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## The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?

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# The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?

JOSHUA M. AUSTIN\*

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## I. INTRODUCTION

“A house divided against itself cannot stand.”<sup>1</sup> While this phrase is well known, perhaps there are times when it misses the mark. Perhaps there are situations in which a “divided house” leads one down a path of enligh-

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1. While accepting the Republican nomination for one of the United States Senate seats in the state of Illinois, Abraham Lincoln uttered this famous sentence, a biblical admonition, before more than 1,000 Republican delegates in Springfield, Illinois on June 16, 1858. DAVID HERBERT DONALD, *LINCOLN* 206 (1996).

tenment. While a nation torn in half by slavery was, indeed, in desperate need of a uniting force,<sup>2</sup> occasionally, a differing view can lead to such a fundamental change that the legal system is changed forever.

Perhaps this was the idea behind the earliest view of the United States Supreme Court<sup>3</sup> and one of the earliest views on judicial systems altogether.<sup>4</sup> The ancient Romans, in the fifth century, created the *Lex Citandi*, or, the Law of Citations.<sup>5</sup> The theory was relatively simple; authority was given to the writings of five important jurists of the classical period of Roman law, and the opinion deemed correct was that of the majority.<sup>6</sup> And while some have deemed this the “low point of Roman jurisprudence,”<sup>7</sup> this Comment postulates that the ancient Romans were on the right track; it was simply their utilization of the concept, not the concept itself that missed the mark.

Similarly, the early Supreme Court of the United States began with the issuing of seriatim, or separate, opinions by each of the Justices hearing the case.<sup>8</sup> While this practice was ultimately halted by John Marshall upon his rise to Chief Justice,<sup>9</sup> perhaps this idea was also strikingly close to necessity in order for the Court to function to its maximum effectiveness.

This Comment discusses the Law of Citations and seriatim opinions. It contends that the ancient Romans were on to something much more lasting than the *Lex Citandi* itself. The concept of separate opinions, and an ability for differing thoughts, while perhaps in the minority at one time, possess the ability to eventually seize control and become the majority opinion on a subject. The Supreme Court’s seriatim opinions, and modern concurrences and dissents, served, and continue to serve, the same fundamental purpose.

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2. *Id.*

3. The early Supreme Court used seriatim, or separate, opinions penned by each Justice hearing a case, a practice ceased by John Marshall upon his appointment to the position of Chief Justice. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 779-80 (Kermit L. Hall et al. eds., 1992).

4. As early as the fifth century, the ancient Romans used the idea of separate opinions to facilitate a system of justice by way of the Law of Citations. ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 90-91 (1970).

5. *Id.*

6. *Id.*

7. *Id.* at 91. A legal historian, Watson stated that the “Law of Citations marks a low point of Roman jurisprudence, since [it declares] the correct opinion is to be found by counting heads, not by choosing the best solution.” *Id.*

8. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 3, at 779-80. This practice was, at least in part, guided by “English legal traditions in effect at the time of American independence,” and, in England, still common usage today. *Id.*

9. *Id.*

This Comment begins with a historical look at the Law of Citations and the importance of its timing within Roman law,<sup>10</sup> as well as a brief discussion of the five jurists whose works were relied upon by this rule of law.<sup>11</sup> This Comment will then discuss seriatim opinions from the early Supreme Court,<sup>12</sup> and their ultimate demise.<sup>13</sup> Then, this Comment will briefly discuss the continued use of separate opinions by the country whose legal system most influenced that of the United States—England—and theorize that this continued use, in part, shows the necessity of multiple rationales and opinions.<sup>14</sup> Next, this Comment will look at recent commentary made by current Chief Justice John Roberts, expressing a dislike for the many concurring and dissenting opinions in current Supreme Court opinions.<sup>15</sup> Finally, this Comment will discuss important concurrences<sup>16</sup> and dissents<sup>17</sup> in Supreme Court cases in an effort to dispel the fears of Chief Justice Roberts, and argue that the Law of Citations and seriatim opinions were the earliest manifestations of these important concepts, and, while perhaps not properly executed, paved the way for these concurrences and dissents.<sup>18</sup>

## II. THE LAW OF CITATIONS

### A. A HISTORICAL LOOK AT THE LAW OF CITATIONS

The *Lex Citandi*, or Law of Citations, was created by Theodosius II in 426 CE.<sup>19</sup> It was the culmination of legislation that had been emphasizing the importance and popularity of five jurists from the classical period of Roman law: Gaius, Modestinus, Papinian, Paul, and Ulpian.<sup>20</sup> The writings of these jurists were declared authoritative.<sup>21</sup>

Much of the popularity of these jurists arose out of the fact that there had been a “long lapse of time since the writings of the great jurists of the second century” and the subsequent rising of “many differences of opinion

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10. See *infra* Part II.A.  
11. See *infra* Part II.B.  
12. See *infra* Part III.A.  
13. See *infra* Part III.B.  
14. See *infra* Part IV.  
15. See *infra* Part V.  
16. See *infra* Part VI.A.  
17. See *infra* Part VI.B.  
18. See *infra* Part VII.  
19. WATSON, *supra* note 4, at 91.  
20. *Id.* at 90.  
21. *Id.* at 91.

among later jurists . . . .”<sup>22</sup> There began to be discord as to which jurists were authoritative, or deserved the most weight or value in deciding cases.<sup>23</sup> Additionally, there existed two formal sources of law, the *ius*<sup>24</sup> and the *leges*.<sup>25</sup> Both forms of the law were spread among many archives and were thus difficult to consult.<sup>26</sup> This was another backdrop to the Law of Citations, which was one of the first major attempts to “simplify the *ius* and organize the *leges*.”<sup>27</sup> Ultimately, “Theodosius published a constitution ordering that the writings of Papinian, Paul[], Gaius, Ulpian, and Modestinus, together with the writings of all other jurists quoted by them as authority, should have the effect of law, and should be followed by the courts.”<sup>28</sup>

In the event of a disagreement among the five jurists as to a particular question of law, the majority of their opinions ruled on the matter.<sup>29</sup> If there was a tie among the jurists, “the opinion of Papinian, if expressed” in the matter, was controlling.<sup>30</sup> The only occasion under which “the judge hearing the case [was to] exercise his<sup>31</sup> own discretion” was if there was a tie among the jurists, and Papinian was silent.<sup>32</sup>

While, as stated earlier, this has been viewed by some as the low point of Roman jurisprudence,<sup>33</sup> it is not viewed entirely in the negative by legal scholars and historians.<sup>34</sup> For instance, Alan Watson said of the Law of Citations:

But things were not so bad as is sometimes thought. The possibility of future development was not excluded, at least

22. WILLIAM L. BURDICK, *PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 148 (1938).

23. *Id.* at 148-49.

24. “The *ius* formed a coherent entity and consisted of the texts of the classical jurists.” J.H.A. Lokin & Bernard H. Stolte, *Byzantium: Early Byzantium*, in *THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY* 327 (e-reference edition) (Stanley N. Katz ed., 2009) (on file with author).

25. “The *leges* were the constitutions enacted by the emperors. Amendments could only be made in the form of new constitutions. Each constitution was, in principle, enacted by all reigning emperors.” *Id.*

26. *See id.*

27. *See id.*

28. BURDICK, *supra* note 22, at 149.

29. *See id.*; WATSON, *supra* note 4, at 91.

30. BURDICK, *supra* note 22, at 149; WATSON, *supra* note 4, at 91.

31. Throughout this Comment, in instances where a female or male pronoun or possessive might be appropriate, the male counterpart will routinely be used when referencing an individual in history, in light of the fact that—in this historical context—the positions referred to throughout this Comment were restricted to men only until fairly recently by historical timelines.

32. BURDICK, *supra* note 22, at 149; WATSON, *supra* note 4, at 91.

33. WATSON, *supra* note 4, at 91.

34. *Id.*

not for new situations or when the law had been or would be changed by legislation. Indeed, the Law of Citations compares favorably with the modern strict doctrine of precedent in Anglo-American law under which a court is bound by a decision of a higher court, regardless of whether at that time the court was composed of undistinguished men or had reached its decision by illogical arguments.<sup>35</sup>

Unfortunate for the Law of Citations was its place in the timeline of Roman history, as well as the attitude permeating the post-classical period of Roman law. During the third and fourth centuries, Roman law began a decline, during which no new noteworthy jurists came to be, and the study of law took a back seat to theology and different attractions.<sup>36</sup> “The center of empire moved from Rome to the Greek East, where intellectual traditions were different and law did not have the same fascination.”<sup>37</sup> Additionally, in 325 CE, Christianity became the official religion of the empire, and thus theology became the premier study for learned men.<sup>38</sup>

In addition to this decline, the attitude of the post-classical period has affected the Law of Citations as well. The post-classical period of Roman law was “marked by the effort to keep what had previously been gained, not by any attempt to make further progress.”<sup>39</sup> Thus the Law of Citations is commonly viewed in the same light as a decline in the advancement of Roman law, particularly in light of the fact that most of what happened in Roman law after the Law of Citations was little more than an organization of the *ius* and the *leges*<sup>40</sup> and the development of canon law.<sup>41</sup>

Nonetheless, the Law of Citations was quite possibly the first identification of the power of multiple viewpoints and rationales behind a decision, and thus is an important part of legal history. In light of this importance, it is necessary to briefly identify the five jurists whom were considered so important that their combined works controlled Roman law for a period of time.

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35. *Id.* As should be apparent, Watson takes a somewhat cynical view of the hard and fast rules of precedent adopted in the United States court system, but he was generous enough to further state of the Law of Citations that it “at least [had] the merit of singling out the best jurists to be followed.” *Id.* Maybe in Watson’s view, the ancient Romans, unlike lawyers today, did not have to follow “undistinguished men” or decisions reached “by illogical arguments.” *Id.*

36. *Id.* at 90.

37. *Id.*

38. WATSON, *supra* note 4, at 90.

39. *Id.*

40. *See* Lokin & Stolte, *supra* note 24.

41. *See id.*

## B. THE FIVE JURISTS

### 1. *Gaius*

“It is to Gaius that we owe the chief source of our knowledge of Roman law prior to the times of Justinian.”<sup>42</sup> Little is known of Gaius the man, rather, as Burdick noted, “the fact that he is mentioned only by a single name, instead of two or three names common to well known Romans, has been made the foundation for the suggestion that he was either a foreigner or even a freedman.”<sup>43</sup> “All we know about Gaius as a person is that he lived in the second half of the second century . . . .”<sup>44</sup>

What is known of Gaius the jurist is that his Institutes had a great impact upon the Institutes of Justinian.<sup>45</sup> Further, his impact on the Digest is well documented.<sup>46</sup> Following his death, Gaius went largely unnoticed for the two centuries prior to the passing of the Law of Citations, at which time he was chosen as one of the five authorities to be followed.<sup>47</sup>

### 2. *Modestinus*

Herennius Modestinus (Modestinus) was another of the five jurists relied upon for the Law of Citations.<sup>48</sup> Modestinus was a “pupil of both Papinian and Ulpian . . . .”<sup>49</sup> He also authored “a number of legal works which ranked among the foremost authorities.”<sup>50</sup> Modestinus also wrote six books on the law on exemptions from tutorship.<sup>51</sup> His works earned him a place in history in the Law of Citations.<sup>52</sup>

42. BURDICK, *supra* note 22, at 129.

43. *Id.*

44. Gaius Noster—Our Gaius: The Jack of Roman Law, [http://www.harris-greenwell.com/HGS/GaiusTheJackOfRomanLaw#fn1\\_7](http://www.harris-greenwell.com/HGS/GaiusTheJackOfRomanLaw#fn1_7) (last visited April 13, 2010) (quoting OLGA TELLEGEN-COUPERUS, A SHORT HISTORY OF ROMAN LAW 104 (1993)).

45. BURDICK, *supra* note 22, at 130. In fact the Justinian Institutes were copied largely from the Institutes of Gaius. *Id.*

46. *Id.* (“Over five hundred quotations from Gaius are found in the Digest . . . .”).

47. See Gaius Noster—Our Gaius: The Jack of Roman Law, *supra* note 44.

48. ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 82 (University of Georgia Press 1991).

49. BURDICK, *supra* note 22, at 135.

50. *Id.*

51. WATSON, *supra* note 4, at 40.

52. See *id.* at 90.

### 3. *Papinian*

“There never was, nor ever will be, a lawyer that excelled or can equal Papinian.”<sup>53</sup> Aemilius Paullus Papinianus (Papinian) is, perhaps, the most well-known and most celebrated Roman jurist.<sup>54</sup> Papinian was not only a great scholar, but a “profound author”<sup>55</sup> and a skilled lawyer.<sup>56</sup> “From his works there are five hundred and ninety-five extracts in the Digest . . . .”<sup>57</sup> Additionally, Papinian counts three of the other five jurists relied upon for the Law of Citations as his pupils, Ulpian, Paulus, and Modestinus.<sup>58</sup>

Papinian is credited with having authored sixty-three books, as well as sixty-seven rescripts, in the name of—then emperor—Septimius Severus.<sup>59</sup> Despite these works, it is his “casuistic works” for which he is better known.<sup>60</sup> Specifically, he is best known for “his thirty-seven books of Problems (Quaestiones),” which discussed cases derived from experiences Papinian had.<sup>61</sup> Further, as stated previously, so respected was Papinian that his works were the “tie-breaker,” should such a situation arise, under the rules of the Law of Citations.<sup>62</sup>

### 4. *Paul*

Julius Paulus (Paul) was a contemporary of Ulpian and a pupil of Papinian.<sup>63</sup> Along with being a well-renowned jurist, Paul was a “praetor, consul, and praetorian prefect.”<sup>64</sup> The Digest “contains 2080 extracts from his works. In fact, about a half of all the contents of the Digest is made up from the writings of the two jurists, Ulpian and Paulus.”<sup>65</sup>

Paul also wrote a large number of casuistic works, much like Papinian, for which he is also well known.<sup>66</sup> Among these works were “twenty books of problems (Quaestiones) devoted to the elucidation of doubtful points of law” drawn from his experiences, and “twenty-three books of opinions

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53. BURDICK, *supra* note 22, at 132 (quoting the French jurist, Cujacius).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. BURDICK, *supra* note 22, at 132.

59. Tony Honoré, *Papinian*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (e-reference edition) (Oxford University Press 2009) (on file with author).

60. *Id.*

61. *Id.*

62. BURDICK, *supra* note 22, at 149; WATSON, *supra* note 4, at 91.

63. BURDICK, *supra* note 22, at 134.

64. *Id.*

65. *Id.*

66. Honoré, *supra* note 59.



(Responsa) drawn from his extensive practice.”<sup>67</sup> Like the other jurists mentioned herein, Paul’s works were also chosen as authoritative for the Law of Citations.<sup>68</sup>

### 5. *Ulpian*

Domitus Ulpianus (Ulpian) was not only a renowned jurist, but was a pupil of Papinian, served as a praetorian prefect, and was the chief adviser of then emperor, Alexander Severus.<sup>69</sup> “The Digest contains 2462 excerpts from the writings of Ulpian, about one third of the subject matter of that entire compilation.”<sup>70</sup> In fact, Ulpian was quoted more in the Digest than any other author.<sup>71</sup>

Ulpian wrote over two hundred books, as well as a great number of imperial rescripts, for Septimus Severus while still ruling.<sup>72</sup> It has been noted that “[o]f all the Roman jurists whose work has survived, his lies closest in style and method to contemporary legal writing.”<sup>73</sup> Ulpian’s works, too, were chosen as authoritative for the Law of Citations.<sup>74</sup>

## III. SERIATIM OPINIONS

### A. THE EARLY SUPREME COURT AND SERIATIM OPINIONS

The United States Supreme Court was established by Article III of the United States Constitution.<sup>75</sup> Article III not only created the Supreme Court, it gave the Court original and appellate jurisdiction while limiting the Court by “Exception” and “Regulations” passed by Congress.<sup>76</sup> Congress decided in 1789, with the passage of the Judiciary Act of 1789, on the basis of the Court, including the creation of a Supreme Court of “six judges and a three-tiered federal judicial structure.”<sup>77</sup>

As previously mentioned, “[c]onsistent with its legal ancestry, the Supreme Court initially adopted seriatim opinions as an accepted way of an-

67. *Id.*

68. WATSON, *supra* note 4, at 90-91.

69. BURDICK, *supra* note 22, at 134.

70. *Id.*

71. *Id.*

72. Tony Honoré, *supra* note 59.

73. *Id.*

74. WATSON, *supra* note 4, at 90-91.

75. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 3, at 373.

76. U.S. CONST. art. III.

77. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 3, at 373.

nouncing decisions.”<sup>78</sup> The result of this action was to leave the Court with no single controlling opinion.<sup>79</sup> However, this served as a significant check on the Supreme Court, and limited some of the authority that several saw as overwhelming.<sup>80</sup> As Thomas Jefferson noted, “The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please.”<sup>81</sup>

However, it was not long before changes made by Lord Mansfield in England<sup>82</sup> would also cross the Atlantic, and Thomas Jefferson would be in for a fight.<sup>83</sup>

#### B. THE END OF SERIATIM OPINIONS

The impact in the United States of a denouncement of seriatim opinions by Lord Mansfield in England<sup>84</sup> was first seen in Virginia at the court of appeals.<sup>85</sup> Chief Judge Edmund Pendleton did away with seriatim opinions, choosing for the judges to work in private before announcing a unified opinion.<sup>86</sup> The Republican Party strongly criticized this practice, its most outspoken proponent being none other than Thomas Jefferson.<sup>87</sup> “Due to this political pressure, upon the ascension of Judge Spencer Roane to Judge Pendleton’s seat on the bench some years later, the practice ceased and the tradition of seriatim opinions was quickly reinstated.”<sup>88</sup>

However, upon the appointment of John Marshall to the position of Chief Justice, seriatim opinions would be done away with, this time for good.<sup>89</sup> Despite the fact that the other justices “were men of intellectual independence, Marshall soon became a dominant force.”<sup>90</sup> It was this influence by which he was able to convince the other justices to do away with seriatim opinions.<sup>91</sup>

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78. *Id.* at 780.

79. *Id.* at 607.

80. See M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 304-05.

81. *Id.* at 305 (quoting Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON 135-40 (Paul Leicester Ford ed., 1905)).

82. See *infra* Part IV.

83. Henderson, *supra* note 80, at 304-05.

84. See *infra* Part IV.

85. Henderson, *supra* note 80, at 304.

86. *Id.*

87. *Id.*

88. *Id.*

89. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 3, at 780.

90. 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 105 (1981).

91. *Id.*

Important to note is the intention of Marshall in abolishing the practice of seriatim opinions. At the time of his ascension to Chief Justice, the judiciary was not only the weakest branch of the government, it was also the only branch remaining in the hands of Jefferson and the Republican's rival, the Federalists.<sup>92</sup> Marshall wanted to build the power of the judiciary so as to put it on equal footing with the other branches of the government.<sup>93</sup> "He saw the termination of seriatim opinions as one step toward achieving that goal."<sup>94</sup> Ultimately, Marshall and the Federalists won this battle, and in so doing, "buil[t] much of what we recognize as the American legal system."<sup>95</sup> But was this the correct action?

Jefferson's praise of the practice of seriatim opinions is enlightening in this regard. Jefferson saw the practice of seriatim opinions as the correct approach for four reasons:

- (1) it increased transparency and led to more accountability,
- (2) it showed that each judge had considered and understood the case,
- (3) it gave more or less weight to a precedent based on the vote of the judges,
- (4) and it allowed judges in the future to overrule bad law based on the reasoning of their predecessors.<sup>96</sup>

These reasons for his belief in seriatim opinions mirrored his fears of allowing the Court to issue one unified opinion.<sup>97</sup>

He was worried about insulating judges from criticism and hiding behind an opinion.<sup>98</sup> He was worried about judges avoiding difficult cases, acknowledging that forcing a judge to draft an opinion proved that, to at least some degree, the judge had considered the case and reasoned it through.<sup>99</sup> He was worried that all rulings would be given the same weight through precedent, regardless of the "votes" of the judges.<sup>100</sup> And lastly, he

92. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 3, at 780.

93. *Id.*

94. *Id.*

95. Henderson, *supra* note 80, at 305.

96. *Id.*

97. *See id.* at 306-07.

98. *See id.*

99. *See id.*

100. *See* Henderson, *supra* note 80, at 306-07. Precedent is important, but in order for it to be given proper weight, the soundness of decisions must be called into question. Is it not a valid point that the number of judges deciding in a particular fashion has a direct impact on how sound that ruling is and how much support it had, and thus, should receive? As one social anthropologist has put it:

Regularity is what law in the legal sense has in common with law in the scientific sense. Regularity, it must be warned, does

was worried about “bad law” having more authority and being more difficult to overcome.<sup>101</sup>

While the Court no longer speaks with only one unanimous opinion all of the time,<sup>102</sup> and has rather become “a hybrid, in which an opinion of a majority of the [C]ourt is issued, but judges” can still choose to issue a separate opinion,<sup>103</sup> are these not still valid concerns? A look at the practice of separate opinions still in effect in England today sheds light on the fact that not all people have dismissed Jefferson’s concerns, and could help to show that not only are seriatim opinions a good practice, but that the Law of Citations was not far off of the mark.

#### IV. ENGLAND AND THE CONTINUED PRACTICE OF SEPARATE OPINIONS

The Supreme Court of the United States is not the only court to have dealt with the idea of seriatim opinions, far from it in fact. As stated previously, the idea of seriatim opinions was not a novel one. It was, in fact, borrowed from the legal traditions our founding fathers were most familiar with, those of England.<sup>104</sup> While this practice has been done away with in the United States, or at least changed into what Henderson coined a “hybrid,”<sup>105</sup> the “practice of issuing separate or ‘seriatim’ opinions remains common in England today.”<sup>106</sup>

For nearly the entirety of the history of the courts of England, the use of seriatim opinions has pervaded.<sup>107</sup> While these were not always written

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not mean absolute certainty. There can be no true certainty where human beings enter. . . . In law, the doctrine of precedent is not the unique possession of the Anglo-American common-law jurist . . . . [P]rimitive law also builds on precedents, for there, too, new decisions rest on old rules of law or norms of custom, and new decisions which are sound tend to supply the foundations of future action.

E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 28 (1954).

101. See Henderson, *supra* note 80, at 306-07. Jefferson noted that in England there were occasions “in which decisions had occasionally been overruled based on ‘dissents’ in previous seriatim opinions.” *Id.* This exact idea will be discussed later. See *infra* Part VI.B.

102. For instance, in the first year of the Court after Chief Justice Roberts received his appointment, fifty-four percent of all decisions rendered were unanimous. Jeffrey Rosen, *Roberts’s Rules*, *THE ATLANTIC*, Jan.-Feb. 2007, available at <http://www.theatlantic.com/magazine/archive/2007/01/roberts-apos-s-rules/5559/>.

103. Henderson, *supra* note 80, at 292.

104. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra* note 3, at 779-80.

105. Henderson, *supra* note 80, at 292.

106. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra* note 3, at 780.

107. Henderson, *supra* note 80, at 292-303.

opinions, especially since opinions were not published until the early seventeenth century, these separate opinions were often “delivered orally by each judge . . . without any prior intracourt consultation.”<sup>108</sup>

However, William Murray, better known as “Lord Mansfield,”<sup>109</sup> did away with this practice in 1756.<sup>110</sup> Lord Mansfield began the practice of the court meeting in private, coming to one decision, and then authoring and delivering a unanimous opinion.<sup>111</sup> Lord Mansfield was attempting to align England with the practices in other countries, specifically with regards to commercial law.<sup>112</sup>

Unfortunately for Lord Mansfield, this practice was short-lived, and upon his retirement, judges returned to issuing seriatim opinions.<sup>113</sup> This decision was made by Lord Kenyon, a firm believer in traditional common law approaches and a man who preferred to decide cases on a factual basis, case-by-case, as opposed to relying upon “broad legal rules.”<sup>114</sup>

This practice is still in effect in England today by all except the Law Lords “who serve as the Supreme Court of Great Britain in some cases . . . .”<sup>115</sup> The preservation of seriatim opinions in England today serves as a shining example of what Jefferson believed to be the greatest check on the Supreme Court of the United States.<sup>116</sup>

If England still recognizes the power and benefits of seriatim opinions, then perhaps this helps to prove that the Law of Citations and the early Supreme Court were not far off the mark. But this alone is not proof enough. The Supreme Court of the United States and its practices must be looked to in order to validate the “low point of Roman jurisprudence . . . .”<sup>117</sup> But first, a look at modern thoughts on individual opinions could be helpful, and for that, this Comment turns to the opinions of the current Chief Justice of the Supreme Court, John Roberts.

## V. CHIEF JUSTICE ROBERTS AND HIS THOUGHTS ON MULTIPLE OPINIONS

Upon his ascension to Chief Justice of the Supreme Court, John Roberts “stated that one of his top priorities was to reduce the number of dis-

108. *Id.* at 292.

109. *Id.* at 294.

110. *Id.* This was the year that Lord Mansfield was appointed to the position of Lord Chief Justice of the King’s Bench. *Id.*

111. *Id.*

112. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 133 (3rd ed. 2005).

113. Henderson, *supra* note 80, at 302.

114. *Id.* at 303.

115. *Id.* at 303 n.90.

116. *Id.* at 305-07.

117. WATSON, *supra* note 4, at 90-91 (footnote omitted).

senting opinions issued by members of the Court.”<sup>118</sup> It is Chief Justice Roberts’s opinion that the Court speaking with one voice is more respected, stabilizes the law, and makes decisions harder to overturn.<sup>119</sup>

Not surprisingly, Chief Justice Roberts looks to Chief Justice Marshall to find support for a unified Court, brushing off Jefferson as a philosopher and academic.<sup>120</sup> “If the Court in Marshall’s era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have . . . .”<sup>121</sup> This is entirely true. Chief Justice Marshall changed the face of the judiciary, but was it, as Chief Justice Roberts believes, for the better?

Chief Justice Roberts has also attempted to discourage his fellow justices from issuing separate opinions in his effort to unify the Court.<sup>122</sup> Chief Justice Roberts has noted that during Chief Justice Marshall’s tenure there were not a lot of concurring or dissenting opinions, something that is not true with today’s Court.<sup>123</sup> It is Chief Justice Roberts’s opinion that if the Court could avoid nine separate opinions, there would be “a commitment on the part of the Court to [act] as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record.”<sup>124</sup>

But Chief Justice Roberts misses the mark. He brushes off the concerns of Jefferson; in fact, he advocates for the Court’s decisions to be more difficult to overturn, which is the exact opposite of one of Jefferson’s concerns.<sup>125</sup> But the decisions of the Supreme Court are not static; they are subject to change and the ever-evolving state of society in the United States.

As such, insisting on a unified view for the Court, especially when it would make it more difficult for constitutional law to evolve, ignores a fundamental aspect of existence—change—and society’s ability to adapt to it. In support of this idea, and to show the importance of additional rationales and separate opinions, examples of important concurrences and dissents must be considered.

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118. Henderson, *supra* note 80, at 283.

119. See Rosen, *supra* note 102.

120. *Id.*

121. *Id.* at 105.

122. *Id.*

123. *Id.*

124. Rosen, *supra* note 102, at 106.

125. *Id.* at 105.

## VI. THE IMPORTANCE OF ADDITIONAL RATIONALES

### A. EXAMPLES OF IMPORTANT HISTORICAL CONCURRENCES

One important concurrence in Supreme Court history can be found in the case *Katz v. United States*,<sup>126</sup> which was authored by Justice Harlan.<sup>127</sup> In *Katz*, the majority of the Court rejected the concept that for a search to occur there must be a physical intrusion, noting rather, that the “Fourth Amendment protects people, not places.”<sup>128</sup> However, it was Justice Harlan who formulated the current Fourth Amendment framework when it comes to unlawful searches and the reasonable expectation of privacy.<sup>129</sup> Harlan articulated the test thusly: “[It is] [m]y understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>130</sup> This concurrence is important because it was the first to articulate a test and describe the Fourth Amendment’s concern with privacy outside the context of property interests.<sup>131</sup>

Perhaps the most important concurrence of all time is that of Justice Brandeis in the case of *Whitney v. California*.<sup>132</sup> In *Whitney*, by a 9-0 vote, the majority upheld a conviction for violation of the Criminal Syndicalism Act of California, giving a great deal of deference to the legislature and concluding that there was no need for any imminence in harm.<sup>133</sup> While his opinion concurs with the majority, Justice Brandeis’s opinion sounds very close to a dissenting opinion. The only reason it appears to be a concurrence is because the majority did not contend that there was a clear and present danger.<sup>134</sup> The test that Justice Brandeis seems to employ is that of a “clear and present danger,” however, he puts an interesting spin on it.<sup>135</sup> In essence, Justice Brandeis opines that the response to evil speech is more speech, or counter speech, and that no danger flowing from speech can be

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126. 389 U.S. 347 (1967).

127. *Id.* at 360-62 (Harlan, J., concurring).

128. *Id.* at 351-53 (majority opinion).

129. Aubrey H. Brown III, Note, *Georgia v. Randolph, The Red-Headed Stepchild of an Ugly Family: Why Third-Party Consent Search Doctrine is an Unfortunate Fourth Amendment Development that Should be Restrained*, 18 WM. & MARY BILL RTS. J. 471, 491 (2009).

130. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

131. Brown, *supra* note 129, at 487.

132. 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

133. *See Whitney*, 274 U.S. at 366-72 (majority opinion).

134. *See id.* at 374 (Brandeis, J., concurring).

135. *See id.*

considered clear and present if there is full opportunity for discussion.<sup>136</sup> Thus, in order for speech to be unprotected, the harm flowing from such speech must not only be highly probable, but also highly imminent.<sup>137</sup>

This concurrence is very important and has been viewed as one of the most speech protective opinions ever written and still guides First Amendment jurisprudence to this day.<sup>138</sup> In fact, there are those that consider this concurrence to be “the most important essay ever written, on or off the bench, on the meaning of the [F]irst [A]mendment.”<sup>139</sup>

#### B. EXAMPLES OF IMPORTANT HISTORICAL DISSENTS

Two important historical dissents can be found in *Bowers v. Hardwick*.<sup>140</sup> In *Bowers*, the majority held that the United States Constitution does not confer a right to engage in homosexual sodomy,<sup>141</sup> a narrow definition of the issue at hand. Justice Blackmun’s dissenting opinion attacks the majority’s narrow interpretation of the issue.<sup>142</sup> In Justice Blackmun’s view, “this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”<sup>143</sup> In light of this, Justice Blackmun stated,

I can only hope that . . . the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.<sup>144</sup>

Justice Stevens followed this dissent with a dissent of his own, noting in large part that prior cases had laid out two clear principles: (1) that a state viewing a practice as immoral is not enough to uphold a statute passed by that state, and (2) that decisions concerning intimate relationships made by both married and unmarried people constitute liberty and are protected under the Constitution.<sup>145</sup>

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136. *See id.* at 375.

137. *Id.*

138. *See, e.g.,* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

139. *Id.* at 668.

140. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

141. *Bowers*, 478 U.S. 186, at 190.

142. *Id.* at 199 (Blackmun, J., dissenting).

143. *Id.* (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

144. *Id.* at 214 (Blackmun, J., dissenting).

145. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).



Less than twenty years after *Bowers v. Hardwick*, the Supreme Court explicitly overruled that prior decision in the case of *Lawrence v. Texas*.<sup>146</sup> In *Lawrence*, the majority held that the Court in *Bowers* construed the issue too narrowly, and noted that not only was the majority's viewpoint a "misapprehen[sion] [of] the liberty claim presented to it,"<sup>147</sup> but society had also changed.<sup>148</sup> The Court went on to state that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."<sup>149</sup> These dissents from *Bowers* are important because they show that both societal views and jurisprudence can change, thus changing the laws of the United States, and a dissenting opinion by a Justice, foreshadowing or facilitating those changes, can provide guidance to the Court today.

Dissenting opinions can also foreshadow future legislation and rule-making. Such a dissent can be seen as far back as in the case of *Dred Scott v. Sandford*.<sup>150</sup> In *Dred Scott*, the majority held that black men were not considered citizens within the meaning of the Constitution and, as such, were not afforded any of the rights that citizens enjoyed, including the ability to sue in federal court.<sup>151</sup> Thus, the Supreme Court ruled that it did not have jurisdiction.<sup>152</sup> Despite this finding, the majority ruled on the merits of the case anyway, concluding that Congress could not prohibit citizens from owning slaves.<sup>153</sup>

Two justices dissented from this opinion, Justices McLean<sup>154</sup> and Curtis.<sup>155</sup> Both Justices criticized the majority for passing judgment on the case after determining that there was no jurisdiction.<sup>156</sup> Justice McLean went on to argue that there was no constitutional basis for which to find that black men were not citizens.<sup>157</sup> He reasoned that since women and minors could sue in federal court, despite not having the right to vote, so too could anyone who was permanently domiciled in a state "under whose laws his rights

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

147. *Id.* at 559.

148. *Id.* ("The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States, including Texas, that still proscribe sodomy (whether for same-sex or heterosexual conduct), there is a pattern of nonenforcement with respect to consenting adults acting in private.")

149. *Id.* at 578.

150. 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amends. XIII & XIV.

151. *Id.* at 422-23.

152. *Id.* at 427.

153. *Id.* at 452-54.

154. *See id.* at 529-64 (McLean, J., dissenting).

155. *See Dred Scott*, 60 U.S. at 564-633 (Curtis, J., dissenting).

156. *See id.* at 529-633 (McLean, J., and Curtis, J., dissenting).

157. *See id.* at 532 (McLean, J., dissenting).

[were] protected, and to which he owe[d] allegiance.”<sup>158</sup> It is Justice Curtis’s dissent however, that has been most remembered from this case, possibly because of its length—a sizable seventy pages—but even more likely because of political reasons.<sup>159</sup> Regardless of the reasons Justice Curtis’s dissent is better known, therein, Justice Curtis argued that Scott was a free man and citizen of the United States because “free native-born citizens of each State are citizens of the United States.”<sup>160</sup> He then went on to argue that “free colored persons born within some of the States are citizens of those States, [therefore,] such persons are also citizens of the United States.”<sup>161</sup>

While these dissents were not adopted by a later Court, they were vindicated—at least as to the issue of citizenship for black men—when the majority decision was superseded by the Thirteenth<sup>162</sup> and Fourteenth<sup>163</sup> Amendments to the United States Constitution. The amendments were ratified in 1865<sup>164</sup> and 1868,<sup>165</sup> less than fifteen years after the decision in *Dred Scott*.<sup>166</sup> As such these dissents foreshadowed and displayed the changing political and social climate in the United States, making them incredibly important from a historical context.

## VII. CONCLUSION

In conclusion, perhaps the ancient Romans were not as far off the mark as many believe when they created the Law of Citations. Additionally, perhaps the Supreme Court of the United States—with the relatively

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158. *Id.* at 530-31.

159. As one author has put it:

The Curtis dissent was reprinted and distributed throughout the North during the election campaigns from 1857 until the presidential election of 1860. Curtis was not known to be antislavery; indeed, he was considered to be a proslavery doughface. His political ties were to the conservative Boston merchants, known as “Cotton Whigs,” who were deeply interested in a steady source of cotton for their factories and utterly unconcerned about the nature of the labor that produced the cotton. Thus, Curtis’s vigorous assault on Taney’s opinion was a welcome surprise to Republicans and other opponents of slavery.

Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 *VAND. L. REV.* 519, 561-62 (2009) (footnotes omitted).

160. *Dred Scott*, 60 U.S. at 588 (Curtis, J., dissenting).

161. *Id.* at 588.

162. U.S. CONST. amend. XIII.

163. U.S. CONST. amend. XIV.

164. U.S. CONST. amend. XIII.

165. U.S. CONST. amend. XIV.

166. *Dred Scott*, 60 U.S. 393.

recent dramatic increase in the number of concurring and dissenting opinions being penned—is also on the right track. Specifically, for the Law of Citations, the workings of five very well-respected jurists were relied upon in a majority-rules fashion, a method that left room for debate. The fact that the Law of Citations may not have been as bad as many have thought can also be seen with the issuance of seriatim opinions, a practice that was halted early in the life of the United States Supreme Court. However, the recent rise in separate opinions, the importance of historical dissents and concurrences, and the continued existence of seriatim opinions in England show that the early Supreme Court and the ancient Romans were, quite possibly, visionaries, seeing the need for multiple opinions and viewpoints. It is also likely that these same factors act as a counter to the recent comments made by Chief Justice John Roberts with regards to doing away with, or at least strongly limiting, the issuance of separate opinions. As such, opinions on the Law of Citations and seriatim opinions should be revisited in an attempt to see that these early legal minds were visionaries, way ahead of their time.