
Volume 28

Number 2 *Symposium on Civility and Judicial Ethics in the 1990s: Professionalism in the Practice of Law*

pp.583-646

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Recommended Citation

Edward McGlynn Gaffney Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 Val. U. L. Rev. 583 (1994).

Available at: <https://scholar.valpo.edu/vulr/vol28/iss2/5>

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THE IMPORTANCE OF DISSENT AND THE IMPERATIVE OF JUDICIAL CIVILITY*

EDWARD MCGLYNN GAFFNEY, JR.**

*A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed. . . . Independence does not mean cantankerousness and a judge may be a strong judge without being an impossible person. Nothing is more distressing on any bench than the exhibition of a captious, impatient, querulous spirit.*¹

Charles Evans Hughes

I. INTRODUCTION

Charles Evans Hughes served as Associate Justice of the Supreme Court from 1910 to 1916 and as Chief Justice of the United States from 1930 to 1941. In 1927, while still a member of the New York Court of Appeals, Hughes delivered a set of six lectures at Columbia University. The excerpt cited above comes from his second lecture on the Supreme Court, in which Hughes wrote about both the importance of dissent and the imperative of judicial civility. He thus anticipated by nearly seven decades the principal concern addressed in this Article, which explores a portion of the *Standards for Professional Conduct within the Seventh Federal Circuit (Standards)*.

This comment on the *Standards* focuses on the duties of courtesy, respect, and civility that they impose on judicial conduct, on and off the bench. I illustrate the importance of the tradition of dissent in American appellate courts, and I offer several instances of incivility among Justices of the Supreme Court. I then conclude that the imperative of judicial civility toward other judges must be held in tension with the duty of appellate judges to account candidly for their differences in carefully written dissents.

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I wish to thank Lynda Anne Sloane and Steven R. Williams for their help with many of the research aspects of this article. I would also like to express my appreciation to my colleagues, Jack Hiller, Laura Gaston Dooley, JoEllen Lind, Michael McConnell, Thomas Shaffer, and Richard Stith for helpful comments on earlier drafts. And I would like to express gratitude to Judge Kenneth Ripple not only for helpful suggestions before I began drafting this article, but also for embodying the virtues of the Seventh Circuit's *Standards* long before his Court formally adopted them.

1. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

The *Standards* are the end product of a project initiated by the Honorable William J. Bauer, then Chief Judge of the United States Court of Appeals for the Seventh Circuit. In the fall of 1989, he appointed a Committee on Civility, requesting that this group—composed of three federal district judges and six practitioners—investigate the apparent lack of civility among lawyers in the Seventh Circuit and recommend appropriate rules for the consideration of the Court. The committee was chaired by the Honorable Marvin E. Aspen, District Judge in the United States District Court for the Northern District of Illinois.

In November of 1989, the Aspen Committee conducted an extensive survey among judges and practicing lawyers in Illinois, Indiana, and Wisconsin about their perception of growing incivility in the practice of law both on and off the bench. On April 22, 1991, the Aspen Committee published an *Interim Report*,² containing the data from its survey, recommendations for improving civility among lawyers through training in law schools, law firms, and Inns of Court, and a draft of the standards for professional conduct that the committee proposed for adoption by the Seventh Circuit.

After opportunity for comment on this draft, the Aspen Committee issued its *Final Report* to Judge Bauer on June 9, 1992.³ This report included a slightly revised version of the proposed rules. The Seventh Circuit adopted these rules on September 18, 1992.

The Seventh Circuit is by no means the only court in the country that has noticed a deterioration of the ethics of the gentleman lawyer⁴ in recent years. Nor, as Justice Brent Dickson observes in his Article in this Symposium,⁵ is the Seventh Circuit the only court, or even the first court, to respond to this

2. *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371 (1991) [hereinafter *Interim Report*].

3. *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441 (1992) [hereinafter *Final Report*].

4. Professor Thomas Shaffer of Notre Dame Law School has in a number of works produced a carefully delineated and refined analysis of the ethic of the gentleman lawyer. In a volume he recently co-authored with his daughter Mary, Shaffer relies principally on illustrative narratives about lawyers to explore astutely the ways in which a gentleman's community enabled the virtues of the gentleman lawyer to flourish. See THOMAS SHAFFER & MARY SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991) [hereinafter SHAFFER, *AMERICAN LAWYERS*]. In an earlier collection of materials, *AMERICAN LEGAL ETHICS* (1985), Shaffer interweaves deftly chosen provisions of the ABA rules and their ethical considerations with stories about the great characters of the American bar for which he is justly famous. He has made a cottage industry out of his commentaries on the character and virtues of Atticus Finch. See, e.g., Thomas Shaffer, *The Gentleman in Professional Ethics*, 10 *QUEEN'S L.J.* 1 (1984); Thomas Shaffer, *The Moral Theology of Atticus Finch*, 42 *U. PITT. L. REV.* 181 (1981).

5. Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 *VAL. U. L. REV.* 531 (1994).

perceived difficulty by enacting rules addressing the lack of civility among lawyers. Nonetheless, the *Standards* are worthy of the attention focused on them in this Symposium for several reasons.

First, the *Standards* do not purport on their face to write rules, but to clarify duties. These duties are addressed in Judge Aspen's thoughtful lead Article in this Symposium.⁶ The emphasis on duties throughout the *Standards* is a welcome departure from the recent reduction of legal ethics to a bunch of rules. As Notre Dame law professor Thomas Shaffer has suggested:

There is more to legal ethics than rules. Ethics is beyond the rules and around and under the rules. This, more than in legal ethics, is not alternative, not secondary, but is so elementary in our lives that without it what we say about rules would be incoherent. What is beyond and around and under the rules are the morals we learn from our families, our towns, our religious congregations, and our clients.⁷

In a similar vein Yale law professor Robert Cover observed:

The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.⁸

Although it is possible to read the *Standards* as yet another subset of the ideas that the American Bar Association is promoting as part of its larger and

6. Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994).

7. Thomas L. Shaffer, *There is More to Legal Ethics Than Rules*, in 18 SOCIAL RESPONSIBILITY: BUSINESS, JOURNALISM, LAW, MEDICINE ANNUAL 31 (Louis W. Hodges ed., 1992).

8. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). For a description of the understanding of *mitzvah* (duty or obligation) as a central category of Jewish ethics, see Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIG. 65 (1987).

more problematic project on professionalism,⁹ I think it may be read in a manner congenial to the efforts of serious ethicists like Shaffer and Cover.

Second, the *Standards* are mutual and reciprocal. They were conceived by a committee that included both judges and practicing lawyers.¹⁰ The duties clarified in this document bind lawyers to better conduct with respect to their fellow lawyers and to the courts in which they practice, and they bind judges to better conduct towards lawyers and other judges.¹¹

This conception of mutual obligations departs from the practice of confining judicial efforts at improving civility to the lawyers who practice in their courts. For example, Judge William Conover of the Indiana Court of Appeals recently took the occasion in a published opinion to admonish both counsel for the quality of their advocacy:

We must first discuss the quality of briefing by counsel in this appeal. Throughout the parties' briefs, they have launched rhetorical broadsides at each other which have nothing to do with the issues in this appeal. Counsels' comments concern their opposite numbers' intellectual skills, motivations, and supposed violations of the rules of common courtesy. Because similar irrelevant discourse is appearing with ever-increasing frequency in appellate briefs, we find it necessary to discuss the easily-answered question of whether haranguing condemnations of opposing counsel for supposed slights and off-record conduct unrelated to the issues at hand is appropriate fare for appellate briefs.

9. For a thoughtful critique of the ABA project on professionalism, see Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1990). See also SHAFER, *AMERICAN LAWYERS*, *supra* note 4, where Shaffer notes that the professionalism folks at the ABA have a "national office, a logo, a motto, its own journal (called *The Professional Lawyer*), and a budget." *Id.* at 65. Worse yet, they produce yet another newsletter. At its worst, the ABA project on professionalism is a pathetic attempt to make the profession look good, not a genuine reform of bad habits. *Id.* at 66-68. For a thoughtful effort to rescue the project on professionalism from the charge that it is little more than slick PR gimmickry, see Robert Gordon & William Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* (Robert L. Nelson et al. eds., 1992).

10. The other two judicial members of the Aspen Committee were Hon. Larry J. McKinney, U.S. District Judge, Southern District of Indiana, and Hon. John C. Shabaz, U.S. District Judge, Western District of Wisconsin. The six practitioners who served on this committee were David E. Beckwith, George N. Leighton, William A. Montgomery (Secretary), Bernard J. Nussbaum, Nancy Schaefer, and Stephen W. Terry, Jr. Cornelia H. Tuite of the American Bar Association, Center for Professional Responsibility, served as the Reporter for the committee. Joanne B. Martin and Dan Willenburg served as consultants.

11. *Final Report*, *supra* note 3, at 448. "The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other" *Id.*

At the outset, we point to the obvious: the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time.

On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal. Further, appellate counsel should realize, such petulant grousing has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument.

On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules. In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs.¹²

The focus of the judge's chastisement is almost exclusively on the tone of the briefs. The opinion offers little structural guidance on the central issue presented for review in that case, abuse of discovery. That issue is a recurring one. In fact, the strongest consensus in the data gathered by the Aspen Committee is that serious problems of incivility exist in the way that litigants behave in discovery proceedings.¹³ This led the committee to observe: "It [discovery] is used as a weapon rather than a fact finding tool. It is done with a double barrel shotgun rather than a carefully aimed rifle. It is done to protect oneself from charges of inadequate representation rather than with judgment to resolve the dispute."¹⁴

One example of potential abuse of the discovery process is the practice of seeking early answers to what are known as "contention interrogatories." One federal trial court describes the practice as follows:

[T]here is a fundamental reason to believe that the early knee-jerk filing of sets of contention interrogatories that systematically track all the allegations in an opposing party's pleadings is a serious form of discovery abuse. Such comprehensive sets of contention interrog-

12. *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).

13. *Interim Report*, *supra* note 2, at 434. Appendix III, Table 5 reports that 94% of the 1297 attorneys surveyed thought that there is a problem of incivility in discovery proceedings; only 2% thought that there is no problem of incivility in these proceedings. *Id.*

14. *Interim Report*, *supra* note 2, at 386; *see also id.* at 383, 387-88.

atories can be almost mindlessly generated, can be used to impose great burdens on opponents, and can generate a great deal of counter-productive friction between parties and counsel.¹⁵

Rather than precluding this practice entirely, however, the court suggested that the burden of justifying the request should be on the party who seeks answers to those kinds of questions before substantial documentary or testimonial discovery has been completed.¹⁶

To return to the theme of judges instructing lawyers about lawyers' incivility, Judge Conover also seized the occasion to admonish counsel for incivil behavior in an earlier opinion in a divorce case: "We first believe it necessary to discuss appellant counsel's use of intemperate language in appellant's brief regarding the trial judge's motives and reasons for amending the judgment below. However, we will not give such language dignity by repeating it here."¹⁷ Without repeating the language, the judge implicitly described it as "impertinent, intemperate, scandalous, or vituperative,"¹⁸ and noted that language of this sort in briefs on appeal "impugning or disparaging this court, the trial court, or opposing counsel"¹⁹ could lead to an order to strike the offending brief "from our files and to affirm the trial court without further ado."²⁰

Lest one think that the issue of incivility is a recent discovery of the Aspen Committee, Judge Conover cited a 1906 decision of the Indiana Supreme Court:

Such statements are as foolish as they are mischievous. Counsel has need of learning the ethics of [her] profession anew, if [she] believes that vituperation and scurrilous insinuation are useful to [her] or [her] client in presenting [her] case. The mind, conscious of its own integrity, does not respond readily to the goad of insolent, offensive, and impertinent language. It must be made plain that the purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion.

15. *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 337 (N.D. Calif. 1985).

16. *Id.* at 338.

17. *Clark v. Clark*, 578 N.E.2d 747, 748 (Ind. Ct. App. 1991).

18. *Id.*

19. *Id.*

20. *Id.* (citing *White v. Sloss*, 198 N.E.2d 219, 220 (1964); *Pittsburgh R.R. Co. v. Muncie & Portland Traction Co.*, 77 N.E. 941, 942 (Ind. 1906)). After citing the 1906 decision at great length, the court concluded that a public reprimand of counsel would be preferable to the starker remedy of depriving an offending lawyer's client of a day in court. *Clark*, 578 N.E.2d at 479.

A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, trial judge, or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord. The language referred to is offensive, impertinent, and scandalous. There is nothing in the record to warrant or excuse it²¹

However useful such admonitions are to counsel who engage in inappropriate behavior, the *Standards* may have greater impact precisely because they do not assume that lawyers are the only ones who offend in these matters. At least one can hope that the humble recognition in the *Standards* that judges also have some behavior to modify may have a salutary effect on Ramboesque lawyers.

Third, the duties that the *Standards* impose on judges run not only toward counsel,²² but also toward one another. Specifically, judges in the Seventh Circuit have undertaken three obligations with respect to one another:

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.²³

These duties provide a text for this comment on what I have called the imperative of judicial civility. Part II acknowledges the vital role that dissents have played in the elaboration of American jurisprudence. Part III explores the three judicial duties mentioned above, in light of several problematic instances involving Justices on the Supreme Court of the United States. I conclude that the duty of courtesy, respect, and civility of judges toward one another must be held in tension with the duty of appellate judges to account candidly for their

21. *Clark v. Clark*, 578 N.E.2d 747, 748-49 (Ind. Ct. App. 1991) (citing *Pittsburgh R.R. Co. v. Muncie & Portland Traction Co.*, 77 N.E. 941, 942 (Ind. 1906)) (brackets in original). The shifts in gender were made by Judge Conover. I have read the briefs myself and did not find them as appalling as he did.

22. *Final Report*, *supra* note 3, at 451-52.

23. *Id.* at 452.

differences in carefully written dissents.

II. THE IMPORTANCE OF DISSENT

Justice William J. Brennan delivered the Third Annual Mathew O. Tobriner Memorial Lecture at Hastings College of the Law in 1985.²⁴ In this lecture, Brennan first noted the distinctive contribution to California law made by the dissents of Justice Tobriner, in whose memory the lecture series was dedicated.²⁵ Brennan acknowledged that “[v]ery real tensions sometimes emerge when one confronts a colleague with a dissent. After all, collegiality is important; unanimity *does* have value; feelings *must* be respected.”²⁶ He cited several critics of dissents, including Justice Holmes, the “Great Dissenter,”²⁷ who described dissents as generally “useless” and “undesirable.”²⁸

Justice Brennan also offered several reasons why dissents can play a legitimate function in an appellate court. First, he noted, “the dissent demonstrates flaws the author perceives in the majority’s legal analysis. It is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case.”²⁹

Second, Brennan suggested:

The dissent is also commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly—a sort of “damage control” mechanism. Along the same lines, a dissent sometimes is designed to furnish litigants and lower courts with practical guidance—such as ways of distinguishing subsequent cases. It may also hint that the litigant might more fruitfully seek relief in a different forum—such as the state courts.³⁰

24. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986) [hereinafter Brennan, *Defense*].

25. *Id.* at 427-28.

26. *Id.* at 429.

27. Justice Holmes is so described not because of the frequency but because of the power of his dissents. See, e.g., *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). See LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 400-01 (1991).

28. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). Other critics of dissents noted by Brennan include H.L.A. HART, *THE CONCEPT OF LAW* 138 (1961), and LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958). Brennan, *Defense*, *supra* note 24, at 429.

29. Brennan, *Defense*, *supra* note 24, at 430; see also *supra* note 1 and accompanying text.

30. Brennan, *Defense*, *supra* note 24, at 430; see, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

Third, Brennan described the "most enduring dissents" as those in which the dissenters speak as "Prophets with Honor."³¹ As Brennan put it:

These are the dissents that often reveal the perceived congruence between the Constitution and the "evolving standards of decency that mark the progress of a maturing society," and that seek to sow seeds for future harvest. These are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law.³²

In the historical account below, I offer several examples of these three functions in Supreme Court dissents. It is safe to say that there is strong consensus about the need for open conflict in appellate opinions. To be sure, some Chief Justices have tried to avoid conflict and to suggest a stronger consensus than has always existed, but the value of dissenting opinions is now beyond question.

This is not the case in all parts of the world today. For example, in British appellate practice the judges still announce their views seriatim orally from the bench. This custom has led to greater uniformity in British appellate panels than in their American counterparts.³³

Because our judiciary was at the outset heavily influenced by British custom, dissent was not always appreciated as part of the function of an appellate court. *Purviance v. Angus*,³⁴ an early Pennsylvania decision, however, illustrates that even before the Judiciary Act of 1789,³⁵ Americans were aware of the value of dissent, even if dissents occurred infrequently. In this case Justice Rush wrote in one of the earliest recorded American dissents: "However disposed to concur with my brethren in this cause, I have not been able to do it. Unanimity in courts of justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment."³⁶

31. Brennan, *Defense*, *supra* note 24, at 430-31 (citing ALAN BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSIDENTS IN THE SUPREME COURT* (1974)).

32. *Id.* at 431 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

33. See Francis Raymond Evershed, *The Judicial Process in Twentieth Century England*, 61 COLUM. L. REV. 761 (1961). In many nations, dissents are forbidden or discouraged. In Germany, there are no dissents *except* on the Constitutional Court.

34. 1 Dallas 180 (Pa. Ct. Errors & App. 1786) (reversing a judgment of the Court of Admiralty), *cited in* PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY* 20 (1969).

35. 1 Stat. 73 (1789). The title of this statute is "An Act to establish the Judicial Courts of the United States." For discussion of the act, see 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 457-508 (1971).

36. *Purviance*, 1 Dallas at 494, *cited in* JACKSON, *supra* note 34, at 20.

From that day to this, dissents have played a vital role in the growth and development of the law. I illustrate this conclusion with a few examples from each period of Supreme Court history.³⁷

In the first period of the Supreme Court, under Chief Justices John Jay of New York (1789-1795), John Rutledge of South Carolina (1795-1796), and Oliver Ellsworth of Connecticut (1796-1800), the Court followed the custom of the King's Bench and announced its decisions through the seriatim opinions of its members.³⁸ I am not aware of any dissents in this period.

John Marshall of Virginia served as Chief Justice of the United States from 1801 to 1836.³⁹ In his first case,⁴⁰ Marshall broke with the English tradition and adopted the practice of announcing judgments of the Court in a single opinion.⁴¹ And in the first few years of the Marshall Court, the Chief Justice delivered all opinions of the Court, which were virtually always unanimous. There were no dissents, and only one one-sentence concurring opinion.⁴² As Justice Brennan observed in his Tobriner Lecture, "Unanimity was consciously pursued and disagreements were deliberately kept private. Indeed, Marshall delivered a number of opinions which, not only did he not write, but which

37. I have adopted the standard periodization of the Court into the tenures of its sixteen Chief Justices: Jay, Rutledge, Ellsworth, Marshall, Taney, Chase, Waite, Fuller, White, Taft, Hughes, Stone, Vinson, Warren, Burger, and Rehnquist.

38. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192 (1959). For a discussion of the Court before John Marshall became Chief Justice, see GOEBEL, *supra* note 35.

39. John Marshall has been the object of considerable scholarly study. See, e.g., LEONARD BAKER, JOHN MARSHALL: A LIFE IN THE LAW (1974); ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (3 vols. 1916-1919); EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT (1919); 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER, JOHN MARSHALL, 1801-15 (1981); SAMUEL J. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON (1964); R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 18-88 (1968); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 99-122 (1987); FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955, at 73-110 (1955); ADRIENNE SIEGEL, THE MARSHALL COURT, 1801-1835 (1987); ROBERT J. STEAMER, THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT 24-53 (1971); FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION (1981); WILLIAM F. SWINDLER, THE CONSTITUTION AND CHIEF JUSTICE MARSHALL (1978); JAMES BRADLEY THAYER, JOHN MARSHALL (1901); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1937); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 7-34 (1976).

40. *Talbot v. Seeman*, 1 U.S. (1 Cranch) 331 (1801).

41. ZoBell, *supra* note 38, at 193.

42. *Head & Armory v. Providence Ins. Co.*, 1 U.S. (2 Cranch.) 459, 465 (1804) (Chase, J., concurring).

were contrary to his own judgment and vote at conference."⁴³ Brennan notes that this new practice was of great symbolic and practical significance:

This change in custom at the time consolidated the authority of the Court and aided in the general recognition of the Third Branch as co-equal partner with the other branches. . . . Not surprisingly, not everyone was pleased with the new practice. Thomas Jefferson, who also was a lawyer, was, of course, conversant with the English custom, and was angrily trenchant in his criticism. He wrote that "[a]n opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning."⁴⁴

If John Marshall did not exactly rule his court with an iron hand, at least it can fairly be said that he strove earnestly to achieve a strong and powerful consensus for his Federalist agenda in the early republic, so it is curious that Brennan would conclude that Marshall sought not to speak as a Federalist from Virginia.⁴⁵ That is exactly what Marshall sought to do, but more to the point he would have much preferred it if the entire Court were unanimous in this Federalist voice.⁴⁶ As Percival Jackson put it: Marshall "sought not only to avoid dissent but also, by the trend of his argument and choice of his language, to foreclose the expression of differences with the reasoning he employed to lead to an agreed-upon result"⁴⁷

Early into the Marshall Court era, however, Justice William Johnson emerged as a strong challenger to the alleged control of the Chief Justice over the Court.⁴⁸ Johnson cast almost half of the seventy dissents and the sixty concurring opinions in the Marshall Court period.⁴⁹ In short, the unanimity which Marshall wished for his Court lasted for only a brief period. Once Johnson blazed the trail of dissent, Marshall himself eventually began to find

43. Brennan, *Defense*, *supra* note 24, at 433 (citing David Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 648 n.24 (1982)); Donald M. Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118, 119 (1965); ZoBell, *supra* note 38, at 193 n.41.

44. Brennan, *Defense*, *supra* note 24, at 433 (citing Letter from John Marshall to Thomas Ritchie (Dec. 25, 1820), *quoted in* ZoBell, *supra* note 38, at 194).

45. Brennan, *Defense*, *supra* note 24, at 433.

46. See generally NEWMYER, *supra* note 39.

47. JACKSON, *supra* note 34, at 22.

48. DONALD G. MORGAN, *JUSTICE WILLIAM JOHNSON—THE FIRST GREAT DISSENTER* (1954). In an earlier article Morgan rejected the view that Marshall controlled the Associate Justices. Donald G. Morgan, *The Origin of Supreme Court Dissent*, 10 WM. & MARY Q. 353 (1953).

49. JACKSON, *supra* note 34, at 26.

himself in dissent.⁵⁰ The pattern was now set. Justices, including the Chief Justice, were free to express their disagreement with the majority of the Court in a formal dissent.

Marshall's successor, Roger Brooks Taney of Maryland, served as Chief Justice of the United States from 1836 to 1864.⁵¹ The transition from the Federalist Marshall to the Jacksonian Democrat Taney was not entirely smooth. Justice Story preserved the memory of his hero Marshall in three dissents in which he wistfully announced Marshall's vote in conference on the cases, which had been set for reargument after the death of Marshall and Johnson. In *Charles River Bridge v. Warren Bridge*,⁵² the new Chief Justice allowed that "the rights of private property are sacredly guarded,"⁵³ but that this principle did not mean that the grant of a charter for a toll bridge would prevent a subsequent legislature from granting another charter for the construction of a parallel bridge that was toll-free. That is not how Marshall would have done things, said Story in dissent, citing the posthumous concurrence of the late Chief Justice as well as Marshall's opinion construing the royal charter given to Dartmouth College as a contract that the State of New Hampshire could not impair.⁵⁴

The second instance of this sort of dissent by Story occurred in *Briscoe v. Commonwealth Bank of Kentucky*.⁵⁵ When this case was finally decided after two postponements,⁵⁶ the vote was contrary to the original outcome reached under Marshall. Story lamented the result in a dissent that again announced the vote in conference of the absent "real" Chief:

When this case was formerly argued before this court, a majority of the judges, who then heard it, were decidedly of the opinion that the act of Kentucky was unconstitutional and void. . . . In principle it was thought to be decided by the case of *Craig v. State of Missouri*. . . .

50. See *Bank of United States v. Dandridge*, 7 U.S. (12 Wheat.) 29, 50 (1827) (Marshall, C.J., dissenting).

51. For a discussion of the Taney Court, see, e.g., HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER THE LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* (1982); NEWMYER, *supra* note 39, at 89-146; DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861* (1976); REHNQUIST, *supra* note 39, at 123-51; RODELL, *supra* note 39, at 111-39; 3 MARTIN SIEGEL, *THE SUPREME COURT IN AMERICAN LIFE: THE TANEY COURT 1836-1864* (1987); STEAMER, *supra* note 39, at 54-95; 5 CARL BRENT SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64* (1974).

52. 12 U.S.(11 Pet.) 496 (1837).

53. *Id.* at 508.

54. *Id.* at 599, (Story, J., dissenting) (citing *Woodward v. Dartmouth College*, 4 U.S. (4 Wheat.) 463 (1819)).

55. 12 U.S. (11 Pet.) 418 (1837).

56. *Deferred*, 12 U.S. (8 Pet.) 43 (1834); *deferred*, 9 Pet. 85 (1835).

Among that majority was the late Mr. Chief Justice Marshall.⁵⁷

In the third case, *New York v. Miln*,⁵⁸ sustaining a state regulation of immigrants that no self-respecting Federalist would have done, Story gave more than a hint of faint nostalgia for the absent Chief:

I have the consolation to know that I had the entire concurrence, upon the same grounds of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was that the act of New York was unconstitutional, and that the present case fell directly within the principles established in the case of *Gibbons v. Ogden*.⁵⁹

As Professor Fred Rodell noted, "No Chief Justice has ever had so bad a historical press as Taney, and, except for his one most egregious error [*Dred Scott*], deserved it so little."⁶⁰ Without a doubt, though, the single most momentous case in the Taney Court was *Dred Scott v. Sandford*.⁶¹ If ever there were an example of the problems that can come from multiple opinions on the Court, this case is it. On March 6, 1857, Chief Justice Taney read for two hours from the bench what he called an "Opinion of the Court," but beyond the fact that *Dred Scott* remained a slave, the political debate that ensued after the case has obscured whether Taney's opinion even commanded a majority on several key points. For example, Taney claimed that: (1) the Court had jurisdiction over the suit, (2) since Negroes were not citizens of the United States, they could not bring a diversity action in federal court; (3) the provision of the Missouri Compromise under which *Dred Scott* claimed his freedom by virtue of his residency at Fort Snelling, Minnesota, was unconstitutional since Congress had no power to prohibit slavery in the federal territories; (4) *Scott* had not been liberated by virtue of his residence in Illinois, for his status as a slave was determined under the law of Missouri, not Illinois, and hence as a non-citizen he was incapable of bringing a diversity action in federal court; and (5) the mandate must be returned to the lower court with instruction that it be vacated for want of jurisdiction.

57. *Briscoe*, 12 U.S. (11 Pet.) at 435 (Story, J., dissenting).

58. 12 U.S. (11 Pet.) 357 (1837).

59. *Id.* at 386 (Story, J., dissenting) (citing *Gibbons v. Ogden*, 6 U.S. (9 Wheat.) 1 (1824)).

60. RODELL, *supra* note 39, at 110. Taney "might have died a little happier had he known that in the era just ahead—the era of ruthless 'reconstruction' and rampant capitalism and expansion high-wide-and-not-always-handsome—there would be no Chief Justice for almost fifty years who could hold a candle to Roger Brooks Taney." *Id.* at 139.

61. 60 U.S. (19 How.) 1 (1857). For a discussion of this case, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS* (1978); VINCENT C. HOPKINS, *DRED SCOTT'S CASE* (1951); SWISHER, *supra* note 51, at 528-652 (1974).

One reading of all of the opinions in the case concludes that only four Justices (Taney, Wayne, Daniel, and Curtis) expressly agreed that the Court had jurisdiction; only three (Taney, Wayne, and Daniel) agreed that a Negro could not be a citizen of the United States; six Justices (Taney, Wayne, Grier, Daniel, Campbell, and Catron) agreed that the restriction in the Missouri Compromise was invalid; and seven Justices (Taney, Wayne, Nelson, Grier, Daniel, Campbell, and Catron) agreed that, since the status of Scott should be decided under the law of Missouri, not Illinois, Scott was still a slave.⁶² In this box score "the justices not committing themselves on a certain issue are counted with the opposition."⁶³ Only the items commanding a majority of five votes could be said to be the holding of the court; the rest, to use the Republican slogan of the day, was mere "obiter dictum."

The leading historian on this case, Stanford professor Don Fehrenbacher, has, however, suggested an alternative reading of the numbers in the case. In Fehrenbacher's box score, only the two dissenting Justices (McLean and Curtis) voted to deny the five propositions mentioned above. Hence he concludes: "What the Court decided was what Taney announced as decided."⁶⁴

On the day after Taney read his lengthy opinion, Justices McLean and Curtis read their dissenting opinions for a combined total of five hours, making plain beyond cavil that the slavery issue was anything but "settled." Both dissenting Justices strongly criticized the suggestion that "due process" meant anything more than the process that is due and was not susceptible of the substantive content that Taney had poured into it.⁶⁵ And so passionately did both of the dissenters feel about the wrongness of the result in *Dred Scott* that both suggested that until the Court's invalidation of the restrictions in the Missouri Compromise was formally overruled, it could and should be ignored as void of any precedential value.⁶⁶

Justice Curtis wrote in dissent:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its

62. FEHRENBACHER, *supra* note 61, at 324.

63. *Id.* at 326.

64. *Id.* at 327.

65. As Stanford Professor John Hart Ely has observed: "Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.' By the same token, 'procedural due process' is redundant." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

66. FEHRENBACHER, *supra* note 61, at 439.

meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.⁶⁷

Sometimes the full power of a dissent is expressed not only in words, but in deeds. After reading his lengthy dissent, Justice Curtis announced that he would resign from the Court.

However unintentionally, the Taney Court had set in motion a chain of events that would lead to a complete upheaval in the nation and eventually to a repudiation of slavery and a complete recasting of the values and structure of our Constitution. Never has a Supreme Court dissent led to greater political consequences in our history. The *Dred Scott* case immediately became the subject of intense debate.⁶⁸ Soon afterwards Abraham Lincoln was elected President. And shortly after that, as Chief Justice Rehnquist has observed in another context, the issue presented in *Dred Scott* was resolved as much by "the blood of brave men on both sides which was shed on the terrible battlefields of Shiloh and Gettysburg and Cold Harbor,"⁶⁹ as it was in the post-Civil War amendments.

Salmon P. Chase of Ohio served as Chief Justice of the United States for the decade from 1864 to 1873.⁷⁰ This crucial period witnessed the adoption of the revolutionary and transformative post-Civil War Amendments.⁷¹

67. 60 U.S. (19 How.) 1, 225 (1857) (Curtis, J., dissenting).

68. On April 17, 1857, the Ohio legislature protested the decision as "repugnant to the plain provision of the Constitution and subversive to the rights of free men and free states." On June 16 and June 26, Abraham Lincoln attacked the opinion in speeches at Springfield that instantly made him the leading Republican contender against Senator Douglas for the U.S. Senate; in the ensuing campaign, the legality and morality of *Dred Scott* are joined directly; see, e.g., *CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858* (Paul M. Angle ed., 1958); for a discussion of the Lincoln-Douglas debates, see POTTER, *supra* note 51, at 328-55.

69. *Carey v. Population Services International*, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting).

70. For a discussion of the Chase Court, see, e.g., 6 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1888* (1971); 4 ROBERT FRIDLINGTON, *THE SUPREME COURT IN AMERICAN LIFE: THE RECONSTRUCTION COURT, 1864-1888* (1987); ALBERT BUSHNELL HART, *SALMON PORTLAND CHASE (1899)*; *STEAMER*, *supra* note 39, at 96-113.

71. U.S. CONST. amend. XIII (abolishing slavery); amend. XIV (protecting the privileges and immunities of the newly emancipated slaves against incursions by state law, guaranteeing that their life, liberty, or property could not be deprived without due process of law, and securing to them the equal protection of the laws); amend. XV (enfranchising newly emancipated male slaves). These provisions, especially the Due Process and Equal Protection Clauses, have, of course, been held to afford constitutional protection to members of groups far broader than African American slaves and their descendants. Indeed, it is no exaggeration to view the Fourteenth Amendment as the equivalent

One of the fundamental issues that the Court was called upon to address in this period was the reach of the Fourteenth Amendment. It is perhaps an accident of history, though a highly symbolic one, that the first test case to come before the Court on the meaning of the Fourteenth Amendment was presented not by poor blacks seeking judicial vindication of political and civil rights, but by white businessmen from the South who complained that a carpetbag monopoly law had deprived them of economic benefits which they deemed to be a "privilege and immunity" secured by the amendment. In the *Slaughter-House Cases*,⁷² Justice Miller, writing for a 5-4 majority, ruled against the anti-monopolistic plaintiffs largely because he could not accept the sweeping contention of counsel for the appellants, John A. Campbell,⁷³ that the Court should strike down any state law which abridged the "liberty" and "property right" of a citizen to live under a laissez-faire system.

Justice Stephen Field, a pistol-packing rugged individualist from California,⁷⁴ wrote a strong dissent which cited Adam Smith's *Wealth of Nations*⁷⁵ and which urged that the Fourteenth Amendment was designed not only to protect blacks but to "protect the citizens of the United States against the deprivation of their common rights by state legislation."⁷⁶ Among such "inalienable rights" was the "right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons,"⁷⁷ a right that Justice Field found to be violated by the Louisiana monopoly. Although Justice Field served long enough on the Court to see his broad interpretation of the Due Process Clause utilized in a substantive sense, implying the power of the Justices to read their own economic beliefs in to the Constitution, in 1873 he could not yet gather a majority.

Justice Miller, anxious to refute Justice Field's thesis, engaged in judicial overkill, butchering the Privileges and Immunities Clause so badly that it would never again serve as a useful tool for securing civil rights.⁷⁸ Further, Justice

of a second American revolution. See, e.g., BRUCE A. ACKERMAN, *WE THE PEOPLE* (1992); CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

72. 83 U.S. (16 Wall.) 36 (1873). For a discussion of this case, see FAIRMAN, *supra* note 70, at 1301-88.

73. Campbell was an Associate Justice of the Supreme Court from 1853 to 1861, when he resigned to return to his native Alabama during the Civil War. See HENRY G. CONNOR, *JOHN ARCHIBALD CAMPBELL* (1920).

74. For a description of Justice Field, see CARL BRENT SWISHER, *STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* (1969) [hereinafter SWISHER, FIELD].

75. ADAM SMITH, *INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776), cited in 83 U.S. (16 Wall.) at 110 n.1 (Field, J., dissenting).

76. 83 U.S. (16 Wall.) at 90 (Field, J., dissenting).

77. *Id.* at 97.

78. *Id.* at 75-81.

Miller intimated that the Fourteenth Amendment had conferred on Congress no general powers to regulate in the area of civil rights, and that the states retained most of their original powers.⁷⁹ The upshot of the case was that it laid the foundation in Justice Field's dissent for substantive due process. Judge Campbell in effect prevailed, although "not as the butchers' attorney but as a Southerner and a Democrat hostile to broad national powers."⁸⁰ Thereafter the pendulum was not to swing back the other way until 1937, when the Court repudiated the use of the Fourteenth Amendment to control economic arrangements devised by the political branches.⁸¹

Morrison R. Waite of Ohio served as Chief Justice of the United States in the critical post-bellum period from 1874 to 1888.⁸² As President Grant's seventh pick for the position as Chief Justice, Waite is sometimes known as "His Accidency."

This period of the Court's history could have marked a brand new day in American legal history, with "equal justice under law" as something more than the slogan later to be etched on the white marble temple erected for the Court in 1925. As things turned out, however, the Waite Court was deeply flawed because of its complicity in the infamous Compromise of 1877. In the presidential election in the previous year, the Democratic candidate, Governor Samuel J. Tilden of New York, commanded a majority of the popular vote over the Republican candidate, Governor Rutherford B. Hayes of Ohio. The outcome in the electoral college, however, was in doubt because of alleged election fraud committed by the Democrats in Florida and Louisiana and by the Republicans in Oregon. To avert a constitutional crisis, a special commission was established to settle the issue. Composed of five Senators, five Members of the House, and five Justices, the commission voted on straight party lines to give the White House to the Republican Hayes,⁸³ and to surrender the Southern capitals and legislatures to the Democrats through a notorious compromise in which the victorious Republicans promised, in effect, to call off Reconstruction, or the vigorous enforcement of the post-Civil War statutes enacted by Congress to protect the civil rights of the newly emancipated slaves. Thus did the soul of the party of Lincoln perish, little over a decade after the body of the Great

79. *See id.* at 77-78.

80. C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 117 (1963).

81. *See infra* text accompanying notes 151-52.

82. For a discussion of the Waite Court, see MAGRATH, *supra* note 80; STEAMER, *supra* note 39, at 113-27.

83. Like Grant, Hayes had a scandal-ridden administration. It is only a slight exaggeration to say that the only good thing he did was to appoint John Marshall Harlan to the Supreme Court. One wag noted that as a result of the Compromise of 1877, Hayes came into the White House by a vote of one, and four years later went out by unanimous consent.

Emancipator had been returned with national mourning to Springfield.⁸⁴

Five Justices were intimately involved in this political compromise, which was not scandalous at the time only because it was not public. Several of the Justices aspired to becoming President themselves.⁸⁵ It was no surprise and no accident that this heavily politicized Court ruled in *United States v. Harris*,⁸⁶ that a Tennessee sheriff's failure to protect the newly emancipated slaves from mob violence was merely a sin of omission not contemplated by or within the scope of the Fourteenth Amendment Equal Protection Clause,⁸⁷ and that the civil rights statute under which the case was brought was likewise held invalid under the Thirteenth Amendment.⁸⁸

In the same term the Court also docketed five consolidated cases from Kansas, California, Missouri, New York, and Tennessee that squarely presented the question whether the post-Civil War amendments gave Congress power to regulate racial discrimination by private actors. Answering that question in the negative in the *Civil Rights Cases*,⁸⁹ Justice Bradley, whose vote on the Electoral Commission had made Hayes President, invalidated the last serious effort of the Reconstruction Congress⁹⁰ to enforce the provisions of the Civil War amendments. The 1875 statute challenged in the *Civil Rights Cases* guaranteed access by the emancipated slaves to places of public accommodation such as "inns, public conveyances on land or water, theatres, and other places of public amusement."⁹¹ Justice Bradley told the former slaves that from now on they would simply have to pull themselves up by their own bootstraps:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of the state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man are to be

84. For a discussion of the Compromise of 1877, see, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 575-87 (1988); see also LOREN BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1817-1917, at 2 (1971); Edward M. Gaffney, Jr., *History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court*, 25 CATH. U. L. REV. 207 (1976).

85. For an account of the political ambitions of Justice Field, see SWISHER, FIELD, *supra* note 74, at 268-320.

86. 106 U.S. 629 (1883).

87. *Id.* at 637-40.

88. *Id.* at 640-43.

89. 109 U.S. 3 (1883).

90. For a thoughtful discussion of the Reconstruction, see, e.g., FONER, *supra* note 84; see also KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 (1965).

91. Act of March 1, 1875, 18 Stat. 335.

protected in the ordinary modes by which other men's rights are protected.⁹²

Historians have given the accolade of the "Great Dissenter" to Justice Holmes, but in my view, it more fittingly belongs to the first Justice Harlan.⁹³ *Harris* marked the beginning of the elder Harlan's long and distinguished career of solo dissents from opinions that we would now find outrageous; in *Harris* he dissented on jurisdictional grounds, expressing no view on the merits.⁹⁴

In the *Civil Rights Cases*, Harlan filed a lengthy dissent.⁹⁵ He first rejected the notion that the denial of access to places of public accommodation was not a "badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation to enforce the Thirteenth Amendment."⁹⁶ Harlan then replied directly to Justice Bradley's claim cited above:

It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." To-day, it is the colored

92. *Civil Rights Cases*, 109 U.S. at 25.

93. See Gaffney, *supra* note 84, at 244-47; Henry J. Abraham, *John Marshall Harlan: A Justice Neglected*, 41 VA. L. REV. 871 (1955); FLOYD B. CLARK, *THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN* (1915); Alan F. Westin, *Mr. Justice Harlan*, in *MR. JUSTICE: BIOGRAPHICAL SKETCHES OF TWELVE SUPREME COURT JUSTICES 93-128* (Allison Dunham & Philip B. Kurland eds., 1964) [hereinafter *MR. JUSTICE*].

94. *United States v. Harris*, 106 U.S. 629, 644 (1883) (Harlan, J., dissenting).

95. 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting).

96. *Id.* at 42-43 (Harlan, J., dissenting).

race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect to civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect⁹⁷

Eight decades later the views of Harlan were vindicated first in the political branches and then in his own Court. After the longest filibuster in the history of the Senate and a moving speech by President Lyndon Johnson, Congress enacted Title II of the Civil Rights Act of 1964, which effectually overturned the *Civil Rights Cases*, guaranteeing equal access to public accommodations such as motels, hotels, and restaurants.⁹⁸ With unusual promptness and with unanimity, the Court sustained this legislation in *Heart of Atlanta Motel, Inc. v. United States*⁹⁹ and *Katzenbach v. McClung*.¹⁰⁰

Melville Weston Fuller of Illinois served as Chief Justice of the United States in the critical period from 1888 to 1910.¹⁰¹ Professor Owen Fiss notes the habit of historians to evaluate the various periods of the Court's history: "Each Court has been graded, and some have been deemed great, others mediocre, some quite dismal. By all accounts, the Court over which Melville Weston Fuller presided . . . ranks among the worst."¹⁰²

97. *Id.* at 61-62 (Harlan, J., dissenting).

98. 78 Stat. 243, 42 U.S.C. § 2000a.

99. 379 U.S. 241 (1964).

100. 379 U.S. 294 (1964).

101. For a discussion of the Fuller Court, see 8 OWEN FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993); 5 HOWARD FURER, THE SUPREME COURT IN AMERICAN LIFE: THE FULLER COURT, 1888-1910 (1987); WILLARD L. KING, MELVILLE WESTON FULLER (1950); STRAMER, *supra* note 39, at 128-54; WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932, at 2-131 (1969).

102. FISS, *supra* note 101, at 3.

Once again, the elder Harlan emerged as a great dissenter. His dissent in *Plessy v. Ferguson*¹⁰³ is, in the words of Justice Brennan, "at once prophetic and expressive of the Justice's constitutional vision, and, at the same time, a careful and methodical refutation on the majority's legal analysis in that case."¹⁰⁴ In *Plessy*, the elder Harlan wrote: "In the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind"¹⁰⁵ He foretold with devastating accuracy the tragic consequences of the majority's position, noting that this decision would

not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the [Thirteenth, Fourteenth, and Fifteenth] amendments of the Constitution¹⁰⁶

Harlan attacked the precedents relied on by the majority:

Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments . . . and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.¹⁰⁷

To use Alan Barth's term, Harlan was an indeed a "Prophet with Honor."¹⁰⁸ In 1954, the Court, while stopping just short of formally overruling *Plessy* in *Brown v. Board of Education*,¹⁰⁹ unanimously vindicated the vision of the elder Harlan. As Justice Brennan stated, Harlan was

the quintessential voice crying in the wilderness. In rejecting the Court's view that so-called separate but equal facilities did not violate the Constitution, Justice Harlan stood alone; not a single other justice joined him. In his appeal to the future, Justice Harlan transcended, without slighting, mechanical legal analysis; he sought to announce

103. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

104. Brennan, *Defense*, *supra* note 24, at 431.

105. 163 U.S. at 559.

106. *Id.* at 560.

107. *Id.* at 563.

108. See BARTH, *supra* note 31.

109. 347 U.S. 483 (1954).

fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy* and long even after *Brown v. Board of Education*, to benefit from his wisdom and courage.¹¹⁰

Another Harlan dissent that earns him the accolade of "Great Dissenter" in my view came in *Lochner v. New York*.¹¹¹ Once again Harlan wrote with insight about the limit of judicial authority over economic legislation such as that invalidated in *Lochner*:

[Whether] or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation I do not stop to consider whether any particular view of this economic question presents the sounder theory. It is enough for . . . this court to know that the question is one about which there is room for debate and for an honest difference of opinion.¹¹²

Justice Holmes also filed a memorable dissent in this case, writing that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*."¹¹³ Both the elder Harlan and Holmes were later vindicated in such cases as *West Coast Hotel Co. v. Parrish*¹¹⁴ and *Williamson v. Lee Optical Co.*¹¹⁵

Three years before he died in 1911, Harlan penned his last dissent dealing with race. In *Berea College v. Kentucky*,¹¹⁶ the Court sustained a state statute that prohibited voluntary integration of privately owned and operated schools. The "Great Dissenter" Holmes concurred in the judgment of the court.¹¹⁷ Harlan again emerged as courageous in his solo dissent:

If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit together in a private

110. Brennan, *Defense*, *supra* note 24, at 431-32 (citing *Brown*, 347 U.S. at 483).

111. 198 U.S. 45 (1905).

112. *Id.* at 68-72 (Harlan, J., dissenting).

113. *Id.* at 75 (Holmes, J., dissenting) (referring to HERBERT SPENCER, *SOCIAL STATICS* (1991), also entitled *THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED*).

114. 300 U.S. 379 (1937) (recognizing a strong presumption of the validity of legislative enactments).

115. 348 U.S. 483 (1955) (stating that it is for the legislature, and not the courts, to determine whether statute regulating visual care met constitutional requirements).

116. 211 U.S. 45 (1908).

117. *Id.* at 58 (Holmes, J., concurring).

institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose. If the Commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath-school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In the cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. Will it be said that the cases supposed and the case here in hand are different in that no government, in this country can lay unholy hands on the religious faith of the people? The answer to this suggestion is that in the eye of the law the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. Again, if the views of the highest court of Kentucky be sound, that commonwealth may without infringing the Constitution of the United States, forbid the association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectively. Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?¹¹⁸

Edward Douglass White of Louisiana served as Chief Justice of the United

118. *Id.* at 68-69 (Harlan, J., dissenting).

States from 1910 to 1921.¹¹⁹ War has often been a testing point of the effectiveness of the limits that our Constitution places on the government. World War I was certainly such a period.¹²⁰ In 1919 Justice Holmes wrote for a unanimous Court in *Schenck v. United States*,¹²¹ *Frohwerk v. United States*,¹²² and in *Debs v. United States*,¹²³ sustaining convictions for speech that was critical of the government during wartime. In short, Holmes did not exactly begin his free speech career as much of a civil libertarian.

Later in that term the Court sustained a conviction of five Bolshevik sympathizers in *Abrams v. United States*.¹²⁴ Although the statute under which the defendants were convicted was aimed at prohibiting the curtailment of the war effort against *Germany*, the leaflet which they distributed protested the American intervention in the *Russian* revolution.¹²⁵ For that reason, among others, Holmes was persuaded to move much further in *Abrams* than he had been willing to go in *Schenck*, *Frohwerk*, or *Debs*, insisting that all three of those cases were rightly decided, but penning one of the dissents for which he is famous:

To allow opposition by speech seems to indicate that you think speech is impotent But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, . . . and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon some imperfect knowledge. While that experiment is part of our system I think we should be

119. For a discussion of the White Court, see 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921* (1984); PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969*, at 1-40 (1972); *STEAMER*, *supra* note 39, at 154-71.

120. See, e.g., CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918* (1989).

121. 249 U.S. 47 (1919).

122. 249 U.S. 204 (1919).

123. 249 U.S. 211 (1919).

124. 250 U.S. 616 (1919).

125. As Russian schoolchildren are taught in the history of their country, America invaded Russia, but not the other way around. The fact that our expedition was small and ineffectual back in 1918 came as a small comfort to the Russians during the period of mutual assured destruction or MAD period of nuclear threat known as the "Cold War." Thank God it never got really hot.

eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹²⁶

Even the speech that he was grudgingly willing to protect he subjected to ridicule, describing the pamphlet circulated by Abrams and his friends as "the surreptitious publishing of a silly pamphlet by an unknown man."¹²⁷ For all its flaws, the *Abrams* dissent, which Justice Brandeis joined, stands at the fountainhead of a process¹²⁸ that eventually led in the Vietnam period to a standard far more protective of speech that is critical of the government even—or especially—during wartime.¹²⁹

William Howard Taft of Ohio served as Chief Justice of the United States from 1921 to 1930.¹³⁰ Having served as President from 1909 to 1913, he was keenly aware of the political processes that affect the Court, not the least of which is the appointment power.¹³¹ If Taft was not an intellectual like Louis Bembitz Brandeis, he did attend to many of the administrative or managerial aspects of the Court as an institution. For example, it was during his tenure as Chief Justice that the modern court building was erected. As for the building of consensus on the Court, he entrusted that function to allies like Justice Willis Van Devanter. Although individual Justices filed significant dissents in the Taft Court, as John Marshall had done in the first years of his tenure as Chief Justice, Taft sought to "marshal a unanimous front on important constitutional issues."¹³² He and Van Devanter tried to avoid dissents whenever possible. Professor White notes that Van Devanter successfully persuaded "conservative" colleagues to suppress dissents in order to ensure larger majorities: "The result was that a number of 5-4 decisions became rendered as 6-3 or even as 7-2."¹³³

126. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

127. *Id.* at 628 (Holmes, J., dissenting).

128. See generally David M. Rabban, *The Emergence of First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

129. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

130. For a discussion of the Taft Court, see 6 NORMAN BINDLER, *THE SUPREME COURT IN AMERICAN LIFE: THE CONSERVATIVE COURT, 1910-1930* (1987); ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO WARREN 40-73* (1968); MURPHY, *supra* note 119, at 42, 103; STEAMER, *supra* note 39, at 172-88; WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY* (1969).

131. Taft had appointed six Justices to the Supreme Court, a record matched only by President Washington at the outset of the Court's history.

132. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 321 (1993). White also reports that "Taft was increasingly irritated with Holmes and any other dissenters in his later years as Chief Justice." *Id.* at 555 n.128.

133. *Id.* at 322.

Brandeis, by contrast, clearly understood the need for public dissent, especially in constitutional cases, in which “what is done is what you call statesmanship, [and hence] is never settled.”¹³⁴ As one of his biographers notes, “‘Holmes and Brandeis dissenting’ had become classic in the progressive fight to liberalize constitutional interpretation.”¹³⁵

Brandeis credited Justice Van Devanter with “successful lobbying with members individually to minimize the number of dissents.”¹³⁶ For example, in *Jay Byrns Baking Co. v. Bryan*,¹³⁷ the Court invalidated a Nebraska statute that regulated the size of loaves of bread as unnecessary for the purpose of protecting consumers against fraud. In a private conversation with Professor Frankfurter that summer, Brandeis recalled that after a 5-4 vote in the conference on this case, Van Devanter:

“got busy” in his personal way, talking and laboring with members of the Court, and finally persuaded two of the justices [Sutherland and Sanford] not to dissent He is indefatigable, on good terms with everybody, ready to help everybody, knows exactly what he wants and clouds over difficulties by fine phrases and deft language.¹³⁸

Van Devanter’s efforts were unavailing with Brandeis, who filed a dissent in *Burns Baking Co.* that read like the famous brief he had filed as an advocate in *Muller v. Oregon*.¹³⁹ Joined by Holmes in this dissent, Brandeis wrote unapologetically about the need for appellate judges to go beyond the record and inform themselves about “the history of experience gained under similar legislation, and the result of scientific experiments made” whenever that is “required to perform the delicate judicial task.”¹⁴⁰

Brandeis continued about Van Devanter: “One can achieve his results by working for them, but I made up my mind I wouldn’t resort to finesse and subtlety and ‘lobbying.’ He never fools himself.”¹⁴¹ Professor Strum notes in her recent biography that this “was more than could be said of Brandeis. Although his tactics differed from Van Devanter’s, Brandeis excelled at finesse and subtlety and ‘lobbying.’”¹⁴²

134. Melvin Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 314.

135. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 570 (1946).

136. WHITE, *supra* note 132, at 321.

137. 264 U.S. 504 (1924).

138. PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 369 (1984).

139. 208 U.S. 412 (1908); for a discussion of the “Brandeis Brief,” see STRUM, *supra* note 138, at 114-31.

140. *Burns Baking Co.*, 264 U.S. at 533 (Brandeis, J., dissenting).

141. STRUM, *supra* note 138, at 369.

142. *Id.*

Alexander Bickel edited a collection of opinions written by Brandeis but never published because Brandeis was clever enough to know that the circulation of a draft of a strong dissent could serve to improve the quality of an Opinion of the Court.¹⁴³ As one of his biographers notes, “[H]e held his fire when a dissent might hurt his bargaining position; and he used the threat of a dissent as a way of ‘lobbying.’”¹⁴⁴ For example, Brandeis once warned Taft of “glaring errors” in a draft prepared by McReynolds for the Court in *Sonneborn Brothers v. Cureton*.¹⁴⁵ Brandeis prepared a “really stinging dissent” which he showed first to the Chief Justice.¹⁴⁶ Taft promptly dispatched Van Devanter to work with McReynolds to eliminate the worst of the features of his draft so that Brandeis would remove his “sting.” As he told Frankfurter: “[T]hey didn’t want the Court shown up that way, and corrections weren’t adequate and finally the Chief took over the opinion . . . and I suppressed my dissent because after all it’s merely a question of statutory construction and the worst things were removed by the Chief.”¹⁴⁷ Brandeis clearly understood not only the external importance of public dissent, but also the internal value of the threat of a good dissent, even if it was suppressed.

Charles Evans Hughes of New York served as Chief Justice of the United States from 1930 to 1941.¹⁴⁸ His comment on the importance of dissent, cited above, bears repetition:

When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be

143. THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS at xvi (Alexander M. Bickel ed., 1957). In a similar vein, Karl Llewellyn wrote:

[T]he dissent and its possibility press toward reckonability of result. Mention has been made of the “law of leeways”; but it is a law without immediate sanction for breach. In real measure, if breach threatens, the dissent, by forcing or suggesting full publicity, rides herd on the majority, and helps to keep constant the due observance of that law.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960).

144. STRUM, *supra* note 138, at 369.

145. 262 U.S. 506 (1923).

146. STRUM, *supra* note 138, at 370.

147. *Id.*

148. For a discussion of the Hughes Court, see MASON, *supra* note 130, at 74-128; 7 ROBERT MAYER, *THE SUPREME COURT IN AMERICAN LIFE: THE COURT AND THE AMERICAN CRISES, 1930-1952* (1987); MURPHY, *supra* note 119, at 101-89; STEAMER, *supra* note 39, at 188-217.

decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.¹⁴⁹

So does his comment on the imperative of judicial civility:

Independence does not mean cantankerousness and a judge may be a strong judge without being an impossible person. Nothing is more distressing on any bench than the exhibition of a captious, impatient, querulous spirit.¹⁵⁰

During his term as Chief Justice, Hughes was to witness the stubborn reluctance of a majority of the Court to approve New Deal legislation. This provoked several important dissents and led in turn to President Roosevelt's famous "court-packing" scheme.¹⁵¹ Eventually, a constitutional crisis was avoided as the Court began to accept the legitimacy of congressional efforts to deal with the great Depression and as the President was able to replace Justices opposed to his program with Justices more inclined to support it.¹⁵²

Among the significant dissents from this period of the Court's stormy history came in *Minersville School District v. Gobitis*.¹⁵³ In *Gobitis*, Justice Frankfurter began and ended his career as a leader on the Court,¹⁵⁴ commanding the votes of eight Justices as he wrote:

149. HUGHES, *supra* note 1, at 67-68 (1928).

150. *Id.* at 68.

151. For a brief description of this conflict, see REHNQUIST, *supra* note 39, at 215-34.

152. In 1937, Franklin Delano Roosevelt replaced Justice Van Devanter with Justice Black; in 1938 he replaced Justice Sutherland with Justice Reed; in 1939 he replaced Justice Cardozo with Justice Frankfurter, and Justice Brandeis with Justice Douglas; and in 1940 he replaced Justice Butler with Justice Murphy. REHNQUIST, *supra* note 39, at 235-51.

153. 310 U.S. 586, 601-07 (1940) (Stone, J., dissenting).

154. Justice Black's widow recalls speaking to Justice Douglas about the *Gobitis* case in 1977.

Bill said that he and Hugo had great respect for Felix when he was first appointed to the Court. Through his writings and public statements, they had put him down as a flaming liberal. 'But,' said Bill, 'it was the first Flag Salute case that disillusioned us The first time around Felix wrote the sole opinion and, to the end, Hugo and I could never understand why we agreed to it to begin with. It gave legislatures pretty broad control over all First Amendment rights.'

ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 72 (1986).

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crotchety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here at issue. But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.¹⁵⁵

Justice Stone wrote a powerful solo dissent that still stands out as a ringing declaration on religious liberty:

Concededly, the constitutional guaranties of personal liberty are not always absolutes. Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end it may compel citizens to give military training despite their religious objections. It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate religious conscience Here we have such a small minority entertaining in good faith religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless

155. *Gobitis*, 310 U.S. at 598.

minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest in the state in maintaining discipline in the schools.¹⁵⁶

Although no one joined Stone's opinion, within three years his solo dissent would become the law of the land.

Having served as an Associate Justice of the Supreme Court since 1925, Harlan Fiske Stone of New York became Chief Justice of the United States in 1941 and served in that capacity until his death in 1946.¹⁵⁷ Stone's brief tenure as Chief Justice was marked by stormy relations among the Justices. The fact that the country was at war did not inhibit strong dissents. For example, Justice Frank Murphy excoriated the Court's complicity with the internment of Japanese-Americans in concentration camps during World War II sustained in *Korematsu v. United States*.¹⁵⁸ Murphy attacked the Court's conclusion as the "legalization of racism," finding it "difficult to believe that reason, logic, or experience could be marshalled in support of [the] assumption . . . [that] all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage."¹⁵⁹

In the previous term, after a rage of episodes in which little Jehovah's Witnesses schoolchildren were beaten in public school yards by other, more "patriotic" children,¹⁶⁰ and after America had become accustomed to the images of the Nuremberg rallies in which thousands of flags flew as a prominent symbol of national unity behind the Reich against which our fortunes were pitted in war,¹⁶¹ the Court revisited the issue of mandatory flag salute in *West Virginia*

156. *Id.* at 602, 606 (Stone, J., dissenting).

157. For a sympathetic treatment of the Stone Court, see SAMUEL J. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT (1946); for further discussion, see MASON, *supra* note 130, at 129-73; MAYER, *supra* note 148, at 223-25; MURPHY, *supra* note 119, at 213-47.

158. 323 U.S. 214 (1944).

159. *Id.* at 214, 242 (Murphy, J., dissenting). For a discussion of Murphy, see John P. Roche, *Mr. Justice Murphy*, in MR. JUSTICE, *supra* note 93, at 281-317. For a discussion of the Japanese-American cases, see PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); Eugene Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L.J. 489 (1945).

160. For a careful discussion of the wave of violence against the Jehovah Witnesses in the wake of *Gobitis*, see DAVID R. MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY 163-86 (1962); see also PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 22-23 (1988).

161. For a thoughtful discussion of the social and historical context of the flag salute cases, see Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675 (1984).

State Board of Education v. Barnette.¹⁶² The decision overruling *Gobitis* was formally decided on free speech grounds rather than as a matter of free exercise, but the spirit of Stone's dissent resonated throughout Justice Jackson's opinion for the Court in *Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of elections¹⁶³

Evoking the tragic reality of the totalitarian regimes against which we were locked in combat at the time, and whose crimes against humanity Jackson would later prosecute at Nuremberg, the Justice continued:

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.¹⁶⁴

In one of the most memorable lines written about the limits placed on governmental power by the Bill of Rights, Jackson concluded:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or any other matters of opinion or force citizens to confess by word or act their faith therein.¹⁶⁵

Now it was Frankfurter's turn to write a solo¹⁶⁶ dissent. He began

162. 319 U.S. 624 (1943); for a full discussion of this case, see MANWARING, *supra* note 160; see also KONEFSKY, *supra* note 157, at 215-34.

163. *Barnette*, 319 U.S. at 638.

164. *Id.* at 641.

165. *Id.* at 642.

166. Although Justices Roberts and Reed voted to reverse the judgment, they refused to join Frankfurter's dissenting opinion. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642-43.

eloquently enough: "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution."¹⁶⁷ But he then promptly denied that his Jewishness had any relevance to the case. Ever the professor¹⁶⁸ at pains to teach the Court about judicial self-restraint, Frankfurter proceeded to discourse at great length about this theme, almost in total oblivion of the factors that motivated six of his colleagues to see things differently from the way he had viewed them in *Gobitis* before the war had broken out:

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation But the real question is, who is to make such accommodations, the courts or the legislature? . . .

Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.¹⁶⁹

In the curious way described below, the Rehnquist Court in 1990 vindicated the views of Frankfurter, not those of Jackson and Stone, only to have a virtually unanimous Congress repudiate that result and enact legislation that

167. *Id.* at 646 (Frankfurter, J., dissenting).

168. Chief Justice Hughes referred to Frankfurter as "Professor" even after he joined the Court as an Associate Justice. SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 159 (1984).

169. *Barnette*, 319 U.S. at 648, 650, 651, 670 (Frankfurter, J., dissenting).

restored religious freedom to its privileged place among our civil liberties.¹⁷⁰

Fred M. Vinson of Kentucky served as Chief Justice of the United States from 1946 to 1953.¹⁷¹ His coming to the Court was itself highly controversial among the Justices with whom he would serve. At the outset Justice Frankfurter was powerfully persuaded that President Truman should appoint Justice Robert Jackson, who was then in Nuremberg acting as Prosecutor in the War Crimes Tribunal, to serve as the Chief Justice. Justice Black, who had locked horns with Jackson on more than one occasion, is said to have opposed Jackson's appointment. According to one version, Black purportedly threatened to resign from the Court if Truman appointed Jackson. Jackson got wind of this from Frankfurter, and sent off several telegrams from Germany campaigning for the appointment, but to no avail. Jackson was furious with Black for blocking his opportunity to become the Chief Justice.¹⁷²

If Vinson ever had a chance to emerge as a leader of the Court, it was surely not against the background of this *Sturm und Drang*. And by the end of his service on the Court, several of the Associates "would discuss in his presence the view that the Chief's job should rotate annually and made no bones about regarding him—correctly—as their intellectual inferior."¹⁷³ Indeed, one of the Frankfurter clerks who went on to serve in the Office of the Solicitor General, wrote to Frankfurter about Vinson:

What a mean little despot he is. Has there ever been a member of the Court who was deficient in *so* many respects as a man and a judge. Even that s.o.b. McReynolds, despite his defects of character, stands by comparison as a towering figure and powerful intellect . . . [T]his man is a pygmy, morally and mentally. And so uncouth.¹⁷⁴

As one of Chief Justice Warren's biographers puts it:

Such a Chief Justice [as Vinson] could scarcely be expected to lead the gifted prima donnas who then sat on the Court. If anything the

170. See *infra* text accompanying notes 215-18.

171. For a discussion of the principal controversies during the Vinson Court, see C. HERMAN PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* (1954); see also MAYER, *supra* note 148, at 259-62; MURPHY, *supra* note 119, at 248-309; STEAMER, *supra* note 39, at 237-41.

172. TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* 116-17 (1992).

173. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 585 (1976).

174. Letter from Philip Elman to Felix Frankfurter (Sept. 3, 1953), FELIX FRANKFURTER PAPERS, LIBRARY OF CONGRESS, cited in BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 73 (1983).

division among the Brethren intensified and, all too often, degenerated into personal animosity during Vinson's tenure.¹⁷⁵

The example of dissent that I have chosen from the period of the Vinson Court is another Murphy dissent, this time in criminal procedure. In *Wolf v. Colorado*,¹⁷⁶ Justice Frankfurter exploited his Anglophile proclivities to rationalize the result that the states need not be required to function with a rule that excluded evidence seized in violation of the rights of the accused secured under the Fourth Amendment. After all, so the argument ran, if England could get along without an exclusionary rule, so could Colorado.

Murphy wrote sweetly in his last dissent: "It is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong."¹⁷⁷ He reached the conclusion that the exclusionary rule was necessary, even in the states, because as one who had served as a prosecutor and as a judge in Michigan, he was not convinced that there were any meaningful alternatives. A little over a decade later, Murphy's dissent was to be vindicated in the Warren Court, when the Court imposed the exclusionary rule on the states as part of its project of incorporation of the provisions of the Bill of Rights through the liberty protected by the Fourteenth Amendment against state action.¹⁷⁸ For all of the arguments against the exclusionary rule¹⁷⁹ and for all of the restrictions placed on the exclusionary rule by the Burger Court,¹⁸⁰ it still stands, in part because—as Justice Murphy knew back in 1949—the alternatives to the rule are largely illusory.

Earl Warren of California served as Chief Justice of the United States from 1953 to 1969.¹⁸¹ His service as Chief is still regarded as one of the most

175. *Id.*

176. 338 U.S. 25 (1949).

177. *Id.* at 41 (Murphy, J., dissenting).

178. *Mapp v. Ohio*, 367 U.S. 643 (1961).

179. *See, e.g.*, Richard Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). *But see* Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, WASH. L. REV. 647 (1982).

180. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (modifying exclusionary rule to allow use of evidence obtained by officers acting in reasonable reliance on search warrant issued by neutral magistrate but ultimately found to be unsupported by probable cause); *Stone v. Powell*, 428 U.S. 465 (1976) (denying habeas jurisdiction over fourth amendment claims, thereby limiting the scope of the exclusionary rule).

181. For a sympathetic discussion of the Warren Court, *see* SCHWARTZ, *supra* note 174; JACK HARRISON POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* (1979); *see also* MASON, *supra* note 130, at 234-82; MURPHY, *supra* note 119, at 310-485; 8 ARNOLD RICE, *THE SUPREME COURT IN AMERICAN LIFE: THE WARREN COURT* (1987); STEAMER, *supra* note 39, at 241-89.

epochal and controversial periods of the Court's history. Left to the wits and devices of Vinson, Jim Crow would probably not have ended his strange career¹⁸² until much later. In fact, every indication of the inner workings of the Court suggests that *Brown v. Board of Education*¹⁸³ would have been decided in favor of the segregated school boards rather than for the little African-American children seeking a racially integrated education.¹⁸⁴ That *Brown* was decided the other way, and without any dissent, was perhaps the greatest achievement of Chief Justice Warren, who exercised a leadership style that skillfully brought his Court together in this momentous decision.

Speaking with one voice on race was not, however, to last. The biggest flap in this respect came not in a dissent, but in a concurring opinion in 1958 by Justice Frankfurter in the famous Little Rock school desegregation case, *Cooper v. Aaron*.¹⁸⁵ In this case Warren was at pains to convey not only to Arkansas Governor Faubus, but to the entire nation that the Court was unanimous in condemning so direct a confrontation of its authority over racial matters. Traditionally, when a majority of the Court agrees in a case, the task of writing an Opinion of the Court is assigned by the Chief Justice (if he is in the majority) or by the most senior Justice in the majority. In this case Warren wanted to send a special signal, so the Opinion of the Court was signed by all nine of the Justices. The only substantive entry in Chief Justice Warren's memoirs concerning Frankfurter refers to his insistence on sending out his own opinion:

After the decision was announced, Mr. Justice Frankfurter informed us that he had many friends in the Southern states, and that he intended to reach them by writing and circulating a concurring opinion of his own, to be officially filed at a later date. This caused quite a sensation on the Court, because it was our invariable practice not to announce the decision in any case until all of the views had been expressed. Nevertheless, he circulated such an opinion prior to the Court's announcement. Afterward, some of the Justices stated that they would never permit a Court opinion in the future to be made public until it was certain that the views of all were announced simultaneously.¹⁸⁶

182. For a discussion of American-style apartheid, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974); see also BICKEL & SCHMIDT, *supra* note 119, at 729-819, 908-90. For the view that the overruling of *Plessy* would be a "close controversial vote" on the Vinson Court, with the Chief Justice as the leading opponent of nullifying school segregation, see ROGER GOLDMAN & DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* 97, 101 (1992).

183. 347 U.S. 483 (1954).

184. For a full discussion of *Brown*, see KLUGER, *supra* note 173.

185. 358 U.S. 1 (1958).

186. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 298-99 (1977).

Warren understated the "sensation" by half. Frankfurter wrote in his separate concurring opinion:

While unreservedly participating with my brethren in our joint opinion, I deem it appropriate also to deal individually with the great issue here at stake. By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences.¹⁸⁷

Professor Dennis Hutchinson notes that Justices Black and Brennan circulated a draft that conveyed their dissent from the filing of the Frankfurter opinion:

The joint opinion of all the Justices handed down on September 29, 1958 adequately expresses the views of the Court, and [we] stand by that opinion as delivered. [We] desire that it be fully understood that the concurring opinion filed this day by Mr. Justice Frankfurter must not be accepted as any dilution of interpretation of the views expressed in the joint opinion.¹⁸⁸

Black and Brennan withdrew their opinion when Justice Harlan wrote a humorous draft opinion that managed to soothe the jangled judicial nerve ends. Harlan's draft noted that he was concurring, expressing a *dubitante*, and dissenting. He obviously concurred in the unanimous opinion of the Court. He doubted Frankfurter's "wisdom" in filing a separate opinion; but since he was "unable to find any material difference between" it and the Court's opinion, he dissented from the Black-Brennan opinion on the grounds "that it is always a mistake to make a mountain out of a molehill." Harlan ended his draft, "*Requiescat in pace.*"¹⁸⁹

In a letter to a friend Frankfurter later justified his position in *Cooper v. Aaron* as follows:

My opinion . . . was directed to a particular audience, to wit: the lawyers and the law professors of the South, and that is an audience which I was in a peculiarly qualified position to address in view of my rather extensive association, by virtue of my twenty-five years at the

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

188. Dennis J. Hutchinson, *Unanimity and Desegregation: Decision Making in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 83 n.705 (1979).

189. *Id.* at 83.

Harvard Law School, with a good many lawyers and law professors.¹⁹⁰

In his thoughtful study on Brandeis and Frankfurter,¹⁹¹ Professor Robert Burt notes the deep irony of Frankfurter's explanation of why he wrote separately in this case. "Beyond the extraordinary vanity of this observation, there is an unintended irony. Frankfurter spoke to his supposedly attentive audience to urge them to subordinate their personal views (on school desegregation) to a common effort that would vindicate the law."¹⁹²

Because the Warren Court era produced a genuine constitutional "revolution" that was intensely controversial,¹⁹³ it was bound to provoke not only external criticism,¹⁹⁴ but also internal dissent. The mantle of the elder Harlan fell sweetly upon the younger John Marshall Harlan, who earned his spurs as another great dissenter by objecting to the transformation of criminal procedure at the state level in which the Warren Court was engaged. Indeed, Professor Yarbrough's recent biography of the younger Justice Harlan features this fact in the title.¹⁹⁵ To be sure, the elder Harlan spoke with the ringing phrases of a biblical prophet denouncing injustice, whereas his grandson was mainly concerned with what he deemed excessive judicial activism, not exactly the stuff with which Amos, Isaiah, and Micah were concerned. One might say, in paraphrase of Senator Lloyd Bentsen's encounter with Vice-President Quayle during the 1988 campaign, "Mr. Justice Harlan, I knew the elder Harlan, and let me tell you, Justice Harlan, you are no elder Harlan." Yet the dissents of the younger Harlan provided a coherent alternative to the path chosen by the Warren Court; and, by and large, it is Harlan's path that the Burger Court and the Rehnquist Court have travelled more often as the two roads diverged in a yellow wood.

The concern about judicial restraint made Harlan a close ideological ally of Felix Frankfurter, but for all the vigor and thoughtfulness of their dissents, there

190. *Id.* at 84.

191. ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 49-52 (1988).

192. *Id.* at 51.

193. For a discussion of the popular resistance to the Warren Court, including the activities of the John Birch Society to impeach Warren, see SCHWARTZ, *supra* note 174, at 249-50, 280-81, 491, 541-42, 627; see also MURPHY, *supra* note 119, at 482.

194. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* (1970); FRED GRAHAM, *THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW* (1970).

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

was a sense of collegiality that Harlan had and that Frankfurter lacked. In at least this respect, Harlan's style was much closer to that commended in the *Standards* than that of his cantankerous colleague. In short, if the younger John Marshall Harlan was no elder Harlan, he was no Felix Frankfurter either.

Warren E. Burger of Minnesota served as Chief Justice of the United States from 1969 to 1986.¹⁹⁶ One of the tasks to which Chief Justice Burger set himself with great vigor was the improvement of civility in the practice of law. For example, in his annual address to the American Law Institute in 1971, he focused primarily on the need for greater civility.¹⁹⁷ The Anglophile side of Burger is disclosed in the prodigious energy he devoted to establishing American Inns of Court, which were charged in part with the task of improving the civility of lawyers.¹⁹⁸ These efforts, however, seem like those of Judge Conover mentioned above, to be directed by a judge at lawyers. So far as one can tell from the public record, Burger paid little attention to the apparent lack of civility by judges—including members of his own Court—to lawyers and to one another. I offer in Part III.B samples of some questionable language used in several dissenting opinions from the last five years of the Burger Court.¹⁹⁹ For now, it is enough to mention one of the more unusual dissents from this period.

The example I have chosen from the Burger Court is the practice maintained by Justices Brennan and Marshall of dissenting in all death penalty cases brought to the Supreme Court.²⁰⁰ In his Tobriner lecture Brennan offered a justification of "the repeated dissent in which a justice refuses to yield to the views of the majority although persistently rebuffed by them."²⁰¹ One of the examples that Brennan offered was his own view on the death penalty:

196. For a discussion of the Burger Court, see *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983); 9 *ARTHUR GALUB, THE SUPREME COURT IN AMERICAN LIFE: THE BURGER COURT, 1968-1984* (1986).

197. Warren E. Burger, *The Necessity for Civility*, Address Before the American Law Institute (May 18, 1971), in *WARREN E. BURGER, DELIVERY OF JUSTICE* 172 (1990).

198. Lisa D. Kahn, *It's a Matter of Ethics: Responsible Practice in an Increasingly Competitive World*, FLA. B.J., Feb. 1993, at 59; James W. Walker & Laura Cerniglia, *American Inns of Court: A Return to Civility in Practicing Law*, 52 *TEX. B.J.* 1306 (1989); Kevin E. Anderson, *The Inns of Court: Prescription for Revitalizing Advocacy in America?*, 1983 *S. ILL. U. L.J.* 311; Sherman Christensen, *The Concept and Organization of an American Inn of Court: Putting a Little More "English" on American Legal Education*, 93 *F.R.D.* 807 (1982).

199. See *infra* text accompanying notes 274-318.

200. Justice Brennan and Justice Marshall entered the following notation in all death penalty cases: "Justice BRENNAN and Justice MARSHALL dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, (1976), we would grant certiorari and vacate the death sentence in this case." See, e.g., *Clark v. Arizona*, 449 U.S. 1067 (1980) (dissenting from denial of certiorari).

201. Brennan, *Defense*, *supra* note 24, at 436-37.

[A]s I interpret the eighth amendment, its prohibition against cruel and unusual punishments embodies to a unique degree moral principles that substantively restrain the punishments governments of our civilized society may impose on those convicted of capital offenses. Foremost among the moral principles inherent in the constitutional prohibition is the primary principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. For, as Justice Tobriner too believed, all legal decisions should advance, not degrade, human dignity. Death for whatever crime and under all circumstances is a truly awesome thing. The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, in other words, "cruel and unusual" punishment in violation of the eighth amendment.²⁰²

Brennan acknowledged that his practice of dissenting to the imposition of the death penalty in all such cases may strike some as "simply contrary, tiresome, or quixotic" or as "a refusal to abide by the judicial principle of stare decisis, obedience to precedent."²⁰³ But to him it was a principled practice grounded in the view of Chief Justice Hughes cited above: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."²⁰⁴

Having served as Associate Justice of the Supreme Court from 1972 to 1986, William H. Rehnquist of Arizona has served as Chief Justice of the United States from 1986 to the present. I offer in Part III.B samples of some questionable language used in several dissenting opinions from the first eight years of the Rehnquist Court.²⁰⁵ For now, it is enough to mention one of the more significant dissents from this period that relates back strangely to the dissents in *Gobitis* and *Barnette*.

202. *Id.* at 436-37.

203. *Id.* at 437.

204. HUGHES, *supra* note 1, at 68.

205. *See infra* text accompanying notes 274-318.

In *Employment Division v. Smith*,²⁰⁶ the Court ruled that the Free Exercise Clause of the First Amendment does not require judicial exemptions from generally applicable norms for religious beliefs or practices. Some of the most distinguished constitutional scholars in the country joined in the petition for rehearing, which the Supreme Court denied.²⁰⁷ The decision was subjected to vigorous scholarly criticism.²⁰⁸ For example, Justice Scalia cited *Gobitis* twice in his opinion in *Smith*,²⁰⁹ without ever mentioning that it had been overruled in *Barnette*.²¹⁰ Professor McConnell compared this use of *Gobitis* to citing *Dred Scott* without mentioning *Brown v. Board of Education*.²¹¹

Because Justice O'Connor was of the view that the government has a compelling interest in the even-handed enforcement of its drug laws, she filed an opinion concurring in the judgment. But it reads more like a dissent than a concurring opinion. For example, O'Connor wrote that "today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."²¹² For her, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."²¹³ Justice Blackmun filed a vigorous dissent, joined by Justices Brennan and Marshall: "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty."²¹⁴

When the very political process that Justice Scalia exalts in *Smith*²¹⁵ focused on the result in that case, Congress passed legislation corrective of the notion that religious freedom is not entitled to a very high degree of respect from the judiciary. In enacting the Religious Freedom Restoration Act,²¹⁶ which President Clinton signed into law on November 16, 1993, another judicial

206. 494 U.S. 872 (1990).

207. *Reh'g denied*, 496 U.S. 913 (1990). See also Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIG. 99 (1990).

208. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991).

209. *Smith*, 494 U.S. at 879.

210. In her concurring opinion, Justice O'Connor cites *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), expressly noting that it had overruled *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940). *Id.* at 902 (O'Connor, J., concurring).

211. McConnell, *supra* note 208, at 1124.

212. *Employment Div. v. Smith*, 494 U.S. 872, 891 (O'Connor, J., concurring).

213. *Id.* at 902 (O'Connor, J., concurring).

214. *Id.* at 909 (Blackmun, J., dissenting).

215. *Id.* at 890.

216. Pub. L. 103-141, 42 U.S.C. § 2000bb (1993).

dissent had come to be vindicated by the political process. Perhaps from the jurisprudential perspective of Chief Justice Rehnquist, and Justices O'Connor and Scalia, it is entirely appropriate that Congress has acted in three instances recently to overturn the effect of their opinions in matters affecting religious freedom.²¹⁷ And it may even be that, having instructed God about the appropriate length of heavenly liturgy according to the way things are done at Harvard, Justice-Professor-Saint (or at least happy) Frankfurter is now smiling down on these results as well, because of the crucial fact that the legislative branch and not the judiciary is making the accommodation of religion in these instances.²¹⁸ In another sense, however, it was the dissenting Justices in these cases—Justice Brennan in *Goldman* and Justice Blackmun in *Smith*—whose views have prevailed.

With the exception of the very first period of Supreme Court history (1789-1804), dissent has played a vital role in each successive period of the Court's history. Hence it is safe to conclude that judges in American courts should always feel free whenever necessary to disagree openly and publicly—that is, in dissents—with one another.

III. THE IMPERATIVE OF JUDICIAL CIVILITY

Although dissent is crucial to the institutional well-being of appellate courts, the manner in which it is undertaken is worthy of further reflection. In other words, although judges must be able to express strong disagreement with one another, they do not need to do so disagreeably.

One way of thinking about the *Standards* is that they are long overdue. In the past decade or so, lawyers have continuously contributed to the deterioration

217. In *Goldman v. Weinberger*, 475 U.S. 503 (1986), Justice Rehnquist wrote an opinion that allowed the dismissal of an observant Jew from the military for wearing a yarmulke under his military cap. Since the decision was grounded in regulations issued under the authority of Congress over the armed forces, Congress has plenary power to reverse that decision, and did so promptly. See 42 U.S.C. § 2000bb. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), Justice O'Connor ruled that the Park Service did not have to show a compelling governmental interest to build a road through a site sacred to the Native Americans because the government has sovereign power over its land; once again, having implicitly invoked Art. I, § 8, a power that the Constitution expressly commits to Congress, Congress felt free to deny the Department of Interior the appropriation to build that road. Broader remedial legislation to secure more effectively the rights of Native Americans to free exercise of their religious beliefs and practices is now being contemplated by Congress.

218. In his *Barnette* dissent, Frankfurter noted: "Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation But the real question is, who is to make such accommodations, the courts or the legislature?" *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting).

of the already inadequate “adversarial ethic.”²¹⁹ In the name of their duty to represent their clients zealously within the bounds of the law,²²⁰ lawyers have moved beyond assertive adversity to aggressive hostility.²²¹ It would be hard to think of a Justice who routinely or even seldom said “yes” when he or she really meant to say “no.” The nub of the problem explored below is the evident hostility that they manifest when they go on to say a few more things than the simple word “no.” These additional words, usually in the form of adjectives that a shrewd practicing lawyer avoids in drafting a complaint, rarely further the argument, but only disclose their feelings of animosity towards others.

Several federal judges in the Seventh Circuit have expressed to me the view that the nastiness among the Justices contributes to the lack of civility among lawyers. It is difficult to imagine busy practitioners poring over the United States Reports to discover a pretextual justification for their Rambo-like techniques in adversarial proceedings. Whether or not the incivility of lawyers mirrors the behavior of the Justices, the amazing thing is that as this kind of nastiness began to affect the quality of advocacy not only in trial courts, but also in appellate courts, appellate judges did very little to counter it. Appellate judges often put up with an awful lot of lawyering that pushes the patience of the bench to the limits or even moves beyond the fringe of zealous advocacy into the zone of disrespect for the court. As the citations from Judge Conover in the Introduction of this Article suggest, moreover, when judges get around to correcting incivility, they typically confine their zeal to telling off lawyers for bad conduct by lawyers.

Because judges have the contempt power and lawyers do not, it is always easier for judges to admonish lawyers about the incivility of lawyers to the court than to attend to the problem of their own incivility to counsel or to other judges in their published opinions. The *Standards* are thus somewhat remarkable in that they call upon judges in the Seventh Circuit to treat counsel with the respect that they wish counsel to show to them, and they require judges to show respect for one another by acting with a presumption of good faith on the part of other judges: “a position articulated by another judge is the result of that judge’s

219. For a graphic description of the problems with the adversarial ethic, see, e.g., Seymour Wishman, *A Criminal Lawyer's Inner Damage*, N.Y. TIMES, July 18, 1977, at A27; see also Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEG. ETHICS 125 (1987).

220. Disciplinary Rule 7-101, entitled “Representing a client zealously,” states the basic norm of the adversarial ethic in sub-section (A)(1): “A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-101 (1983).

221. For a discussion of the value of assertiveness, see, e.g., ROBERT E. ALBERTI & MICHAEL L. EMMONS, *YOUR PERFECT RIGHT: A GUIDE TO ASSERTIVE BEHAVIOR* (2d ed. 1974); HERBERT FENSTERHEIM & JEAN BAER, *DON'T SAY YES WHEN YOU WANT TO SAY NO* (1975).

earnest effort to interpret the law and the facts correctly."²²² The *Standards* implicitly recognize that serious damage is done when *judges* do not "endeavor to work with other judges in an effort to foster a spirit of cooperation in [the] mutual goal of enhancing the administration of justice."²²³ It is to these judicial duties toward other judges that I now turn.

Circuit judges on the federal courts of appeals do not always agree with one another, but they write dissents much less frequently than do Justices of the Supreme Court.²²⁴ Perhaps this is because circuit judges rotate on panels of three, and rarely sit as an entire court to decided matters en banc.²²⁵ This procedural fact may account for the tendency of circuit judges to get along with one another. On the other hand, the ability of circuit judges to get along with one another does not assure that the same judges will treat counsel courteously. Several lawyers in the Seventh Circuit have noted what may be termed demeaning behavior directed at them from the bench, including nonverbal behavior such as contemptuous, dismissive looks or the rolling of judicial eyes to the heaven. Another complaint is that the circuit judges occasionally do the lawyering for the parties, inserting an argument—which will then be demolished—that counsel had not included.²²⁶

The stakes in deciding cases in the Supreme Court are higher; they have national, not regional, consequences. Perhaps for this reason, the Justices treat counsel who appear before them with a certain measure of respect and courtesy. Even when they subject counsel to tough questions in oral argument, the Justices are paying counsel the supreme compliment of taking their arguments seriously. By the same token, disagreement among the Justices is surely more frequent and probably more intense than among circuit judges. Thus it may be less easy for Supreme Court Justices than for circuit judges to display a constant regard for one another in their opinions. The Justices have a ceremonial ritual of shaking hands with one another before each session of the Court, but that does not mean

222. *Final Report*, *supra* note 3, at 452.

223. *Id.*

224. The first issue of the *Harvard Law Review* each year is devoted to an analysis of the major decisions of the Supreme Court in the previous term. The issue contains a statistical breakdown of dissents on the Supreme Court.

225. According to the Circuit Executive, Collins Fitzpatrick, it is more probable that the Supreme Court would grant certiorari to the Seventh Circuit in a case presented to it for review than that the Seventh Circuit would grant rehearing en banc in a case on which it had already ruled. Telephone Interview with Collins Fitzpatrick, Circuit Executive for the Seventh Circuit Court of Appeals (Feb. 21, 1994).

226. This problem could be addressed by allowing counsel to comment in a supplemental brief on any argument that the judges would like to see addressed. Under the current rules counsel may only do this in a petition for rehearing by the panel that heard the case and has already decided the case. F. R. APP. P. 40. As noted above, petitions for rehearing are generally disfavored.

that their strong differences will not become public in the ensuing session or in the opinions that they write. Sometimes the relationships between the Justices both before and after the ritual handshake have deteriorated to a point where the personality conflicts between the Justices may fairly be said to have damaged the Court.

I offer several examples of behavior of this sort in this century. First, I describe the strained relations between several of the Justices in the era from the Taft Court to the Warren Court. Then I offer some examples of the use of language in dissents that appears to move beyond the duty of clarifying reasons for disagreement with the Opinion of the Court to a level of emotional feeling that presents a problem if the *Standards* are to be taken seriously. In all of these instances I trust that I have followed the suggestion of Judge Learned Hand, who once wrote: “[W]hile it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them.”²²⁷

A. *Stormy Relationships*

A group can be dysfunctional in many ways. The dysfunctionality may be manifested in snitty words, such as those I explore below in Part III.B. Or it may be manifest in an inability of a member of a group to accept the others as colleagues genuinely worthy of respect. I focus now on personality clashes among the Justices that have occasionally impeded the work of the Court.

I begin with an extreme case, one in which a Justice had apparent contempt for others on the Court not by virtue of an honest intellectual disagreement over conflicting ideas, but because of a vicious predisposition rooted in anti-Semitism. Justice James Clark McReynolds has been called “the Supreme Court’s greatest tragedy,”²²⁸ but several of his character flaws make even this harsh evaluation more elevated than McReynolds probably deserves. In particular, McReynolds “appeared to be an open anti-Semite, seemingly hating Brandeis and Cardozo for no other reason than their being Jewish.”²²⁹ One of Brandeis’s biographers notes:

Cardozo was a Jew, a “Hebrew,” and McReynolds did not like those people. It was no secret. After observing his reaction to Brandeis,

227. Learned Hand, as cited in the masthead page of each annual issue of *The Supreme Court Review*.

228. DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 222 (1936).

229. STEAMER, *supra* note 39, at 159. A recent study of Justices Brandeis and Frankfurter is strangely silent about the anti-Semitic attacks of Justice McReynolds. See BURT, *supra* note 191.

everyone assumed that McReynolds was anti-Semitic. The Justice treated the newcomer as though he did not exist. He would almost never talk to him or acknowledge his presence.²³⁰

For example, when McReynolds was assigned to write an Opinion of the Court, he would circulate only seven copies of his draft to the chambers of the other Justices, leaving Brandeis to get access to the draft by reading the copy sent to Justice Holmes. And on at least one occasion when Justice Brandeis wrote for the Court, Justice McReynolds scribbled an anti-Jewish comment on Brandeis's draft.

Justice Holmes regarded McReynolds as a "savage" who could not control his contradictory impulses.²³¹ Justice Brandeis, for his part, "was able to evaluate McReynolds from a distance, as though the insults were nothing more than barbs that could not stick."²³² Even with so sweet a person as Brandeis, there were limits. Brandeis tried to maintain cordial relations with all of the Justices, even those he regularly disagreed with, but found that it was impossible for him to develop anything like a friendship with McReynolds. Although there was to be no closeness between Brandeis and McReynolds, Brandeis at least strove not to return to McReynolds the insults that McReynolds had visited upon him.

Several commentators have observed that the appointments of President Franklin Roosevelt to the Supreme Court led not to judicial harmony on that Court, but to one of the most divisive periods of its history. In particular, I explore here the stormy relationships between Justice Felix Frankfurter (1939-1962) and Justice Hugo Black (1937-1971), and between Justice Frankfurter and Justice William O. Douglas (1939-1975). Although it is doubtful that Justice Frankfurter intended that his own judicial behavior would be subjected to the blunt and candid criticism it has received, he did once write: "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."²³³

When Felix Frankfurter was appointed to the Court, Justice Black wrote

230. LEWIS J. PAPER, *BRANDEIS* 251 (1983).

231. *Id.* at 252.

232. *Id.* According to another biographer, Brandeis "made a point of maintaining cordial relations with his colleagues (with the exception of McReynolds who constantly slighted him), even when he thought little of them." STRUM, *supra* note 138, at 369.

233. Felix Frankfurter, as cited in the masthead page of each annual issue of *The Supreme Court Review*.

him a congratulatory note stating that he was "looking forward with unusual pleasure to our association in the [Court's] important work—work which my experience here has convinced me, more than ever, is vital to the causes in which we believe."²³⁴ For his part Frankfurter had a very high regard for the legislative process. Justice Black's service as a United States Senator from Alabama might have provided a basis for collegiality between Black and Frankfurter. The reality, however, was that these Justices did not relate well to one another.

Frankfurter would not only go on to have a longstanding and important argument with Black over the incorporation of the provisions of the Bill of Rights against the several states through the Fourteenth Amendment,²³⁵ but he would also go on to denounce Black as "violent, vehement, indifferent to the use he was making of cases, utterly disregarding of what they stood for, and quite reckless when challenged."²³⁶ He thought of Black, Douglas, and Murphy not as colleagues with differing views, but as "enemies" on the bench. Frankfurter once yelled at Eliot Richardson, his clerk from the 1945 term, "Don't you get the idea that this is a war we are fighting."²³⁷ He referred to Black, Douglas and Murphy as "the Axis," and once described Douglas as one of the "two completely evil men I have ever met."²³⁸ By 1957 the metaphor of "the Axis" was no longer useful, but Frankfurter still thought of the three pivotal members of the Court as enemies, conjoining the new Chief Justice with his old foes, Black and Douglas, in a vituperative letter to his friend, Judge Learned Hand. In this letter he described Black, Douglas, and Warren as men "whose 'common denominator is a self-willed self-righteous power-lust,'" men

"undisciplined by adequate professional learning and cultivated understanding" . . . who made decisions on the basis of "their prejudices and their respective pasts and self-conscious desires to join Thomas Paine and T. Jefferson in the Valhalla of 'liberty' and in the meantime to have the avant-garde of the Yale Law School . . . praise them."²³⁹

"Professor Frankfurter," as Chief Justice Hughes called his colleague after

234. YARBROUGH, *supra* note 172, at 117.

235. *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947).

236. FINE, *supra* note 168, at 251.

237. Interview with Eliot Richardson, *cited* in BRUCE A. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 267 (1982) [hereinafter MURPHY, BRANDEIS].

238. JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 217 (1980).

239. Letter from Felix Frankfurter to Learned Hand (June 30, 1957), *cited* in MURPHY, BRANDEIS, *supra* note 237, at 181.

he had joined the Court²⁴⁰ and as Frankfurter himself regarded his role on the Court,²⁴¹ could be awfully patronizing towards “the Brethren,” as the Justices were known before the appointments of Sandra Day O’Connor and Ruth Bader Ginsburg. For example, he once told his colleague, Justice Stanley Reed, to read a statute not once, but *thrice*, in order to grasp its meaning, because he had instructed his students at Harvard to do this.²⁴² Frankfurter made the following entry into his diary about a conversation he had with Justice Roberts about his own performance at the conference relating to a Black opinion:

[A] difficult problem confronted me and probably if I had been wise I would not have said anything, because in order to say anything I had to spell it out in detail and at least in the manner in which I did it appeared to be very professorial—not that I mind being a professor because that is what I am and I was appointed to this Court as a professor, so to speak. Roberts: “It was your duty to do what you did and I would have been very unhappy if you did not do so.” “Well,” I replied, “as a matter of self-respect I just could not be silent when such hog-wash was emitted by Black with fanatical disregard of the truth of the cases and statutes which he threw together haphazardly without relevance and without meaning except generally to create an atmosphere of confusion and intensity of conviction.”²⁴³

In 1954, Frankfurter described Black in a letter to Learned Hand: “Hugo is a self-righteous, self-deluded part fanatic, part demagogue, who really disbelieves in Law, thinks it essentially manipulation of language.”²⁴⁴ According to a biographer of Justice Murphy, Frankfurter regarded Black as “violent, vehement, indifferent to the use he was making of cases, utterly disregarding of what they stood for, and quite reckless when challenged.”²⁴⁵

Frankfurter’s ongoing tiff with Black spilled over into other relationships as well, with institutional ramifications for the Court. Justice Harlan’s biographer recalls that a divisive personal dispute between Black and Frankfurter erupted even over the content of a message upon the retirement of a colleague from the Court.

240. See *supra* note 168 and accompanying text.

241. See *infra* text accompanying note 243.

242. FINE, *supra* note 168, at 159.

243. FROM THE DIARIES OF FELIX FRANKFURTER 228 (Joseph P. Lash ed., 1975) [hereinafter FRANKFURTER DIARIES].

244. FINE, *supra* note 168, at 251.

245. *Id.* For a full discussion of the stormy relationship between Black and Frankfurter, see JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989).

When Justice Owen Roberts, who often had joined the Court's laissez-faire conservatives in striking down early New Deal legislation, announced his retirement from the bench in 1945, Chief Justice Stone prepared the customary farewell letter for his colleagues' signatures. Black, a harsh critic of the old Court's repudiation of the Roosevelt recovery program, objected to a passage in the letter which expressed the justices' regret "that our association with you in the daily work of the Court must now come to an end," and to the observation that Roberts had "made fidelity to principle your guide to decision." To secure unanimity, Stone had agreed to the Black deletions. When Frankfurter learned of them, however, he persuaded the Chief Justice to circulate the original letter among the brethren, with the passages to which Black had objected enclosed in brackets. In a brief letter to the colleagues, moreover, Frankfurter insisted that he could not be a "party to the denial, under challenge, of what I believe to be the fundamental truth about Roberts, the Justice—that he 'made fidelity to principle' his 'guide to decision.'"²⁴⁶

Black's biographer puts it this way:

The upshot of the affair was that Roberts received no letter at all, and the quarreling New Deal Court divided as bitterly on the issue of complimentary phraseology as it ever did on a question of substantive law. Douglas backed Black's position, and Murphy and Rutledge were willing to sign either draft. Frankfurter and Jackson dug in to fight to the end for the original version.²⁴⁷

As I mentioned above, when Chief Justice Stone died in April of 1946, Black opposed the nomination of Justice Jackson to become the Chief Justice, in no small part because Black perceived Jackson as an ally of Frankfurter.²⁴⁸ President Truman appointed Vinson instead. Jackson bitterly denounced Black in a lengthy telegram to the members of the Senate and House Judiciary Committees and provided copies to the press.²⁴⁹ According to Justice Harlan's biographer, when Jackson returned to the Court after his service in Nuremberg, he "resumed outwardly cordial, if essentially aloof and formal, relations" with Black; and Jackson went "to his grave resentful of Black and convinced that his colleague's opposition had denied him the chief justiceship."²⁵⁰

246. YARBROUGH, *supra* note 172, at 118.

247. GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 231 (1977).

248. YARBROUGH, *supra* note 172, at 116.

249. *Id.*

250. *Id.* at 117.

If Frankfurter's relationship with Black was troubled, his relationship with Douglas bordered on the pathological, and Douglas returned the compliment. In a recent article on the Frankfurter-Douglas relationship, Professor Melvin Urofsky noted the irony of this sad reality:

Professor Felix Frankfurter and William O. Douglas, both former academics, both intimates of Franklin Roosevelt and partisans of the New Deal, both strong-willed egotists, and both once friends, personified in their deteriorating relationship the philosophical debate on the Court and how personality conflicts poisoned the once placid waters of the temple pool.²⁵¹

An example of the warmth that Douglas once felt for Frankfurter even precedes the period of strong support that both law professors lent to the programs of the New Deal. Douglas wrote to Frankfurter in 1932:

My dear Felix:

I read with great joy in yesterday's Times the Governor's recommendation of you for the Supreme Judicial Court [of Massachusetts]. I was happy not only because it spells the end of mediocrity of a formerly distinguished bench but also because it is such an appropriate and timely tribute to your own distinctions and accomplishments. I fully realize the great loss this would entail for the Harvard Law School and the veritable host of young men whom you inspire and stimulate in your incomparable fashion. The loss to the teaching profession would be absolutely irreparable . . . and the service you would render to your Commonwealth would be memorable.²⁵²

251. Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71 [hereinafter Urofsky, *Conflict*].

252. Letter from William O. Douglas to Felix Frankfurter (June 24, 1932), cited in THE DOUGLAS LETTERS 76 (Melvin I. Urofsky ed., 1987) [hereinafter DOUGLAS LETTERS]. Frankfurter turned the appointment down, noting:

There were only two things that seemed to appeal to that part of my nature which is whimsical, why I should like to have accepted. In those days the seven members of the Supreme Judicial Court of Massachusetts went in lock step every day from where the court was sitting . . . to lunch at the Union Club in formal dress and top hat. I thought that would be an interesting thing—to go in lock step in top hat to the Union Club for lunch.

The other consideration that appealed to me was the desire to satisfy [my] curiosity of the means that Chief Justice Rugg used whereby if a fellow dissented from an opinion, his opinion wouldn't be filed. How did he work it that grown men of independent position—life tenure—would suppress their views when presumably they felt

Against this background one might have anticipated that when President Roosevelt appointed these two academics to the Supreme Court, they would have become close allies on the Court. Although Douglas suggests in his autobiography that Frankfurter was on his list of superlative Justices,²⁵³ Douglas lost patience with Frankfurter pretty early on in their tenure on the Court, and the relationship between them deteriorated progressively. In the article referred to above, Professor Urofsky has collected from the diaries of the Justices and internal memoranda considerable evidence that would lead one to conclude that the feud between these two Justices was bad for the Court. I include here several of the instances referred to by Urofsky, but cite them to their original sources.²⁵⁴

One of the reasons why Frankfurter held Douglas in such low esteem is that he found Douglas's flirting with political ambitions particularly disturbing. Although Douglas had written Frankfurter a letter in 1940 clarifying that he had no intention of leaving the Court,²⁵⁵ and although Douglas again turned down the offer of the vice-presidential nomination when President Truman offered it to him in 1948, Frankfurter persisted in believing that Douglas had political aspirations that interfered with his commitment to the Court. For example, in a letter to Philip Elman, his law clerk from the 1941 term, Frankfurter condemned Douglas as "an absolute cynic who didn't believe in anything" and was using the Court as a political launching pad.²⁵⁶ In a conversation with Justice Roberts in 1943, he denounced a Douglas opinion as one "of a judge who has political ambitions, and is not thinking about the Court or his Court job."²⁵⁷ When Roberts stated that he found this hard to believe, Frankfurter continued:

[N]ot long after Douglas came on the Court it was as plain as a

them with sufficient strength to dissent. I was confident that he couldn't suppress any dissent of mine, and I just wondered how that would operate, but these two considerations didn't outweigh my sober convictions that the opportunities the Harvard Law School afforded me were more significant than even membership on the Supreme Judicial Court of Massachusetts.

FELIX FRANKFURTER REMINISCES 233 (H. Phillis ed., 1960).

253. WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975*, at 42 (1980).

254. See generally Urofsky, *Conflict*, *supra* note 251.

255. "There is considerable talk in Washington about putting me on the ticket. I discount it very much But it is sufficiently active to be disturbing. It is disturbing because I want none of it. I want to stay where I am. This line to you is to ask you, should the matter come your way, to scotch it. You need not be told any reasons. You know hosts of them—from the ones Brandeis would give, on down. I am *most* serious about this—probably more serious than the possibilities justify." Letter from William O. Douglas to Felix Frankfurter (July 2, 1940), *cited in* Urofsky, *Conflict*, *supra* note 251, at 101.

256. Interview with Philip Elman, *cited in* MURPHY, *supra* note 119, at 266-67 (1982).

257. FRANKFURTER DIARIES, *supra* note 243, at 229-30.

pikestaff to me that he was not consecrated to the work of this Court but his thoughts and ambitions were outside it. And for me such ambition in a man corrupts his whole nature—especially if he is a judge, as the history of this Court amply proves.²⁵⁸

In the same term, Frankfurter entered into his diary the following record of a conversation with Justice Murphy:

FF: I am surprised, Frank, that it doesn't shock you to have this Court made a jumping-off place for politics.

FM: Well, I don't like it.

FF: Well, it's much more than a matter of not liking. When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery. And this isn't idle, high-flown talk. We are all poor human creatures and it's difficult enough to be wholly intellectually and morally disinterested when one has no other motive except that of being a judge according to one's full conscience. And the returns are all in on judges of this Court who, while on the Court, have had conflicting political ambitions. We know all the instances and the experience is unedifying and disastrous.²⁵⁹

But at the time Frankfurter wrote this, he was no monk retired from the "political thicket" he later urged his colleagues to stay out of.²⁶⁰ Although never regarding himself as a candidate for political office, he was himself an intensely political animal who maintained an active correspondence and vivid presence in the White House for the duration of the Roosevelt presidency.²⁶¹

I mentioned above the wound of superiority that Professor Frankfurter inflicted upon himself after joining the Court. It remains to explore how this trait affected Frankfurter's relationship with Douglas. Justice Potter Stewart recalled that if Frankfurter were really interested in a case, he "would speak for fifty minutes on various subjects, no more and no less, because that was the length of the lecture at the Harvard Law School." According to Stewart, Douglas could be "absolutely devastating" after one of these lectures; for

258. *Id.* at 230.

259. *Id.* at 155.

260. *Colegrove v. Green*, 328 U.S. 549 (1946).

261. For example, Frankfurter urged President Roosevelt to appoint Judge Learned Hand to the Court, but FDR declined his advice. For a full account of Frankfurter's secret political activities, see MURPHY, BRANDEIS, *supra* note 237.

example, he once told Stewart: "When I came into this conference, . . . I agreed with the conclusion that Felix has just announced. But he's talked me out of it."²⁶²

Another example of the better-than-the-rest-of-you attitude that Professor Frankfurter brought with him to the Court is reflected in a memorandum to the Conference penned as late as 1956:

Even before I came on the Court, I had good reason to believe that the course of proceedings leading to adjudication was not all that it might be. My grounds for feeling that the deliberative process was inadequate derived from the intimacies I had enjoyed over the years with Justices Holmes, Brandeis, and Cardozo.²⁶³

The Frankfurter-Douglas relationship suffered from the well-known malady in the academy that one pompous professor deserves another. Having taught a student or two at Columbia and Yale, Professor Douglas replied to Professor Frankfurter as follows:

We are not first-year law students who need to be put under strict restraints The blowing of whistles, the counting to three or ten, the suspension of all activity for a stated time may be desirable and necessary on playgrounds or in sports. But we are not children; we deal not with trivia; we are not engaged in contests. Our tasks involve deliberation, reflection, meditation When opinions have jelled, the case is handed down. When jelling is not finished, the case is held.²⁶⁴

In the madcap relationship between two narcissistic personalities, Douglas gave Frankfurter as good as he got. The editor of the Douglas correspondence, Professor Urofsky, sums up this mutual crazy-making and name-calling between the Justices:

Douglas call[ed] his colleague "Der Fuehrer," the "little bastard," "the Little Giant," "Machiavellian," "divisive," and a "prevaricator." Frankfurter could be, as we have seen, equally caustic, calling Douglas "malignant," "narrow minded," "the most cynical, shamelessly amoral character I've ever known," and a "mommser"

262. BERNARD SCHWARTZ & STEPHAN LESHER, *INSIDE THE WARREN COURT* 24 (1983).

263. Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court*, *O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143, 182-83.

264. William O. Douglas, Memorandum to Conference (Oct. 23, 1961), cited in Urofsky, *Conflict*, *supra* note 251, at 108.

[bastard].²⁶⁵

Urofsky notes that Douglas

resented Frankfurter's constant badgering, and took every opportunity to puncture his pretensions. He claimed that whenever some incompetent attorney was making a mess of oral argument, he would send a note over saying he understood "this chap led your class at Harvard Law School," and "Felix would be ignited, just like a match." Once when Douglas suspected Frankfurter of using a clerk to draft an opinion—a practice Douglas never followed since he wrote so quickly—he said "Felix, this opinion doesn't have your footprints"; Frankfurter was livid.²⁶⁶

In 1954, Douglas confronted Frankfurter for his evident lack of collegiality in the Conference:

Today at Conference I asked you a question concerning your memorandum opinion in Nos. 480 & 481. The question was not answered. An answer was refused, rather insolently. This was so far as I recall the first time one member of the Conference refused to answer another member on a matter of court business.

We all know what a great burden your long discourses are. So I am not complaining. But I do register a protest at your degradation of the Conference and its deliberations.²⁶⁷

Three years later when Frankfurter had gone to great lengths—departing from his printed dissent on the bench—to denounce an Opinion of the Court written by Douglas, Douglas sent Frankfurter the following memorandum:

The reason that I asked you for some statute which would run afoul of Lambert other than the ordinance involved in Lambert was your statement on the bench that it would make a dissent much, much too long to list the statutes which would fall as a result of Lambert. We made a fairly exhaustive search in this office, and we have not been able to find any others that would have this defect. In view of the fact that you had found so many that would suffer from the same infirmity, I thought you might be willing to disclose their identity—at

265. Urofsky, *Conflict*, *supra* note 251, at 106 (citations omitted).

266. *Id.* at 81.

267. Memorandum from William O. Douglas to Felix Frankfurter (May 29, 1954), *cited in* DOUGLAS LETTERS, *supra* note 252, at 85.

least the identity of a single one.²⁶⁸

When no answer came from Frankfurter's chambers, Douglas sent Frankfurter another memorandum on the same day:

I, too, would go to the stake for the accuracy of my quotation of what you said from the bench, i.e., that it would make a dissent much, much too long to list the statutes which would fall as a result of Lambert. To be more specific, you stated from the bench the list would fill a volume. So when we ask for just one, we are not asking for very much out of that long tabulation.²⁶⁹

Douglas also sent a memorandum on the matter to Black:

[O]ur friend from Harvard went hogwild. He said it would take a book to list all the criminal statutes which this decision held unconstitutional. Therefore, he did not want to clutter up the law books with all these hundreds or thousands of citations.

Since the announcement of his dissent, I have been writing him asking him to give us just one citation of one other statute which would be held unconstitutional.

It is now 11:40 AM, December 17th, and this has been going on for nearly 24 hours. He has not yet sent me any citations, but if he does I will rush it all down to you, because I know you must be as worried about the devastating effect of Lambert as I am.²⁷⁰

In 1974, over a decade after Frankfurter's death and at a point when his own ability to discharge his responsibilities was in question, Douglas wrote to a professor in Missouri who inquired about the episode in 1954 described above:

We were always twitting our Brother Frankfurter over his long and dramatic performances in Conference. He was an artist as well as an able advocate and his Conference presentations were dramatic and lengthy. Most of us thought the function of the Conference was to discover the consensus. His idea was different: he was there to proselytize and to gain converts²⁷¹

This letter overlooks the sad reality that by 1960 the relationship between the two Justices had deteriorated to the point that Douglas had prepared a

268. *Id.* at 86-87 (referring to *Lambert v. California*, 355 U.S. 225 (1957)).

269. *Id.* at 88.

270. Urofsky, *Conflict*, *supra* note 251, at 107.

271. *Id.* at 110-11.

memorandum to the Conference which, on the advice of Warren, he did not forward to the Brethren:

The continuous violent outbursts against me in Conference by my Brother Frankfurter give me great concern. They do not bother me. For I have been on the hustings too long. But he's an ill man; and these violent outbursts create a fear in my heart that one of them may be his end.

I do not consciously do anything to annoy him. But twenty-odd years have shown that I am a disturbing symbol in his life. His outbursts against me are increasing in intensity. In the interest of his health and long life I have reluctantly concluded to participate in no more conferences while he is on the Court.

For the cert lists I will leave my vote. On argued cases I will leave a short summary of my views.²⁷²

In his autobiography Douglas wrote:

One would err greatly to conclude that Frankfurter and I were at war. We clashed often at the ideological level but our personal relations were excellent and I always enjoyed being with him.²⁷³

Perhaps I "err greatly," but this passage is hard to reconcile with the considerable evidence that suggests that their personal relationships were anything but "excellent." In his relationship with Frankfurter, Douglas reached the nadir of embitterment with another Associate Justice, even refusing to attend his colleague's funeral. Was that civility?

B. Emotional Language

In this section I explore several instances of language used by the Justices in concurring opinions or dissents during the Burger Court and the Rehnquist Court. It might be the better part of prudence to refrain from comment on sitting Justices. Certainly this counsel would probably be observed in a large Washington firm that appeared regularly before the court.²⁷⁴ But as Justice

272. William O. Douglas, Memorandum to Conference (Nov. 23, 1960), cited in Urofsky, *Conflict*, *supra* note 251, at 109-10.

273. DOUGLAS LETTERS, *supra* note 252, at 98.

274. For an unusual example of blunt criticism of sitting Justices by the Attorney General, who might be regarded as the "senior partner" in the largest group of lawyers in Washington, the United States Department of Justice, see Edwin Meese III, Address to the American Bar Association (July 9, 1985); Edwin Meese III, Address to the American Enterprise Institute (Sept. 6, 1985); Edwin Meese III, Address to the Federal Bar Association (Sept. 13, 1985); Edwin Meese III, Address at Dickinson College (Sept. 17, 1985). Two Justices replied to these speeches in extrajudicial

Frankfurter and Judge Hand suggested in the two citations mentioned above, some of us in our society—including for example, journalists²⁷⁵ and elected officials in the political branches of government—are expected to engage in respectful criticism of the Court. Indeed criticism of the operations of the institutions of our government is, of course, one of the most basic freedoms enjoyed by the citizens in a democracy.²⁷⁶ Legal scholars, moreover, have a special obligation to discharge the task of criticism of judges, albeit with care and respect for the judicial institution. In the words of Judge Hand, effective criticism comes from “those who will take the trouble to understand [judges].” Trusting that no offense is intended to any of the Justices and that none will be taken by them or “on behalf of them” by others, I now rush in where fools or even angels might hesitate to tread.

Although the following instances of rhetorical overkill are much less threatening to the well-being of the Court than the soured relationships among the Justices referred to above, they may at least be said to present a difficulty for the ideals of judicial courtesy sought in the *Standards*.

I do not attempt to provide here an all-inclusive list of mean-spirited or disrespectful dissents, but simply to offer some examples of excessive or distracting language in the opinions of the Justices. There is no neat pattern that I can discern in these opinions, in the sense that it cannot be said that Justices on one or another wing of the Court tend to use excessive or distracting language in their opinions more than others. For example, in *United States v. Ash*,²⁷⁷ Justice Brennan, who is generally regarded as one of the most affable and collegial members of the Court in recent times,²⁷⁸ characterized an opinion written by a close ideological ally, Justice Blackmun, as “wooden.”²⁷⁹ It seems that once a Justice has written an opinion that another finds “wooden,” then it becomes imperative for that Justice to label someone else’s opinion as wooden as well. Thus, Justice Blackmun, found “wooden” in *Ash* by Justice Brennan, passes on the compliment to Justice Stewart in *Aaron v. S.E.C.*²⁸⁰

And if Brennan could suggest in his dissent in *Columbia Broadcasting*

appearances. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification* (Oct. 12, 1985); John Paul Stevens, *Address to the Federal Bar Association* (Oct. 23, 1985). See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 117-19, 121, 122, 124 (1987).

275. See, e.g., Vincent Blasi, *The Checking Function in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

276. See, e.g., *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991).

277. 413 U.S. 300 (1973).

278. See Owen M. Fiss, *Brennan's Faith*, 26 VAL. U. L. REV., at ix, xiv-xv (1991).

279. *U.S. v. Ash*, 413 U.S. 300, 342 (1973) (Brennan, J., dissenting).

280. 446 U.S. 680, 704 (1980) (Blackmun, J., dissenting).

System, Inc. v. Democratic National Committee that Justice Stewart had a “complete misunderstanding” of the issues before the Court,²⁸¹ why should not Justice Black think the same of Justice White in *Williams v. Florida*, suggesting that “[the] statement [by Justice White] is plainly and simply wrong as a matter of fact and law, and the Court’s holding based on that statement is a complete misunderstanding of the protections provided for criminal defendants”²⁸²

And why not get right down to your basic schoolyard dialogue that goes this way: “You’re a fool.” “No, I’m not, but you know what? You’re a fool!”²⁸³

The affable and amiable Justice Brennan is thus by no means the only Justice who has referred to his colleagues in a manner that raises a question about opinion writing being “courteous, respectful, and civil . . . , ever mindful that a position articulated by another judge is the result of that judge’s earnest effort to interpret the law and the facts correctly.”²⁸⁴ In fact, one can find at least borderline rhetoric in the opinions of almost all the Justices, who from time to time get around to labeling the positions of their colleagues as “foolish”²⁸⁵ or “absurd.”²⁸⁶

Are we really supposed to believe that the Justices are truly “surprised” at their colleagues’ opinions?²⁸⁷ Do these differing views really come to the

281. 412 U.S. 94, 181 n.12 (1973) (Brennan, J., dissenting).

282. 399 U.S. 78, 108 (1970) (Black, J., dissenting).

283. Lest you think I exaggerate, see *United States v. Johnson*, 457 U.S. 537 (1982), where Justice White states in dissent that “[t]he majority makes no better suggestion today and is just fooling itself.” *Id.* at 567 (White, J., dissenting). To which, without even the dubious benefit of a thesaurus, Justice Blackmun responds in a footnote that “the dissent, and not the Court, ‘is fooling itself.’” *Id.* at 556 n.17. Nyagh! Nyagh!

284. *Final Report, supra* note 3, at 452.

285. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 586 (1974) (White, J., concurring); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 984 (1984) (Rehnquist, J., dissenting); *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 219 (1991) (Scalia, J., concurring).

286. *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2345 (1992) (Stevens, J., dissenting); *Grady v. Corbin*, 495 U.S. 508, 543 (1990) (Scalia, J., dissenting); *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting); *Goldman v. Weinberger*, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting).

287. *Harper v. Virginia Dep’t of Taxation*, 113 S. Ct. 2510, 2520 (1993) (Scalia, J., concurring); *Edenfield v. Fane*, 113 S. Ct. 1792, 1805 (1993) (O’Connor, J., dissenting); *Blystone v. Pennsylvania*, 494 U.S. 299, 313 (1990) (Brennan, J., dissenting); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting); *Honig v. Doe*, 484 U.S. 305, 333 (1987) (Scalia, J., dissenting); *Midatlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494, 507 (1986) (Rehnquist, J., dissenting).

Justices as a “shock”?²⁸⁸ Or is the voice here that of law clerks unsupervised as they carry on their petty skirmishes in footnotes?²⁸⁹

I conclude with an episode in the Rehnquist Court that illustrates the downside risk of berating a colleague who is fairly close to one's own views in the first place. There are some very strong similarities between Justices O'Connor and Scalia. Both received their commissions from President Ronald Reagan. Both have a strong regard for the legislative process, which in their view should not be second-guessed by the judiciary very often. Both are firm in their conviction that criminals must pay the penalties that society has arranged for their wrongdoing, without elaborate constitutional intervention. One could even make the case that there is a parallel concern about one of the burning controversies of the day, abortion.

Chief Justice Rehnquist, who had dissented from the Court's opinion in *Roe v. Wade*,²⁹⁰ wrote an Opinion of the Court in *Webster v. Reproductive Services*,²⁹¹ ruling that a provision in a Missouri statute prohibiting the use of public facilities and employees to perform or assist abortions not necessary to save the mother's life did not contravene its previous rulings in this area.²⁹² Joined by Justices White and Kennedy, and concurred in by Justices Blackmun, Brennan, Marshall, and Stevens, the Chief Justice ruled invalid a provision requiring viability testing. The Chief Justice, joined only by Justices White and Kennedy, expressed the view that the trimester framework announced in *Roe* should be abandoned, but that this case did not afford the Court an opportunity to do so, since the Missouri statute provided that viability is the point at which the state's interest in human life should be safeguarded, whereas the Texas statute invalidated in *Roe* had criminalized all abortions except where the life of the mother is at stake.²⁹³

Justice O'Connor, who had dissented in *Akron v. Akron Center for Reproductive Health, Inc.*,²⁹⁴ wrote a separate concurring opinion in *Webster*,

288. See Gerald Uelmen, *ID.*, 1991 B.Y.U. L. REV. 335.

289. For an example of a footnote war, see *Kungys v. United States* 485 U.S. 759, 774 n.9 (1987) (Scalia, J., dissenting); for one that comes out of the trenches and rushes aimlessly through the no man's land, see *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 610 n.57 (1989).

290. 410 U.S. 113, 171-78 (1973) (Rehnquist, J., dissenting).

291. 492 U.S. 490 (1989).

292. *Id.* at 507-11. The Court declined to rule on the preamble to the statute, which set forth legislative “findings” that “[t]he life of each human being begins at conception.” *Id.* at 504. The Court also ruled that the controversy over another provision prohibiting the use of public funds to encourage or counsel nontherapeutic abortions was moot. *Id.* at 511-13.

293. *Id.* at 516-21.

294. 462 U.S. 416, 453-59 (1983) (O'Connor, J., dissenting).

suggesting that the approach taken by the Chief Justice was correct because of the Court's practice of not deciding more than is necessary to resolve a particular case,²⁹⁵ which she described as a "fundamental rule of judicial restraint."²⁹⁶

As I have suggested above, judicial restraint is one of the things that Justices O'Connor and Scalia have in common. Judicial restraint, however, is not easy to define with precision, and is—like hard-core pornography—mainly recognized when seen.²⁹⁷ It may not, in short, truly be a "fundamental rule," but one of those things which one sees now and again but not always, even in judges who are deeply committed to abiding by the principle.

Justice Scalia also wrote a concurring opinion in *Webster*. Agreeing with Justice Blackmun that the effect of one portion of the Court's opinion was to overrule *Roe v. Wade*,²⁹⁸ Scalia would have done so more explicitly than the Rehnquist opinion did.²⁹⁹ He offered a persuasive rationale for doing so, that the avoidance of squarely overruling *Roe*

needlessly . . . prolong[s] this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.³⁰⁰

Had Justice Scalia stopped there, his point would have been made, at least for those who agree that there is greater prospect for reaching principled compromise on this burning controversy in the political branches than in protracted litigation.³⁰¹ The remainder of his opinion, however, offers an

295. Justice O'Connor suggested that the Court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Webster v. Reproductive Services*, 492 U.S. 490, 533 (1989) (O'Connor, J., concurring).

296. *Id.*

297. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

298. 492 U.S. 490, 532 (Scalia, J., concurring in part); for Justice Blackmun's view, see *id.* at 532 (Blackmun, J., dissenting).

299. *Webster v. Reproductive Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part).

300. *Id.*

301. Tempers flare so easily in this heated matter that it may not be possible to find middle ground through the legislative process, but one of the unfortunate effects of *Roe* is that it tends to discourage such efforts by constitutionalizing the issue and in this way removing it from the realm of political discourse. Another way of reading *Roe* is that it contributes to the breakdown of a meaningful distinction between law and politics. Whatever the Supreme Court did in *Roe*, it did not, as the *New York Times* confidently announced the day after the decision, "settle" the abortion issue.

opportunity for reflecting on the imperative of judicial civility stated in the *Standards*.

As I mentioned above, Justice O'Connor suggested that it is proper to avoid the formulation of "a rule of constitutional law broader than is required by the precise facts to which it is to be applied." One could disagree with that suggestion, as Justice Scalia did in his concurring opinion, but what he wrote is that O'Connor's suggestion "cannot be taken seriously."³⁰² Scalia then cited two opinions written in that term by O'Connor, illustrating that even O'Connor does not always abide by the rule she commended in *Webster*.³⁰³ In rhetoric this device is known as invidious citation.³⁰⁴ In street talk we call it hoisting someone on his own petard.

Having changed his own mind on more than one occasion, Ralph Waldo Emerson made a famous comment about the "hobgoblin" of "a foolish consistency," with which, he said, "a great mind has simply nothing to do."³⁰⁵ Emerson's dictum may be shrewd advice for poets or, for that matter, for Transcendentalist essayists, but great appellate judges surely have to wrestle with the issue of consistency as they write in dialogue with the views of other judges who have written relevant precedents.

Whatever the consistency of Justice O'Connor's views about abortion, they were not fully articulated in *Webster*. In the next major case in this area, *Planned Parenthood v. Casey*,³⁰⁶ she reached back to the *Cooper v. Aaron* precedent to produce an Opinion of the Court *signed jointly* by herself and by Justices Kennedy and Souter, at least with respect to the proposition that principles of institutional integrity and the rule of stare decisis require that the

Warren Weaver, Jr., *National Guidelines Set by 7-to-10 Vote*, N.Y. TIMES, Jan. 23, 1973, at A1 (stating that the *Roe* decision constituted the "resolution of a fiercely controversial issue").

302. *Webster*, 492 U.S. at 532.

303. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506-08 (1989) (holding racially based set-aside unconstitutional because unsupported by evidence of identified discrimination, but outlining criteria for properly tailoring race-based remedies in cases where such evidence is present); *Perry v. Leeke*, 488 U.S. 272, 278-80 (1989) (announcing constitutional rule that deprivation of the right to confer with counsel during trial violates the Sixth Amendment even if no prejudice can be shown, despite finding that there had been no such deprivation on the facts before the Court).

304. *See, e.g.*, G. Nigel Gilbert, *Referencing as Persuasion*, 7 SOC. STUD. SCI. 112 (1977).

305. Emerson has written:

A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do . . .
. . . Speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today.

Ralph Waldo Emerson, *Essays* (1841), cited in BARTLETT'S FAMILIAR QUOTATIONS 497 (1980).

306. 112 S. Ct. 2791 (1992).

fundamental rule in *Roe v. Wade*³⁰⁷ be retained and reaffirmed, albeit with a rejection of the rigid trimester framework in *Roe* and the substitution of the "undue burden" test that O'Connor had suggested in *Webster*.

Given the intensity of the conflict over abortion in this country, which several commentators have compared to the debates over the abolition of slavery in the nineteenth century,³⁰⁸ it is totally understandable that debate will continue to take place within the precincts of the Supreme Court over this burning controversy. Chief Justice Rehnquist (joined by Justices White, Scalia, and Thomas) and Justice Scalia (joined by the Chief Justice and Justices White and Thomas) both produced dissents in *Casey*, vigorously rejecting the views of the Opinion of the Court signed by Justices O'Connor, Kennedy, and Souter. Both of these dissents expressed willingness to overturn *Roe* formally.³⁰⁹ And Justice Scalia evoked the image of *Dred Scott* in two ways, by citing the text of the Curtis dissent mentioned above,³¹⁰ and by describing the haunting portrait of Chief Justice Taney that hangs in the Harvard Law School. What Scalia sees in this portrait is "an expression of profound sadness and disillusionment."³¹¹ Scalia acknowledges that sadness may be in the eye of the beholder and that Taney may have "always looked that way, even when dwelling upon the happiest of thoughts."³¹² For Scalia, however, the portrait evokes the memory of the one case that eclipsed all of Taney's considerable achievements, *Dred Scott*, with "its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation burning on [Taney's] mind."³¹³

The author of *Roe*, Justice Blackmun, was obviously conflicted by the outcome in the case. On the one hand, Blackmun thinks of the joint opinion as "an act of personal courage and constitutional principle" because it left *Roe* standing.³¹⁴ On the other hand, he attacks the joint opinion for abandoning the

307. 410 U.S. 113 (1973).

308. See, e.g., Michael Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J. L. & RELIG. 33 (1989) (viewing *Roe* as "a lawless and immoral decision enshrining as fundamental law of the polity (that is, constitutional law) the most atrocious injustice in American law since slavery"). Before reaching this conclusion, Paulsen considered the "distressingly many" other "great injustices of American law in this century," including the internment of Japanese-Americans in concentration camps during World War II sustained in *Korematsu v. United States*, 323 U.S. 214 (1944), and the legally enforced regime of racial segregation and discrimination countenanced in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Paulsen, *supra* at 35-36 n.11.

309. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2873-85 (1992) (Scalia, J., dissenting).

310. See *supra* text accompanying note 67.

311. *Casey*, 112 S. Ct. at 2885 (Scalia, J., dissenting).

312. *Id.*

313. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2885 (1992) (Scalia, J., dissenting).

314. *Id.* at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

trimester framework that he announced in *Roe*.³¹⁵ And he views Justice Scalia as “uncharacteristically naive if he thinks that overruling *Roe* and holding that restrictions on a woman’s right to an abortion are subject only to rational-basis review will enable the Court henceforth to avoid reviewing abortion-related issues.”³¹⁶

The debate rages on, and that is as it should be, for the stakes are high. But dare we hope that the *Standards* may be found useful even in the High Court, even on controversial issues such as abortion? If the depth of conviction as well as the style of the elder Harlan is any guide, the answer should be in the affirmative. But if the intensity of this issue is more akin to the abolition of slavery, and the style of the Justices is more like that of Taney and Curtis in *Dred Scott*, then the *Standards* may prove quite irrelevant to this controversy. And for all my distaste for the judicial style of Justice Frankfurter, I may wind up wondering unhappily where Felix is when we need him.

It is not for nothing that Article III judges have life tenure during good behavior. With this constitutional guaranty comes the independence of our judiciary. But that does not mean that the sharp differences that should flourish among the Justices are truly advanced by snitty language that might be appropriate in the House of Commons or other low places of parliamentary debate, but that somehow seems out of place in the United States Reports. The cause of advancing dialogue is not enhanced by disrespect; it is diminished. And to that extent so is the ability of Justices to serve as “teachers in a vital constitutional seminar”³¹⁷ or to lead the nation in debate on matters of public concern that should be “uninhibited, robust, and wide-open.”³¹⁸

IV. CONCLUSION

Part II of this article has illustrated the crucial role that dissents play in appellate courts by highlighting important dissents that proved in subsequent generations to be correct and by discussing moments when dissents, or even concurring opinions, are better left unpublished. Part III has explored the need for judges to be careful about this task. In one of the instances examined here, there was not much hope for civility between Justice McReynolds and any other Jew appointed to the Court, as Justices Brandeis and Cardozo discovered. In

315. *Id.* at 2847-50 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

316. *Id.* at 2854 n.12 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

317. Eugene V. Rostow, *Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (describing the Supreme Court Justices).

318. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

another instance, there probably wasn't much hope for deep mutual regard between a Harvard academic like Felix Frankfurter and an Alabama Senator like Hugo Black. There might have been greater hope for such regard between two academics like Harvard Law Professor Frankfurter and Columbia-Yale Law Professor Douglas, but their strong friendship deteriorated into an embittered relationship soon after both were appointed to the High Court. In each of these instances members of the High Court were not setting a very good example of what the *Standards* call the duty to "endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice."³¹⁹ And in several other instances recounted here the Justices have included in their opinions language that does not appear—in the language of the *Standards*—to view "a position articulated by another judge as the result of that judge's earnest effort to interpret the law and the facts correctly."³²⁰

I am not aware of any evidence that the current members of the Court have allowed their differences to move to the extreme point reached in an earlier period of the Court's history.³²¹ Certainly the courtesy with which various Justices have spoken of the others whenever I have visited with them in chambers suggests that they continue to maintain a very high regard for one another, even when they strongly disagree with one another.³²²

For their sake and for the sake of the Court I hope they are always able to maintain the mutual respect which the *Standards* enjoin upon all judges. And those of us who are not judges (or ever likely to become one) can learn that the duties which the *Standards* impose on judges can readily be applied to all of us,

319. *Final Report*, *supra* note 3, at 452.

320. *Id.*

321. A former clerk of one of the Justices once told me that "his" Justice once asked, "What's a bright guy like me doing in a place like this?" I dismissed the story as improbable because if the Justice in question were as smart as the question assumes, he never would have said it, especially to an indiscreet clerk who doesn't know how to keep his mouth shut. I suspect that the comment was raw projection on the part of the clerk, who didn't want to appear too smug by placing the comment on his own lips about himself.

322. For a rich discussion of ways in which Americans have learned to live with their deepest differences, see *The Williamsburg Charter*, 8 J. L. & RELIG. 5 (1990). At one point the Charter, a bicentennial document celebrating religious freedom, states: "Pluralism must not be confused with, and is in fact endangered by, philosophical and ethical indifference. Commitment to strong, clear philosophical and ethical ideas need not imply either intolerance or opposition to democratic pluralism. On the contrary, democratic pluralism requires an agreement to be locked in public argument over disagreements of consequence within the bonds of civility." *Id.* at 19. See George Weigel, *Achieving Disagreement: From Indifference to Pluralism*, 8 J. L. & RELIG. 175 (1990).

whether we practice law in a courtroom or a classroom.³²³

323. I am grateful to my research assistant, Steve Williams, for the observation that the Justices surveyed in this article probably learned the problematic behavior explored above in the law schools they attended. For an account of the assaultive behavior of law professors, see SCOTT TUROW, ONE L (1988); JOHN J. OSBORN, JR., THE PAPER CHASE (1971).