WHO JOINED THAT? *** CONCLUSIONS AND UNLABELED INTRODUCTIONS IN SUPREME COURT OPINIONS

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One of the most famous Supreme Court quotes from the Chief Justice Roberts era is his quip at the end of Parents Involved v. Seattle School District*: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." This pithy statement, perfectly capturing the Roberts Court's turn in affirmative action cases to race-blind, anti-classification theory, is familiar to almost everyone who has studied modern constitutional law. But here is a quiz for you: is this quote from a majority opinion of the Court, a plurality opinion, or an individual opinion of the Chief Justice?*

*The answer, surprisingly, is impossible to find in the Court's main opinion because this statement appears in the *** conclusion section of the opinion, a section that the Court never identifies who joins. The *** conclusion has become a common feature of Supreme Court opinions, but this Article shows that the Court's failure to identify who joins these conclusions creates confusion for courts, scholars, lawyers, law review editors, and anyone else consuming or using Supreme Court opinions. The stakes here can be high. For example, disagreement over the precedential weight of this part of* Parents Involved *could play an important role in the Harvard admissions case,* Students for Fair Admissions v. President & Fellows of Harvard College, *that the Supreme Court will decide next Term. The same considerations are at play with unlabeled introductions of Supreme Court opinions, which also fail to include information about who joins.*

*In an attempt to sort out this confusion, this Article walks through the complexities of Supreme Court opinions' *** conclusions and unlabeled introductions, attempts to solve*

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* Professor of Law, Drexel University Thomas R. Kline School of Law. Thank you to Leah Litman, Maxwell Stearns, Nina Varsava, and participants in the Maryland Carey Law Virtual Constitutional Law and Economics Workshop for insightful comments and discussion on this topic and Article. Thanks also to Lindsay Steussy for her helpful research.

*the puzzle of determining which Justices join these sections, and concludes ultimately that the only solution to the confusion described in this Article is for the Supreme Court to change its practice. The Court must either stop using *** conclusions and unlabeled introductions altogether or separately indicate who joins them in the opinion's opening joining statement. Anything less will continue the mistakes and confusion these sections currently create.*

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INTRODUCTION

One of the most famous Supreme Court quotes from the Chief Justice Roberts era is his quip at the end of *Parents Involved v. Seattle School District*[1]: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[2] This pithy statement, perfectly capturing the Roberts Court's turn in affirmative action cases to race-blind, anti-classification theory, is familiar to almost everyone who has studied modern constitutional law. But here is a seemingly simple quiz for you about this quote:

1. 551 U.S. 701 (2007).

2. *Id.* at 748 (*** conclusion). The footnotes throughout this Article will use this convention to denote the *** conclusion of an opinion. Given the argument in this Article, any other way of citing to this section would be confusing and possibly wrong.

Is this statement from:

(A) An opinion of the Court written by the Chief Justice, joined by four other Justices

(B) A plurality opinion written by the Chief Justice, joined by only three other Justices

(C) An opinion written by the Chief Justice for himself alone

(D) Part of the opinion written by no one

Any good student of the Supreme Court will respond immediately that the answer can be found in the statement at the beginning of the opinion indicating which parts of the opinion each Justice has joined (what I call throughout this Article "the joining statement"). In *Parents Involved*, the Chief Justice's opinion begins with the following:

> Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B and IV, in which Justice SCALIA, Justice THOMAS, and Justice ALITO join.[3]

Broken down, this statement differentiates the majority opinion of the Court (Parts I, II, III–A, and III–C) from the plurality opinion of Chief Justice Roberts and three others (Parts III–B and IV). With this detailed guide beginning the opinion, answering the quiz above seems like it should be an easy task: find the header for the section that contains the quote, match it against the joining statement, and then you have your answer.

Of course, it is not that simple. A Ctrl-F search reveals that this quote comes at the very end of the Chief Justice's opinion, right before the paragraph stating the judgment of the Court.[4] The statement appears at the end of four long paragraphs about the legacy of *Brown v. Board of Education*[5] that, when you scroll to the top of the section, are separated from the rest of the opinion not by any of the standard Roman numeral outline headers that form the basis of the joining statement but rather by a different header: ***.

Returning to the quiz, the answers highlight that these three asterisks create confusion with no easy solution. In fact, it is not hard to formulate a reasonable argument to support each of the quiz options:

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3. *Id.* at 708.
4. *Id.* at 748 (*** conclusion).
5. 347 U.S. 483 (1954).

(A) *An opinion of the Court written by the Chief Justice, joined by four other Justices*. The *** conclusion that contains the quote ends with the Court's judgment: "The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings."[6] The joining statement that starts the Chief Justice's opinion indicates that this judgment is the "judgment of the Court," which means it has majority support (Justices Roberts, Scalia, Kennedy, Thomas, and Alito).[7] If the entire section where the judgment sentence is contained constitutes the judgment of the Court, then that means it is a statement of five Justices, and thus part of the majority opinion of the Court.

(B) *A plurality opinion written by the Chief Justice, joined by only three other Justices*. But perhaps what matters is that the *** conclusion appears immediately following Part IV of the Chief Justice's opinion. According to the joining statement, Part IV is joined by only Justices Scalia, Thomas, and Alito (not Kennedy).[8] If the quote is part of a section that is a triple-asterisk-introduced appendage of Part IV, then it is part of a Court plurality opinion, not a Court majority. Perhaps an alternative explanation also gets us to the plurality answer. The *** conclusion recaps the entire opinion, and only four Justices join the entire opinion, so the *** conclusion is from only those four Justices, not a Court majority.

(C) *An opinion written by the Chief Justice for himself alone*. This third option comes from a close reading of the joining statement. That statement is very careful about which parts of the Chief Justice's opinion the different Justices joined. The statement indicates that Parts I, II, III–A, and III–C were authored by Chief Justice Roberts and constitute an "opinion of the Court," which means they were joined by the Justices who did not dissent—Scalia, Kennedy, Thomas, and Alito.[9] Parts III–B and IV were authored by Chief Justice Roberts and joined only by Justices Scalia, Thomas, and Alito.[10] The joining statement says nothing about the opinion in its entirety or about the *** conclusion specifically, thus indicating that no other Justice joined the *** conclusion.[11] Under this reading, the statement is part of a section that is merely a concluding statement by the Chief Justice alone.

(D) *Part of the opinion written by no one*. This sounds absurd, but if we want to get technical, there is no indication in the joining statement of who even authored the *** conclusion. The joining statement mentions two parts authored by the Chief Justice: (1) "the opinion of the Court with respect to Parts I, II, III–A, and III–C," and

6. *Parents Involved*, 551 U.S. at 748 (*** conclusion).
7. *Id.* at 708.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

(2) "an opinion with respect to Parts III–B and IV, in which Justice SCALIA, Justice THOMAS, and Justice ALITO join."[12] The joining statement is silent as to who wrote anything else in the opinion. Thus, the *** conclusion has no author.[13]

Even though three of these options are plausible answers (option D is absurd), this quiz *does* have an actual answer: (B). The statement in *Parents Involved* is from a plurality opinion (as this Article will explain). That solution, however, is not apparent from the joining statement and is only clear after digging into the separate opinions in the case. This search rewards close and complete reading, but it is contrary to the reasoning behind how modern Supreme Court opinions are written—with joining statements that are supposed to clearly identify for the reader which parts of the opinion are joined by which Justices.

The *** conclusion has become a common feature of Supreme Court opinions, but this Article shows that it creates confusion for courts, scholars, lawyers, law review editors, and anyone else consuming or using Supreme Court opinions. Importantly, this confusion is not merely a matter of cocktail-party trivia for the detail-obsessed Court fanatic. Rather, it matters in serious ways. When lawyers or judges need to describe the precedential value of statements from the Supreme Court, they need to know if statements in *** conclusions are part of a binding Court majority, a persuasive Court plurality, or a singular Justice's musings. The stakes here can be high. For example, disagreement over the precedential weight of this part of *Parents Involved* could play a decisive role in the Harvard admissions case, *Students for Fair Admissions v. President & Fellows of Harvard College*, that the Supreme Court will decide next Term.[14]

Deciphering the *** conclusion matters in other ways too. Scholars trying to assess the jurisprudential legacy of individual Supreme Court Justices often need to know exactly which statements that Justice has supported during their career, something *** conclusions make difficult to discern. Additionally, student law review editors and others who write about Supreme Court decisions want to be as accurate as possible in their citations (though admittedly the stakes here are somewhat lower).

Although much of this Article concerns *** conclusions in Supreme Court opinions, the same confusion is often present in opinion introductory sections. Take the Court's 2020 decision in *Seila Law LLC. v. Consumer Financial Protection Bureau.*[15] Chief Justice Roberts wrote the main opinion and started it with five paragraphs

12. *Id.*
13. *See* discussion *infra* note 102.
14. *See* discussion *infra* Part II.
15. 140 S. Ct. 2183 (2020).

introducing the case that were not preceded by any section header.[16] The first paragraph sketches the structure of the new consumer protection agency Congress created in 2008.[17] The next two paragraphs then review basic separation of powers precedent relevant to the case, and the final two paragraphs frame the issue and give a short answer.[18]

Seila Law's unlabeled introduction is standard fare for Supreme Court opinions, but it creates the same problems as *Parents Involved*'s *** conclusion because there is no indication as to which Justices joined this introduction. The joining statement in the case is simpler than *Parents Involved*'s:

> CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III."[19] The syllabus's joining statement provides more detail, adding that Chief Justice Roberts wrote "an opinion with respect to IV, in which ALITO and KAVANAUGH, JJ., joined.[20]

These joining statements share an important feature—they ignore the unlabeled introduction (as well as the *** conclusion). Thus, if they are read literally, no Justice joined the Chief Justice's introduction because the joining statement refers to the other Justices joining only Roman numeral parts, of which the introduction is not. But it would be odd to think of an introduction to the Court's main opinion as being from one Justice alone.[21] Unlabeled introductions thus create the same confusion as *** conclusions.

To sort out this confusion, this Article walks through the complexities of Supreme Court opinion *** conclusions and unlabeled introductions, attempts to solve the puzzle of determining which Justices join these sections, and concludes ultimately that the only solution to such confusion is for the Supreme Court to change its practice. The Court must either stop using *** conclusions and unlabeled introductions altogether or separately indicate who joins them in the joining statement. Anything less will continue the mistakes and confusion these sections currently create.

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16. *Id.* at 2191–92 (introduction). As with the *** conclusions, the best way to cite the introduction is using this convention because, as this Article explains, it is not clear who else joined it. *See supra* note 2 and accompanying text.

17. *Seila Law*, 140 S. Ct. at 2191 (introduction).

18. *Id.* at 2191–92.

19. *Id.* at 2191.

20. *Id.* at 2190 (syllabus). The joining statement in the syllabus also fails to mention the introduction, as it repeats the opinion's joining statement and adds merely "an opinion with respect to Part IV, in which ALITO and KAVANAUGH, JJ., joined." *Id.*

21. It would also call into question the Westlaw headnotes that appear for the two substantive paragraphs of the introduction, as headnotes usually do not appear in nonmajority sections of opinions.

I. SUPREME COURT OUTLINE-STYLE FORMATTING

*** conclusions and unlabeled introductions are an outgrowth of the Supreme Court's almost century-old custom of using outline-style formatting to divide opinions.[22] This now-familiar way to separate opinion sections first appeared in 1926 when Justice McReynolds used Roman numerals to divide the eighteen parts of his dissenting opinion in *Myers v. United States*.[23] Later that same year, Justice McReynolds first employed this convention in a majority opinion, using Roman numerals to separate out the resolution of three different suits brought by the Federal Trade Commission in *FTC v. Western Meat Co*.[24] The practice did not immediately catch on with the rest of the Court, but according to the definitive (and only) history of this practice, "by the mid-1940s the centered Roman numeral had clearly become the Court's favored device for dividing opinions into parts."[25] The practice appears to have originated to make increasingly lengthy Supreme Court opinions readable by dividing them into more-easily digestible and logically organized chunks.[26]

It was not until 1971, however, that Justices regularly took advantage of this formatting convention to assist the reader in understanding which Justices agree with which parts of the opinion.[27] Prior to 1971, Justices usually indicated they joined parts of main opinions by substantively describing the parts with which they agreed.[28] In 1971, the Court introduced a new feature of opinions by including its first joining statement.[29] This new statement at the beginning of the Court's main opinion indicated the vote breakdown based on the Roman numeral parts within the opinion.[30] In *Gillette v. United States*,[31] after the syllabus but before the counsel listing, the Court included this type of note for the first time:

> MARSHALL, J., delivered the opinion of the Court, in which BURGER, C.J., and HARLAN, BRENNAN, STEWART, WHITE, and BLACKMUN, J.J., joined. BLACK, J., concurred

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22. Not every Justice uses outline-style formatting all of the time. Justices Gorsuch and Kavanaugh sometimes write opinions by stringing together sections separated by asterisks, with Justice Gorsuch repeatedly breaking up sections with a single asterisk. *See, e.g.*, Opati v. Republic of Sudan, 140 S. Ct. 1601, 1604–10 (2020). Justice Kavanaugh does the same but with three asterisks. *See, e.g.*, Greer v. United States, 141 S. Ct. 2090, 2095–2101 (2021).

23. 272 U.S. 52, 178–239 (1926) (McReynolds, J., dissenting).

24. 272 U.S. 554 (1926).

25. B. Rudolph Delson, Note, *Typography in the* U.S. Reports *and Supreme Court Voting Protocols*, 76 N.Y.U. L. REV. 1203, 1209 (2001).

26. *Id.* at 1214 n.69.

27. *See id.* at 1212–13.

28. *Id.* at 1225–26.

29. *Id.* at 1207 n.19.

30. *Id.*

31. 401 U.S. 437 (1971).

> in the judgment and in Part I of the Court's opinion. DOUGLAS, J., filed dissenting opinions, post, p. 463 and p. 470.[32]

This section of the Court's opinion, drafted by the Court's reporter of opinions and not the Justices themselves, began "in the spirit of helping the press and the public better understand the Court's decisions."[33]

Although outline-style formatting was not initially created to allow Justices to join different parts of opinions, it emerged as an important way to facilitate the practice. As the study on the history of this practice concludes, "it seems likely that the Court eventually came to recognize the strategic utility of outline-style formatting, and that strategic motivations—like the desire to coordinate better the Justices' voting—now play a substantial role in its continuing use. [D]espite its apparently stylistic origins, outline-style formatting is now central to the voting protocols of the Court."[34]

*A. *** Conclusions*

Outline-style formatting was common among the Justices for decades before the first *** conclusion appeared. Innovation of the *** conclusion was brought to the Court by Justice Antonin Scalia. Prior to his joining the Court in 1986, there are no reported Supreme Court decisions that used *** as part of the outline-style formatting.[35]

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32. *Id.* at 438. Confusingly, while this statement does appear in the official U.S. Reports version of the case, it does not appear in the Supreme Court Reporter version of this case, 91 S. Ct. 828, 830 (1971), nor on the Westlaw version. Delson determined this was the first instance of such a joining statement. Delson, *supra* note 25, at 1207 n.19.

33. Delson, *supra* note 25, at 1207 nn.18–19.

34. *Id.* at 1214–15.

35. Searching for *** conclusions is unnecessarily difficult, if not impossible. Westlaw and Lexis do not allow a search to include an asterisk. FindLaw does, but FindLaw's search function lacks the sophistication and ease-of-use of the fee databases. Moreover, the various services have inaccuracies surrounding the *** header in the digitalized versions of cases. Some cases, particularly older ones, use *** in the digitized version of the case where the published opinion has a standard ellipses. *Compare, e.g.*, Am. Fed'n of Lab. v. Am. Sash & Door Co., 335 U.S. 538, 558 n.1 (1949) (Rutledge, J., concurring) (using standard ellipses to introduce and end quoted language), *with* Am. Fed'n of Lab. v. Am. Sash & Door Co., 335 U.S. 538, 558 n.1 (1949) (Rutledge, J., concurring), https://caselaw.findlaw.com/us-supreme-court/335/538.html (last visited Feb. 12, 2022) (using "***" instead of an ellipses to introduce and end the same quoted language in the FindLaw version), *and* Am. Fed'n of Lab. v. Am. Sash & Door Co., 335 U.S. 538, 558 n.1 (1949) (Rutledge, J., concurring) (using "***" instead of an ellipses to introduce and end the same quoted language in the Westlaw version). Other cases have an unexplained "3" in the digitized version in place of the *** in the published version. *Compare, e.g.*, *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) ("***" separating the last two paragraphs of the opinion),

Justice Scalia broke this new ground with his 1987 concurring opinion in *Rose v. Rose*.[36] In that case, he wrote a three-part opinion for himself explaining his disagreement with the majority's reasoning.[37] He separated each section of his concurrence with a Roman numeral but then ended the opinion with a *** header separating out his concluding paragraph.[38] Later in 1987, Justice Scalia first used a *** conclusion in a majority opinion in *Langley v. Federal Deposit Insurance Corporation*.[39] Over the next three years, only Justice Scalia used *** conclusions, using them several times per term.[40]

In 1990, the use of the *** conclusion finally spread to the other Justices. Chief Justice Rehnquist was the first to adopt Justice Scalia's style innovation in his opinion for the Court in *Whitmore v. Arkansas*.[41] Chief Justice Rehnquist used the *** conclusion for two paragraphs at the end of his multi-part majority opinion.[42] Later in 1990, Justice Stevens adopted this practice with his opinion in *Hodgson v. Minnesota*.[43] Justice Stevens's opinion uses outline-style formatting to separate the parts of his opinion that are the opinion of the Court, an opinion with Justice Brennan, an opinion with Justice O'Connor, and a dissenting opinion for himself.[44] At the end of this complicated mix of opinions and alliances, Justice Stevens uses the *** to finish his opinion. Since 1990, almost every Justice on the Court has used the *** at times to separate out the end of an opinion.[45]

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overruled by Roper v. Simmons, 543 U.S. 551 (2005), *with id.* at 380 (1989) (noting "3" separating the last two paragraphs of the opinion in the Westlaw version) (last visited Dec. 13, 2021). The research that supports this Article used these different databases with their limitations and inaccuracies, which means there is a risk of incompleteness. However, the basic point of this Article—that the Supreme Court's use of *** creates unnecessary confusion that can be easily fixed—does not change if there may be a small number of undiscovered cases in the past that use *** in the way analyzed in this Article.

36. 481 U.S. 619 (1987) (Scalia, J., concurring).

37. *Id.* at 640–44.

38. *Id.*

39. 484 U.S. 86 (1987); *id.* at 96.

40. To the best of my research abilities, see *supra* note 35, it appears Justice Scalia did *not* use the *** conclusion as then-Judge Scalia on the U.S. Court of Appeals for the D.C. Circuit. He did use outline-style formatting at times but never ended an opinion with a *** conclusion. Thus, his innovative use of this style came upon his being elevated to the Supreme Court.

41. 495 U.S. 149 (1990).

42. *Id.* at 166.

43. 497 U.S. 417, 458 (1990).

44. *Id.* at 420–21.

45. Justice Gorsuch seems to be an outlier in that he almost always uses a single * to divide the last part of his opinions, rather than ***. *See, e.g.*, Nat'l Collegiate Athletic Ass'n. v. Alston, 141 S. Ct. 2141, 2166 (2021). However, in the only two shifting majority/plurality opinions written by Justice Gorsuch during his time on the Supreme Court, he concludes with a *** divider in one, Currier v.

The *** conclusion can serve one of three different functions. At its most uninteresting, the *** conclusion separates a multipart opinion from the Court's judgment. For instance, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[46] the joint opinion of Justices O'Connor, Kennedy, and Souter ends with a Part VI that includes one flowery paragraph concluding the complex reasoning that upholds *Roe v. Wade*[47] but changes the analytical standard to allow for more abortion restrictions.[48] The *** conclusion follows this paragraph and blandly states the judgment of the Court: "The judgment in No. 91-902 is affirmed. The judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion, including consideration of the question of severability. *It is so ordered.*"[49] Many opinions that end with *** conclusions contain much less complicated judgments, similar to Justice Alito's *** conclusion in *American Legion v. American Humanist Association*[50] in 2019: "We reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the cases for further proceedings. *It is so ordered.*"[51]

Another function *** conclusions serve is to not only state the judgment of the case but also to summarize its holding. Some of these summaries are barebones, such as Justice Breyer's in *Polar Tankers, Inc. v. City of Valdez*:[52] "We conclude that the tax is unconstitutional."[53] Other summaries give a more substantive holding, like in *Town of Greece v. Galloway*[54] where Justice Kennedy concluded, "[t]he town of Greece does not violate the First

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Virginia, 138 S. Ct. 2144, 2156 (2018), and a Roman numeral divider in the other, Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020).

46. 505 U.S. 833 (1992).

47. 410 U.S. 113 (1973).

48. *Planned Parenthood*, 505 U.S. at 901 ("Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.").

49. *Id.* (*** conclusion).

50. 139 S. Ct. 2067 (2019).

51. *Id.* at 2090 (*** conclusion).

52. 557 U.S. 1 (2009).

53. *Id.* at 16 (*** conclusion). He followed this statement with the judgment: "We reverse the contrary judgment of the Supreme Court of Alaska. And we remand the case for further proceedings. *It is so ordered*." *Id.*

54. 572 U.S. 565 (2014).

Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents."[55]

The *** conclusion's final function is where the trouble at the heart of this Article arises—when *** conclusions go beyond stating the judgment and the simple holding of the case and instead delve into legal analysis that might have value in future cases. For instance, in *McDonald v. City of Chicago*,[56] Justice Alito's *** conclusion restates the holding of the Court's then-most recent Second Amendment decision, explains the importance of stare decisis with respect to the doctrine of incorporation, and then states the holding and judgment of the case at hand.[57] In a way, this is a straightforward and succinct recap of the entire opinion's analysis. Given the complexity, length, and historical detail of the opinion, Justice Alito employs the *** conclusion as a way to distill the various sections of the opinion down to their most basic component parts. He does not use the *** conclusion to introduce any new principles of law but rather to rearticulate previously explained general principles of law in a way that may be useful for others to cite in the future.[58]

These more substantive *** conclusions can sometimes include important discussions of law, policy concerns, and other considerations. For instance, in *Ziglar v. Abbasi*,[59] the Supreme Court faced multiple *Bivens* claims[60] brought by immigrant detainees following the September 11, 2001, terrorist attacks.[61] The claims alleged various forms of abuse, illegal and prolonged detention, and

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55. *Id.* at 591–92 (*** conclusion). He followed this statement with the judgment: "The judgment of the U.S. Court of Appeals for the Second Circuit is reversed. *It is so ordered.*" *Id.* at 592.

56. 561 U.S. 742 (2010).

57. *Id.* at 791 (*** conclusion). The full *** conclusion is as follows:

> In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. *See Duncan*, 391 U.S. at 149 & n.14. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings. It is so ordered.

Id.

58. *See* United States v. Smith, 742 F. Supp. 2d 855, 866 (S.D. W. Va. 2010) (quoting *McDonald*'s *** conclusion).

59. 137 S. Ct. 1843 (2017).

60. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–96, 397 (1971) (holding that Fourth Amendment violations committed by federal government officials can give rise to a private damages action).

61. *Abbasi*, 137 S. Ct. at 1853 (2017).

unlawful strip searches.[62] Writing for the majority that rejected most of these claims but remanded others, Justice Kennedy ended his five-part Roman numeral opinion with a *** conclusion that began by expressing his concern with how the detainees were treated while simultaneously separating this concern from the issue before the Court:

> If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected. The question before the Court, however, is not whether petitioners' alleged conduct was proper, nor whether it gave decent respect to respondents' dignity and well-being, nor whether it was in keeping with the idea of the rule of law that must inspire us even in times of crisis. Instead, the question with respect to the *Bivens* claims is whether to allow an action for money damages in the absence of congressional authorization.[63]

Justice Kennedy followed this introduction to the *** conclusion with four more paragraphs that separated out the various holdings from the case and then stated the Court's judgment.[64]

Justice Kennedy's treatment of *** conclusions in *Ziglar* and Justice Alito's treatment of *** conclusions in *McDonald* are the key to this third type of *** conclusion. These sections go beyond merely restating the holding and judgment of the case; instead, the sections introduce new language that helps conclude the case. This new language can offer a novel or simplified frame for the authoring Justice's complex reasoning, provide additional thoughts about the issue before the Court, and even introduce propositions of law that will get their own Westlaw headnotes.[65] These more substantive ***

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62. *Id.*

63. *Id.* at 1869 (*** conclusion).

64. The full *** conclusion is as follows:

> For the reasons given above, the Court answers that question in the negative as to the detention policy claims. As to the prisoner abuse claim, because the briefs have not concentrated on that issue, the Court remands to allow the Court of Appeals to consider the claim in light of the *Bivens* analysis set forth above. The question with respect to the § 1985(3) claim is whether a reasonable officer in petitioners' position would have known the alleged conduct was an unlawful conspiracy. For the reasons given above, the Court answers that question, too, in the negative. The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect to that claim is vacated, and that case is remanded for further proceedings. *It is so ordered.*

Id.

65. *See, e.g.*, Koon v. United States, 518 U.S. 81, 113 (1996) (*** conclusion) (containing two Westlaw headnotes for the *** conclusion's first paragraph).

conclusions provide language that others citing the case may want to use to support future arguments.[66]

B. Unlabeled Introductions

Unlabeled introductions are much more common than *** conclusions. In fact, my review of the Court's 2019–2020 Term reveals that every lead opinion that used outline-style formatting begins with an unlabeled introduction.

Unlabeled introductions are almost as old as outline-style formatting itself. Justice McReynolds did not use one in his first outline-style formatted majority opinion, opting to start the opinion with the section labeled with Roman numeral I.[67] Two years later, though, in 1928, Justice Stone was the first Justice apart from Justice McReynolds to use outline-style formatting, and he did so with an unlabeled introductory section.[68] As outline-style formatting became more commonplace in the 1930s and 1940s, unlabeled introductions began appearing regularly as well.[69] Today, it would be odd for a Supreme Court opinion to use outline-style formatting but *not* include an unlabeled introductory section.

Like *** conclusions, unlabeled introductions vary in type. Some are short and to the point. These introduce the case with one paragraph that follows a basic format familiar to any first-year law student—issue followed by holding. Justice Thomas's unlabeled introduction in *General Electric Energy Power Conversion v. Outokumpo Stainless*[70] is a prime example of this succinct introduction: "The question in this case is whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. We hold that it does not."[71] These simple introductions can be more in depth, such as Justice Kagan's unlabeled introduction in *Banister v. Davis*[72] that adds slightly more information about the issue and more

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These headnotes in *Koon*, however, do not create any of the problems this Article identifies because, despite a shifting lineup within the opinion, it never ceases to have a majority of the Justices. *See id.* at 84 (joining statement).

66. Thus, even if somehow the Justices writing these *** conclusions (and unlabeled introductions) intend them to have less weight, they are treated by others as helpful in making arguments (subject to the normal rules of precedent). *See* discussion *infra* Part II.

67. Fed. Trade Comm'n v. W. Meat Co., 272 U.S. 554, 556 (1926).

68. Sisseton & Wahpeton Bands of Sioux Indians v. United States, 277 U.S. 424, 426–27 (1928) (introduction).

69. *See, e.g.*, Palmer v. Hoffman, 318 U.S. 109, 110–11 (1943) (introduction); Wickard v. Filburn, 317 U.S. 111, 113–17 (1942) (introduction).

70. 140 S. Ct. 1637 (2020).

71. *Id.* (introduction).

72. 140 S. Ct. 1698 (2020).

substance to the holding.[73] But the basic idea is the same: to quickly introduce the reader to the issue at hand and the Court's resolution of the case. These short unlabeled introductions, like short *** conclusions, are largely uncontroversial because their simplicity avoids most of the problems this Article examines.

It is when unlabeled introductions go beyond this basic structure that they raise the same issues as substantive *** conclusions. In these substantive introductions, Justices can do a variety of things, including provide more factual context for the case, wax poetic about the issue and the law involved in deciding the dispute, begin framing the legal issue with basic principles of law, and summarize the parties' arguments or the reasoning of the opinion. For example, the unlabeled introduction to *Bostock v. Clayton County*[74] includes much of this rhetorical flourish around several important areas of law, such as LGBT rights, Title VII, and statutory interpretation:

> Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.
>
> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations

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73. The full unlabeled introduction is as follows:

> A state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction. But he may not usually make a 'second or successive habeas corpus application.' 28 U.S.C. § 2244(b). The question here is whether a motion brought under Federal Rule of Civil Procedure 59(e) to alter or amend a habeas court's judgment qualifies as such a successive petition. We hold it does not. A Rule 59(e) motion is instead part and parcel of the first habeas proceeding.

Id. at 1702 (introduction).

74. 140 S. Ct. 1731 (2020).

> suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[75]

This highly quotable introduction, like the introduction to *Seila Law*, contains powerful substantive language that might be useful to future courts, litigators, and scholars.

II. HOW *** CONCLUSIONS AND UNLABELED INTRODUCTIONS CREATE CONFUSION

As a writing device, Justice Scalia's innovation of using a *** conclusion to wrap up an analytically complicated opinion works nicely. And stylistically, beginning an opinion with an unlabeled introduction appears less clunky on the page than beginning with a Roman numeral. The Supreme Court's current practice of explaining which Justices join which parts of opinions, however, completely ignores these stylistic innovations.

For run-of-the-mill majority opinions in which the same set of Justices join the main opinion in its entirety, *** conclusions and unlabeled introductions present no problem. However, when a majority of Justices join part of the lead opinion but other parts attract only a plurality (what I call in this Article "shifting majority/plurality opinions"), the fact that joining statements ignore these sections is a problem. The result is confusion that makes it difficult to determine binding precedent, individual Justices' perspectives on key issues, and proper citation practice.

Returning to the example in the Introduction of this Article, *Parents Involved* perfectly illustrates this confusion. In *Parents Involved*, the Supreme Court assessed the constitutionality of two voluntary integration plans that used race as a factor—one in Seattle high schools and the other in Louisville elementary schools.[76] Chief Justice Roberts wrote the opinion of the Court that struck down these plans as unconstitutional.[77]

Because of the multiple issues at play in the case and the multistep legal analysis required within the substantive constitutional issue, Chief Justice Roberts used outline-style formatting in his opinion.[78] Breaking it down by section, the opinion's separated numeral sections progressed as follows:

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75. *Id.* at 1737 (introduction).

76. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711–18 (2007).

77. *Id.* at 710–11.

78. *Id.* at 711–36.

I. Recitation of the facts and procedural history.

A. Seattle facts and procedural history.

B. Louisville facts and procedural history.

II. Plaintiffs have standing to bring this lawsuit.

III. The voluntary integration plans violate the Constitution.

A. Strict scrutiny applies and neither of the compelling government interests recognized in past cases—remedying the effects of past intentional discrimination and diversity in higher education—applies in this case.

B. The other stated interests that the schools cast as promoting racial diversity in school amount to an unconstitutional form of racial balancing.

C. The minimal impact on student assignments that these programs have proves that they are not necessary to achieve a compelling government purpose, and other methods unrelated to race should have been considered.

IV. Justice Breyer's dissent is flawed for a variety of reasons.

*** *Brown v. Board of Education* supports this ruling because the goal of *Brown* was to eliminate race as the basis of school assignments. The lower court opinions are reversed and remanded.[79]

As with any good use of outline-style formatting, Chief Justice Roberts's use of the practice not only helps organize his opinion logically, making it easier for the reader to digest, but also facilitates different groups of Justices joining different parts of the opinion. Like other shifting majority/plurality opinions, *Parents Involved* includes a joining statement at the beginning that explains the Justice alignment for the main opinion:

> Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B and IV, in which Justice SCALIA, Justice THOMAS, and Justice ALITO join.[80]

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79. *Id.* at 711–48.

80. *Id.* at 708. The end of the syllabus contains a separate joining statement that explicitly addresses every opinion. The syllabus joining statement is:

> ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, in

The unlisted Justice who joined part of the opinion, but not all of it, is Justice Kennedy (Justices Stevens, Souter, Ginsburg, and Breyer dissented). Thus, from the outline above, the two Roman numeral parts that Justice Kennedy did not join are Part III–B about racial balancing and Part IV refuting Justice Breyer's dissent in detail. Because Parts III–B and IV of Chief Justice Roberts's opinion did not receive five votes, they are not part of the opinion of the Court but rather part of a four-Justice plurality.

The confusion stems from what the joining statement leaves out—any mention of the *** conclusion. That section contains four substantive paragraphs that cut to the heart of the dispute in *Parents Involved*. In these paragraphs, the Chief Justice writes about the meaning of the Court's most famous and influential opinion, *Brown v. Board of Education*.[81] Advocates for the school districts argued that their programs were consistent with *Brown* because the 1954 opinion attempted to eliminate racial subordination, and the Seattle and Louisville classifications at issue in *Parents Involved* were a means to counter ongoing racial subordination.[82]

Chief Justice Roberts saw it differently. In the *** conclusion, he provided an alternate view of *Brown*, one in which the case stood for the proposition that "government classification and separation on grounds of race themselves denoted inferiority."[83] In other words, the Seattle and Louisville classifications were the same unconstitutional evil as the classifications that undergirded school segregation before *Brown*.[84] According to this logic, the Seattle and Louisville schools

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> which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Parts III–B and IV, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

Id. at 707 (syllabus). Although this joining statement is more complete, it is not part of the official Court opinion. *Id.* at 701 n.* ("The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.").

81. *See Parents Involved*, 551 U.S. at 743.

82. Chief Justice Roberts's plurality opinion, however, explicitly rejected the idea that "different rules should govern racial classifications designed to include rather than exclude." *Parents Involved*, 551 U.S. at 742 (Roberts, C.J.) (plurality opinion); *see* Brief for Respondent at 30–33, Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) (No. 05-908) (discussing countering ongoing discrimination and segregation, which is the product of longstanding racial subordination).

83. *Parents Involved*, 551 U.S. at 746 (*** conclusion).

84. *Id.* at 747 (*** conclusion) ("What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? . . . What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?").

must, like the schools that segregated before *Brown*, "stop assigning students on a racial basis."[85] The *** conclusion section then concluded with the soundbite that defines *Parents Involved* to this day: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[86]

The Chief Justice's statements in the *** conclusion are not throwaway concluding thoughts about an inconsequential issue. Rather, they are statements from the Chief Justice about one of the defining issues the Court has confronted in the past century and the legacy of the Court's arguably most celebrated decision. It is reasonable to want to know, then, whether these statements are statements from the Chief Justice alone, from a four-Justice plurality, or from a five-Justice majority. However, the joining statement gives no answer, as it is silent about the *** conclusion.

As a result, everyone is confused. For instance, the soundbite sentence from the *Parents Involved* *** conclusion—"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[87]—has been quoted, in full, ten times by federal courts. Four of those opinions cited it without any parenthetical notation thus, according to *The Bluebook: A Uniform System of Citation*[88] convention, indicating the quote is from a majority opinion of the Court.[89] Four opinions cited it with a parenthetical indicating it is from a plurality opinion,[90] one cited it as an opinion of the Chief Justice alone,[91] and one even cited it as a concurrence from the Chief Justice.[92]

Law reviews fare no better than the federal courts. The "stop discriminating"[93] sentence appears, in full, thirty-three times in print

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85. *Id.* at 748 (*** conclusion).

86. *Id.*

87. *Id.*

88. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 1 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) (stating that *The Bluebook* is "the definitive style guide for legal citation in the United States. For generations, law students, lawyers, scholars, judges, and other legal professionals have relied on *The Bluebook*'s uniform system of citation").

89. Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 380 (2014) (Sotomayor, J., dissenting); Smith v. Sch. Bd. of Concordia Par., 906 F.3d 327, 338 (5th Cir. 2018) (Ho, J., concurring); U.S. Equal Emp. Opportunity Comm'n v. AutoZone, Inc., 875 F.3d 860, 861–62 (7th Cir. 2017) (Wood, C.J., dissenting); Heike v. Guevara, 519 F. App'x 911, 919 (6th Cir. 2013).

90. Vitolo v. Guzman, 999 F. 3d 353, 365–66 (6th Cir. 2021); Robinson v. Shelby Cnty. Bd. of Educ., 566 F. 3d 642, 656 (6th Cir. 2009); Smith v. City of Boston, 144 F. Supp. 3d 177, 198 (D. Mass. 2015); Perrea v. Cincinnati Pub. Schs., 709 F. Supp. 2d 628, 643 n.5 (S.D. Ohio 2010).

91. Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739, at *181 n.724 (N.D. Ala. Nov. 7, 2011).

92. Shea v. Kerry, 961 F. Supp. 2d 17, 54 n.16 (D.D.C. 2013).

93. *Parents Involved*, 551 U.S. at 748 (*** conclusion).

and online versions of the flagship law reviews for the four schools that write and update the Bluebook.[94] Of these thirty-three articles, twelve cited the sentence without any parenthetical notation indicating that it is from the majority opinion of the Court,[95] twelve have cited it with an indication it is from a plurality opinion,[96] eight

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94. The law review editors at Harvard, Yale, Columbia, and Penn write the Bluebook and update it periodically. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION VII–VIII (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). I have looked at how these journals cite this sentence because, as the schools responsible for *The Bluebook*, they are, in theory, the students most likely to use proper citation form.

95. Geoffrey R. Stone, *A Four-Decade Perspective on Life Inside the Supreme Court*, 133 HARV. L. REV. 1010, 1033 n.58 (2020); Richard R.W. Brooks, *The Banality of Racial Inequality*, 124 YALE L.J. 2626, 2661 n.163 (2015); Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1620 n.55, 1649 (2015); Ellen D. Katz, *A Cure Worse Than the Disease?*, 123 YALE L.J. ONLINE 117, 120 n.12 (2013), https://www.yalelawjournal.org/forum/a-cure-worse-than-the-disease; Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2252 n.81 (2013); Luis Fuentes-Rohwer, Response, *Justice Kennedy to the Rescue?*, 160 U. PA. L. REV. ONLINE 209, 216 n.50 (2012), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1086&context=penn_law_review_online; Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1304 n.77 (2011); Guy-Uriel E. Charles, Response, *Do We Care Enough About Racial Inequality? Reflections on* The River Runs Dry, 158 U. PA. L. REV. ONLINE 119, 120 n.4, 124 (2009), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1036&context=penn_law_review_online; Note, *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750, 1766 n.119 (2009); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1365 n.14 (2009); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1126 n.147 (2008); Murad Hussain, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 967 n.240 (2008); J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There is No Other Way*, 121 HARV. L. REV. 158, 161 n.19 (2007).

96. Angela Onwuachi-Willig & Anthony V. Alfieri, *(Re)Framing Race in Civil Rights Lawyering*, 130 YALE L.J. 2052, 2081 n.156 (2021); Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1246–47 n.304 (2021); Aaron Tang, *The Radical-Incremental Change Debate, Racial Justice, and the Political Economy of Teachers' Choice*, 169 U. PENN. L. REV. 2015, 2039 n.110 (2021); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2263 n.159 (2019); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 78 n.468 (2019); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2121 n.21 (2018); *Sixth Amendment—Ineffective Assistance of Counsel—Race and Sentencing*—Buck v. Davis, 131 HARV. L. REV. 263, 263 n.2 (2017); Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 92 n.465 (2013); Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825, 1855 n.180 (2017) (citing the quote without notation but introducing it textually as from the plurality opinion); Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2029 n.96 (2012); Kenji

have cited it as an opinion from the Chief Justice alone,[97] and one cited it multiple ways within the same article.[98]

Lawyers litigating high-profile cases before the Supreme Court are similarly confused. Take the case challenging Harvard University's admissions policies as race-based discrimination. In its 2022–23 Term, the Supreme Court will review the First Circuit's conclusion that Harvard's policies were lawful.[99] *Parents Involved* figures prominently throughout the briefing at the certiorari stage,[100] but again, confusion about how to cite the *** conclusion abounds. The petitioners' briefs repeatedly cite statements from the *** conclusion as statements of the Court itself.[101] In contrast, the respondent's brief refers to statements from the *** conclusion as from a plurality of the Court.[102]

Some might brush this variation off as simply how advocacy works—the petitioners oppose Harvard's policy, so they paint the *Parents Involved* color-blindness language as that of a binding decision of the Court; the respondents support Harvard's policy, so they paint the same language as from a less persuasive plurality of

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Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 775 n.197 (2011); Lani Guinier, *Foreward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 7 n.4, 38 n.163 (2008).

97. Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 284 n.20 (2016); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3183 n.420 (2015); *Fair Housing Act—Disparate Impact and Racial Equality*—Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 129 HARV. L. REV. 321, 327 n.72 (2015); Ian Farrell & Nancy Leong, *Gender Diversity and Same-Sex Marriage*, 114 COLUM. L. REV. SIDEBAR 97, 106 n.33 (2014); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 134 (2007); J. Harvie Wilkinson III, *supra* note 95 at 161 n.19; Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 114–15 n.43 (2007); Martha C. Nussbaum, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 91 n.410 (2007).

98. *Compare* Note, *The Virtues of Heterogeneity, in Court Decisions and the Constitution*, 131 HARV. L. REV. 872, 873 n.16 (2018) (citing without notation), *with id.* at 878–79 n.55 (citing as the opinion of Chief Justice Roberts with a textual introduction indicating that it is a statement from a plurality of the Court).

99. Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (No. 20-1199).

100. The merits briefs will be filed after this Article is published.

101. Petition for Writ of Certiorari at 22–23, 36, *Students for Fair Admissions*, No. 20-1199 (U.S. Feb. 25, 2021); Reply Brief for Petitioner at 9, Students for Fair Admissions, No. 20-1199 (May 24, 2021)..

102. Brief in Opposition at 31, *Students for Fair Admissions*, No. 20-1199 (May 17, 2021).

the Court. But this disagreement is different than normal fodder for advocates, such as spinning the meaning of language from the Court, arguing over whether to extend or narrow a holding, or debating which nonmajority opinion is the binding, narrowest grounds opinion. These, and other disagreements among advocates, usually share a factual basis about which and how many Justices joined an opinion or part of an opinion. Whether language is from a Court majority or plurality should be an ascertainable fact rather than something for advocates to guess at and then spin in their favor.

The amicus briefs filed in the Harvard case at the certiorari stage prove that this confusion is not mere advocacy. Among the five amicus briefs filed in the case on behalf of the petitioners that cite to the *** conclusion in *Parents Involved*, three refer to this section as part of a majority opinion, one refers to this section as a plurality opinion, and one cites it as an opinion of the Chief Justice alone.[103] Each of these briefs has the same substantive goal—persuading the Court to strike down Harvard's policy as unlawful—yet they cite the *** conclusion differently.[104]

This confusion is far from an esoteric problem stymying judicial clerks and law review editors tasked with determining the proper way to cite the *** conclusion. Instead, this confusion creates substantive problems that raise questions about important issues of American law. After all, when the Supreme Court directly confronts the legacy of its most celebrated decision, as it did in *Parents Involved*, most judges, lawyers, students, commentators, and the general public would like to know whether the Court's words about that case are joined by a majority of the Court. Stated more directly, did a majority of the Court believe that *Brown* requires color-blindness in all walks of life, including public school student assignments? If so, that is a binding statement of law that lower courts are obligated to follow and to which future Supreme Court decisions will give appropriate stare decisis weight. Or are these musings about *Brown* and color-blindness just that, the concluding but nonbinding thoughts of a plurality of the Court? If this is the case, there is still wiggle room for

103. Briefs citing the section as part of a Court majority are: Brief for the State of Texas as Amicus Curiae in Support of Certiorari at 6, *Students for Fair Admissions*, No. 20-1199 (Mar. 30, 2021); Brief of Hamilton Lincoln Law Institute as Amicus Curiae in Support of Petitioner at 15, *Students for Fair Admissions*, No. 20-1199 (Mar. 31, 2021); Brief of Amicus Curiae Former Attorney General Edwin Meese III in Support of Petitioner at 2–3, *Students for Fair Admissions*, No. 20-1199 (Mar. 31, 2021). The one brief citing it as part of a plurality is Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 20, *Students for Fair Admissions*, No. 20-1199 (Mar. 30, 2021). The brief citing it as part of a section from Chief Justice Roberts alone is Brief of the Californians for Equal Rights Foundation as Amicus Curiae in Support of Petitioner at 21 n.44, *Students for Fair Admissions*, No. 20-1199 (Mar. 31, 2021)..

104. *See supra* note 103 and accompanying text.

the use of race classifications to address ongoing racial subordination, though with the understanding that four Justices believe in complete color-blindness.[105] Or is it the case that only Chief Justice Roberts believes the message behind his pithy "stop discriminating"[106] sentence, in which case his treatment of *Brown* can be largely ignored as the side thoughts of a single Justice?

Confusion surrounding *** conclusions also creates problems for scholars and commentators trying to assess the legacy of individual Justices. In the past six years, three highly influential Justices have left the Supreme Court—Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg. All three served in the age of the *** conclusion. Much has been, and will be, written about these Justices' legacies. Those engaging in such analysis should be able to know the full extent of the opinions and parts of opinions that the Justice they are analyzing joined. Sticking with the *Parents Involved* example, writing about Justice Kennedy's legacy on race would be very different depending on whether he joined the Chief Justice's "stop discriminating"[107] statement.

The various problems identified here go beyond *Parents Involved*. For the cases that use the *** conclusion merely for a statement of the Court's judgment, the ambiguity over who joined the *** conclusion is immaterial. However, for the other types of *** conclusions, the same problem as in *Parents Involved* arises. Merely restating the holding of a case may not raise the same serious problems as in *Parents Involved*, though lawyers and judges regularly rely on the precise wording of holdings to analogize and distinguish cases. Thus, determining whether the statement of a case's holding in the *** conclusion is joined by a majority or a plurality matters for future fights over the extension of a Supreme Court decision.

The real problem arises from substantive *** conclusions, which appear in many cases beyond just *Parents Involved*. For instance, in *Seila Law*, when the Supreme Court held that the removal provision for the leader of the Consumer Financial Protection Bureau ("CFPB") violated the separation of powers doctrine, the Chief Justice's opinion ended with a *** conclusion that stated several important principles of law regarding the President's power to remove agency officials.[108]

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105. Plurality opinions sometimes have precedential value, but that involves a more complicated and disputed analysis that is beyond the scope of this Article. *See, e.g.*, Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 287–88 (2019).

106. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (*** conclusion).

107. *Id.*

108. The full *** conclusion is as follows:

> In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While

The joining statement indicates that the Chief Justice's opinion with respect to the separation of powers sections in the opinion are for a Court majority (with Justices Thomas, Alito, Kavanaugh, and Gorsuch) but that Justices Thomas and Gorsuch part ways with the Chief Justice with respect to the remedy.[109] The *** conclusion appears immediately after the remedy discussion, but contains discussion of the substantive separation of powers issues.[110] Are the Chief Justice's separation of powers statements in the *** conclusion those of the majority who agreed on these substantive principles? Or just the plurality that agreed with the entire opinion? Or only Chief Justice Roberts because there is no indication anywhere in the opinion or syllabus that anyone else joined the *** conclusion? Lower courts deciding related matters and attorneys litigating these issues have good reason to be confused.

Unlabeled introductions can present the same exact problem, just at the beginning of the opinion. For example, Justice Alito begins his opinion in *Matal v. Tam*[111] with a short, unlabeled introduction.[112] The first paragraph sets forth the basic facts of the case about an Asian-American rock band named "The Slants."[113] The second paragraph succinctly states that the Patent and Trademark Office's decision to deny federal trademark registration for the band because the name was disparaging or contemptuous violated the "bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[114] Analogous to the *Parents Involved* *** conclusion, the joining statement is silent as to the introduction, so it could be from a Court majority, a plurality, or Justice Alito alone.[115]

Justice Alito's introductory expression of these simple First Amendment ideas is highly quotable. Other courts have done so but have experienced the same confusion as with *Parents Involved*'s soundbite quote. For example, the Tenth Circuit quoted the principle

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> we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.

Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020) (*** conclusion).

109. *Id.* at 2190–91.

110. *Id.* at 2211 (*** conclusion).

111. 137 S. Ct. 1744 (2017).

112. *Id.* at 1751 (introduction).

113. *Id.*

114. *Id.*

115. *Id.* ("Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B, III–C, and IV, in which THE CHIEF JUSTICE, Justice THOMAS, and Justice BREYER join.").

of protection for "ideas that offend" and attributed it to a Court majority.[116] The Ninth Circuit saw it differently, quoting the entire section about "ideas that offend" as from a plurality of the Court.[117] The Supreme Court and the Federal Circuit have taken the third approach, referring to this section as an opinion from Justice Alito alone.[118]

The confusion caused by unlabeled introductions is sometimes less obvious than the confusion created by *** conclusions, but it still exists. *Seila Law*'s statements of the law regarding separation of powers are a perfect example. Chief Justice Roberts's opinion begins with some basic principles about executive power and removal, stating in one paragraph that the President generally has the power to remove subordinate officers because of accountability concerns and in the next paragraph that there are two recognized exceptions to the President's removal power.[119] Amidst this separation of powers recap is an emphatic use of "all of it" to highlight that all executive power is vested in the President: "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[120] The introduction also includes the Chief Justice's statement of the Court's holding.[121]

Only one of the six federal courts or twelve law review articles that have cited to the *Seila Law* introduction's "all of it" language has done anything other than indicate that it is from the majority of the Court.[122] The other courts and law review articles have ignored key evidence indicating otherwise—that the joining statement refers to only "Parts I, II, and III" of the opinion of the Court, and the header for these pages of the Court's slip opinion labels these substantive

116. CSMN Invs., LLC v. Cordillera Metro. Dist., 956 F.3d 1276, 1286 n.12 (10th Cir. 2020).

117. Am. Freedom Def. Initiative v. King County, 904 F.3d 1126, 1131 (9th Cir. 2018).

118. Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019); *In re* Brunetti, 877 F.3d 1330, 1341 (Fed. Cir. 2017).

119. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020) (introduction).

120. *Id.* at 2191.

121. *Id.* at 2192 ("[T]here are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.").

122. Search as of March 4, 2022. One court cited the quote as from a plurality of the Court. *See* Sanofi-Aventis U.S. v. U.S. Dep't of Health and Hum. Servs, No. CV-00634 (FLW), 2021 WL 5150464, at *23 (D.N.J. Nov. 5, 2021). The others cite it with no parenthetical. *See, e.g.*, Axon Enter., Inc. v. Fed. Trade Comm'n, 986 F.3d 1173, 1187 (9th Cir. 2021); Kathryn E. Kovacs, *The Supersecretary in Chief*, 94 S. CAL. L. REV. POSTSCRIPT 61, 65 n.21 (2020).

introductory paragraphs as an opinion of Chief Justice Roberts alone.[123]

Unlabeled introductions create less confusion for future citation practices than *** conclusions because those citing introductions seem to assume that they contain noncontroversial or summary statements that a majority of the Court joins. However, there is nothing in the Court's practices that makes this assumption automatically correct. In fact, it is very possible that the common presumption that unlabeled introductions are from a Court majority is simply wrong. After all, when the Supreme Court cited the *Matal* introduction just two years after the case was decided, in an opinion written by Justice Kagan who had been part of the shifting majority/plurality in *Matal*, the Court referred to the introduction as that of just one Justice.[124] Whatever the correct approach is, it is clear at this point that joining statements also ignore unlabeled introductions, which makes them ripe for the same confusion as *** conclusions.

III. SOLVING THE *** CONCLUSION AND UNLABELED INTRODUCTION PROBLEM

Outline-level formatting began, in part, to lessen confusion among Supreme Court opinion readers.[125] With it came the unlabeled introduction, a stylized way to introduce a multipart opinion. Decades later, the *** conclusion seems to have originated as a way to minimize confusion even further by denoting the finishing thoughts of a complicated, multisectioned opinion.[126] Yet, courts, scholars, and editors have been unable to sort out exactly who is responsible for the words in these sections. Unfortunately, after surveying four possible solutions—as well as a fifth approach that I cannot even label as a solution—there appears to be no currently feasible way out of this conundrum.

A. U.S. Reports and Slip Opinion Headers

One possible solution to this confusion is to look at the headers from the United States Reports and, for opinions not yet published in the official Supreme Court reporter, slip opinions.[127] At the top of every page in the United States Reports and slip opinions appears a

123. Seila L. LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 1–2 (introduction).

124. Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019).

125. *See infra* Part I.

126. *See infra* Part I.A.

127. "United States Reports" is the official publisher of Supreme Court opinions. 28 U.S.C. § 411. Slip opinions are the opinion versions that appear on the Supreme Court's website prior to publication in United States Reports. *See Information About Opinions*, SUP. CT. U.S., https://www.supremecourt.gov/opinions/info_opinions.aspx (last visited Feb. 12, 2022).

header. On odd-numbered pages, the first line gives the United States Reports's citation (or, for slip opinions, the temporary citation); on even-numbered pages, the first line is the name of the case.[128] In the headers on both odd- and even-numbered pages, underneath is a notation indicating whether the opinion on that page is from a majority of the Court or from a subset.[129] If the opinion on that page is from a majority, the header will state "Opinion of the Court."[130] If it is from less than a majority, whether for a single Justice or a group of Justices, it will state the author of that opinion, such as "Opinion of Roberts, C.J." or, when relevant, "Thomas, J., concurring," or "Kagan, J., dissenting."[131]

For the shifting majority/plurality opinions that form the basis of this Article, the header provides useful information. The custom the Court appears to use for these shifting opinions is that the header corresponds to the part of the opinion that finishes the page. The simplest way to demonstrate this is to look at the United States Reports version of *Parents Involved*.[132] As described above, Part III–A is for a majority of the Court, while Part III–B is for a four-Justice plurality. The opinion transitions between III–A and III–B on page 725, which contains half of the last paragraph of Part III–A and most of the beginning paragraph of III–B.[133] While page 724, which contains the last complete page of III–A, has the header "Opinion of the Court," the header changes to "Opinion of Roberts, C.J." on page 725 because Part III–B is the section that finishes that page.[134] The next seven pages have the same "Opinion of Roberts, C.J." header, until the switch on page 733.[135] Page 733 is split between the end of the plurality section, III–B, and the beginning of the majority section, III–C. Because III–C ends the page, the header is back to "Opinion of the Court."[136]

This running indication of whether the opinion is that of the majority or that of some smaller group appears at first glance to be a

128. Thus, in *Parents Involved*, odd-numbered pages have "Cite as: 551 U.S. 701 (2007)" in the header, and even-numbered pages have "Parents Involved in Community Schools v. Seattle School Dist. No. 1" in the header. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702–03 (2007) (exemplifying this heading format).

129. *See, e.g.*, *id.* at 711.

130. *See, e.g.*, *id.*

131. *See, e.g.*, *id.* at 744.

132. The Supreme Court's website has PDFs of United States Reports dating back to 1991. *U.S. Reports*, SUP. CT. U.S., https://www.supremecourt.gov/opinions/USReports.aspx (last visited Feb. 12, 2022). The official opinion for *Parents Involved* appears at https://www.supremecourt.gov/opinions/boundvolumes/551bv.pdf#page=754.

133. *Parents Involved*, 551 U.S. at 725.

134. *Id.* at 724–25.

135. *Id.* at 725–33.

136. *Id.* at 733.

promising solution to the *** conclusion and unlabeled introduction problem. To determine which Justices join the *** conclusion, just flip to the *** conclusion of the opinion in either the United States Reports or the slip opinion, look at the header, and there is the Court's answer. Thus, in *Parents Involved*, the header for the *** conclusion is "Opinion of Roberts, C.J.,"[137] as is the header for the unlabeled introduction in the case.[138]

Unfortunately, this proposed solution is not without its problems. To be exact, there are four problems with this solution. First, the header is not widely available. This running header appears only in the United States Reports reporter and slip opinions, not in the Supreme Court reporter or digitized versions of the case on Westlaw, Lexis, FindLaw, or other online databases that do not include a copy of the official slip opinion. If the header was the solution to the confusion identified in this Article, the fact that it is unavailable from leading sources for legal research is a significant problem that does not help prevent most people's confusion.

Second, the header does not account for the Court's judgment. The Court's judgment, indicating whether the lower court opinion is affirmed, reversed, vacated, or remanded (or some combination thereof), appears at the end of the main opinion. By virtue of it being a judgment, it is the judgment of the Court. However, the header does not account for this. Again, using *Parents Involved* as an example, the judgment at the end of the opinion is as follows: "The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings. *It is so ordered*."[139] That is the judgment of the Court,[140] yet the header says "Opinion of Roberts, C.J."[141] The same is true with other shifting majority/plurality opinions with less-than-majority sections leading into the judgment.[142]

Third, the header provides no useful information when another opinion appears on the same page as a *** conclusion or another section appears on the same page as an unlabeled introduction. Unlabeled introductions and *** conclusions that are in the United

137. *Id.* at 745 (*** conclusion).

138. *Id.* at 708–11 (introduction).

139. *Id.* at 748 (*** conclusion).

140. *Id.* at 708 ("Chief Justice Roberts announced the judgment of the Court . . . .").

141. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, No. 05-908, slip op. at 41 (U.S. June 28, 2007). The judgment in the United States Reports version appears on the same page as Justice Thomas's concurring opinion, and thus the header refers to Justice Thomas (see discussion in the next paragraph in the text). Thus, this citation is to the slip opinion, not the United States Reports, version of *Parents Involved*.

142. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 37 (U.S. June 29, 2020).

States Reports[143] are immediately followed by the next section (for introductions) or the next opinion (for *** conclusions) if there is enough room on the page. When this happens for *** conclusions, the header is for the next opinion in the case, not the case with the *** conclusion. When this happens for unlabeled introductions, the header is for the next part of the opinion, not the introduction. For instance, in the United States Reports version of *Olmstead v. L.C.*,[144] on the same page as the entire short *** conclusion to Justice Ginsburg's shifting majority/plurality opinion is the start of Justice Stevens's concurring opinion.[145] The header, which reflects the opinion that is at the bottom of the page, thus reads "Opinion of Stevens, J."[146] and provides no information about the *** conclusion.[147]

Finally, the header notations appear to be used inconsistently. For instance, in two cases decided eleven days apart in 2020, the Court used different headers for *** conclusions written by the Chief Justice. In *Seila Law*, the header for the *** conclusion is "Opinion of Roberts, C.J.,"[148] while less than two weeks earlier in *Department of Homeland Security v. Regents of the University of California*,[149] the header for the *** conclusion is "Opinion of the Court."[150]

The same inconsistency appears in headers for unlabeled introductions. For example, in *Kisor v. Wilkie*,[151] Justice Kagan's shifting majority/plurality opinion begins with a short unlabeled introduction that has the page header "Opinion of the Court."[152] However, in *Seila Law*, Chief Justice Roberts's introduction has the header "Opinion of Roberts, C.J."[153]

Thus, the promise of the header fades upon close inspection. The header is not only unavailable in leading research databases but also is used inconsistently. Additionally, it fails to account for Court judgments and ignores sections that run into other sections or opinions. It is very likely that the header is just an administrative addition to the case that exists to be helpful for the reader, not to

143. The current slip opinion practice is that each opinion starts on a new page, so *** conclusions do not run into the next opinion in slip opinions. Any separate opinions that follow the *** conclusion start on the next page.

144. 527 U.S. 581 (1999).

145. *Id.* at 607.

146. *Id.*

147. *Id.*

148. Seila L. LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 37 (U.S. June 29, 2020).

149. No. 18-587, slip op. (U.S. June 18, 2020).

150. *Id.* at 29.

151. No. 18-15, slip op. (U.S. June 26, 2019).

152. *Id.* at 1.

153. *Seila Law*, slip op. at 1.

answer the substantive questions posed by *** conclusions and unlabeled introductions.[154]

B. Including v. Excluding Joining Statements

Perhaps another solution to the confusion this Article identifies is closely reading the joining statements at the beginning of opinions and differentiating between what I call here *including* and *excluding joining statements*. An *including joining statement* is one that takes the format of identifying the author of the main opinion and then identifying specifically which sections of the opinion are included as part of the opinion of the Court. Think of a kid deciding among five candy bars labeled one through five saying, "I want candy bars one, three, and four." An *excluding joining statement* is one that flips the focus by identifying the main opinion as the opinion of the Court and then identifying specifically which sections of it are excluded from the opinion of the Court. Using the same kid and candy bar example, think of the kid saying, "I want all of the candy bars except two and five."

Returning to the two opinions decided less than two weeks apart in 2020, *Seila Law* and *Department of Homeland Security* illustrate this difference. *Seila Law* starts with an including joining statement: "CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III."[155] The syllabus version of the joining statement is more specific but in the same form:

> ROBERTS, C.J., delivered the opinion of the Court with respect to Parts I, II, and III, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, J.J., joined, and an opinion with respect to Part IV, in which ALITO and KAVANAUGH, J.J., joined.[156]

With this type of joining statement, the opinion of the Court constitutes only the specifically included sections, here, only Parts I,

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154. Moreover, the slip opinion header can contain errors unrelated to the *** conclusion or the unlabeled introduction. In reviewing the cases for this Article, I was not looking for other errors in the header but found one in *Giles v. California*, 554 U.S. 353 (2008). Part II–E of Justice Scalia's opinion is part of the opinion of the Court (only Part II–D–2 is a plurality), yet the header for this section in the slip opinion is "Opinion of Scalia, J." Giles v. California, No. 07-6053, slip op. at 22–23 (U.S. June 25, 2008). A review of all slip opinion headers is outside the scope of this Article, but based on the conclusion here that headers are for reader convenience and are not a substantive indication of Court votes, there is reason to believe more errors like this exist in slip opinions. The United States Reports version of *Giles* corrected this error. *See Giles*, 554 U.S. at 376. Given the long time in between slip opinion and official publication, errors in slip opinion headers, if the headers solved the problem this Article identifies, would be consequential for the initial several years after a case is decided.

155. *Seila Law*, slip op. at 1 (introduction).

156. *Seila Law*, slip op. at 5 (syllabus).

II, and III. All other parts of the opinion not specifically included are not part of the opinion of the Court.

In contrast, *Department of Homeland Security* uses an excluding joining statement. The opinion joining statement states: "CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part IV."[157] The syllabus joining statement gives more detail:

> ROBERTS, C. J., delivered the opinion of the Court, except as to Part IV. GINSBURG, BREYER, and KAGAN, JJ., joined that opinion in full, and SOTOMAYOR, J., joined as to all but Part IV.[158]

This excluding joining statement is different than *Seila Law*'s because rather than telling the reader which parts of the opinion constitute the opinion of the Court, it tells the reader what parts of the opinion are excluded from the opinion of the Court. Here, the entirety of what Chief Justice Roberts writes is the opinion of the Court *except* for Part IV because Justice Sotomayor does not join Part IV.[159]

The difference between including and excluding joining statements could be the key to deciphering the *** conclusion and the unlabeled introduction. When the *** conclusion appears in an opinion with an including joining statement, the implication is that it is not part of the opinion of the Court because that section is not specifically listed as included in the opinion of the Court. The same is true for the unlabeled introduction—if it is not listed in the including joining statement, it is not part of the opinion of the Court. Returning to the example of the kid and the candy bars, think of the *** conclusion or the unlabeled introduction as a sixth candy bar that is labeled *** or has no label at all. The kid who says "I want candy bars one, three, and four" is not asking for the *** candy bar or the unlabeled one.

Conversely, the excluding joining statement is more inclusive (which is ironic given its name). When the *** conclusion appears in an opinion with an excluding joining statement, the implication is that it *is* a part of the opinion of the Court because everything written by the main author is the opinion of the Court except for the specifically listed sections that are excluded, which is never the *** conclusion. The same goes for the unlabeled introduction—not listed as excluded means it is included. Going back to the kid and the candy bars one last time, the kid who says "I want all of the candy bars except two and five" would also be asking for the additional *** or unlabeled candy bar.

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157. Dep't of Homeland Sec. v. Regents of Univ. of Cal., No. 18-587, slip op. at 2 (U.S. June 18, 2020) (introduction).

158. *Id.* at 5 (syllabus).

159. *Id.*

Thus, if a close reading of joining statements matters, the different types of joining statements in *Seila Law* and *Department of Homeland Security* have substantive meaning for the *** conclusions and unlabeled introductions. In *Seila Law*, because of the including joining statement, only Parts I, II, and III are the opinion of the Court, meaning the *** conclusion and the unlabeled introduction are not. And in *Department of Homeland Security*, because of its excluding joining statement, everything is the opinion of the Court except for Part IV, so the *** conclusion and the unlabeled introduction are part of the opinion of the Court because they are not specifically excluded.

This possible solution is attractive because it rewards close and logical reading, something lawyers particularly enjoy. Moreover, it comports with the different use of slip opinion headers in *Seila Law* and *Department of Homeland Security* identified in the previous Subpart of this Article. Under this approach, because of the including joining statement, *Seila Law*'s *** conclusion and unlabeled introduction are correctly labeled with "Opinion of Roberts, C.J." headers while, because of its excluding joining statement, *Department of Homeland Security*'s *** conclusion and unlabeled introduction are correctly labeled with "Opinion of the Court" headers.

As appealing as this close reading of the joining statement is, however, this proposed solution has its own flaws. First, closely reading the joining statement will never result in the *** conclusion or unlabeled introduction being part of a plurality opinion. When the joining statement has excluding language, the *** conclusion and unlabeled introduction will always be part of the opinion of the Court because the entire opinion is a majority except the explicitly excluded sections. With including language, the *** conclusion and unlabeled introduction will always be a solo opinion for the author because this type of joining statement provides information about who is included in each section. Because *** conclusions and unlabeled introductions are never listed among the included parts,[160] the only information a reader has about them is that they are written by the Justice who authored the opinion.[161] Thus, with the way joining statements are

160. Using various search terms to isolate the Court's joining statements, I have found just one that references either "introduction" or "conclusion," and that one statement does so for a section introduction, not for an opinion introduction. In *Board of Education of Kiryas Joel Village School District v. Grumet*, the syllabus's joining statement (but not the joining statement that starts the main opinion) indicates that Justices Blackmun, Stevens, and Ginsburg joined Justice Souter's opinion "with respect to Parts II (introduction) and II–A." 512 U.S. 687, 688–89 (1994).

161. Taking this argument even further, closely reading including joining statements indicates that the unlabeled introduction and *** conclusion actually have no author. Take the joining statement for *Seila Law* as an example: "CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III." Seila L. LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 1 (U.S. June 29, 2020). Because that statement indicates nothing more than that

currently written, close-reading leaves out the possibility that a section of the main opinion is for a plurality of the Justices. Unless there is a reason to believe that *** conclusions and unlabeled introductions are somehow never part of plurality opinions, this flaw seems fatal to the close-reading solution.

Second, closely reading joining statements often reaches a conclusion that conflicts with the opinion header, calling into question the utility of both. Take the *** conclusion first. Since 1990, there have been forty-nine shifting majority/plurality opinions that have used a *** conclusion.[162] Of these opinions, thirteen cases[163] have

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the Chief Justice wrote Parts I, II, and III, which are parts of the opinion of the Court, there is no specification in the main opinion's joining statement who wrote any of the other sections, including the unlabeled introduction and *** conclusion. The syllabus's joining statement helps a bit more because it also includes that the Chief Justice delivered "an opinion with respect to Part IV, in which ALITO and KAVANAUGH, J.J., joined." *Id.* at 5 (syllabus). While this more detailed joining statement indicates that the Chief Justice wrote Part IV, something the opinion joining statement is silent about, it still does not indicate anything about the unlabeled introduction or the *** conclusion. Thus, when the joining statement is an including one, the only way to know who wrote the entirety of the lead opinion is by assuming that listing the author in the beginning of the opinion is a statement of who wrote the *entire* opinion, even if the joining statement does not technically say that. To be clear, there seems to be no reason whatsoever to question this assumption. However, the fact that we have to resort to making an assumption for this basic fact rather than relying on the actual language in the joining statement is yet another indication that closely reading the joining statement is not the answer here.

162. Using Westlaw, I searched Supreme Court cases through March 3, 2022, for shifting majority/plurality opinions by looking for "opinion of the Court" within five words of "respect" (for including joining statements) or "except" (for excluding joining statements). From there, because Westlaw does not allow a search for the * character, I had to download all these opinions in their entirety and then search within Microsoft Word. I am reasonably confident that I have captured the entire universe of these opinions, but given the shortcomings of the legal databases in terms of searching for the * character, *see supra* note 35, I cannot be completely confident. For a full listing of these cases, see Appendix.

163. Of the identified forty-nine cases, forty-four slip opinions are available. (Slip opinions are available on the Supreme Court website dating back to 2005. Before that, they are available on Cornell's Legal Information Institute website into the mid-1990s. Before that, I have been unable to find them anywhere.) From those forty-four, eleven have headers for the slip opinion's *** conclusion that do not align with a close reading of the joining statement. Looking at the United States Reports rather than slip opinions, there are seventeen cases that are in the United States Reports *and* do not have another opinion immediately following the section on the same page. (Currently, United States Reports has been published through the start of the 2014 Term (volume 575). Volumes 576 to 579, from the 2015 Term, are in preliminary print version. *See U.S. Reports*, SUP. CT. U.S., https://www.supremecourt.gov/opinions/USReports.aspx (last visited Mar. 3, 2022)). Twelve of the forty-nine identified shifting majority/plurality opinions with *** conclusions are too recent to be in any form

some form of mismatch between a close reading of the joining statement and the *** conclusion header—meaning an "Opinion of the Court" header with an including joining statement or an "Opinion of [individual Justice]" with an excluding joining statement. This high misalignment rate (twenty-seven percent of the forty-nine cases) between closely reading joining statements and the opinion headers creates even more confusion, further underscoring that neither method can be relied upon to provide meaningful information. [164]

The same is true with unlabeled introductions. Using the same set of cases,[165] errors appear just as frequently as with *** conclusions. There are thirteen unique cases[166] with a mismatch between the unlabeled introduction's header and a close reading of the joining statement, or twenty-seven percent of the forty-eight cases with unlabeled introductions.[167] Again, as with *** conclusions, the high rate of mismatch with unlabeled introductions undercuts any argument that either a close reading or headers can alleviate the confusion this Article identifies.

It is attractive, particularly to lawyers, to imbue the different types of joining statements with meaning such that they answer the question about *** conclusions and unlabeled introductions. However, joining statements have limited value because they mostly exclude the possibility of plurality opinions and are often misaligned

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of the United States Reports. Of the remaining thirty-seven opinions that are in the United States Reports, twenty have *** conclusions on the same page as the next opinion, making the page header useless with respect to the *** conclusion. *See* discussion *supra* notes 143–46 and accompanying text. Of this group of seventeen, five have headers for the *** conclusion that do not align with the joining statement. Because there is some overlap in the United States Reports and slip opinion mismatch groups, there is some form of header/joining statement mismatch in thirteen different cases out of the forty-nine *** conclusion cases identified here.

164. For those wondering if the type of joining statement matters, of the thirteen mismatch cases, eight have including joining statements, and five have excluding joining statements.

165. As noted earlier, looking at all cases with unlabeled introductions would be almost impossible given the ubiquity of the practice. Looking at the forty-nine cases already identified for the *** conclusions is thus incomplete but still provides useful information for the point made here.

166. From this set of cases, there are thirty slip opinions where the unlabeled introduction does not run into another section on the same page. Of these thirty, nine have a mismatch between the header for the unlabeled introduction and a close reading of the joining statement. There are twenty-seven opinions in the United States Reports that have an unlabeled introduction that does not run into another section on the same page. Of these twenty-seven, six show a misalignment. Figuring in the overlap, there are thirteen unique cases with mismatch.

167. One case from the forty-nine *** conclusion cases does not have an unlabeled introduction, as it begins immediately with Roman numeral I. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

with opinion headers, creating even more confusion about *** conclusions and unlabeled introductions. Thus, like opinion headers, joining statements are not the solution here.

C. Default Rules

What about something simpler, like default rules that apply to all opinions? Rather than looking to headers or joining statements for guidance, maybe the answer is much simpler and more uniform. For instance, maybe unlabeled introductions are always opinions of the Court, because all they do is simply introduce the issue in the case. In contrast, *** conclusions are summarizing the entire opinion, so they are only the opinion of the smallest group of Justices that join the entire opinion. Simple straightforward default rules like this would make the endeavor of determining who signed onto which parts of opinions much easier.

However, there are many problems with these default rules. First, there is no reason to believe that the default rules I set forth in the previous paragraph are the right ones. In fact, it would be just as easy to come up with others that make sense. Maybe the unlabeled introduction is the introduction for the entire opinion, so only Justices who join the entire opinion join the introduction. Or the *** conclusion is actually not the conclusion to the entire opinion but really a conclusion or addendum to the section immediately preceding it, so only Justices who have noted they joined that section join the *** conclusion. There are other possibilities, but the point is the same: there could be many different—and conflicting—sensible default rules.

This leads to the second objection: if there are indeed default rules applicable to all *** conclusions and unlabeled introductions, it is quite clear that no one knows what they are. As already explained in depth, lawyers, judges, scholars, editors, and others who interact with Supreme Court opinions do not seem to know what the default rules are, as they routinely cite *** conclusions and unlabeled introductions differently.[168] If these experienced and otherwise-informed actors within the legal system are confused about how to treat these sections, it is hard to imagine that default rules actually exist. After all, if no one, not even the smartest repeat players within the system, knows what the default rules are, then they fail to function as default rules.

Finally, any default rule conflicts with the changing import of the different joining statement styles. As described earlier, taken literally, excluding joining statements indicate that all parts of the main opinion are the opinion of the Court except for the listed exclusions.[169] Conversely, again taken literally, including joining

168. *See* discussion *supra* notes 88–123 and accompanying text.

169. *See supra* Subpart III.B.

statements indicate that the only parts of the main opinion that are the opinion of the Court are the listed inclusions.[170] The Court uses the two different kinds of joining statements in shifting majority/plurality decisions that feature unlabeled introductions and *** conclusions. If there was a default rule that applied to these sections for all opinions, whatever that rule might be, the different joining statements would sometimes conflict with the default rule.

As appealing as a general default rule might be, there is no proof that this is what is happening with *** conclusions and unlabeled introductions. What the default rule might be is neither obvious nor known and conflicts with other parts of opinion-writing practice.

D. Reading Concurrences

Based on how the Supreme Court currently writes opinions, the only remaining possible solution is to return to the old-fashioned method of discerning agreement or disagreement among Justices—to read concurrences. Prior to the advent of outline-style formatting and detailed joining statements, reading separate opinions was the only way to determine where different Justices' views overlapped and where they diverged.

For instance, sometimes a Justice would indicate agreement or disagreement with a particular part of the main opinion by including in their concurrence a description of the legal point of departure. One example comes from the multiple separate opinions in *United States v. United Mine Workers of America*.[171] In that case, Justice Jackson included a note at the end of Chief Justice Vinson's majority opinion, noting that he "joins in this opinion except as to the Norris-LaGuardia Act which he thinks relieved the courts of jurisdiction to issue injunctions in this class of case."[172] Justice Frankfurter wrote a separate lengthy concurrence, concluding that he "concur[s] in the Court's opinion insofar as it is not inconsistent with these views."[173] And in yet another concurrence, Justice Black wrote for himself and Justice Douglas that they agree with much of the Court's opinion, but as to the "decision of this Court [that] also approves unconditional fines of criminal punishment for past disobedience,"[174] he wrote that the two Justices "cannot agree to this aspect of the Court's judgment."[175] Without identifying page numbers or parts, these three separate concurring opinions leave it to the reader to discern the exact parts of the majority opinion with which the Justices disagree.

Now that Justices use outline-style formatting to indicate agreement with specific parts of opinions, this kind of descriptive

170. *Id.*
171. 330 U.S. 258 (1947).
172. *Id.* at 307.
173. *Id.* at 328 (Frankfurter, J., concurring in judgment).
174. *Id.* at 332 (Black, J., concurring in part, dissenting in part).
175. *Id.*

joining is rare.[176] Rather, now, Justices conveniently vote by part "because outline-style formatting creates an index by which the Justices may opt into and out of an opinion."[177] As this Article explains, the joining statement typically indicates which parts of the opinion a Justice opts into and out of.[178] However, with the *** conclusion and unlabeled introduction never included in the joining statements, we have to turn elsewhere. And sometimes, reading the actual separate concurring opinion can give the answer to whether a Justice has joined the unlabeled introduction or the *** conclusion.

This approach finally provides an answer to the quiz that started this Article: in *Parents Involved*, the Chief Justice's statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[179] is definitively a statement of a plurality of the Court (so, as previously mentioned, the answer to the multiple-choice quiz in the Introduction is (B)). We know this because Justice Kennedy's separate concurrence twice states as much.[180] First, in his second paragraph, he explains in detail the parts of the Chief Justice's opinion he agrees with:

> I agree with THE CHIEF JUSTICE that we have jurisdiction to decide the cases before us and join Parts I and II of the Court's opinion. I also join Parts III–A and III–C for reasons provided below. My views do not allow me to join the balance of the opinion by THE CHIEF JUSTICE, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause.[181]

Because Justice Kennedy writes that he does not join "the balance of the [Chief Justice's] opinion,"[182] he has omitted the *** conclusion (which is in the balance of the Chief Justice's opinion) from having his vote.

This passage answers whether Justice Kennedy joined the *** conclusion but nonetheless still leaves ambiguity as to whether the

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176. For a modern use of such a descriptive joining, see Justice Scalia's concurrence in *Adarand Constructors v. Pena* where he writes that he "join[s] the opinion of the Court, except Part III–C, and except insofar as it may be inconsistent with the following: In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direct." Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part, concurring in judgment) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgement)).

177. Delson, *supra* note 25, at 1226–27.

178. *See supra* text accompanying note 80.

179. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (*** conclusion).

180. *See infra* text accompanying notes 193–96.

181. *Parents Involved*, 551 U.S. at 782–83 (Kennedy, J., concurring in part).

182. *Id.* at 782.

other Justices in the plurality also joined.[183] Justice Kennedy resolves this ambiguity later in his opinion. He writes midway through his concurrence:

> This is by way of preface to my respectful submission that parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The *plurality* opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The *plurality*'s postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" is not sufficient to decide these cases.[184]

Now we finally have the answer. Justice Kennedy clearly states that this section of the opinion is that of a plurality of the Court.

But what if Justice Kennedy got the vote count wrong for this section? If he did, so did Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) in his dissent: "The Court should leave [school districts] to their work. And it is for them to decide, to quote the *plurality*'s slogan, whether the best 'way to stop discrimination on the basis of race is to stop discriminating on the basis of race.'"[185] It is hard to imagine that all five of these Justices—who were part of the confidential voting and drafting process in the case—are wrong about the vote count for this key part of the Chief Justice's opinion. Case closed.

This solution brings us to a definitive answer for the *Parents Involved* *** conclusion. It also appears promising for other cases because all but one of the shifting majority/plurality opinion cases that I have identified for this Article include at least one concurring opinion with its own joining statement.[186] The joining statements in

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183. *See* discussion *supra* Subpart III.B.

184. *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring in part) (bracket in original) (emphasis added) (citation omitted).

185. *Id.* at 862 (Breyer, J., dissenting) (emphasis added) (citation omitted).

186. In *League of United Latin American Citizens v. Perry,* Justice Stevens did not include a joining statement in his concurrence in part *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 447–83 (2006) (Stevens, J., concurring in part and dissenting in part). There were three other concurrences in part in the case, each of which did include a joining statement. *See id.* at 483–91 (Souter, J., concurring in part and dissenting in part); *id.* at 491–92 (Breyer, J., concurring in part and dissenting in part), *id.* at 492–511 (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part). Justice Thomas did not include a joining statement in his concurrence in part in the slip opinion in *McDonald v. City of Chicago*, but the final United States Reports version includes one. *Compare* McDonald v. City of Chicago, No. 08-1521, slip op. at 67 (U.S. June 28, 2010) (Thomas, J., concurring in part), *with* McDonald v. City of Chi., 561 U.S. 742, 805–06 (2010) (Thomas, J., concurring in part).

these concurrences generally appear at the start of the concurring opinion,[187] but they can also appear at the end of the conclusion[188] or, when there is no separate concurring opinion, just as a footnote to the main opinion's joining statement.[189] When read closely, as suggested here, these joining statements might help provide clues as to whether the Justice agrees with the *** conclusion or unlabeled introduction.

Upon closer inspection, though, reading concurrences carefully also fails to solve the confusion problem for the simple reason that not every case with a *** conclusion or unlabeled introduction has a separate concurrence that clearly explains whether *these sections* are part of a majority or plurality. For instance, in *Seila Law*, Justice Thomas's concurrence, on behalf of himself and Justice Gorsuch, states that he joins Parts I, II, and III of the main opinion but that he "respectfully dissent[s] from the Court's severability analysis [in Part IV], however, because [he does] not believe that [the Court] should address severability in this case."[190] On the one hand, this statement plainly indicates which part of the Chief Justice's main opinion Justices Thomas and Gorsuch agree with—the factual recitation in Part I, the jurisdictional analysis in Part II, and the substantive separation of powers analysis in Part III. Because Justice Thomas does not indicate he and Justice Gorsuch join the Chief Justice's *** conclusion or unlabeled introduction, the logical implication is that they do not.[191]

On the other hand, however, the concurrence's joining statement also plainly indicates the part of the Chief Justice's opinion that Justices Thomas and Gorsuch dissent from: Part IV about

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187. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part). Justice Kagan's joining statement in that case is detailed and long:

> I fully agree with the Court's reasons for allowing the Bladensburg Peace Cross to remain as it is, and so join Parts I, II–B, II–C, III, and IV of its opinion, as well as Justice BREYER's concurrence. Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows. I therefore do not join Part II–A. I do not join Part II–D out of perhaps an excess of caution.

Id. Most concurring opinion joining statements are much shorter.

188. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1918 (2020) (Sotomayor, J., concurring in part) (concluding with "I join all but Part IV of the opinion and do not concur in the corresponding part of the judgment").

189. *See, e.g.*, Peugh v. United States, 569 U.S. 530, 532 (2013) (noting in a footnote "Justice Kennedy joins this opinion except as to Part III–C").

190. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring in part and dissenting in part).

191. *Id.*

severability.[192] This statement about dissenting does not say that they dissent from either the *** conclusion or the unlabeled introduction. Moreover, nothing in the substance of the concurrence indicates disagreement with the doctrinal statements about separation of powers contained in the *** conclusion or the unlabeled introduction. In fact, because the substantive part of the *** conclusion is about separation of powers only and not about severability,[193] one reasonable conclusion would be that Justices Thomas and Gorsuch do in fact join that paragraph because it summarizes the parts of the opinion with which they explicitly agreed.

Seila Law's unlabeled introduction poses the same problem as its *** conclusion in that the introduction's substance is all about separation of powers.[194] However, it concludes with two sentences stating the severability holding.[195] Do these sentences of fact about the Court's holding and judgment mean Justices Thomas and Gorsuch do not join the unlabeled introduction? That is entirely possible, but neither the opinions nor the notations from the Court give the reader any definitive indication one way or the other.

The same problems occur with Justice Scalia's separate concurrence in *United Haulers Ass'n, v. Oneida-Herkimer Solid Waste Management Authority.*[196] In that case, Justice Scalia's concurring opinion indicates that he joins Part I and Parts II–A through II–C of Chief Justice Roberts's opinion but that he is "unable to join Part II–D"[197] because he does not support the Dormant Commerce Clause's *Pike* balancing test.[198] His opinion does not indicate whether he joins the Chief Justice's *** conclusion. The *** conclusion does not apply the *Pike* balancing test, with which Justice Scalia indicated he disagreed, but rather notes that the Supreme Court needs to stay out of cases, such as this one, that ask it to "rigorously scrutinize economic legislation passed under the auspices of the police power."[199] That substantive statement, consistent with Justice Scalia's concurrence, is a sentiment with which Justice Scalia would presumably agree given his jurisprudence in this area.[200] Yet his

192. *Id.*

193. *Id.* at 2211 (*** conclusion).

194. *Id.* at 2191–92 (introduction).

195. *Id.* at 2192 ("We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.").

196. 550 U.S. 330 (2007).

197. *Id.* at 348 (Scalia, J., concurring in part).

198. *Id.* at 348–49 (referring to the test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

199. *Id.* at 347 (*** conclusion).

200. *Id.* at 348 (Scalia, J., concurring in part) ("I write separately to reaffirm my view that 'the so-called "negative" Commerce Clause is an unjustified judicial

opinion is silent as to whether he joins that overall assessment of Dormant Commerce Clause jurisprudence, leaving readers unclear about whether the *** conclusion speaks for a majority or plurality.[201]

The unlabeled introduction in the *United Haulers* case is different. The introduction is short, but after reciting the basic factual context, it refers to applying the *Pike* balancing test (without naming it).[202] Justice Scalia's antipathy for the *Pike* balancing test noted in his concurrence presumably means he does not join the introduction.

Of course, nowhere in the opinion can the reader find this information. In fact, the main opinion's joining statement indicates otherwise, as it is an excluding joining statement that would indicate Justice Scalia joined everything but Part II–D, meaning that he joined both the *** conclusion and the unlabeled introduction, even though the latter applies the *Pike* balancing test that Justice Scalia detests.[203] Further confusing matters, the United States Reports headers provide either no information (the unlabeled introduction shares a page with the start of Part I, so the header is for Part I, not the unlabeled introduction) or information that contradicts the joining statement (the *** conclusion is labeled "Opinion of Roberts, C.J.," when the excluding joining statement would indicate Justice Scalia joined this part).[204] The problems identified with the joining statements in the concurrences of both *United Haulers* and *Seila Law* are common to all shifting majority/plurality cases where the concurrence fails to do what Justice Kennedy did in *Parents Involved*—discuss the content of either the *** conclusion or unlabeled introduction with specificity.

Staying with *United Haulers*, a possibly more fatal problem appears when closely reading the concurrence: The joining statement in the concurrence can sometimes conflict with the joining statement in the main opinion.[205] This problem is not uncommon, as it has occurred in fourteen of the forty-nine shifting majority/plurality opinions identified for this Article. In *United Haulers*, Chief Justice Roberts's main opinion starts with an excluding joining statement: "CHIEF JUSTICE ROBERTS delivered the opinion of the Court,

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invention, not to be expanded beyond its existing domain.'" (quoting General Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring))).

201. *Id.* at 348–49 (offering neither disagreement nor support of the *** conclusion).

202. *Id.* at 334 (introduction) ("Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties.").

203. *Id.* at 332.

204. *Id.* at 334 (introduction), 347 (*** conclusion).

205. *Id.* at 348 (Scalia, J., concurring in part); *id.* at 334.

except as to Part II–D."[206] If the difference between including and excluding joining statements means anything, this statement would mean that every part of the Chief Justice's opinion, other than Part II–D, is an opinion of the Court, thus including the unlabeled introduction and the *** conclusion.

However, Justice Scalia's concurrence indicates otherwise. His concurrence's joining statement takes the form of an including joining statement: "I join Part I and Part II–A through II–C of the Court's opinion."[207] This including joining statement, again if the difference matters, indicates that Justice Scalia joined only the listed parts,[208] which would mean he did not join the unlabeled introduction or the *** conclusion.

So which Justice should the close reader believe here? The Chief Justice, who claims that every part of his opinion, which would include the unlabeled introduction and *** conclusion, was joined except for II–D? Or Justice Scalia, who only asserts he joins Part I and Part II–A through II–C, which would mean no introduction or conclusion? At this point, a reader trying to decipher *United Haulers* would have every reason to walk away in befuddled frustration because, in short, everything about this case either leaves the reader in the dark or confuses them even more.

This close analysis of the concurring opinions in these shifting majority/plurality opinions raises the question: do any of the close reading solutions offered here, to the extent they hold promise, imbue more meaning in the opinion headers and joining statements of both majority opinions and concurrences than they deserve? It is certainly possible that the court reporter and the Justices think meaningfully about the different opinion headers and the different types of joining statements when they write them. But, given the high number of mistakes, mismatches, and conflicts this survey of a small number of cases identified, it seems more likely that they are not thinking about the *** conclusion or unlabeled introduction when they write headers and joining statements at all. Rather, it seems likely they are merely using a header and/or language convention they are familiar with because of its general utility without considering its implications for the *** conclusion or unlabeled introduction. Currently, outside of

206. *Id.* at 334.

207. *Id.* at 348 (Scalia, J., concurring in part).

208. One might argue that Justice Scalia did not state "I join *only* Part I and Part II–A through II–C of the Court's opinion" and that the lack of the word "only" in his joining statement is material. But that makes no sense given the point of the joining statement, which is to be an affirmative act by the authoring Justice (and any others who join) indicating with which parts of the main opinion the Justice agrees. It would be an odd practice for the lack of the word "only" to indicate that a Justice might actually join a different part of the main opinion but is just failing to tell the readers.

cases with the rare concurrence like Justice Kennedy's in *Parents Involved*, we have no way of knowing.

E. Accept the Confusion

I began the previous Subpart about reading concurrences by saying it was the last possible solution. However, there is another option, though I do not call this a solution. This last option is to accept the confusion: we should not try to discern who joined the *** conclusion or the unlabeled introduction because the lack of clarity is intentional. Thus, an ultimate answer is not just unattainable, but the Justices do not want us to know, so we should not even try.

In what world is it possible that the confusion is intentional on the part of the Justices? In a world where the Justices think and act strategically to achieve their jurisprudential goals. This world has been well chronicled by scholars over the past several decades.[209] Within this strategic world, there could be good reason to obscure the exact Justice lineup through the use of *** conclusions and unlabeled introductions. For instance, in *Parents Involved*, Chief Justice Roberts certainly knew that Justice Kennedy wanted to leave some wiggle room for schools to use race to assign students. Thus, if this theory is correct, the Chief Justice intentionally opted not to include his "stop discriminating"[210] statement in the Roman numeral sections of the opinion, the sections with which the joining statement specifically indicates agreement and disagreement. Instead, he slipped this statement into the *** conclusion with the strategic goal of creating ambiguity about whether a majority of the Justices believe this proposition.

Putting important statements like the one in *Parents Involved* in the *** conclusion or the unlabeled introduction would accomplish two objectives. First, it places the burden on the concurring Justice to disown such a statement. In *Parents Involved*, Justice Kennedy does so,[211] but if he had not disassociated himself from this statement with such clarity, Chief Justice Roberts could have scored a win by

209. *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (discussing how Justices realize that their ability to achieve their policy and other goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context in which they act); THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005) (focusing on how each Justice's wish to gain as desirable a final opinion as possible will affect his or her behavior at each stage of the decision-making process); MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000) (analyzing how the collective nature of Supreme Court decision making affects the transformation of the Justices' preferences).

210. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (*** conclusion).

211. *See* discussion *supra* Subpart II.D.

making it more likely that lower courts and others interpret the *** conclusion as coming from a Court majority. Second, the ambiguity increases the likelihood that future readers will think the statement has more weight than it does. For example, even with Justice Kennedy's clear disavowal in his *Parents Involved* concurrence, many intelligent judges and scholars have still understood the *** conclusion as coming from a Court majority.[212] Had Chief Justice Roberts included the "stop discriminating"[213] statement in a section that the joining statement explicitly stated Justice Kennedy did not join, there would be no confusion and no possibility that a reader would understand this statement to be from a majority. But, with the statement appearing in the *** conclusion, the Chief Justice got his wish—some readers believe the "stop discriminating"[214] line is a majority sentiment despite Justice Kennedy's express disavowal.

Thinking of the *** conclusion and unlabeled introduction as strategically employed conventions rather than stylistic conveniences complicates the story here. After all, if the ambiguity and confusion are intentional, then the Court itself does not want anyone to solve the problem that lies at the heart of this Article. Nonetheless, there are two reasons that just accepting the ambiguity and confusion as being part of Court strategy is unconvincing. First, even if the Justices are using the *** conclusions and unlabeled introductions intentionally to create ambiguity, readers deserve to know which Justices have signed onto which sections. As described throughout this Article, the lack of clarity impacts cases, scholarship, judicial biographies, editors, and more.[215] Much of the law is a debate about interpreting precedent, language, and history; it borders on absurd to think that it should also involve debating what should be basic, knowable facts, such as whether a particular Justice joined a particular section of an opinion. It is hard to come up with a legitimate argument to support the Court's general transparency as to who joins which sections of opinions not extending to all sections of an opinion.

Second, several indicia point to the likelihood that the Justices are not using *** conclusions and unlabeled introductions strategically. First, almost every Justice on the Court over the past several decades uses the *** conclusion and unlabeled introduction, and most do so at times for substantive propositions of law and policy.[216] That almost every Justice uses these conventions makes it less likely that their use is a clever ploy to pull one over on fellow Justices. Second, the opinions with substantive *** conclusions and unlabeled introductions have used both including and excluding

212. *See* discussion *supra* Part II.
213. *Parents Involved*, 551 U.S. at 748 (*** conclusion).
214. *Id.*
215. *See* discussion *supra* Part II.
216. *See supra* text accompanying note 57–66.

joining statements (sometimes both in the same case when you include the concurring opinion). When the Court uses an including joining statement, the main opinion provides some public indication[217] that the *** conclusion and unlabeled introduction is *not* part of the Court majority, which is inconsistent with a strategic decision to make it appear as though those sections are actually part of the Court majority. And finally, unless all of the Justices have agreed over time to both employ this strategic maneuver *and* stay quiet about it, one of them likely would have angrily called out the practice in a concurrence or dissent. That no one has done so indicates strategic trickery is unlikely.[218]

Stated differently, though strategic manipulation is a conceivable explanation, employing Occam's Razor here makes more sense. The simpler, and therefore more likely, explanation is what undergirds the rest of this Article—that the Court simply has not paid attention to the implications of the use of *** conclusions and unlabeled introductions in shifting majority/plurality opinions. As a result, confusion abounds.

IV. JUST TELL US

Deciphering the *** conclusion and the unlabeled introduction has turned out to be a complex, detailed, and laborious process that, frustratingly, has led to no easy answer. Fortunately, though, as tortured as the previous analysis of Supreme Court opinion esoterica has been, the solution is straightforward and simple—include the *** conclusion and unlabeled introduction in the joining statement.

This can be done in one of two ways. If the Justices insist on continuing to use the *** conclusion as a convenient way to conclude an opinion and the unlabeled introduction as a stylistically neat way to begin an opinion, then the joining statement should treat these sections as any other section in the opinion and include them in its list of which Justices have joined which sections. Thus, in *Parents Involved*, the new joining statement would read (with the new additions appearing in italics):

> CHIEF JUSTICE ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to *the*

217. Albeit an imperfect indication, see *supra* Subpart III.B.

218. Unless, to dig just a bit deeper, the Justices all have the same incentive to stay quiet, so they do so in order to reap the long-term benefits of cooperating, with or without an explicit agreement to do so. *See generally* MAXWELL STEARNS, ET AL., LAW AND ECONOMICS: PRIVATE AND PUBLIC 585–92 (2018) (situating the benefits of long-term cooperation in game theory). Under this theory, the Justices are content to let the confusion this Article identifies be managed internally—sometimes Justices care enough to disavow statements specifically, as Justice Kennedy did in *Parents Involved*; other times, they have no reason to say anything or the costs of doing so are too high, so they do not.

> *introduction*, Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B, IV, *and* ***, in which JUSTICES SCALIA, THOMAS, and ALITO join.[219]

No case has yet done this in a joining statement,[220] though one Justice in one case has included a reference to the unlabeled introduction in his separate opinion. In *Ramos v. Louisiana*,[221] Justice Kavanaugh began his concurrence noting that he "join[s] the introduction and Parts I, II–A, III, and IV–B–1 of the Court's persuasive and important opinion."[222] This reference is the only one in the United States Reports implicitly acknowledging that the unlabeled introduction (and by extension, the *** conclusion) needs to be separately listed to accurately indicate which sections of the opinion are joined by which Justices. Future joining statements and opinions need to follow Justice Kavanaugh's lead.

In the alternative, the Justices could jettison the *** conclusion and unlabeled introduction altogether and replace them with the appropriately labeled section or subsection in standard Roman numeral outline formatting. Justice Kennedy's opinion in *National Cable & Telecommunications Ass'n v. Gulf Power Co.*[223] is a rare model in this regard. This case is unlike many of the others highlighted in this Article, as his entire opinion attracted a majority with five other Justices joining it in its entirety.[224] However, two other Justices joined only some parts of Justice Kennedy's opinion. [225]

Because Justice Kennedy used Roman numerals for both the introduction (Part I) and the conclusion (Part IV), the joining statements provide perfect clarity about which Justice joined which parts. The opinion opens with "Justice Kennedy delivered the opinion of the Court,"[226] and then Justice Thomas's concurrence for both himself and Justice Souter pinpoints exactly which parts they join: "I join Parts I and III of the Court's opinion . . . ."[227] The syllabus's joining statement is also perfectly clear:

> KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, SCALIA, GINSBURG, and BREYER, JJ., joined, and in which SOUTER and THOMAS, JJ., joined as to Parts I and III.[228]

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219. *Cf. Parents Involved*, 551 U.S. at 707.
220. *See* discussion *supra* note 163 and accompanying text.
221. 140 S. Ct. 1390 (2020).
222. *Id.* at 1410.
223. 534 U.S. 327 (2002).
224. *Id.* at 329 (syllabus).
225. *Id.*
226. *Id.* at 330.
227. *Id.* at 347 (Thomas, J., concurring in part and dissenting in part).
228. *Id.* at 329 (syllabus).

Despite the shifts in who has joined which parts of the opinion, there is no confusion in this opinion because Justice Kennedy used Roman numerals throughout. Other Justices have also done this in the past.[229] When Justices separate out the introduction and conclusion with Roman numerals, the joining statements provide readers with exactly the information they need to know which Justices join which parts.

This is a simple fix that would completely avoid the confusion currently created by *** conclusions and unlabeled introductions. The Court needs to immediately change its practices so that everyone who consumes its opinions can more accurately assess not only the weight that should be given to each and every section of the main opinion but also which Justices agree with which sections. The confusion that the Court has created for important statements, such as "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[230] must be avoided in the future.

It would be more complicated for the Court to go back and fix this problem in all past opinions. Going back in time would not require any change to the *** conclusion label or adding a label to the introduction. Rather, the Court could fix the joining statements to indicate who joined the *** conclusion and the unlabeled introduction. If the Court did this, it would clarify the cases in the past that use the *** conclusion and start the opinion without any label. The complicating factor, beyond the difficulty of amending opinions that already appear in the final version of the United States Reports, is that the Justices may have never actually voted on these sections. Moreover, even if they did, the Court's internal records might not include this information for either or both of the *** conclusion and the unlabeled introduction. Given the sheer volume of cases that begin with unlabeled introductions, this might be a daunting, time-consuming job. Nonetheless, every effort should be made to accomplish such a task.

CONCLUSION

On first blush, the confusion created by the *** conclusion and the unlabeled introduction may not seem to be the weightiest issue

229. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (showing Justice Kagan's use of a Roman numeral instead of *** to separate out the conclusion); Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018) (showing same for Justice Alito). Using Roman numeral I to immediately start an opinion appears rarer, but Justice Kennedy is not alone. *See, e.g.*, Soldal v. Cook County, 506 U.S. 56, 57 (1992) (showing that Justice White uses Roman numeral I to immediately start the opinion); Zinermon v. Burch, 494 U.S. 113, 114 (1990) (showing same for Justice Blackmun).

230. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (*** conclusion).

facing the Supreme Court right now.[231] However, knowing which Justices join *** conclusions and unlabeled introductions turns out to be vitally important for understanding certain Supreme Court precedent. The Court has the power to correct the confusion these sections currently create, and it should do so immediately.[232]

231. *See, e.g.*, *President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE (Apr. 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/ (discussing proposals for structural reform of the Supreme Court); Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (resulting in the potential overturn of *Roe v. Wade*).

232. While this Article was in draft form, I mailed a copy to the Court's Reporter of Decisions. Since then, there has been an additional shifting majority/plurality opinion released by the Court. Consistent with the conclusion of this Article, that opinion uses a Roman numeral divider, rather than the *** divider for the conclusion, making it perfectly clear which Justices joined that part of the opinion. *See* United States v. Husayn, No. 20-827, slip op. at 18 (Mar. 3, 2022) (starting the conclusion with "IV" after the syllabus joining statement clearly indicated which Justices joined that part). The opinion continues the practice of starting with an unlabeled introduction, but baby steps should be applauded—if that is indeed what this sample size of one is indeed a baby step.

APPENDIX: SHIFTING MAJORITY/PLURALITY CASES WITH *** CONCLUSIONS[233]

Hodgson v. Minnesota, 497 U.S. 417 (1990).

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Reed v. Farley, 512 U.S. 339 (1994).

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995).

United States v. Scheffer, 523 U.S. 303 (1998).

Jones v. United States, 527 U.S. 373 (1999).

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

Branch v. Smith, 538 U.S. 254 (2003).

Clingman v. Beaver, 544 U.S. 581 (2005).

Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005).

Hudson v. Michigan, 547 U.S. 586 (2006).

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006).

United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007).

Microsoft Corp. v. AT & T Corp., 550 U.S. 437 (2007).

Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).

Parents Involved in Community. Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

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233. As noted *supra* note 163, these forty-nine cases compose the entire universe of cases that I have been able to find. However, given the difficulty in searching for *** conclusions, it is possible there are others.

Department of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008).

Giles v. California, 554 U.S. 353 (2008).

Federal Communication Commission v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1 (2009).

Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance. Co., 559 U.S. 393 (2010).

Magwood v. Patterson, 561 U.S. 320 (2010).

Bilski v. Kappos, 561 U.S. 593 (2010).

McDonald v. City of Chicago, 561 U.S. 742 (2010).

Chamber of Commerce v. Whiting, 563 U.S. 582 (2011).

PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011).

Bullcoming v. New Mexico, 564 U.S. 647 (2011).

CSX Transportation, Inc. v. McBride, 564 U.S. 685 (2011).

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

Missouri v. McNeely, 569 U.S. 141 (2013).

Peugh v. United States, 569 U.S. 530 (2013).

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