷ *Id.* at 452-53.

⁴⁸ *Id.* at 454. Administrative law is an area of expertise for Scalia. As a law professor, Scalia taught administrative law and chaired both the Administrative Law Section of the A.B.A. and the Administrative Conference of the United States. King, *supra* note 33, at 2 n.1. Scalia frequently has written on problems of administrative law, generally arguing for deference by the courts to agency expertise and to the prerogatives of the executive branch. See, e.g., Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTI-TRUST L.J. 191, 193-94 (1986). Such deference by the courts, he believes, has "less to do with 'unsuitability' than with lack of political accountability." Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 107-08 (1987); see also Scalia, *Vermont Yankee: The A.P.A., the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 404-06 (stating "the fundamental point that one of the functions of procedure is to limit power" and lamenting Congress' tendency to adjust procedures as an indirect method of curbing agency power); King, *supra* note 33, at 67-72 (discussing Scalia's first term opinions on administrative law).

⁴⁹ *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J. concurring).

⁵⁰ *Id.* The precedent at issue is *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In 1987, Scalia joined the Court's unanimous opinion in *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133 (1988) (Scalia, J., concurring) (writing separately "only to note that our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law" set forth in *Chevron*); see Scalia, *Judicial Deference to Administrative*

This opinion is vulnerable to criticism on two counts. First, Scalia's characterization of the Court as justifying its use of legislative history under the doctrine of variance between intent and language somewhat overstated the case. In the footnote cited,⁵¹ Justice Stevens for the majority observed that an examination of legislative history for signs of variance in fact "adds compelling support to our holding" based on the statute's plain language.⁵² It did not, as in the scenario Scalia fears, authorize an inverted reading of that language. This case perhaps was not the most appropriate occasion for an attack on a doctrine that was neither central to the Court's resolution nor illustrative of the dreaded consequence. Second, Scalia's concurrence comes perilously close to practicing what it condemns. In denouncing what he sees as a revisionist reading of *Chevron*, he accused the Court of a misguided "eagerness to refashion important principles of administrative law in a case in which such questions are completely unnecessary to the decision and have not been fully briefed by the parties."⁵³ Yet his own use of this occasion to challenge the variance doctrine is open to a similar charge. Since the majority in fact relied principally on a straightforward reading of statutory language with which he agreed, this case was not the most propitious for an attack on approved doctrine.

Justice Scalia again accused the Court of ignoring statutory language when he concurred in its judgment in *NLRB v. International Brotherhood of Electrical Workers, Local 340*.⁵⁴ The majority ruled that a union had not committed an unfair labor practice by disciplining a union member who, although employed as a supervisor, did not participate in collective bargaining or adjust contractual grievances and whose employer had not entered into a collective bargaining agreement with the union. Scalia agreed that no violation occurred on the narrower ground that no collective bargaining agreement covered the employees at issue.⁵⁵ His quarrel with the majority, however, derived from the box in which he argued the Court had placed itself by "excessive judicial deference" to the NLRB in an earlier case.⁵⁶ By allowing the Board in the past to apply the same section to a remote factual situation, the

Interpretation of Law, 1989 DUKE L.J. (forthcoming) (discussing *Chevron's* implications).

⁵¹ *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring) (citing to note 12 of Justice Stevens' opinion for the majority).

⁵² *Id.* at 432 n.12.

⁵³ *Id.* at 455 (Scalia, J., concurring).

⁵⁴ 481 U.S. 573 (1987) (Scalia, J., concurring in the judgment).

⁵⁵ *Id.* at 596.

⁵⁶ *Id.* at 597.

Court now was faced with a further logical expansion of the statute: "And the Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction."⁵⁷ Faced with the conflicting claims of precedent and statutory fidelity, he opted for the latter: "Logic is on the side of the Board, but the statute is with the respondent."⁵⁸

Ironically, Justice Scalia found himself refuting the deference to an administrative agency in *International Brotherhood* that he had championed in *Cardoza-Fonseca*.⁵⁹ In both concurrences, however, he insisted on the primacy of statutory language and rejected the impurities introduced into the interpretive process by legislative history in one instance and excessive deference in the other.⁶⁰ Although the majority in *International Brotherhood* implicitly recognized the error of its earlier ways, Scalia took the opportunity provided by his narrower ground to insist on the Court's role as faithful interpreter of statutory language.

Justice Scalia's concurrence in *Rose v. Rose* again raised broad questions of statutory interpretation.⁶¹ In *Rose*, a fragmented Court⁶² approved a Tennessee statute that authorized the payment of child support from veterans' disability benefits. Justice Scalia concurred in one part of the majority opinion but declined to join the Court in its resolution of three additional issues that he argued were unnecessary.⁶³ He identified a more serious problem, however, in the Court's use of an

⁵⁷ *Id.* at 597-98.

⁵⁸ *Id.* at 598.

⁵⁹ *See id.* at 596-98; *see also supra* note 48 (discussing Justice Scalia's views on administrative law).

⁶⁰ In his concurrences of the 1988 Term, Justice Scalia has continued to criticize the Court's use of legislative history. *See, e.g.,* *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment); *United States v. Stuart*, 109 S. Ct. 1183, 1195 (1989) (Scalia, J., concurring in the judgment). Although Scalia's later concurrences are generally milder than his first term concurrences, he did reject "the level of unreality that our unrestrained use of legislative history has attained." *Blanchard v. Bergeron*, 109 S. Ct. 939, 947 (1989) (Scalia, J., concurring in part and in the judgment).

⁶¹ 481 U.S. 619, 640-44 (1987) (Scalia, J., concurring in part and in the judgment).

⁶² Chief Justice Rehnquist and Justices Brennan, Blackmun, and Powell joined in the majority opinion written by Justice Marshall. Justice O'Connor, joined by Justice Stevens, wrote a separate opinion concurring in part and in the judgment. Justice Scalia also wrote separately, concurring in part and in the judgment. Justice White wrote a dissenting opinion. *Id.* at 620-21.

⁶³ *Id.* at 644 (Scalia, J., concurring in part and concurring in the judgment).

interpretive method that exalted the purpose of statutes above their texts.⁶⁴

According to Justice Scalia, the Court reads federal statutes selectively to support its view of congressional intent. He denounced this approach strongly:

While incompatibility with the purpose of a federal statute may invalidate a state law that does not violate its text, I know of no precedent for the proposition, which these portions of the opinion adopt, that compatibility with the purpose of a federal statute can save a state law that violates its text.⁶⁵

In this concurrence Scalia again insisted on the primacy of the text over legislative history.⁶⁶

Two other Scalia concurrences deserve brief mention for their general propositions of law. In *CTS Corporation v. Dynamics Corporation of America*,⁶⁷ Scalia concurred in several parts of the majority opinion that found no preemption by the Williams Act of an Indiana statute that regulated tender offers.⁶⁸ Although he proclaimed himself less admiring than the Court of the statute, he offered a formulation reminiscent of Justice Holmes on Herbert Spencer: "But a law can be both economic folly and constitutional."⁶⁹ In *Welch v. Texas Department of Highways and Public Transportation*,⁷⁰ the Court held by plurality decision that the eleventh amendment barred suit in federal court under the Jones Act. Here Scalia implicitly countered Justice Brennan's long-running campaign to reverse the doctrine that prohibited suit by a citizen against his or her own state.⁷¹ Further, he objected to Justice Pow-

⁶⁴ *Id.* at 642-43.

⁶⁵ *Id.* at 640.

⁶⁶ *Id.*; see *United States v. Taylor*, 108 S. Ct. 2413, 2423 (1988) (Scalia, J., concurring in part) (finding text of statute at issue "so clear that there is no justification for resort to the legislative history" and chiding Court for "perpetuating the view that legislative history can alter the meaning of even a clear statutory provision"); see also *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment) (stating his view that legislative intent means precisely what Congress had in mind when it passed the legislation).

⁶⁷ 481 U.S. 69, 94 (1987) (Scalia, J., concurring in part and in the judgment).

⁶⁸ *Id.*

⁶⁹ *Id.* at 96-97. Holmes wrote that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

⁷⁰ 483 U.S. 468 (1987).

⁷¹ *Id.* at 495 (Scalia, J., concurring in part and in the judgment). Justice Brennan dissented at some length. *Id.* at 496-521. Brennan frequently has elaborated his arguments for what he considers to be the proper interpretation of the eleventh amendment. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissent-

ell's willingness to discuss a case that the parties did not raise. He argued that when a case "has been assumed to be the law for nearly a century," statutes have been enacted in reliance upon it.⁷² "Even if we were now to find that assumption to have been wrong," he continued, "we could not, in reason, interpret the statutes as though the assumption never existed."⁷³ This reluctance to disturb law based on an arguably incorrect precedent suggests a high regard for *stare decisis* as a limitation on the Court's ability to make new law by discarding the old. It also, however, places Scalia's *Welch* opinion in conflict with his concurrence in *Pope v. Illinois*.⁷⁴ *Pope* was an obscenity case in which he joined the majority's application of the "reasonable person" test under *Miller v. California*.⁷⁵ Nonetheless, he called for a "reexamination of *Miller*" on the ground that its standard had proved unworkable.⁷⁶ *Miller* is much more recent and more elusive law than the precedent at issue in *Welch*.⁷⁷ *Pope* still suggests, however, that Scalia does not view the interweaving of case law and statutes as absolute protection against reconsideration.

In his brief tenure on the Court, Justice Scalia has transformed the limiting concurrence from a centripetal to a centrifugal device. Instead of seeking merely to constrict the Court's holdings, Scalia has used his early concurrences to issue broad attacks on its methodology and some of its precedents. Read together, his concurring opinions form a judicial manifesto on statutory interpretation. Scalia came to the Court with a judicial philosophy previously expressed in his opinions for the Court of Appeals for the District of Columbia and his frequent law review

ing); see Ray, *supra* note 1, at 321-22 (discussing Brennan's position on this issue)

⁷² *Welch*, 483 U.S. at 496 (Scalia, J., concurring in part and in the judgment).

⁷³ *Id.*

⁷⁴ 481 U.S. 497, 504 (1987) (Scalia, J., concurring).

⁷⁵ *Id.*

⁷⁶ *Pope*, 481 U.S. at 504-05 (Scalia, J., concurring).

⁷⁷ *Miller v. California*, 413 U.S. 15 (1973). The *Miller* test permits regulation of "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. Scalia believes that "it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can." *Pope*, 481 U.S. at 504 (Scalia, J., concurring). Justice Brennan regularly dissents from obscenity cases decided under *Miller* on the grounds that its standard is unclear and unworkable. He dissented as usual in *Pope*. *Id.* at 506 (Brennan, J., dissenting). For a discussion of Brennan's obscenity dissents, see Ray, *supra* note 1, at 326-27.

articles.⁷⁸ His initial use of the concurrence thus may reflect the exuberance of an ideologically-minded new justice speaking for the first time from the Supreme Court platform. In fact, the concurrences of Scalia's second and third Terms generally are less ambitious in scope and less declamatory in tone than his inaugural pieces.⁷⁹ With his strong views and epigrammatic style, Scalia has demonstrated, however, that the simple limiting concurrence may become a vehicle for substantial doctrinal discourse.

B. *The Expansive Concurrence*

Although a third of the 1986 concurrences sought to limit majority opinions, only a handful — three — expressly sought to enlarge them. This imbalance suggests that the concurrence is principally a conservative agent in the decisionmaking process, or at least that its usefulness in encouraging change is more often oblique than direct.

The most direct of the Rehnquist Court concurrences seeking expansion of the majority position is a one-paragraph opinion by Justice White. In *Commissioner of Internal Revenue v. Fink*,⁸⁰ the majority held that “a dominant shareholder who voluntarily surrenders a portion of his shares to the corporation, but retains control, does not sustain an immediate loss deductible from taxable income.”⁸¹ Justice White joined the opinion but wrote separately⁸² in response to a footnote reserving the issue with regard to a surrender that results in a loss of control.⁸³ He stated succinctly that the footnote had “little substance” since the opinion offered no “principled ground for distinguishing” one

⁷⁸ See supra notes 33 & 48.

⁷⁹ See, e.g., *Riley v. National Fed'n of the Blind*, 108 S. Ct. 2667, 2681 (1988) (Scalia, J., concurring in part and concurring in the judgment) (rejecting, with milder tone than in his 1986 concurrences, one footnote of Court's opinion as a divergence from first amendment doctrine and noting that “it is safer to assume that the people are smart enough to get the information they need than to assume that the Government is wise or impartial enough to make the judgment for them”); see also *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2378 (Scalia, J., concurring) (writing briefly to reject direct judicial supervisory power).

In one 1988 concurrence, Scalia observed that the Court's use of a phrase from a statute's legislative history to guide the lower courts “seems to me about as helpful to the conduct of their affairs as ‘life is a fountain.’” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2907 (1989) (Scalia, J., concurring in the judgment). Again, the language, though tart, lacks the bite of his earlier efforts.

⁸⁰ 483 U.S. 89 (1987).

⁸¹ *Id.* at 99.

⁸² *Id.* at 100 (White, J., concurring).

⁸³ *Id.*; see *id.* at 99 n.15.

situation from the other.⁸⁴

Somewhat less direct is Justice Powell's concurrence in *Griffith v. Kentucky*.⁸⁵ In this case, the Court held that a new rule affecting the conduct of criminal prosecutions should be applied retroactively to all cases on direct review. Justice Powell enthusiastically joined the majority, noting that a decade before he had adopted Justice Harlan's view that such retroactive application was appropriate for both direct appeals and habeas petitions.⁸⁶ Acknowledging that the present case did not raise the habeas aspect, he urged the Court to extend its position when the occasion arose.⁸⁷ The concurrence thus laid the groundwork for a future expansion in the face of resolute dissents.⁸⁸

The third expansionist concurrence, by Justice Blackmun, sought to enlarge the Court's opinion by changing its ground. The majority in *Young v. United States ex rel. Vuitton et Fils*⁸⁹ ruled that although a district court has the authority to appoint private attorneys to prosecute criminal contempt of its injunction, it could not appoint to that position counsel for an interested party to the earlier litigation. The opinion relied on the ethical implications of a conflict of interest between the prosecutor's loyalties to the client and to the government. Justice Blackmun joined the majority but announced that he "would go further" and hold the appointment of an "interested party's counsel to prosecute for criminal contempt a violation of due process."⁹⁰ By shifting the judgment's basis from legal ethics to the Constitution, Blackmun sought to elevate the Court's holding and to propose a sterner framework for subsequent cases. The brevity of the opinion, however, a single paragraph with no development of its constitutional position, made its impact only suggestive and self-limiting.

One expansive concurrence from the Court's 1987 Term warrants special mention because its author, Chief Justice Rehnquist, has never been among the Court's most prolific concurers.⁹¹ Since his elevation to Chief Justice he has authored only three concurrences, two in the 1987

⁸⁴ *Id.* at 100.

⁸⁵ 479 U.S. 314, 328 (1987) (Powell, J., concurring).

⁸⁶ *Id.*

⁸⁷ *Id.* at 329.

⁸⁸ Chief Justice Rehnquist and Justice White both filed dissenting opinions. *Id.* The White opinion was joined by the Chief Justice and by Justice O'Connor. *Id.*

⁸⁹ 481 U.S. 787 (1987).

⁹⁰ *Id.* at 814 (Blackmun, J., concurring).

⁹¹ From the 1971 through the 1988 Terms, Rehnquist averaged fewer than five concurrences per term. His greatest output was an uncharacteristic 12 concurrences in 1978. See *supra* note 4.

Term and one in the 1988 Term.⁹² In *Honig v. Doe*, Rehnquist joined the majority opinion finding that events following a court of appeals decision had not rendered the case moot.⁹³ He wrote separately, however, to urge “reconsideration of our mootness jurisprudence.” Specifically, he sought to expand the Court’s holding to include events that occurred after the grant of certiorari.⁹⁴

Both the recent scarcity of his concurrences and the *Honig* opinion undoubtedly are traceable to Rehnquist’s new role on the Court. He has expressed his view that “[the] increase in separate opinions is a natural and warranted result of the increase in constitutional decisions” on the Court’s docket.⁹⁵ As Chief Justice, however, he apparently feels greater constraint in contributing to the volume. Even his *Honig* opinion reflects an administrator’s concern in his argument that the Court wastes its resources in the preparation of cases that it later dismisses as moot.⁹⁶ Curiously, two of the most ideological justices on the Rehnquist Court — Rehnquist and Marshall — write the fewest concurrences.⁹⁷

Another curious aspect of the Rehnquist Court is that while the limiting concurrence has expanded in Justice Scalia’s hands, the expansive concurrence has remained a limited judicial tool. The few expansive concurrences written by the present Court suggest that their authors see it less as a platform for broad statements than as a modest corrective device. One variant of this model is the Rehnquist opinion. Yet another is the concurring opinion regularly appended by Justice Brennan to capital punishment cases in which the Court’s decision to vacate a capi-

⁹² *Id.* Rehnquist wrote no concurrences in his first term as Chief Justice. Interestingly, he also wrote none in 1971, his first term on the Court. In addition to *Honig v. Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J., concurring), Rehnquist concurred in *South Carolina v. Baker* to insist that the Court “unnecessarily casts doubt on the protective scope of the Tenth Amendment.” 485 U.S. 505, 529 (1988) (Rehnquist, C.J., concurring in the judgment). His solitary 1988 concurrence appeared in *New Orleans Pub. Serv. v. Council of New Orleans*, 109 S. Ct. 2506, 2521 (1989) (Rehnquist, C.J., concurring in part and in the judgment) (voicing reservations about some of majority’s statements on abstention doctrine).

⁹³ 484 U.S. at 329.

⁹⁴ *Id.* at 329-30.

⁹⁵ Rehnquist, *supra* note 3 (conceding that “[p]erhaps the Court in recent years has overindulged the tendency to write separate views”).

⁹⁶ *Honig*, 484 U.S. at 329.

⁹⁷ Marshall wrote only one concurrence in each of the first two terms of the Rehnquist Court and wrote none in the 1988 Term. In his tenure from the 1967 through the 1988 Terms, he averaged fewer than four concurrences while never authoring more than eight in a single term. *See supra* note 4.

tal sentence is not absolute.⁹⁸ Although these opinions are brief and succinct, they contain citations to the views Brennan elaborated in *Gregg v. Georgia*⁹⁹ and thus embody a broad statement of judicial philosophy. With this exception, however, the expansive concurrence currently plays only a minor role in the Court's discourse.

C. *The Emphatic Concurrence*

The concurrence that seeks only to emphasize its author's view of the majority's position falls somewhere between the limiting and expansive concurrences. The emphatic concurrence is prompted by caution, or perhaps by its author's inability to negotiate the insertion of some clarifying language into an otherwise acceptable majority opinion.

Such concurrences usually are modest in tone and intention. For example, Justice Blackmun agreed that evidence obtained from an inventory search was admissible. He wrote separately, however, "to underscore the importance of having such inventories conducted only pursuant to standardized police procedures."¹⁰⁰ In a similar opinion, Justice White agreed that a police officer's movement of stereo equipment to uncover serial numbers constituted a search and therefore wrote "only to emphasize that this case does not present, and we have no occasion to address, the so-called 'inadvertent discovery' prong of the plain-view exception to the Warrant Clause."¹⁰¹ A variant of this type of concurrence is Justice Brennan's addition to the unanimous decision that section 1981 protected the respondent against discrimination based on his birth as an Arab.¹⁰² Brennan wrote "only to point out" that since the line between discrimination based on ancestry and that based on place of origin "is not a bright one," the Court's opinion should not be read as making that difficult distinction.¹⁰³

⁹⁸ See, e.g., *Johnson v. Mississippi*, 486 U.S. 578, 591 (1988) (Brennan, J., concurring); *Mills v. Maryland*, 486 U.S. 367, 389 (1988) (Brennan, J., concurring); *Maynard v. Cartwright*, 486 U.S. 356, 366 (1988) (Brennan, J., concurring). In all three cases, using identical language, Brennan concurred because the Court's judgments vacating capital sentences did not preclude reimposition of the death penalty on remand. Justice Marshall joined Brennan's concurrences in *Johnson* and *Maynard*.

⁹⁹ 428 U.S. 153, 227 (1976) (Brennan, J., dissenting).

¹⁰⁰ *Colorado v. Bertine*, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring).

¹⁰¹ *Arizona v. Hicks*, 480 U.S. 321, 329-30 (1987) (White, J., concurring).

¹⁰² *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring).

¹⁰³ *Id.* (reading majority opinion as stating only that "discrimination based on *birth-place* alone is sufficient to state a claim under Section 1981"); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (Blackmun, J., concurring) (writing to emphasize his un-

In *Edwards v. Aguillard*,¹⁰⁴ Justice Powell illustrated a related use of the concurrence as a means of emphasizing or underplaying one aspect of the majority opinion. When the Court held that Louisiana's Creationism Act violated the establishment clause of the First Amendment, Powell concurred in Justice Brennan's majority opinion but staked out additional territory.¹⁰⁵ He explained that he wrote separately "to note certain aspects of the legislative history, and to emphasize that nothing in the Court's opinion diminishes the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum."¹⁰⁶ The first section of his substantial opinion reviewed the statutory language and the legislative history that persuaded him of the statute's religious purpose.¹⁰⁷ The second section, however, went somewhat beyond his own prospectus to argue that the role of religion in American life appropriately can be carried into the classroom as long as the purpose of such instruction is secular.¹⁰⁸ In effect Powell tied the majority's opinion more tightly to the circumstances of this case and dissociated himself from any broader implications of its ruling.¹⁰⁹

Occasionally, however, justices use the emphatic concurrence for more ambitious purposes. Justice Stevens illustrated this practice in his separate opinion endorsing a government agency's affirmative action promotion plan.¹¹⁰ While joining the majority in holding the plan consistent with Title VII, he concurred "to emphasize that the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups."¹¹¹ Justice

derstanding that majority opinion directed INS to appropriate sources to help it define meaning of "well-founded fear" standard and that meaning would be refined in later litigation).

¹⁰⁴ 482 U.S. 578 (1987).

¹⁰⁵ *Id.* at 597 (Powell, J., concurring).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 597-604.

¹⁰⁸ *Id.* at 606-08.

¹⁰⁹ *See id.* Powell's caution is also evident in *Federal Communication Comm'n v. Florida Power Corp.*, 480 U.S. 245, 255, 256 (1987) (Powell, J., concurring) (writing to emphasize that judicial review of rates set by federal agency "involves careful consideration of the relevant statute, the action of the regulatory commission, and a complex of other factors").

¹¹⁰ *Johnson v. Transportation Agency*, 480 U.S. 616, 642 (1987) (Stevens, J., concurring).

¹¹¹ *Id.* Stevens also used his concurrence to describe his "problem" in deciding whether to honor the Court's prior decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), which approved preferential treatment for minorities under Title VII, or to

O'Connor's opinion concurring only in the Court's judgment counterpointed Stevens' effort to hold the door open. O'Connor found herself in agreement with neither the "expansive and ill-defined approach" of the majority nor the "clean slate" approach of Justice Scalia's dissent.¹¹² Instead, she concurred "in light of our precedents" that in her view required the Court's outcome.¹¹³ This O'Connor opinion is another type of limiting concurrence, one compelled by precedents that a justice no longer feels free to question.¹¹⁴

O'Connor's opinion also suggests another use for the emphatic concurrence, to reconcile the author's present stand with past opinions. Thus, Justice Brennan wrote separately in *Mathews v. United States*¹¹⁵ because he had dissented four times in cases holding, as *Mathews* did, "that the defendant's predisposition to commit a crime is relevant to the defense of entrapment."¹¹⁶ Although he indicated that his views had not changed, he also recognized that "I am not writing on a clean slate; the Court has spoken definitively on this point."¹¹⁷ In earlier opinions Brennan had made clear his sense of a justice's duty to reiterate dissent on constitutional issues.¹¹⁸ On this statutory question, however, he "bow[ed] to stare decisis" and used a concurrence to signal his capitulation.¹¹⁹

Justice White has used the same means for the related purpose of

follow his own understanding of the neutral intent of the statute. *Johnson*, 480 U.S. at 644. He opted for the former on *stare decisis* grounds. *Id.*

¹¹² *Johnson*, 480 U.S. at 648 (O'Connor, J., concurring in the judgment); *see id.* at 657 (Scalia, J., dissenting). Scalia inverted Stevens' *stare decisis* argument and insisted that for the sake of stability in the law *Weber* should be overruled. *Id.* at 671-72. In his own dissenting opinion, Justice White agreed that *Weber* should be overruled. *Id.* at 657 (White, J., dissenting).

¹¹³ *Id.* at 648 (O'Connor, J., concurring in the judgment). O'Connor did, however, give *Weber* a narrower reading than Justice Stevens. *Id.* at 649.

¹¹⁴ O'Connor was not a member of the *Weber* Court and so her concurrence is not strictly in the tradition of Justice Harlan's concurrences following prior dissents. *See* Kelman, *supra* note 19. O'Connor did, however, indicate that in her view Justice Scalia "illuminates with excruciating clarity" the variance between the *Weber* decision and the statutory language. *Johnson*, 680 U.S. at 647.

¹¹⁵ 485 U.S. 58, 66 (1988) (Brennan, J., concurring).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 67.

¹¹⁸ Brennan, *supra* note 11, at 437.

¹¹⁹ *Mathews*, 485 U.S. at 67 (Brennan, J., concurring). For other concurrences in which the author bowed to *stare decisis* after an earlier, unsuccessful disagreement, see *Teague v. Lane*, 109 S. Ct. 1060, 1078-79 (1989) (White, J., concurring in part and in the judgment); *id.* at 1081-82 (Stevens, J., concurring in part and in the judgment).

recanting past views. In *Sheridan v. United States*,¹²⁰ he noted in concurrence that he had earlier found a statutory barrier to federal liability for assaults by government employees. When the Court authorized such liability, he conceded that "to the extent" his earlier views "are inconsistent with my present understanding, I think the Court's opinion, which I join, has the better of it."¹²¹

In his first months on the Court, Justice Kennedy offered an example of the emphatic concurrence that makes its point with notable mildness. In *Stewart Organization, Inc. v. Ricoh Corp.*,¹²² he wrote separately "only to observe that enforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and further[s] vital interests of the justice system."¹²³ This statement, though unexceptionable, is scarcely a forceful way to persuade district courts to exercise their discretion in favor of enforcing such clauses. As an early effort, however, this opinion may be only the clearing of a judicial throat as a prelude to more strenuous efforts.¹²⁴

Although a tentative quality persists in some of Justice Kennedy's 1988 concurrences,¹²⁵ in one case he appended an opinion of greater weight. In *Texas v. Johnson*,¹²⁶ the Court's controversial flag burning decision, Kennedy provided the fifth vote for Justice Brennan's majority opinion. He concurred, however, to add what he termed "these few remarks" on the rigors of the judicial role.¹²⁷ While accepting "without reservation" Brennan's opinion holding flag burning to be expressive conduct protected by the first amendment, Kennedy characterized *Johnson* as that "rare case" in which a member of the Court feels such distaste for the result his judicial principles require that he must de-

¹²⁰ 108 S. Ct. 2449, 2456 (1988) (White, J., concurring).

¹²¹ *Id.*

¹²² 108 S. Ct. 2239, 2249 (1988) (Kennedy, J., concurring; joined by O'Connor, J.).

¹²³ *Id.*

¹²⁴ Kennedy's other three concurrences in the 1987 Term were somewhat more ambitious. See *Bowen v. Kendrick*, 108 S. Ct. 2562, 2582 (1988) (Kennedy, J., concurring) (disagreeing with part of the Court's remand order); *Sheridan v. United States*, 108 S. Ct. 2449, 2456 (1988) (Kennedy, J., concurring in the judgment) (disagreeing with aspects of both majority and dissenting opinions); *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988) (Kennedy, J., concurring) (qualifying nature of seizure under fourth amendment).

¹²⁵ See, e.g., *Kentucky Dep't of Corrections v. Thompson*, 109 S. Ct. 1904, 1911 (1989) (Kennedy, J., concurring); *United States v. Halper*, 109 S. Ct. 1892, 1904 (1989) (Kennedy, J., concurring). Justice Kennedy wrote 10 concurrences in the 1988 Term. *Leading Cases*, 103 HARV. L. REV. 137, 394.

¹²⁶ 109 S. Ct. 2533 (1989).

¹²⁷ *Id.* at 2548 (Kennedy, J., concurring).

scribe the “personal toll” exacted.¹²⁸ Kennedy’s reflections on the conflict between judicial imperatives and private principles may herald a quasi-confessional use of the emphatic concurrence as an expression of a justice’s emotional as well as jurisprudential responses.

The emphatic concurrence functions largely as a means of clarification. As employed by the Rehnquist Court, it has allowed a member of the majority to specify the terms of assent or to single out an aspect of the Court’s opinion for elaboration. In its purest form, it may in fact be superfluous: a restatement by a single justice that adds nothing to the import of the majority opinion. In its impure form, however, it may be the safety valve that permits a justice to join with or make possible a majority. By allowing its author to put her own spin on the Court’s holding, the emphatic concurrence may in some instances work to create a precarious but useful consensus.

D. *The Doctrinal Concurrence*

Perhaps the most influential variant of the concurrence is the opinion that advances an alternate theory in support of the Court’s holding. The quintessential “right result, wrong reason” concurrence results from a quirk of circumstance that permits two distinct theories to produce the same result. Unlike the limiting concurrence, which usually attempts to forestall the implications of an otherwise acceptable opinion, the doctrinal concurrence generally rejects the entire foundation of the Court’s opinion. While the author of the former most often concurs in the majority opinion and appends a qualification, the author of the latter generally concurs only in the Court’s judgment and charts an independent course. The judicial process, like its political counterpart, occasionally makes strange bedfellows, and the concurring justice may be surprised at times by the company she is keeping.

On the Rehnquist Court the doctrinal concurrence is a judicial device favored by some justices and rarely used by others. For example, Justice White seldomly concurred in the 1986 Term and only once to insist on a different theoretical approach.¹²⁹ Even then, his concurrence had a restrictive effect. He argued that when both lower federal courts agree on the purpose of a state statute and are not plainly wrong, the Court should accept their interpretation instead of presenting its own.¹³⁰ Jus-

¹²⁸ *Id.*

¹²⁹ White authored 5 concurrences in the 1986 Term, 13 in the 1987 Term, and 8 in the 1988 Term. *See Leading Cases, supra* note 5.

¹³⁰ *Edwards v. Aguillard*, 482 U.S. 578, 608 (1987) (White, J., concurring in the judgment). Four of Justice White’s 1988 concurrences proposed different theories for

tice Powell, another infrequent concurrer,¹³¹ also wrote separately only once to offer a different theory. In *Gray v. Mississippi*,¹³² he joined most of Justice Blackmun's opinion that rejected the application of harmless error analysis to the improper exclusion of a juror in a capital case.¹³³ Powell balked, however, when Blackmun relied on such "real-world factors" as the potentially prejudicial effect of the prosecution's use of its peremptory challenges to exclude any prospective juror opposed to the death penalty.¹³⁴ Insisting that the prosecution is perfectly entitled to use its peremptory challenges in that manner, Powell argued that the effect of these challenges should not be a basis for the Court's holding.¹³⁵ Like White, he concurred to restrict the theory supporting a result he endorsed.

Other justices have made more elaborate use of the doctrinal concurrence. For example, Justice Blackmun concurred in parts of the Court's opinion in *Pennsylvania v. Ritchie*¹³⁶ but withheld his support when the plurality said that confrontation rights apply only at trial. The Blackmun concurrence, which argued that the confrontation clause also applies to pretrial discovery, explicitly was in accord with much of Justice Brennan's dissent.¹³⁷ Blackmun chose to concur rather than to dissent because he viewed the Court's remedy for a due process violation, a remand, as adequate to correct the confrontation problem as well.¹³⁸ In theoretical harmony with Brennan, Blackmun nonetheless provided the fifth vote for a result that he felt solved a problem he and two dissenters had identified.¹³⁹

the Court's result. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2289 (1989) (White, J., concurring in the judgment); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795 (1989) (White, J., concurring in the judgment); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 905 (1989) (White, J., concurring in the judgment); *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 109 S. Ct. 639, 647 (1989) (White, J., concurring in the judgment).

¹³¹ Powell authored seven concurrences in the 1986 Term, his last on the Court. *Leading Cases*, 101 HARV. L. REV. 119, 362 (1987).

¹³² 481 U.S. 648 (1987) (plurality opinion).

¹³³ *Id.* at 669 (Powell, J., concurring in part and in the judgment).

¹³⁴ *Id.* at 671; see *id.* at 667.

¹³⁵ *Id.* at 671-72 (Powell, J., concurring in part and in the judgment).

¹³⁶ 480 U.S. 39, 61 (1987) (Blackmun, J., concurring in part and concurring in the judgment).

¹³⁷ *Id.* at 66 (Brennan, J., dissenting).

¹³⁸ *Id.* at 65 (Blackmun, J., concurring in part and in the judgment) (noting that "[h]ere I part company with Justice Brennan").

¹³⁹ Justice Brennan's dissent was joined by Justice Marshall. *Id.* at 66 (Brennan, J., dissenting). For another case in which Blackmun as concurrer found common ground with the dissent, see *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 930 (1989)

Justice Brennan, a frequent dissenter in recent years,¹⁴⁰ has used the concurrence as he does the dissent, to keep alive doctrine that has been altered or discredited by the Court.¹⁴¹ In a case in which he agreed with the majority that a defendant's statement was admissible, Brennan nonetheless concurred to make clear his departure from the Court's present *Miranda* jurisprudence.¹⁴² He wrote separately to insist on an affirmative waiver, a requirement eliminated by the Court eight years before, and to note his view that in this case that requirement had been met.¹⁴³ As he has in dissents advising state courts to expand state constitutional rights in the wake of Court decisions narrowing federal rights.¹⁴⁴ Brennan has also used the concurrence to advise a neighborhood organization of an alternate method of pursuing its claimed right

(Blackmun, J., concurring in part and in the judgment) (agreeing with Justice O'Connor's dissent that Court lacked jurisdiction but believing that "[d]isposition of the case deserves — if not requires — a majority of participating Justices" and so going on to discuss the merits). For a Blackmun concurrence clearly proposing an independent theory to resolve the case, see *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732, 2739 (1989) (Blackmun, J., concurring in the judgment) (formulating scheme for intervenor fee liability); see also *Lukhard v. Reed*, 481 U.S. 368, 383 (1987) (Blackmun, J., concurring in the judgment) (stating in single paragraph that his vote was not based on statutory interpretation accepted by Court but on "the deference that is due the Secretary of Health and Human Services in his interpretation of the governing statutes").

¹⁴⁰ For an analysis of Justice Brennan's role as a dissenter, see Ray, *supra* note 1.

¹⁴¹ See *id.* at 351. Brennan believes that a justice should continue to express principled disagreement with Court doctrine. See Brennan, *supra* note 11, at 437.

¹⁴² *Connecticut v. Barrett*, 479 U.S. 523, 530 (1987) (Brennan, J., concurring in the judgment).

¹⁴³ *Id.* at 535. Brennan acknowledged that the Court had "retreated from" the waiver requirement in *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). He announced, however, that "I continue to believe that the Court should require the police to obtain an "affirmative waiver" of *Miranda* rights before proceeding with interrogation." *Barrett*, 479 U.S. at 531-32. Brennan was a member of the *Miranda* Court majority, *Miranda v. Arizona*, 384 U.S. 436 (1966), joining Chief Justice Warren's opinion. Brennan dissented in *Butler*. 441 U.S. at 377.

For another concurrence in which Justice Brennan restates a position offered earlier in dissent, see *New Orleans Pub. Serv. v. Council of New Orleans*, 109 S. Ct. 2506, 2520-21 (1989) (Brennan, J., concurring). Brennan noted that "I continue to adhere to my view . . . that the abstention doctrine of *Younger v. Harris* . . . is in general inapplicable to civil proceedings." In a recent opinion, Brennan used the doctrinal concurrence for an unusual purpose. He gave what he termed "a more respectful burial" to an interpretation of the Warsaw Convention rejected by the Court. *Chan v. Korean Airlines*, 109 S. Ct. 1676, 1684 (1989) (Brennan, J., concurring in the judgment).

¹⁴⁴ See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 188 (1986) (Brennan, J., dissenting).

of intervention.¹⁴⁵ For Brennan, then, the concurrence can serve both as a forum for an alternate jurisprudence elaborated in earlier opinions and as an advisory tool.

Justice O'Connor, like Justice Brennan, has used the concurrence to restate prior positions that failed to persuade the Court. For example, when four members of the Court applied the *Lemon* test¹⁴⁶ for government entanglement with religion in *Corporation of the Presiding Bishops v. Amos*, O'Connor accepted the outcome but declined to create a majority by endorsing Justice White's opinion.¹⁴⁷ Instead, she wrote separately "to note that this action once again illustrates certain difficulties inherent in the Court's use" of the *Lemon* test¹⁴⁸ and to offer her own alternate test, one proposed earlier in concurrence.¹⁴⁹ In the Court's most recent establishment clause case, *County of Allegheny v. American Civil Liberties Union*, O'Connor once again invoked a test previously articulated in concurrence — whether government makes "adherence to a religion relevant in any way to a person's standing in the political community."¹⁵⁰ After applying this test, O'Connor concluded that the display of a creche in a county courthouse violated the first amendment while the display of a menorah with a Christmas tree did not. She also withheld her endorsement from a seven member majority that accepted the constitutionality of the preponderance standard for determining paternity, finding instead no due process obstacle to Pennsylvania's imposition of its own standard.¹⁵¹ Finally, she blocked a majority opinion that would have eliminated the contingency of a lawsuit as a basis for award of attorney's fees.¹⁵² Concurring only in part,

¹⁴⁵ *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 384-85 (1987) (Brennan, J., concurring in part and in the judgment).

¹⁴⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹⁴⁷ 483 U.S. 327, 362 (1987) (O'Connor, J., concurring in the judgment).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 348; see *Amos*, 483 U.S. at 348 (stating that "the inquiry framed by the *Lemon* test should be 'whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement'" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69) (O'Connor, J., concurring in the judgment); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

¹⁵⁰ 109 S. Ct. 3086, 3118 (1989) (O'Connor, J., concurring in part and in the judgment). Her test first appeared in *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring).

¹⁵¹ *Rivera v. Minnich*, 483 U.S. 574, 582 (1987) (O'Connor, J., concurring in the judgment). O'Connor relied on "the reasons set forth by Justice Rehnquist in dissent in *Santosky v. Kramer*, 455 U.S. 745, 770-91 (1982)." *Id.* Rehnquist, however, joined the majority in *Rivera*.

¹⁵² *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711,

O'Connor agreed with Justice Blackmun's dissent on the contingency issue¹⁵³ and proposed her own guidelines for setting appropriate compensation.¹⁵⁴ She nonetheless joined the Court's judgment and several preliminary parts of its opinion because she also agreed that in this case the relevant factors were included adequately in the lodestar and that the Court had properly rejected an additional adjustment.¹⁵⁵ Unlike *Amos* and *Allegheny*, cases in which she reiterated prior tests, here O'Connor formulated a new test. Although no other member of the Court accepted her test, by preventing a majority opinion she reserved the issue for future cases.

As his limiting concurrences suggest, Justice Scalia is not hesitant to use a separate opinion as a forum for alternate doctrine. In a fourth amendment case in which the Court was divided equally over the proper standard for employer searches of the offices of government employees, he concurred in the Court's judgment remanding for reversal of summary judgment. Scalia, however, articulated his own standard midway between the two camps of his colleagues.¹⁵⁶ Like Justice O'Connor, he struck a solitary note that prevented either camp from delivering a binding standard. In blocking a majority, he expressly rejected the plurality's standard as "so devoid of content that it produces rather than eliminates uncertainty in this field."¹⁵⁷

Scalia used two other concurrences to develop his views on the parameters of judicial power.¹⁵⁸ In *Young v. United States ex rel. Vuitton*

731 (1987) (O'Connor, J., concurring in part and in the judgment).

¹⁵³ *Id.* at 731.

¹⁵⁴ *Id.* at 733-34.

¹⁵⁵ *Id.* at 735.

¹⁵⁶ *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) (Scalia, J., concurring in the judgment) (arguing that "government searches to retrieve work-related materials or to investigate violations of workplace rules — searches of the sort that are regarded as reasonable and normal in the private-employer context — do not violate the Fourth Amendment").

¹⁵⁷ *Id.* at 730. For another Scalia concurrence offering an alternate theory, see *Commissioner v. Fink*, 483 U.S. 89, 100-01 (1987) (Scalia, J., concurring in the judgment).

¹⁵⁸ Scalia has frequently argued in his speeches and writings against overreaching by the judicial branch in violation of the doctrine of separation of powers. See, e.g., *Role of the Judiciary*, *supra* note 48, at 193. He believes that "[w]here the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class." Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 896 (1983).

One commentator has identified "judicial deference [as] a major theme in Scalia's writings and opinions," a theme reflected in his reliance on government structure as a

et Fils,¹⁵⁹ Scalia agreed that the district court's appointment of a private attorney to prosecute contempt was improper. He rejected, however, the notion of independent judicial authority to enforce court orders.¹⁶⁰ He vigorously argued that such appointments usurp the executive's prosecutorial power and violate the founding fathers' design of interdependence among the three branches of government.¹⁶¹ In a second case, Scalia blocked a unanimous opinion by concurring in the Court's judgment that imposed the Clayton Act's statute of limitations on RICO litigation.¹⁶² His separate opinion rejected the Court's rule that permitted federal courts to fill gaps in federal statutes by selecting suitable statutes of limitations from related federal statutes. The problem, as in *Young*, was one of usurpation, this time of legislative authority to establish statutes of limitations, under the guise of interpreting congress-

basis for limitations on the role of the courts. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter*, 40 U. MIAMI L. REV. 1171, 1199 (1986). Another commentator has observed that Scalia's "faith in the political process extends to the belief that the task of defining at least some constitutional rights should rest not with the courts but with the politically accountable executive and legislative branches." Meaux, *supra* note 33, at 231. See *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986), *aff'd sub nom. Bowsheer v. Synar*, 478 U.S. 714 (1986) (per curiam) (relying on separation of powers doctrine, Scalia, as part of a three-judge district court, ruled the Gramm-Rudman-Hollings Act unconstitutional because of Congress' authority to remove from office an executive appointee, the Comptroller General). Although the court issued the decision as a per curiam opinion, some observers believe that Scalia was the principal author. Wilson, *supra*, at 1201. In support of that view, compare the Court's linkage of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (concerning removal authority) and the anti-New Deal sentiment of *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (declaring National Recovery Act unconstitutional) with Justice Scalia's historical speculations on that same linkage in an article published a year earlier. Scalia, *Historical Anomalies in Administrative Law*, 1985 Y.B. SUP. CT. HIST. SOC'Y 103, 107-08. For discussions of Scalia's views on separation of powers, see King, *supra* note 33, at 60-67; Meaux, *supra* note 33, at 246-56.

¹⁵⁹ 481 U.S. 787 (1987).

¹⁶⁰ *Id.* at 815 (Scalia, J., concurring in the judgment).

¹⁶¹ *Id.* at 818. Scalia's language is characteristically sharp: he accused the Court of "self-love" in permitting an intrusion of judicial authority into the province of the executive branch. *Id.* at 821. For another, less acerbic attack on the Court for overreaching, this time for attempting to fill a gap in the law governing the Federal Savings and Loan Insurance Corporation, see *Coit Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 109 S. Ct. 1361, 1378 (1989) (Scalia, J., concurring in part and in the judgment). Scalia observed that "the Court creates yet another novel doctrine that we may have cause to regret." *Id.* at 1377. The milder tone is typical of his 1988 concurrences.

¹⁶² *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 157 (1987) (Scalia, J., concurring in the judgment).

sional intent.¹⁶³ As in his limiting concurrences, Scalia used the occasion of his doctrinal disagreement to raise the larger question of the Court's method of statutory interpretation. Such opinions show the concurrence as a centrifugal device that places the issues of a particular case in a more comprehensive doctrinal context.

Often characterized as the most independent and least predictable member of the Court, Justice Stevens seems comfortable in the role of concurrer.¹⁶⁴ His opinions present radically different theories from those of the majority, and, like Brennan and O'Connor, he will use one concurrence to restate rejected doctrine from another. In *Arkansas Writers' Project v. Ragland*, for example, he concurred in part of the Court's opinion and buttressed his divergence with the authority of his prior separate opinions.¹⁶⁵ The Court had ruled that a state sales tax exemption for selected publications was a content-based provision in violation of the first amendment. Stevens agreed that the state had failed to meet its burden of justification but succinctly repeated his view that content-based restrictions on expression may be imposed.¹⁶⁶ Concurring in the judgment of an affirmative action case, *United States v. Paradise*, Stevens offered a separate rationale for the use of racial quotas to remedy past discrimination.¹⁶⁷ While the majority relied on equal protection analysis, he invoked the broad equitable powers of the district court to remedy a past wrong.¹⁶⁸ In a third concurrence, *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, three members of the Court joined Stevens to create a concurring bloc.¹⁶⁹ All nine justices agreed that an order denying an administrative reconsider-

¹⁶³ Scalia argued that when the Court decides to borrow a limitation provision from another federal statute it must make "quintessentially the kind of judgment to be made by a legislature." *Id.* at 169. His imagery for the Court is vividly predatory: the Court is "prowling hungrily through the Statutes at Large for an appetizing federal limitations period, and pouncing on the Clayton Act." *Id.* at 166. Scalia invoked this opinion when he concurred in a recent case applying a state statute of limitations to a federal statute. *See Reed v. United Transp. Union*, 109 S. Ct. 621, 631 (1989) (Scalia, J., concurring in the judgment).

¹⁶⁴ Stevens wrote 14 concurrences in the 1986 Term; 6 in the 1987 Term; 13 in the 1988 Term. *See Leading Cases, supra* note 5.

¹⁶⁵ 481 U.S. 221, 235 (1987) (Stevens, J., concurring in part and in the judgment).

¹⁶⁶ *Id.* at 235.

¹⁶⁷ 480 U.S. 149, 189 (1987) (Stevens, J., concurring in the judgment).

¹⁶⁸ *Id.* at 190-93.

¹⁶⁹ 482 U.S. 270, 287 (1987) (Stevens, J., concurring in the judgment). Justices Brennan, Marshall, and Blackmun joined Stevens' opinion. Chief Justice Rehnquist and Justices White, Powell, and O'Connor joined in the majority opinion written by Justice Scalia. *Id.* at 270.

ation was not reviewable. Stevens, however, rejected as “policy” the majority’s jurisdictional argument.¹⁷⁰ Instead, he addressed the merits of the petition for reconsideration and found that the Commission had acted within its discretion.¹⁷¹ Stevens’ concurrences in *Paradise* and *Brotherhood* are among the best examples of a justice responding to the issues of a particular case with an independent legal theory detached from either his prior opinions or a broader jurisprudential perspective.¹⁷²

Because the three remaining members of the Court — Chief Justice Rehnquist and Justices Marshall and Kennedy — rarely use the doctrinal concurrence, the existing samples are too small to support generalizations. Rehnquist does not offer an alternate theory for the Court’s judgment in any of his three concurrences written as Chief Justice.¹⁷³ Although four of Justice Kennedy’s concurrences to date indicate a willingness to differ doctrinally from the majority, a clear pattern has yet to emerge.¹⁷⁴

One interesting similarity, however, does exist in Kennedy’s two 1988 doctrinal concurrences: both express concerns grounded in the doctrine of separation of powers. When the Court held that the Federal Advisory Committee Act did not apply to the role played by the American Bar Association’s Standing Committee on Federal Judiciary, Kennedy raised two separation of powers issues. First, he found that the Court’s reading of the statute amounted to amendment by interpretation, thus encroaching on the legislative role.¹⁷⁵ Second, he argued that

¹⁷⁰ *Id.* at 287 (Stevens, J., concurring in the judgment).

¹⁷¹ *Id.* at 295-303.

¹⁷² In taking exception to part of Justice Powell’s concurrence, Justice Stevens referred in a footnote to his own concurrence in *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring), in which he insisted on a uniform standard for review under the equal protection clause. That reference did not, however, affect the theory he proffered in the body of his *Paradise* concurrence. *Paradise*, 480 U.S. at 186.

For additional concurrences formulating independent solutions, see *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1597 (1989) (Stevens, J., concurring in the judgment) (rejecting Court’s first amendment analysis in favor of substantive due process approach); *Goldberg v. Sweet*, 109 S. Ct. 582, 592 (1989) (Stevens, J., concurring in part and in the judgment) (justifying state tax on interstate telephone calls on basis of its net results).

¹⁷³ See *supra* note 92.

¹⁷⁴ See *Murray v. Giarratano*, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J., concurring in the judgment); *Public Citizen v. United States Dep’t of Justice*, 109 S. Ct. 2558, 2573 (1989) (Kennedy, J., concurring in the judgment); *Bowen v. Kendrick*, 108 S. Ct. 2562, 2582 (1988) (Kennedy, J., concurring); *Sheridan v. United States*, 108 S. Ct. 2449, 2456 (1988) (Kennedy, J., concurring in the judgment).

¹⁷⁵ *Public Citizen*, 109 S. Ct. at 2574 (Kennedy, J., concurring in the judgment).

application of the statute would have violated the appointments clause of the Constitution.¹⁷⁶ In a less ambitious concurrence, Kennedy endorsed judicial deference to states that provided representation for collateral challenges by indigent death row inmates on the grounds that “[u]nlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us.”¹⁷⁷ Both opinions echo some of Justice Scalia’s characteristic themes,¹⁷⁸ suggesting that Justice Kennedy may be prepared to use the concurrence to pursue an agenda similar to Scalia’s, or at least to raise the larger questions of the judicial system.¹⁷⁹

Though Justice Marshall seldom writes separately,¹⁸⁰ his opinion in *Satterwhite v. Texas*¹⁸¹ is a classic example of a doctrinal concurrence. In that opinion Marshall rejected the Court’s application of harmless error analysis to capital sentencing procedures.¹⁸² Long an opponent of capital punishment on eighth amendment grounds,¹⁸³ Marshall expressed “serious doubts” that any error in sentencing procedures could be harmless. He had particular reservations when the error, as in this case, concerned the admission of psychiatric testimony in violation of the sixth amendment.¹⁸⁴ Marshall thus refused to endorse by silence a result that had been reached by an analytic method he rejected.

The doctrinal concurrence is the most elusive and the most problematical variety. On the Rehnquist Court it has served a multiplicity of functions: for Justices Brennan and O’Connor, it has permitted the re-statement of a position previously articulated in a dissent or concurrence and rejected by the Court; for Justice Scalia it has served, like his

¹⁷⁶ *Id.* at 2580-81.

¹⁷⁷ *Murray*, 109 S. Ct. at 2773.

¹⁷⁸ *See supra* notes 157-62 and accompanying text. Justice Scalia did not join either of these Kennedy concurrences: he did not participate in *Public Citizen*, 109 S. Ct. at 2558, and he joined the majority in *Murray*, 109 S. Ct. at 2767.

¹⁷⁹ In addition to his concurrence in *Texas v. Johnson*, Justice Kennedy filed a brief concurrence in *Mallard v. United States District Court*, 109 S. Ct. 1814, 1823 (1989) (Kennedy, J., concurring) (agreeing with Court’s statutory resolution of attorney’s obligation to represent indigent civil litigant but noting nonstatutory obligations of attorneys: “To the contrary, it is precisely because our duties go beyond what the law demands that ours remains a noble profession”).

¹⁸⁰ *See supra* note 97.

¹⁸¹ *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988) (Marshall, J., concurring in part and in the judgment).

¹⁸² *Id.* at 261.

¹⁸³ *See Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

¹⁸⁴ *Satterwhite*, 486 U.S. at 261.

limiting concurrences, as a forum for his larger legal theories; for Justice Blackmun it has permitted simultaneous endorsement of the Court's result and the dissent's reasoning; and for Justice Stevens it has been the occasion for independent analysis and conclusion leading to the majority's result. The common thread in all of these concurrences, the outright rejection by the concurring justice of the majority's legal theory, provides perhaps the most appropriate occasion for a separate opinion. When in good conscience a justice cannot subscribe to the Court's doctrine, the concurrence permits its author to treat the litigants fairly without compromising his or her own views. In striking a balance between the values of conscience and consensus, a justice may find the concurring opinion to be an appropriate judicial resource.

III. THE ROLE OF THE CONCURRENCE IN APPELLATE DECISIONMAKING

The presence of one or more concurrences as part of a Supreme Court decision has both functional and jurisprudential consequences. The concurrences may quite simply mean that the Court has been unable to produce a majority opinion for some or all of the issues raised. But even if a majority opinion exists, the concurrences that flank it will alter the way that the opinion is read.

On a collegial court, the process of arriving at a majority opinion generally will involve some accommodation. For judicial politicians like Felix Frankfurter, the idea of a concurrence may be a useful bargaining chip to secure concessions from a colleague anxious to gain a majority or to forestall a divided Court.¹⁸⁵ In some sense, the most successful concurrences may be the unpublished ones whose authors have negotiated the incorporation of their views into the majority opinion. Some justices have preferred to reserve their separate opinions for cases in

¹⁸⁵ In one such episode, Frankfurter wrote to Chief Justice Vinson reporting that his concurrence to Vinson's opinion was then at the printer and adding the following suggestion: "Of course I should be happy if the substance of what I have said in that proposed concurrence appeared instead in the Court's opinion." Letter from Frankfurter to Vinson (May 26, 1949), *reprinted in* H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 190 (1981). The case involved was *Commissioner v. Culbertson*, 337 U.S. 733 (1949), and Frankfurter did file his concurrence. *Id.* at 749. Frankfurter, however, did not invent these maneuvers, which long have been a part of the Court's decisionmaking process. For example, Chief Justice Taft persuaded Justice Brandeis to omit from a majority opinion several sentences that Taft could not support by proposing alternatively to "write a short concurring opinion, avoiding responsibility for those words." Letter from Taft to Brandeis (Mar. 30, 1922) (quoted in A.T. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 201 (1965)).

which their divergent views were of special significance.¹⁸⁶ Others reportedly have been willing to include the suggestions of fellow justices even at the cost of confusion or inconsistency.¹⁸⁷ Observers of the Court receive only occasional glimpses of the process by which majorities are, in Chief Justice Taft's word, "massed"¹⁸⁸ and separate opinions come into being. The role played by the concurrence in these transactions remains largely shrouded in the confidentiality of the Court's deliberations.¹⁸⁹

The jurisprudential consequences of published concurrences are more accessible but difficult to assess. Any concurrence provides an internal commentary on the majority opinion that may affect the way it is read and applied by lower courts and later Supreme Court justices. Each type of concurrence discussed above aims at shaping the future jurisprudence of the Court by limiting, expanding, clarifying, or changing the grounds for an otherwise authoritative majority opinion.¹⁹⁰ Clearly, a decision accompanied by such concurrences speaks with less authority than a single unanimous opinion.¹⁹¹ The Court itself made

¹⁸⁶ See generally A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957) (citing examples of judicial restraint regarding separate opinions).

¹⁸⁷ According to one scholar, Chief Justice Hughes "had no particular pride in authorship, and if in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant." McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 *HARV. L. REV.* 5, 19 (1949). In cases in which Hughes was not the author, he also tried to prevent concurrences and dissents by proposing conciliatory revisions. *Id.* Although Hughes placed a high value on unanimity as a source of public confidence in the Court, he did not encourage "unanimity which is merely formal, which is recorded at the expense of strong conflicting views" and the justices' independence. C. HUGHES, *supra* note 10, at 67-68.

¹⁸⁸ A. MASON, *supra* note 185, at 198.

¹⁸⁹ Aside from the published papers and memoirs of justices, efforts such as R. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979) have attempted to pierce the shroud.

¹⁹⁰ One commentator suggested that the erosion of *stare decisis* may reduce the incentive for compromise and encourage a justice to write separately "in the hope that such an opinion will persuade future Courts to adopt his position in full." Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 *WIS. L. REV.* 467, 475-76 n.46.

¹⁹¹ See, e.g., J. FRANK, *supra* note 3, at 129 (claiming that "no single thing has more depreciated the standing of the institution since the time of Hughes than the impression that it is overtalkative"). Frank quoted Learned Hand's famous injunction: "Disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends." *Id.* (quoting L. HAND, *THE BILL OF RIGHTS* 72 (1958)).

that point in *Cooper v. Aaron*¹⁹² when it rendered a unanimous opinion written by all nine justices¹⁹³ to enforce its school integration decision in *Brown v. Board of Education*.¹⁹⁴ The intriguing question is how the use of the concurrence is affecting the decisionmaking of the Rehnquist Court.

A. *The Plurality Opinion*

The most visible effect of a concurrence — and the one that has most worried commentators on the Court's performance — is the substitution of a plurality for a majority opinion. When a concurring justice endorses the Court's judgment but elects to offer an independent opinion, the result may be a judgment unsupported by a majority rationale.

For most of the Court's history the plurality opinion was a relative rarity. From 1801 to 1955 the Court produced only forty-five plurality opinions.¹⁹⁵ Since 1955, however, the incidence of plurality cases has increased dramatically and gives no indication of slackening.¹⁹⁶ In its first three terms, the Rehnquist Court has contributed a total of thirty-four complete or partial plurality opinions.

The plurality opinion generally is regarded as a source of uncertainty and instability in the law.¹⁹⁷ Lower courts understandably are confused by conflicting signals from a judgment majority at odds with

¹⁹² 358 U.S. 1 (1958).

¹⁹³ *Id.* at 4.

¹⁹⁴ 347 U.S. 483 (1954).

¹⁹⁵ Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 99 n.4 (1956) [hereafter *Chicago Comment*].

¹⁹⁶ From 1956 to the close of the 1972 Term, the Court produced 61 plurality opinions, 26 of them written in the 1970, 1971, and 1972 Terms. Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 60. In its first 11 years, the Burger Court produced 88 plurality opinions. *Harvard Note, supra* note 3, at 1127 n.1.

¹⁹⁷ See, e.g., Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 759 (1980) [hereafter *Columbia Note*]; Davis & Reynolds, *supra* note 196, at 62. One author denounced plurality decisions as examples of "pathological decisionmaking." *Harvard Note, supra* note 3, at 1127. Critics of plurality decisions have proposed a number of causes for the phenomenon, including the Court's heavy workload; ideological and personal differences between justices; weak leadership by the Chief Justice; and the increase in controversial issues. *Columbia Note, supra*, at 159. According to one view, an additional cause is the Court's new tendency under Chief Justice Warren to apply "'substantive reasoning,' a form of reasoning that is heavily value laden and relies on an arbitrary choice of values from sources external to the Constitution." *Harvard Note, supra* note 3, at 1140. These suggested causes of course are virtually identical with the suggested causes of Court fragmentation.

itself. No clear consensus has emerged about the appropriate directional force of plurality opinions.¹⁹⁸ Plurality cases have been denounced as ineffectual and distracting, indications of the Court's inability to provide the guidance that lower courts require and of its own weakened authority.¹⁹⁹

Such criticism of plurality opinions is not entirely misplaced. Certainly lower courts are deprived of a clear-cut precedent to guide their resolutions of related cases. Further, plurality opinions contain an element of judicial wastefulness: the scarce resource of a place on the Supreme Court's docket is used not to clarify the law but to prolong debate. If the issue is an urgent one, the Court may choose to address it a second time, at additional cost, or it may allow the lower courts to struggle with an imperfect answer.

The record of the Rehnquist Court suggests, however, that the plurality opinion may not be an entirely negative phenomenon. The Court failed to produce a majority opinion in only a handful of cases — five in the 1986 Term, three in the 1987 Term, six in the 1988 Term. The remaining plurality cases — eight in 1986, five in 1987, seven in 1988 — lacked a majority only on selected issues. For an annual docket of some 150 cases,²⁰⁰ a failure to reach consensus in four percent of its opinions is scarcely a dismal record.

Further, the issues in some plurality cases offer a possible justification for the failure to reach agreement. In the 1987 Term, for example, two of the three cases on which the Court did not produce even a partial majority opinion involved sentencing standards in capital punish-

¹⁹⁸ Several solutions have been proposed for the problem of according precedential effect to plurality opinions. *See, e.g., Columbia Note, supra* note 197, at 778-80 (offering normative standards for interpretation); Davis & Reynolds, *supra* note 196, at 81-85 (counseling greater reliance by Court on per curiam opinions finding common ground). One curious but ingenious solution proposed for the situation in which two or more opinions win the same number of votes is that "the dissenting judges shall cast votes to determine which of the tied majority opinions shall serve as precedent for the lower courts." Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 376 (1968). The suggestion indicates the depth of concern plurality opinions have aroused. For examinations of the various ways in which lower courts have treated plurality decisions, see *Chicago Comment, supra* note 195; *Columbia Note, supra* note 197, at 767-78.

¹⁹⁹ *See, e.g., Davis & Reynolds, supra* note 196, at 63-75 (arguing that plurality opinions impair Court's leadership function, hinder its own development of constitutional law, and create confusion in lower courts).

²⁰⁰ The Court issued 152 opinions in the 1986 Term, 142 in the 1987 Term, and 143 in the 1988 Term. *See Leading Cases, supra* note 5.

ment cases;²⁰¹ in 1986 one such case involved conflicting fourth amendment and privacy rights,²⁰² another the use of racial quotas to remedy past discrimination,²⁰³ and a third the reach of the eleventh amendment.²⁰⁴ With such difficult constitutional issues before the Court, its inability to muster a majority is understandable and perhaps excusable.

Perhaps expectations for the Court should be readjusted in light of the substantial changes in the nature of its docket since John Marshall set a premium on unity almost two centuries ago. As Chief Justice Rehnquist has observed, expansion of jurisdictional statutes and of the Court's discretionary authority have transformed the largely private law docket of the nineteenth century to a docket heavily weighted with public law and constitutional questions.²⁰⁵ It may be preferable for the Court to prolong its debate on a few of these issues each term when the alternative is an uneasy compromise of conflicting views.

An examination of two cases, one a partial, the other a complete plurality decision, suggests the tensions that may produce such disharmonies and the consequences. In *Asahi Metal Industry Co. v. Superior Court*,²⁰⁶ all nine justices agreed that the State of California acted improperly in exercising personal jurisdiction over a Japanese manufacturer whose product was involved in a fatal accident in the State. Nine justices signed the first section of the opinion, a summary of the facts, and eight signed part of the second, an analysis of the factors which rendered jurisdiction unreasonable. The Court divided, however, over the threshold question of minimum contacts, the constitutional predicate for jurisdiction since *International Shoe Co. v. Washington*.²⁰⁷ Part of an opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, offered a new and more rigorous test for minimum contacts between a manufacturer and the forum in

²⁰¹ *Thompson v. Oklahoma*, 108 S. Ct. 2320 (1988); *Franklin v. Lynaugh*, 487 U.S. 164 (1988).

²⁰² *O'Connor v. Ortega*, 480 U.S. 709 (1987).

²⁰³ *United States v. Paradise*, 480 U.S. 149 (1987).

²⁰⁴ *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468 (1987). The issues in the Court's 1988 plurality cases included the proper standards for Title VII cases, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989); the validity of a sales tax exemption for religious publications under the establishment clause, *Texas Monthly Inc. v. Bullock*, 109 S. Ct. 890 (1989); and the constitutionality of helicopter surveillance under the fourth amendment, *Florida v. Reilly*, 109 S. Ct. 693 (1989).

²⁰⁵ Rehnquist, "All Discord, Harmony Not Understood": *The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973, 984-85 (1980).

²⁰⁶ 480 U.S. 102 (1987).

²⁰⁷ 326 U.S. 310 (1945).

which its product causes harm.²⁰⁸ Justice Brennan, a frequent dissenter in the Court's jurisdiction cases,²⁰⁹ wrote a concurrence rejecting the new modification and arguing for the merits of the prior test.²¹⁰ Justices White, Marshall, and Blackmun joined in Brennan's opinion. Justice Stevens wrote a separate concurrence, arguing that it was unnecessary for the Court to reach the minimum contacts issue in light of its reasonableness ruling.²¹¹ Justices White and Blackmun joined in Stevens' opinion.

As a result of the Court's alignment, the outcome of *Asahi* was limited to a reversal on reasonableness grounds of the California Supreme Court's decision finding jurisdiction. Had Justice O'Connor garnered an additional vote, the Court would have proclaimed a tough new minimum contacts requirement.²¹² Was this case a failure of persuasion or of accommodation? There are at least two possible explanations for the result in *Asahi*. First, the facts of this case made it unsuitable for a substantial change in doctrine. *Asahi* was a Japanese corporation sued for indemnification by a Taiwanese corporation that had settled all claims with a California plaintiff. The Court's reasonableness analysis relied heavily on the international nature of the surviving litigation and the limited remaining interest of California. Second, the minimum contacts test defined by the Court earlier in *World-Wide Volkswagen Corp. v. Woodson*²¹³ and *Burger King Corp. v. Rudzewicz*²¹⁴ required a two-stage analysis. No matter how compelling the reasonableness factors might be, a court determining jurisdiction would not reach them unless it previously found that minimum contacts existed. Thus, by its own precedent the Court was barred (except in Justice Stevens' view) from relying exclusively on the second stage of its own test. There were, then, two reasons for rejecting *Asahi* as an appropriate vehicle for changing doctrine — the international twist provided by its facts and the strong feeling on the Court that a reasonableness analysis was the most appropriate to its resolution. Four justices nonetheless chose

²⁰⁸ *Asahi*, 480 U.S. at 108-13.

²⁰⁹ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting); *Hanson v. Denckla*, 357 U.S. 235, 256 (1958) (Black, J., dissenting; joined by Burton, and Brennan, J.J.).

²¹⁰ *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and in the judgment).

²¹¹ *Id.* at 121 (Stevens, J., concurring in part and in the judgment).

²¹² O'Connor proposed that the defendant's contacts with the forum state "must come about by an action of the defendant purposefully directed toward the forum State." *Id.* at 112.

²¹³ 444 U.S. at 286, 299.

²¹⁴ 471 U.S. 462 (1985).

this occasion to argue a change in law unnecessary to final disposition of the case; even if minimum contacts existed, no one thought it was reasonable to find jurisdiction.²¹⁵

Asahi suggests one function of a plurality opinion. Such an opinion allows the Court to do justice without making new law in an inappropriate context. The outcome in *Asahi* did not harm the principals in the litigation, but at the same time the Court refrained from tightening jurisdictional standards in a case that offered the plurality two grounds for reversal. Justice O'Connor signaled counsel in future cases that four justices support a new test, while Justice Brennan responded that four justices reject that change. Justice Stevens' concurrence thus left the issue open until a more suitable case — one in which the contacts question is necessary to its resolution — comes before the Court.²¹⁶

Thompson v. Oklahoma,²¹⁷ a capital sentencing case, illustrates another way in which a plurality opinion may defer a strong constitutional ruling. In *Thompson* the Court addressed the constitutionality of a death sentence imposed on a defendant convicted of a murder committed when he was fifteen years old. The plurality opinion, written by Justice Stevens and joined by Justices Brennan, Marshall, and Blackmun, reviewed state legislation and jury verdicts to identify a national consensus. These four justices determined that capital punishment of an offender less than sixteen years of age when he or she committed the crime is cruel and unusual punishment under the eighth and fourteenth amendments.²¹⁸ A strong dissent by Justice Scalia, joined by the Chief Justice and Justice White, argued that the plurality had failed to demonstrate the existence of the consensus on which it relied and was in fact "acting in a legislative rather than a judicial capacity" in proposing its constitutional ban.²¹⁹

Justice O'Connor's concurring opinion fell between these two

²¹⁵ *Asahi*, 480 U.S. at 116-22. Justice Scalia's role in this case is slightly puzzling. Although he joined in the sections of Justice O'Connor's opinion setting forth the facts and proposing the new minimum contacts standard, he did not join in Part IIB, the reasonableness analysis expressly endorsed by the seven other justices. *Id.* at 102. Presumably Scalia thought that the case should have been resolved on the minimum contacts point alone, but he did not write separately to explain his position.

²¹⁶ An alternate view of *Asahi* found that its outcome was confusing and would lead to conflicting results in the lower courts. See, e.g., Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C.L. REV. 729, 803 (1988); Comment, *Civil Procedure — Muddying the Stream of Commerce Theory*, 36 U. KAN. L. REV. 191, 207 (1987).

²¹⁷ 108 S. Ct. 2687 (1988) (plurality opinion).

²¹⁸ *Id.* at 2689, 2700.

²¹⁹ *Id.* at 2718 (Scalia, J., dissenting).

strongly held positions.²²⁰ After reviewing the data that had persuaded the plurality, O'Connor announced that the disputed national consensus "very likely" did exist but that she needed "better evidence than we now possess" before she could endorse a constitutional rule on that basis.²²¹ She agreed, however, that the execution of this defendant was improper because the authorizing state statute failed to specify any minimum age for capital punishment. Acknowledging that her chosen ground was "unusual," she nonetheless celebrated its effect: "the approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives."²²²

Like *Asahi*, *Thompson* offered immediate relief without establishing a new principle of law. O'Connor's concurrence effectively bridged the views of her colleagues: while agreeing with the dissent that the Court should not usurp the legislative function by drawing a sharp line,²²³ O'Connor also detected an incipient consensus sufficient to render unacceptable a capital sentence for this defendant based on this Oklahoma statute. Her accommodation has its own problems, as Scalia pointed out, because her opinion proposed a new standard of particularity for state legislatures to meet.²²⁴ Nonetheless, O'Connor deferred rather than resolved the constitutional question. In the painful and difficult area of capital punishment, a set of opinions alerting state legislatures to the nature of the Court's concern may help to clarify the consensus on which the plurality relied and to prepare for a majority resolution of the eighth amendment issue.²²⁵

²²⁰ *Id.* at 2706 (O'Connor, J., concurring in the judgment).

²²¹ *Id.*

²²² *Id.* at 2711.

²²³ *Id.* at 2709.

²²⁴ *Id.* at 2721. Scalia observed that although O'Connor claimed to be more respectful of the legislature's prerogative, she in fact was "much more disdainful." *Id.* In a characteristic turn of phrase, he claimed that her new standard of specificity for state capital sentencing statutes "hoists on to the deck of our Eighth Amendment jurisprudence the loose cannon of a brand new principle" less palatable than the plurality's "misdescription" of a national consensus. *Id.*

²²⁵ The Court moved a step closer to that clarification in deciding *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). In *Stanford*, the Court reviewed the capital sentences of two defendants, one 17, the other 16, when they committed their crimes. The Court affirmed both sentences in an opinion by Justice Scalia holding that no national consensus existed to bar execution of 16 and 17 year old offenders. *Id.* at 2975-76. Justice O'Connor concurred in that section of the Court's opinion but wrote separately to distinguish *Stanford* from *Thompson*. *Id.* at 2981 (O'Connor, J., concurring in part and in the judgment). She explained that since all state legislatures specifying a minimum

As *Asahi* and *Thompson* suggest, a plurality opinion may not always be the worst solution to a difficult case. While the failure to produce a majority will leave an issue open for another day, such prolonged decisionmaking may in some cases serve the interests of principled adjudication.²²⁶ A concurring justice who effectively blocks the announcement of a new doctrine or a new constitutional rule may not be a recalcitrant spoiler. Such resistance may allow the Court to await a better case — or a clearer vision — before it endorses a change in the law.

B. Disturbing Unanimity

Concurring opinions may also have a less potent but more symbolic effect on the Court's resolution of a case: they may prevent the Court from producing a unanimous opinion. On those occasions when the Court musters a majority of nine, it speaks as Chief Justice Marshall thought it should, with a single voice. The Court has recognized the significance of a unified response to a case of major significance, as its opinion in *Cooper v. Aaron*²²⁷ illustrates. On cases of lesser import, however, justices seem ready to concur in the Court's judgment or even in its opinion and yet add a separate statement of their views.

The Rehnquist Court shows a tendency to punctuate an otherwise unanimous opinion with an extra concurrence. These concurrences tend to be brief but not always solitary. In the 1986 Term, for example, six unanimous opinions were accompanied by additional concurrences, and three of those were joined by a second justice.²²⁸ In the 1987 Term,

age for execution set that age at 16 or above, she was persuaded that no national consensus existed in opposition to execution of offenders 16 or older. *Id.* at 2981. The question of capital punishment for 15-year-old offenders remains open.

²²⁶ One author takes exception to the otherwise negative chorus that plurality opinions have inspired. *Columbia Note, supra* note 197 at 760 (arguing that plurality opinions "are often more thoughtful and of generally higher quality than short per curiam opinions," that their authors are freer to propose creative approaches, and that they leave lower courts valuable "freedom to adapt to changing conditions and to achieve equitable results within the logical boundaries of Supreme Court mandates").

²²⁷ 358 U.S. 1 (1958).

²²⁸ *Board of Airport Comm's v. Jews for Jesus*, 482 U.S. 577 (1987) (White, J., concurring; joined by Rehnquist, C.J.); *United States v. Hohri*, 482 U.S. 64, 76 (1987) (Blackmun, J., concurring) (Scalia, J., did not participate); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring); *Metropolitan Life Ins. v. Taylor*, 481 U.S. 58, 67 (1987) (Brennan, J., concurring; joined by Marshall, J.); *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245, 254 (1987) (Powell, J. concurring; joined by O'Connor, J.); *Western Air Lines v. Board of Equalization*, 480 U.S. 123, 135 (1987) (White, J., concurring).

which produced a substantial number of unanimous opinions,²²⁹ six otherwise unanimous decisions carried concurrences; additional justices joined four of those opinions.²³⁰ In the 1988 Term, again six unanimous opinions carried concurrences, but a second justice joined only once.²³¹

Concurrences accompanying unanimous opinions tend to be instruments of limitation or emphasis. Thus, Justice Blackmun joined the Court's opinion but wrote separately "to underscore the narrow grounds on which its decision rests and to emphasize what it is *not* holding today."²³² Justice Scalia gathered three other members of a unanimous Court for his concurrence written "only to note that our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law."²³³ Although no

²²⁹ There were 50 unanimous opinions in the 1987 Term, compared with only 28 in the 1986 Term and 39 in the 1988 Term. *Leading Cases*, 101 HARV. L. REV. 119, 364 (1987); 102 HARV. L. REV. 143, 352 (1988-1989); 103 HARV. L. REV. 137, 396 (1989). Harvard Law Review defines a unanimous opinion as one in which "all Justices hearing the case voted to concur in the Court's opinion as well as its judgment." 102 HARV. L. REV. 352 n.g (1988-1989).

²³⁰ *Christianson v. Colt Indus. Operating Corp.*, 286 U.S. 800, 803 (1988) (Stevens, J., concurring; joined by Blackmun, J.); *Michigan v. Chesternut*, 486 U.S. 576, 578 (1988) (Kennedy, J., concurring; joined by Scalia, J.); *Maynard v. Cartwright*, 286 U.S. 356, 357 (1988) (Brennan, J., concurring; joined by Marshall, J.); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151 (1988) (White, J., concurring); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 290 (1988) (Scalia, J., concurring) (Kennedy, J., did not participate); *NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 133 (1987) (Scalia, J., concurring; joined by Rehnquist, C.J., and White and O'Connor, JJ.); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 46 (1987) (Blackmun, J., concurring; joined by Brennan, J.).

²³¹ *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1980 (1989) (Scalia, J., concurring); *Eu v. San Francisco County Democratic Cent. Comm.*, 109 S. Ct. 1013, 1026 (1989) (Stevens, J., concurring) (Rehnquist, C.J., did not participate); *United States v. Halper*, 109 S. Ct. 1892, 1904 (1989) (Kennedy, J., concurring); *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1851 (1989) (Brennan, J., concurring) (termed a concurring statement); *Mesa v. California*, 109 S. Ct. 959, 970 (1989) (Brennan, J., concurring; joined by Marshall, J.); *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 475 (1989) (Scalia, J., concurring). The Court had one partially unanimous opinion, *Coit Indep. Joint Venture v. Federal Sav. & Loan*, 109 S. Ct. 1371, 1376 (1989) (Blackmun, J., concurring in part and in the judgment) (Scalia, J., concurring in part and in the judgment).

²³² *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 46 (1987) (Blackmun, J., concurring).

²³³ *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 133 (1987). *Cf. Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring) (noting that "our finality jurisprudence is sorely in need of further limiting principles").

doctrinal disagreement existed in these cases, the concurring justices wrote to clarify the terms on which each accepted the Court's formulation.

In other cases, the basis for the concurrence is more substantial than a clarification or a limitation. On such occasions one or more justices may concur only in the Court's judgment, thereby blocking even a qualified unanimous opinion.²³⁴ When a majority of eight agreed to interpolate a federal statute of limitations into the RICO statute, Justice Scalia produced an elaborate and solitary concurrence questioning the legitimacy of the Court's rule.²³⁵ His point, as in other concurrences, was that the Court was making a legislative judgment and therefore usurping a congressional function.²³⁶ Justice Stevens, joined by three supporters, rejected the Court's rationale for holding that a denial of a petition for rehearing was not reviewable.²³⁷ He criticized the Court's "creative reading" of the applicable statute, though he agreed that the result was correct.²³⁸

Concurrences of the first sort eat away at the authority of a unanimous opinion by appending a guide to interpretation, while concurrences of the second sort deny the Court that authority entirely. The authors of these blocking concurrences, however, are not merely indulging in self-assertion. When the price of joining an opinion is a justice's separate statement of how that opinion should be read, the concurrence indicates little more than a scrupulous regard for its subsequent application. When, however, the concurring justice completely rejects the Court's theory, the separate opinion represents an appropriate forum for airing a substantial disagreement.

The days are long past when unanimity was the norm for the Court's decisionmaking process. For the present Court, cases without dissent may themselves represent notable achievements. Unless the Court seeks to resolve a matter of high import that threatens to polarize an already divided society, there is little reason to demand unanimity for its own sake. There is, however, reason to question the value of a concurrence without explanation. In *Board of Directors of Rotary International v. Rotary Club*, six of the seven sitting justices found that a

²³⁴ There were 11 such cases in the 1986 Term, 12 in the 1987 Term, and 19 in the 1988 Term. *Leading Cases*, 101 HARV. L. REV. 119, 364 (1987); 102 HARV. L. REV. 143, 352 (1988-1989).

²³⁵ *Agency Holding Corp. v. Malley-Duff Assoc.*, 483 U.S. 143, 157 (1987).

²³⁶ *Id.* at 169.

²³⁷ *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring in the judgment; joined by Brennan, Marshall, and Blackmun, JJ.).

²³⁸ *Id.* at 294.

California statute prohibiting private clubs from excluding women did not violate the first amendment.²³⁹ Justice Scalia again stood alone, but this time he filed only an opaque addendum that “Justice Scalia concurs in the judgment.”²⁴⁰ Such a response would be of dubious value even in a case including dissent, but when the Court approaches consensus on a constitutional question little is gained by blocking that consensus without discussion. To that extent, at least, the concurring justice owes the Court and the legal community an explanation for the decision to undermine the authority of unanimity.

C. *The Splintered Decision*

Even when the presence of concurring opinions neither creates a plurality opinion nor impedes unanimity, it remains a concern to observers of the Court. Commenting on the tendency of the Burger Court to produce separate opinions, Archibald Cox cautioned that “[c]ontinuous fragmentation could well diminish not only the influence of the Court but the ideal of the rule of law.”²⁴¹ Another scholar, John P. Frank, writing during the Warren Court, argued that, since concurrences conflict with John Marshall’s vision of an authoritative Court opinion for each case, they “ought not to be used where differences are either minor or insignificant.”²⁴² The danger feared by both is an undermining of the Court’s institutional role if the justices repeatedly prove unable or unwilling to achieve consensus, especially on issues of great import, and offer the nation disharmony instead of leadership.²⁴³

²³⁹ 481 U.S. 537, 538 (1987).

²⁴⁰ *Id.* at 550 (Scalia, J., concurring). Concurrences without opinion are criticized in Moorhead, *supra* note 2, at 824, and Stephens, *supra* note 2, at 396. For other concurrences without opinion, see United States Dep’t of Justice v. Tax Analysts, 109 S. Ct. 2841, 2853 (1989) (White, J., concurring in the judgment); Ward v. Rock Against Racism, 109 S. Ct. 2746, 2760 (1989) (Blackmun, J., concurring in the result).

²⁴¹ Cox, *The Supreme Court 1979 Term Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72 (1980). For commentators in agreement with Cox, see Moorhead, *supra* note 2, at 821; Gewin, *supra* note 14, at 595; McWhinney, *supra* note 3, at 614-15; Soifer, *Disarray on the High Court*, BARRISTER, Fall 1987, at 42, 44.

²⁴² J. FRANK, *supra* note 3, at 125.

²⁴³ One curious by-product of a fragmented Court fortunately occurs infrequently but merits mention. The Court’s alignment may produce a judgment even though a majority of the justices has rejected each of the several proposed theories supporting that result. Frank called this result “a near-breakdown of the normal conception of the judicial system.” *Id.* at 125. For an analysis of three such cases, see Spritzer, *Multiple-Issue Cases and Multi-Member Courts: Observations on Decision Making by Discordant Minorities*, 28 JURIMETRICS J. 139 (1988).

Paradoxically, the Court has produced some of its most fragmented decisions on issues that seem to counsel accommodation for the public good. In *Youngstown Sheet & Tube Co. v. Sawyer*,²⁴⁴ the Court addressed the limits of presidential power in the wake of President Truman's seizure of the nation's steel mills. Even at this moment of crisis, five justices appended separate opinions, four joining in the Court's opinion and one concurring only in the judgment; three justices dissented.²⁴⁵ Twenty years later, when the Court addressed the constitutionality of the death penalty in *Furman v. Georgia*,²⁴⁶ the Court did not issue a majority opinion, only a brief per curiam followed by five concurrences and four dissents.²⁴⁷ Yet the nature of the issues presented by these cases — issues in which law approaches political philosophy or morality — inevitably encourages justices to place their individual convictions ahead of institutional claims. The danger in such conduct, of course, is that a single Court may become, in Paul Freund's words, "a federation of nine corporate aggregates or chambers"²⁴⁸ with diminished regard for its lawmaking and stabilizing functions.²⁴⁹

If a Court that regularly produces cases with multiple concurrences suggests a disturbing level of institutional disarray or flawed decision-making, the Rehnquist Court's record in this regard provides little cause for alarm. In the 1986 Term, sixteen cases offered more than one concurring opinion: thirteen cases contained two concurrences,²⁵⁰ two

²⁴⁴ 343 U.S. 579 (1952).

²⁴⁵ *Id.* at 667 (Vinson, C.J., dissenting; joined by Reed and Minton, JJ.). Justice Black wrote for the Court. *Id.* at 582. Justices Frankfurter, Douglas, Jackson, and Burton joined in that opinion but also wrote separately. *Id.* at 593-634. Justice Clark concurred in the judgment only. *Id.*

²⁴⁶ 408 U.S. 238 (1972).

²⁴⁷ Justices Douglas, Brennan, Stewart, White, and Marshall wrote concurring opinions. *Id.* at 240-374. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist wrote dissenting opinions. *Id.* at 375-470.

²⁴⁸ Federal Judicial Center, *Report of the Study Group on Caseload of the Supreme Court*, 57 F.R.D. 573, 583 (1972) (Paul A. Freund, Chairman); see also Justice Jackson's celebrated observation that "the Court functions less as one deliberative body than as nine." JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 16 (1955).

²⁴⁹ Bernard Schwartz took a firm stand against such fragmentation. In his opinion, "[t]he members of the highest Court have no duty greater than that of preventing the spectacle of a separate opinion by each Justice, each of whom deals with the case from his own individualistic point of view." B. SCHWARTZ, *supra* note 2, at 361, 373-76 (discussing concurrences in *Youngstown*).

²⁵⁰ See *Welch v. Texas Highways & Pub. Transp. Dept.*, 483 U.S. 468, 495 (1987) (White, J.); *id.* (Scalia, J.); *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987) (O'Connor, J.); *id.* at 231 (Scalia, J.); *Commissioner v. Fink*, 483 U.S. 89, 100 (1987)

cases contained three,²⁵¹ and one — the *Pennzoil* case — contained an unsettling five.²⁵² The 1987 Term was remarkably similar: twelve cases appeared with two concurrences²⁵³ and two with three concurrences,²⁵⁴ but there was no counterpart to *Pennzoil*. The 1988 Term produced eleven cases with two concurrences,²⁵⁵ three cases with three,²⁵⁶ and one

(White, J.); *id.* (Scalia, J.); *Edwards v. Aguillard*, 482 U.S. 578, 597 (1987) (Powell, J.); *id.* (White, J.); *Houston v. Hill*, 482 U.S. 451, 472 (1987) (Powell, J.); *id.* (Scalia, J.); *Young v. United States*, 481 U.S. 787, 814 (1987) (Blackmun, J.); *id.* at 815 (Scalia, J.); *Rose v. Rose*, 481 U.S. 619, 636 (1987) (O'Connor, J.); *id.* at 640 (Scalia, J.); *Johnson v. Transportation Agency*, 480 U.S. 616, 642 (1987) (Stevens, J.); *id.* at 647 (O'Connor, J.); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (Blackmun, J.); *id.* at 452 (Scalia, J.); *United States v. Paradise*, 480 U.S. 149, 186 (1987) (Powell, J.); *id.* at 189 (Stevens, J.); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987) (Powell, J.); *id.* at 147 (Stevens, J.); *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J.); *id.* at 121 (Stevens, J.); *California Fed. Sav. & Loan*, 479 U.S. 272, 292 (1987) (Stevens, J.); *id.* at 295 (Scalia, J.).

²⁵¹ *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 340 (1987) (Brennan, J.); *id.* at 346 (O'Connor, J.); *id.* (Blackmun, J.); *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (Brennan, J.); *id.* at 719 (Scalia, J.); *id.* (Stevens, J.).

²⁵² *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (Scalia, J.); *id.* (Brennan, J.); *id.* at 23 (Marshall, J.); *id.* at 27 (Blackmun, J.); *id.* at 29 (Stevens, J.).

²⁵³ *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2791 (1988) (Blackmun, J.); *id.* at 2797 (Stevens, J.); *United States v. Kozminski*, 108 S. Ct. 2751, 2765 (1988) (Brennan, J.); *id.* at 2771 (Stevens, J.); *Bowen v. Kendrick*, 108 S. Ct. 2562, 2581 (1988) (O'Connor, J.); *id.* at 2582 (Kennedy, J.); *Sheridan v. United States*, 108 S. Ct. 2449, 2456 (1988) (White, J.); *id.* (Kennedy, J.); *United States v. Taylor*, 108 S. Ct. 2413, 2423 (1988) (White, J.); *id.* (Scalia, J.); *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2237 (1988) (O'Connor, J.); *id.* at 2238 (Scalia, J.); *Johnson v. Mississippi*, 486 U.S. 578, 591 (1988) (Brennan, J.); *id.* (White, J.); *Mills v. Maryland*, 486 U.S. 367, 389 (1988) (Brennan, J.); *id.* (White, J.); *Satterwhite v. Texas*, 486 U.S. 249, 260 (1989) (Marshall, J.); *id.* (Blackmun, J.); *Kungys v. United States*, 485 U.S. 759, 783 (1988) (Brennan, J.); *id.* at 784 (Stevens, J.); *Mathews v. United States*, 485 U.S. 58, 66 (1988) (Brennan, J.); *id.* at 67 (Scalia, J.); *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (O'Connor, J.); *id.* (Scalia, J.).

²⁵⁴ *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 85 (1988) (White, J.); *id.* (O'Connor, J.); *id.* (Scalia, J.); *South Carolina v. Baker*, 485 U.S. 505, 527 (1988) (Stevens, J.); *id.* at 528 (Scalia, J.); *id.* (Rehnquist, C.J.).

²⁵⁵ *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3058 (1989) (O'Connor, J.); *id.* at 3064 (Scalia, J.); *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989) (O'Connor, J.); *id.* (Scalia, J.); *Murry v. Giarratano*, 109 S. Ct. 2765, 2772 (1989) (O'Connor, J.); *id.* (Kennedy, J.); *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2346 (1989) (O'Connor, J.); *id.* at 2347 (Stevens, J.); *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2286, 2289 (1989) (Stevens, J.); *id.* at 2289 (White, J.); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1795, 1796 (1989) (White, J.); *id.* at 1796 (O'Connor, J.); *Coit Indep. Joint Venture v. Federal Sav. & Loan*, 109 S. Ct. 1361, 1376 (1989) (Blackmun, J.); *id.* (Scalia, J.); *Board of Estimate v. Morris*, 109 S.

case with four.²⁵⁷

Although the prospect of a decision with more than a single concurrence may suggest a lack of judicial discipline, these multiple concurrence cases indicate that the authors of separate opinions are not writing simply to express idiosyncratic views. First, a substantial number of these concurrences accept the majority opinion. In the 1987 Term, for example, fully one half of the multiple concurrences were of that variety.²⁵⁸ Second, one or more other justices joined in almost a third of these multiple concurrences.²⁵⁹ The willingness to contribute toward a splintered decision thus seems to derive not from a dubious impulse toward self-assertion but rather from a serious belief that the majority opinion is in need of correction or adjustment. Finally, these multiple concurrences rarely seem duplicative or superfluous.

In *Johnson v. Transportation Agency, Santa Clara, California*,²⁶⁰ for example, a majority of five upheld an affirmative action plan that used gender as a factor in promotion over dissents by Justices White and Scalia that insisted on the application of neutral principles.²⁶¹ Jus-

Ct. 1433, 1443 (1989) (Brennan, J.); *id.* (Blackmun, J.); *United States v. Stuart*, 109 S. Ct. 1183, 1193 (1989) (Kennedy, J.); *id.* (Scalia, J.); *Harris v. Reed*, 109 S. Ct. 1038, 1045 (1989) (Stevens, J.); *id.* at 1046 (O'Connor, J.); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 905 (1989) (White, J.); *id.* (Blackmun, J.). In addition, two concurring opinions appeared as part of the Court's resolution of three consolidated cases. *See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 109 S. Ct. 2994, 3009 (1989) (Stevens, J., concurring in two cases); *id.* at 3017 (Blackmun, J., concurring in one case; dissenting in two).

²⁵⁶ *Teague v. Lane*, 109 S. Ct. 1060, 1078 (1989) (White, J.); *id.* at 1079 (Blackmun, J.); *id.* at 1084 (Stevens, J.); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 730 (1989) (Stevens, J.); *id.* at 734 (Kennedy, J.); *id.* at 735 (Scalia, J.); *Goldberg v. Sweet*, 109 S. Ct. 582, 592 (1989) (Stevens, J.); *id.* at 593 (O'Connor, J.); *id.* at 594 (Scalia, J.).

²⁵⁷ *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2699 (1989) (White, J.); *id.* at 2769 (Blackmun, J.); *id.* at 2700 (Kennedy, J.); *id.* (Scalia, J.).

²⁵⁸ In the 1986 Term, 10 of 37 multiple concurrences accepted the majority opinion. *See* cases cited *supra* notes 257-59 and accompanying text. In 1987, 15 of 30 accepted the majority opinion. *See* cases cited *supra* notes 255-56 and accompanying text. That figure declined to 9 of 38 in 1988. *See supra* notes 257-59 and accompanying text.

²⁵⁹ Other justices joined in 12 1986 multiple concurrences. *See* cases cited *supra* notes 252-54. Of these, three were joined by two justices and one by three. *Id.* Ten 1987 multiple concurrences were joined; again, three were endorsed by two justices. *See* cases cited *supra* 255-56. Eight 1988 multiple concurrences were joined; one was joined by three justices (two of those joined only in part), one by two justices, and the others by a single justice. *See* cases cited *supra* notes 257-59.

²⁶⁰ 480 U.S. 616 (1987).

²⁶¹ *Id.* at 657 (White, J., dissenting; Scalia, J., dissenting).

tice Stevens, concurring in the majority opinion, announced that he wrote separately "to explain my view of this case's position in our evolving antidiscrimination law."²⁶² While recognizing the neutral intent of the Civil Rights Act, he nonetheless accepted the majority view permitting a preference based on gender or race.²⁶³ The second concurrence, authored by Justice O'Connor, rejected the majority's opinion entirely but also departed from the Stevens position.²⁶⁴ O'Connor criticized both the majority's "expansive and ill-defined approach" and the dissent's dismissal of the Court's prior Title VII jurisprudence.²⁶⁵ She accepted the Court's judgment because the record did not show the application of a strict quota.²⁶⁶ Although Stevens and O'Connor shared some common ground, their reasons for concurring differed markedly: Stevens wrote to explain and expand the majority opinion, while O'Connor wrote to criticize and contract it. The only notable duplication occurred in the dissents. Justice White joined sections of Justice Scalia's opinion, and the dissenters appeared to differ principally in the nature of their distaste for an earlier affirmative action case.²⁶⁷

One of the most controversial cases of the 1988 Term illustrates the widely divergent functions that multiple concurrences may serve. In *Webster v. Reproductive Health Services*,²⁶⁸ the Court addressed a Missouri statute regulating abortion and produced a plethora of opinions.²⁶⁹ The most explosive question in *Webster* was whether the Court

²⁶² *Id.* at 642 (Stevens, J., concurring).

²⁶³ *Id.* at 644-45 (accepting Court's prior opinions interpreting Act to permit employer preferences).

²⁶⁴ *Id.* at 647 (O'Connor, J., concurring in the judgment).

²⁶⁵ *Id.* at 648.

²⁶⁶ *Id.* at 656 (accepting Court's view of gender as a "plus" factor).

²⁶⁷ *Id.* at 657 (White, J., dissenting); *id.* at 672 (Scalia, J., dissenting). White and Scalia agree that *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), should be overruled. White's opinion is a single paragraph, while Scalia's runs for 20 pages. For other cases in which two concurrences present clearly divergent positions, see *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2286 (1989) (Stevens, J., concurring) (accepting statutory authority for abrogation of eleventh amendment immunity); *id.* at 3289 (White, J., concurring) (relying on constitutional authority under article I); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795 (1989) (White, J., concurring) (finding shift in burden of persuasion consistent with Court's precedents); *id.* at 1746 (O'Connor, J., concurring) (finding no consistency); *see also* the discussion of the concurrences by Justices O'Connor and Scalia in *Webster v. Reproductive Health*, 109 S. Ct. 3040, 3058-64 (1989), *infra* notes 268-78 (disagreeing about need to overrule precedent).

²⁶⁸ 109 S. Ct. at 3040.

²⁶⁹ *Id.* at 3058 (O'Connor, J., concurring in part and in the judgment); *id.* at 3064 (Scalia, J., concurring in part and in the judgment); *id.* at 3067 (Blackmun, J., concur-

needed to reconsider *Roe v. Wade*²⁷⁰ in order to evaluate the provisions of the Missouri statute. On this issue the two concurrers offered dramatically different approaches. In a detailed and workmanlike opinion, Justice O'Connor painstakingly analyzed the viability testing provision of the statute in light of the Court's precedents. She concluded that no conflict existed and thus that the Court had no occasion to reconsider *Roe*.²⁷¹ The opinion ascended only briefly to a more general plane when O'Connor invoked the traditional principle that the Court will address a constitutional issue only when necessary.²⁷² Only her conclusion to that discussion hinted at the complex concerns that may underlie her reluctance to see *Roe* reconsidered: "When the constitutional invalidity of a state's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully."²⁷³

In contrast to O'Connor's meticulous analysis is the sweeping, almost swashbuckling concurrence by Justice Scalia. From the outset Scalia made clear his belief that the Court should have reconsidered and explicitly overruled *Roe*.²⁷⁴ Rejecting O'Connor's view that the case was controlled by the prudential avoidance of a constitutional issue, he recast the controlling principle as whether the Court should render a decision broader than necessary to resolve the issue before it. He then answered that question with an emphatic affirmative.²⁷⁵ Scalia briefly paused to needle O'Connor by citing the opinions she had authored and joined that formulate such broader principles. He then went on to attack what he termed the indecisiveness and "newly contracted abstemiousness" of the Court.²⁷⁶ His reasons for advocating immediate reconsideration of *Roe* were both pragmatic and ideological: the Court's avoidance "preserves a chaos that is evident to anyone who can read and count" and prolongs judicial control of a political issue.²⁷⁷ Not unexpectedly, the opinion ended with an apt rhetorical flourish: "On the question of the constitutionality of Section 188.029, I concur in the judgment of the Court and strongly dissent from the manner in which

ring in part and dissenting in part); *id.* at 3079 (Stevens, J., concurring in part and dissenting in part). Chief Justice Rehnquist wrote the Court's opinion.

²⁷⁰ *Id.* at 3060.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 3061.

²⁷⁴ *Id.* at 3064 (Scalia, J., concurring in part and in the judgment).

²⁷⁵ *Id.* at 3065-66.

²⁷⁶ *Id.* at 3066.

²⁷⁷ *Id.* at 3065-66.

it has been reached.”²⁷⁸ The tone and structure of the opinion are in fact more typical of a dissent than a concurrence. Scalia’s reliance on the general contrasts sharply with O’Connor’s preference for the specific. His opinion is bold, direct, and critical, while her opinion is cautious, oblique, and diplomatic. These concurrences share no common ground of substance or approach. They effectively summarize, however, their authors’ current roles on the Court: O’Connor as the concurrer who blocks doctrinal departures, Scalia as the concurrer who challenges the basic assumptions and methods of his colleagues.

Even when a case is less controversial than *Webster* and spawns three concurrences, little overlap may occur. In *Hodel v. Irving*,²⁷⁹ the Court ruled unconstitutional a statute providing for escheat of small fractional interests in Indian land. Three justices wrote separately, but for divergent reasons. Justices Brennan and Scalia both joined the Court’s opinion but, while Brennan noted that the opinion did not limit a prior case,²⁸⁰ Scalia insisted that the same case was limited to its facts.²⁸¹ The third concurrence, by Justice Stevens, offered an independent ground to support the Court’s result.²⁸² No occasion for judicial economy existed in *Hodel*, though it did in another triple concurrence case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.²⁸³ A majority of five ruled that section 702 of the Civil Rights Act exempting religious organizations from the prohibition against religious discrimination was constitutional²⁸⁴ because it passed the test of *Lemon v. Kurtzman*.²⁸⁵ Justice Brennan, joined by Justice Marshall, concurred in the judgment, but argued that only nonprofit activities were categorically exempted.²⁸⁶

²⁷⁸ *Id.* at 3067.

²⁷⁹ 481 U.S. 704 (1987).

²⁸⁰ *Id.* at 718 (Brennan, J., concurring) (finding “nothing in today’s opinion that would limit *Andrus v. Allard*, 441 U.S. 51 (1979), to its facts”).

²⁸¹ *Id.* at 719 (Scalia, J., concurring) (writing separately to note that since the statute in *Hodel* was “indistinguishable” from the statute in *Allard*, “in finding a taking today our decision effectively limits *Allard* to its facts”).

²⁸² The majority believed that the statute at issue effected an uncompensated taking of Indian land. *Id.* at 718. Stevens, however, found a due process violation in the denial of reasonable notice and an opportunity for compliance. *Id.* at 734 (Stevens, J., concurring in the judgment).

²⁸³ 483 U.S. 327 (1987).

²⁸⁴ *Id.* at 339.

²⁸⁵ *Id.*; see *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁸⁶ 483 U.S. at 338, 343 (Brennan, J., concurring in the judgment) (arguing that case-by-case analysis of nonprofit activities by religious organizations would result in “considerable ongoing government entanglement in religious affairs”).

Justice O'Connor, also concurring in the judgment, repeated her rejection of the *Lemon* test and her preferred alternative.²⁸⁷ She also noted with approval Brennan's distinction between nonprofit and for-profit activities.²⁸⁸ Justice Blackmun straddled both concurrences by expressly accepting the reasons offered in the O'Connor opinion and agreeing with its view that the constitutionality of section 702 as applied to for-profit activities was still open.²⁸⁹ Only one paragraph in length, the Blackmun concurrence added nothing new to the O'Connor opinion it endorsed. Instead of writing separately, Blackmun could simply have joined all or part of the O'Connor opinion.

The Rehnquist Court's most dramatic example of the unfruitful propagation of concurrences is *Pennzoil Co. v. Texaco, Inc.*²⁹⁰ All nine justices joined in the Court's judgment directing the dismissal of a federal court action filed by Texaco to challenge the constitutionality of a Texas appeal bond provision. Five justices agreed that the federal district court should have abstained, in part because state procedures existed for review of Texaco's constitutional claims.²⁹¹ One of the five, Justice Scalia, filed a brief concurrence, joined by Justice O'Connor.²⁹² Four other justices, with overlapping views and concerns, also filed separate opinions arriving at the same conclusion. They found that the federal action was untenable and therefore concurred in the Court's

²⁸⁷ *Id.* at 348 (O'Connor, J., concurring in the judgment) (arguing that test should be whether government purpose endorses religion and whether statute conveys message of endorsement); see *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985).

²⁸⁸ 483 U.S. at 349.

²⁸⁹ *Id.* at 346 (Blackmun, J., concurring in the judgment). For other multiple concurrence cases with some overlap, see, e.g., *Harte-Hanks Communications v. Dunnaughton*, 109 S. Ct. 2673, 2699-70 (1989) (White, Blackmun, and Kennedy, JJ., concurring); *id.* at 2700 (Scalia, J., concurring in the judgment). Both White — joined by the Chief Justice — and Kennedy found Scalia's analysis consistent with the Court's opinion. Kennedy wrote separately only to make that point. Scalia apparently did not share that view and declined to join the Court's opinion. *Id.* at 2699-70; see also *United States v. Stuart*, 109 S. Ct. 1183, 1193 (Kennedy, J., joined by O'Connor, J., concurring in part and in the judgment) (accepting Court's opinion in part and echoing briefly the objections to its use of legislative history made at length by Justice Scalia in his opinion concurring in the judgment).

²⁹⁰ 481 U.S. 1, 2-3 (1987).

²⁹¹ Justice Powell wrote the majority opinion, and Chief Justice Rehnquist and Justices White, O'Connor, and Scalia joined. *Id.* at 2; see also *Younger v. Harris*, 401 U.S. 37 (1971) (establishing authority for the abstention doctrine).

²⁹² 481 U.S. at 18 (Scalia, J., concurring) (writing to indicate that the *Rooker-Feldman* doctrine did not deprive "the Court of jurisdiction to decide Texaco's challenge to the constitutionality of the Texas stay and lien provisions").

judgment.²⁹³ Justice Marshall observed in his concurrence that “[t]he history of this lawsuit demonstrates that great sums of money, like great cases, make bad law.”²⁹⁴ Justice Stevens agreed, noting that equal justice under law “does not admit of a special exemption for multi-billion-dollar corporations or transactions.”²⁹⁵ Despite these disclaimers, it is hard to escape the conclusion that the eleven billion dollar bond at issue in *Pennzoil* encouraged a proliferation of concurrences seldom seen on issues of this nature.

The four justices concurring in the judgment generally agreed that the *Younger* abstention doctrine did not bar the federal district court from hearing Texaco’s claim. Each one, however, offered a different ground for dismissing the federal action: Justice Brennan relied on the availability of state court review to Texaco even in bankruptcy;²⁹⁶ Justice Marshall relied on the unavoidable and impermissible review of state claims by the federal district court;²⁹⁷ Justice Blackmun found that the circumstances of the case fell under the *Pullman* abstention doctrine;²⁹⁸ and Justice Stevens cited Texaco’s right to appeal even if it failed to post the disputed bond.²⁹⁹ The concurrences contained a great deal of mutual support and several cross-references,³⁰⁰ but only Marshall formally joined in the opinions of other justices.³⁰¹ Although the case raised some important issues of comity and some technical aspects

²⁹³ *Id.* at 18 (Brennan, J., concurring in the judgment); *id.* at 23 (Marshall, J.); *id.* at 27 (Blackmun, J.); *id.* at 29 (Stevens, J.).

²⁹⁴ *Id.* at 26 (Marshall, J., concurring in the judgment).

²⁹⁵ *Id.* at 34 (Stevens, J., concurring in the judgment).

²⁹⁶ *Id.* at 22 (Brennan, J., concurring in the judgment).

²⁹⁷ *Id.* at 26 (Marshall, J., concurring in the judgment).

²⁹⁸ *Id.* at 29 (Blackmun, J., concurring in the judgment).

²⁹⁹ *Id.* at 32 (Stevens, J., concurring in the judgment).

³⁰⁰ See *id.* at 19 (Brennan, J.) (stating Brennan “wholeheartedly concur[red] with Justice Stevens’ conclusion that a creditor’s invocation of a State’s postjudgment collection procedures constitutes action under color of state law”). Brennan also concurred in Stevens’ view that Texaco’s claim was without merit, though on the latter point he added that “my reasons for so concluding are different.” *Id.* at 22. Justice Blackmun agreed with Brennan and Stevens on the state law point and on the inapplicability of the *Younger* doctrine. *Id.* at 27 (Blackmun, J., concurring in the judgment). Blackmun announced that he nonetheless refrained from joining their opinions because of their conclusions on the question of due process violations, conclusions which “suffer somewhat from contortions due to attempts to show that a due process violation *in this case* is not possible or is hardly possible.” *Id.* at 28. Justice Stevens cited with approval Brennan’s *Younger* analysis. *Id.* at 30 n.2 (Stevens, J.). He also approved the reasons offered by Brennan and Scalia for rejecting the *Rooker-Feldman* doctrine as a bar to review of Texaco’s claims by the federal courts. *Id.* at 31 n.2.

³⁰¹ Marshall joined the concurrences of Brennan and Stevens. *Id.* at 18, 29.

of federal-state court relations, surely these four justices could have packaged their agreements and divergences in a more economical and cooperative form. Rarely has a party with an untenable position received such elaborate attention.

Pennzoil illustrates the temptation posed by the concurrence, a temptation perhaps rendered irresistible by the extraordinary sum at issue and the public interest focused on the case. But *Pennzoil* also suggests how seldom this Court has succumbed to the temptation of unalloyed self-expression. *Pennzoil* notwithstanding, the record of the Rehnquist Court generally is one of restraint rather than indulgence in its use of the multiple concurrence.

CONCLUSION

The concurring opinion is firmly established as an element of judicial discourse for the United States Supreme Court. The time is long past when observers of the Court attacked dissenting opinions as obstacles to the norm of unanimity. Since early in the twentieth century, the unified Court of John Marshall's design has been replaced by a Court in which dissent is an accepted part of the appellate process. In the use of the concurrence by the Rehnquist Court, we see what may be the next stage in the evolution of judicial decisionmaking, a more individualized discourse in which justices freely contribute separate opinions to explain with greater precision their relationship to a majority opinion or holding.

As the diversity of function served by these concurrences suggests, an appropriate use of the concurrence is not easily distinguished from an abusive use. A concurrence by a justice who also joins the Court's opinion may at first seem to be a self-indulgent flourish. On closer examination, however, it may turn out to be the price conscience exacts before permitting the author to join or create a majority. A separate opinion concurring only in the judgment discloses a more serious breach within the judgment majority, but it also expresses a doctrinal disagreement that its author properly refuses to suppress. The emphatic concurrence is perhaps the most expendable variety, since it generally sheds the least light on the Court's opinion. Even here, however, the justice who writes to emphasize or clarify may honestly believe that the concurrence provides an essential adjustment to the majority's imperfect focus.

What does seem clear is that the members of the Rehnquist Court feel neither apologetic nor defiant when they choose to write separately. Serving on a Court with a discretionary docket, they are unlike their

nineteenth century predecessors who responded to the cases litigants appealed as of right. Today the right to shape their docket belongs to the justices,³⁰² and they select cases for their place in a larger jurisprudential scheme. It is little wonder, then, that the more recent justices feel free to limit or expand, to clarify or contradict a Court opinion that is perceived not as a discrete resolution of a single matter but as one link in a chain of developing law.

The idea of a Court that publishes its divergent views is not without its critics or its problems. The broadest objection to the frequent use of the concurrence is that it weakens the authority with which the Court speaks. Too many concurrences may cause too many plurality decisions, interfering with the Court's responsibility to stabilize and clarify the law. The concurrence that seeks only to refine its author's vision of the majority opinion may undermine the force of a unanimous Court or create a splintered and confusing response. The concurrence that seizes an inappropriate occasion to assert a general judicial philosophy may provide an unwarranted distraction from the case at hand. The concurrence without explanation contributes uncertainty to the decisionmaking process.

Although the record of the Rehnquist Court reveals some examples of these problems, it also suggests that the concurrence may serve a positive function. By preventing a majority, a concurrence may defer resolution of a difficult issue to a more suitable case or more propitious time. The centripetal force of a concurrence may illuminate for bench and bar the implications of a majority opinion; its centrifugal force may help to place that opinion in context. If concurrences fragment the Court, they also moderate the most frequent alternative: not unanimity but polarization into two sharply defined blocs.

The present Court seems no more — and no less — inclined than its predecessor to write separately, though Justice Scalia's early concurrences represent a more aggressive use of the form. If, however, the Rehnquist Court turns away from the excesses of those opinions and the *Pennzoil* case, the concurrence may continue to serve a circumscribed but constructive role. By allowing individual justices to qualify and elaborate their positions, the concurrence may be a modest price to pay for a majority opinion or an appropriate judgment. Used with restraint, the concurrence may contribute to the creation of a more finely

³⁰² The Court's discretion recently was rendered almost absolute when, in 1988, Congress repealed several statutory provisions authorizing appeals as of right. See Stern, Gressman & Shapiro, *Epitaph for Mandatory Jurisdiction*, 74 A.B.A. J., Dec. 1988, at 66.

tuned jurisprudence.

As members of a collegial body, Supreme Court justices must constantly weigh the clearest expression of their individual views against the claims of the institution, precision against accommodation, conscience against consensus.³⁰³ The concurring opinion may offer a reasonable compromise that permits at once the principled expression of divergent views and the occupation of common ground. A Court whose justices use the concurrence to reach this compromise will find it a versatile and responsive instrument of judicial discourse.

³⁰³ Justice Stewart provided an illustration of this tension. *See Talk of the Town*, *NEW YORKER*, Oct. 19, 1981, at 35. In an interview conducted at the time of his retirement from the Court in 1981, Stewart spoke of the competing claims on a justice. *Id.* For him, "one of the duties of this Court, one of the reasons for its existence, is to produce a Court opinion in every case, for the guidance of lawyers and, ultimately, the people of the United States." *Id.* at 36. At the same time he acknowledged that "it's tempting to write a separate, original essay on a subject" and that the pressure for compromise "does not mean that each justice should subscribe to something he doesn't believe, and it does not mean that every justice doesn't have the right and sometimes the duty to express his own views." *Id.*

