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DIVISION OF OPINION IN THE SUPREME COURT: A HISTORY OF JUDICIAL DISINTEGRATION

Karl M. ZoBell†

On August 28, 1958, at the call of the Chief Justice, the Supreme Court of the United States met in an extraordinary special session to hear arguments in an appeal taken by the Little Rock School Board from a decision of the Court of Appeals for the Eighth Circuit. After supplemental arguments were presented on September 11, 1958, a decision which, in effect, denied a two and one-half year delay in the Board's schedule for integration of the races in Central High School, was rendered on September 12.¹

Although the substance of this decision was hardly unexpected, it was marked by a characteristic which has become unusual in the recent pronouncements of the Court when faced with problems of such gravity—unanimity. Once again, as has been the case with each of the related appeals that has been taken to the Supreme Court since the original *Segregation Cases*,² nine justices joined³ to demand obedience to what they have declared to be the clear dictate of the Constitution.

Unhappily, this unanimity has become, except for this line of cases, a rather atypical example of the manner in which members of the present Court have chosen to discharge their judicial duties.⁴

Criticism of the frequency with which the Justices resort to their right to publicly disagree with the decisions of the majority of their brethren has appeared in most of the recent popular writing concerning the "Warren Court."⁵ Indeed, Professor Bernard Schwartz finds that:

† See Contributors' Section, Masthead, p. 232, for biographical data. The author wishes to express his appreciation to Professor J. Keith Mann, of Stanford Law School, who encouraged the preparation of this article.

¹ *Cooper v. Aaron*, 78 S. Ct. 1399 (1958).

² *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

³ Note that Mr. Justice Frankfurter filed a separate concurring opinion in the final official report. 3 L. ed. 2d 19 (1958).

⁴ The divisions in several cases involving important constitutional issues handed down on March 31 and May 19 were perhaps more representative of recent practice. On the latter date, in eleven decisions handed down, there were 34 dissenting votes cast, and 24 opinions were filed; but one of the eleven was by a unanimous vote. On the former date, no less than nineteen written opinions and eighteen dissenting votes attended but five decisions (four of which were rendered by bare 5-4 majorities).

⁵ See, e.g., "The Trouble With the Warren Court," *Life*, June 16, 1958, p. 35:

One obvious ground for dissatisfaction with the Warren Court is the inflated number of its separate opinions, both dissenting and concurring, which seem to bespeak an inflation of the judicial ego. . . . The modern abuse of the right to dissent is costing the Supreme Court a lot of its prestige.

Lewis, "Conflict in the Court," *N.Y. Times*, April 3, 1958, p. 17, writing of the March 31 results (supra note 4), said:

Inevitably the public is puzzled and disturbed by such shifting 5-4 votes on constitutional issues.

Apart from the question of adherence to precedent, the most common complaint voiced against the Supreme Court in recent years has concerned the all too frequent tendency of that tribunal to render nonunanimous decisions.⁶

An imposing number of pages in legal literature has been devoted to arguments in favor of, and in opposition to, a diminution of the number of separate opinions caused to appear in the official reports of Supreme Court decisions.⁷ Almost nothing has been written of the historical background of the present practice. It is the purpose of this article to correct that omission.

It seems to be commonly assumed that filing and publishing separate opinions is in some way related to, and based upon, the practice of English appellate tribunals. This assumption is examined in Part I—The English Background. Part II—Division of Opinion in the Supreme Court of the United States: 1789-1958, is devoted to a discussion of the genesis and growth of Dissent,⁸ and particularly of separate opinions, in the Court. In Part III—A Suggested Approach, some of the arguments which have been advanced by advocates and opponents of unlimited dissent are examined.

PART I—THE ENGLISH BACKGROUND

A. *The Privy Council.*

The ultimate appeal available from decisions of the American colonial courts was to the Privy Council in England.⁹ Thus, in the same sense that the colonial courts were the antecedents of contemporary state and federal tribunals, the Council exercised an historical parallel of the appellate jurisdiction now found in the Supreme Court of the United States.

See also, "Supreme Court's Quiet Term Masks Deepening Rift," *Business Week*, June 28, 1958, p. 30; "One Supreme Court," *Life*, June 16, 1958, p. 93; "The Supreme Court," *Time*, April 14, 1958, p. 20; "A Court Under Fire," *U.S. News*, March 21, 1958, p. 58.

⁶ Schwartz, *The Supreme Court, Constitutional Revolution in Retrospect* 354 (1957).

⁷ See, e.g., the materials cited in note 123-24 *infra*.

⁸ "Dissent," and "dissenting opinion," unless appearing in a context which indicates otherwise, will be used hereinafter as generic terms embracing any minority disagreement with the result, or with the reasoning, subscribed to by the majority. The term "dissent" will thus include concurrences when their rationales are inconsistent with those of the related majority opinions.

⁹ Jurisdiction over appeals from without the jurisdiction of the ordinary courts of law and equity was all that was left the Council by a Parliamentary Act of 1641 (16 Charles 1, c. 10) "for the Regulation of the Privy Council and the taking away the court commonly called the Court of Star Chamber." See Potter, *Historical Introduction to English Law* 143-44 (3rd ed. 1948).

Thereafter, the principle developed that all appeals from the "foreign plantations" should lie to the Council. See 1 Holdsworth, *History of English Law* 516 (3rd ed. 1922).

Review of judicial proceedings in the colonies before the King in Council . . . was regularly provided for in provincial charters, and required in commissions to royal governors.

Pound, *Organization of the Courts* 63 (1940).

The Privy Council,¹⁰ in the exercise of this appellate jurisdiction, adopted as its decision that favored by the majority of those present.¹¹ Once the decision of the Council had been determined, however, it was announced as the decision of the whole, regardless of what may have been the individual views of its members.¹² By an Order of Privy Council, adopted in 1627, it was provided that:

When the business is to be carried according to the most voices, no publication is afterwards to be made by any man, how the particular voices and opinions went.¹³

The theoretical reasons for this requirement of apparent unanimity¹⁴ become evident when the historical bases of Privy Council jurisdiction are examined. First, based upon what had once been fact, the notion survived that a "decision" of the Council constituted only advice, or a recommendation, to the Crown.¹⁵ This idea was thought to require that only united counsel be presented. Second, the decrees and writs of the Council were of no effect until confirmed by the King.¹⁶ They ran in his name, and it was not conceived that the King could speak simultaneously with two voices—a dissenting opinion in the Council would have presented the form-minded Common Lawyer with a logical paradox.¹⁷

Thus, no dissenting voice was heard from members of the Privy Coun-

¹⁰ In practice, appeals had long been heard by a committee of the whole Council, who report the matters so heard by them to His Majesty in Council. See 1 Holdsworth, *op. cit. supra* note 9, at 516. The constitution and powers of this committee were not statutorily defined until passage of an Act in 1833 "for the better administration of justice in His Majesty's Privy Council." 3 & 4 William IV, c. 41.

¹¹ The Rules for Privy Council, given parliamentary sanction in 1429, read, in part: VII. Item, that in all things that owith to pass and be agreed by the said Council, there be six or four at the least present of the said Council . . . so always that no matter be taken as assented, but the least there assent thereto four councillors and an officer, whose assent nevertheless shall not suffice but if they make the more part of the number that is present at the Council.

Quoted by Baty, "The History of Majority Rule," 216 Q. Rev. 1, 16-17 (1912).

¹² See McWhinney, "Judicial Concurrences and Dissents," 31 Can. B. Rev. 595, 599 (1953).

¹³ Quoted by Simpson, "Dissenting Opinions," 71 U. Pa. L. Rev. 205, 207 (1923).

¹⁴ See the address of Right Hon. Lord Morton, P.C., M.C., reported in 31 Proceedings Can. B. Assn. 107, 115 (1949), for an account of the process by which the single judgment of the Council "in chamber" is arrived at.

¹⁵ See McWhinney, *supra* note 12, at 599; Simpson, *supra* note 13, at 207. The judgments of the Privy Council still take the form of a "humble advice" to His Majesty, the reasons for which advice are given in an opinion read in Court. See Potter, *Historical Introduction to English Law* 145 (3rd ed. 1948).

¹⁶ As a technical matter, this is still true. See Radcliffe and Cross, *The English Legal System* 350 (2d ed. 1946).

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee [see note 10 *supra*], who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred.

Opinion by the Privy Council, in *British Coal Corporation v. The King*, [1935] A.C. 500, 511.

¹⁷ See Simpson, *supra* note 13, at 207.

cil in pre-revolutionary times.¹⁸ Minority opinions were, therefore, unknown in the tribunal whose jurisdiction made it the ultimate arbiter of American causes.

B. *The House of Lords.*

During the two centuries immediately preceding the American Revolution, the House of Lords had been established as the supreme appellate tribunal for cases arising in English courts of common law and equity.¹⁹ The judicial function of the House of Lords was not considered to be distinct in nature from that it exercised as a branch of the legislature. This supposed identity of function led to a result of considerable significance to an inquiry into the bases for the dissemination of minority opinions by our Supreme Court.

In the eighteenth century, the publication of reports of Parliamentary debates was not authorized. It was thought to be a necessary corollary of this rule (or, in view of the concept of identity of judicial and legislative function, simply another application of the same rule) that reports of judicial proceedings in the House of Lords could not be published.²⁰ It was not, in fact, until about 1848 that the public dissemination of such reports was first authorized.²¹

Thus, although the legal profession could not have been unaware that judicial decisions by the Lords were rendered after debate, and that they usually represented a view favored by a majority and opposed by a minority,²² it is clear that lawyers did not have access to the published

¹⁸ Holdsworth found but three cases in which dissenting opinions were published. He does not indicate how they came to be made known. All occurred during the middle of the 19th century. 1 Holdsworth, *History of English Law* 519 (3rd ed. 1922).

¹⁹ See 1 Holdsworth, *op. cit. supra* note 18, at 368-76, for a complete discussion of House of Lords appellate jurisdiction circa 1600-1800. See also Plucknett, *A Concise History of the Common Law* 192-93 (4th ed. 1948). Certain appeals in Admiralty and Ecclesiastical cases were, in addition to those from the overseas possessions, within the province of the Privy Council. See Potter, *Historical Introduction to English Law* 144 (3rd ed. 1948).

²⁰ Thus, when Sir Bartholomew Shower, in 1698, attempted to publish a collection of reports of cases decided by the highest judicature court in his land, a Parliamentary reprimand was directed at both author and printer. See Radcliffe and Cross, *The English Legal System* 215 (2d ed. 1946). Similar action was directed at a would-be reporter of House of Lords cases in 1762. See Plucknett, *op. cit. supra* note 19, at 193.

²¹ *Ibid.*

²² One historian, relying upon ancient and seemingly ambiguous sources, concluded that the adoption of the course favored by a plurality was, in the exercise of a legislative function of Parliament, the result of a sort of historical error committed by the misapplication of canonical principles.

[I]n early England there existed no notion that a mere majority could control a considerable minority. The equation of the will of the majority to the will of the whole was simply unknown. The voice which could speak in the name of an assembly was that voice which could fairly be taken as representative of the whole.

Baty, "The History of Majority Rule," 216 *Q. Rev.* 1, 16 (1912). He concluded, however, that decisions of Parliament, when sitting as a court, were properly controlled by a majority.

[T]hese determinations were administrative and judicial, and in no sense legislative . . .

[M]ajority decisions are not majority rule.

Id. at 17.

views of either faction. Publication of the seriatim opinions of the Lords, now a familiar characteristic of the English Reports, was a practice unknown to the American Bench and Bar at the time independence was declared.

C. *The Common Law Courts.*

The Privy Council and the House of Lords were, together, the ultimate appellate tribunals for all causes arising in the courts of England and its possessions.²³ Most appeals,²⁴ however, were finally concluded in one of the Common Law Courts with subordinate appellate jurisdiction.²⁵ Although they were technically intermediate courts in the judicial hierarchy, The Exchequer Chamber,²⁶ The Court of Common Pleas,²⁷ and The King's Bench,²⁸ collectively had the last judicial say in most litigation during and before the eighteenth century. It was of The King's Bench which Thomas Jefferson wrote, in 1822, that:

[F]rom the earliest ages of English law, from the date of the year-books, at least, to the end of the II^d George, the judges of England in all but self-evident cases, delivered their opinions seriatim, with the reasons and authorities which governed their decisions. If they sometimes consulted together, and gave a general opinion, it was so rarely as not to excite either alarm or notice. Besides the light which their separate arguments threw on the subject, . . . it shewed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent. . . . When Ld. Mansfield came to the bench [in 1756] he introduced the habit of caucusing opinions. . . . On the retirement of Mansfield [in 1793], Ld. Kenyon put an end to the practice, and the judges returned to that of seriatim opinions, and practice it habitually to this day, I believe.²⁹

An examination of the published reports for the seventeenth and eighteenth centuries³⁰ discloses that the delivery of opinions seriatim was

²³ See Thompson, "The Development of the Anglo-American Judicial System," 17 *Cornell L.Q.* 395, 432-51 (1932).

²⁴ "Appeal" is used in this article as a generic term describing all of the forms of correction and interference by which a result reached by one court may be altered by another court of superior jurisdiction.

²⁵ See Thompson, *supra* note 23, at 424-29. See also Plucknet, *op. cit. supra* note 19, at 191. To bring a case before the Council or the House of Lords was so expensive and inconvenient as to discourage most litigants. See Pound, *Appellate Procedure in Civil Cases* 58-60 (1941).

²⁶ See 1 Holdsworth, *op. cit. supra* note 18, at 244-45. See also Radin, *Anglo-American Legal History* 91 (1936).

²⁷ See 1 Holdsworth, *op. cit. supra* note 18, at 200-01. See also Potter, *op. cit. supra* note 19, at 122-23.

²⁸ See 1 Holdsworth, *op. cit. supra* note 18, at 213-17. See also Potter, *op. cit. supra* note 19, at 125-29.

²⁹ Letter to Justice William Johnson, collected in 10 Ford, *The Writings of Thomas Jefferson* 223-25 (1899), quoted by Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 *Mich. L. Rev.* 497, 513-14 (1944).

³⁰ Rudimentary reports of cases in the Common Law Courts have been published since as early as the thirteenth century. At an early date, these reports began to disclose the views of individual judges, and the arguments of counsel. See Winfield, *The Chief Sources of English Legal History* 145-58 (1925).

common to all of the Common Law Courts, and that the reporters generally endeavored to transcribe at least the substance of the individual expressions from the Bench.³¹ It is these reports to which colonial lawyers had access (if they had access to any), and it was the judicial practice of these courts with which they were most familiar. It is not surprising to learn that their first High Court assimilated much of this practice.

D. Colonial Appellate Courts.

Appeal was available within the colonies almost as soon as there were courts.³² According to Dean Pound:

[B]y the time of the Revolution we have two main types of highest appellate tribunal. One follows the analogy of the House of Lords and is the upper branch of the legislature or a derivative. The other follows the analogy of the King's Bench and is both an appellate court and a court of first instance.³³

As noted above, however, the ultimate appeal from the judgment of a colonial court was to the Privy Council in England.³⁴ Thus, a precise historical analogy cannot be drawn between the Supreme Court of the United States and any of its pre-Revolutionary antecedents on this continent. Furthermore, as Dean Pound has pointed out, "when English precedents were controlling, the [colonial] courts did not need to shape procedure to the exigencies of finding, formulating, and promulgating the law."³⁵ For these reasons, it seems doubtful that the experience of the colonial courts was of much significance to the first Justices of the Supreme Court; it is more probable that those who laid the foundations for Supreme Court practice drew primarily upon the customs and rules of the English Courts.

If any single pre-1789 court is thought of as the direct antecedent of our Supreme Court, in point of view of jurisdiction exercised, then the practice of writing "majority" and "dissenting" opinions, as it has de-

³¹ The following description of the practice, although made much later, is believed to be a fair statement of the earlier method of announcing judgment:

At the conclusion [of oral argument], judgment is rendered orally, in nine cases out of ten, by the presiding Lord Justice, as the last speaker resumes his seat. Then follow the opinions of the associate Lord Justices of Appeal, concurring or dissenting, all expressed with the utmost frankness and spontaneity. These are taken down stenographically, and, after revision, sometimes by the judge himself, find their way into the books to become authorities. Occasionally, a "considered judgment" is reserved to be delivered within two or three days.

Leaming, *A Philadelphia Lawyer in the London Courts* 109 (1911).

³² See Pound, *Organization of Courts* 26-90 (1940). The type of tribunal to which the ultimate appeal within the colony lay varied with the colony and with the time. Those which were used fall into five categories: 1) the legislature; 2) the governor and council; 3) the governor; 4) the council; and 5) a court of judges.

³³ *Id.* at 67.

³⁴ See note 9 *supra*.

³⁵ Pound, *Appellate Procedure in Civil Cases* 105 (1941).

veloped here, must be viewed as a mutation. The Privy Council and the House of Lords each exercised a jurisdiction which was, in a sense, parallel to that which was given the Supreme Court. The former reached decisions after a consideration by all of the judges sitting, and rendered an opinion representative of the resultant of the views of all. No dissenting voice was heard as a consequence of the historical connection of the tribunal with the Executive. In cases before the House of Lords, the views of all of those who participated in the decision might be expressed internally, but no one judge spoke for the tribunal, or even for the majority. Further, because of its essentially legislative attributes, the opinions of the Lords were not published and distributed at the time of the Revolution.

Eighteenth century judicial tribunals were associated with the legislative or the executive (usually the latter) functions of government. An independent judiciary existed neither in theory nor in practice. It should not, then, be surprising to discover that the Supreme Court of the United States, at the head of the newly defined third part of the governmental trichotomy formulated in the Constitution, adopted practices not wholly like those of any of its precursors. The course chosen by the Supreme Court to reach and render its decision may have found its initial impetus in the practices of The King's Bench, but in its historical development, it very early took a distinctly American direction.

PART II—DIVISION OF OPINION IN THE SUPREME COURT OF THE UNITED STATES: 1789-1958

A. *The First Dissent.*

During most of its first decade, the Supreme Court followed the custom of The King's Bench—its decisions were announced through the seriatim opinions of its members. (Unlike King's Bench practice, however, the opinions were delivered in inverse order of seniority.) Thus, in the first case reported in which a full opinion was published, *State of Georgia v. Brailsford*,³⁶ the Justices announced their independent judgments. The first opinion to appear was that of a Justice who disagreed with the prevailing majority.³⁷ Although opinions "by the Court" appeared whenever the matter could be disposed of with a memorandum, seriatim opinions were always filed in important cases.³⁸

³⁶ 2 U.S. (2 Dall.) 402 (1792).

³⁷ Justice Thomas Johnson, the junior Justice in point of service, disagreed with the decision reached by Chief Justice Jay and Justices Wilson, Blair, and Iredell. Justice Cushing also reached a conclusion contrary to that of the majority.

³⁸ Seriatim opinions are reported in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Penhallow v. Doane's Administrators*, 3 U.S. (3 Dall.) 54 (1795); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); *Wiscart v.*

When John Marshall became Chief Justice, he adopted the practice of announcing the judgment of the Court in a single opinion to which the majority of its members assented. There is some evidence tending to suggest that this idea did not originate with Marshall,³⁹ but there is no doubt that it was he who made it the practice of the Court. It is evident, from an examination of the early reports, that from the first, Marshall impressed his ideas of judicial administration upon the Court, just as he was to impress his constitutional thought upon the nation.

Only after a consideration of the early English practice and of the embryonic custom of the Supreme Court does one become aware of the striking nature of the innovation which was introduced when, in the first case decided after he became Chief Justice, "Marshall, C. J., delivered the opinion of the Court."⁴⁰ He did not propose to announce only the views of John Marshall, *Federalist of Virginia*. When "the Chief Justice delivered the opinion of the Court," he intended that the words he wrote should bear the imprimatur of the Supreme Court of the United States.⁴¹ For the first time, the Court as a judicial unit had been committed to an opinion—a *ratio decidendi*—in support of its judgments.

According to Beveridge, for Marshall to disregard the custom of the delivery of opinions by the Justices *seriatim* was "one of those acts of audacity that later marked the assumption of power which rendered his career historic Thus Marshall took the first step in impressing the

D'Auchy, 3 U.S. (3 Dall.) 321 (1796); *Fenemore v. United States*, 3 U.S. (3 Dall.) 357 (1797); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411 (1799); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800).

³⁹ In *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797), the opinion of Chief Justice Ellsworth commenced: "In delivering the opinion of the court. . . ." There were no other opinions filed.

See the opinion of Mr. Justice Chase, in *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800), beginning: "The judges agreeing unanimously in their opinion, I presumed that the sense of the court would have been delivered by the president; and therefore I have not prepared a formal argument on the occasion." Basing his conclusion solely upon this language, Charles Warren asserted that: "The change in the practice of the Court had occurred before Marshall's accession to the Bench." 1 Warren, *The Supreme Court in United States History* 654 (Rev. ed. 1932).

⁴⁰ *Talbot v. Seaman*, 5 U.S. (1 Cranch) 1 (1801).

⁴¹ This language, which first preceded a Marshall opinion in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 108 (1801), had previously introduced a few brief memoranda of the Court.

It is probable that "the opinion of the Court," as announced by Marshall, was not always that of all of its members. In *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 363, the last case of the February term, 1803, it was stated that the Chief Justice delivered "the unanimous opinion of the court." Thirteen cases had previously been disposed of with full opinions by Marshall, and unanimity had not been specifically claimed for any of them.

See Shirley, *The Dartmouth College Causes* 309-10 (1879), wherein it is suggested that in more than one case, Marshall read an opinion as that of the Court, whereas in fact, it represented the views of a minority of the Justices sitting.

In 1822, Mr. Justice Johnson wrote to Jefferson that Marshall delivered the opinion of the Court "even in some instances when contrary to his own Judgment and Vote." Quoted by Morgan, "Mr. Justice William Johnson and the Constitution," 57 *Harv. L. Rev.* 328, 333 (1944). See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), an apparent example of such a case.

country with the unity of the highest court of the nation."⁴² Another biographer has written that the change "was admirably adopted to strengthen the power and dignity of the court. The chief justice embodied the majesty of the judicial department of the Government almost as fully as the president stood for the power of the executive."⁴³

That this change in the established order of things would not meet with a wholly favorable reception was inevitable. It is not surprising to learn that then, as now, those who most vigorously attacked the practices of the Court were those who were displeased with the tenor of its current decisions. Of the manner in which the Marshall Court performed its duties, Jefferson wrote:

An 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

Jefferson favored a return to "the sound practice of the primitive court" of delivering seriatim opinions.⁴⁵ He proposed that each Justice should be compelled to announce his individual views in each case to come before the Court; that Congress should formally evaluate his opinions; and that if the Justice subsequently failed to conform his published opinions to the congressional conclusions, impeachment should follow.⁴⁶ Despite this criticism, Marshall retained for himself the task of expounding the Constitution during the most critical period in its history.

During the first four years after the advent of Marshall, twenty-six decisions were handed down by the Court. The Chief Justice delivered the opinion of the Court in all of these save two,⁴⁷ and in those, the senior Justice present delivered the opinion in the absence of Marshall. The apparent unanimity of the Court was breached only once during this period; Justice Chase delivered a one-sentence concurring opinion in *Head & Armory v. Providence Ins. Co.*⁴⁸ In later cases in which Marshall disqualified himself, or was absent, the Justices sometimes

⁴² 3 Beveridge, *The Life of John Marshall* 16 (1919).

⁴³ Lewis, 14 *Enc. Brit.* 968, 969 (14th ed. 1951).

⁴⁴ Letter to Thomas Ritchie, Dec. 25, 1820, 12 *Ford, The Works of Thomas Jefferson* 175 (1905).

⁴⁵ Letter to Justice Johnson, quoted by Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 *Mich. L. Rev.* 497, 518 (1944).

⁴⁶ See 1 Warren, *op. cit. supra* note 39, at 655.

⁴⁷ *Stuart v. Laird*, 1 *Cranch* 299 (1803); *Ogden v. Blackledge*, 5 *U.S.* (1 *Cranch*) 272 (1804).

⁴⁸ 6 *U.S.* (2 *Cranch*) 127, 169 (1804). In *United States v. Fisher*, 6 *U.S.* (2 *Cranch*) 358, 397 (1804), Mr. Justice Bushrod Washington, having taken part in the lower court decision of the case reversed, did not participate in the Supreme Court decision. His opinion in support of the judgment below was filed and printed in the official report, however.

reverted to the delivery of opinions seriatim,⁴⁹ but never again while Marshall sat did he participate in a decision so rendered.⁵⁰ The Associate Justices "seem to have had hardly any other function than to add the weight of their silent concurrence to the decision of their great chief."⁵¹

It was inevitable that Marshall's associates would not forever conceive of their duties as so delimited. Thus it was that when William Johnson of South Carolina came to the Court in 1804, familiar with the seriatim practice of the state appellate court upon which he had served, he was "not a little surprised to find our Chief Justice delivering all the opinions in Cases in which he sat . . ."⁵² In *Huidekoper's Lessee v. Douglass*,⁵³ one of the first cases in which Justice Johnson participated, he uttered a substantial dissent from the reasoning of the court, in a separate concurring opinion. Of this occasion, he later wrote:

Some Case soon occurred in which I differed from my Brethren, and I felt it a thing of Course to deliver my Opinion. But, during the rest of the Session I heard nothing but lectures on the Indecency of Judges cutting at each other, and the Loss of Reputation which the Virginia appellate Court had sustained by pursuing such a Course.⁵⁴

Following the trail broken by Johnson in 1805, Mr. Justice Paterson, in the case of *Simms & Wise v. Slacum*, decided the following term, delivered the first true dissent from a judgment and opinion of the Court.⁵⁵

So it was that the judicial usage of writing separate opinions, as it exists today, was established in the Supreme Court of the United States.

B. *The Dissenting Justices.*

An examination of the use of separate opinions in the Supreme Court during the century from 1810 to 1910 discloses the emergence of an

⁴⁹ E.g., *Lambert's Lessee v. Paine*, 7 U.S. (3 Cranch) 97 (1805); *Marine Ins. Co. v. Wilson*, 7 U.S. (3 Cranch) 187 (1805); *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806); *Marine Ins. Co. v. Tucker*, 7 U.S. (3 Cranch) 357 (1806); *Randolph v. Ware*, 7 U.S. (3 Cranch) 503 (1806).

⁵⁰ Marshall wrote a dissenting opinion, however, in one case in which the majority delivered their opinions seriatim. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 358 (1827).

⁵¹ Lewis, op. cit. supra note 43, at 969.

⁵² Letter to Jefferson, December 10, 1822, quoted by Morgan, "Mr. Justice William Johnson and the Constitution," 57 *Harv. L. Rev.* 328, 333 (1944). Johnson continued: "But I remonstrated in vain; the Answer was he is willing to take the trouble and it is a Mark of Respect to him. I soon however found out the real Cause. Cushing was incompetent. Chase could not be got to think or write—Paterson was a slow man and willingly declined the Trouble, and the other two (Marshall and Washington) are commonly estimated as one Judge."

⁵³ 7 U.S. (3 Cranch) 1, 72 (1805).

⁵⁴ Letter to Jefferson, supra note 52.

⁵⁵ 7 U.S. (3 Cranch) 300, 309 (1806).

During the pre-Marshall era, two opinions were filed by Justice Wilson which addressed themselves to the majority opinions, as well as to the merits of the cases. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 184 (1796), and *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 324 (1796). In each case, opinions were announced by all of the Justices seriatim; it cannot, therefore, be said that Wilson's opinions dissented from opinions of the Court.

historical type peculiar to American jurisprudence—the “Dissenting Justice.”⁵⁶ Throughout that period, the literature of Dissent on the Court is dominated by the work of a very few men.

After Justice Johnson established the first breach in what seems to have been Marshall’s conception of judicial discipline, dissents were never again a rarity. Indeed, Marshall himself eventually filed nine dissents (and one special concurrence) from opinions of the Court during his Chief Justiceship.⁵⁷ Nevertheless, Marshall’s foundation of judicial unity was a strong one for the Court to build upon, and seldom were dissents published in more than fifteen or twenty per cent of the cases decided in any one term before the early 1900’s.⁵⁸ In most years, the figure did not reach ten per cent.

The right—or duty—of a Justice to express his own views, when they differed from those adopted by the Court, was exercised by most, if not all, of those who served during the period under consideration.⁵⁹ But only a few exercised it in a manner which was—either because of a particular notable dissenting opinion, or because of the sheer weight of dissents filed—of historical or jurisprudential significance. These few men have come to be known more for their work in dissent than for their contributions on the majority side of the ledger. These were the Dissenting Justices.

⁵⁶ The title is suggested by Hendrick, *Bulwark of the Republic* 417 (1937).

The most engaging judicial figure of the new dispensation is the character known as the “dissenting judge.” He is the gentleman who differs, not only from the particular majority opinion, but from the spirit that informs it.

⁵⁷ Machen, “Dissent and Stare Decisis in the Supreme Court,” 45 *Md. S.B.A.* 79, 99 (1940). The author provides a comprehensive tabulation of separate opinions filed by each Chief Justice, through the 1939 term.

In filing the lone dissent from the opinion of the Court in *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 90 (1827), Marshall wrote:

I should now, as is my custom, when I have the misfortune to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the circuit court of Virginia gave general surprise to the profession, and was generally condemned. A full conviction that the commission of even gross error, after a deliberate exercise of the judgment, is more excusable than the rash and hasty decision of an important question, without due consideration, will, I trust, constitute some apology for the time I consume in stating the reasons and the imposing authorities which guided the circuit court in the judgment that has been reversed.

⁵⁸ See Evans, “The Dissenting Opinion—Its Use and Abuse,” 3 *Mo. L. Rev.* 120, 138-41 (1938), for a tabulation of dissenting and concurring opinions and votes on the Court between 1789 and 1928. Unfortunately, the break-down is by volumes of the official reports, rather than by terms. Most of these figures are unavailable elsewhere.

Justice Evans concluded that between 1789 and 1928, dissents and concurrences had been filed in 15.21% of all Supreme Court decisions.

⁵⁹ The dates selected to bound the era of The Dissenting Justice are, of course, completely arbitrary. They suggest a period commencing with the appointment of Mr. Justice Johnson, and terminating with that of Mr. Justice Holmes. Before that time, the device of dissent as we know it was not used, and after it, its significance has not been in its use by one or two individuals at a time.

See Evans, *supra* note 58, at 140, for a tabulation of the cumulative voting and opinion-writing records of many of the less well known Justices.

1. Mr. Justice William Johnson, 1804-1834.

Mr. Justice William Johnson⁶⁰ was the first of the new genre. When he came to the Court in 1804 as the only Jeffersonian Republican on a theretofore all-Federalist bench,⁶¹ it was inevitable that he should find himself involved in fundamental disagreements with his brethren. Johnson, an independent thinker,⁶² did not choose to conceal his ideas when they differed from those of the majority. That he considered individual expression a duty is perhaps best demonstrated by the first words of his concurring opinion in *Gibbons v. Ogden*:

The judgment entered by the court in this cause has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have, also, another inducement; in questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way.⁶³

During his three decades on the Court, Johnson wrote some 169 opinions, of which 31 were dissents, and 21 were concurring opinions. He produced almost half of the 70 dissenting opinions written by the entire Court during that period. He wrote comparatively few majority opinions—113 of the 974 rendered during his tenure, as compared with Marshall's 450 and Story's 176 during the same period.⁶⁴

Mr. Justice Johnson's biographer, noting that in the three areas in which he most frequently dissented from the pronouncements of the Court—judicial versus legislative power, the sanctity of property, and the role of the states—his views blend smoothly with current Supreme Court doctrines, characterized him as "the first modern justice."⁶⁵ It seems, however, that his greatest contribution to the future was the precedent of individual judicial responsibility he set when he became The First Dissenter.

⁶⁰ I have drawn primarily upon Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 Mich. L. Rev. 497 (1944), and Morgan, "Mr. Justice William Johnson and the Constitution," 57 Harv. L. Rev. 328 (1944). Morgan's article was later expanded into a full-length biography. Morgan, *Justice William Johnson, The First Dissenter* (1954).

⁶¹ In selecting his first appointee to the Supreme Court, Jefferson had "gone out to find a successor to Justice Moore who would reflect his own political views." Levin, *supra* note 60, at 509.

⁶² Beveridge, accepting the characterization of a contemporary of Johnson, described him as "strongly imbued with the principles of southern democracy, bold, independent, and sometimes harsh." 4 Beveridge, *The Life of John Marshall* 60 (1919), quoting 1 Ingersoll, *Historical Sketch of the Second War between the United States and Great Britain* 74 (2d Series).

⁶³ 22 U.S. (9 Wheat.) 1, 222-23 (1824).

⁶⁴ The figures presented are based upon the computation of Levin, *supra* note 60, at 522-23. Compare the slight variance with those of Morgan, *supra* note 60, at 332, who counted 33 dissenting and 24 concurring opinions.

⁶⁵ Morgan, *supra* note 60, at 361.

2. Mr. Justice Benjamin R. Curtis, 1851-1857.

Viewed in the light of the perspective provided by a hundred years of history, the place of the Dissenting Justice on the Taney Court appears to belong to a judge who, in fact, seldom dissented, and whose six years on the Court represented but one facet of a distinguished legal career.⁶⁶ Benjamin R. Curtis earned the title by a single judicial act—his dissent in the *Dred Scott* decision.⁶⁷

Mr. Justice Peter V. Daniel, who served under Taney for nineteen years, has been called "one of the most pertinacious dissentients" who ever served on the Court.⁶⁸ He dissented many more times, and far more frequently, than did Curtis,⁶⁹ yet "as most of his disagreements were uttered in defence of slavery and State rights, they are forgotten . . ." ⁷⁰ Curtis' dissent in *Dred Scott*, on the other hand, was subsequently vindicated by the will of the people, and constitutional amendment; it is thus recalled as a landmark opinion in the history of American judicature.

Curtis authored the opinion of the Court in *Cooley v. Board of Wardens of Philadelphia*,⁷¹ an opinion which was apparently "in the nature of a compromise between the conflicting views of the Judges."⁷² But when a difference of fundamental principles made compromise impossible,⁷³ Curtis did not hesitate to write his burning *Dred Scott* dissent. Upon the occasion of his death in 1874, Reverdy Johnson wrote:

Able as was the opinion of the majority of the Court in [the *Dred Scott*] . . . case, delivered by Chief Justice Taney, it was admitted at the time, I believe, by most of the profession, that the dissenting opinion of Judge Curtis was equally powerful. Lawyers may differ, as they have differed, as to which of these two eminent men were right, but they will all concede that the view of each was maintained with extraordinary ability, whilst those who knew them both will never differ as to the sincerity of their respective convictions.⁷⁴

⁶⁶ See Leach, "Benjamin Robbins Curtis: A Model for a Successful Legal Career," 41 A.B.A.J. 225 (1955). One of Curtis' later services was heading the defense of President Andrew Johnson in the High Court of Impeachment.

⁶⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 564 (1856).

⁶⁸ Hendrick, *Bulwark of the Republic* 417 (1937).

⁶⁹ Curtis filed 7 dissenting opinions, and cast 12 dissenting votes, during his tenure. The Court decided 467 cases during that period.

Daniel apparently filed more dissenting opinions than any other Justice, before or after, during his career. See Abraham, *infra* note 78, at 872.

⁷⁰ Hendrick, *op. cit. supra* note 68, at 417.

⁷¹ 53 U.S. (12 How.) 299 (1851).

⁷² 2 Warren, *The Supreme Court in United States History* 237 (1932).

⁷³ Note that in the *Dred Scott* case, opinions were filed seriatim. See Bowen, "Dissenting Opinions," 17 *Green Bag* 690, 694-96 (1905), for one view of the confusion resulting from the cumulative effect of the barrage of lengthy opinions.

⁷⁴ Remarks of Reverdy Johnson, 87 U.S. vi, vii (1874).

It is worthy of note that prior to the *Dred Scott* dissent, Curtis had been denounced by the anti-slavery faction as a "tool of Webster, a supporter of the doctrine of Webster's Seventh of March Speech, and a believer in the constitutionality of the Fugitive Slave Law." 2 Warren, *op. cit. supra* note 72, at 228.

Curtis' *Dred Scott* opinion was his last; he resigned before the commencement of the next term.⁷⁵ By that last pronouncement from the Bench, he had acquired the status of Dissenting Justice.

3. Mr. Justice John Marshall Harlan, 1877-1911.

The post-Civil War Court numbered among its members some prodigious dissenters. Samuel F. Miller and Stephen J. Field cast, respectively, 159 and 233 dissenting votes in the course of judicial careers which extended over thirty years.⁷⁶ But it is their contemporary, Mr. Justice John Marshall Harlan, who has recently pre-empted popular regard as perhaps the greatest of all the Dissenters. He heard from the Supreme Bench 7,649 cases,⁷⁷ and wrote 703 majority opinions and 100 concurring ones. One of the many writers who have recently "discovered" Mr. Justice Harlan has written that:

[I]t was as a dissenter that he made his chief mark: he delivered no less than 316 dissenting opinions! In 107 of these he was joined by at least three colleagues. *In toto* Harlan dissented 380 times, an aggregate second only to that established by Mr. Justice Daniel. . . .⁷⁸

Largely as a consequence of the recent vindication, in the *Segregation Cases* of 1954,⁷⁹ of Harlan's lone dissent in *Plessy v. Ferguson*,⁸⁰ he has come to be regarded as something of a judicial folk-hero. It was not always so. Only two men, Marshall and Field, served longer on the Court than did Harlan. Although he participated in over half of the cases decided by the Supreme Court in its entire history to the time of his death, he has achieved widespread recognition only recently.⁸¹

⁷⁵ Curtis' resignation was at least in part due to friction which developed between Taney and himself as a consequence of the circumstances surrounding the publication of the *Dred Scott* opinions. See 2 Warren, *op. cit. supra* note 72, at 320-21. Taney had directed that the clerk of the court not deliver copies of his opinion to any person prior to its appearance in the official reports. The order was supposed to apply to minority opinions as well. Taney's final opinion was withheld from Curtis, apparently to prevent direct attack in Curtis' dissent. The latter caused his dissent to be published in a Boston Newspaper on the same day that he filed it. See Swisher, Reger B. Taney 512-16 (1935); Beitzinger, "Chief Justice Taney and the Publication of Court Opinions," 7 *Catholic U. L. Rev.* 32 (1958).

⁷⁶ The figures are from Machen, *supra* note 57, at 100.

⁷⁷ *Ibid.*

⁷⁸ Abraham, John Marshall Harlan: A Justice Neglected, 41 *Va. L. Rev.* 871, 872 (1955).

⁷⁹ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharp*, 347 U.S. 497 (1954).

⁸⁰ 163 U.S. 537 (1896).

⁸¹ Warren, in *The Supreme Court in United States History* (1919), and Hughes, in *The Supreme Court of the United States* (1927), accord Harlan only mention of the dates of his appointment and his death, and the length of his service. In contrast, the work of Justice Curtis, whose years on the court numbered less than a fifth of those of Harlan, is treated at length by both authors.

One of the many articles on Harlan which have appeared since 1954 reported that: [O]ther than a 1915 doctoral dissertation and scarcely a handful of articles, virtually nothing, not even a biography, has been written since his death in 1911. Abraham, *supra* note 78, at 872.

It was Harlan's lot to read the law differently than did the majority of his brethren in numerous cases, only to have his views adopted by the legislature or by the Court years after his death.⁸² Thus, several of his opinions, perhaps "wrong" when written, became "right" years later. Although Mr. Justice Harlan was a highly respected judge in his day, and acquired, during his incumbency on the bench, the title of "The Great Dissenter,"⁸³ the opinions for which he is today so well-known have not always been so well-thought of by the public and the profession.⁸⁴ His contemporary "greatness" was as much a matter of quantity as of substance of dissent. In 1905 it was written:

Among the forms which Dissent has taken the most harmful is that which may be called the 'Dissent of Warning'. The office of this is to criticize the opinion of the court, and to warn an innocent public against the ills which will surely befall it if the court persists in its erroneous course. . . .

[T]he most drastic treatment of this kind to which the court has ever had to submit at the hands of one of its members, is, perhaps, that furnished by Mr. Justice Harlan in *Plessy v. Ferguson*. . . .

Moreover, the attitude of discussion which the Dissenting Opinion assumes, and the heat of argument which it sometimes evokes, create naturally a tendency to travel far out of the law and to extend the discussion to all manner of subjects, political, social, and economic, and cause the objecting judges to forget that it is not their province to make the law, nor even to direct its policy, but merely to interpret it. . . .

A most remarkable instance of this tendency is to be found in the dissenting opinion of Mr. Justice Harlan, in the *Jim Crow Case*, above referred to. . . .⁸⁵

Fifty years later, a *New York Times* editorial commenting on the decision in the *Segregation Cases* began:

For an embryo biography, see Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," 66 *Yale L.J.* 637 (1957).

For a perceptive, and seemingly prescient, article written without the benefit of afterthought, see Watt and Orlikoff, "The Coming Vindication of Mr. Justice Harlan," 44 *Ill. L. Rev.* 13 (1949).

⁸² See Abraham, *supra* note 78, at 890. Nine of Harlan's leading dissents, each in a case involving important constitutional questions, are listed; each has since "been vindicated by becoming accepted governmental practice, either as a result of Court reversals or legislative action."

⁸³ See Knight, "The Dissenting Opinions of Justice Harlan," 51 *Am. L. Rev.* 481, 484 (1917).

⁸⁴ An early article which treated Harlan's dissents at length gave one sentence to *Plessy v. Ferguson*. Knight, *supra* note 83. Carson, in a rather extensive discussion of "Great Dissenting Opinions," 50 *Albany L.J.* 120 (1894), mentions Harlan by name, but gives no attention to the content of his opinions.

In 1949, it was reported that "Not a single one of Justice Harlan's significant civil rights dissents appears in any of the three Constitutional Law case books most widely used today, those by Dodd, Dowling, and Rottschaefer." Watt and Orlikoff, *supra* note 81, at 15 n.7.

The 1952 Ross Prize Essay on the subject of concurring and dissenting opinions made no mention of Justice Harlan, although numerous dissents and dissenters considered significant by the author were discussed. Moorhead, "Concurring and Dissenting Opinions," 38 *A.B.A.J.* 821 (1952). Would such an omission be likely today?

⁸⁵ Bowen, "Dissenting Opinions," 17 *Green Bag* 690, 697 (1905).

It is eighty-six years since the Fourteenth Amendment was proclaimed a part of the United States Constitution. It is fifty-eight years since the Supreme Court, with Justice Harlan dissenting, established the doctrine of 'separate but equal' provision for white and Negro races on interstate carriers. It is forty-three years since John Marshall Harlan passed from this earth. Now the words he used in his lonely dissent in an 8-to-1 decision in the case of *Plessy v. Ferguson* in 1896 have become in effect by last Monday's unanimous decision of the Supreme Court a part of the law of the land. . . .

This is an instance of which the voice crying in the wilderness finally becomes an expression of a people's will and in which justice overtakes and thrusts aside a timorous expediency.⁸⁶

If a comparison of these writings teaches a lesson, it is a lesson which is not likely to be a deterrent to a Supreme Court Justice contemplating a dissent from the law as it is declared by the Supreme Court of the United States.

4. Mr. Justice Oliver Wendell Holmes, 1902-1932.

Mr. Justice Oliver Wendell Holmes and his work have provided more editors and authors with matter for publication than all of his predecessors (and probably his contemporaries and successors) combined. He has been the subject of numerous biographies (the most popular of which was translated into a play and a motion picture) and more are still appearing.⁸⁷ Hundreds of essays about Holmes have appeared in popular and legal periodicals. His own, *The Common Law*, has been published in several editions, and his letters, opinions, and miscellany have all been placed between covers. Recently, a writer who was not to be denied a Holmes article took as his thesis a comparison of the theses of other writers about Holmes—it was his thought that "much of the variation in the tenor of contemporary thought can be traced in the fluctuations in the reputation of Oliver Wendell Holmes."⁸⁸

It seems unlikely that any attempt to add to the Holmes literature would be profitable here. I merely note that which is well known already—that Holmes was and remains the best known figure who has ever been connected with the Supreme Court and one of the four or five most widely regarded individuals in American government history, and that he achieved this recognition almost wholly because of his reputation as a Dissenting Justice.

The figures indicate that Holmes more than carried his share of the burden of writing opinions for the Court, and lawyers are aware that he

⁸⁶ N.Y. Times, May 23, 1954, § 4, p. 10E, cols. 1-2.

⁸⁷ The first volume of a projected definitive biography appeared last year. Howe, Justice Oliver Wendell Holmes, *The Shaping Years* (1957).

⁸⁸ Krislov, "Oliver Wendell Holmes: The Ebb and Flow of Judicial Legendry," 52 Nw. U.L. Rev. 514 (1957).

wrote well for the majority, in many important cases every year. Furthermore, a tabulation suggests that Holmes actually dissented *less frequently* during his tenure than did the average of his brethren—once in every 33 cases.⁸⁹ Why then, did he succeed to Harlan's title of "The Great Dissenter"?

Holmes' dissents had a way of later becoming correct expositions of the law, as defined by the Court or as effected by the Legislature, not only more frequently, but sooner than did those of Harlan. In *Lochner v. New York*,⁹⁰ Holmes and Harlan both differed from the majority on the constitutional issue presented for decision. Each wrote a dissenting opinion. Harlan died in 1911, but Holmes participated in the decision of *Bunting v. Oregon*,⁹¹ which effectively overruled *Lochner* in 1917. Perhaps it was that the three decades of Holmes' tenure were made up of years of greater flux than those of Harlan.

At any rate, the *Lochner* dissent was one of several which Holmes later saw vindicated, and the public became aware that Mr. Justice Holmes had frequently preceded the Court in its search for The Law.⁹² He wrote dissenting opinions that were met with broad (albeit not universal) favor *when they were written*. He was, in this sense, a more fortunate dissenter than was Harlan, whose opinions began to achieve substantial recognition only recently.

The lasting effect of Holmes' experience with dissent cannot be overestimated.

Because of the fame of the picturesque and "Magnificent Yankee", the felicity of his style, the vigor of his argument, the charm of his personality, and above all the later triumph of his ideas in matters of far-reaching significance, the dissenting opinion stood dramatically revealed and confirmed as a powerful instrument of change in the law.⁹³

It has been remarked that Holmes' contribution to Anglo-American jurisprudence was the destruction of the myth of judicial certainty.⁹⁴

⁸⁹ 173 dissents in 5950 cases heard. Bowen, *Yankee from Olympus* 457 (1944). Compare the figures of Machen, "Dissent and Stare Decisis in the Supreme Court," 45 Md. S.B.A. 79, 100 (1940), listing 163 dissents in 5924 cases heard. Holmes dissented approximately twice as frequently after Brandeis joined him on the court as he had before.

⁹⁰ 198 U.S. 45 (1905).

⁹¹ 243 U.S. 426 (1917).

⁹² Let us call the roll of his achievements: The *Lochner* case overruled sub silentio twelve years later; the *Adkins* case overruled expressly in fourteen years; *Swift v. Tyson*, attacked in dissents by Holmes in 1909 and 1927 set aside in 1938; *Hammer v. Dagenhart* of 1917 overturned in 1941 by the decision in the *Darby* case; Holmes' dissent in the *Adair* case in 1908, majority law by Jones & Laughlin in 1937; his reasoning in *Baldwin v. Missouri* in 1930 adopted by the majority in the *Aldrich* case in 1942; his dissent from *Evans v. Gore* in 1920 became law in 1939; his *Schwimmer* case dissent of 1929 was expressly overruled by the *Girouard* decision in 1946.

Palmer, "Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents," 34 A.B.A.J. 677, 680-81 (1948) (citations omitted).

⁹³ *Id.* at 681.

⁹⁴ Kurland, "The Supreme Court and the Attrition of State Power," 10 Stan. L. Rev. 274, 277 (1958).

But a concomitant of the destruction of that myth was the creation of another—the idea that the views of each Justice upon the law in a given case are as likely to be “correct” statements of The Law as those of any *or all* of his brethren: that he alone reads the law as he does is all the more reason to afford the public the benefit of his conclusions.

During the era of Holmes it came to pass that the significance of Dissent was no longer to be found in its use by the extraordinary few—the Dissenting Justices—who wrote of what the law ought to be, or what it might someday be. Dissent became an instrument by which Justices asserted a personal, or individual, responsibility which they viewed as of a higher order than the institutional responsibility owed by each to the Court, or by the Court to the public. When a Supreme Court Justice could write, as did Mr. Justice Jackson in 1955, that “the Court functions less as one deliberative body than as nine,”⁹⁵ no one could doubt that the proposition was an accurate statement of fact, if not an exposition of a desirable state of affairs.

C. *The Return to Seriatim Opinions.*

During the last thirty or thirty-five years, division and dissension have become increasingly notable characteristics of the work of the Supreme Court. Agreement by all of the Justices⁹⁶ as to the proper decision in an important case comes as a pleasant surprise,⁹⁷ when it comes at all. The legal writers of the past three decades have devoted a great deal of attention to the “problem” of Dissent.⁹⁸

⁹⁵ Jackson, *The Supreme Court in the American System of Government* 16 (1955).

⁹⁶ Agitation in favor of a rule that certain types of decisions could be rendered only by a unanimous court, or by some extraordinary majority of its members, . . . began in 1823 and has continued ever since. Between 1823 and 1830 at least six proposals of this kind were made in Congress, and two others were made in 1867 and 1869 respectively. A bill requiring unanimous decisions was introduced by Senator Bourne in 1911.

Cushman, “Constitutional Decisions by a Bare Majority of the Court,” 19 Mich. L. Rev. 771, 795-96 (1921) (footnotes omitted).

Such proposals recurred frequently during the 1920's and 1930's. See Norton, “The Supreme Court's Five to Four Decisions,” 9 A.B.A.J. 417 (1923) and Norton, “What Damage Have Five to Four Decisions Done?,” 9 A.B.A.J. 721 (1923), for arguments against Senator Borah's mandatory 7-2 bill. See also Sloan, “The Supreme Court and Five-to-Four Decisions,” 96 Cent. L.J. 404 (1923).

See Note, “Judgments of the Supreme Court Rendered by a Majority of One,” 24 Geo. L.J. 984, 985-86 (1936), for a summary of several such bills offered in 1935 and 1936. The author also collects all cases decided by a majority of one from 1789 through the 1935 term.

⁹⁷ See ops. cited notes 106 and 107 *infra*.

⁹⁸ See e.g., Pritchett, *Civil Liberties and the Vinson Court* 20-22 (1954); Pritchett, *The Roosevelt Court* 23-45 (1948); a comprehensive series of articles on dissent in the Supreme Court by Ben Palmer, appearing at 35 A.B.A.J. 189 (1949); 35 A.B.A.J. 101 (1949); 34 A.B.A.J. 1092 (1948); 34 A.B.A.J. 1000 (1948); 34 A.B.A.J. 887 (1948); 34 A.B.A.J. 761 (1948); 34 A.B.A.J. 677 (1948); 34 A.B.A.J. 554 (1948).

See also Ganoë, “The Passing of the Old Dissent,” 21 Ore. L. Rev. 285 (1942); Lashly and Rava, “The Supreme Court Dissents,” 28 Wash. U.L.Q. 191 (1943); Pritchett, “The Coming of the New Dissent: The Supreme Court, 1942-1943,” 11 Chi. L. Rev. 49 (1943);

The figures set forth in Table I, below, rather clearly indicate that the trend toward judicial disintegration has steadily gained momentum since the early 1930's. If a countertrend toward unity were momentarily effected by Chief Justice Warren in his first two years in office, it now seems to have been reversed.

The years during which much New Deal legislation was before the Court might appear, to the student reader of a constitutional law case-book, to have been marked by a continual succession of five-to-four decisions. And yet, the two great "blocs" about which so much has been written were rarely blocs at all.⁹⁹ As Table I, below, indicates, the Justices of the 1930's usually stood together; they united with twice the frequency that any of their successors can claim.

By 1941, only two Justices remained who had not been appointed by President Roosevelt, and one of these, Chief Justice Stone, had been promoted by Roosevelt from Associate Justice. Never since the days of the all-Federalist Court in Marshall's early years had so many of the Justices been chosen because of their supposed sympathies with the policies of one Executive and one program. But under Stone dissension increased to a new high.¹⁰⁰

It is generally believed that upon Stone's death in 1946, Fred M. Vinson was selected as his successor "for the purpose of giving the Court an administrator who could persuade the Justices to work more effectively as a team."¹⁰¹ Probably no man could have achieved this goal—Vinson did not, as the figures show. The Court became atomized to a degree never before known.¹⁰²

Shearn, "Split Decisions in the Supreme Court," 23 A.B.A.J. 329 (1937); Simmons, "The Use and Abuse of Dissenting Opinions," 16 La. L. Rev. 497 (1956); Thurman, "The Coming Test of the Supreme Court," 22 Calif. S.B.J. 21 (1947).

Nor is judicial dissension a new topic to the writers. See 20 Am. L. Rev. 428 (1886), discussing an editorial controversy then current among the law journals as to proposals that the practice of writing dissenting opinions be abolished; 57 Albany L.J. 74, 75 (1898), for an argument that "Nothing of any benefit to the public can be gained by a dissenting opinion."

See also Bowen, "Dissenting Opinions," 17 Green Bag 690 (1905), wherein the author expressed alarm because 13 and 17 dissenting opinions were filed, respectively, during the 1903 and 1904 terms!

⁹⁹ There were 13 5-4 votes in 1936, and 9 in 1935; the Court decided 162 and 160 cases, respectively, in those, the years of its greatest complete division prior to the 1940's. See Pritchett, *The Roosevelt Court* 25 (1948).

Compare with these figures the 35 5-4 decisions during the 1948 term, and the 28 5-4 votes during the 1957 term.

During the most recent term, a single foursome, The Chief Justice, and Justices Black, Douglas, and Brennan, dissented together on thirteen occasions.

¹⁰⁰ See Mason, Harlan Fiske Stone, *Pillar of the Law* 605-27 (1956), for an account of the sometimes chaotic division with which Chief Justice Stone was faced.

¹⁰¹ Swisher, "The Supreme Court—Need for Re-Evaluation," 40 Va. L. Rev. 837, 845 (1954).

¹⁰² See, as striking examples of the fragmentary answers sometimes given to constitutional questions by the Vinson Court:

TABLE I¹⁰³
The Supreme Court, Dissenting: 1930-1958

Term	Decisions ¹⁰⁴ By Full Opinion	Nonunanimous Decisions:		Dissenting Votes Cast:	
		Number	Per Cent	Number	Per Case
1930	168	18	11	46	.27
1931	151	26	17	55	.36
1932	169	27	16	61	.36
1933	166	26	16	66	.40
1934	172	22	13	61	.35
1935	160	26	16	80	.50
1936	162	31	19	82	.51
1937	170	46	27	88	.52
1938	149	50	34	116	.78
1939	141	42	30	85	.60
1940	169	47	28	117	.69
1941	162	59	36	160	.99
1942	171	75	44	176	1.03
1943	137	80	58	194	1.42
1944	163	94	58	245	1.50
1945	137	77	56	156	1.14
1946	144	92	64	246	1.71
1947	118	82	69	224	1.90
1948	124	93	75	273	2.22
1949	98	61	62	120	1.22
1950	98	60	61	166	1.69
1951	90	66	73	164	1.82
1952	110	86	78	198	1.80
1953	78	56	72	132	1.67
1954	82	49	60	117	1.43
1955	94	55	59	147	1.56
1956	115	82	71	203	1.77
1957	119	90	76	251	2.11

- a. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a 6-3 decision in which all six of the majority Justices thought it necessary to file separate opinions. Vinson's dissent, in which the other two dissenters joined, thus had more adherents than did the opinion of the Court.
- b. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). Frankfurter, J., dissenting, summed up the result of the opinions filed: A substantial majority of the Court agrees that each of the two grounds urged in support of [the decision] . . . must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—that differing majorities of the Court find insupportable. 337 U.S. at 655.

¹⁰³ A. Figures for the 1957 term are based upon the writer's computations. (Compare those collected in 72 *Harv. L. Rev.* 77, 102 (1958).) The following allocations were made: The opinion of Harlan, "concurring in part and dissenting in part," in which Frankfurter and Brennan joined, in *Lawn v. United States*, 355 U.S. 339, 363 (1958), is counted as a dissent.

In a single opinion, Douglas, joined by Warren, Black, and Brennan, dissented from the judgments in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), and *Safeway Stores v. Vance*, 355 U.S. 389 (1958). The opinion, which appears at 355 U.S. at 383, has been listed as a single dissenting opinion; those who joined in it are considered to have cast two dissenting votes each.

Included as dissenting opinions are those of Frankfurter, 356 U.S. at 350, and Harlan (with whom Clark and Whittaker joined), 356 U.S. at 351, both of which were headed "concurring in part and dissenting in part," in *N.L.R.B. v. Wooster Division of Borg Warner*, 356 U.S. 342 (1958).

The opinion of Harlan, "concurring in part and dissenting in part," joined by Burton, in *United States v. Bess*, 357 U.S. 51, 60 (1958), has been included as a dissent.

The opinion of Whittaker, "concurring in part and dissenting in part" in *Byrd v. Blue Ridge Rural Electric Co-operative, Inc.*, 356 U.S. 525, 540 (1958) has been included as a dissent.

Six months after Earl Warren succeeded Vinson as Chief Justice, he wrote the opinion for a unanimous Court in the highly controversial *Segregation Cases*.¹⁰⁵

As the story is pieced together by those in a position to know, unanimity against segregation did not come readily. It had to be brought about slowly, by a painful process of compromise and accommodation. Mr. Warren exerted all his newly found leadership to obtain it.¹⁰⁶

Clearly, the impact of the decision was in large measure due to the unanimity with which it was announced. "Massing the Court" was called "a stroke of judicial statesmanship by the Chief Justice."¹⁰⁷ And yet, subsequent events have borne out the doubts held by those who

The opinion of Frankfurter, in which Harlan, Douglas, and Brennan joined, in *Sherman v. United States*, 356 U.S. 369, 378 (1958), is treated as a concurring opinion. It should be noted that its rationale is inconsistent with that of the Chief Justice, who wrote for the Court. This is demonstrated by the fact that in the companion case of *Masciale v. United States*, 356 U.S. 386 (1958), the same four justices dissented, upon slightly different facts, incorporating by reference their opinion in the *Sherman* case. 356 U.S. at 389.

The opinion of Douglas, "concurring in part and dissenting in part" in *United States v. McNinch*, 356 U.S. 595, 601 (1958) is treated as a dissent.

The opinion of the Chief Justice, "dissenting in part and concurring in part," joined by Douglas, to the single opinion filed for the Court in *N.L.R.B. v. United Steelworkers and N.L.R.B. v. Avondale Mills*, 357 U.S. 357, 365, is counted as a dissent from the latter case only. Douglas dissented in both cases, and Black from the former, only.

No opinion was filed for the Court in *Caritativo v. California* and *Rupp v. Dickson*, decided together on June 30, 1958. However, as lengthy opinions were filed by Harlan (concurring, at 357 U.S. at 550) and Frankfurter (dissenting, joined by Douglas and Brennan, at 357 U.S. at 552) the case has been included in the tabulation.

B. Figures for the 1948 term through the 1956 term have been extracted from the following Harvard Law Review Notes, each of which reviews a term of the Court.

1948 Term	— 63 Harv. L. Rev.	119, 125 (1949);
1949 Term	— 64 Harv. L. Rev.	114, 162 (1950);
1950 Term	— 65 Harv. L. Rev.	107, 181 (1951);
1951 Term	— 66 Harv. L. Rev.	89, 179 (1952);
1952 Term	— 67 Harv. L. Rev.	91, 171 (1953);
1953 Term	— 68 Harv. L. Rev.	96, 192 (1954);
1954 Term	— 69 Harv. L. Rev.	119, 204 (1955);
1955 Term	— 70 Harv. L. Rev.	83, 101 (1956);
1956 Term	— 71 Harv. L. Rev.	85, 102 (1957).

Figures for the 1940 term through the 1947 term have been extracted from Pritchett, *Civil Liberties and the Vinson Court* 21 (1954). For the 1930 term through the 1940 term, Pritchett, *The Roosevelt Court* 25 (1948) was used.

Slight differences were noted in the tabulations of Pritchett and the Harvard Law Review, where the two overlapped; the latter were arbitrarily chosen by the writer.

¹⁰⁴ The tabulations are of cases disposed of by the Court with a full written opinion, and do not include memoranda which note only the disposition made of the petition or appeal. The Court achieves unanimity much more frequently in its memorandum dispositions. Per Curiam opinions have been included on the same basis as others.

¹⁰⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁰⁶ "A Court Under Fire," *U.S. News*, March 21, 1953, pp. 58, 60; see also Smith, "Earl Warren's Greatest Moment," *Sat. Eve. Post*, July 24, 1954, pp. 17, 18.

And see *N.Y. Times*, May 18, 1954, p. 14, col. 6:

Two principal surprises attended the announcement of the decision. One was its unanimity. There had been reports that the court was sharply divided and might not be able to get an agreement this term.

¹⁰⁷ "Justices Agree More Often on What the Law Is," *U.S. News*, June 11, 1954, p. 70. See also Smith, *supra* note 106.

reserved judgment¹⁰⁸ in the midst of general acclamation of the "re-united Court." The Warren Court is as afflicted with dissension as the most divided among its predecessors. (Tables II and III, p. 208, indicate the contributions made by the present Justices toward judicial division.)

In recent years, criticism of the Court's failure to resolve weighty issues to the satisfaction of its own members has evoked an increasing amount of adverse comment.¹⁰⁹ Perhaps a good indication of the frequency with which this sort of criticism recurs is the fact that in a lengthy review of Professor Schwartz' recent book, *The Supreme Court, Constitutional Revolution in Retrospect*, the reviewer dismissed the chapter entitled "*Dissentio ad absurdum*,"¹¹⁰ wherein a statement of the case against the current surfeit of dissenting opinions was made, as "typical cant about the work of the Court."¹¹¹

To be sure, complaints about the manner in which the Court performs its work have often been advanced by those who object to the substance of current decisions—this is no less true today than it was in the days of Jefferson's diatribes against Marshall. But in the last few years, criticism of the manner in which decisions are announced has tended to come even from those who are pleased by the pronouncements of the majority-for-the-time-being.¹¹² This state of affairs is unfortunate, for, in the recent words of Carl Brent Swisher:

[The] people tend ordinarily to think of the Court as something much more than an aggregate of nine statesmen of high rectitude and learning in the law. They think of it as a court, as a tribunal, as an organic whole. For constitutional leadership they look not to an aggregation of nine individual leaders but to an organic unit of one tribunal, one court. To the extent of its inability to integrate into decisions and into opinions of the Court the best that individual justices have to offer, the Court fails the people and fails in fulfillment of its proper function of leadership.¹¹³

Judge Learned Hand, in the course of this year's Oliver Wendell Holmes lectures given at the Harvard Law School, entered a plea for a

¹⁰⁸ See, e.g., Swisher, "The Supreme Court—Need for Re-Evaluation," 40 Va. L. Rev. 837, 850, n.12 (1954):

The publicly assumed position of complete unanimity taken [in the Segregation Cases] . . . seemed to indicate a victory for the Chief Justice in bringing unity to the Court in critical situations. It remains to be seen, however, whether the appearance of unity can be preserved over a considerable period of time. Apart from the cases here mentioned, the work of the most recent term of the Court showed no appreciable tendency toward important change.

¹⁰⁹ See note 5 supra.

¹¹⁰ Schwartz, *The Supreme Court, Constitutional Revolution in Retrospect* 354-62 (1957).

¹¹¹ Kurland, "The Supreme Court and the Attrition of State Power," 10 Stan. L. Rev. 274, 276 (1958).

¹¹² See note 5 supra.

¹¹³ Swisher, *The Supreme Court in Modern Role* 180 (1958).

TABLE II¹¹⁴
Separate Opinions (dissenting and concurring):

	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957
Black	10	14	13	18	17	13	9	7	10	9
Brennan									6	6
Burton	9	6	3	4	4	3	3	5	12	3
Clark		1	4	2	4	5	3	3	7	13
Douglas	18	7	18	19	34	19	9	14	14	21
Frankfurter	32	25	22	18	29	11	11	26	26	26
Harlan							3	10	21	21
Warren						1	3	3	4	9
Whittaker									0	12

TABLE III¹¹⁵
Dissenting Votes Cast:¹¹⁶ 1948-1957

	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957
Black	33	35	39	50	49	33	23	23	25	31
Brennan									13	17
Burton	22	9	14	18	13	13	17	24	44	28
Clark		1	8	1	6	6	5	10	27	22
Douglas	45	10	43	43	62	35	27	32	32	39
Frankfurter	33	29	26	22	31	12	12	25	49	28
Harlan							6	23	45	32
Warren						8	7	15	13	27
Whittaker									12	27

TABLE IV

<i>A. Ten Year Totals:</i>	<i>Separate Opinions</i>	<i>Dissenting Votes</i>
Black	122	341
Burton	52	202
Douglas	173	368
Frankfurter	221	267
<i>B. Average Per Year:¹¹⁷</i>		
Black	12.2	34.1
Brennan	6	15
Burton	5.2	20.2
Clark	4.7	9.6
Douglas	17.3	36.8
Frankfurter	22.1	26.7
Harlan	13.7	35.3
Warren	4.0	14.0

C. A Comparison:

In thirty-four years on the Bench, Mr. Justice Harlan wrote 316 dissenting opinions, and cast 380 dissenting votes.

In thirty years on the Bench, Mr. Justice Holmes wrote 70 dissenting opinions, and cast 173 dissenting votes.

¹¹⁴ See notes 103 and 104 supra.

¹¹⁵ See notes 103 and 104 supra.

¹¹⁶ This tabulation includes the dissenting votes cast in those cases covered by Table I, and, in addition, a comparatively small number of dissenting votes which have been noted in memorandum dispositions.

¹¹⁷ The average figures given for Justices Black, Frankfurter, Douglas, and Burton, are for the ten years 1948-1957 only.

Compare the five-year tables appearing in 72 Harv. L. Rev. 77, 108 (1958).

return to the concept of the primacy of institutional responsibility over individual proclivities in the work of appellate courts.

[I]n very much the greater part of a judge's duties he is charged with freeing himself as far as he can from all personal preferences, and that becomes difficult in proportion as these are strong. The degree to which he will secure compliance with his commands depends in large measure upon how far the community believes him to be the mouthpiece of a public will, conceived as the resultant of many conflicting strains that have come, at least provisionally, to a consensus.

This consideration becomes especially important in appellate courts. . . . [E]xperience has over and over again shown the difficulty of securing unanimity. This is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.¹¹⁸

If we accept the reasoning of Judge Hand and of Mr. Swisher, we see that an undesirable situation exists today, when there is a very substantial body of unfavorable comment about the failure of the Justices of the Supreme Court to adjust their personal differences to reach mutually acceptable results. No one should suppose that the Court, faced with scores of highly controversial (and indeed, controverted) issues each year, could ever achieve perfect harmony. But it would seem that respect for, and willing obedience to, the dictates of the Court will be more easily earned when its members manage to reduce the number of cases in which they announce their intramural disagreements to a proportion somewhat less than the present three out of every four.

PART III—A SUGGESTED APPROACH

Since the early years of John Marshall's Chief Justiceship, a body of historical precedent which clearly establishes the right of the individual Justices of the Supreme Court to make known their differences with the majority has developed. Certainly, no thinking person would, at this date, suggest that this precedent be "overruled." Even if a jural reincarnation of the Great Chief Justice were to preside, the idea of imposing judicial silence upon his Associates by external means—whether by positive law¹¹⁹ or by the fiat of the Chief Justice¹²⁰—would be intolerable to

¹¹⁸ Published sub. nom. Hand, *The Bill of Rights* 71-72 (1958).

¹¹⁹ At least two states have experimented with statutory control of the publication of minority judicial opinions. See 24 *Fordham L. Rev.* 450 (1955).

¹²⁰ The right of the Chief Judge of the highest appellate court of a state to bar the publication of a dissenting opinion has been litigated. Associate Justice Musmanno of the Pennsylvania Supreme Court sought a writ of mandamus in a county nisi prius court to compel the official reporter to print his (Musmanno's) dissent in a case, when the Chief Justice had ordered that it not be included with the official report. *Musmanno v. Eldridge*, 1 Pa. D. & C. 2d 535 (Ct. of C.P. 1955). (Counsel for defendant reporter included former United States Supreme Court Justice Owen J. Roberts—who, one would suppose, well knew the value of separate opinions—and ex-United States Senator George Wharton Pepper.) Musmanno appealed an adverse judgment to the Pennsylvania Supreme Court.

today's lawyers and judges.¹²¹

On the other hand, most people would also agree that a measure of unity in the work of the Court should be considered by the potential dissenter. Thus, when the American Bar Association adopted its Canons of Judicial Ethics, in 1924, it did not ignore the subject of separate opinions. Canon 19 reads, in part:

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

The language used by the Committee which proposed Canon 19¹²² suggests a pattern of judicial responsibility rather than a set of precise criteria to be satisfied by the author of a dissent. Perhaps it is just this lack of rigidity of formulation which makes the Canon acceptable. The Justice who disagrees with a decision, or with an opinion, to which the majority of his brethren subscribe, must be free to dissent or concur in accordance with his own conception of his duties.

Some factors tend to make minority expression desirable;¹²³ others operate to suggest a measure of self-restraint in the publication of minority opinions.¹²⁴ Only when the former appear to the author of such an opinion to outweigh the latter, should he publicly dissent.

After ruling against his motion that all of the Justices disqualify themselves as interested parties, the Court affirmed. *Musmanno v. Eldridge*, 382 Pa. 167, 114 A.2d 511 (1955), 24 *Fordham L. Rev.* 450 (1957). *Musmanno* later published what amounts to a brief for his position in the case. *Musmanno*, "Dissenting Opinions," 60 *Dick. L. Rev.* 139 (1956). See also Freedman, "The Dissenting Opinions of Justice *Musmanno*," 30 *Temp. L.Q.* 253 (1957).

See note 75 *supra*, for references concerning an attempt by Chief Justice Taney to prevent the extra-judicial publication of judicial opinions.

¹²¹ See Mr. Justice Douglas, "The Dissent: A Safeguard of Democracy," 32 *J. Am. Jud. Soc'y* 104, 105 (1948):

Dissent among judges is as true to the character of democracy as freedom of speech itself.

¹²² Chief Justice Taft and Associate Justice Sutherland of the Supreme Court were original members of the five-man committee.

¹²³ For arguments by writers generally opposed to any limitation upon the publication of minority opinions, see, e.g., Carter, "Dissenting Opinions," 4 *Hastings L.J.* 118 (1952); Douglas, "The Dissent: A Safeguard of Democracy," 32 *J. Am. Jud. Soc'y* 104 (1948); Moorhead, "Concurring and Dissenting Opinions," 38 *A.B.A.J.* 821 (1952); Roberts, "Dissenting Opinions," 39 *Am. L. Rev.* 23 (1905); Simmons, "The Use and Abuse of Dissenting Opinions," 16 *La. L. Rev.* 497 (1956); Simpson, "Dissenting Opinions," 71 *U. Pa. L. Rev.* 205 (1923); Stephens, "Concurring and Dissenting Opinions," 5 *U. Fla. L. Rev.* 394 (1952); Vinson, "Address," 20 *Okl. B.A.J.* 1269 (1949); 20 *Am. L. Rev.* 428 (1886).

¹²⁴ The arguments in favor of a reduction in the number of dissents are most forcefully marshalled in the series of articles by Palmer, *supra* note 98.

See also Bowen, "Dissenting Opinions," 17 *Green Bag* 690 (1905); Evans, "The Dissenting Opinion—Its Use and Abuse," 3 *Mo. L. Rev.* 120 (1938); Manley, "Nopareil Among Judges," 34 *Cornell L.Q.* 50 (1948) (discussing *per curiam* opinions); Moore, "The Habit of Dissent," 8 *Va. L. Reg.* 388 (1922); Wigmore, "The Qualities of Current Judicial Decisions," 9 *Ill. L. Rev.* 529, 534-35 (1915); 57 *Albany L.J.* 74 (1893).

The argument most frequently advanced by proponents of Dissent is that by forcefully registering disapproval of what the Court declares to be the law today, a Justice may have a positive effect upon the law as it develops tomorrow. In the oft-quoted words of Charles Evans Hughes:

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.

Nor is the appeal always in vain. In a number of cases dissenting opinions have in time become the law.¹²⁵

There have been dissenting opinions which have provided an impetus for changes in the positive law of the United States,¹²⁶ and there have been dissents which have become translated into majority opinions after a change in personnel,¹²⁷ or even in attitude,¹²⁸ of the Supreme Court. But the reasoning necessary to proceed from the statement that some dissents have "become the law" to the conclusion that *all* dissent tends to influence the direction which the law takes involves some logical gaps which should not be assumed without question. One of these gaps concerns the existence of a causal relationship between a prior dissent and the present law. One must not too readily assume such a relationship.¹²⁹ Fortuitous predictions should be distinguished from actual influence.

A second matter which should be considered by one who, impressed by dissents which have later gained majority adherence, is the vastly greater number of minority opinions which have not fared so well. Perhaps the best examples of these are provided by the dissents of Mr. Justice Holmes. To be sure, it is correct that, to "an uncommon degree, Justice Holmes' dissenting opinions "became the law." Yet, it appears that the theses of fewer than one-tenth of his 173 dissents can be recognized in the substance of subsequently-declared law.¹³⁰

¹²⁵ Hughes, *The Supreme Court of the United States* 68 (1937 ed.).

¹²⁶ See, e.g., Brown, "A Dissenting Opinion of Mr. Justice Story Enacted as Law Within Thirty-Six Days," 26 Va. L. Rev. 759 (1940).

¹²⁷ See, e.g., Jones v. Opelika, 316 U.S. 584 (1942), overruled by *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943), after Justice Rutledge replaced Justice Byrnes on the Court.

¹²⁸ See, e.g., *Mimersville School District v. Gobitis*, 310 U.S. 586, 601 (1940), Stone, J. dissenting. *Gobitis* was effectively overruled in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), in which the Court adopted the substance of Stone's earlier dissent.

¹²⁹ Would the Fourteenth Amendment have come a day later had not Mr. Justice Curtis dissented in the *Dred Scott* case? Was the Supreme Court of 1954 dependent upon, or even substantially influenced by, the wisdom of Mr. Justice Harlan when it discovered that "separate but equal" had become a constitutional non sequitur? To so frame the questions is to require answers that I believe to be obviously in the negative.

¹³⁰ Palmer, *supra* note 92, counted nine, including at least two in which neither Holmes' dissent nor the case in which it was rendered was cited by the "overruling" court.

Furthermore, other forums for the advocacy of change in the law are probably more effective, absolutely and relatively.¹³¹ And finally, some might argue that regardless of the locus chosen for its exercise, action directed at effecting a change in the law, as the law is declared by the majority of the Court, is not properly a judicial function at all.¹³²

Despite these reservations, it is not open to serious doubt that dissents do tend to have an effect upon the development of the law. To the extent that this effect is susceptible of translation into propositions which later become correct expositions of the law, the dissenter is correct in causing their publication. Where the dissent is such that it *cannot* influence the future of the law,¹³³ it is submitted that no purpose which is, or should be,¹³⁴ a purpose of a Justice of the Supreme Court, is advanced by placing it in the official reports.¹³⁵

The arguments advanced against the use of minority opinions have been phrased in a variety of ways. They are usually restatements of a single proposition, however—that continual or repeated dissension tends to weaken the Court in the esteem and confidence of the public.¹³⁶ If

¹³¹ Articles in legal and popular periodicals, pamphlets, and even street-corner speeches have frequently "become the law."

¹³² It is frequently argued that written dissenting opinions are important because they may become the opinion of the Court by gaining adherence upon circulation. Chief Justice Vinson emphasized this factor. Vinson, "Address," 20 Okla. B.A.J. 1269 (1949). Chief Justice Stone, on the other hand, tended to discount it.

Although in my time there have been some opinions of the Court which were originally written as dissents, the dissenting opinion is likely to be without any discernible influence in the case in which it is written.

Stone, "Dissenting Opinions are not Without Value," 26 J. Am. Jud. Soc'y 78 (1942).

However, if a dissent remains a dissent, no further contributions along this line can be made by appending it to the published majority opinion.

¹³³ An example would be a dissent from a determination of the court which is wholly factual in content. Aside from informing the disappointed litigant that he "came close," such a dissent serves only to add to the appearance of judicial disunity, when rendered in a court of last resort. It can have no effect upon the development of the law.

In determining whether a conclusion of law in any adjudicated case is a precedent in a subsequent one, the value of the first, usually, is measured by its similarity or dissimilarity to the second in its controlling facts. And even if the court, announcing the conclusion, misapprehends or mistakes the facts, the conclusion, to be of any value as a precedent, must be taken as assumed by the court; they, as concerns the judgment, are the facts, and whether existing or non-existing either prompt or compel the conclusion of law that determines the judgment.

Dean, J., in *Yoders v. Amwell Township*, 172 Pa. 447, 457 (1896).

¹³⁴ No opinion should be filed which tends to cast doubt upon the judicial qualifications of another Justice. See Pound, "Cacoethes Dissentiendi: The Heated Judicial Dissent," 39 A.B.A.J. 794 (1953):

The opinions of the judge of a highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributing of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court. (p. 795.)

See also 8 Va. L. Reg. 221 (1922).

¹³⁵ Perhaps all that can be said about such dissents is that "Dissenting opinions may be as pleasant to the minority judge as it is for a boy to make faces at a bigger boy across the street, whom he can't whip . . ." 57 Alb. L.J. 74, 75 (1898).

¹³⁶ It has also been argued that the frequent preparation of dissents amounts to a self-imposed addition to a judicial workload already too great for the effective and rapid prosecution of the Court's business. Acceptance of this depends, of course, upon what one conceives the business of the Supreme Court to be.

this is true, then it probably follows that as the frequency of dissent in the Supreme Court increases, the authority of the Court tends to depreciate.¹³⁷ All too frequently, the multiple opinions of the Court *seem* (and appearance is the important thing here) to represent statements of the extreme positions of advocates of a variety of possible dispositions of an issue. This is something foreign to what people would like to observe in a Court constituted to resolve the differences brought there by suitors.

It might be urged that since any deleterious effect which may inhere in the use of Dissent is collectively attributable to the sum of all dissents, that responsibility for regulating minority expression should lie with the Court as a whole. For the Court to attempt to resolve its own differences into a resultant satisfactory to all is, of course, to be encouraged.¹³⁸ But where this is sought to be accomplished by resort to the slightest degree of compulsion, differences may in fact be submerged, rather than eliminated. Opinions which have been constructed in order to obtain unanimity, or a majority, even though no one Justice really concurs in all that is said therein, are less desirable than seriatim expression.

Perhaps there are "too many dissents." The author of a separate opinion, should, in each case, ask himself whether this is true. He should consider not only the good that he expects to follow from its publication, but also the potentially undesirable effects of an addition to the sum of all dissents.¹³⁹ This much would seem to be required in

¹³⁷ The major premise of this argument is that the authority of the Court is in substantial part measured by the respect in which it is held by the public. See text at notes 136-137 *supra*.

¹³⁸ Charles Warren (addressing himself in particular to five-to-four votes, then a controversial issue; see note 96 *supra*), suggested a rather cumbersome procedure by which the court could reduce the number of intramural divisions. It involved setting cases down for reargument, limited to the area of disagreement between factions of the court, and permitting counsel "all such reasonable time for argument as they may require." "Leaders of the bar" were to be asked to submit briefs on both sides of the troublesome question, as *amici curiae*. (Does this suggest the procedure which has been followed in the Segregation Cases?)

If after all of this, the Court remained divided, it was suggested that only the majority opinion be published, with a mere announcement of the names of dissenters. Their opinions could be announced orally, but would not be placed in the official reports. Warren, "The Supreme Court of the United States—Shall a Minority of Its Justices Control Its Decisions On the Constitutionality of Federal Statutes?" 28 Md. S.B.A. 59, 88-89 (1923).

¹³⁹ See Frank, Book Review of Bickel, "The Unpublished Opinions of Mr. Justice Brandeis," 10 J. Legal Ed. 401, 403-04 (1958). Considering the reasons which may have prompted Mr. Justice Brandeis to withhold from publication completed dissents, "replete with the most exquisite detail of citation and the most comprehensive of footnotes," Mr. Frank speculates:

The reason, I think, is because Brandeis was a great institutional man. He realized that the Court is not the place for solo performances, that random dissents and concurrences weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents and concurrences need to be saved for major matters if the Court is not to appear indecisive. . . . To have discarded some of these opinions is a supreme example of sacrifice to strength and consistency of the Court. And he has his reward: his shots are all the harder because he chose his ground.

recognition of individual judicial responsibility to the Court, and *institutional* responsibility to the people.

Only the author of a dissent can assign weights to the factors which are to be balanced. When the balance has been struck in favor of publication—when he has concluded that his opinion may contribute to the eventual correction of a decision which he believes to be wrong, and that this contribution is of greater moment than that which it will inevitably make to the appearance of a distintegrated Court—then his right to publish it has become a duty.